Statutory Interpretation

A Pragmatic Approach

2025-2026 Supplement

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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

c) Federal Statutory Interpretation – Chief Justice Marshall

Page 32

Add the following

COMMENT ON "INCONVENIENCE"

Marshall's opinion in Fisher distinguishes between fundamental principles and inconvenience. The implication is that a court can require a clear statutory statement to protect fundamental values but has a much diminished role when the statute might cause "inconvenience".

In Prakash, The Inconvenience Doctrine, 78 Stan. L. Rev. ___ (2026), the author argues that at the time of the Founding courts were more concerned with interpreting statutes to prevent inconvenience than Marshall implies. This is important because it would provide an originalist understanding of the "Judicial Power" that allows for more judicial concern with substantive consequences than a textualist would allow. One reason supporting this view of judging is that it was faithful to the common law conception of judging that was still prevalent, quite the opposite of the view that the United States approach to separation of powers posited a sharp difference between written law and common law (a point that Justice Thomas emphasizes in an opinion discussed in sec. 3.04(b)iv in the Supplement).

Moreover, Prakash reads Marshall's opinion in Fisher to be less suspicious of judicial concern with inconvenience than I do, noting Marshall's comment that such concern was entirely proper when the statutory text was unclear. He also suggests that some courts interpreted statutes to avoid inconvenience even when the text was clear. And, of course, there was always the possibility that a decision that the text was unclear would follow from a concern with inconvenience rather than first finding that the statute was unclear and then worrying about inconvenience.

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 Arms 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).

But see Bondi v. VanDerStok, 145 S.Ct. 857 (2025), which concerned the meaning of the Gun Control Act of 1968. That Act requires those engaged in importing, manufacturing, or dealing in firearms to obtain federal licenses, etc. The Act defines "firearm" to include "(A) any weapon . . . which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; [and] (B) the frame or receiver of any such weapon." In 2022, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) adopted a rule interpreting the Act to cover weapon parts kits that are "designed to or may readily be converted to expel a projectile,"

The Court agreed with the ATF in an opinion by Justice Gorsuch. It noted that "[r]ecent years have witnessed profound changes in how guns are made and sold, with companies now able to sell weapon parts kits that individuals can assemble into functional firearms at home. These kits vary widely in how complete they come and in how much work is required to finish them. Sales have grown exponentially, with law enforcement agencies reporting a dramatic increase in untraceable 'ghost guns' used in crimes—from 1,600 in 2017 to more than 19,000 in 2021."

The Court refused to apply the rule of lenity, because lenity has no "role to play where 'text, context, and structure' decide the case."

Thomas' dissent would have relied on the rule of lenity, arguing that the case was similar to the Thompson/Center Arms case.

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 or the "reasonable reader"), These issues are discussed in Anita Krishnakumar, The Common Law as Statutory Backdrop, 136 Harv. L. Rev. 608 (2022).

B) Common law background

Page 77

Add the following

3. *What is the common law background*

In Kousisis v. United States, 145 S.Ct. 1382 (2025), the Court held that there was *no* agreed-upon common law meaning that provided the background for the statute.

> [The defendants] assert that economic loss is part and parcel of the common-law understanding of fraud . . . . When Congress uses a term with origins in the common law, we generally presume that the term "brings the old soil with it." . . . This old-soil principle applies, however, only to the extent that a common-law term has "accumulated [a] settled meaning."
>
> So to show that economic loss is necessary to securing a federal fraud conviction, [defendants] must show that such loss was "widely accepted" as a component of common-law fraud. They cannot. . . . To summarize, then, common-law courts did not uniformly condition an action sounding in fraud on the plaintiff 's ability to prove economic loss.

Chapter 3

Contemporary History – Declining Faith in Judging and Legislating

3.04 Reconstructing the judicial role

b) Giving judges as little to do as possible -- Textualism

Page 104

Add the following

v) Judicial power and textualism -- Common law vs. statutory interpretation – Justice Thomas

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 with 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 justified a restrictive view of the 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. . . .

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?

vi) Textualist methodology – "Ordinary meaning" and functional textualism

The cases in this section illustrate the difficulty in applying a statutory text to events which postdate adoption of the law. Most textualists agree that a statute *does* apply to future events when those events serve the same function as the historical text – referred to as "functional textualism"; events which serve the *same function* as the historical text are within the text's meaning. But here is the dilemma. If the history is described with too much specificity, you lapse into intentionalism and risk too narrow an application of the statute (limiting statutory meaning to what the historical legislature intended). Conversely, if you describe the history at too high a level of generality, the judge is no longer anchored by the text and the judge has too much leeway to determine the meaning of the law. This dilemma is illustrated in the following Alien Enemies Act cases and the Rahimi case (dealing with the history and tradition underlying the constitutional right to bear arms)

A. Alien Enemies Act

In J.A.V. vs. Trump, ___ F.Supp.3d ___ (S.D.Texas, May 1, 2025), 2025 WL 1257450, the question was whether the President can utilize the Alien Enemies Act (AEA) to detain and remove Venezuelan aliens who are members of TdA [a terrorist organization]. The statutory text authorized the President to take such action "[w]henever there is . . . any invasion or predatory incursion [] perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government". The court concluded that the President's invocation of the AEA was contrary to the plain, ordinary meaning of the statute's terms – specifically, that there was neither an "invasion" nor a "predatory incursion" as those terms were ordinarily understood.

The court's interpretive approach was as follows:

> Courts normally interpret statutory terms "consistent with their ordinary meaning at the time Congress enacted the statute." When ascertaining the plain, ordinary meaning of statutory language that harkens back to the nation's founding era, courts rely on contemporaneous dictionary definitions and historical records that reveal the common usage of the terms at issue. Utah v. Evans, 536 U.S. 452, 492 (2002) (Thomas, J., concurring) ("Dictionary definitions contemporaneous with the ratification of the Constitution inform our understanding."). . . . At times, terms can hold more than one ordinary meaning. See, e.g., United States v. Santos, 553 U.S. 507, 511 (2008) (finding that the word "proceeds" in a money laundering statute had the commonly accepted meanings of "receipts" or "profits"). Reviewing courts, however, apply "the contextually appropriate ordinary meaning, unless there is reason to think otherwise." Antonin Scalia and Bryan Garner, Reading Law: The Interpretation of Legal Texts 70 (2012).

The court then applied this approach to support its conclusion that there was neither an "invasion" nor a "predatory incursion". It relied on numerous sources contemporaneous to the enactment of the AEA in which "invasion" and "predatory incursion" expressly reference or imply military action, which had not occurred in this case. The government responded with other contemporaneous sources that reflected a broader understanding of "invasion," with no express or implicit military requirement, but provided only two examples. In sum, "the Court reviewed numerous historical records using 'invasion,' 'predatory incursion,' and 'incursion' for the period from 1780 through 1820. . . . In the significant majority of the records, the use of 'invasion' and 'predatory incursion' referred to an attack by military forces."

A Pennsylvania district court reached the opposite conclusion. In A.S.R. v. Trump, ___ F.Supp.3d ___, 2025 WL 1378784 (W.D.Penn. May 13, 2025), the court stated the issue as follows: "[W]hether 'predatory incursion' may fairly be applied to [Foreign Terrorist Organizations -- FTOs] today." It concluded "that 'predatory incursion' may be so applied," noting that "as the terms 'terrorist' and 'terrorism' have become more common, courts around the country have used 'incursion' in ways that support applying 'predatory incursions' to FTOs." [Editor – Examples excluded]

The court provides the following explanation, implicitly disagreeing with the Texas district court:

> Is a duly-designated [Foreign Terrorist Organization – FTO] . . . [that] enters the United States for purposes such as destabilizing the country, committing rampant crime, and then funneling profits from that crime back to South America, among other things, not the very definition of a cohesive group entering territory with a common and significant destructive purpose, just as a detachment of a military in 1798? Is such an FTO not the modern equivalent of the "enemies, pirates, and robbers," committing "incursions" around the enactment of the AEA? . . .
>
> In sum, based on the Supreme Court's statement that, while the "meaning" of a statute is fixed at its enactment, new "applications" may arise in light of changes of the world, this Court has continued to ask itself this question: If [Foreign Terrorist Organizations -- FTOs] existed and were entering the United States in 1798 for purposes such as those set out above, would the public and Congress have viewed those FTOs as committing "predatory incursions" against the territory of the United States? . . . [T]he Court answers that question in the affirmative.

In my reading, the Pennsylvania court concluded that the current FTO functioned in the same way as the military forces that the Texas court identified as the limit of the AEA's reach.

B. "History and Tradition"

In the constitutional context, textualist methodology relies on "originalism" and, more particularly, the "history and tradition" that explains the meaning of the historical text. The application of the "history and tradition" standard was the issue in United States v. Rahimi, 602 U.S. 680 (2024), involving the application of the Second Amendment "right to bear arms" to a situation in which a person subject to a restraining order wanted to own a gun.

Chief Justice Roberts wrote an opinion of the Court, joined by seven other Justices, with a dissent by Justice Thomas, but there were also five concurring opinions – written by Justices Sotomayor (joined by Kagan), Gorsuch, Kavanaugh, Barrett, and Jackson – all of which struggled with the application of the "history and tradition" standard. The problem was what to do when there was no direct historical precedent for the current regulation in the case (a restraining order) but there were analogous regulations in the historical record. These opinions considered how close the historical analogies had to be to the current regulation to justify interference with the right to bear arms.

Although this case involved the Constitution, similar issues arise in statutory interpretation. One commentator described originalist methodology in the context of statutory interpretation this way: "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." This appeal to historical understanding comes with the caveat that changing events can come within the meaning of an old text if they are analogous to the events that clearly fall within the historical text – that is, "functional textualism".

Here are some excerpts from the "right to bear arms" constitutional decision that grapples with the difficulties of relying on functional textualism – for example, how to weigh post-enactment tradition; how to identify "close enough" analogies; how to assure that applying the "history and tradition" standard really entails less risk of judicial policymaking than pragmatism or purposivism.

