2023-2024 SUPPLEMENT

TO

STATUTORY INTERPRETATION: A PRAGMATIC APPROACH

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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.

One way to explain the scope of the judicial power in the context of statutory interpretation is to contrast the court's power to determine the common law and its power to interpret legislation. Put differently, the issue is the extent to which common law judges retain some of their creative common lawmaking power when interpreting statutes. In Gamble v. United States, 139 S.Ct. 1960 (2019), Justice Thomas addressed this issue. He developed his own version of the restrictive view of judicial power, based on the difference between English common law decisionmaking and the court's role in interpreting text-based law.

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 prosecuted 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. 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 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. . . . 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. . . . The federalist structure of the constitutional plan had significant implications for the exercise of [the judicial] 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." . . . In other words, judges were expected to adhere to precedents because they embodied the very law the judges were bound to apply. . . .

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. . . . 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.

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. . . . 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. . . .

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.

Query: Thomas stresses a judicial duty to "correctly expound" the law. But he then distinguishes between prior decisions that are "demonstrably erroneous" and those that are "permissible." Stare decisis is still appropriate when the prior interpretation is permissible. Doesn't the judge's effort to draw a line between a permissible interpretation and one that is "demonstrably erroneous" allow the kind of judicial discretion of which he disapproves?

Chapter 2

From 1900 to the 1960s – Purposive Interpretation

2.04 Interaction of purpose and substantive canons

a) Rule of lenity

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* consider in the Thompson/Center case. In other words, Doerfler suggests 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.

Gorsuch vs. Kavanaugh. In Wooden v. United States, 142.Ct. 1063 (2022), Justices Gorsuch and Justice Kavanaugh wrote separate concurring opinions, disagreeing about the role of the rule of lenity. The case dealt with a provision of the Armed Career Criminal Act, which mandated a 15-year sentence for offenders with at least three prior convictions for certain felonies “committed on occasions different from one another.” The issue was whether ten previous burglary convictions arising from a single criminal event, in which Wooden entered a storage facility and stole items from ten different storage units in that facility, amounted to felonies committed on different “occasions.” The Court held that it did not, relying not only on the “ordinary usage” of the word “occasion”, but also on the statute’s legislative history and purpose. The Court did not cite the rule of lenity.

Gorsuch concurred in the judgment, relying on the rule of lenity. Gorsuch’s version of the rule of lenity, however, prompted Kavanaugh to disagree with Gorsuch in a separate concurring opinion.

Gorsuch had adopted the strong or at least in-between version of the rule of lenity, arguing that it was a way to implement constitutional values of due process and separation of powers, placing “the weight of inertia upon the party that can best induce Congress to speak more clearly.” “Where the traditional tools of statutory interpretation yield no clear answer, the judge’s next step isn’t to legislative history or the law’s unexpressed purposes. The next step is to lenity.” He objected to the suggestion,

found in some cases, that the rule of lenity applies "only when, after employing every tool of interpretation, a court confronts a 'grievous' statutory ambiguity."

Kavanaugh responded to Gorsuch with a defense of the "weak" version of the rule of lenity. The rule, he said, "does not apply when a law merely contains some ambiguity [but] only when 'after seizing everything from which aid can be derived,' the statute is still grievously ambiguous." He concluded that "the rule of lenity [] rarely if ever plays a role" because a court will "almost always reach a conclusion about the best interpretation of the [law] at issue." His commitment to relying on the judge's "best interpretation" of the law is based in part on his suspicion of relying on "front-end ambiguity [] even before exhausting the tools of statutory interpretation. One major problem with that kind of ambiguity is that ambiguity is in the eye of the beholder and cannot be readily determined on an objective basis." We will revisit Kavanaugh's suspicion of judicial reliance on a statutory text's ambiguity and his preference for relying on the "best interpretation" of the text when we discuss the circumstances under which a court will consider legislative history or defer to agency rules.

2.04 Interaction of purpose and substantive canons

b) Statutes in derogation of the common law

iii) Statutes based on the common law

A) Common law text

Page 76

Add the following

4. *Common law meaning vs. ordinary meaning*. As the Moskal case indicates, a common law text may also have a meaning familiar in everyday conversation (that is, an ordinary meaning). Courts often reflexively adopt the common law meaning but this bumps up against the modern textualist's commitment to relying on the ordinary meaning, a theme we will repeatedly encounter in later material. This conflict between common law and ordinary meaning can also be framed more precisely in two additional ways: as a conflict (1) between technical and lay meaning (common law legal language being a subset of technical language) and (2) between the understanding of a more-technically knowledgeable legislative *author* (such as a legislative committee), and the understanding of the statute's *audience* (usually presumed to be the ordinary reader, rather than a legally-trained specialist) – themes discussed in Chapter 4.03a. These issues are discussed in Anita Krishnakumar, The Common Law as Statutory Backdrop, 136 Harv. L. Rev. 608 (2022).

Chapter 3

Contemporary History – Declining Faith in Judging and Legislating

3.05 Pragmatism

Page 107

Add the following

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

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

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

Eclecticism (Eskridge & Frickey's cable metaphor)

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

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

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)

Common law judging (vs. Scalia and Thomas)

"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

Gluck & Posner note 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)

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Chapter 4

The Text

4.02 Routine sources of uncertainty

b) Ambiguity

ii) Syntactic ambiguity

Page 116

Add the following

Series-qualifier canon. In Facebook, Inc. v. Duguid, 141 S.Ct. 1163 (2021), the Court dealt with the "series-qualifier canon", which instructs that a modifier at the end of a series of nouns or verbs applies to the entire series. The case involved the text of the Telephone Consumer Protection Act of 1991 (TCPA), which "proscribes abusive telemarketing practices by, among other things, imposing restrictions on making calls with an 'automatic telephone dialing system'." The statute defined an "automatic telephone dialing system" as a piece of equipment with the capacity both "to store or produce telephone numbers to be called, using a random or sequential number generator," and to dial those numbers. The issue was whether that definition encompasses equipment that can "store" and dial telephone numbers, even if the device does not "us[e] a random or sequential number generator."

Facebook argued "that the clause 'using a random or sequential number generator' modifies both verbs that precede it ("store" and "produce"), while Duguid contends it modifies only the closest verb ("produce")." The Court agreed with Facebook, concluding "that the clause modifies both, specifying how the equipment must either 'store' or 'produce' telephone numbers." It placed considerable weight on what it called "conventional rules of grammar" – specifically: "[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series," a modifier at the end of the list "normally applies to the entire series." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 147 (2012). It asserted that the Court often applied this "interpretive rule" – usually referred to as the "series-qualifier canon"; and claimed that the "canon generally reflects the most natural reading of a sentence."

The Court buttressed this conclusion because it "heed[s] the commands of its punctuation" – specifically, the comma placed after the phrase "store or produce telephone numbers to be called." It noted that several treatises concluded that "[a] qualifying phrase separated from antecedents by a comma is evidence that the qualifier is supposed to apply to all the antecedents instead of only to the immediately preceding one." W. Eskridge, Interpreting Law: A Primer on How To Read Statutes and the Constitution 67–68 (2016); Scalia & Garner 161–162.

Justice Alito concurred separately in the judgment "to address the Court's heavy reliance on one of the canons of interpretation that have come to play a prominent role in our statutory interpretation cases. . . . [T]hese canons are useful tools, but it is important to keep their limitations in mind. This may be especially true with respect to the particular canon at issue here, the 'series-qualifier' canon." He noted that the Court referred to this canon as a "rule of grammar", even though the Scalia & Garner treatise stated that the interpretive canons "are not 'rules' of interpretation in any strict sense but presumptions about what an intelligently produced text conveys." The treatise also went "out of its way to emphasize the limitations of the series-qualifier canon, warning: 'Perhaps more than most of the other canons, [the series-qualifier canon] is highly sensitive to context. Often the sense of the matter prevails: *He went forth and wept bitterly* does not suggest that he went forth bitterly.'"

Alito's basic argument is that our understanding of how to apply these canons "has little to do with syntax. . . . The important point is that interpretive canons attempt to identify the way in which 'a

reasonable reader, fully competent in the language, would have understood the text at the time it was issued.' To the extent that interpretive canons accurately describe how the English language is generally used, they are useful tools. But they are not inflexible rules. . . . Statutes are written in English prose, and interpretation is not a technical exercise to be carried out by mechanically applying a set of arcane rules. Canons of interpretation can help in figuring out the meaning of troublesome statutory language, but if they are treated like rigid rules, they can lead us astray. When this Court describes canons as rules or quotes canons while omitting their caveats and limitations, we only encourage the lower courts to relegate statutory interpretation to a series of if-then computations. No reasonable reader interprets texts that way."

"Reasonable reader". Alito's reliance on the understanding of the "reasonable reader" to determine the ordinary meaning of a statutory text is a common theme among contemporary textualists. *See* Tara Leigh Grove, Testing Textualism's "Original Meaning", 90 Geo. Wash. L. Rev. 101 (2022). Although identifying the reasonable reader's understanding may sound like an empirical question, Grove argues persuasively that it is a legal construct based on normative assumptions. Among these assumptions are determining the relevant author and audience for the statute, as we discuss later in this Chapter. Grove notes: "Scholarship that relies on survey methods appears to assume that the "ordinary meaning" of a statutory provision depends on the views of the general public. But the broader public may not be the target audience for some statutes. Instead, some laws may be aimed at, for example, federal agencies and regulated parties. An "ordinary meaning" to a federal agency or regulated entity may not match that of the general public."

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/or C. Other style books discourage its use, on the ground that the meaning was the same with or without the serial comma.

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 (the Oxford comma) before the last activity in the list ("or distribution"), the exemption would clearly 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 the manuals in most other states and in Congress differs from Maine. That was enough to create ambiguity. See Hart, State Legislative Drafting Manuals and Statutory Interpretation, 126 Yale L.J. 438 (2016), arguing that the manuals are useful tools of statutory interpretation. The article also provides an exhaustive study of the contents of state drafting manuals.

Page 124

Add the following

3. *Term of art transplanted from another legal source.* In George v, McDonough, 142 S.Ct. 1953 (2022), a statute allowed collateral review of a final veterans' benefit decision if there was "clear and unmistakable error". The Court stated: "Where Congress employs a term of art 'obviously transplanted from another legal source,' it 'brings the old soil with it.' That principle applies here. In 1997, Congress used an unusual term that had a long regulatory history in this very context. It enacted no new definition or other provision indicating any departure from the same meaning that the VA had long applied. We therefore [conclude] that Congress "codif[ied] and adopt[ed] the [clear-and-unmistakable-error] doctrine as it had developed under" prior agency practice. *Query:* Why doesn't the soil of the new statute in which the old phrase is planted influence meaning?

Page 127

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.'"

4.04 Internal context

b) Ejusdem generis

Page 136

Add the following

3. In Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118 (2016), the author questions whether the ejusdem generis canon makes sense. He describes the canon this way: "The ejusdem generis canon tells us to interpret a general term at the end of a series of specific terms to be of like character as the specific terms. So when a statute says 'no dogs, cats, or other animals allowed in the park,' we are told that we should read 'other animals' to mean 'other animals like dogs and cats.'" He then asks why we should not read "other animals" to mean "other animals". After all, the drafters did not add a dog/cat limitation and we should be wary of adding what the drafters omitted; they could easily have said "other *similar* animals" after the listing of dogs and cats.

Kavanaugh goes on to argue the usual textualist point that the "fundamental problem" with ejusdem generis is the need for judges to identify "their own sense of the connective tissue that binds the terms in the statute" (dogs and cats), in order to impose "an implied limitation on 'other animals'"; and this is "a very indeterminate task for judges." He concludes that judges should not have to devise the common denominator and that he "would consider tossing the ejusdem generis canon into the pile of fancy-sounding canons that warrant little weight in modern statutory interpretation." In this vein, he sounds much like Alito in his concurrence in the Facebook case, questioning the Court's reliance on the series-qualifier canon.

4.04 Internal context

c) Presumption that words have a consistent meaning throughout the statute

Page 139

Add the following

4. A recent case stated that "'[i]n all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning' across a statute." Lomax v. Ortiz-Marquez, 140 S.Ct. 1721 (2020).

d) Avoid surplusage – Expressio Unius Exclusio Alterius

i) In general

Page 139

Add the following

For a skeptical view of the no surplusage canon and an argument favoring a belt-and-suspenders counter-canon, see Lieb & Brudney, The Belt-and-Suspenders Canon, 105 Iowa L. Rev. 735 (2020). The authors argue that that legislatures might well prefer textual redundancy out of an abundance of caution in trying to achieve a policy goal or as a way of gaining a voting consensus for passing a statute. In addition, they suggest that this may be one area where textualists might be willing to consider legislative history, citing Judge Koznski's concurrence in Gonzalez v. Arizona, 677 F.3d 383, 442 (9th Cir. 2012) (even staunchly textualist justices might well not object to the use of legislative history when the statutory language is in equipoise between a belt-and-suspenders and no surplusage approach).

4.07 When textualists disagree

Page 166

Add the following

Stevens' dissent in Circuit City directly challenges the claim that textualism is minimalist because it reduces judicial discretion. Cases in which textualist judges disagree about the meaning of the text provide some support for his argument.

a. 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 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.

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."

b. In Niz-Chavez v. Garland, 141 S.Ct. 1474 (2021), the Court dealt with a provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which requires the government to serve "a notice to appear" on individuals it wishes to remove from this country. In a 6-3 opinion, the Court held that sending multiple documents to an individual did not satisfy the statutory definition of "a notice to appear." Justice Gorsuch wrote the opinion, joined by Justices Thomas and Barrett (three textualists) and by Justices Breyer, Kagan and Sotomayor (three "liberals"). Justices Kavanaugh, Alito and Roberts dissented.

The issue was important because the immigration law allows otherwise removable aliens to remain in the country if (among other things) they have been "continuously present in the country for at least ten years," but specifies that "any period of continuous . . . presence in the United States shall be deemed to end . . . when the alien is served a notice to appear." In this case, the government sent one document containing the charges against the alien and, then, two months later, it sent a second document with the time and place of his hearing. The government argued that a "notice to appear" is complete and the stop-time rule kicks in whenever it finishes delivering all the statutorily prescribed information.

Gorsuch began by stating that "[a]t first blush, a notice to appear might seem to be just that — a single document containing all the information an individual needs to know about his removal hearing. But, the government says, supplying so much information in a single form is too taxing. It needs more flexibility, allowing its officials to provide information in separate mailings (as many as they wish) over time (as long as they find convenient). The question for us is whether the law Congress adopted tolerates the government's preferred practice." Gorsuch also stated that "[t]o an ordinary reader[] 'a' notice would seem to suggest just that: 'a' single document containing the required information, not a mishmash of pieces with some assembly required."

Gorsuch acknowledged that "a lot here turns on a small word." He noted the government's and dissent's view that "[t]he indefinite article 'a' is often used to refer to something that may be provided in more than one installment"; for example, that a writer can publish "a" story serially, or an author may deliver "a" manuscript chapter by chapter, and "a job application" and "a contract" also can be prepared in parts. This supported the view that Congress might have meant to allow notice to come over time and in pieces. But Gorsuch responded that "everyone admits [that] language doesn't always work this way. [For example,], someone who agrees to buy 'a car' would hardly expect to receive the chassis today, wheels next week, and an engine to follow. At best, then, all of the competing examples the government and dissent supply do no more than demonstrate context matters. . . ."

