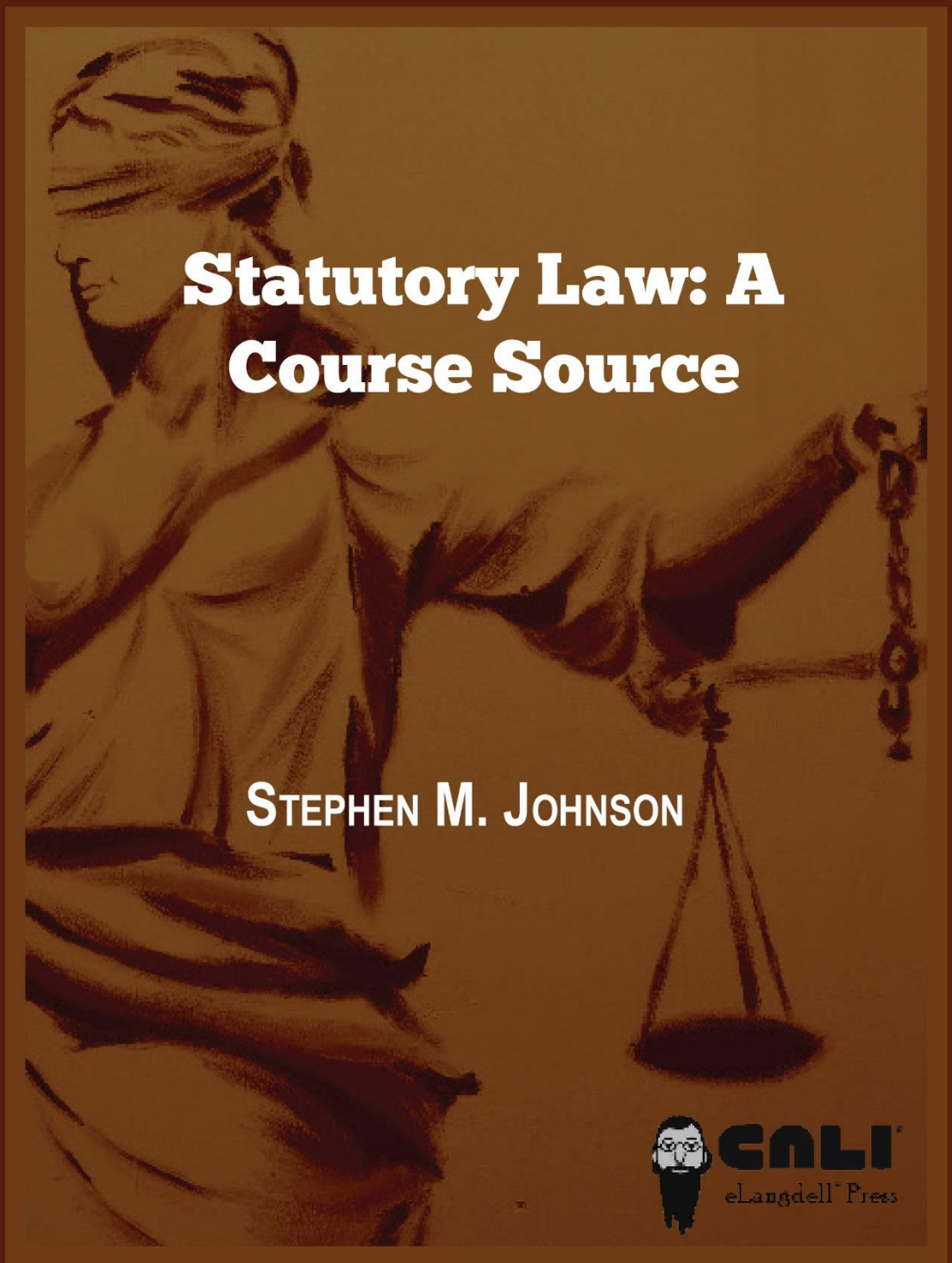

# Statutory Law: A Course Source

STEPHEN M. JOHNSON

CALI
eLangdell Press

# Statutory Law: A Course Source

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CALI eLangdell® Press 2024

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# Notices

This is the first edition of this book, published August 2024. Visit the eLangdell bookstore for the latest version and for revision history.

# Table of Contents

# Acknowledgments

This book would not have been possible without the support and inspiration of my wife, Anne, and my children, Lyndsey, Keith, and Caroline. I am also grateful to my parents, Ed and Mary Lou Johnson, in whose footsteps I followed as a lawyer (dad) and teacher (mom).

Finally, I would like to dedicate this project to everyone at CALI and in academia that are working to create the next generation of e-books.

# About the Author

Stephen M. Johnson is a Professor of Law at Mercer University Law School in Macon, Georgia. He received his J.D. from Villanova University School of Law and an LL.M. in environmental law from the George Washington University Law School. Prior to teaching, he served as an attorney for the Bureau of Regulatory Counsel in the Pennsylvania Department of Environmental Resources (now DEP) and as a trial attorney for the U.S. Department of Justice, Environment and Natural Resources Division, Environmental Defense Section, where he worked on environmental litigation.

He joined the Mercer faculty in 1993 and served as the Associate Dean for Academic Affairs from 2002-2012. He specializes in Environmental Law, but has also taught Torts, Statutory Law, Administrative Law, and Dispute Resolution. His scholarship focuses on administrative law, wetlands, environmental justice, economics and the environment, technology and the law, and statutory law. In addition to authoring numerous articles on those topics, he has edited an American Bar Association book on Wetlands law and has authored a book on economic approaches to environmental protection. He has also authored several CALI exercises on wetlands and environmental law, a Course Source on Wetlands, and has served on the Board of Directors of CALI for almost three decades.

While teaching at Mercer, he has been fortunate to teach or visit at Notre Dame Law School, the University of London, and Strathclyde University. In 2004, he taught at the University of Tokyo and at Waseda University (Tokyo) on a Fulbright grant.

# Preface

## Course Source: The Casebook Evolved

You'll notice that these materials are entitled, **Statutory Law: A Course Source**. I chose the term "course source," as opposed to casebook or coursebook, to indicate that the format of these materials is qualitatively different from traditional law school textbooks.

### I. Traditional Casebooks and the Evolution of Casebooks

The law school casebooks that were created in the late 1800's to implement Christopher Columbus Langdell's case method of teaching consisted primarily of edited versions of cases and perhaps a few questions and comments. Casebooks have evolved slowly over the years. Over time, it became popular to incorporate excerpts from law review articles, statutes, and regulations into the texts in addition to the cases, questions, and comments.

Little changed for decades until problem-based books came along, incorporating a wealth of hypotheticals and problems that allowed students to apply the law that they were learning from the cases, statutes, and regulations included in the book. Those books could more precisely be referred to as "coursebooks" than "casebooks," because they incorporated more than cases, questions, and comments.