Chief Justice Roberts majority opinion stated:

> A federal statute prohibits an individual subject to a domestic violence restraining order from possessing a firearm if that order includes a finding that he "represents a credible threat to the physical safety of [an] intimate partner," or a child of the partner or individual. 18 U. S. C. §922(g)(8). Respondent Zackey Rahimi is subject to such an order. The question is whether this provision may be enforced against him consistent with the Second Amendment.
>
> When a restraining order contains a finding that an individual poses a credible threat to the physical safety of an intimate partner, that individual may — consistent with the Second Amendment — be banned from possessing firearms while the order is in effect. Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms. As applied to the facts of this case, Section 922(g)(8) fits comfortably within this tradition. . . .
>
> [Our] precedents were not meant to suggest a law trapped in amber. As we explained in Heller, for example, the reach of the Second Amendment is not limited only to those arms that were in existence at the founding. Rather, it "extends, prima facie, to all instruments that constitute bearable arms, even those that were not [yet] in existence." By that same logic, the Second Amendment permits more than just those regulations identical to ones that could be found in 1791. Holding otherwise would be as mistaken as applying the protections of the right only to muskets and sabers.
>
> As we explained in Bruen, the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition. A court must ascertain whether the new law is "relevantly similar" to laws that our tradition is understood to permit, "apply[ing] faithfully the balance struck by the founding generation to modern circumstances." Discerning and developing the law in this way is "a commonplace task for any lawyer or judge." . . .
>
> [W]hen a challenged regulation does not precisely match its historical precursors, "it still may be analogous enough to pass constitutional muster." The law must comport with the principles underlying the Second Amendment, but it need not be a "dead ringer" or a "historical twin."

> Taken together, the surety and going armed laws [Editor – statutes existing at the time of the Founding] confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed. Section 922(g)(8) is by no means identical to these founding era regimes, but it does not need to be. Its prohibition on the possession of firearms by those found by a court to present a threat to others fits neatly within the tradition the surety and going armed laws represent.
>
> Like the surety and going armed laws, Section 922(g)(8)(C)(i) applies to individuals found to threaten the physical safety of others. . . .
>
> The dissent reaches a contrary conclusion primarily on the ground that the historical analogues for Section 922(g)(8) are not sufficiently similar to place that provision in our historical tradition.

Justice Sotomayor's concurrence took direct aim at Justice Thomas's dissent:

> I write separately to highlight why the Court's interpretation [] is the right one. In short, the Court's interpretation permits a historical inquiry calibrated to reveal something useful and transferable to the present day, while the dissent would make the historical inquiry so exacting as to be useless, a too-sensitive alarm that sounds whenever a regulation did not exist in an essentially identical form at the founding. . . .
>
> The dissent . . . picks off the Government's historical sources one by one, viewing any basis for distinction as fatal. . . . This case lays bare the perils of the dissent's approach. Because the dissent concludes that "§922(g)(8) addresses a societal problem — the risk of interpersonal violence — 'that has persisted since the 18th century," it insists that the means of addressing that problem cannot be "materially different" from the means that existed in the 18th century. That is so, it seems, even when the weapons in question have evolved dramatically. According to the dissent, the solution cannot be "materially different" even when societal perception of the problem has changed, and even if it is now clear to everyone that the historical means of addressing the problem had been wholly inadequate. Given the fact that the law at the founding was more likely to protect husbands who abused their spouses than offer some measure of accountability, it is no surprise that that generation did not have an equivalent to §922(g)(8). Under the dissent's approach, the legislatures of today would be limited not by a distant generation's determination that such a law was unconstitutional, but by a distant generation's failure to consider that such a law might be necessary. History has a role to play in Second Amendment analysis, but a rigid adherence to history, (particularly history predating the inclusion of women and people of color as full members of the polity), impoverishes constitutional interpretation and hamstrings our democracy.

How, if at all, does the following excerpt from *Justice Gorsuch's concurrence* differ from Justice Sotomayor?

> To prevail, the government need not show that the current law is a "dead ringer" for some historical analogue. But the government must establish that, in at least some of its applications, the challenged law "impose[s] a comparable burden on the right of armed self-defense" to that imposed by a historically recognized regulation. . . .

> Why do we require those showings? Through them, we seek to honor the fact that the Second Amendment "codified a pre-existing right" belonging to the American people, one that carries the same "scope" today that it was "understood to have when the people adopted" it. When the people ratified the Second Amendment, they surely understood an arms-bearing citizenry posed some risks. But just as surely they believed that the right protected by the Second Amendment was itself vital to the preservation of life and liberty. We have no authority to question that judgment. As judges charged with respecting the people's directions in the Constitution — directions that are "trapped in amber," — our only lawful role is to apply them in the cases that come before us. Developments in the world may change, facts on the ground may evolve, and new laws may invite new challenges, but the Constitution the people adopted remains our enduring guide. If changes are to be made to the Constitution's directions, they must be made by the American people. . . .
>
> Proceeding with this well in mind today, the Court rightly holds that Mr. Rahimi's facial challenge to §922(g)(8) cannot succeed. It cannot because, through surety laws and restrictions on "going armed," the people in this country have understood from the start that the government may disarm an individual temporarily after a "judicial determinatio[n]" that he "likely would threaten or ha[s] threatened another with a weapon." And, at least in some cases, the statute before us works in the same way and does so for the same reasons: It permits a court to disarm a person only if, after notice and hearing, it finds that he "represents a credible threat to the physical safety" of others.
>
> I appreciate that one of our colleagues sees things differently. But if reasonable minds can disagree whether §922(g)(8) is analogous to past practices originally understood to fall outside the Second Amendment's scope, we at least agree that is the only proper question a court may ask. Discerning what the original meaning of the Constitution requires in this or that case may sometimes be difficult. Asking that question, however, at least keeps judges in their proper lane, seeking to honor the supreme law the people have ordained rather than substituting our will for theirs. And whatever indeterminacy may be associated with seeking to honor the Constitution's original meaning in modern disputes, that path offers surer footing than any other this Court has attempted from time to time. Come to this Court with arguments from text and history, and we are bound to reason through them as best we can. (As we have today.) Allow judges to reign unbounded by those materials, or permit them to extrapolate their own broad new principles from those sources, and no one can have any idea how they might rule. (Except the judges themselves.) Faithful adherence to the Constitution's original meaning may be an imperfect guide, but I can think of no more perfect one for us to follow.

Justice Kavanaugh's concurrence elaborated on the role of pre- and *post-ratification history*. Here is some of what he said about post-ratification history:

> As the Framers made clear, and as this Court has stated time and again for more than two centuries, post-ratification history — sometimes referred to as tradition — can also be important for interpreting vague constitutional text and determining exceptions to individual constitutional rights. When the text is vague and the pre-ratification history is elusive or inconclusive, post-ratification history becomes especially important. Indeed, absent precedent, there can be little else to guide a judge deciding a constitutional case in that situation, unless the judge simply defaults to his or her own policy preferences. . . .

Post-ratification interpretations and applications by government actors — at least when reasonably consistent and longstanding — can be probative of the meaning of vague constitutional text. The collective understanding of Americans who, over time, have interpreted and applied the broadly worded constitutional text can provide good guidance for a judge who is trying to interpret that same text decades or centuries later.

Importantly, the Framers themselves intended that post-ratification history would shed light on the meaning of vague constitutional text. They understood that some constitutional text may be "more or less obscure and equivocal" such that questions "daily occur in the course of practice." The Federalist No. 37, at 228–229. Madison explained that the meaning of vague text would be "liquidated and ascertained by a series of particular discussions and adjudications." In other words, Madison articulated the Framers' expectation and intent that post-ratification history would be a proper and important tool to help constitutional interpreters determine the meaning of vague constitutional text.

Throughout his consequential 30-year tenure on this Court, Justice Scalia repeatedly emphasized that constitutional interpretation must take account of text, pre-ratification history, and post-ratification history — the last of which he often referred to as "tradition." . . .

The historical approach is not perfect. But "the question to be decided is not whether the historically focused method is a perfect means of restraining aristocratic judicial Constitution-writing; but whether it is the best means available in an imperfect world."

Justice Barrett's concurrence added:

[F]or an originalist, the history that matters most is the history surrounding the ratification of the text; that backdrop illuminates the meaning of the enacted law. History (or tradition) that long postdates ratification does not serve that function. To be sure, postenactment history can be an important tool. For example, it can "reinforce our understanding of the Constitution's original meaning"; "liquidate ambiguous constitutional provisions"; provide persuasive evidence of the original meaning; and, if stare decisis applies, control the outcome. But generally speaking, the use of postenactment history requires some justification other than originalism simpliciter.

Courts have struggled with this use of history in the wake of Bruen. One difficulty is a level of generality problem: Must the government produce a founding-era relative of the challenged regulation—if not a twin, a cousin? Or do founding-era gun regulations yield concrete principles that mark the borders of the right? Many courts, including the Fifth Circuit, have understood Bruen to require the former, narrower approach. But Bruen emphasized that "analogical reasoning" is not a "regulatory straightjacket." To be consistent with historical limits, a challenged regulation need not be an updated model of a historical counterpart. Besides, imposing a test that demands overly specific analogues has serious problems. To name two: It forces 21st-century regulations to follow late-18th-century policy choices, giving us "a law trapped in amber." And it assumes that founding-era legislatures maximally exercised their power to regulate . . . . Such assumptions are flawed, and originalism does not require them.

> "Analogical reasoning" under Bruen demands a wider lens: Historical regulations reveal a principle, not a mold. To be sure, a court must be careful not to read a principle at such a high level of generality that it waters down the right. Pulling principle from precedent, whether case law or history, is a standard feature of legal reasoning, and reasonable minds sometimes disagree about how broad or narrow the controlling principle should be.
>
> [Justice Barrett concludes that the Court settles on just the right level of generality.]