Gorsuch's context argument took account of how texts are understood when they provide a notice to commence a "grave legal proceeding – such as an indictment in a criminal case or a complaint in a civil case. The use of the indefinite article in these situations refer to a single document — an indictment, an information, or a civil complaint. "No one contends those documents may be shattered into bits, so that the government might, for example, charge a defendant in 'an indictment' issued piece by piece over

months or years. And it is unclear why we should suppose Congress meant for *this* case-initiating document to be different."

And, finally: "At one level, today's dispute may seem semantic, focused on a single word, a small one at that. But words are how the law constrains power. In this case, the law's terms ensure that, when the federal government seeks a procedural advantage against an individual, it will at least supply him with a single and reasonably comprehensive statement of the nature of the proceedings against him. If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them." Gorsuch also notes that, "[o]n the government's account, it would be free to send a person who is not from this country — someone who may be unfamiliar with English and the habits of American bureaucracies — a series of letters. These might trail in over the course of weeks, months, maybe years, each containing a new morsel of vital information. All of which the individual alien would have to save and compile in order to prepare for a removal hearing. And as soon as the last letter arrives, the alien's ability to accrue time toward the residency requirement would be suspended indefinitely." These comments contain a hint of a policy concern for the deportable alien that may have attracted the three liberal justices to join Gorsuch's opinion.

Kavanaugh dissented, joined by Roberts and Alito, accusing the majority of literalism:

> Ordinary meaning and literal meaning are two different things. And judges interpreting statutes should follow ordinary meaning, not literal meaning. See, e.g., McBoyle v. United States, 283 U. S. 25, 26 (1931) (in ordinary speech,"vehicle" does not cover an aircraft, even though "etymologically it is possible to use the word" that way); see also A.Scalia, A Matter of Interpretation 24 (1997) (a "good textualist is not a literalist"). The Court here, however, relies heavily on literal meaning . . . . As a matter of ordinary parlance, however, the word "a" is not a one-size-fits-all word. . . . And in this case, the better reading of the article "a" is that it does not require delivery in only one installment. A notice to appear for a removal hearing is more like a job application, a manuscript, and a contract than it is like a car. A notice to appear conveys information, like a job application, a manuscript, and a contract. And unlike a car, a notice to appear is easy for the recipient to assemble from its constituent installments.
>
> The Court prefers a different analogy. To buttress its interpretation, the Court analogizes the notice to appear to legal documents that initiate criminal cases, like indictments. The Court reasons that "an indictment" traditionally provides all the required information in a single document, so "a notice to appear" must do so as well. But that analogy is misplaced. An indictment generally provides charging information. By contrast, a notice to appear provides charging information *and* logistical calendaring information that is not always knowable at the time of charging. . . . [A] notice to appear is more than just a charging document because it serves "another equally integral function: telling a noncitizen when and where to appear." In other words, a notice to appear is akin to a charging document *plus* a calendaring document. It is therefore easy to understand why a notice to appear might require two installments while an indictment requires only one. The analogy to an indictment actually cuts strongly *against* the Court's interpretation.

c. In Ohio Adjutant General's Dept. v. Federal Labor Relations Authority (FLRA), 143 S.Ct. 1193 (2023), the issue was whether the FLRA had jurisdiction over the Ohio State National Guard ("Guard"). The answer depended on whether the Guard was a "federal agency". The Court, in an opinion by Justice Thomas, held that the Guard "acts as a federal agency" and that therefore the FLRA had jurisdiction. Justice Alito's dissent (joined by Gorsuch) describes the majority opinion as holding that petitioner "act[s[as a federal 'agency,'" "exercise[s[the authority of" a covered agency, and even "function[s] as an agency," But, the dissent concludes, this did not mean that the Guard was in fact a "federal agency" and therefore the FLRA lacked jurisdiction. Thomas appears to adopt a functional definition of "agency", while Alito and Gorsuch adopt a more literal approach.

d. In Sackett v. EPA, 143 S.Ct. 1322 (2013), the problem was to determine when wetlands were "adjacent" to "waters of the United States," in which case they would be subject to regulation by the Environmental Protection Agency pursuant to the Clean Water Act [CWA]. The Court (5-4 in an opinion by Alito) held that the CWA extends to only those "wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands." In other words, the wetlands had to be "indistinguishable" from "waters of the United States."

An opinion by Kavanaugh concurring in the Court's judgment and joined by Kagan,, Sotomayor, and Jackson argued that "adjacent" had a broader meaning than the Court's more restrictive definition, which had insisted that wetlands had to "adjoin" waters of the United States.

Alito responded that Kavanaugh's opinion paid no attention to the key statutory provision that limits the CWA's geographic reach to "the *waters* of the United States." Kavanaugh's opinion did not attempt "to explain how the wetlands included in their interpretation fall within a fair reading of 'waters.' Textualist arguments that ignore the operative text cannot be taken seriously."

4.08 The uncertainties of textualism

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Add the following

Textualism claims to implement two important values – (1) preserving the rule of law by providing certainty and reliability when interpreting legislation; and (2) separation of powers by reducing the opportunity for judges to make policy choices. Disagreement among textualists suggests that textualists may have trouble achieving these goals and even allow judges to indirectly choose results most in line with their policy preferences. Thomas implied as much in his dissent in the Republic of Sudan case, stating that "[the Court's] bright-line rule may be attractive from a policy perspective . . . ."

As noted by the authors in the draft of a recent article (Eskridge, William Nichol and Slocum, Brian G. and Tobia, Kevin, Textualism's Defining Moment (December 17, 2022), available at SSRN: https://ssrn.com/abstract=4305017 or http://dx.doi.org/10.2139/ssrn.4305017), the Niz-Chavez decision illustrated one way in which textualist judges might disagree. Gorsuch's majority opinion was "hyper-focused" on the meaning of "a" while Kavanaugh's dissent relied on a "social, holistic" approach to identify how an ordinary speaker/reader would understand the statutory text.

There are numerous other examples noted in this and later chapters where textualists must make choices. First, does the text have an ordinary or term-of-art meaning, an issue that can only be resolved by identifying the author and the audience and choosing whose understanding counts (Chapter 4.03)?

Second, what is the relevance of dictionaries in determining the meaning of a statutory text; which dictionary should the judge use?

Third, what is the text? Should meaning focus on one word, a whole phrase ("use a firearm"), the whole text, related statutes, or the entire statute book? King v. Burwell (is a federal exchange a state exchange under Obamacare?; Chapter 4.04(e)) produced intense disagreement between Roberts and Scalia about how to apply the whole text approach, suggesting that Roberts was actually relying on the statute's purpose, not the text.

Fourth, how should the linguistic canons be applied? Chapter 4.04. What weight do they have in comparison to other criteria of meaning?; are they applied only after finding that the text is unclear or are they intrinsic to determining meaning in the first place?

Examples of potential disagreement among textualists addressed in other chapters include:

(1) Whether and how to rely on corpus linguistics; Chapter 5.05.
(2) What counts as relevant context (the internal text; information external to the text);, discussed in Chapter 5 on purpose and intent and Chapter 9 on legislative history.
(3) What counts as a scrivener's error that the judge can correct; Chapter 5.03a,c,d.
(4) What is the role of the substantive canons – e.g., the rule of lenity, Chapter 2.04(a); and avoiding an absurd result, Chapters 1.02(c), 5.03(c).
(5) Whether to rely on an agency interpretation of the law (the Chevron doctrine) and how to apply the "major questions" qualification of Chevron; Chapter 8.02.
(6) should the statute be updated to account for change; current vs. historical meaning (does Title VII prohibiting discrimination based on sex apply to discrimination against gays; Chapter 7.04)?

Chapter 5

External Context – Purpose and Intent

5.04 Conflict of text and context

b) Holy Trinity today

Add the following

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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. . . .
>
> 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. . . .
>
> This is not to say absurdity doctrine has no role left to play when it comes to seemingly clearly worded statutes. Take the scrivener's error. Sometimes a statute will misspell "third party" as "third partly." Antonin Scalia & Bryan A. Garner, Reading Law 235 (2012). Or provide that the "winning party" rather than the "losing party" must pay the other side's reasonable attorney's fees. *Id.* In cases like these, the error in the statute is

> so "unthinkable" that any reasonable reader would know immediately both (1) that it contains a "technical or ministerial" mistake, and (2) the correct meaning of the text. *Id.* at 237–38. When these demanding conditions are met, a court may invoke the doctrine to enforce the statute's plain meaning, much as it might in cases where a modifier is misplaced or the grammar otherwise mangled but the meaning plain to any reasonable reader. Cabined in this way, the absurdity doctrine seeks to serve a "linguistic rather than substantive" function, Jaskolski v. Daniels, 427 F.3d 456, 462 (7th Cir. 2005) (Easterbrook, J.), and does not depend nearly as much on doubtful claims about legislative intentions, risk nearly as much interference with the separation of powers, or pose anything like the same sort of fair notice problems as its more virulent cousin. Instead, it aims only to enforce a meaning reasonable parties would have thought plain all along.

5.04 Conflict of text and context

d) Drafting errors—Not gibberish

Comments and Questions

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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"?

5.04 Conflict of text and context

d) Drafting errors—Not gibberish

Comments and Questions

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Add the following

3. *Administrative correction of drafting error.* Another way to deal with a drafting error is for the administering agency to make the correction without legislative blessing. This is a controversial "solution" but there may be no one with standing to challenge the agency action. For example, the Internal Revenue Code was amended to disallow the deduction of attorney's fees in cases involving sexual harassment when the payment of compensation was subject to a nondisclosure agreement, but the text of the law seemed to apply not only to the harassing defendant but also to a plaintiff who alleged harassment. This was understood to be a drafting error, but legislative efforts to fix the mistake were unsuccessful. So the IRS informed the public in the answer to a Frequently Asked Question about the plaintiff's deduction, by stating that *recipients* of payments related to sexual harassment, whose payment is subject to a nondisclosure agreement, are not precluded by the tax law from deducting related attorney's fees.

5.05 Context and permissible readings of the text

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Add the following

Comment about how textualists determine the meaning of a text – Corpus Linguistics

The discussion of the meaning of "representatives" in Chisom v. Roemer is a good occasion to consider the role that corpus linguistics might play in determining the meaning of a statutory text. The discussion of corpus linguistics relies on material gleaned from the footnoted references.[1] It uses examples discussed in these references and refers to cases that you will recognize from earlier in the course. Corpus linguistics purports to avoid the subjectivity associated with reliance on intuition and to be less scattershot than dictionary definitions.

(1) *How corpus linguistics works.* Corpus linguistics relies on a "corpus" of data illustrating how language is used, in two ways. One way is "collocation" – the frequency with which individual words appear within a certain range of the search word; for example, car within four words of "vehicle". A second way is "concordance" – texts showing the search word in its surrounding textual context; for example, "the driver lost control of the vehicle". Both examples support an inference that a "vehicle" is a car.

The best known corpus is the "Corpus of Contemporary American English (COCA – found at corpus.byu.edu/coca and www.english-corpora.org/coca), but there are others -- such as COHA (Corpus of Historical American English). One of the issues confronting an interpreter is the choice of corpus, analogous to the choice of dictionaries. Each corpus relies on a somewhat different set of materials. For example, COCA contains more than 520 million words divided among spoken language, fictional works, popular magazines, newspapers, and academic texts; COHA contains over 400 million words appearing in fiction, magazines, newspapers, poetry, and nonfiction books.

Here are some examples illustrating the use of a corpus of data to suggest the meaning of a statutory text.

(A) Before the recent interest in corpus linguistics, the justices in Muscarello v. United States, 524 U.S. 125 (1998), relied on a corpus of data without the rigor of corpus linguistics analysis. The issue was whether a statute, which made it a crime to carry a firearm, applied when the gun was in a locked glove compartment of a truck or a car's trunk. The majority cited usage in the Bible, Robinson Crusoe, and Moby Dick; the dissent cited the Bible, poems, scripts for a film (MASH) and a TV show (Sesame Street).

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[1] (1) Kevin Tobia, Testing Ordinary Meaning, 134 Harv. L. Rev. 726 (2020); (2) Tammy Gales & Lawrence Solan, Revisiting a Classic Problem in Statutory Interpretation: Is a Minister a Laborer, 36 Ga. St. U. L. Rev. 491 (2020); (3) Brain Slocum & Stefan Th. Gries, Judging Corpus Linguistics, 94 S. Cal. L. Rev. Postscript 13 (2020); (4) Evan Zoldan, Corpus Linguistics and the Dream of Objectivity, 50 Seton Hall L. Rev. 401 (2019); (5) Thomas Lee & Stephen Mouritsen, Judging Ordinary Meaning, 127 Yale L.J. 788 (2018); (6) John Ramer, Corpus Linguistics: Misfire or More Ammo for the Ordinary-Meaning Canon?, 116 Mich. L. Rev. 303 (2017) (dealing with the Michigan case of People v. Harris); (7) Recent Case, Statutory Interpretation--Interpretive Tools—Utah Supreme Court Debates Judicial Use of Corpus Linguistics—State v. Rasabout, 356 P.3d 1258 (Utah 2015), 129 Harv. L. Rev. 1468 (2016).

(B) A statute referred to "personal privacy" and the issue was whether corporations were covered by that phrase. In FCC v. AT&T, Inc., 562 U.S. 397 (2011), an amicus brief relied on corpus linguistics to show that "personal" was associated with individuals, not corporations; the Court adopted that conclusion but without relying explicitly on corpus linguistics (this was a 2011 case).

(C) A statute made it a crime to "discharge" a weapon and the issue was whether twelves shots fired in succession consist of twelve discharges, rather than a single discharge. The concurring opinion in State v. Rasabout, 356 P.3d 1258 (Utah 2015), used corpus linguistics to conclude that there were twelve shots (relying on "discharge" appearing within five words of "firearm, firearms, gun, or weapon").

These examples suggest that corpus linguistics is concerned with *prototypical* usage (for example, a giraffe is the prototype of a tall animal); or what Scalia refers to as probable (not possible) meaning. For those with a bent for legal philosophy, you might recognize prototypical meaning as what H.L.A. Hart referred to as the core meaning of a word (as opposed to the penumbra). The question this raises is whether statutory language is best understood by relying on prototypical usage.

(2) *Sources of distortion.* The use of corpus linguistics can distort meaning in the following ways.

First, the judge might fail to be consistent in selecting a source – sometimes a dictionary, sometimes a corpus; or varying which corpus to use. Instead of producing a reliable source of meaning, the variety of choices may leave the reader unsure of what the judge will do and, worse, may add to suspicion that the judge will pick the source of meaning that suits the desired result. We will see later in the course that this is one of the criticisms of judicial reliance on legislative history.

Second, the judges must be sensitive to using the corpus as it relates to the time period when the law was passed (assuming reliance on original meaning).

Third, the search results may vary depending on whether the judge searches for the meaning of a word or a phrase ("use" or "use a firearm"). The results might also vary depending on what combination of words is searched. For example, in the case involving the meaning of "discharge", the concurring opinion searched for the word "discharge" within five words of "firearm, firearms, gun, or weapon," resulting in the conclusion that the "discharge" referred to each individual shot. According to the case note appearing at 129 Harv. L. Rev. 1468, a different inference might have followed if "discharge" had been searched in proximity to "Glock, pistol or magazine."