After the MacCrate report in the 1990s and the 2007 Carnegie Foundation report, faculty and book publishers began publishing separate books focusing on skills development that could be used to supplement traditional casebooks and coursebooks. In a few cases, books that were not marketed as "skills" books incorporated some skills exercises as well. Publishers also began marketing "law stories" books that provided a wealth of background information about a few cases to help bring those cases to life. Those were positive developments in the evolution of law school teaching materials.

### II. The "Course Source": The Technological Evolution of the Casebook

Technology can help casebooks and coursebooks evolve into a new format. Several years ago, publishers began marketing e-books for the law school market. So far, e-books for law school have not taken full advantage of the medium. A few of the early books were simply electronic versions of traditional casebooks or coursebooks. Others added a few hyperlinks to a traditional casebook or coursebook. For the most part, though, the changes in the format of casebooks and coursebooks in the e-book era have been modest. Much more is possible. Technology can foster the transformation of the casebook and the coursebook into the "course source"—a one-stop shop for all of a faculty member's teaching resource needs.

The Carnegie Foundation Report, *Educating Lawyers: Preparation for the Profession of Law*, stressed the importance of three apprenticeships in the formation of a lawyer—the

cognitive apprenticeship, the apprenticeship in the forms of expert practice shared by practitioners, and the apprenticeship of identity and purposes (professionalism). In short, the report stressed that law schools should be training students in the ***knowledge***, ***skills***, and ***values*** necessary to the legal profession. A "course source," the next generation of law teaching materials, can utilize technology to provide resources for training students in all three apprenticeships. A "course source" recognizes that the three apprenticeships are interconnected and that a faculty member needs the tools to train students in all three apprenticeships, rather than assuming that a separate course in legal professionalism or research and writing will develop the student's skills and values.

In addition, legal educators have increasingly recognized the importance of formative and summative assessment, and the American Bar Association's Standards for Approval of Law Schools require schools to use both formative and summative assessment in their curriculum "to measure and improve student learning and to provide meaningful feedback to students." A "course source" provides a variety of tools for formative and summative assessment.

A "course source" also takes advantage of the wealth of materials available online and in a variety of media formats to incorporate links to content that puts the cases, materials, and disputes in the book in context, to provide a fuller and richer understanding of the materials.

Further, a "course source" is portable and customizable since it is distributed through a Creative Commons license as open-source materials. Thus, faculty can pick and choose the portions of the materials that they find most useful and relevant for their teaching and distribute those materials to students for free.

A "course source" is available in a variety of formats as an e-book, but the content and links in the book can also be re-purposed as a web-based library of teaching resources related to the topic of the book.

CALI previously published **Wetlands Law: A Course Source**, the first course source.

## III. Statutory Law: A Course Source

This "course source" on statutory law implements the vision outlined in the preceding section. The Statutory Law Course Source includes resources to train students in all three apprenticeships. To address the ***knowledge*** apprenticeship, the "course source" includes all of the traditional elements of a casebook or coursebook (cases, commentary, notes and questions) and includes several hypotheticals and problem exercises that focus on reinforcing statutory law and developing students' analytical and writing skills. In addition, as one of the many forms of summative and formative assessment included in the book, every chapter includes one or more CALI exercises as "quizzes" to reinforce the material covered in the chapter.

To address the ***skills*** apprenticeship, the "course source" includes several legal research exercises (focusing on finding statutes, analyzing statutory structure, and understanding

the notice and comment rulemaking process) and drafting exercises in addition to the hypotheticals and problem exercises described above.

To address the ***values*** apprenticeship, the “course source” includes several professional identity formation exercises.

As noted above, the “course source” also incorporates a wealth of audio/video materials and external links to bring the cases, disputes, and materials in the book to life. For instance, links are provided to the audio for the oral arguments in most of the principal cases excerpted in the book. For many of the principal cases that are excerpted in the book, there are also links to decision documents, local media coverage or other background materials. While the principal cases have been edited, the book includes links to the full unedited versions of all of the principal cases in the book. Throughout the book, there are also several “Resource” sections that identify reports, databases, audio or video materials, government documents, and other materials that are relevant to the topics covered in the chapter.

The book also links to (1) a series of video lectures summarizing major Supreme Court decisions included in the book; (2) videos of Congressional proceedings; and (3) videos produced by Quimbee that outline the background of several of the cases included in the book.

I hope you will find this “course source” to be a useful and engaging teaching and learning tool.

# Table of Cases

The principal cases that are excerpted in the book are indicated in bold text.

# Audio/Video Materials

Video Summaries of Cases by Professor Steve Johnson:

Chapter 1: INS v. Chadha
Myers v. United States
Humphrey's Executor v. United States

Chapter 3: Church of the Holy Trinity v. United States

Chapter 4: Muscarello v. United States

Chapter 5: Smith v. City of Jackson
Flood v. Kuhn

Chapter 6: United States v. Bass
NLRB v. Catholic Bishop of United States
Gregory v. Ashcroft – Part 1; Part 2

Chapter 7: Skidmore v. Swift

Links to Quimbee video summaries of case background for the following cases:

Chapter 1: ALA Schechter Poultry v. United States
INS v. Chadha
Myers v. United States
Humphrey's Executor v. United States

Chapter 3: General Dynamics Land Systems v. Cline
King v. Burwell

Chapter 4: Bostock v. Clayton County
Taniguchi v. Kan Pacific Saipan
Muscarello v. United States
Public Citizen v. Department of Justice
United States v. Locke
Yates v. United States

Chapter 5: Smith v. City of Jackson
Morton v. Mancari
Johnson v. Transportation Agency
Bob Jones University v. United States
Flood v. Kuhn

Chapter 6: CSX Transportation, Inc. v. McBride
United States v. Bass
NLRB v. Catholic Bishop of Chicago
Gregory v. Ashcroft
Wyeth v. Levine
Landgraf v. USI Film Products

Chapter 7: Auer v. Robbins
Kisor v. Wilkie

Other Videos:

Chapter 1: Oversight Hearing

Chapter 2: Tutorial on searching Congress.gov

Markup of Legislation - House Energy and Commerce Committee

Senate Environment Committee hearing

Video of Floor Proceedings from the House and Senate

Video of Congressional proceedings – Congress.gov; CSPAN

I'm Just a Bill – Schoolhouse Rock

Chapter 3: John Yates' Story

A Dialogue with Justice Kagan on the Reading of Statutes

Oral Arguments From Oyez:

Alaska Airlines, Inc. v. Brock (Chapter 6)

Alexander v. Sandoval (Chapter 6)

Auer v. Robbins (Chapter 7)

Biden v. Texas (Chapter 4)

Bob Jones University v. United States (Chapter 5)

Bostock v. Clayton County (Chapter 4)

Chevron v. NRDC (Chapter 7)

CSX Transportation, Inc. v. McBride (Chapter 6)

Facebook v. Duguid (Chapter 4)

# Problems and Exercises

## Chapter 6



## Chapter 7

# Chapter 1:

## Congress, Agencies, and the Courts

### I. Introduction

The creation, implementation and interpretation of statutes involves all three branches of government. Article I of the Constitution vests the Legislative Branch (Congress) with the power to make laws. Article II assigns the Executive Branch authority to implement and enforce the laws. Article III provides the Judicial Branch the responsibility of interpreting the laws. Most state constitutions assign authorities in a similar manner. Consequently, Congress, courts, and administrative agencies all play important, but different, roles, in creating, implementing, and interpreting statutes. It is difficult to fully comprehend statutory interpretation without understanding the unique roles that each branch plays in the process.