Justice Jackson's concurrence noted that "[c]onsistent analyses and outcomes [in Second Amendment cases] are likely to remain elusive because whether [the Court's] test is satisfied in a particular case seems to depend on the suitability of whatever historical sources the parties can manage to cobble together, as well as the level of generality at which a court evaluates those sources — neither of which we have as yet adequately clarified."

Thomas's lengthy dissent explained how historical efforts to regulate gun ownership were not analogous to current regulations. For example, as for the Court's reliance on surety laws, Thomas stated: "Although surety laws shared a common justification with §922(g)(8), surety laws imposed a materially different burden. Critically, a surety demand did not alter an individual's right to keep and bear arms. After providing sureties, a person kept possession of all his firearms; could purchase additional firearms; and could carry firearms in public and private. Even if he breached the peace, the only penalty was that he and his sureties had to pay a sum of money. To disarm him, the Government would have to take some other action, such as imprisoning him for a crime."

Trump v. Casa, ___ S.Ct. ___ (2025), 2025 WL 1773631, also raised the question of whether a current practice was sufficiently analogous to historical practice that existed when the governing law was adopted. The specific issue was the legality of a "universal injunction" — an injunction barring executive officials from applying President Trump's Executive Order denying birthright citizenship to anyone, not just the plaintiffs. Justice Barrett (writing for the Court) said "no", stating: "The universal injunction was conspicuously nonexistent for most of our Nation's history. Its absence from 18th- and 19th-century equity practice settles the question of judicial authority. That the absence continued into the 20th century renders any claim of historical pedigree still more implausible." And: "Because the universal injunction lacks a historical pedigree, it falls outside the bounds of a federal court's equitable authority under the Judiciary Act."

Historical pedigree did not, of course, require an exact mapping of current practice onto historical practice; the search was for a sufficient analog in the historical record. Barrett did not find any such analog:

> We must [] ask whether universal injunctions are sufficiently "analogous" to the relief issued "by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act." . . . The answer is no: Neither the universal injunction nor any analogous form of relief was available in the High Court of Chancery in England at the time of the founding. . . . Of importance here, suits in equity were brought by and against individual parties. Indeed, the "general rule in Equity [was] that all persons materially interested [in the suit] [were] to be made parties to it."
>
> Faced with this timeline, the principal dissent accuses us of "misunderstand[ing] the nature of equity" as being "fr[ozen] in amber . . . at the time of the Judiciary Act." (opinion of Sotomayor, J.). Not so. We said it before, and say it again: "[E]quity is flexible." . At the

> same time, its "flexibility is confined within the broad boundaries of traditional equitable relief." A modern device need not have an exact historical match, but [] it must have a founding-era antecedent. And neither the universal injunction nor a sufficiently comparable predecessor was available from a court of equity at the time of our country's inception.

Barrett went on to dismiss the argument that a "universal injunction" was analogous to the historical "bill of peace",

> which was a form of group litigation permitted in English courts. The analogy does not work. True, "bills of peace allowed [courts of equity] to adjudicate the rights of members of dispersed groups without formally joining them to a lawsuit through the usual procedures." Even so, their use was confined to limited circumstances. Unlike universal injunctions, which reach *anyone* affected by legislative or executive action—no matter how large the group or how tangential the effect—a bill of peace involved a 'group [that] was small and cohesive,' and the suit did not "resolve a question of legal interpretation for the entire realm."' . . . As Chief Judge Sutton aptly put it, "[t]he domesticated animal known as a bill of peace looks nothing like the dragon of nationwide injunctions." The bill of peace lives in modern form, but not as the universal injunction. It evolved into the modern class action, which is governed in federal court by Rule 23 of the Federal Rules of Civil Procedure. And while Rule 23 is in some ways "more restrictive of representative suits than the original bills of peace," it would still be recognizable to an English Chancellor. Rule 23 requires numerosity (such that joinder is impracticable), common questions of law or fact, typicality, and representative parties who adequately protect the interests of the class. The requirements for a bill of peace were virtually identical. None of these requirements is a prerequisite for a universal injunction.

As Barrett noted, Sotomayor took a different view of the history, especially of the "bill of peace". For example: "The majority seeks to distinguish bills of peace from universal injunctions by urging that the former (but not the latter) typically applied to small and cohesive groups and were representative in nature. Yet those are distinctions without a difference. Equity courts had the flexibility to "adapt their decrees to all the varieties of circumstances, which may arise, and adjust them to all the peculiar rights of all the parties in interest." There is no equitable principle that caps the number of parties in interest." Although Barrett does not say so explicitly, she probably views Sotomayor's opinion as an example of failing to "be careful not to read a principle at [] a high level of generality."

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 117

Add the following

Series-qualifier canon. In Facebook, Inc. v. Duguid, 592 U.S. 395 (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" and the relevant audience. 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 in this case was whether delivery drivers for the dairy company were exempt from the overtime pay law. The statute provided an exemption for 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."

4.03 Authors and audiences

a) Lay vs. Technical Meaning

iii) Legal Language

Page 124

Add the following

3. *Term of art transplanted from another legal source.* In George v, McDonough, 596 U.S. 740 (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?

And, in Monsalvo Velasquez v. Bondi, 145 S.Ct. 1232 (2025), the Court (in an opinion by Gorsuch, joined by Roberts, Sotomayor, Kagan and Jackson) held that "days" had a specialized rather than ordinary meaning. The Court stated:

> The Board's final order of removal permitted the government to detain and remove Mr. Monsalvo if he failed to leave the country within "60 days . . . the maximum period allowed by" §1229c(b)(2). Everyone agrees the proper construction of that order is "governed by" the proper construction of §1229c(b)(2). Like Mr. Monsalvo's final order of removal, that statute sets forth a deadline expressed in terms of a number of "days." But what does that mean: Does every calendar day count? Or does the statute operate to extend a deadline that falls on a weekend or legal holiday to the next business day?
>
> In truth, the statute is susceptible to both understandings. An ordinary reader might understand "days" to mean calendar days, no more or less. . . . And, to be sure, we usually assume statutory terms bear their ordinary meaning "until and unless someone points to evidence suggesting otherwise." But here, evidence suggesting the possibility of specialized meaning does exist. In legal settings, the term "days" is often understood to extend deadlines falling on a weekend or legal holiday to the next business day. Various federal rules reflect this understanding. As do our own. . . . The question before us thus boils down to whether §1229c(b)(2) uses the term "days" in its ordinary or specialized sense.
>
> To resolve that question, we turn to one of this Court's customary interpretive tools. When Congress adopts a new law against the backdrop of a "longstanding administrative construction," this Court generally presumes the new provision should be understood to work in harmony with what has come before.
>
> That presumption is all but dispositive here. For many years, Congress has authorized the executive branch to draw up regulations to enforce the immigration laws. And since at least the 1950s, those regulations have provided that, when calculating the deadline for the "taking of any action," the term "day" carries its specialized meaning by

> excluding Sundays and legal holidays if a deadline would otherwise fall on one of those days. . . . Congress adopted §1229c(b)(2) against the backdrop of this consistent, longstanding administrative construction. And, given that, we presume the statute employs the same understanding.

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., 586 U.S. 347 (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. U.S. Supreme Court

In Fischer v. United States, 603 U.S. 480 (2024), the Court dealt with "[t]he Sarbanes-Oxley Act of 2002, [which] imposes criminal liability on anyone who corruptly 'alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding.' 18 U. S. C. §1512(c)(1). The next subsection extends that prohibition to anyone who 'otherwise obstructs, influences, or impedes any official proceeding, or attempts

to do so.' §1512(c)(2). [The Court] consider[ed] whether this 'otherwise' clause should be read in light of the limited reach of the specific provision that precedes it."

Chief Roberts' opinion for a 6-3 majority noted that "[t]his case concerns the prosecution of petitioner Joseph Fischer for his conduct on January 6, 2021. That day, both Houses of Congress convened in a joint session to certify the votes in the 2020 Presidential election. While they did so, a crowd of supporters of then-President Donald Trump gathered outside the Capitol. As set forth in the criminal complaint against Fischer, some of the crowd eventually 'forced entry' into the building, 'breaking windows,' and 'assaulting members of the U. S. Capitol Police.' This breach of the Capitol caused Members of Congress to evacuate the Chambers and delayed the certification process. The complaint alleges that Fischer was one of those who invaded the building. According to the complaint, about an hour after the Houses recessed, Fischer trespassed into the Capitol and was involved in a physical confrontation with law enforcement. Fischer claimed in Facebook posts that he 'pushed police back about 25 feet,' and that he 'was inside the [Capitol] talking to police.'"

Fischer claimed that the statute criminalizes only attempts to impair the availability or integrity of evidence. The Court argued that

> [t]wo general principles are relevant [to decide the case]. . . . [T]he canon of noscitur a sociis teaches that a word is "given more precise content by the neighboring words with which it is associated. . . . And under the related canon of ejusdem generis, "general or collective term at the end of a list of specific items" is typically "controlled and defined by reference to the specific classes . . . that precede it." These approaches to statutory interpretation track the common sense intuition that Congress would not ordinarily introduce a general term that renders meaningless the specific text that accompanies it.
>
> To see why, consider a straightforward example. A zoo might post a sign that reads, "do not pet, feed, yell or throw objects at the animals, or otherwise disturb them." If a visitor eats lunch in front of a hungry gorilla, or talks to a friend near its enclosure, has he obeyed the regulation? Surely yes. Although the smell of human food or the sound of voices might well disturb gorillas, the specific examples of impermissible conduct all involve direct interaction with and harassment of the zoo animals. Merely eating or talking is so unlike the examples that the zoo provided that it would be implausible to assume those activities were prohibited, even if literally covered by the language.
>
> The idea is simply that a general phrase can be given a more focused meaning by the terms linked to it. That principle ensures — regardless of how complicated a sentence might appear — that none of its specific parts are made redundant by a clause literally broad enough to include them. For instance, a football league might adopt a rule that players must not "grab, twist, or pull a facemask, helmet, or other equipment with the intent to injure a player, or otherwise attack, assault, or harm any player." If a linebacker shouts insults at the quarterback and hurts his feelings, has the linebacker nonetheless followed the rule? Of course he has. The examples of prohibited actions all concern dangerous physical conduct that might inflict bodily harm; trash talk is simply not of that kind.
>
> The "otherwise" provision of Section 1512(c)(2) is similarly limited by the preceding list of criminal violations. The offenses enumerated in subsection (c)(1) cover someone who "alters, destroys, mutilates, or conceals a record, document, or other object