Fourth, there is doubt whether judges and lawyers have the technical competence to use corpus linguistics, especially if law schools do not teach this research tool. For example, in People v. Harris, 885 N.W.2d 832 (Mich. 2016), both majority and dissent used corpus linguistics to decide whether "information" included a *false* statement, but reached different results. The majority relied on collocation and found that words like "accurate" *and* "inaccurate" occurred in close proximity to "information", inferring that false information was covered by the law. But one critic of the opinion (Ramer, 116 Mich. L. Rev. 303) suggested that the court's use of collocation was more suited to determining the meaning of adjectives than nouns, a distinction that a competent researcher using COCA might have made. This critic also took the dissent to task for failing to indicate how many concordance lines (a contextual analysis) it had reviewed.

Fifth, the failure to find an association of a word with a particular usage can give rise to the nonappearance fallacy, which can create a bias against an unusual meaning that would nonetheless make sense to ordinary users of the language. The nonappearance fallacy is especially serious when change

brings something into existence that did not exist when an old text was written (such as an old law referring a "vehicle" before airplanes were common).

Even when there is no change, there may simply too few situations in which people have occasion to talk or write about a particular usage of a word for that meaning to be supported by a corpus linguistics analysis. For example, a penguin is "bird" even though it may not be so designated in the corpus.

Sixth, Tobia's empirical study of various language users (such as judges and nonlegally-trained individuals) revealed that there was a significant number who would conclude that "ordinary meaning" includes certain things that would not be included using a corpus linguistic analysis – for example: an airplane or bicycle or a canoe can be a "vehicle" or a shark can be a "fish". This discrepancy occurs because of a bias in corpus linguistics in favor of a prototypical (or core) meaning.

Seventh, the corpus can fail to record a significant number of legal usages, a problem of special note when the text has a legal meaning. A remedy for this problem would be the development of a corpus specifically concerned with legal usage.

Eighth, corpus linguistics abstracts from the circumstances of writing statutes (such as hasty drafting), which may differ from the circumstances in which the corpus material was written or spoken.

Ninth, there is a risk that a judge will use a corpus without the litigants' knowledge, thereby preventing rebuttal. One possible solution is suggested by the way that English judges now deal with legislative history; a litigant planning to rely on legislative history must give notice to the other parties and the court prior to oral argument. Similarly, a judge might only consider a corpus after a litigant or the court had given notice of its potential usefulness.

(3) *Corpus linguistics as a last resort?* In their Yale Law Journal article, Lee & Mouritsen state that corpus linguistics is "something of a last resort"; 127 Yale L.J. at 872. This suggests that judges should not select corpus linguistics from their interpretive toolbox until after other interpretive techniques have been exhausted. These techniques include relying on the following: internal context, the linguistic canons, the statute's purpose, and substantive canons.

[A] *Internal context* refers to other language in the relevant statute (the "whole text") and related statutes. (1) You do not need corpus linguistics to know that "provisions" refers to religious benefits rather than food, when the text of the law revealed that its subject matter was religious; Blackstone, Vol. 1, Commentaries on the law of England (1765) (number 3 in discussion of statutory interpretation). The only corpus you needed was the statute itself. (2) Similarly, "jurisdiction" can mean personal or subject matter jurisdiction but its meaning in a particular statute was easily determined by reference to surrounding language; United States v. Morton, 467 U.S. 822 (1984). (3) Although the meaning of "established by the state" was more controversial, the Court relied on the whole text of the Obamacare statute to decide that this phrase included "established by the federal government"; King v. Burwell, 576 U.S. 473 (2015).

Looking at related statutes is also a version of the whole text approach, although it is not always clear what laws are "related". In W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83 (1991), Scalia read statutes together when they were passed at the same time; similar-in-time made them "related", even though they had different subject matters. Stevens' opinion in that case argued that the text at issue dealt

with a different subject matter from the other laws that Scalia examined and should therefore not be read together with those other laws.

Considering the whole text and related statutes is different from and less controversial than using the entire U.S. Code as a corpus of relevant data. Posner rejects using the entire Code as the relevant "corpus" approach because the U.S. Code is not written by a single omniscient intellect. But that rejection may be too hasty if other statutes provide good evidence of how legal language is generally understood by the legislative community. That was the rationale for the conclusion reached by Gales & Solan (36 Ga.St.U.L.Rev. 491), that "labor or service" (the text in the Holy Trinity case) was a legal term of art that excluded ministers, based on an examination of a legal corpus that consisted of multiple 19th Century statutes.

[B] *Linguistic canons* can also reduce doubt about the meaning of a text without resorting to corpus linguistics. These canons include ejsudem generis, consistent meaning, and expressio unius.

[C] *Purposivists* would avoid reliance on corpus linguistics in favor of considering what the legislature was trying to accomplish. For example:

(a) Deciding whether a "vehicle in the park" includes more than a car should depend on whether the purported "vehicle" threatened to undermine the law's purpose, which could be preserving safety, reducing noise, and/or preventing air pollution?

(b) Deciding whether a bicycle is a "carriage" – in order to apply an old law requiring roads to be kept in good repair to prevent damage to a "carriage" – should depend on whether the bicycle owner's cost of repairing a damaged bicycle was less than the municipality's cost of repairing the road. This follows from an assumption that the purpose of the repair statute relied on a comparison of the respective costs of the owner repairing damage to the conveyance and the municipality repairing the road to prevent the damage in the first place. A different conclusion might be reached if the issue was whether a bicycle was a "carriage" required to pay a toll. Richardson v. Town of Danvers, 57 N.E. 688 (Mass. 1900).

(c) A "farmer" in a statute exempting farmers from an anti-trust law might not include modern corporations who farm, produce, and distribute the food, given the historical purpose of the law to protect small farmers. National Broiler Marketing Ass'n. v. United States, 436 U.S. 816 (1978) (Brennan, J., concurring).

The fundamental disagreement between purposivists and those who would rely primarily on ordinary meaning (whether by relying on corpus linguistics or any other way to determine ordinary meaning) is that, for a purposivist, a legislative text does not necessarily have the same meaning that the same text would have in a different context. For example, why would we assume that "representatives" in a civil rights law dealing with voting and race discrimination has the same meaning as it would have based on a corpus linguistics analysis of multiple usages of that term in a different environment? Corpus linguistics assumes that you ask a simple question – is the word "representative" associated with "judges" and, if not, then elected judges are not "representatives". But, as anyone familiar with empirical surveys knows, the answer depends on how the question is worded. Suppose you ask someone whether "representatives" includes elected judges in a statute concerned with racial discrimination in voting. I suspect the person questioned might have a different answer than would be produced by word association – that is, a corpus linguistics analysis. Recall that the Louisiana Bar Association used the word "representatives" to refer to elected judges.

Similarly, why would we insist that "family" has the same meaning in a statute that allows a surviving family member to stay in a dwelling and avoid eviction as it has in a statute that deals with inheritance? Braschi v. Stahl Assocs. Co., 543 N.E.2d 49 (N.Y. 1989).

[D] *Substantive background considerations; substantive canons.* Substantive canons, like purpose, also point to a result without regard to corpus linguistics analysis. For example, the rule of lenity will favor a particular meaning, whatever the corpus data might indicate. In United States v. Santos, 553 U.S. 507 (2008), the issue was the meaning of the word "proceeds" in a federal criminal money-laundering statute, as applied to someone who conducted an illegal lottery. Scalia's plurality opinion chose the "profits" meaning of "proceeds" over "receipts" because it was more defendant-friendly. And the canon favoring a liberal interpretation of remedial statutes led to a determination that a "carriage" included a car in a statute exempting a carriage from creditors. Parker v. Sweet, 127 S.W. 881 (Tex. 1910).

5.05 Context and permissible readings of the text

Other examples of purpose/text interaction

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Add the following

5. *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 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 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, the different purposes of the IOIA (1945) and Foreign Government Immunity Act (1976). 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 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 (1945).

5.07 Legislative intent and the reenactment/inaction doctrines

Page 236

Add the following

e) Reenactment skepticism and the plain meaning of the text

The Comstock Act, enacted in 1873 and codified in section 1461 of title 18 of the U.S. Code, declares "[e]very article or thing designed, adapted, or intended for producing abortion," as well as "[e]very article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion," to be "nonmailable matter" that the United States Postal Service ("USPS") may not lawfully deliver. There is currently a dispute over whether this law prohibits the mailing of mifepristone and misoprostol, two prescription drugs that are commonly used to produce abortions, among other purposes. Here are two opinions – (1) one issued by the Office of Legal Counsel of the U.S. Postal Service (OLC), which concludes that section 1461 does *not* prohibit the mailing of mifepristone or misoprostol where the sender lacks the intent that the recipient of the drugs will use them unlawfully; and (2) another opinion issued by a Texas federal district court judge in Alliance for Hippocratic Medicine v. U.S. Food and Drug Administration, concluding that the Comstock Act *does* prohibit such mailing without regard to the sender's intent. Both opinions deal extensively with the reenactment doctrine.

Office of Legal Counsel opinion. The OLC argues that there was evidence that Congress repeatedly reenacted section 1461 when it was aware of and approved of judicial interpretations narrowing the meaning of the Comstock Act, so that it does not apply where there is no evidence that the sender intends the recipient to use the drugs illegally. The OLC opinion stated: "Over the course of the last century, the Judiciary, Congress, and USPS have all settled upon an understanding of the reach of section 1461 and the related provisions of the Comstock Act that is narrower than a literal reading might suggest. . . . By the middle of the century, the well-established, consensus interpretation was that none of the Comstock Act provisions, including section 1461, prohibits a sender from conveying such items where the sender does not intend that they be used unlawfully. USPS accepted that construction and

informed Congress of it. On several occasions, Congress reenacted and amended the Comstock Act against the backdrop of the judicial precedent in a manner that ratified the federal courts' narrowing construction." And: "Congress has amended the Comstock Act's provisions numerous times since the federal courts' decisions in [six cases], each time perpetuating the wording of the Act's abortion-related provisions. . . . We conclude that Congress's repeated actions, taken '[a]gainst this background understanding in the legal and regulatory system,' ratified the Judiciary's settled narrowing construction."

The OLC opinion also argued that its conclusion "is strongly reinforced by the Historical and Revision Note that was included in the 1945 report of the House Committee on the Revision of the Laws when Congress enacted title 18 of the U.S. Code into positive law. That Note . . . specifically 'invited' the 'attention of Congress' to [court decisions] . . . including [the] conclusion that the relevant provisions of the statute should be construed to require 'an intent on the part of the sender that the article mailed or shipped [] be used for illegal [] abortion.' Congress subsequently amended the Comstock Act four times (in 1955, 1958, 1971, and 1994) without changing the language in any respect that suggested disagreement with the well-established narrowing interpretation that the Historical and Revision Note had specifically brought to its attention. . . . Congress's several actions 'perpetuating the wording' of the Comstock Act's abortion provisions against the backdrop of a well-established, settled judicial construction that was brought to Congress's attention establishes Congress's acceptance of that narrowing construction."

Texas district court opinion April 7 (2023 WL 2825871). The Texas district court opinion refused to apply the reenactment doctrine because "[w]here the law is plain, subsequent reenactment does not constitute an adoption of a previous [] construction. . . . The canon is easily overcome for one simple reason: it is a dubious means of ascertaining congressional intent. 'There are plenty of reasons to reenact a statute that have nothing to do with codifying the glosses that courts have already put on the statute.'" Moreover, "the plain text of the Constock Act controls. . . . The statute plainly does *not* require intent on the part of the seller that the drugs be used 'unlawfully.' To be sure, the statute does contain a catch-all provision that prohibits the mailing of such things 'for producing abortion, *or for any indecent or immoral purpose*.' But 'or' is 'almost always disjunctive.' Additionally, the 'or' in Section 1461 is preceded by a comma, further disjoining the list of nonmailable matter. Thus, the Court does not read the 'or' as an 'and.' . . . In sum, the reenactment canon is inapplicable here because the law is plain."

Question. These opinions raise the following question.Can the reenactment doctrine justify a result that overrides the plain meaning of the initial text that has been subject to interpretations preceding the reenactment? The Texas opinion rejecting that result is reminiscent of Justice Thomas' view, noted in Chapter 1, that statutory interpretation must rely on the text and not on any doctrines that consider nontextual criteria.

Fifth Circuit April 12 opinion (2023 WL 2913725). The Fifth Circuit refused to resolve the Comstock issue because "[t]he speed of our review does not permit conclusive exploration of this topic." However, it made some comments that held out little hope that a more thorough review would agree with the OLC's reliance on the reenactment doctrine. It characterized the issue was as whether "the Comstock Act does not mean what it says it means;" and noted that "the OLC memo relied on 'a variety of aging out-of-circuit opinions and a single footnote within one Supreme Court dissent [that] favor[s] the [OLC] position.'"

Broader litigation. This litigation involved not only the issue of mailing mifepristone and misoprostol and the reenactment doctrine, but also the authority of the FDA to authorize the use of these products at all. The Texas District Court decision had denied that the FDA had such authority and, in the end, the U.S. Supreme Court stayed that decision. *2023 WL 3033177.* The case will now proceed on the merits.

5.08 Legislative intent and severing an unconstitutional part of a statute

COMMENT -- JUSTICE THOMAS' VIEW OF SEVERABILITY ANALYSIS

Page 240

Add the following

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. 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. 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.'"

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

> Because courts cannot take a blue pencil to statutes, the severability doctrine must be an exercise in statutory interpretation. In other words, the severability doctrine has courts decide how a statute operates once they conclude that part of it cannot be constitutionally enforced. [U]nder this view, the severability doctrine is [] dubious []. . . .
>
> [T]he severability doctrine does not follow basic principles of statutory interpretation. Instead of requiring courts to determine what a statute means, the severability doctrine requires courts to make "a nebulous inquiry into hypothetical congressional intent." It requires judges to determine what Congress would have intended had it known that part of its statute was unconstitutional. But it seems unlikely that the enacting Congress had any intent on this question; Congress typically does not pass statutes with the expectation that some part will later be deemed unconstitutional. Without any actual evidence of intent, the severability doctrine invites courts to rely on their own views about what the best statute would be. More fundamentally, even if courts could discern Congress' hypothetical intentions, intentions do not count unless they are enshrined in a text that makes it through the constitutional processes of bicameralism and presentment. Because we have "a Government of laws, not of men," we are governed by "legislated text," not "legislators' intentions"—and especially not legislators' *hypothetical* intentions. Yet hypothetical intent is exactly what the severability doctrine turns on, at least when Congress has not expressed its fallback position in the text. . . .
>
> In sum, our modern severability precedents are in tension with longstanding limits on the judicial power. And, though no party in this case has asked us to reconsider these precedents, at some point, it behooves us to do so.

Chapter 7

Change

7.03 Statutory evolution

a) Common law context

ii) Is a fetus a "person"

Page 312

Add the following

COMMENT – THE IMPACT OF DOBBS (DENYING A FEDERAL CONSTITUTIONAL RIGHT TO AN ABORTION)

As you evaluate the prior material about whether the word "person" can evolve to include a fetus (which was not true under the common law), consider the effect, if any, of the Supreme Court's decision in Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228 (2022) (holding that there was no right to an abortion under the U.S. Constitution, overruling Roe v. Wade). The decision does not, of course, require states to adopt any specific meaning of "person" under state law; Dobbs is about whether there is a federal constitutional right to an abortion. But some of what the Court says suggests a contemporary legal landscape that could influence the interpretation of state statutes.

An important part of the Dobbs opinion is the Court's explanation that its decision does not overrule other cases, such as the right of gay partners to marry (Obergefell v. Hodges, 576 U.S. 644 (2015)). The Court stated:

> [T]he Solicitor General suggests that overruling those decisions would "threaten the Court's precedents holding that the Due Process Clause protects other rights." Brief for United States 26 (citing *Obergefell*, 576 U. S. 644. That is not correct . . . . "[A]bortion is a unique act" because it terminates "life or potential life." And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.