U.S. Capitol – Public domain

The U.S. Constitution specifically enumerates the areas within which Congress may legislate[1], and, for the most part, this book does not explore the constitutional limits on Congress' authority to legislate on various topics. However, the Constitution also imposes important limits on the process that Congress must use to legislate[2], and Chapter 2 of this book explores those limits in detail.

Once Congress or a state legislature has enacted a statute, courts play a major role in interpreting them when parties file lawsuits in cases implicating the statutes. Most of this book will examine the theories and tools that courts use to interpret statutes. Chapter 3 outlines the various theories of interpretation adopted by courts, while Chapters 4 through 6 focus on various canons and rules of statutory interpretation adopted by courts.

Supreme Court - Photo by Larry Micheli CC BY-SA4.0

While the role of Congress and courts in creating and interpreting statutes are discussed in detail in Chapters 2 through 6 of this book, there is

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1 Article I, § 8 of the Constitution specifically enumerates Congress' powers and includes a "necessary and proper clause" (clause 18) that empowers it to enact laws necessary and proper for executing its other enumerated powers.

2 *See* U.S. CONST., Art. I, § 7.

another major player involved in the creation, implementation, and interpretation of statutes. Since the middle of the twentieth century, ***administrative agencies*** have played an important role in drafting statutes and have played a major role in interpreting statutes as they implement and enforce them.

EPA headquarters – Government document posted on Flickr

It is useful, therefore, to spend some time, in this first chapter, exploring the nature of administrative agencies, their powers, the manner in which Congress and the Executive Branch attempt to control them, and the limits on the controls that those other branches can exert over them. After introducing those issues, Chapters 2 through 6 of the book focus very broadly on principles of statutory interpretation that apply regardless of whether an agency is involved in implementing or interpreting the statute. In Chapter 7, however, agencies re-take center stage. Chapter 7 focuses on whether and how courts interpret statutes differently when the legislature has delegated authority to an agency to interpret and enforce the statute.

# II. Introduction to Agencies[3]

## A. Nature of Administrative Agencies

Administrative agencies are ubiquitous. In a typical day, your alarm clock may wake you to the sounds of your favorite radio station, which is licensed and regulated by the Federal Communications Commission, a federal administrative agency. When you shower, the water in your home may be provided by a municipal or regional water authority, a public utility which is usually regulated by a state utility commission, and the water ***quality*** is regulated by federal and state environmental or health agencies.

**Resources**

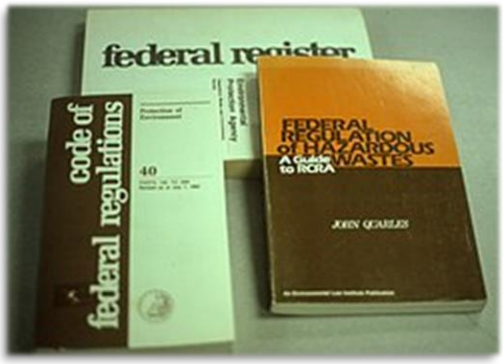
List of Federal Agencies from USA.gov and the Federal Register
Administrative Conference of the U.S. (ACUS)
Office of Management and Budget (White House)
Sourcebook of U.S. Executive Agencies (ACUS)

At breakfast, the packages for the food you eat usually include nutritional labels required by the Food and Drug Administration. In addition, federal, state, and local agricultural and environmental agencies often regulate the production of the foods that you put on your breakfast table. Those products were produced by businesses that were required to adhere to fair labor standards and workplace safety standards set by federal and state labor departments.

[3] Part II of this chapter is excerpted from my *Wetlands Course Source*. *See* Stephen M. Johnson, *Wetlands Law: A Course Source* (4th ed., eLangdell Press 2021), *accessible at:* https://www.cali.org/books/wetlands-law-course-source.

If you drive to work, the car that you drive was probably built to comply with safety and environmental standards set by federal and state transportation and environmental agencies. Indeed, it is hard to identify events in your daily routine that are not touched, in some way, by administrative agencies implementing and enforcing statutes.

Administrative agencies exist at the ***federal, state, and local*** levels and are often referred to as the "***fourth branch***" of government. In today's world, agencies exert broad authority over public and private activities. Moreover, agencies can take a variety of types of actions. First, agencies often create standards, limits or other requirements that apply prospectively to the communities that they regulate (***rulemaking***). For instance, an environmental agency may set limits on the amount of lead that can be emitted into the air by a factory or a car.



Regulatory publications – Public domain


Gavel – Photo by Lobo – CC BY 2.0

In addition to setting standards and making rules, agencies apply the law and the rules that they make to specific factual situations on a case-by-case basis (***adjudication***). In the environmental context, for instance, a federal or state agency will often decide whether a business can obtain a permit to discharge pollution into the air or water, or whether a company meets the legal requirements for an exemption from pollution standards.

In order to create rules and to make decisions on a case-by-case basis, agencies also collect information from the regulated community and other sources. They maintain that information, make much of it available to the public and often create reports based on the information.

Consequently, administrative agencies engage in activities that can be characterized as ***legislative*** (setting standards and establishing other rules), ***judicial*** (applying the law to facts on a case-by-case basis) and ***executive*** (implementing and administering the law). This ***combination of functions*** in federal administrative agencies creates some tensions because the United States Constitution exclusively assigns these functions to other branches of government. There is no provision in the Constitution that explicitly creates or authorizes the creation of administrative agencies or authorizes them to carry out powers delegated to the legislative, judicial, or executive branches of government. Similar separation-of-powers concerns can arise under state constitutions, which also do not explicitly provide for state administrative agencies.

Nevertheless, agencies have flourished throughout the twentieth and twenty-first

centuries and courts have generally upheld most delegations of authority to agencies against constitutional challenges, as discussed further below.

## B. Limits on Agency Authority

Agencies are ***created by statutes***. The composition of agencies, their ***authorities*** and any ***limits on their authorities*** are generally ***set forth in statutes***. Congress or a state legislature often initially creates an agency through an "***organic statute***," but the legislature frequently expands or limits the agency's powers through other statutes that target the agency or statutes that apply generically to a group of agencies or to all agencies. For example, the Equal Employment Opportunity Commission (EEOC) was initially created by Title VII of the Civil Rights Act of 1964, but Congress subsequently enacted additional laws, including the Age Discrimination in Employment Act, that expanded or altered EEOC's authority to regulate various activities.