> . . . with the intent to impair the object's integrity or availability for use in an official proceeding." Complex as subsection (c)(1) may look, it simply consists of many specific examples of prohibited actions undertaken with the intent to impair an object's integrity or availability for use in an official proceeding: altering a record, altering a document, concealing a record, concealing a document, and so on. That list is followed immediately by a residual clause in (c)(2). Guided by the basic logic that Congress would not go to the trouble of spelling out the list in (c)(1) if a neighboring term swallowed it up, the most sensible inference is that the scope of (c)(2) is defined by reference to (c)(1).
>
> Tethering subsection (c)(2) to the context of (c)(1) recognizes the distinct purpose of each provision. As we have explained, subsection (c)(1) refers to a defined set of offense conduct — four types of actions that, by their nature, impair the integrity or availability of records, documents, or objects for use in an official proceeding. When the phrase "otherwise obstructs, influences, or impedes any official proceeding" is read as having been given more precise content by that narrower list of conduct, subsection (c)(2) makes it a crime to impair the availability or integrity of records, documents, or objects used in an official proceeding in ways other than those specified in (c)(1). For example, it is possible to violate (c)(2) by creating false evidence — rather than altering incriminating evidence. Subsection (c)(2) also ensures that liability is still imposed for impairing the availability or integrity of other things used in an official proceeding beyond the "record[s], document[s], or other object[s]" enumerated in (c)(1), such as witness testimony or intangible information.

Justice Barrett, often aligned with the judges in the majority, wrote a dissent, joined by Justices Sotomayor and Kagan. (Interestingly, Justice Jackson, often aligned with Kagan and Sotomayor, joined the majority.) Barrett's dissent stated:

> Joseph Fischer allegedly joined a mob of rioters that breached the Capitol on January 6, 2021. At the time, Congress was meeting in a joint session to certify the Electoral College results. The riot forced Congress to suspend the proceeding, delaying it for several hours. The Court does not dispute that Congress's joint session qualifies as an "official proceeding"; that rioters delayed the proceeding; or even that Fischer's alleged conduct (which includes trespassing and a physical confrontation with law enforcement) was part of a successful effort to forcibly halt the certification of the election results. Given these premises, the case that Fischer can be tried for "obstructing, influencing, or impeding an official proceeding" seems open and shut. So why does the Court hold otherwise?
>
> Because it simply cannot believe that Congress meant what it said. Section 1512(c)(2) is a very broad provision, and admittedly, events like January 6th were not its target. (Who could blame Congress for that failure of imagination?) But statutes often go further than the problem that inspired them, and under the rules of statutory interpretation, we stick to the text anyway. The Court, abandoning that approach, does textual backflips to find some way –- any way — to narrow the reach of subsection (c)(2). . . .
>
> The Court begins with the noscitur a sociis and ejusdem generis canons. The noscitur anon counsels that "words grouped in a list should be given related meanings." It is particularly useful when interpreting "a word [that] is capable of many meanings." The ejusdem canon applies when "a catchall phrase" follows "an enumeration of specifics, as in dogs, cats, horses, cattle, and other animals." We often interpret the catchall phrase to

"embrace only objects similar in nature to those objects enumerated by the preceding specific words." These canons are valuable tools. But applying either to (c)(2) is like using a hammer to pound in a screw — it looks like it might work, but using it botches the job. Unlike the pattern to which the noscitur canon applies, §1512(c) is not a list of terms that includes an ambiguous word. So the Court does not do what it does when applying noscitur: select between multiple accepted meanings of the words "obstructs," "influences," and "impedes." Instead, it modifies those words [in subsection (c)(2)] by adding an adverbial phrase: obstructs, influences or impedes by "impair[ing] the availability or integrity for use in an official proceeding of records, documents, or objects." The ejusdem canon is an equally poor fit. Unlike the pattern to which ejusdem applies, (c)(2) is "not a general or collective term following a list of specific items to which a particular statutory command is applicable." Instead, (c)(1) and (c)(2) are "distinct and independent prohibitions." Though they share a subject and an adverb — "[w]hoever corruptly" — the two clauses contain different verbs that take different objects. Moreover, (c)(1) has a separate mens rea provision that further disrupts the connection between the clauses.

To my knowledge, we have never applied either of these canons to a statute resembling §1512(c). Rather than identify such a case, the Court invents examples of a sign at the zoo and a football league rule. The zoo example ("do not pet, feed, yell or throw objects at the animals, or otherwise disturb them") does not help, because it mimics the typical ejusdem format of specific words followed by a catchall. The list of specific verbs makes clear that the cleanup phrase ("otherwise disturb") is limited to conduct that involves direct interaction with the animals. But in the absence of a laundry list followed by a catchall, it is hard to see why the ejusdem canon fits. . . .

The Court argues that "there would have been scant reason for Congress to provide any specific examples" in (c)(1) if (c)(2) covered all forms of obstructive conduct. Conduct like destroying and concealing records "obstructs, influences, or impedes a[n] official proceeding," so Congress could have enacted just (c)(2) and been done with it. On the Government's interpretation, the Court asserts, the second prohibition swallows the first. If (c)(1) has any function, it must be to cast light (and impose limits) on (c)(2). . . .

It bears emphasis, though, that the broad overlap makes sense, given the statute's backstory. When the Enron scandal occurred, Congress (along with the general public) was taken aback to discover that seemingly criminal conduct was actually not a federal crime. As it then existed, §1512 had a loophole: It imposed liability on those who persuaded others to destroy documents, but not on the people who themselves destroyed documents. Congress enacted §1512(c) to close this "Enron gap." Subsection (c)(1) deals with the particular problem at hand — document destruction. Subsection (c)(2) reflects Congress's desire to avoid future surprises: It is "a catchall for matters not specifically contemplated — known unknowns." So contrary to the Court's suggestion, it would not be "peculiar" for (c)(2) to cover conduct "far beyond the document shredding and similar scenarios that prompted the legislation in the first place." Enron exposed more than the need to prohibit evidence spoliation — it also exposed the need to close statutory gaps. And in any event, statutes often reach beyond the "principal evil" that animated them. That is not grounds for narrowing them, because "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."

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 Kozinski'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).

4.04 Internal context

d) Avoid Surplusage – Expressio Unius Exclusio Alterius

ii) *Expressio Unius*

B) Applying *Expressio Unius* Canon; Drafting Context

Page 142

Add the following

The following case applied the expressio unius canon, buttressed by the drafting of a neighboring provision. In Esteras v. United States, ___ S.Ct. ___ (2025), 2025 WL 1716137 (Barrett , J., for the Court, joined by Roberts, Thomas, Kagan, Kavanaugh, Sotomayor, and Jackson), the Court considered the circumstances in which the court may revoke the term of supervised release. The statute (§3583(e)) provided a list of eight sentencing factors to consider but "[c]onspicuously missing from this list is §3553(a)(2)(A). . . ." [A lower court] "held that a district court may consider that factor nonetheless." The Supreme Court agreed with the defendant that "District courts cannot consider §3553(a)(2)(A) when revoking supervised release. This conclusion follows directly from the application of a well-established canon of statutory interpretation: 'expressio unius est exclusio alterius'—in plain English, 'expressing one item of [an] associated group or series excludes another left unmentioned.' . . . Here, §3553(a) lays out 10 factors that inform a district court's sentencing decision. Section 3583(e) provides that a district court may revoke a term of supervised release 'after considering' 8 of these 10 factors. The natural implication is that Congress did not intend for courts to consider [other factors]. Indeed, the expressio unius canon has particular force here because the [list of 8] constitute an 'established series,' such that any 'omission' from that series necessarily 'bespeaks a negative implication.'" . . .

The statutory structure confirms this negative inference. Neighboring provisions that govern the imposition and revocation of sentences other than supervised release instruct the court to consider *all* the factors in §3553(a) (emphasis added). For instance, when imposing a term of probation, the court 'shall consider the factors set forth in §3553(a) to the extent that they are applicable.' §3562(a). . . . So for supervised release—and for supervised release only—Congress omitted §3553(a)(2)(A). This, we think, is a distinction with a difference. After all, our task is to "give effect to, not nullify Congress' choice to include" that factor "in some provisions but not others." . . .

An argument was made that "[w]hen interpretive disputes arise, it is easy to imagine how Congress could have drafted the statute to avoid them. But Congress cannot anticipate (much less account for) every future statutory skirmish—and even if it could, courts have no authority to hold Congress to a "perfect as we see it" standard of drafting. On the contrary, we have "routinely construed statutes to have a particular meaning" even when "Congress could have expressed itself more clearly." What Congress said here gets its point across just fine . . . . [Editor – Watch for other cases where the Court does "hold Congress to a 'perfect as we see it' standard of drafting."

4.07 The uncertainties of textualism

Page 166

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 (587 U.S. 1 (2019)), stating that "[the Court's] bright-line rule may be attractive from a policy perspective . . . ."

[1] The Niz-Chavez decision (493 U.S. 155 (2021)) 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. Gorsuch's textualist opinion also added that the government must turn square corners when it seeks a procedural advantage over an individual, an obvious policy reference.

[2] Gorsuch also disagreed with the majority of the Court in Pulsifer v. United States, 601 U.S. 124 (2024). The issue was whether a defendant was eligible for "safety-valve" relief from a minimum sentence requirement. The statute lists three conditions -- A, B. and C – that cannot exist if relief is to be granted. The Court held that the defendant was not entitled to relief if any one of the listed conditions existed. In this case, the defendant was not described by condition C but was described by condition A and B. In effect, the Court's decision meant that "and" in the list of conditions meant "or". Gorsuch filed a dissenting opinion stressing that "and" did not mean "or", noting that "and" is an "additive" conjunction, "often indicating that the words it connects should be added together." In his view, Pulsifer was eligible for relief because he did not have all three disqualifying conditions in the aggregate.