And:

> [W]e have stated unequivocally that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion." We have also explained why that is so: rights regarding [] same-sex relationships are inherently different from the right to abortion because the latter (as we have stressed) uniquely involves what *Roe* and *Casey* termed "potential life." . . . The exercise of the rights at issue in []*Obergefell* does not destroy a "potential life," but an abortion has that effect.

The fact that life or potential life is an important value would support an interpretation of "person" to include an unborn fetus. Moreover, Dobbs explicitly rejects using viability as the criterion for determining when abortion is impermissible, extending the denial of abortions to nonviable fetuses.

7.04 Textualism and change

Page 333

Add the following

7. *Sexual preference and transgender discrimination as "sex discrimination"?*

In Bostock v. Clayton County, 140 S.Ct. 1731 (2020), the Supreme Court held (6-3) that discrimination against a gay or a transgender employee violated the statutory prohibition against discrimination based on sex. Justice Gorsuch wrote the majority, joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Kagan, and Sotomayor. The Court said "[t]he answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. . . . Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."

Gorsuch emphasized a textualist explanation for his conclusion: "This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations."

Gorsuch continues: "[T]he statute prohibits employers from taking certain actions 'because of' sex. And [] the ordinary meaning of 'because of ' is 'by reason of' or 'on account of.' In the language of law, this means that Title VII's 'because of' test incorporates the 'simple' and 'traditional' standard of but-for causation. That form of causation is established whenever a particular outcome would not have happened 'but for' the purported cause. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause."

The opinion then deals with the argument that the statute only prohibits discrimination based on group membership, whether "a policy affects one sex as a whole versus the other as a whole." This argument had persuaded some lower courts that the law did not apply because, for example, it discriminated equally between gay men and lesbian women. Although that argument had what the Court referred to as "some intuitive appeal," it concluded that the text of the law "focus[es] [] on individuals, not groups." It states that employers may not "fail or refuse to hire or . . . discharge any individual, or otherwise . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . . . So an employer who fires a woman [] because she is insufficiently feminine and also fires a man [] for being insufficiently masculine may treat men and women as groups more or less equally. But in both cases the employer fires an individual in part because of sex . . . . If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee — put differently, if changing the employee's sex would have yielded a different choice by the employer — a statutory violation has occurred."

The Court gives yet another example: "Consider [] an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no

reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge." . . .

An argument was made that discrimination against gays and transgender individuals is not referred to as sex discrimination in "ordinary conversation." The Court responded: "But this submission rests on a mistaken understanding of what kind of cause the law is looking for in a Title VII case. In conversation, a speaker is likely to focus on what seems most relevant or informative to the listener. So an employee who has just been fired is likely to identify the primary or most direct cause rather than list literally every but-for cause. . . . But [] conversational conventions do not control Title VII's legal analysis, which asks simply whether sex was a but-for cause." [Editor – Is this a rejection of corpus linguistics analysis?]

The Court also dismissed the argument that the illegality of discrimination against gays and transgender people was not anticipated when the law was adopted in 1964. "[T]he employers and dissents [] suggest that, because few in 1964 expected today's result, we should not dare to admit that it follows ineluctably from the statutory text. When a new application emerges that is both unexpected and important, they would seemingly have us merely point out the question, refer the subject back to Congress, and decline to enforce the plain terms of the law in the meantime. That is exactly the sort of reasoning this Court has long rejected. Admittedly, the employers take pains to couch their argument in terms of seeking to honor the statute's "expected applications" rather than vindicate its "legislative intent." But the concepts are closely related. One could easily contend that legislators only intended expected applications or that a statute's purpose is limited to achieving applications foreseen at the time of enactment. However framed, the employer's logic impermissibly seeks to displace the plain meaning of the law in favor of something lying beyond it."

Justice Alito's dissent (joined by Justice Thomas) characterized the Court's decision as "legislation", stating: "[O]ur duty is to interpret statutory terms to 'mean what they conveyed to reasonable people at the time they were written.' A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 16 (2012). If every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation — not to mention gender identity, a concept that was essentially unknown at the time."

And further:

> [T]extualists like Justice Scalia do not confine their inquiry to the scrutiny of dictionaries. See Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1, 109 (2001). Dictionary definitions are valuable because they are evidence of what people at the time of a statute's enactment would have understood its words to mean. But they are not the only source of relevant evidence, and what matters in the end is the answer to the question that the evidence is gathered to resolve: How would the terms of a statute have been understood by ordinary people at the time of enactment? . . . [J]udges should ascribe to the words of a statute "what a reasonable person conversant with applicable social conventions would have understood them to be adopting." Manning, 106 Colum. L. Rev., at 77. Or, to put the point in slightly different terms, a judge interpreting a statute should ask "what one would ordinarily be understood as saying, given the circumstances in which one said it." Manning, 116 Harv. L. Rev., at 2397-2398. . . . Thus, when textualism is properly understood, it calls for an examination of the social context in which a statute was enacted because this may have an important bearing on what its words were understood to mean at the time of enactment. Textualists do not read statutes as if they were messages picked up by a powerful radio telescope from a distant

> and utterly unknown civilization. Statutes consist of communications between members of a particular linguistic community, one that existed in a particular place and at a particular time, and these communications must therefore be interpreted as they were understood by that community at that time. For this reason, it is imperative to consider how Americans in 1964 would have understood Title VII's prohibition of discrimination because of sex. To get a picture of this, we may imagine this scene. Suppose that, while Title VII was under consideration in Congress, a group of average Americans decided to read the text of the bill with the aim of writing or calling their representatives in Congress and conveying their approval or disapproval. What would these ordinary citizens have taken "discrimination because of sex" to mean? Would they have thought that this language prohibited discrimination because of sexual orientation or gender identity? The answer could not be clearer. In 1964, ordinary Americans reading the text of Title VII would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity. The ordinary meaning of discrimination because of "sex" was discrimination because of a person's biological sex, not sexual orientation or gender identity. The possibility that discrimination on either of these grounds might fit within some exotic understanding of sex discrimination would not have crossed their minds.

Alito's dissent goes on to state that the "Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated — the theory that courts should 'update' old statutes so that they better reflect the current values of society." Alito notes that Judge Posner had adopted an updating approach in Hively v. Ivy Tech Community College of Ind., 853 F.3d 339 (2017) (en banc).

[Here is some of what *Posner said in his concurring opinion in Hively*:

> Title VII of the Civil Rights Act of 1964, now more than half a century old, invites an interpretation that will update it to the present, a present that differs markedly from the era in which the Act was enacted. But I need to emphasize that this third form of interpretation — call it judicial interpretive updating — presupposes a lengthy interval between enactment and (re)interpretation. A statute when passed has an understood meaning; it takes years, often many years, for a shift in the political and cultural environment to change the understanding of the statute. . . .
>
> But it has taken our courts and our society a considerable while to realize that sexual harassment, which has been pervasive in many workplaces (including many Capitol Hill offices and, notoriously, Fox News, among many other institutions), is a form of sex discrimination. It has taken a little longer for realization to dawn that discrimination based on a woman's failure to fulfill stereotypical gender roles is also a form of sex discrimination. And it has taken still longer, with a substantial volume of cases struggling and failing to maintain a plausible, defensible line between sex discrimination and sexual-orientation discrimination, to realize that homosexuality is nothing worse than failing to fulfill stereotypical gender roles.
>
> It's true that even today if asked what is the sex of plaintiff Hively one would answer that she is female or that she is a woman, not that she is a lesbian. Lesbianism denotes a form of sexual or romantic attraction; it is not a physical sex identifier like masculinity or femininity. A broader understanding of the word "sex" in Title VII than the original understanding is thus required in order to be able to classify the discrimination of which Hively complains as a form of sex discrimination. That broader understanding is essential. Failure to adopt it would make the statute anachronistic, just as interpreting the

> Sherman Act by reference to its nineteenth-century framers' understanding of competition and monopoly would make the Sherman Act anachronistic. . . .
>
> The most tenable and straightforward ground for deciding in favor of Hively is that while in 1964 sex discrimination meant discrimination against men or women as such and not against subsets of men or women such as effeminate men or mannish women, the concept of sex discrimination has since broadened in light of the recognition, which barely existed in 1964, that there are significant numbers of both men and women who have a sexual orientation that sees them apart from the heterosexual members of their genetic sex (male or female), and that while they constitute a minority their sexual orientation is not evil and does not threaten our society. Title VII in terms forbids only sex discrimination, but we now understand discrimination against homosexual men and women to be a form of sex discrimination . . . .
>
> I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of 'sex discrimination' that the Congress that enacted it would not have accepted.]

Justice Kavanaugh did not join Alito's dissent but penned his own dissent, stressing that federal judges exercise "neither force nor will, but merely judgment" – Hamilton's words from Federalist # 78. He argued that "[j]udges may not predictively amend the law just because they believe that Congress is likely to do it soon anyway. If judges could rewrite laws based on their own policy views, or based on their own assessments of likely future legislative action, the critical distinction between legislative authority and judicial authority that undergirds the Constitution's separation of powers would collapse, thereby threatening the impartial rule of law and individual liberty.

Kavanaugh accused the Court of relying on "literal" meaning, not "ordinary public meaning" as understood "at the time of enactment". He concluded that "[b]oth common parlance and common legal usage treat sex discrimination and sexual orientation discrimination as two distinct categories of discrimination — back in 1964 and still today."

COMMENTS AND QUESTIONS

Both opinions claim to be textualist. Both Gorsuch for the six-person majority (joined by Roberts) and the dissenting Justices claim to rely on textualism. Both opinions define "sex" as a biological trait. More specifically, Gorsuch says that his approach relies on "ordinary public meaning" at the time of enactment. Alito stresses what sounds like the same thing – how terms would be understood by ordinary people at the time of enactment; what a reasonable person conversant with applicable social conventions would have understood the text to mean, given the circumstances in which the speech occurred.

The dissent -- textualist or intentionalist; Functional textualism? Justice Alito's dissent makes some statements that lead the majority to accuse it of intentionalism – referencing "expected applications" when the law was enacted, which the majority understands to be reliance on legislative intent. The majority implies that the dissent would only apply the law to what was "foreseen at the time of enactment."

This majority criticism of the dissent is unfair. No textualist would limit a text to what is foreseen at the time of enactment. If that were true a short opinion by Easterbrook (a textualist) would conclude that a haybine could not be a mower. Analogously, the Constitution's Second Amendment protection of the right to bear arms applies to numerous weapons well beyond the imagination of the public who wrote and ratified the Constitution. Moreover, textualists have accepted *functional* updating of a text when the "new" situations fit the purpose of the text.

An example is Judge Lynch's dissenting opinion in Zarda v. Altitude Express, Inc., 883 F.3d 100, 145 (2d Cir. 2018). She stated:

> The majority cites judicial interpretations of Title VII as prohibiting sexual harassment, and allowing hostile work environment claims, in an effort to argue that the expansion they are making [to include sexual preference] simply follows in this line. But the fact that a prohibition on discrimination against members of one sex may have unanticipated consequences when courts are asked to consider carefully whether a given practice does, in fact, discriminate against members of one sex in the workplace does not support extending Title VII by judicial construction to protect an entirely different category of people. It is true that what *counts* as discrimination against members of one sex may not have been fully fleshed out in the minds of supporters of the legislation, but it is easy enough to illustrate how the language of a provision enacted to accomplish the goal of equal treatment of the sexes compels results that may not have been specifically intended by its enacters. . . .
>
> . . . Perhaps it did not occur to some [] male members of Congress that sexual harassment of women in the workplace was a form of employment discrimination . . . . But although a few judges were slow to recognize this point, as soon as the issue began to arise in litigation, courts quickly recognized that for an employer to expect members of one sex to provide sexual favors as a condition of employment from which members of the other sex are exempt, or to view the only value of female employees as stemming from their sexualization, constitutes a fundamental type of discrimination in conditions of employment based on sex. . . .
>
> The same goes for other forms of "hostile environment" discrimination. . . . Nothing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be [] prohibited.

Is the majority literalist by rejecting nontextual context? What of Kavanaugh's dissent criticizing the majority as literalist?. Gorsuch's majority opinion insists that it is also giving the text its ordinary public meaning at the time of enactment. It focuses on the phrase "because of" and concludes that it references a "but for" test. "But for" the fact that the employee who has a sexual preference for men was himself a man, the employer would not have discriminated against the employee. If the man-employee traded places with a woman-employee who preferred men, the woman would not have suffered discrimination. Is this literalism?

Literalism abstracts a text from context. This is easily understood when the context is other text – carving out "use" from the phrase "use a firearm" is literalist. But literalism can also occur by reading a text without regard to nontextual context. Recall the Court's opinion in Circuit City that applied the expressio unius canon to conclude that an express reference in the text exempting a limited group of employees from mandatory arbitration *must* have meant that the law applied to other employees. The dissent in Circuit City objected to the majority's literalist opinion because it disregarded the political context – which was that the "squeaky wheel" unions wanted to make sure that transportation workers were exempt, not to assure that the statute applied to other employees.

The Bostock dissent is arguing that the majority is lapsing into literalism when it focuses on the "but for" meaning of "because of", rather than taking a step back and asking how the entire phrase "discrimination because of sex" would have been understood in 1964. In 1964 gay sex was considered psychopathic and its practice was criminal in many states. Nontextual context therefore supports the dissent's textualist reading of the law.

A possible meaning of the text. Perhaps there is an argument that the "but for" reading of the text is not literalist but is instead a *possible* interpretation of the text. One such argument is that "but for" analysis is borrowed from tort law; this suggests that the text might have a technical legal meaning. The choice between technical-legal and ordinary reader meaning might give the policy-oriented judge enough space to adopt a meaning that implements a strong public policy.

Of course, this would not persuade the textualist. As Scalia insisted in Chisom v. Roemer involving the meaning of "representatives", textualism's reliance on the ordinary reader's understanding looks for the *probable*, not a possible meaning, unless some canon (such as the lenity canon or the federalism canon) suggests a different result. But at least this analysis avoids the charge that the majority opinion is literalist.

Dynamic updating; Posner. The Seventh Circuit majority opinion in Hively had adopted the "but for" approach that persuaded Gorsuch and, interestingly, Easterbrook joined this majority opinion. However, Posner's concurring opinion advocated a dynamic updating approach to older statutes, not limited to adopting a "possible" meaning. Alito's textualist dissent in the Supreme Court explicitly rejected Posner's approach.

Posner's opinion provides a bit of fresh air, explaining what is really driving the Bostock majority and forcing us to decide whether updating in this case is a legitimate judicial function. That is the issue raised by Kavanaugh when he accused the Court of exercising will, not judgment. Posner's view is that modern social and cultural evolution (the contemporary legal landscape) had changed the meaning of the statute. Although he did not put it this way, the issue is the meaning of the *statute*, not the meaning of the *text*, a view that is obviously anathema to textualists but was implicit in Frankfurter's view in United States v. Monia, 317 U.S. 424, 431 (1943): "The notion that because the words of a statute are plain, *its* meaning is also plain, is merely pernicious oversimplification."