As noted above, Congress frequently ***authorizes***, and ***sometimes requires***, agencies to set standards or to promulgate rules that apply generally to persons or entities regulated by the statute. There are several reasons why Congress gives this power, which seems like law-making authority, to agencies. In some cases, the legislature simply does not have the ***time*** to set standards at the level of detail that is necessary to implement the law. For instance, the federal Clean Water Act imposes limits on hundreds of different types of industries regarding the amount of potentially hundreds of different types of pollutants that they might discharge based on technologies that those industries can use to reduce or eliminate those pollutants. *See* U.S. Environmental Protection Agency, *Water: Industry Effluent Guidelines*. When Congress created the program limiting those pollutants, it delegated to the Environmental Protection Agency (EPA) the authority to establish specific numerical limits on the industries through a rulemaking process, rather than trying to establish those thousands of numerical limits in the statute itself. *See* 33 U.S.C. § 1311.

In addition to not having the time to enact detailed standards, Congress also may not have the ***expertise*** to determine what specific numerical standards may be appropriate for specific industries. Although the legislature will likely have some experts on staff, they will not have the resources that are available to an administrative agency, which will also have the experience of implementing the law on a day-to-day basis. Continuing with the Clean Water Act example, because an agency may be better equipped to determine the specific numerical pollutant limits, Congress will often give the agency ***general directions*** regarding how to set those numerical limits but allow the agency to establish the limits through a rulemaking process.

There are a few other reasons why Congress frequently delegates authority to agencies to make rules. To the extent that regulatory restrictions in a law are based on specific technological, economic, or other assumptions that are in existence at the time the restrictions are put in place, those restrictions may no longer be appropriate when the technological, economic, or other circumstances change. If Congress were to have set

the regulatory restrictions by statute, Congress could only change the restrictions by enacting another statute. When Congress delegates the authority to an agency to set the restrictions through rulemaking, however, the agency can ***respond to changing circumstances*** by changing the requirements through rulemaking, as opposed to waiting for legislative consensus. In theory, the rulemaking process should be faster than the legislative process. In practice, that is not always true.

A final reason why Congress may delegate authority to an agency to make rules, rather than setting the standards directly through legislation, is that Congress may ***lack the political will*** to set the standards itself. Delegating to an agency the authority to set specific standards gives Congress political cover from difficult political issues in implementation of the legislation.

While Congress or state legislatures delegate broad authorities to agencies in statutes, the Legislative Branch and the Executive Branch use various tools to try to control the agencies' exercise of discretion in implementing and interpreting those laws. The next two sections of this book discuss (1) the methods that Congress and state legislatures have used to control agencies' exercise of the discretion delegated to them by the legislature, and the limits on the use of those methods; and (2) the methods that the Executive Branch has used to control agencies' exercise of discretion delegated to them and the limits on the use of those methods.

# III. Congress' Control Over Agencies

Since the middle of the twentieth century, Congress has frequently enacted laws that give agencies broad discretion to interpret and administer the laws to carry out Congress' objectives. At the same time, Congress has often wanted to retain power to prevent agencies from interpreting and administering the laws in particular ways after delegating the broad discretion. Separation of powers issues have arisen in both situations: (1) the initial delegation of authority to agencies to interpret and administer the laws; and (2) the exercise of control over the agencies' interpretation and administration of the laws.

## A. Nondelegation Doctrine

Early in the twentieth century, before the proliferation of administrative agencies during the New Deal era, the Supreme Court articulated the ***non-delegation doctrine*** in *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1929). Pursuant to the doctrine, Congress may not delegate lawmaking power to an agency in a statute unless it provides the agency with specific standards (***"an intelligible principle"***) to apply in interpreting and administering the statute.[4]

[4] Scholars (and courts) disagree on whether the doctrine is based on the Vesting clause, general principles of separation of powers, or the requirements of bicameralism and presentment for legislation. *See* John F. Manning & Matthew C. Stephenson, LEGISLATION AND REGULATION: CASES AND MATERIALS 534 (3d ed. Foundation Press, 2017).

The Supreme Court upheld Congress' delegation of lawmaking authority in *J.W. Hampton, Jr. & Co. v. United States*, but relied on the doctrine several years later in *Panama Refining Company v. Ryan*, 293 U.S. 388 (1935), to strike down a Congressional delegation of authority to the President, under the National Industrial Recovery Act (NIRA), to limit petroleum sales. The NIRA was enacted by Congress in 1933 during the Great Depression to promote industrial recovery. The majority in *Panama Refining Company* held that the provision of the statute that delegated authority to the President to limit petroleum sales was unconstitutional because it did not establish any standard or rule to guide the President in limiting petroleum sales.[5] Justice Cardozo dissented in the case, arguing that the title of the statute, the title of the section authorizing Presidential action, and language in the "purposes" section of the statute identified meaningful standards to limit the President's exercise of delegated authority.[6]

The following case (popularly referred to as "the Sick Chicken Case") is perhaps the most famous example of the application of the doctrine by the Court. It was decided in the same year as *Panama Refining Company* and involves a challenge to "codes of fair competition" drafted by industries and approved by the President pursuant to authority delegated to the President in the NIRA.

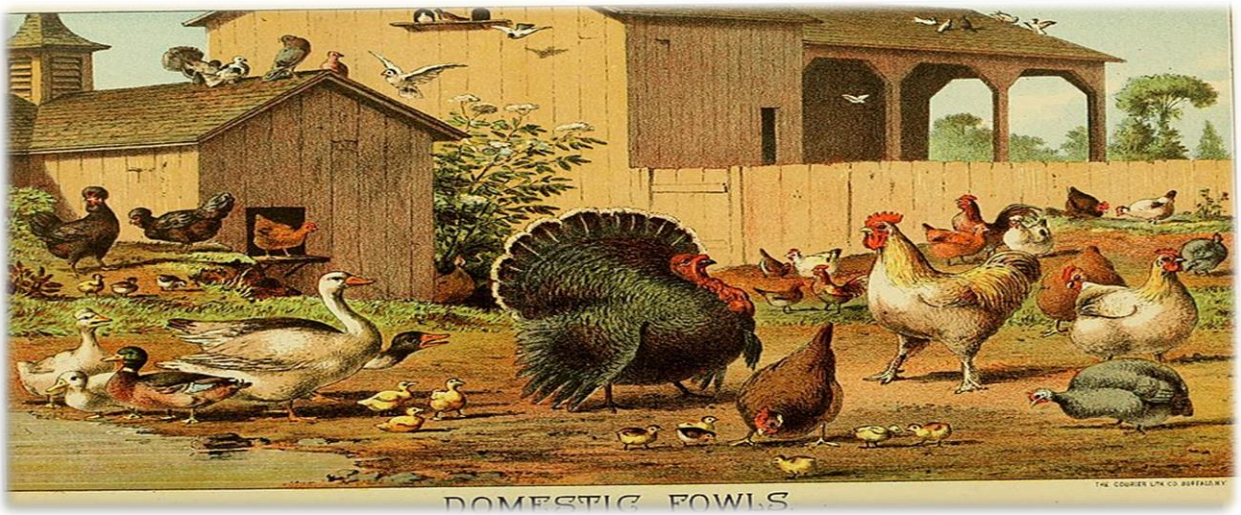



Illustration of livestock by Jonathan Periam and A.H. Baker – Flickr Commons

5 293 U.S. at 433.