[3] The issue in Delligatti v. United States, 145 S.Ct. 797 (2025) was whether the defendant had committed a "crime of violence", resulting in a mandatory five-year minimum sentence. A "crime of violence" occurred when the crime "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." The Court (in an opinion by Justice Thomas) held that "the intentional causation of bodily injury necessarily involves the use of physical force" and that this can occur through an act of omission. All that is necessary to prove causation is that the injury would not have occurred "but for" the defendant's conduct. "When a child starves to death after the parents refuse to provide food, the parents' conduct is no less a cause of death than if the parents had poisoned the child."

Gorsuch's dissent began with a rival hypothetical – "Imagine a lifeguard perched on his chair at the beach who spots a swimmer struggling against the waves. Instead of leaping into action, the lifeguard chooses to settle back in his chair, twirl his whistle, and watch the swimmer slip away. The lifeguard may know that his inaction will cause death. . . . [D]oes the lifeguard's offense also qualify [] as a "crime of

violence" involving the "use ... of physical force against the person ... of another"? The Court thinks so. I do not. [The statute] does not reach crimes of omission." His basic argument was that the Court did not rely on the statute's text but instead "chooses to begin (and largely end) its analysis of this case with an examination of precedent and assumptions about congressional purposes."

Gorsuch argues that several of the relevant terms in the statutory text involve affirmative action, not omission. This was true of the word "use", which (based on Black's and Webster's Dictionary) implied an "active meaning", not "inaction". Similarly, "physical force" implies a "physical act"

Gorsuch also examines what he calls "context", relying of legislative history to shed light on linguistic usage (a point explained later in Chapter 9) and on Corpus Linguistics to shed light on prototypical meaning (discussed in Chapter 5).

> First, consider how informed readers understood the phrase in 1981. When Congress first considered defining "crime of violence" to require the "use of physical force against the person or property of another," legislators recognized that those terms would not reach omissions. S. Rep. No. 97–307, p. 591 (1981). A Senate report explained that the "operator of a dam [who] refuse[d] to open the floodgates during a flood, thereby placing the residents of an upstream area in jeopardy of their lives" would not commit a "crime of violence" since "he did not ... use physical force." Of course, "legislative history is not the law" and should not be confused for it. But the report supplies at least some evidence that ordinary speakers at the time of [the statute's adoption] understood the phrase "use ... of physical force" to exclude crimes of omission. See A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 388 (2012) (Scalia & Garner) (recognizing that courts may use legislative history "for the purpose of establishing linguistic usage").
>
> Second, analyzing "how particular combinations of words are used in a vast database of English prose" can shed light on how ordinary people understand statutory terms. Just such a database—the Corpus of Contemporary American English—contains "forty-seven non-specialist instances of 'use of physical force.'" Of those references, "all refer to physical contact . . . ." Thus the phrase "prototypically refers to assertive physical contact—'punches, kicks, slaps[,] and body slams.'"

[4] In Feliciano v. Department of Transportation, 145 S.Ct. 1284 (2025), the alignment of Justices again pitted textualists against each other. Gorsuch wrote for a 5-4 majority (joined by Roberts, Kavanaugh, Barrett and Sotomayor) with a dissent by Thomas (joined by Alito, Kagan and Jackson).

The issue was as follows:

> Tens of thousands of federal civilian employees serve the Nation as military reservists. When the military calls those reservists to active duty, it often pays them less than they earn in their civilian jobs. Seeking to address that gap, Congress some years ago adopted a "differential pay" statute. That law requires the government to make up the difference between a federal civilian employee's military and civilian pay in various circumstances, including when he is called to active duty "*during* a national emergency." The question we face concerns the meaning of that quoted language. Does it guarantee a reservist differential pay when he serves on active duty while a national emergency is

> ongoing, or does it require a reservist to prove that his service bears a "substantive connection" to a particular national emergency?

The Court cited, as a "contextual" clue, a comparison of the text of the relevant statute with other laws: "When insisting on both a temporal and a substantive connection in other settings, Congress has commonly made its point expressly. Up and down the federal criminal code, for instance, statutes speak of actions taken "during *and in relation to*" specified criminal conduct. When it comes to statutes governing the Armed Forces, Congress has used the phrase 'during *and because of*" to describe leave both contemporaneous with and related to a reservist's active duty service. . . . As these examples illustrate, Congress can and does use different words in different provisions to insist on a substantive connection. But the absence of any words hinting at a substantive connection in the statute before us supplies a telling clue that it operates differently and imposes a temporal condition alone."

The dissent responded to the majority's emphasis on different language in different statutes, stating":

> Because "drafters more than rarely use the same word to denote different concepts, and often . . . use different words to denote the same concept," inferences like the majority's are "particularly defeasible by context." Scalia & Garner 170–171. And, the presumption of consistent usage and canon of meaningful variation carry especially little weight when applied to words that are "ubiquitous" and "context-dependent," whose use drafters are not "likely to keep track of and standardize." That is the case with a preposition such as "during" . . . Thus, the majority's arguments on this front cannot be controlling.

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?

Chapter 5

External Context – Purpose and Intent

5.04 Conflict of text and context

b) Holy Trinity today

Add the following

Page 193

Comment – Judge/Justice Gorsuch

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

> Lexington's invocation of the absurdity doctrine is no more persuasive than (or really more than a repackaging of) its speculation about legislative intentions. To be sure, at one time some thought 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

Page 201

Add the following

4. *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

Other examples of purpose/text interaction

a. *Avoid purposivism*

Page 214

Add the following

Stanley v. City of Sanford, ___ S.Ct. ___ (2025), 2025 WL 1716138, is another case which relies in part on the relevance of grammar to interpret legislation. [Editor – Recall Blackstone's admonition that "Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar"; p. 20]. The Court, in an opinion by Gorsuch, joined by Roberts, Thomas, Alito, Kagan, Kavanaugh and Barrett, held that retirees were not "qualified individuals" entitled to protection from discrimination under the Americans With Disabilities Act. The Court stated:

> [A] qualified individual [] is someone "who, with or without reasonable accommodation, can perform the essential functions of the employment position that [she] holds or desires." From these directions, one clue emerges immediately. "[T]o ascertain a statute's temporal reach," this Court has "frequently looked to Congress' choice of verb tense." And here, Congress has made it unlawful to "discriminate against" someone who "can perform the essential functions of" the job she "holds or desires." Those present-tense verbs signal that [the statute] protects individuals who, with or without reasonable accommodation, are able to do the job they hold or seek at the time they suffer discrimination. Conversely, those verbs tend to suggest that the statute does not reach retirees who neither hold nor desire a job at the time of an alleged act of discrimination.

Hewitt v. United States, ___ S.Ct. ___ (2025), 2025 WL 1758501, is yet another case in which the majority relied on grammar. The majority opinion was written by Jackson, joined by Roberts, Sotomayor, Kagan, and Gorsuch. The dissenters were Alito, Thomas, Kavanaugh, and Barrett.

The issue involved a provision of the "First Step Act" enacted in 2018. It eliminated a harsh mandatory minimum penalty, not only prospectively for sentencing after the Act's enactment but was also "partially retroactive" -- specifically, if a sentence "has not been imposed" as of the Act's enactment. The question was whether the retroactive provision applied when the offender had been sentenced as of the Act's enactment, but that sentence was subsequently vacated, in which case the offender had to face a post-Act resentencing. The Court held that the Act applied: "[B]ased on the text of the statute . . . , we conclude that a sentence has been imposed for purposes of that provision if, and only if, the sentence is extant—i.e., has not been vacated." It relied on the grammar of the statutory text, as follows:

> . . . [F]ocus first on the language Congress used. Most notably, the operative phrase is not written in the past-perfect tense, excluding anyone upon whom a sentence "had" been imposed. Rather, Congress employed the present-perfect tense—thereby requiring evaluation of whether "a sentence . . . has . . . been imposed" upon the defendant. In this context, that distinction makes a difference. See United States v. Wilson, 503 U. S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes"). . . .
>
> . . . [T]he present-perfect tense conveys to a listener that the event in question continues to be true or valid. The dissent counters that, for purposes of the First Step Act, the relevant moment of analysis should not be the present, but rather the statute's date of enactment. But that reframing is inconsistent with normal understandings of the present-perfect tense, which by definition focuses on the present. Today, if an event is merely a relic of history because it was voided by a subsequent action, the past-perfect (not the present-perfect) tense would usually be the more appropriate verb choice.

5.05 Context and permissible readings of the text

Other examples of purpose/text interaction

Page 215

Add the following

4. *Purpose vs. text (when statute refers to another law).* In Jam v. International Finance Corp., 586 U.S. 199 (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).

5.05 Context and permissible readings of the text

Page 215

Add the following

COMMENT ON DETERMINING 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).

[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).

The Sixth Circuit has been in the forefront of advocating the usefulness of corpus linguistics.

[1] Judge Thapar's concurring opinion in Wilson v. Safelite Group, Inc., 930 F.3d 429 (6th Cir. 2019), explains why courts should consider take account of corpus linguistics.