Other cases in which updating is the best explanation for the decision include: (1) Braschi v. Stahl Associates Co., 543 N.E.2d 49 (N.Y. 1989), where an older law referencing "family" was now interpreted to include a gay family; and (2) In the Matter of Jacob, 660 N.E.2d 397 (1995), where a law mandating that a parent lose custody of a child after adoption did *not* apply when the adoption was by the same-sex partner of the parent, even though "the Legislature that last codified [the law] in 1938 may never have envisioned families that included two adult lifetime partners whose relationship . . . is characterized by an emotional and financial commitment and interdependence."

Justifying the dynamic approach. The judicial decision to update a statute requires justification. Does it help to ask who has the *responsibility* to update the law – the court or the legislature. Consider whether a "responsibility" analysis would help to resolve the following cases: (1) the Bostock case, involving sexual preference; (2) deciding that a "mower" includes a haybine (in a statute exempting a mower from creditors; (3) denying that a "farmer" includes a modern farming corporation (in a statute exempting a farmer from anti-trust laws); (4) defining "telephoning" to include faxing (in a statute prohibiting annoying telephone calls).

Does the fact that an issue is very *politically controversial* cut *against* judges taking responsibility for updating the law? (You will see later that deference to administrative rulemaking is less likely when the issue is politically controversial, but does that approach also apply to judging?)

Miscegenation. In Loving v. Virginia, 388 U.S. 1 (1967), the Court held that it was unconstitutional as a violation of Equal Protection to make miscegenation (mixed race marriage) a crime. It did not matter that the law made both the white and black spouse criminals. Doesn't that undermine the argument that an employer acts legally when it discriminates against both gay and lesbian employees? Why didn't the Court in Bostock even discuss this case?

Chapter 8

Administrative Interpretation

8.02 Super-Deference – Chevron

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Add the following

f) The future of Chevron

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

1. In SAS Institute Inc. v. Iancu, 138 S.Ct. 1348 (2018), the Court held (5-4) (Gorsuch, J.), that the Patent Office must decide *all* of the claims that a petitioner has challenged when it engaged in a review of a patent claim. The Court relied on the plain text of the law. As for Chevron, the Court stated that "whether Chevron should remain is a question we may leave for another day."

2. 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 Court's conclusion relied on the text but 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 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."

3. *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 Kavanaugh, "Fixing Statutory Interpretation" (Book Review of "Judging Statutes" by Judge Robert Katzmann), 129 Harv. L. Rev. 2118 (2014), the author 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." In the *Chevron* he is concerned with the risk that a judge will find clarity to avoid deferring to an administrative interpretation that goes against the judge's policy preferences and find ambiguity when the administrative interpretation agrees with those policy preferences.

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?

4. *Overruling Chevron? Chevron* may be overruled by the Supreme Court, which has granted certiorari in a case for the explicit purpose of reconsidering *Chevron.* Loper Bright Enterprises v. Raimondo, 2023 WL 3158352.

5. *"Major questions" doctrine*

(A) In West Virginia v. EPA, 142 S.Ct. 2587 (2022) (6-3, opinion by Chief Justice Roberts), the Court struck down an Environmental Protection Agency regulation by applying the "major question" doctrine (what I have been referring to as "politically controversial" questions). Its application of that doctrine, as the following quote suggests, further undermines the weight of the Chevron doctrine, without explicitly overruling it.

> Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]." Nor does Congress typically use oblique or elliptical language to empower an agency to make a "radical or fundamental change" to a statutory scheme. Agencies have only those powers given to them by Congress, and "enabling legislation" is generally not an "open book to which the agency [may] add pages and change the plot line." E. Gellhorn & P. Verkuil, Controlling *Chevron*-Based Delegations, 20 Cardozo L. Rev. 989, 1011 (1999).We presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies."
>
> Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.
>
> The dissent criticizes us for "announc[ing] the arrival" of this major questions doctrine, and argues that each of the decisions just cited simply followed our "ordinary method" of "normal statutory interpretation." But in what the dissent calls the "key case" in this area, *Brown & Williamson*, the Court could not have been clearer: "In extraordinary cases . . .there may be reason to hesitate" before accepting a reading of a statute that would, under more "ordinary" circumstances, be upheld. 529 U. S., at 159. Or, as we put it more recently, we "typically greet" assertions of "extravagant statutory power over the national economy" with "skepticism." The dissent attempts to fit the

> analysis in these cases within routine statutory interpretation, but the bottom line—a requirement of "clear congressional authorization,"—confirms that the approach under the major questions doctrine is distinct.
>
> As for the major questions doctrine "label[]," it took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.

(B) In Sohoni, The Major Questions Quartet, 136 Harv. L. Rev. 262 (2022), the author argues that a quartet of recent cases, culminating in the West Virginia v. EPA case, changed the way courts review agency action with "momentous consequences". First, these cases reject *Chevron* as the starting point for deciding on the legality of agency action. According to the author, the "new major questions doctrine does not operate as a factor within the *Chevron* framework, nor is it described as an exception to that framework. None of the quartet even cites *Chevron*." Second, the Court will not uphold "a major regulatory action unless the statute contains a *clear statement* that the action is authorized."

Missing from the Court's decisions was a revival of the constitutional nondelegation doctrine of the 1930s, despite the similarity between striking down a delegation of authority to an agency and striking down agency efforts to decide major questions (a "subconstitutional" doctrine). Indeed, none of the decisions said that the agency decision would be invalid "if Congress had delegated to the agency the authority that the agency claimed." This led the author to object that "[i]t is not clear what theory of nondelegation, *if any*, underlies and justifies the major questions [decisions]. . . . But whenever the Court . . . imposes a requirement on Congress that it legislate with special clarity, the Court should articulate a concrete and specific constitutional value that justifies that rule [which it has failed to do]."

This lack of a standard for applying the major questions doctrine has led, as the author notes, to the following: Congress must speak clearly to regulate tobacco products, eviction moratoria, and vaccine mandates at large private employers; but agencies may regulate without a clear legislative mandate in cases involving the destruction of habitats of endangered species, cable television, and "the scope of the agency's statutory authority (that is, its jurisdiction)." In an obvious reference to Chief Justice Roberts conception of judging, the author states that "[s]ome agency regulations are strikes; others are balls--that much is clear. Less clear are the rules of the game and (therefore) whether the umpire has made fair calls."

The author also asks whether the imposition of a clear statement rule is good textualism. She notes Kagan's concern that "[t]he current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards." The malleability of clear statement rules undermines "the neutrality and judicial constraint that textualism is intended to promote."

See also Freeman & Stephenson, The Antidemocratic Major Questions Doctrine, https://ssrn.com/abstract=4409630; and ___ S.Ct.Rev. ___ (2023) (forthcoming), for an historical review and critique of the major questions doctrine. The authors argue that a

> third and more aggressive version of the [major questions doctrine – MQD] inverts the usual Chevron presumption that a statutory ambiguity constitutes an implicit delegation to the responsible agency. This version proceeds from the same starting point as the Step Zero version — the idea that Congress is unlikely to delegate major issues to agencies through ambiguous or broad statutory terms — but takes it further. Under this anti-delegation version of the MQD, when a major question is at issue, not only should the court decline to apply the usual Chevron presumption that statutory ambiguity implies delegation to the agency, but instead the court should embrace the opposite presumption: an ambiguous or broadly worded statute, on this version of the MQD, should be

> interpreted as not delegating to the agency the power to take an "extraordinary" action, even if the statute would more naturally be read as authorizing that action. This non-delegation presumption can only be overcome by especially clear and express statutory authorization. . . . [T]he argument for the anti-delegation MQD is that delegations (at least of major questions) are so normatively undesirable that courts should avoid finding that they have occurred unless Congress has compelled that conclusion. That is, the normative argument for the Step Zero MQD is grounded in a claim about comparative institutional competence, while the normative argument for the anti-delegation MQD is grounded in opposition to (or at least deep skepticism of) delegation.

(C) In Biden v. Nebraska, 2023 WL 4277210, the issue was whether a federal statute gave the executive branch the authority to establish a student loan forgiveness program that would cancel around $430 billion in debt principal, affecting nearly all borrowers. In an opinion by Chief Justice Roberts, the Court (6-3) relied in part on the major questions doctrine to conclude that the executive did not have such authority. Here is some of what he said about that doctrine.

> [T]he dissent offers little to rebut our conclusion that "indicators from our previous major questions cases are present" here. The dissent insists that "[s]tudent loans are in the Secretary's wheelhouse." But in light of the sweeping and unprecedented impact of the Secretary's loan forgiveness program, it would seem more accurate to describe the program as being in the "wheelhouse" of the House and Senate Committees on Appropriations. Rather than dispute the extent of that impact, the dissent chooses to mount a frontal assault on what it styles "the Court's made-up major questions doctrine." But its attempt to relitigate West Virginia is misplaced. As we explained in that case, while the major questions "label" may be relatively recent, it refers to "an identifiable body of law that has developed over a series of significant cases" spanning decades. At any rate, "the issue now is not whether [West Virginia] is correct. The question is whether that case is distinguishable from this one. And it is not."

The government argued that the major questions doctrine only in cases involving regulations, not the provision of government benefits. The Court dismissed this argument: "This Court has never drawn the line the Secretary suggests — and for good reason. Among Congress's most important authorities is its control of the purse. It would be odd to think that separation of powers concerns evaporate simply because the Government is providing monetary benefits rather than imposing obligations.

Justice Barrett's concurrence addressed the role of the major questions doctrine in statutory interpretation more fully. She stated:

> Substantive canons are rules of construction that advance values external to a statute. Some substantive canons, like the rule of lenity, play the modest role of breaking a tie between equally plausible interpretations of a statute. Others are more aggressive — think of them as strong-form substantive canons. Unlike a tie-breaking rule, a strong-form canon counsels a court to strain statutory text to advance a particular value. There are many such canons on the books, including constitutional avoidance, the clear-statement federalism rules, and the presumption against retroactivity. Such rules effectively impose a "clarity tax" on Congress by demanding that it speak unequivocally if it wants to accomplish certain ends. This "clear statement" requirement means that the better interpretation of a statute will not necessarily prevail. They stand in contrast to linguistic or descriptive canons, which are designed to reflect grammatical rules (such as the punctuation canon) or speech patterns (like the inclusion of some things implies the

exclusion of others). . . . So to achieve an end protected by a strong-form canon, Congress must close all plausible off ramps.

While many strong-form canons have a long historical pedigree, they are "in significant tension with textualism" insofar as they instruct a court to adopt something other than the statute's most natural meaning. The usual textualist enterprise involves "hear[ing] the words as they would sound in the mind of a skilled, objectively reasonable user of words." But a strong-form canon "load[s] the dice for or against a particular result" in order to serve a value that the judiciary has chosen to specially protect. A. Scalia, A Matter of Interpretation 27 (1997) (Scalia). . . . [I]t is undeniable that they pose "a lot of trouble" for "the honest textualist." Scalia 28. Whether the creation or application of strong-form canons exceeds the "judicial Power" conferred by Article III is a difficult question. On the one hand, "federal courts have been developing and applying [such] canons for as long as they have been interpreting statutes," and that is some reason to regard the practice as consistent with the original understanding of the "judicial Power." Moreover, many strong-form canons advance constitutional values, which heightens their claim to legitimacy. On the other hand, these canons advance constitutional values by imposing prophylactic constraints on Congress — and that is in tension with the Constitution's structure. Thus, even assuming that the federal courts have not over-stepped by adopting such canons in the past, I am wary of adopting new ones — and if the major questions doctrine were a newly minted strong-form canon, I would not embrace it. In my view, however, the major questions doctrine is neither new nor a strong-form canon.

Some have characterized the major questions doctrine as a strong-form substantive canon [].On this view, the Court overprotects the nondelegation principle by increasing the cost of delegating authority to agencies — namely, by requiring Congress to speak unequivocally in order to grant them significant rule-making power. This "clarity tax" might prevent Congress from getting too close to the nondelegation line, especially since the "intelligible principle" test largely leaves Congress to self-police. . . . In addition or instead, the doctrine might reflect the judgment that it is so important for Congress to exercise "[a]ll legislative Powers," Art. I, §1, that it should be forced to think twice before delegating substantial discretion to agencies — even if the delegation is well within Congress's power to make. (So the doctrine would function like the rule that Congress must speak clearly to abrogate state sovereign immunity.) No matter which rationale justifies it, this "clear statement" version of the major questions doctrine "loads the dice" so that a plausible antidelegation interpretation wins even if the agency's interpretation is better.

While one could walk away from our major questions cases with this impression, I do not read them this way. No doubt, many of our cases express an expectation of "clear congressional authorization" to support sweeping agency action. . . .

So what work is the major questions doctrine doing in these cases? I will give you the long answer, but here is the short one: The doctrine serves as an interpretive tool reflecting "common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." FDA v. Brown & Williamson Tobacco Corp., 529 U. S. 120, 133 (2000).

Justice Barrett's longer answer argued that "[t]he major questions doctrine situates text in context, which is how textualists, like all interpreters, approach the task at hand. After all, the meaning of a word depends on the circumstances in which it is used. To strip a word from its context is to strip that word of

its meaning. Context is not found exclusively "'within the four corners' of a statute." She gave the following examples:

> Background legal conventions, for instance, are part of the statute's context. Thus, courts apply a presumption of mens rea to criminal statutes . . . It is also well established that "[w]here Congress employs a term of art obviously transplanted from another legal source, it brings the old soil with it." I could go on. See, e.g., Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U. S. 118, 132 (2014) (federal causes of action are construed "to incorporate a requirement of proximate causation"); As it happens, "[t]he notion that some things 'go without saying' applies to legislation just as it does to everyday life." Context also includes common sense, which is another thing that "goes without saying." Case reporters and casebooks brim with illustrations of why literalism — the antithesis of context-driven interpretation — falls short. Consider the classic example of a statute imposing criminal penalties on "'whoever drew blood in the streets.'" Read literally, the statute would cover a surgeon accessing a vein of a person in the street. But "common sense" counsels otherwise,, because in the context of the criminal code, a reasonable observer would "expect the term 'drew blood' to describe a violent act," . . Why is any of this relevant to the major questions doctrine? Because context is also relevant to interpreting the scope of a delegation. Think about agency law, which is all about delegations. When an agent acts on behalf of a principal, she "has actual authority to take action designated or implied in the principal's manifestations to the agent . . . as the agent reasonably understands [those] manifestations." Whether an agent's understanding is reasonable depends on "[t]he context in which the principal and agent interact," including their "[p]rior dealings," industry "customs and usages," and "the nature of the principal's business or the principal's personal situation. With that in mind, imagine that a grocer instructs a clerk to "go to the orchard and buy apples for the store." Though this grant of apple-purchasing authority sounds unqualified, a reasonable clerk would know that there are limits. For example, if the grocer usually keeps 200 apples on hand, the clerk does not have actual authority to buy 1,000 — the grocer would have spoken more directly if she meant to authorize such an out-of-the-ordinary purchase. A clerk who disregards context and stretches the words to their fullest will not have a job for long. . . .
>
> [We] "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" That clarity may come from specific words in the statute, but context can also do the trick. Surrounding circumstances, whether contained within the statutory scheme or external to it, can narrow or broaden the scope of a delegation to an agency. This expectation of clarity is rooted in the basic premise that Congress normally "intends to make major policy decisions itself, not leave those decisions to agencies." That makes eminent sense in light of our constitutional structure, which is itself part of the legal context framing any delegation. Because the Constitution vests Congress with "[a]ll legislative Powers," Art. I, §1, a reasonable interpreter would expect it to make the big-time policy calls itself, rather than pawning them off to another branch. . . . My point is simply that in a system of separated powers, a reasonably informed interpreter would expect Congress to legislate on "important subjects" while delegating away only "the details." That is different from a normative rule that discourages Congress from empowering agencies.