6 *Id.* at 434-441.

## A.L.A. SCHECHTER POULTRY CORP. V. UNITED STATES

**295 U.S. 495 (1935)**

**Resources for the Case**

Unedited Opinion (From Justia)
Oyez Resources
Factual/Proc. Background (From Quimbee)
Video Summary (Prof. Stevenson – South Texas College of Law)

**MR. CHIEF JUSTICE HUGHES** delivered the opinion of the Court.

Petitioners * * * were convicted * * * on eighteen counts of an indictment charging violations of * * * the "Live Poultry Code" * * * The Circuit Court of Appeals sustained the conviction on * * * sixteen counts for violation of the Code. * * *

New York City is the largest live poultry market in the United States. * * * [Defendants] A.L.A. Schechter Poultry Corporation and Schechter Live Poultry Market are corporations conducting wholesale poultry slaughterhouse markets in Brooklyn, New York City. * * *

The "Live Poultry Code" was promulgated under § 3 of the National Industrial Recovery Act. That section * * * authorizes the President to approve "codes of fair competition." Such a code may be approved for a trade or industry, upon application by one or more trade or industrial associations or groups, if the President finds (1) that such associations or groups "impose no inequitable restrictions on admission to membership therein and are truly representative," and (2) that such codes are not designed "to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy" of Title I of the Act. * * * As a condition of his approval, the President may "impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared. * * * Violation of any provision of a code (so approved or prescribed) "in any transaction in or affecting interstate or foreign commerce" is made a misdemeanor punishable by a fine of not more than $500 for each offense, and each day the violation continues is to be deemed a separate offense.

The "Live Poultry Code" was approved by the President on April 13, 1934. * * The declared purpose is "To effect the policies of title I of the National Industrial Recovery Act." The Code is established as "a code of fair competition for the live poultry industry of the metropolitan area in and about the City of New York." * * *

[The Code established limits on the maximum number of hours for workdays, a minimum wage for workers, a minimum number of employees, a minimum age for workers, a right to unionize and a right to collective bargaining, among other provisions. The Codes are administered through an industry advisory committee selected by trade associations and members of the industry. The Code also included prohibitions on activities that it identified as “unfair methods of competition.”

The defendants violated various provisions of the Code, including provisions that limited the manner in which poultry could be killed or sold (i.e. allowing purchasers to choose individual chickens), and provisions that prohibited the sale of unfit poultry or sale of poultry without appropriate inspection and approval.

In response to challenges that the Congressional delegation of authority to the President to approve codes of fair competition was invalid, the United States argued that:] the provision of the statute authorizing the adoption of codes must be viewed in the light of the grave national crisis with which Congress was confronted. Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. * * *

The Constitution provides that

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Art I, § 1. And the Congress is authorized "To make all laws which shall be necessary and proper for carrying into execution" its general powers. Art. I, 8, par. 18. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly. We pointed out * * * that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality which will enable it to perform its function in laying down policies and establishing standards while leaving to selected instrumentalities the making of subordinate rules within prescribed limits, and the determination of facts to which the policy, as declared by the legislature, is to apply. * * *

Accordingly, we look to the statute to see whether Congress has overstepped these limitations -- whether Congress, in authorizing "codes of fair competition," has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others. * * *

As to the "codes of fair competition," under § 3 of the Act, the question is more fundamental. It is whether there is any adequate definition of the subject to which the codes are to be addressed.

What is meant by "fair competition" as the term is used in the Act? Does it refer to a category established in the law, and is the authority to make codes limited accordingly? Or is it used as a convenient designation for whatever set of laws the formulators of a code for a particular trade or industry may propose and the President may approve

(subject to certain restrictions), or the President may himself prescribe, as being wise and beneficent provisions for the government of the trade or industry in order to accomplish the broad purposes of rehabilitation, correction and expansion which are stated in the first section of Title I?

The Act does not define " fair competition." "Unfair competition," as known to the common law, is a limited concept. * * * But it is evident that, in its widest range, "unfair competition," as it has been understood in the law, does not reach the objectives of the codes which are authorized by the National Industrial Recovery Act. The codes may, indeed, cover conduct which existing law condemns, but they are not limited to conduct of that sort. The Government does not contend that the Act contemplates such a limitation. It would be opposed both to the declared purposes of the Act and to its administrative construction. * * * We cannot regard the "fair competition" of the codes as antithetical to the "unfair methods of competition" of the Federal Trade Commission Act. The "fair competition" of the codes has a much broader range, and a new significance. * * *

For a statement of the authorized objectives and content of the "codes of fair competition," we are referred repeatedly to the "Declaration of Policy" in section one of Title I of the Recovery Act. Thus, the approval of a code by the President is conditioned on his finding that it "will tend to effectuate the policy of this title." § 3(a). The President is authorized to impose such conditions

> "for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code as the President in his discretion deems necessary to effectuate the policy herein declared."

The "policy herein declared" is manifestly that set forth in section one. That declaration embraces a broad range of objectives. * * It is there declared to be "the policy of Congress" --

> "to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof, and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.

Under § 3, whatever "may tend to effectuate" these general purposes may be included in the "codes of fair competition." We think the conclusion is inescapable that the authority sought to be conferred by § 3 was not merely to deal with "unfair competitive practices ".

* * * Rather, the purpose is * * * to authorize new and controlling prohibitions through codes of laws which would embrace what the formulators would propose, and what the President would approve * * * as wise and beneficient measures for the government of trades and industries in order to bring about their rehabilitation, correction and development, according to the general declaration of policy in section one. * * *

The Government urges that the codes will "consist of rules of competition deemed fair for each industry by representative members of that industry -- by the persons most vitally concerned and most familiar with its problems." * * * But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And, could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in section 1 of title I? The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress.

The question, then, turns upon the authority which § 3 of the Recovery Act vests in the President to approve or prescribe. * * Accordingly, we turn to the Recovery Act to ascertain what limits have been set to the exercise of the President's discretion. * * * [While the statute imposes some restrictions on the President’s authority to approve codes,] these restrictions leave virtually untouched the field of policy envisaged by section one, and, in that wide field of legislative possibilities, * * * [the President] may roam at will and * * * approve or disapprove * * * as he may see fit. * * *

The Act provides for the creation by the President of administrative agencies to assist him, but the action or reports of such agencies, or of his other assistants -- their recommendations and findings in relation to the making of codes -- have no sanction beyond the will of the President, who may accept, modify, or reject them as he pleases. Such recommendations or findings in no way limit the authority which § 3 undertakes to vest in the President with no other conditions than those there specified. And this authority relates to a host of different trades and industries, thus extending the President's discretion to all the varieties of laws which he my deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country.

Such a sweeping delegation of legislative power finds no support in the decisions upon which the Government especially relies. * * *

To summarize and conclude upon this point: Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, § 3 sets up no

standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section one. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority this conferred is an unconstitutional delegation of legislative power.