> [W]e interpret laws with their "ordinary meaning at the time Congress enacted the statute." Or, to put it another way, we look at how an ordinary person would normally understand the words that Congress used given the circumstances in which Congress used them. Only then can we give "ordinary people fair warning about what the law demands of them." But words often have multiple permissible meanings. And parties will dispute which of a word's *permissible* meanings does, in fact, prove to be its *ordinary* one, given the statutory context. *See* Thomas R. Lee & Stephen C. Mouritsen, Judging Ordinary Meaning, 127 Yale L.J. 788, 800, 802 (2018) (describing how words have possible, common, most frequent, exclusive, and prototypical meanings). To assist in this sometimes-difficult task, judges and lawyers can utilize a variety of tools. For example, judges routinely consult the canons of interpretation, especially those which help us "understand the English language." We also look to other statutes or the pre-existing common law for context or to better understand a term's meaning. And we need look no further than the majority opinion to see the value that dictionaries bring to our interpretive endeavor.
>
> We ought to embrace another tool to ascertain the ordinary meaning of the words in a statute. This tool — corpus linguistics — draws on the common knowledge of the lay person by showing us the ordinary uses of words in our common language. How does it work? Corpus linguistics allows lawyers to use a searchable database to find specific examples of how a word was used at any given time. State v. Rasabout, 356 P.3d 1258, 1275–76, 1289 (Utah 2015) (Lee, A.C.J., concurring in part and concurring in the judgment). These databases, available mostly online, contain millions of examples of everyday word usage (taken from spoken words, works of fiction, magazines, newspapers, and academic works). See, e.g., Corpus of Contemporary American English, BYU,

https://corpus.byu.edu/coca/help/texts.asp (listing types of sources); Corpus of Historical American English, BYU, http://www.english-corpora.org/coha/. Lawyers can search these databases for the ordinary meaning of statutory language like "results in." The corresponding search results will yield a broader and more empirically-based understanding of the ordinary meaning of a word or phrase by giving us different situations in which the word or phrase was used across a wide variety of common usages. In short, corpus linguistics is a powerful tool for discerning how the public would have understood a statute's text at the time it was enacted.

Of course, corpus linguistics is one tool — new to lawyers and continuing to develop — but not the whole toolbox. Its foremost value may come in those difficult cases where []dictionaries diverge. In those cases, corpus linguistics can serve as a cross-check on established methods of interpretation (and vice versa). This cross-check can provide both judges and parties with greater certainty about the meaning of words in a statute.

[One] concurring opinion argues that we should not add corpus linguistics to the judicial toolkit for several reasons. The first is methodological — corpora are not representative because of their sources. For instance, a corpus search for "flood" may lead to an overinclusion of newspaper articles talking about giant flood waters rather than basements flooding. But the entire practice of law — and certainly the practice of interpretation — involves judgment calls about whether a particular source is relevant. And, at least with corpus linguistics, those calls can be vetted by the public in a more transparent way. That is more than can be said of the alternative, which, as Justice Lee has thoughtfully noted, is for a judge to use his or her intuition — something far less representative and frankly far less "democratic." Plus, the danger of judges relying upon their own intuition is that we introduce other risks, like confirmation bias. Judges may unintentionally give greater weight to those definitions that match up with their preconceived notions of a word's meaning. We cannot get away from confirmation bias altogether, but we can surely check our intuition against additional sources of a word's meaning. The corpus allows us to do this.

[Another] concurring opinion argues that the use of corpus linguistics will descend into mere rote frequency analysis; judges will simply pick the use of the word that shows up the most. Yet judges who use corpora do not become automatons of algorithms. They will still need to exercise judgment consistent with the use of the other tools of statutory interpretation. Sometimes the most frequent use of a word will line up with its ordinary meaning as used in a statute. Sometimes it will not. The data from the corpus will provide a helpful set of information in making that interpretive decision. But the judge must make the ultimate decision after considering multiple tools.

[Yet another opinion suggests] that corpus linguistics is redundant when compared with another tool — dictionaries. Expert lexicographers already do corpus linguistics when compiling dictionaries, so, the argument goes, when judges use corpus linguistics, they become unnecessary and unhelpful armchair lexicographers. But the use of corpus linguistics improves upon dictionaries by helping pinpoint the ordinary uses of a word at the time a statute was enacted. For example, when a court considers a dictionary definition, it looks at a dictionary from that time period. But the usage examples in those dictionaries often come from a time before the dictionary was published. So the dictionary definition may actually tell us the ordinary meaning at a time *long before* Congress enacted the statute. Instead of relying on just a few sample sentences in the dictionary, the corpus

develops a broader picture of how words were actually used when Congress passed the statute.

In sum, I agree that corpus linguistics is not the only tool we should use, but it is an important tool that can assist us in figuring out the meaning of a term.

[2] Here are two Sixth Circuit examples in which corpus linguistics was considered.

[a] In United States v. Woodson, 960 F.3d 852 (6th Cr. 2020), the meaning of "scheme" was important.

> [The defendant] equates a "scheme" to a tangible object with a fixed location (i.e., the hub of operations). But lexical sources [citing dictionaries] defining "scheme" do not back up Woodson's interpretation. Those sources refer not to hideouts or tangible tools of the criminal trade but instead to intangible plans and concerted actions between co-conspirators.
>
> Nor does Woodson's argument find support when viewed through the lens of corpus linguistics, which can also play a critical role in resolving interpretive questions. Consistent with the dictionary sources already discussed, the Corpus of Contemporary American English, which provides insight into how the word "scheme" is used in ordinary speech, offers no examples of the word "scheme" being used to refer to a tangible thing similar to a criminal hideout. Instead, the term is consistently used to refer to concepts, plans, and, especially, criminal enterprises such as Ponzi schemes. For purposes of [the statute], then, a scheme is primarily the criminal agreement between co-conspirators rather than the physical headquarters from which the enterprise operates.

[b] In United States v. Carson, 55 F.4th 1053 (6th Cir. 2022), the issue was the meaning of "substantial".

> [A] resource is "substantial" if it is of "ample or considerable amount or size," "weighty," or of "real significance." *E.g., Substantial, Oxford English Dictionary Online* (3d ed. 2022). Corpus linguistics evidence from the 1990s—when the "substantial resource" language was added to [the statute]—confirms this understanding. The Corpus of Contemporary American English shows that the general public at that time most often associated "substantial" with "big," "large," "important," "significant," and "extensive." Brigham Young Univ., *Corpus of Contemporary American English,* http://corpus.byu.edu/coca. But prison wages are none of those things. Indeed, inmates accumulate 12¢ to 40¢ per hour for institutional work assignments, and 23¢ to $1.15 for [other] projects. Simply put, gradual payments of such small amounts are not "substantial."

[3] See also Gorsuch's dissent in Delligatti v. United States, 145 S.Ct. 797 (2025)

> [A]nalyzing "how particular combinations of words are used in a vast database of English prose" can shed light on how ordinary people understand statutory terms. Just such a database—the Corpus of Contemporary American English—contains "forty-seven non-specialist instances of 'use of physical force.' " Of those references, "all refer to physical contact . . . ." Thus the phrase "prototypically refers to assertive physical contact—'punches, kicks, slaps[,] and body slams.'"

5.06 Political compromise

COMMENTS

Page 221

Add the following

3. *Presumed compromise vs. actual compromise.* Recall that the "Public Choice" approach to statutory interpretation is willing to presume political compromise to determine the meaning of a statute; see pp. 85 and 178. This differs from the Stevens approach, which is to look for evidence of actual compromise. The "presumed compromise" approach, however, continues to be influential.

For example, in Advocate Christ Medical Center v. Kennedy, 145 S.Ct. 1262 (2025), the issue was how to compute Medicare reimbursements to hospitals for treating low-income Medicare beneficiaries. The purpose of the law was to take account of the fact that low-income patients have worse medical conditions and, consequently, have higher Medicare costs than wealthier patients. The Court (7-2) held that the beneficiaries included in the reimbursement formula were only patients who *received* cash payments from a means-tested welfare program known as supplementary security income (SSI) during the month of their hospitalization.

The dissent (Jackson and Sotomayor) argued that the included beneficiaries were those *entitled* to be enrolled in the SSI program, not limited to those with a right to receive a payment for the month of hospitalization.

The majority supported its conclusion by noting that "[n]o statute pursues a single policy at all costs, and we are not free to rewrite this statute [] as if it did. We must determine *how* Congress chose to pursue its objective." The Court cited an earlier opinion, stating: "Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage". In its view, "Congress made a specific choice: For purposes of the Medicare fraction, an individual is "entitled to [SSI] benefits" when she is eligible to receive an SSI cash payment during the month of her hospitalization.

The dissent's argument stressed that the purpose of the law was not served by the Court's narrow reading of the reimbursement formula. It stated:

> In the majority's view, my way of analyzing the relevant statutes impermissibly elevates purpose over text, because it "overlooks that Congress chose a specific means to advance its end." But that contention simply begs the question before us; what we are doing now is trying to discern what it was that Congress "chose" when it referenced the SSI program while crafting the Medicare fraction. The majority apparently believes it can figure that out without considering what the Medicare fraction was designed to accomplish – it just insists [] that Congress "chose" a proxy for low-income status that asks whether a patient received an SSI check during the month of their hospital stay. My response is simply, why would Congress possibly make that choice? The illogic of the majority's interpretation strongly signals that what the majority believes Congress "chose" is not actually what Congress intended or accomplished.

5.07 Legislative intent and the reenactment/inaction doctrines

b) Changing law despite reenactment

Page 231

Add the following

iii) 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, Alliance for Hippocratic Medicine v. Food & Drug Administration, April 7, 2023, 668 F.Supp.3d 507 (D.Ct. Tex. 2023). 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 Comstock 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) (not reported in Fed. Rptr). 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.'"

Supreme Court. The U.S. Supreme Court granted cert. on Dec. 13, 2023; 2023 WL 8605746; it held, on June 13, 2024, that plaintiffs lacked Article III standing to challenge FDA's actions regarding the regulation of mifepristone. This left access to mifepristone and misoprostol in place, as determined by the FDA, *for the meantime.*

5.08 Legislative intent and severing an unconstitutional part of a statute

Page 240

Add the following

COMMENT -- JUSTICE THOMAS' VIEW OF SEVERABILITY ANALYSIS

In Murphy v. National Collegiate Athletic Ass'n, 584 U.S. 453 (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 310

Add the following

2. *Nonviable fetus;* Alabama treats a nonviable fetus as a "child" for purposes of its Wrongful Death statute. The dramatic implications of this rule were brought home in an Alabama Supreme Court decision in LePage v. Center for Reproductive Medicine, 403 So.3d 747 (Alabama 2024), which held that an embryo stored cryogenically after in vitro fertilization (IVF) was a "child" under this statute. The facts of the case involved a patient at the hospital who removed the embryos from storage and dropped them, resulting in their death. Because embryos are often destroyed on purpose once they are no longer needed by prospective parents, the use of IVF in Alabama was halted. The court rejected an argument that "child" did not include an embryo outside of the mother's womb.