8.04 Agency interpretation of its own Regulations – Auer deference

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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, 139 S.Ct. 2400 (2019), in which 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 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 (the plurality joined by Chief Justice Roberts) concluded that *Auer* did not "bestow[] on agencies expansive, unreviewable" authority. Instead, "it 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 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. . . . [T]he 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*."

Chapter 9

Legislative History

9.02 Analytical and Historical Frameworks

b) History

i) United States

Page 376

Add the following

COMMENT

The following comment speaks more favorably of the accuracy of the 19th Century Congressional Globe as a reliable source of legislative history. Gregory E. Maggs, A Critical Guide to Using the Legislative History of the Fourteenth Amendment to Determine the Amendment's Original Meaning, 49 Conn.L.Rev. 1069, 1075 (2017):

> The *Congressional Globe* is an accurate and reliable source. It was a non-partisan journal funded and published by Francis Preston Blair and John C. Rives from 1833 until 1873, with funding from the Senate starting in 1848 and funding from the House starting in 1850. Its goal was to report all Congressional floor debates, much like the *Congressional Record* does today. The *Congressional Globe* started the practice of "printing debates as first-person narratives rather than third-person summations." In addition, despite the lack of electronic recording equipment in the 1860s, the *Congressional Globe* achieved almost verbatim accounts of the floor debates by employing "a corps of reporters trained in the latest stenographic techniques."

ii) England

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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

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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."

4. In Jesse M. Cross, Legislative History in the Modern Congress, 57 Harv. J. on Legis. 91 (2020), the author emphasizes the reliability of the committee reports as evidence of what the law was trying to accomplish. First, the committee's legislative staff are likely to have written both the bill and the committee reports. Second, the committee staff have specialized policy expertise in the area covered by the law. Third, the committee staff working for the majority party usually provide the staff who work for the minority party with copies of the report for their comments, allowing for dissenting views to be expressed or for modifications in the majority report. Fourth, the primary audiences for the reports are the courts and relevant agencies, which makes it likely that they will accurately convey what the committee was doing. These observations argue for the reliability of committee reports without placing any weight on the view that they will be examined by members of Congress.

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

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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 and "conservative" judges saying Scalia went too far (id. at 1324). The fact that lawyers' briefs usually discuss legislative history makes it hard for judges to avoid its influence (whatever they say in their opinions) (id. at 1325). As a side note, the authors observe that Roberts, Alito, and Gorsuch all used legislative history when they served on a Court of Appeals (id. at 1325).

More tea leaves: In Delaware v. Pennsylvania, 143 S.Ct. 696 (2023), the five justices in the majority (Jackson writing for the Court joined by Roberts, Sotomayor, Kagan, and Kavanaugh) stated: "Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text." But four justices refused to join that part of the Court's opinion (Justices Gorsuch, Alito, Thomas, and Barrett).

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) The Scalia vs. Stevens positions -- current justices

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 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 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."

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 reliance on the "best reading" of the statutory text, in part to discourage a judge from implicitly relying on his or her own policy preferences when deciding whether it is appropriate to rely on legislative history. See Kavanaugh, 129 Harv. L. Rev. 2118 (2014).

9.09 State Legislative History

c) State responses to the contemporary debate

i) Oregon

D) Revising the first step in the linear approach; 2001 Law

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Add the following

COMMENT ON WHAT *GAINES* ALLOWS TO BE INCLUDED IN LEVEL 1

The concluding sentence of the *Gaines* decision raises a problem. It says that when a statute is "truly capable of having only one meaning," no weight can be given to legislative history that suggests a different intent. This suggests that the legislative history that has been raised to level 1 is only legislative history that provides textual context: for example, by helping us understand that "race" means ethnicity in a statute, even though on first glance "race" seems to mean something else. This was Easterbrook's view, discussed in an earlier chapter. But this approach to interpreting the 2001 law assumes that the methods of determining the meaning of the text in level 1 of PGE had excluded legislative history about textual context. Is that a good understanding of PGE step 1.

There is another plausible understanding of *Gaines* that focuses on the "truly capable of having only one meaning" language. Perhaps legislative history about purpose or specific intent (not just textual context) might be allowed by the 2001 law to help the judge decide whether to choose between probable and plausible meanings of the statutory text (e.g., "representatives"). If there is a plausible meaning, the text is capable of having more than one meaning.

Chapter 10

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

10.01 Legislating rules of statutory interpretation

a) Efficacy – General vs. specific statutory interpretation statutes

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Add the following

Typical general statutory interpretation statute about "legislative intent". Many states provide by statute that legislative intent determines the meaning of a statute but then insist that a clear text prevails -- in effect inferring intent from the text. In this respect, the following Pennsylvania statute is typical (see section (b) below). Note that this section of Pennsylvania law explicitly rejects the Holy Trinity spirit-over-text approach. Pennsylvania law also goes on to state in subsection (c) that, when the text is not clear ("not explicit"), various other criteria may be considered.

1 Pa. C.S.A. § 1921. Legislative intent controls

(a) The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions.
(b) When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.
(c) When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters:
(1) The occasion and necessity for the statute.
(2) The circumstances under which it was enacted.
(3) The mischief to be remedied.
(4) The object to be attained.
(5) The former law, if any, including other statutes upon the same or similar subjects.
(6) The consequences of a particular interpretation.
(7) The contemporaneous legislative history.
(8) Legislative and administrative interpretations of such statute.

The criteria listed in subsection (c) are a jumble and are not rank-ordered.

-- Numbers 1-4, dealing with the statute's policy background seem repetitive (e.g., circumstances of the enactment, mischief to be remedied, etc).

-- Number 5 references "former law", which could be considered textual context which determines whether the text is clear or ambiguous in the first place.

-- Number 6 is the pragmatic "consequences" criterion.

-- Number 7 takes account of "legislative history", but without guidance about how it stacks up against policy background, consequences, or former law.

-- Finally, number 8 references legislative and administrative interpretations. What is a "legislative" interpretation? When and how should the court consider administrative interpretation (the Skidmore and Chevron approaches at the federal level).

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

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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 previously issued an opinion about statutory interpretation or in courts below a higher court that has adopted an approach to statutory interpretation). 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. (1) Six judges said that the Supreme Court can and does dictate statutory interpretation rules (id. at 1344-1345). (2) Fifteen judges said that the Court cannot dictate such rules but differed on the reason. (a) Some said that interpretive rules were "common sense" or useful guides" but were not "legal principles." (b) 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). (3) 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 judges prefer an "approach that is closer to a common law and/or pragmatic approach [that] may be less amenable to doctrinalization by methodological precedent. . . . " (id. at 1353).

An alternative view is expressed in a recent article: Bruhl, Eager to Follow: Methodological Precedent in Statutory Interpretation, 99 North Carolina Law Review 101 (2020). The author argues that there is much more methodological precedent than is usually recognized. He cites one reason for this lack of recognition as a focus on Supreme Court cases, especially the battle over use of legislative history on which there remains disagreement. And he finds that the use of methodological precedent is "pervasive" in lower courts. He notes that interpretive methodologies often take the form of fuzzy imprecise standards and are not determinative of outcomes in many cases but that this is no barrier to their having precedential status, frequently having some *weight* in the court's analysis. [*Query*: Is a methodology that has weight "precedential"?]

A recent case note in the Harvard Law Review dealing with Reporters Committee for Freedom of the Press v. F.B.I., 3 F.4th 350 (D.C.Cir. 2021) – 135 Harv. L. Rev. 1480 (2022) – describes how the D.C. Circuit failed to follow the Supreme Court's interpretive methodology. The Court of Appeals relied on "detailed legislative history", which was "at odds with the strictly textualist FOIA jurisprudence of the Supreme Court," as evidenced by its opinion in Food Marketing Institute v. Argus Leader Media, 139 S.Ct. 2356, 2364 (2019) ("[where] a careful examination of the ordinary meaning and structure of the law itself . . . yields a clear answer, judges must stop"). The note states that the Court of Appeals decision "contributes to the trend of dissonance between the Supreme Court's preferred interpretive methodology and those of the appellate courts beneath it." The note concludes that there would be benefits if the lower courts' and the Supreme Court's interpretive approaches converged, including – providing litigants with greater predictability; giving Congress a more certain interpretive regime against which to legislate; limiting judicial discretion and enhancing the rule of law.

10.03 Interjurisdictional issues

c) State statutory interpretation as a federal constitutional issue; Bush v. Gore

Page 456

Add the following

The material in the book deals with the role of the judiciary in determining how Presidential electors are chosen. It focused on Bush v. Gore as the leading Supreme Court case.

Article II. The relevant provision of the U.S. Constitution is Art. II, sec. 1, cl. 2, which states: *"Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, . . ."*

Article I. Also relevant to the discussion are a number of cases interpreting Art. I, § 4, cl. 1, which appears similar to Art. II in its reference to the power of the state Legislature: *"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ."*

The legal issues raised by these two provisions are discussed in the following material.

Outline of Discussion

[1] Judicial interpretation of state law; beyond a reasonable interpretation

[2] Judicial reliance on the state constitution

[3] The "independent state legislature" theory vs. "legislature" referencing the state's lawmaking process

[4] Article I compared to Article II; Article II, but not Article I, refers to "State" appointment power

[5] State legislative power to give authority to appoint electors to the state legislature acting alone!

[6] Can the state legislature appoint electors after the election?

[7] Reforming the Electoral Count Act – Congressional involvement in selecting electors?

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[1] *Judicial interpretation of state law; beyond a reasonable interpretation.* In Bush v. Gore, the issue was how much power judges had to interpret state election law. There seemed to be general agreement that judges had some interpretive role to play but three Justices (in an opinion authored by Rehnquist) argued that any exercise of this power that fell outside the boundaries of reasonable interpretation impinged on the legislature's power to specify the manner of selecting electors. It appears, as explained by the U.S. Supreme Court opinion in Moore v. Harper discussed below, that a majority of the current Court agrees with that view.

A Pennsylvania statute raised the Bush v. Gore issue in 2020. It required receipt of mail-in ballots for the 2020 Presidential election by 8 p.m. on election day, November 3, 2020 (25 P.S. §§ 3146.6(c), 3150.16(c)). In response to the prospect of mail delays resulting from the pandemic, the Secretary of the Commonwealth of Pennsylvania recommended a three-day extension to permit receipt of mail-in ballots until 5 p.m. November 6. The Pennsylvania Supreme Court held that this would "allow for the tabulation of ballots mailed by voters via the USPS and postmarked by 8:00 p.m. on Election Day to reduce voter disenfranchisement resulting from the conflict between the [State's] Election Code and the current USPS

delivery standards, given the expected number of Pennsylvanians opting to use mail-in ballots during the pandemic." Pennsylvania Democratic Party v. Boockvar, 238 A.3d 345 (Pa. 2020).

The court relied on the rationale in an earlier Pennsylvania case, as follows: "[W]hile neither the Constitution nor the Election Code specified 'any procedure to follow when a natural disaster creates an emergency situation that interferes with an election,' courts could look to the direction of 25 P.S. § 3046. *In re General Election-1985*, 531 A.2d at 836. Section 3046 provides courts of common pleas the power, on the day of an election, to decide 'matters pertaining to the election as may be necessary to carry out the intent' of the Election Code, which the Commonwealth Court properly deemed to include providing 'an equal opportunity for all eligible electors to participate in the election process,' which in that case necessitated delaying the election during a flood."

Did this decision violate the provision of the U.S. Constitution that the appointment of electors in a presidential election shall be "in such manner as the Legislature [] may direct"? The Respondent contended that it did, stating: ". . . Petitioner asks this Court to rewrite the plain language of [State] Act 77 and to substitute its preferred ballot deadline for the statutory deadline that resulted from the legislative compromise during the bi-partisan enactment of Act 77. . . . Judicial restraint according to Respondent, is especially necessary in regard to election law, where this Court has long recognized that '[t]he power to regulate elections is a legislative one, and has been exercised by the General Assembly since the foundation of the government.' Indeed, it observes . . that '[e]ach State shall appoint, in such Manner as the Legislature thereof may direct,' electors for President and Vice President. U.S. Const. art. II, § 1, cl. 2. Respondent highlights special concerns relevant to Presidential elections, emphasizing that '[w]ith respect to a Presidential election,' state courts must 'be mindful of the legislature's role under Article II in choosing the manner of appointing electors.'" Respondent's Supplemental Brief at 20 (quoting Bush v. Gore, 531 U.S. 98, 114, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000) (Rehnquist, C.J., concurring))."

The constitutionality of the Pennsylvania court's decision never made it to the U.S. Supreme Court.[2]

[2] *Judicial reliance on the state constitution.* The Pennsylvania court also stated that "[i]n considering this issue, we reiterate that the Free and Equal Elections Clause of the Pennsylvania Constitution requires that 'all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government.' *League of Women Voters*, 178 A.3d at 804." *Query*: Does this statement by the court suggest that it was relying on the state constitution for authority to extend the filing deadline, not on an interpretation of state legislation? If so, does that run afoul of the U.S. Constitution's requirement that the state *legislature* sets the rules for conducting the presidential election?

There are two possible answers to this argument. First, reference to the "legislature" in Article II of the U.S. Constitution encompasses the state's legislative lawmaking process, which includes state

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[2] On October 28, 2020, the Supreme Court refused to expedite consideration of a petition for certiorari, over a dissent by Justices Thomas, Alito and Gorsuch; Republican Party v. Boockvar, 141 S.Ct. 1 (2020). The U.S. Supreme Court did order that the "late" mail in ballots be segregated from other ballots in the event that the Court eventually took up the case; 2020 WL 6536912 (mem) (Nov. 6, 2020). But, in the end, the U.S. Supreme Court refused to consider the issue on the ground that it was moot; Bognet v. Degraffenreid, 141 S.Ct. 2508 (mem) (April 19, 2021). The Court obviously did not want to be seen as intervening in the election after the public's reaction to its role in Bush v. Gore.

constitutional law. Second, the state constitution only provided policy concerns that informed the interpretation of state legislation. The difference between these two answers was relevant in Bush v. Gore. The Supreme Court was obviously worried that a state court's reliance on the state constitution might violate Article II. It sent the case back to the state court to answer that question; Bush v. Palm Beach County Canvassing Board,531 U.S. 70, 78 (Dec. 4, 2000) The Florida court's answer indicated that the state constitution was not relied on directly but was only used to help interpret state legislation, as a background policy influencing the meaning of state legislation. 772 So.2d 1273, 1290 (Dec. 11, 2000): It turns out – as explained in Moore v. Harper discussed below – that it doesn't matter which answer was given. There is nothing wrong with a state court relying on the state constitution when applying the requirement that the "legislature" determine the method of choosing electors.

[3] *The "independent state legislature" theory vs. "legislature" referencing the lawmaking process*

The issues discussed so far are a subset of a broader issue: does the state legislature have an independent power to choose electors, unencumbered by any restraints such as: state constitutional rules; governor's veto; referendums; initiatives. This is known as the "independent state legislature" theory. As noted, the legislature acts alone in ratifying amendments to the Constitution, but that independent legislative power might not exist when the legislature acts in the exercise of the lawmaking process, as indicated by cases discussed in the book interpreting Article I (the Time, Place and Manner of choosing representatives).