**MR. JUSTICE CARDOZO**, concurring.

The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. * * * Here, in effect, is a roving commission to inquire into evils and, upon discovery, correct them. I have said that there is no standard, definite or even approximate, to which legislation must conform. Let me make my meaning more precise. If codes of fair competition are codes eliminating "unfair" methods of competition ascertained upon inquiry to prevail in one industry or another, there is no unlawful delegation of legislative functions when the President is directed to inquire into such practices and denounce them when discovered. * * * The industries of the country are too many and diverse to make it possible for Congress, in respect of matters such as these, to legislate directly with adequate appreciation of varying conditions. Nor is the substance of the power changed because the President may act at the instance of trade or industrial associations having special knowledge of the facts. Their function is strictly advisory; it is the imprimatur of the President that begets the quality of law. * * * But there is another conception of codes of fair competition, their significance and function, which leads to very different consequences * * * By this other conception, a code is not to be restricted to the elimination of business practices that would be characterized by general acceptation as oppressive or unfair. It is to include whatever ordinances may be desirable or helpful for the wellbeing or prosperity of the industry affected. In that view, the function of its adoption is not merely negative, but positive -- the planning of improvements as well as the extirpation of abuses. What is fair, as thus conceived, is not something to be contrasted with what is unfair or fraudulent or tricky. The extension becomes as wide as the field of industrial regulation. If that conception shall prevail, anything that Congress may do within the limits of the commerce clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code. This is delegation running riot. No such plenitude of power is susceptible of transfer. The statute, however, aims at nothing less, as one can learn both from its terms and from the administrative practice under it. Nothing less is aimed at by the code now submitted to our scrutiny.

## Questions and Comments

**1. Intelligible principle:** Although the Schechter Court did not use the “intelligible principle” language, it is clear, from the opinion, that the Court was looking for an intelligible principle in the statute to limit the President’s exercise of authority to approve “codes of fair competition.” Note that the majority stresses that Congress cannot delegate its “essential functions” to another branch of government. How does the majority describe

the appropriate roles of Congress and agencies in legislating and administering statutes? In cases involving the non-delegation doctrine, you may notice extended discussions focusing on whether agencies are making law (exercising legislative power) or merely finding facts and applying the law to facts when establishing binding rules in areas where statutes are not clear (exercising executive power).

**2. Where to look for the intelligible principle:** Section 3 of the NIRA authorized the President to approve "codes of fair competition." Where did the Court look to find an "intelligible principle" to limit the President's discretion? Did the majority limit its focus to Section 3? Is there anything about the nature of the language used in Section 3 that is troubling to the majority?

**3. "Fair competition":** The statute authorized the President to approve "codes of fair competition" and there was significant precedent predating the statute regarding the meaning of "unfair competition." Why wasn't that an "intelligible principle" that limited the President's discretion?

**4. Role of the regulated industry:** The statute authorized the industries that would be regulated by "codes of fair competition" to be involved in drafting the codes that would be approved by the President. Does the majority suggest that delegating that power to the regulated industry is per se invalid? How about Justice Cardozo in his concurring opinion? Many statutes enacted after the NIRA establish advisory committees that play a role in development of standards and rules by agencies, and those committees may include representatives of the regulated industry.

**5. Extraordinary times necessitate extraordinary measures:** The NIRA was enacted during the Great Depression to foster industrial recovery, so the United States argued that the Court should be more deferential to Congress' choice in delegating authority to the President to respond to the economic emergencies of the era. Does the Court agree that the circumstances leading to enactment of the statute are relevant in reviewing the constitutionality of the delegation of legislative authority?

**6. Post-script:** Shortly after the Supreme Court decided *Schechter Poultry,* President Roosevelt, through Executive Order, abolished the National Recovery Administration, which administered the codes of fair competition.

**7. Decades of disuse:** Although the Supreme Court struck down two provisions of the NIRA on non-delegation grounds in the same year, the Court has not invalidated another statutory provision on non-delegation grounds since *Schechter Poultry.* Indeed, after the proliferation of administrative agencies during the New Deal, the Court and lower federal courts upheld very broad delegations of legislative authority to agencies against constitutional challenges. In *Yakus v. United States*, 321 U.S. 414 (1944), for instance, the Supreme Court upheld a delegation of authority, under the Emergency Price Control Act, to the Office of Price Administrator to impose price controls that were "fair and equitable." In *United States v. Southwestern Cable Co*., 392 U.S. 157 (1968), the Court

upheld rules adopted by the FCC pursuant to the Communications Act, which authorized it to establish rules “as public convenience, interest or necessity requires.”

The following case, *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001), exemplifies the latitude that the Court gave to Congress until recently when reviewing non-delegation challenges.

## WHITMAN V. AMERICAN TRUCKING ASSOCIATIONS, INC.

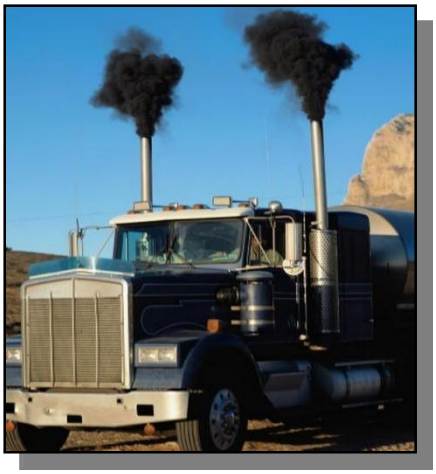
**531 U.S. 457 (2001)**

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument (From the Oyez Project)
D.C. Circuit Opinion (From Justia)
Video Summary (Prof. Stevenson – South Texas College of Law)
Background of the Case (Professor Craig Oren – Admin. Law Stories)

**JUSTICE SCALIA** delivered the opinion of the Court.

Section 109(a) of the [Clean Air Act (CAA)] * * * requires the Administrator of the EPA to promulgate [National Ambient Air Quality Standards (NAAQS)] for each air pollutant for which "air quality criteria" have been issued under § 108, 42 U. S. C. § 7408. Once a NAAQS has been promulgated, the Administrator must review the standard (and the criteria on which it is based) "at five-year intervals" and make "such revisions ... as may be appropriate." CAA § 109(d)(1), 42 U. S. C. § 7409(d)(1). These cases arose when, on July 18, 1997, the Administrator revised the NAAQS for particulate matter and ozone. American Trucking Associations, Inc., and its co-respondents * * * challenged the new standards in the Court of Appeals for the District of Columbia Circuit * * *.