The court relied in part on the use of the term "child" in the 1872 Wrongful Death statute, which prompted a concurring opinion to consider this view "problematic", because IVF was not even a scientific possibility at that time. The dissent made the same point as the concurring opinion, arguing that the court was expanding the "original public meaning" of "child" beyond what it meant in 1872. *Query*: Is that "expansion" any more problematic than defining a "person" to include a viable fetus, when that expands the meaning of the term beyond its understanding when an old Wrongful Death statute was passed.

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, consider the effect, if any, of the Supreme Court's decision in Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (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, distinguishing abortion rights from other constitutional rights, 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 [abortion] decisions would "threaten the Court's precedents holding that the Due Process Clause protects other rights," [such as same-sex marriage]. 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.

7.04 Textualism and change

c) More Examples

Page 333

Add the following

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

In Bostock v. Clayton County, 590 U.S. 644 (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."

It is important to understand that no textualist would *always* limit the meaning of 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. Textualists have accepted *functional* updating of a text when the "new" situations fit the purpose of the text. Judge Lynch's dissenting opinion in Zarda v. Altitude Express, Inc., 883 F.3d 100, 145 (2d Cir. 2018) explains this functional approach in the context of Title VII, as follows:

> [T]he 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.

So the majority's hint that textualists, like the dissenters in Bostock, would *always* limit the meaning of a text to what was foreseen when the statute was adopted is too broad.

Is the majority literalist? 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. . An example is applying the expressio unius canon without regard to whether the "expression" was a response to a politically squeaky wheel or an effort to exclude other results – as when a statute that explicitly *prohibits* government-employer discrimination is reflexively interpreted to *allow* private-employer discrimination.

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. But what justifies adopting the borrowed (possible) tort law meaning? The choice between technical-legal and ordinary reader meaning might give the policy-oriented judge 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. As noted, 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

Delete Chapter 8 – Replace with the following

THE DEMISE OF CHEVRON

The Chevron doctrine, named for a 1984 case (Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984)), was overruled in Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024); Chief Justice Roberts wrote the decision for a 6-3 majority.

Chevron required courts to defer to an agency regulation when the statute was ambiguous and the agency rule was reasonable and, in a later evolution of Chevron, did not deal with a "major question" (such questions being too politically important to leave to an agency). The decision to overrule Chevron was undoubtedly influenced by a suspicion of the "deep state". It was also obvious to some that the uncertainties in relying on the "ambiguity" predicate for applying Chevron (for example: did it depend on the statute's text or purpose) allowed judges a lot of policy-oriented leeway – finding ambiguity only when the judge liked the agency decision.

Our discussion of the overruling of Chevron begins with a discussion of the major questions doctrine. There are several reasons for this. (1) It is a clear example of the institutional competence approach to statutory interpretation – rejecting agency authority in favor of legislation. (2) It is a good example of how the Court telegraphs its intention to overrule a case, by severely limiting Chevron before finally overruling it. (3) The major questions doctrine is still relevant in applying the Skidmore case under circumstances explained below.

Major questions doctrine. Here are two examples of cases applying the major questions doctrine and one case where Justice Barrett discusses why applying that doctrine is not an illustration of aggressive policy-oriented judging.

1. King v. Burwell, 576 U.S. 473 (2015), involved whether, under Obamacare, an insured was entitled to tax credits for insurance purchased on a federal exchange. Chief Justice Roberts stated:

> When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in [Chevron]. . . . This approach 'is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.' This is one of those cases. The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep "economic and political significance" that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. . . . This is not a case for the IRS. It is instead our task to determine the correct reading of [the statute].

2. In West Virginia v. EPA, 142 S.Ct. 2587 (2022), the Court struck down an Environmental Protection Agency regulation. Chief Justice Roberts stated:

> 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. . . . 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] major questions doctrine "label[]," 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.

3. In Biden v. Nebraska, 143 S.Ct. 2355 (2023), Justice Barrett's concurrence discussed the major questions doctrine in statutory interpretation, paying special attention to the role of substantive canons. 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 . . . speech patterns (like the inclusion of some things implies the exclusion of others). . . .
>
> 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. . . . [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) ([I]t is undeniable that they pose "a lot of trouble" for "the honest textualist."). 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. . . .

[We] "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" 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.

Overruling Chevron; Skidmore "respect". In its Loper decision overruling Chevron, the Court stressed two important points: (1) the courts are responsible for exercising *independent judgment* in determining the law; and (2) courts are expected to show respect but not blindly defer (as Chevron required) to agency decisions. The circumstances in which respect was appropriate was explained in the *Skidmore* case, which persists even after the demise of Chevron.

The Court in Loper stated:

Article III of the Constitution assigns to the Federal Judiciary the responsibility and power to adjudicate "Cases" and "Controversies" . . . . The Framers appreciated that the laws judges would necessarily apply in resolving those disputes would not always be clear. Cognizant of the limits of human language and foresight, they anticipated that "[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation," would be "more or less obscure and equivocal, until their meaning" was settled "by a series of particular discussions and adjudications." The Framers also envisioned that the final "interpretation of the laws" would be "the proper and peculiar province of the courts." Unlike the political branches, the courts would by design exercise "neither Force nor Will, but merely judgment." To ensure the "steady, upright and impartial administration of the laws," the Framers structured the Constitution to allow judges to exercise that judgment independent of influence from the political branches. . . .

The Court [] recognized from the outset [] that exercising independent judgment often included according due respect to Executive Branch interpretations of federal statutes. For example, [] the Court explained that "[i]n the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." Such respect was thought especially warranted when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time. That is because "the longstanding 'practice of the government'—like any other interpretive aid—"can inform [a court's] determination of what the law is." The Court also gave "the most respectful consideration" to Executive Branch interpretations simply because "[t]he officers concerned [were] usually able men,

> and masters of the subject," who were "[n]ot unfrequently . . . the draftsmen of the laws they [were] afterwards called upon to interpret."
>
> "Respect," though, was just that. The views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it. Whatever respect an Executive Branch interpretation was due, a judge "certainly would not be bound to adopt the construction given by the head of a department." Otherwise, judicial judgment would not be independent at all. The [Administrative Procedure Act] [] incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions. In exercising such judgment, though, courts may [] seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" . . . . Skidmore v. Swift & Co., 323 U. S. 134, 140 (1944). And interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning.

Justice Kagan's dissent in Loper noted that Skidmore continued to apply, stating: "If the majority thinks that the same judges who argue today about where 'ambiguity' resides are not going to argue tomorrow about what 'respect' requires [under Skidmore], I fear it will be gravely disappointed." You can get an idea of what Skidmore entails from the following list of "Skidmore factors": the thoroughness evident in the agency's analysis; the validity of its reasoning; its consistency with earlier and later pronouncements; its specialized experience; public participation in agency proceedings; concern about agency bias; the need to protect persons from serious harms that might result from agency decisions; and the length of time during which the agency rule has been in effect.

The list of Skidmore factors also includes the "major questions" doctrine, which would limit the respect accorded administrative decisions with great "economic and political significance". It should be noted that this limitation on judicial deference would apply to the Presidential executive orders with which we have recently become familiar.

A surviving interpretive question. There is one more interpretive question that survives overruling Chevron. Does the statute actually delegate authority to make law to the agency. The inference that this has occurred no longer depends on whether the statute is ambiguous (as was true under Chevron), but the text of the statute might still be interpreted to have that effect.

State law. States are, of course, free to follow their own approach to interpreting statutes and deferring to an administering agency. Pre-Loper, sixteen states give strong Chevron-deference to state agencies and fourteen states give no deference. Eighteen states give "due deference" (or the like) to agency rules. See D. Zachary Hudson, A Case for Varying Interpretive Deference at the State Level, 119 Yale L.J. 373 (2009). Hudson argues that the political accountability that is common for state judges – either initial election or a retention vote after appointment – undermines the argument that agencies are more politically accountable than judges. Consequently, the Chevron doctrine should be *less* applicable in the states.

At least one state has rejected adoption of the Chevron test, based (in part) on its lack of clarity. See Complaint of Rovas v. SBC Michigan, 754 N.W.2d 259 (Mich. 2008).

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

Page 379

Backtracking

Add the following

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

9.03 Justifications for judicial use of committee reports

c) Committees as agents of parent chamber

Questions

Page 381

Add the following

3. In Digital Realty Trust, Inc. v. Somers, 138 S.Ct. 767 (2018), Justices Sotomayor justified relying on a Senate Report based on an understanding of how Congress works. She emphasized that committee reports are a "particularly reliable source to which we can look to ensure fidelity to Congress' intended meaning"; that such reports are "typically circulated at least two days before" floor consideration of a bill and "provide Members of Congress and their staffs with information about a bill's context, purposes, policy implications, and details"; and that "legislative staffers view committee and conference reports as the most reliable type of legislative history."

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

Page 385

Add the following

In Lamar, Archer & Cofrin, LLP v. Appling, 584 U.S. 709 (2018), Justice Sotomayor wrote for a unanimous Court, citing several dictionaries to support an interpretation of the word "respecting" in the phrase "statement respecting the debtor's financial condition." But Part III-B of her opinion, joined by only six Justices, also cited a House Committee Report to support the Court's interpretation. Justices Thomas, Alito, and Gorsuch did not join Part III-B, carrying on Justice Scalia's tradition of noting their objection to relying on legislative history.

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

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

Page 398

Add the following

The Gluck & Posner study (discussed in Chapter 3.05 – Pragmatism) noted that "all [the judges] consult legislative history" (131 Harv. L. Rev. at 1302, 1310); and all but one judge said they used legislative history, with "liberal" judges saying they use it in moderation 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, 598 U.S. 115 (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, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2121 (2014).