This issue came up in the context of Article I (the Elections Clause) of the U.S. Constitution, discussed in a North Carolina case involving redistricting. The Court reviewed a North Carolina decision in which the state court struck down a gerrymandered state legislative electoral map as a violation of the state constitution. Harper v. Hall, 868 S.E.2d 499, 551-52 (N.Car. 2022), affirmed Moore v. Harper, 2023 WL. 4187750. Although the case involved Article I, it was widely believed that it could be a vehicle for deciding whether the independent state legislature theory applies to choosing electors under Article II and what that independent role might mean.

The Court rejected application of the independent state legislature theory in the context of Article I. Justice Roberts wrote for the Court in a 6-3 decision (joined by Sotomayor, Kagan, Kavanaugh, Barrett, and Jackson) that "[t]he Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review." The Court supported its conclusion by citing the cases holding that the reference to "legislature" in Article I included the use of referendums, initiatives, and the governor's veto. It affirmed that "when legislatures make laws, they are bound by the provisions of the very documents that give them life. Legislatures, the Framers recognized, 'are the mere creatures of the State Constitutions, and cannot be greater than their creators.'"[3]

Article I precedents. These precedents included the following.

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[3] The inference that "legislature" in Article II means the state's lawmaking process is an example of synecdoche – whereby the part is made to stand for the whole.

A statement of the view that "legislature" in Article II means the state's lawmaking process appears in In Re Opinion of the Justices, 107 A. 705, 706 (Me. 1919) ("[Article II, sec. 1] means, simply that the state shall give expression to its will [] through its law–making body, the Legislature. The will of the state in this respect must be voiced in legislative acts or resolves, which shall prescribe in detail the manner of choosing electors, the qualifications of voters therefor, and the proceedings on the part of the electors when chosen. . . .state' But these acts and resolves must be passed and become effective in accordance with and in subjection to the Constitution of the state, like all other acts and resolves having the force of law. The Legislature was not given in this respect any superiority over or independence from the organic law of the state in force at the time when a given law is passed."

1. "Legislature" included a governor's veto when applying Article I, section 4 (Time, Place and Manner). Smiley v. Holm, 285 U.S. 355 (1932) held that "legislature" in Article I included a role for the Governor, who had a veto power. The Court stated:

> The question then is whether the provision of the Federal Constitution . . . invests the Legislature with a particular authority, and imposes upon it a corresponding duty, the definition of which imports a function different from that of lawgiver, and thus renders inapplicable the conditions which attach to the making of state laws. . . . The question here is not with respect to the 'body' as thus described but as to the function to be performed. The use in the Federal Constitution of the same term in different relations does not always imply the performance of the same function. The Legislature may act as an electoral body, as in the choice of United States Senators under article 1, s 3, prior to the adoption of the Seventeenth Amendment. . . . The primary question now before the Court is whether the function contemplated by article 1, s 4, is that of making laws. Consideration of the subject-matter and of the terms of the provision requires affirmative answer. The subject-matter is the "times, places and manner of holding elections for senators and representatives." It cannot be doubted that these comprehensive words embrace authority to provide a complete code . . . . As the authority is conferred for the purpose of making laws for the state, it follows, in the absence of an indication of a contrary intent, that the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments.

A key point in the Smiley decision is its distinction between the legislature choosing Senators (without the Governor's consent, prior to the Seventeenth Amendment) and providing the manner of holding elections for Senators (as in Art. I, sec. 4). This undermines the dictum in McPherson, which had analogized selecting both senators and electors.

2. A similar result prevailed when the issue was the state's reliance on referendums under Article I. Hawke v. Smith, 253 U.S. 221 (1920), held that the state legislature's authority under *Article V* (ratifying amendments to the Constitution) is complete and cannot admit of interference by other governmental institutions. Consequently, state referendums could not be used in the constitutional amendment process. But Hawke v. Smith explicitly distinguished the constitutional amendment process from the Elections Clause (Article I, sec. 4) – authorizing the state legislature to exercise its lawmaking power to determine the time, place, and manner of electing Members of Congress. As to the selection of Members of Congress, the Court in Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565 (1916), upheld a provision of the Ohio Constitution that vested legislative power not only in the state legislature, but also "in the people, in whom a right was reserved by way of referendum to approve or disapprove by popular vote any law enacted by the general assembly." After the Ohio general assembly passed a redistricting act for congressional elections, a petition was filed to subject the act to voter approval through a referendum and the redistricting act was rejected in a referendum. The Supreme Court held that "the referendum constituted a part of the state Constitution and laws; and was contained within the legislative power; and therefore the claim that the law which was disapproved and was no law under the Constitution and laws of the state was yet valid and operative is conclusively established to be wanting in merit."

3. The Article I legislative lawmaking power was held to include initiatives (over a strong Roberts' dissent). Arizona State Legislature v. Arizona Independent Redistricting Commission, 135 S.Ct. 2652 (2015) (the Arizona legislature gave the redistricting task to an independent commission for federal congressional districts). The Court noted that the meaning of the word "legislature" differs depending on the function that it is expected to perform, citing Hawke v. Smith (constitutional amendment process) and Smiley v. Holm (Governor veto; Elections Clause). The Court concluded that, in the Elections Clause, "legislature" refers to the "legislative function, to be performed in accordance with the State's

prescriptions for lawmaking," which could include a state initiative, even though the initiative was virtually unknown when the Constitution was drafted in 1787.[4]

Rehnquist's concerns. The Court in Moore v. Harper did not disregard Rehnquist's concerns in Bush v. Gore regarding Article II (the Electors Clause) -- specifically, the problem of a "way-out" interpretation of state law. In a veiled reference to Rehnquist's Bush v. Gore opinion, the Court stated that there were some limits to a state court's reliance on judicial review: "In interpreting state law [], state courts may not so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures by Article I, Section 4, of the Federal Constitution." It did not reach this issue in Moore v. Harper because the issue was not present that issue in its presentation to the Court.

Kavanaugh's concurrence directly referenced the issue raised by Rehnquist in Bush v. Gore. He described "Rehnquist's standard [a]s straightforward: whether the state court 'impermissibly distorted' state law 'beyond what a fair reading required,'" a standard that should apply "not only to state court interpretations of state statutes, but also to state court interpretations of state constitutions."

Thomas/Gorsuch. Justices Thomas, Gorsuch and Alito dissented in Moore v. Harper on the ground that the case was "moot," but Thomas and Gorsuch added their disagreement with the majority's views on the merits. They argued that the earlier Supreme Court decisions that defined "legislature" to include referendums, initiatives and a governor's veto dealt with procedures for lawmaking, not

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[4] The meaning of "legislature" in a federal *statute* might shed light on the meaning of "legislature" in Article II. A statute -- 3 U.S.C. sec. 2, discussed in Levitt, 96 N.Y.U. L. Rev. at 1071 et seq, -- was part of the Electoral Count Act of 1887. It stated: "Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the *legislature* of such State may direct." The predecessor of 3 U.S.C. sec. 2 was passed in 1845 and stated: "[W]hen any State shall have held an election for the purpose of choosing electors, and shall fail to make a choice on the day aforesaid, then the electors may be appointed on a subsequent day in such manner as the State shall *by law* provide" (Act of Jan. 23, 1845, Pub. L. No. 28-1, 5 Stat. 721). "By law" implies following the state's lawmaking process. The "by law" requirement was, however, deleted in the process of revising federal statute law in 1873 and replaced by the current text, tracking Article II of the federal constitution, that the electors may be appointed "as the legislature of such State may direct." Did this change signify a substantive change from following the state's lawmaking process ("in such manner as the State shall *by law* provide") to authorizing the legislature to act independently, regardless of the state's lawmaking process?

The revision process in 1873 was fraught with difficulty. The original effort, begun in 1866, was rejected by Congress in part because the revision had changed prior law, which the revisers were not authorized to do. The next effort, completed in 1873, was passed by Congress in 1874, despite errors and a suspicion that the revisers had still exceeded their authority. The 1874 law also repealed the 1845 law, along with all other laws covered by the revision. There are several reasons for thinking that the 1874 law did *not* change the substance of the 1845 statute and that "legislature" still meant following the state's lawmaking process ("by law"). First, the reviser had no authority to make the change. Second, the reviser annotated several substantive changes in prior law but made no such annotation regarding the legislature's choice of electors when an election "failed". Third, there was no apparent policy reason in 1873 for giving the legislature the power to act alone, rather than "by law", in a "failed" election.

If 3 U.S.C. sec. 2 did not change the substance of the 1845 law (providing a power of appointment "in such manner as the State shall *by law* provide") -- so that the *statutory* power authorized by 3 U.S.C. sec. 2 required following the state's lawmaking process -- that might suggests that the *constitution's* language in Article, II, sec. 1, which was the same as the 1873 version of 3 U.S.C. sec. 2, was also understood by Congress to require the legislature to follow the state's lawmaking process.

substantive limits on the legislative power. The majority stated that there was no "defensible line between procedure and substance in this context." .

The relevance of McPherson. A final point regarding the independent state legislature theory under *Article II* is the reference in the opinion of the three concurring justices in Bush v. Gore, 531 U.S. 98, 113 (2000) (Rehnquist, Scalia, Thomas), to McPherson v. Blacker, 146 U.S. 1 (1892): "[W]e explained [in McPherson] that Art. II, § 1, cl. 2, 'convey[s] the broadest power of determination' and 'leaves it to the legislature exclusively to define the method' of appointment." That might suggest that the legislature appoints electors without interference from the courts or the governor.

The opinion in McPherson included the following dictum (quoting from Senate Rep. 1st Sess. 43d Cong. No. 395), which could support an independent power in the legislature to appoint electors; 146 U.S. at 34:

> The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the state at large . . . and it is no doubt competent for the legislature to authorize the governor, or the supreme court of the state . . . to appoint these electors. This power is conferred upon the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified by their state constitutions any more than can their power to elect senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.

The weight accorded to the McPherson dictum depends on an understanding of the legislative role at the time of the Founding (an "original intent" argument). Current practice in all fifty states is for electors to be selected by popular election, but the selection practice was not uniform at the time of the Founding. As the Court in McPherson noted: "At the first presidential election, the appointment of electors was made by the legislatures of Connecticut, Delaware, Georgia, New Jersey, and South Carolina".[5] However, an examination of the practice of selecting electors in the first presidential election undermines any suggestion that the legislature can act alone, *based on Article II of the U.S. Constitution*, rather than by acting in accordance with the rules governing the legislative lawmaking process.[6]

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[5] 146 U.S. at 29.

[6] The discussion of the historical practice is based on (1) Justin Levitt, Failed Elections and the Legislative Selection, 96 N.Y.U. L. Rev. 1052, 567-68 and notes 61-65 (2021); (2) Grace Brosofsky, Michael C. Dorf, and Laurence H. Tribe, State Legislatures Cannot Act Alone in Assigning Electors (Sept. 25, 2020), https://drive.google.com/file/d/109FpcfXzXwcpJL43pgaTBmh-PD9pgDLx/view, pp. 7-8. (3) The role of the governor's veto power under Article II is discussed in Hayward H. Smith, History of the Article II Independent State Legislature Doctrine, 29 Fla. State U. L. Rev. 731 (2001).

First, every state authorized the manner of selecting electors by following the selection procedures *authorized by state law*,[7] including three states where the legislature acted alone to choose presidential electors (South Carolina, Connecticut, and Georgia). South Carolina acted alone as authorized by state legislation. The Connecticut legislature acted alone under the authority of its colonial charter because it had not yet adopted a constitution. The Georgia legislature acted alone because, lacking a quorum until the day before the selection day, it wanted to avoid losing a say in the election of the president and relied on a state constitutional provision allowing the legislature to expedite the lawmaking process when necessary. In addition, state law authorized the selection of electors by popular election in five states. New Jersey provided for selection by the Governor and upper house of the legislature, as authorized by statute; and a Massachusetts statute provided for selection of two candidates by popular election, with the legislature making the final choice.

Second, the argument might be made that the legislature can act free of a *governor's veto* because the early selection process was not subject to a gubernatorial veto. But that inference is invalid, because all of the states which participated in the first presidential election (except Massachusetts) did not give the governor a veto power.[8] (New York gave the governor a veto power but it did not participate in the first election because it could not agree on the manner of selecting electors.) Under current lawmaking practice the governor has a veto power in all states. If we understand "legislature" in Article II to refer to the lawmaking process and not the legislature acting with independent authority, then the legislature cannot act alone to select electors under Article II because the veto power has now become part of the lawmaking process. This interpretation of the Constitution is an application of the *functional* approach to interpreting a text. As the lawmaking function evolves to include a veto, the meaning of "legislature" also evolves, just as the meaning of "voters" in a jury-selection statute evolves to include women after they got the vote even though the statute was adopted when only men could vote.[9]

In any event, the following comment in Moore v. Harper put to rest any thought that McPherson supports an independent state legislature theory under either Article I or Article II:

> McPherson considered a challenge to the Michigan Legislature's decision to allocate the State's electoral votes among the individual congressional districts, rather than to the State as a whole. We upheld that decision, explaining that in choosing Presidential electors, the Clause "leaves it to the legislature exclusively to define the

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[7] A possible counter example is provided by Vermont, which joined the union in 1791. According to McKnight, Vermont's four electors favoring John Adams in the 1796 election were appointed by the legislature acting alone *without* prior legislative authorization, raising a risk that their votes would not be counted. McKnight, David A., The Electoral System of the United States: A Critical and Historical Exposition of Its Fundamental Principles in the Constitution and of the Acts and Proceedings of Congress Enforcing It, p. 65 (1878). Their choice was consequential because, without those four votes for Adams, Jefferson would have won the election. *id*. One newspaper report observed that Vermont's method of selecting electors was based on a 1791 Vermont law which was valid only for the 1792 election and expired before the 1796 presidential election; *see* Bruce Ackerman & David Fontana, Thomas Jefferson Counts Himself in to the Presidency, 90 Va. L. Rev. 551, 573 (2004). However, according to Ackerman and Fontana, these concerns were without merit. Their examination of the Vermont archives led them to the conclusion that the 1791 statute regulating the selection of presidential electors was *not* a temporary measure for the 1792 election but a procedure that applied in the future and that this procedure was followed in 1796. *Id.* at 574-75. McKnight was, therefore, wrong in his claim that Vermont's method of selecting electors lacked legislative authorization.

[8] John A. Fairlie, The Veto Power of the State Governor, 11 Amer. Pol. Sci. Rev. 473, 476 (1917).

[9] Commissioner v. Maxwell, 114 A. 825 (Penn. 1921).

> method of effecting the object." 146 U. S., at 27. Our decision in McPherson, however, had nothing to do with any conflict between provisions of the Michigan Constitution and action by the State's legislature — the issue we confront today. McPherson instead considered whether Michigan's Legislature itself directly violated the Electors Clause (by taking from the "State" the power to appoint and vesting that power in separate districts) . . . .

[4] *Article I compared to Article II; Article II, but not Article I, refers to "State" appointment power.* There is also a fine line that might be drawn between Article I (at issue in Harper v. Hall, 868 S.E.2d 499, 551-52 (N.Car. 2022), affirmed Moore v. Harper,2023 WL 4187750 and Article II. Moore v. Harper deals with Article I, not Article II. *Article I* does *not* say that "each State" shall make the rules for electing members of Congress. By contrast, the language of Article II *does* refer to the "State"; Article II says that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.. . . ." This might suggest that the legislature's Article II power is exercised on behalf of the State, bringing with it all of the lawmaking process that would normally accompany legislation.