Diesel Truck – Photo by EPA – Public domain

The District of Columbia Circuit * * * agreed with the * * * respondents * * * that § 109(b)(1) delegated legislative power to the Administrator in contravention of the United States Constitution, Art. I, § 1, because it found that the EPA had interpreted the statute to provide no "intelligible principle" to guide the agency's exercise of authority. The court thought, however, that the EPA could perhaps avoid the unconstitutional delegation by adopting a restrictive construction of § 109(b)(1), so instead of declaring the section unconstitutional the court remanded the NAAQS to the agency. * * *

III

Section 109(b)(1) of the CAA instructs the EPA to set "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on [the] criteria [documents of § 108] and allowing an adequate margin of safety, are requisite to protect the public health." 42 U. S. C. § 7409(b)(1). The Court of Appeals held that this section as interpreted by the Administrator did not provide an "intelligible principle" to guide the EP A's exercise of authority in setting NAAQS. "[The] EPA," it said, "lack[ed]

any determinate criteria for drawing lines. It has failed to state intelligibly how much is too much." The court hence found that the EPA's interpretation (but not the statute itself) violated the nondelegation doctrine. We disagree.

In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, § 1, of the Constitution vests "[a]ll legislative Powers herein granted ... in a Congress of the United States." * * * [W]e repeatedly have said that when Congress confers decisionmaking authority upon agencies *Congress* must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute. * * * The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise-that is to say, the prescription of the standard that Congress had omitted-would *itself* be an exercise of the forbidden legislative authority. Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self denial has no bearing upon the answer.

We agree with the Solicitor General that the text of § 109(b)(1) of the CAA at a minimum requires that "[f]or a discrete set of pollutants and based on published air quality criteria that reflect the latest scientific knowledge, [the] EPA must establish uniform national standards at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air." Requisite, in turn, "mean[s] sufficient, but not more than necessary." These limits on the EPA's discretion are strikingly similar to the ones we approved in *Touby* v. *United States,* 500 U.S. 160 (1991), which permitted the Attorney General to designate a drug as a controlled substance for purposes of criminal drug enforcement if doing so was" 'necessary to avoid an imminent hazard to the public safety.'" They also resemble the Occupational Safety and Health Act of 1970 provision requiring the agency to "'set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer any impairment of health"' - which the Court upheld in *Industrial Union Dept., AFL-CIO* v. *American Petroleum Institute,* 448 U.S. 607, 646 (1980) * * *.

The scope of discretion § 109(b)(1) allows is in fact well within the outer limits of our nondelegation precedents. In the history of the Court we have found the requisite "intelligible principle" lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring "fair competition." * * * We have, on the other hand, upheld the validity of § 11(b)(2) of the Public Utility Holding Company Act of 1935, 49 Stat. 821, which gave the Securities and Exchange Commission authority to modify the structure of holding company systems so as to ensure that they are not "unduly or unnecessarily complicate[d]" and do not "unfairly or inequitably distribute voting power among security holders." *American Power & Light Co.* v. *SEC, 329* U.S. 90, 104 (1946). We have approved the wartime conferral of agency power to fix the prices of commodities at a level that" 'will be generally fair and equitable and will effectuate the [in some respects conflicting] purposes of thee] Act."' *Yakus* v. *United States,* 321 U.S. 414, 420, 423-426

(1944). And we have found an "intelligible principle" in various statutes authorizing regulation in the "public interest." See, *e. g., National Broadcasting Co.* v. *United States,* 319 U. S. 190, 225-226 (1943). * * * In short, we have "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." * * *

It is true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred. While Congress need not provide any direction to the EP A regarding the manner in which it is to define "country elevators," which are to be exempt from new stationary-source regulations governing grain elevators, it must provide substantial guidance on setting air standards that affect the entire national economy. But even in sweeping regulatory schemes we have never demanded, as the Court of Appeals did here, that statutes provide a "determinate criterion" for saying "how much [of the regulated harm] is too much." In *Touby,* for example, we did not require the statute to decree how "imminent" was too imminent, or how "necessary" was necessary enough, or even-most relevant here-how "hazardous" was too hazardous. * * * It is therefore not conclusive for delegation purposes that, as respondents argue, ozone and particulate matter are "non-threshold" pollutants that inflict a continuum of adverse health effects at any airborne concentration greater than zero, and hence require the EPA to make judgments of degree. "[A] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action." Section 109(b)(1) of the CAA, which to repeat we interpret as requiring the EPA to set air quality standards at the level that is "requisite" - that is, not lower or higher than is necessary - to protect the public health with an adequate margin of safety, fits comfortably within the scope of discretion permitted by our precedent.

We therefore reverse the judgment of the Court of Appeals remanding for reinterpretation that would avoid a supposed delegation of legislative power. It will remain for the Court of Appeals - on the remand that we direct for other reasons - to dispose of any other preserved challenge to the NAAQS under the judicial-review provisions contained in 42 U. S. C. § 7607(d)(9).

**JUSTICE THOMAS**, concurring.

I agree with the majority that § 109's directive to the agency is no less an "intelligible principle" than a host of other directives that we have approved. I also agree that the Court of Appeals' remand to the agency to make its own corrective interpretation does not accord with our understanding of the delegation issue. I write separately, however, to express my concern that there may nevertheless be a genuine constitutional problem with § 109, a problem which the parties did not address.

The parties to these cases who briefed the constitutional issue wrangled over constitutional doctrine with barely a nod to the text of the Constitution. Although this Court since 1928 has treated the "intelligible principle" requirement as the only constitutional limit on congressional grants of power to administrative agencies, * * * the Constitution does not speak of "intelligible principles." Rather, it speaks in much simpler terms: "All legislative Powers herein granted shall be vested in a Congress." U. S. Const., Art. 1, § 1 (emphasis added). I am not convinced that the intelligible principle doctrine serves to

prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than "legislative."

As it is, none of the parties to these cases has examined the text of the Constitution or asked us to reconsider our precedents on cessions of legislative power. On a future day, however, I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers.

**JUSTICE STEVENS**, with whom **JUSTICE SOUTER** joins, concurring in part and concurring in the judgment.

Section 109(b)(1) delegates to the Administrator of the Environmental Protection Agency (EPA) the authority to promulgate national ambient air quality standards (NAAQS). In Part III of its opinion, the Court convincingly explains why the Court of Appeals erred when it concluded that § 109 effected "an unconstitutional delegation of legislative power." I wholeheartedly endorse the Court's result and endorse its explanation of its reasons, albeit with the following caveat.

The Court has two choices. We could choose to articulate our ultimate disposition of this issue by frankly acknowledging that the power delegated to the EPA is "legislative" but nevertheless conclude that the delegation is constitutional because adequately limited by the terms of the authorizing statute. Alternatively, we could pretend, as the Court does, that the authority delegated to the EPA is somehow not "legislative power." Despite the fact that there is language in our opinions that supports the Court's articulation of our holding, l I am persuaded that it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is "legislative power."

The proper characterization of governmental power should generally depend on the nature of the power, not on the identity of the person exercising it. * * * If the NAAQS that the EPA promulgated had been prescribed by Congress, everyone would agree that those rules would be the product of an exercise of "legislative power." The same characterization is appropriate when an agency exercises rulemaking authority pursuant to a permissible delegation from Congress.