9.06 Legislative debates

Comments and Questions

Page 412

Add the following

There is a suggestion in the editor's comments in the Weber case that the statutory prohibition of discrimination might not apply when there is discrimination against "majority" groups. In Ames v. Ohio Dept. of Youth Services, 145 S.Ct. 1540 (2025), the Court rejected any such suggestion, stating:

> As a textual matter, Title VII's disparate-treatment provision draws no distinctions between majority-group plaintiffs and minority-group plaintiffs. Rather, the provision makes it unlawful "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. §2000e–2(a)(1). The "law's focus on individuals rather than groups [is] anything but academic." Bostock v. Clayton County, 590 U. S. 644, 659 (2020). By establishing the same protections for every "individual"—without regard to that individual's membership in a minority or majority group—Congress left no room for courts to impose special requirements on majority-group plaintiffs alone."

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

Page 436

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 initially excluded legislative history about textual context. Is that a good understanding of PGE step 1.

There is another possible 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, thereby allowing consideration of legislative histrory.

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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

Page 443

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 section (b) of the 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?

Page 448

Add the following

Many observers have noted that judicial approaches to statutory interpretation have neither stare decisis nor precedential effects (either in the court that 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 discussing Reporters Committee for Freedom of the Press v. F.B.I., 3 F.4th 350 (D.C.Cir. 2021) describes how the D.C. Circuit failed to follow the Supreme Court's interpretive methodology; 135 Harv. L. Rev. 1480 (2022). 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, 588 U.S. 427 (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

d) Contemporary issues regarding state legislative power

Page 456

Add the following

There are two provisions of the U.S. Constitution that are relevant:

Article II. The provision of the U.S. Constitution dealing with selection of electors 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 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 . . . ."*

Contemporary issues are discussed under the following headings.

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] State legislative power to give authority to appoint electors to the state legislature acting alone!
[5] Can the state legislature appoint electors after the election?
[6] Reforming the Electoral Count Act

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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 this 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 (2000) (Rehnquist, C.J., concurring))."

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

[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 constitutional law. *Second*, the state constitution only provided policy concerns that inform the interpretation of state legislation. This second answer 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 whether the state court was relying on the state constitution;

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. There are situations under the constitution where the legislature acts alone – such as ratifying amendments to the Constitution -- but that independent legislative power does not exist when the legislature acts in the exercise of the lawmaking process, as explained in the following paragraphs concerning the interpretation of Article I (the Time, Place and Manner of choosing representatives).

In Harper v. Hall, 868 S.E.2d 499, 551-52 (N.Car. 2022), affirmed Moore v. Harper, 600 U.S. 1 (2023), 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. 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. 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.'"[2] In other words, "legislature" meant "lawmaking process". (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.)

Article I precedents. The precedents included the following.

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

[2] A statement of the view that "legislature" in Article II means the state's lawmaking process also appears in In Re Opinion of the Justices, 107 A. 705, 706 (Me. 1919).

> 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, 576 U.S. 787 (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.[3]

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[3] 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,

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 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 can appoint electors without interference from the courts or the governor.

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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.

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".[4] 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.[5]

First, every state authorized the manner of selecting electors by following the selection procedures *authorized by state law*,[6] 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

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[4] 146 U.S. at 29.

[5] 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).

[6] 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.

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.[7] (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.[8]

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 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] *State legislative power to give authority to appoint electors to the state legislature acting alone!* It is clear that Article II allows a state legislature acting *before* the election (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 an independent power.

[5] *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 under Article II 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

[7] John A. Fairlie, The Veto Power of the State Governor, 11 Amer. Pol. Sci. Rev. 473, 476 (1917).
[8] Commissioner v. Maxwell, 114 A. 825 (Penn. 1921).

candidate? The legislature lacks such power because Congress, pursuant to Art. I, sec. 4 of the U.S. Constitution, specifies the day for selecting presidential electors (now the first Tuesday after the first Monday in November).

Query – Would the following *pre-election* statute avoid the "taint" of new post-election selection rules?: "If the legislature determines that it has no confidence in the results of the election, it may direct that the electors vote for a different candidate. Failure by an elector to comply with this direction shall result in removal of the elector and replacement with an elector who will vote as directed." In this example, the legislature is not adopting new rules for selecting electors after election day; it is only acting as the judge of what happened on election day, just as a state court judge or a state Election Board has the power to decide what happened on election day – for example, was there fraud or was the ballot properly filled out. Presumably, a federal court could still make sure that the state legislature's lack of confidence in the election results was not too farfetched, because that would change the selection process from a decision on election day, which the Constitution requires, to a new post-election day selection process by the legislature.

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[6] *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 (ECRA), effective December 29, 2022. The following are its major provisions.

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 with the laws of the State enacted prior to election day." But a State that appoints electors by popular vote can modify the voting period "as necessitated by force majeure events that are extraordinary and catastrophic 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 one-fifth 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 []. [Editor – For example, the elector was chosen by the state legislature acting alone without prior pre-election authorization]; (II) The vote of one or more electors has not been regularly given [Editor – For example, the elector was bribed]."

"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

Inferring cause of action from the Constitution (Bivens)

(1) In Jesner v. Arab Bank, PLC, 584 U.S. 241 (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, 589 U.S. 93 (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, 596 U.S. 482 (2022), the Court did not overrule Bivens but still refused to find a Bivens cause of action, in part because Congress was better able to provide a damage remedy than the courts.

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." You will recall that Chisom v. Roemer was a sec. 2 case brought by private plaintiffs.

In Arkansas State Conference NAACP v. Arkansas Board of Apportionment, 586 F.Supp.3d 893 (U.S.D.Ct. Ark. 2022), the court followed Gorsuch's suggestion and held that sec. 2 did *not* authorize a private cause of action. And the 8th Circuit has agreed with the district court (86 F.4th 1204 (8th Cir. 2023)), holding that the power to enforce sec. 2 belonged solely to the U.S. Attorney General. The Court of Appeals stated:

> When to imply a cause of action is bigger than just this case. The practice has long been controversial, in part because having the judiciary decide who can sue bypasses the legislative process. . . . Many statutes simply say when a private right of action is available. . . . When those details are missing, it is not our place to fill in the gaps, except when "text and structure" require it. . . . It is unclear whether § 2 creates an individual right.
>
> One provision of the statute [§ 12] empowers the Attorney General to bring "an action for preventive relief . . . ." Any mention of private plaintiffs or private remedies, however, is missing. Under a test that requires Congress to "create" causes of action, silence is not golden for the plaintiffs.
>
> The omission was no accident, given the remedial framework that § 12 provides. [Discussion of remedial framework omitted.] [T]hese remedies are all the text provides. . . . And their existence deserves significant weight in the implied-cause-of-action calculus. As *Sandoval* put it, "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012) (noting that the inclusion of one implies the exclusion of another). Here, Congress not only created a method of enforcing § 2 that does not involve private parties, but it also allowed someone else to bring lawsuits in their place. If the text and structure of § 2 and § 12 show anything, it is that "Congress intended to place enforcement in the hands of the [Attorney General], rather than private parties."
>
> [The argument] to the contrary hinges on legislative history, not text or structure. The statute is silent on the existence of a private right of action, but the committee reports are not. In 1982, when Congress amended § 2, the House and Senate Judiciary Committees wrote that Congress had "clearly intended" all along to allow private enforcement. . . . There are many reasons to doubt legislative history as an interpretive tool. But let's assume for the moment that we should give great weight to it when a statute like the Voting Rights Act is silent on the existence of a private right of action. . . . [The question is what—if anything—the legislative history tells us about the "text and structure" of the Voting Rights Act.

> The answer is nothing. . . . Nor is it clear how the 1982 Congress could possibly have known what a different set of legislators thought 17 years earlier. . . [One] more troubling possibility is that it was "a deliberate effort to amend a statute through . . . committee report[s]." If "the hard-fought compromise that Congress" reached in amending § 2 left no room for any other changes to the Voting Rights Act, then the next-best way to introduce a possible private right of action would have been through committee reports written by "unrepresentative committee members—or, worse yet, unelected staffers and lobbyists," Whatever the reason, treating these statements as anything more than the opinions of just a few legislators would "circumvent the Article I process."

The 5th Circuit in Robinson v. Ardoin, 86 F.4th 574 (5th Cir. 2023), disagrees with the 8th Circuit; it held that sec. 2 does permit a private cause of action. Presumably, the U.S. Supreme Court will address this issue in the near future, although it did not do so in Allen v. Milligan, 599 U.S. 1 (2023). The Court upheld a § 2 claim that Alabama's apportionment map was illegal, but 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 in Allen v. Milligan 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, 587 U.S. 554 (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, 590 U.S. 296 (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.'"

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, 588 U.S. 558 (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, 587 U.S. 618 (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

E. 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

15.02 Executive control of spending – States

b) State constitutions

v) Vetoing letters, words, and numbers

Comments

Page 630

Add the following

3. As passed by the Wisconsin state legislature, a bill provided that "[f]or the limit for 2023-24 school year and the 2024—25 school year, add $325" to the amount the school districts could raise through property taxes per student. By the time the Governor had finished wielding his veto pen, the text read "for the limit for 2023-2425, add $325" etc. An objection was made that "the governor impermissibly deleted digits to create new numbers." But the court concluded that this did not violate the state constitution's provision (in § 10(1)(c)) that "the governor may not create a new word by rejecting individual letters in the words of the enrolled bill," because that provision relates exclusively to the deletion of letters to create new words, not the deletion of digits to create new numbers. The decision was 4-3 – LeMieux v. Evers, 19 N.W.3d 76 (2025).

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

b) Supreme Court; No standing

Comments and Questions

2. Survival of congressional standing

Page 651

Add the following

c. In Virginia House of Delegates v. Bethune-Hill, 587 U.S. 658 (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 spend unappropriated funds 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.
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> 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."