[5] *State legislative power to give authority to appoint electors to the state legislature acting alone!* It seems clear that Article II authorizes a state legislature (subject to whatever restraints are inherent in the state's grant of power to the "legislature", such as the Governor's veto) to give the power to select electors to the state legislature, *acting alone*. In the current political climate that seems possible, assuming that the long tradition of permitting a popular election to choose electors is not strong enough to overcome whatever political support there might be to give state legislatures independent power.

[6] *Can the state legislature appoint electors after the election?* Whatever it means for the state legislature to have the power to determine the manner of appointing electors *before* the election, what power does the legislature have to appoint electors by adopting rules *after* the election (taking account of the governor's veto power) – that is, after the people have voted to choose electors for a candidate? The answer might lie in an interpretation of the word "direct" in Article II ("in such manner as the Legislature thereof may direct"), as informed by the interpretive canon against inferring that a law is retroactive. Legislative "direction" of the choice of electors, who are different from the electors already chosen in a popular election, would retroactively defeat the expressed will of the people. That result is avoided if the power to "direct" the manner of appointing electors is interpreted to exclude any exercise of that power with retroactive impact.

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[7] *Reforming the Electoral Count Act.* Our focus has been on how courts might interpret the legislature's authority to determine the manner of selecting electors, pursuant to Article II. An additional issue has concerned the role of the Vice President and Congress in counting electoral college votes. Prior to December 29, 2022, the statute that governed those issues was the Electoral Count Act of 1887, which, by most accounts, was barely intelligible. On December 23, 2022, President Biden signed the Electoral Count Reform Act, effective December 29, 2022. The following are its major provisions.[10]

Rules for appointment of electors cannot be retroactively changed after election day. "The electors of President and Vice President shall be appointed, in each State, on election day, in accordance

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[10] Some have claimed that an Electoral Count Act is unconstitutional but Bruce Ackerman & David Fontana argue that the Act of 1887 (and presumably any reform version) was adopted pursuant to the Necessary and Proper Clause ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States . . . ."). See Thomas Jefferson Counts Himself into the Presidency, 90 Va. L. Rev. 551, 636, 640-41 (2004).

with the laws of the State enacted prior to election day." A State that appoints electors by popular vote can modify the voting period "as necessitated by extraordinary and catastrophic events as provided under laws of the State enacted prior to [election day]".

Executive of state issues certificate appointing electors; State can define "executive" as other than the Governor by law in effect on election day. "Not later than the date that is 6 days before the time fixed for the meeting of the electors, the executive of each State shall issue a certificate of ascertainment of appointment of electors, under and in pursuance of the laws of such State providing for such appointment and ascertainment enacted prior to election day. . . . '[E]xecutive' means, with respect to any State, the Governor of the State . . . , except when the laws or constitution of a State in effect as of election day expressly require a different State executive to perform the duties identified under this chapter."

Vice-President's role ministerial. "[T]he role of the President of the Senate while presiding over the joint meeting [of Congress] shall be limited to performing solely ministerial duties. . . . The President of the Senate shall have no power to solely determine, accept, reject, or otherwise adjudicate or resolve disputes over the proper list of electors, the validity of electors, or the votes of electors." [The heading of this section states that it is a "clarification" of the law, presumably to avoid any implication that the prior law was different.]

Objections by members of Congress to certification of electors. "No objection shall be in order unless the objection (I) is made in writing; (II) is signed by at least onefifth of the Senators duly chosen and sworn and one-fifth of the Members of the House of Representatives duly chosen and sworn; and (III) states clearly and concisely, without argument, one of the [following] grounds . . . ."

"The only grounds for objections shall be as follows: (I) The electors of the State were not lawfully certified under a certificate of ascertainment of appointment of electors []. (II) The vote of one or more electors has not been regularly given."

"No objection may be sustained unless such objection is sustained by separate concurring votes of each House."

Chapter 12

Inferring Private Causes of Action from Statutes

12.02 Federal statutes

d) The current Court's skepticism

Page 518

Add the following

(1) 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.'"

(2) In Hernandez v. Mesa, 140 S.Ct. 735 (2020), the Court refused to extend the reach of Bivens. Justice Alito took the occasion to make some remarks about inferring a cause of action more generally, as follows: "We are asked in this case to extend [Bivens] and create a damages remedy for a cross-border shooting. As we have made clear in many prior cases, however, the Constitution's separation of powers requires us to exercise caution before extending Bivens to a new 'context'. . . ." The Court noted that Bivens was "the product[] of an era when the Court routinely inferred 'causes of action' that were 'not explicit' in the text of the provision that was allegedly violated" and that "[i]n later years, we came to appreciate more fully the tension between this practice and the Constitution's separation of legislative and judicial power." He further suggested that it is "doubtful that we would have reached the same result" as Bivens today. Justices Thomas and Gorsuch concurred, stating that "the time has come to consider discarding Bivens altogether" because it "is a relic of the heady days in which this Court assumed common-law powers to create causes of action."

(3) In Egbert v. Boule, 142 S.Ct. 1793 (2022), the Court did not overrule Bivens but still refused to find a Bivens cause of action: first, because it would risk undermining border security and, second, Congress had provided alternative remedies. These criteria suggested that Congress was better able to provide a damage remedy than the courts.

(4) *Voting Rights Act, sec. 2.* In Brnovich v. Democratic National Committee, 141 U.S. 2321, 2350 (2021), Gorsuch's concurring opinion (joined by Thomas) suggested that sec. 2 of the Voting Rights Act might not authorize a private cause of action. He stated: "Our cases have assumed—without deciding—that the Voting Rights Act of 1965 furnishes an implied cause of action under § 2. Lower courts have treated this issue as an open question."

In Arkansas State Conference NAACP v. Arkansas Board of apportionment, 586 F.Supp.3d 893 (2022), the court followed Gorsuch's suggestion and held that sec. 2 did *not* authorize a private cause of action. The court noted that "[t]he Supreme Court's current jurisprudence on implied private rights of action is notoriously tight-fisted. That's to be expected; after all, the question at hand is whether a court should "read into" a statute something that Congress did not 'write into' the statute. What a strange thing for courts to do—especially in the modern era." And: "A line of Supreme Court cases, beginning with *Alexander v. Sandoval*, has made quite clear that judicially implied private rights of action are now extremely disfavored. If Congress wants private litigants to be able to enforce federal statutes, Congress should express that desire in the statute."

The court relied in part on an expressio unius argument, noting that "Section 12 of the Act [] appears to be the only remedial provision that Congress provided for violations of § 2. A comprehensive reading of § 12 clearly establishes that it is focused entirely on enforcement proceedings instituted by the Attorney General of the United States. That's a problem for the Plaintiffs because "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."

In Allen v. Milligan, 143 S.Ct. 1487 (2023), the Court upheld a § 2 claim that Alabama's apportionment map was illegal. But, as Thomas noted in dissent: "The Court does not address whether § 2 contains a private right of action, an issue that was argued below but was not raised in this Court." The lower court decision was Caster v. Merrill, 2022 WL 264819 (U.S.D.Ct. Ala. 2022). It decided that there *was* a private cause of action under § 2, stating: "Since the passage of the Voting Rights Act, federal courts across the country, including both the Supreme Court and the Eleventh Circuit, have considered numerous Section Two cases brought by private plaintiffs. . . . Holding that Section Two does not provide a private right of action would work a major upheaval in the law, and we are not prepared to step down that road today."

Chapter 13

Statutory Patterns

13.01 Super-text vs. policy coherence

b) Same text

Page 525

Add the following

In Taggart v. Lorenzen, 139 S.Ct. 1795 (2019), the Court made the following statement: "When a statutory term is 'obviously transplanted 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

b) Appropriations acts

iii) Denying money

Page 544

Add the following

Legal obligation to pay survives denial of appropriation. In Maine Community Health Options v. United States, 140 S.Ct. 1308 (2020), the Court dealt with a portion of Obamacare that compensated insurers whose losses exceeded a certain amount. Riders to appropriation bills stated that federal funds could not be used to provide this compensation.

The Court first held that Obamacare had established a legal obligation to make such payments. Although the typical legislative sequence was to authorize appropriations before the government incurs a legal obligation, that order was not absolute and, in this instance, the legal obligation preceded the appropriations legislation.

The Court then turned to the impact of the appropriations riders denying compensation. It held that the appropriations law did not change the substantive obligation to make the payments, in part because the "aversion to implied repeals is 'especially' strong 'in the appropriations context.'"

Finally, having found that the legal obligation to make the payment under Obamacare survived the appropriations rider, the Court allowed a suit for damages in the Court of Federal Claims under the Tucker Act, which waived the federal government's defense of sovereign immunity that would otherwise prevent the success of a claim for damages.

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, 139 S.Ct. 2400 (2019), Justice Gorsuch's concurrence suggested that statutory interpretation statutes might have an entrenching effect effect. He asked a question "which the majority [did] not address, about the ability of one Congress to entrench its preferences by attempting to control the interpretation of legislation enacted by future Congresses."

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 both the Dictionary Act and a longstanding judicial 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."

Chapter 14

The Legislature

14.03 Direct Democracy (Referendums and Initiatives)

d) State Law Requirements

i) The "One Subject" Rule

Page 609

Add the following

D. Massachusetts

In Koussa v. Attorney General, 188 N.E.3d 510 (2022), the Supreme Court of Massachusetts dealt with an initiative that classified app-based drivers (such as Uber) as independent contractors (1) for purposes of providing a wage and benefit scheme for the drivers and (2) for purposes of determining the rights of third parties against the drivers' employers in respondeat superior for torts committed by drivers (such as an assault by the driver or a traffic accident). The court held that this initiative violated the state constitution's requirement that an initiative petition contain only subjects that "are related or which are mutually dependent," because the petitions "encompass at least two distinct public policy decisions."

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

Page 651

Add the following

c. In Virginia House of Delegates v. 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 a dissent (joined by Roberts, Breyer and Kavanaugh). The Court's majority stated:

> 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.

d. In House of Representatives v. Mnuchin, 976 F.3d 1 (D.C.Cir. 2020), the court held that the House had standing to block Trump's plan to use certain spending to build a border wall.

> The House alleges that it has suffered an institutional injury because the defendants' actions have disrupted Congress's specific authority over the appropriation of federal funds. Congress's authority is derived from the Appropriations Clause, U.S. Const. art I, § 9, cl. 7, which provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." The House suggests that the structure of the Appropriations Clause means that Congress, as an institution, has the specific authority to decide how federal funds are allocated and, when the defendants transferred more funds to be spent on construction of the barrier than Congress had authorized, the defendants disrupted congressional authority. The defendants assert that the House of Representatives is not an injured party with standing to litigate this injury in federal court, but that any

alleged injury is to the legislative right of Congress as a whole, not the entity comprising a single house of the bicameral body. Thus, the defendants' first line of defense is that a single house of Congress can never have standing to litigate a claim of legislative injury against the Executive, even though each house has a specific authority to prevent the authorization.

The House answers that there is no mismatch between the institution injured and the institution bringing the lawsuit. According to the House, while the Appropriations Clause grants the power to both chambers of Congress in limiting the spending of federal funds, each chamber also possesses a unique interest in appropriations. That interest, the House argues, stems from the nature of appropriations, namely, that appropriations legislation must be passed, "otherwise the government literally cannot function." As a result, the House suggests that each chamber has "the power to dictate funding limits" because if either chamber does not pass an appropriation, there will be no funds for the federal government to spend on the project or goal to which the proposed appropriation is directed.

In support of its position that each chamber has a distinct interest, the House relies on statements from the founding era. In particular, the House turns to the history of the passage and amendment of the Appropriations Clause. In an early draft of the Constitution, all appropriation bills had to originate in the House and could not be altered by the Senate. The origination provision was removed, the House asserts, because it made the Senate subservient to the House in appropriations and the Framers intended that each chamber would have the independent ability to limit spending. Additionally, the House references statements from the founding era that recognize the federal purse has "two strings" and "[b]oth houses must concur in untying" them. The structure of the "two strings" system means, the House maintains, that the House, by not passing an appropriation, can prevent the expenditure of funds for a government project, such as the proposed border wall even if the Senate disagrees. In sum, as the House asserts, "unlike the situation in which one chamber of Congress seeks to enforce a law that it could not have enacted on its own, a suit to enforce a spending limit vindicates a decision to block or limit spending that each chamber of Congress could have effectively imposed — and, in this case, the House did impose — unilaterally."

The court dealt with Virginia House of Delegates v. Bethune-Hill (involving the legislature's redistricting power) as follows:

When the injury alleged is to the Congress as a whole, one chamber does not have standing to litigate. When the injury is to the distinct prerogatives of a single chamber, that chamber does have standing to assert the injury. The allegations are that the Executive interfered with the prerogative of a single chamber to limit spending under the two-string theory discussed at the time of the founding. Therefore, each chamber has a distinct individual right, and in this case, one chamber has a distinct injury. That chamber has standing to bring this litigation.

To put it simply, the Appropriations Clause requires two keys to unlock the Treasury, and the House holds one of those keys. The Executive Branch has, in a word, snatched the House's key out of its hands. That is the injury over which the House is suing. . . . The ironclad constitutional rule is that the Executive Branch cannot spend until both the House and the Senate say so. . . .

Nor does it work to say that suit can only be brought by the House and Senate together, as that ignores the distinct power of the House alone not to untie its purse string. "[*E*]*ach* Chamber of Congress [possesses] an *ongoing* power — to veto certain Executive

> Branch decisions — that each House could exercise independent of any other body." Unlike the affirmative power to pass legislation, the House can wield its appropriations veto fully and effectively all by itself, without any coordination with or cooperation from the Senate.
>
> For that reason, expenditures made without the House's approval — or worse, as alleged here, in the face of its specific disapproval — cause a concrete and particularized constitutional injury that the House experiences, and can seek redress for, independently. And again, failure to recognize that injury in fact would fundamentally alter the separation of powers by allowing the Executive Branch to spend any funds the Senate is on board with, even if the House withheld its authorizations. . . . In that way, this case bears no resemblance to *Bethune-Hill*. The House of Representatives seeks to vindicate a legal interest that it possesses completely independently of the Senate, or of the Congress as a whole. The Constitution's structure and the Appropriations Clause together give the House a vital power of its own . . . That is quite different from an effort by one legislative chamber to enforce rights that vest solely in the full legislature as a whole.

e. In Blumenthal v. Trump, 949 F.3d 14 (D.C.Cir. 2020), the court dealt with a claim by 215 Members of Congress that the President repeatedly violated the United States Constitution's Foreign Emoluments Clause. They alleged that President Trump "has a financial interest in vast business holdings around the world that engage in dealings with foreign governments and receive benefits from those governments" and that "[b]y virtue of that financial interest, [he] has accepted, or necessarily will accept, 'Emoluments' from 'foreign States' while holding the office of President." The Members alleged that the President's failure to seek and obtain congressional consent has "completely nullified" the votes they are authorized to cast to approve or disapprove his acceptance of foreign emoluments. They based their argument on the text of the Foreign Emoluments Clause, which requires the President to obtain "the Consent of the Congress" before accepting otherwise prohibited "Emoluments." They asserted that the "requirement of a successful prior vote, combined with the right of each Senator and Representative to participate in that vote, means that every time the President accepts an emolument without first obtaining congressional consent, [the Members] are deprived of their right to vote on whether to consent to its acceptance."

The court denied the Members standing: "[O]ur conclusion is straightforward because the Members — 29 Senators and 186 Members of the House of Representatives — do not constitute a majority of either body and are, therefore, powerless to approve or deny the President's acceptance of foreign emoluments."