My view is not only more faithful to normal English usage, but is also fully consistent with the text of the Constitution. In Article I, the Framers vested "All legislative Powers" in the Congress, Art. I, § 1, just as in Article II they vested the "executive Power" in the President, Art. II, § 1. Those provisions do not purport to limit the authority of either recipient of power to delegate authority to others. Surely the authority granted to members of the Cabinet and federal law enforcement agents is properly characterized as "Executive" even though not exercised by the President.

It seems clear that an executive agency's exercise of rulemaking authority pursuant to a valid delegation from Congress is "legislative." As long as the delegation provides a sufficiently intelligible principle, there is nothing inherently unconstitutional about it. Accordingly, while I join Parts I, II, and IV of the Court's opinion, and agree with almost everything said in Part III, I would hold that when Congress enacted § 109, it effected a

constitutional delegation of legislative power to the EPA.

**JUSTICE BREYER** wrote an opinion concurring in part and concurring in the judgment, which is omitted here.

## Questions and Comments

**1. D.C. Circuit's holding:** The D.C. Circuit concluded that the Clean Air Act did not provide an "intelligible principle" for EPA to use to set air pollution limits in national ambient air quality standards, but that the *agency*, through regulation, might interpret the statute to have a narrower and concretely defined scope, which might prevent the statute from being invalidated on non-delegation grounds. Does the *Whitman* Court agree that it is appropriate to examine an agency's interpretation of a statute in determining whether Congress has unconstitutionally delegated authority to an agency?

**2. Intelligible principle and determinative criteria:** Does the *Whitman* majority agree with the D.C. Circuit that the Clean Air Act does not provide EPA with an "intelligible principle" to limit its discretion in setting air pollution limits? Why or why not? The statute appears to provide the agency with a broad degree of discretion in authorizing the agency to set standards "requisite" to protect public health. Does the majority find that the non-delegation doctrine requires Congress to provide determinative criteria for agencies to use when making legislative-type decisions?

**3. Sliding scale re: specificity:** Does the *Whitman* majority believe that the non-delegation doctrine analysis varies depending on the scope and significance of the regulatory authority delegated to an agency by Congress? If so, how?

**4. Justice Thomas' concurrence:** Justice Thomas concurs in the judgment upholding the delegation of authority to EPA in the Clean Air Act. Does he agree that Congress may constitutionally delegate legislative authority to agencies as long as Congress provides agencies with an "intelligible principle"?

**5. Are agencies legislating or carrying out executive power?** As noted above, academics and judges frequently disagree about whether agencies are exercising legislative, quasi-legislative, or executive power when making rules to implement ambiguous statutes. How does Justice Stevens believe the Court should restructure its non-delegation doctrine jurisprudence?

**6. Constitutional avoidance:** While the Court has not invalidated any statutory delegation of authority under the non-delegation doctrine since *Schechter Poultry*, Justices have kept the doctrine alive in concurrences and dissents, and the Court has relied on the constitutional avoidance doctrine, discussed in Chapter 6, in several cases to interpret statutes narrowly because a broader interpretation of the statute might constitute an improper delegation of authority under the non-delegation doctrine. For instance, in *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607 (1980), a plurality of the Supreme Court concluded that Section 3(8) of the Occupational Safety and Health Act required the Administrator of the Occupational Safety and Health Administration to determine that it is "reasonably necessary and appropriate" to remedy a significant risk of material health impairment before establishing an occupational safety and health standard. The plurality argued that if it did not read the statute that narrowly,

the statute "would make such a 'sweeping delegation of legislative power' that it might be unconstitutional under the Court's reasoning in [*Schechter Poultry* and *Panama Refining*]." *Id.* at 646.

**7. Reinvigoration of the doctrine:** As the Supreme Court adopted a decidedly anti-regulatory stance in the early twenty-first century, the Court began to reinvigorate the non-delegation doctrine. In 2019, in *Gundy v. United States*, 139 S.Ct. 2116 (2019), the Court upheld Congress' delegation, in the Sex Offender Registration and Notification Act, of authority to the Attorney General to "specify the applicability of the requirements" of the statute to sex offenders convicted before enactment of the statute, even though the statute provided no other direction regarding the manner in which the statute should apply to those offenders. Although the Court upheld the delegation, Justice Gorsuch, Justice Thomas, and Chief Justice Roberts dissented and argued for a reformulation of the non-delegation doctrine. Justice Alito concurred in the Court's judgment, but indicated that he was doing so only because it was consistent with precedent and he wrote that "[i]f a majority of this Court were willing to reconsider the approach [to nondelegation] that the Court has taken for the past 84 years, I would support that effort." *Id.* at 2131. Justice Kavanaugh did not participate in *Gundy*, but indicated his support for Justice Gorsuch's concurrence when he wrote separately when the Court denied cert. in *Paul v. United States,* 140 S.Ct. 342 (2019). Thus, there appear to be five Justices on the Court who support reformulating (and likely reinvigorating) the non-delegation doctrine.

**8. Nondelegation in the states:** Although the Supreme Court has not relied on the non-delegation doctrine very frequently to invalidate federal statutes, many states have adopted non-delegation doctrines based on their constitutions and have struck down state laws on those grounds on several occasions. *See* Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 Notre Dame L. Rev. 619 (2017). *See also, Boreali v. Axelrod*, 71 N.Y.2d 1 (1987) (outlining a four-part test for determining whether an agency rule constitutes legislative policymaking as opposed to administrative rulemaking); *D.A.B.E. v. Toledo-Lucas County Board of Health*, 773 N.E.2d 536 (Ohio 2002).

## Problem 1-1

Assume that Congress recently enacted the **Federal Health Care Cost Control Act**, which included:

**Section 1 - Findings**.

a. The prices that health care providers charge for goods and services are artificially inflated.
b. In order to guarantee prompt, continuous and equitable distribution of health care goods and services, it is necessary to impose limits on the costs of such goods and services.

## Problem 1-1 (continued)

**Section 2 - Price controls**.

a. There is hereby established a Federal Health Care Costs Commission.
b. The Commission may, by rule or order, establish maximum prices for health care products and services.

Pursuant to authority in the statute, the Federal Health Care Costs Commission adopts a regulation that establishes limits on the prices that health care providers can charge patients for crutches, wheelchairs, walkers, and various products used in physical therapy. Assuming that the Commission complied with all of the required procedures when adopting the regulations, on what grounds might the American Physical Therapy Association (APTA) challenge the regulations, and with what success? Assume that the APTA concedes that the regulated products are "health care products."

Would your answer be different if Section 2b required the Commission to establish maximum prices that are "generally fair and equitable"?

What if Section 2 of the statute, in addition to requiring that the prices be "fair and equitable," limited the Commission's authority, when setting maximum prices, to approving prices established by a working group composed of representatives of the American Medical Association, the National Association of Pharmaceutical Companies, and the National Hospital Association?

## B. Legislative Vetoes

When Congress delegates broad authority to agencies to interpret and administer statutes, it frequently tries to retain some control over the manner in which the agencies interpret and administer the statutes. For many years, Congress accomplished this by including, in the statutes, ***legislative veto*** provisions. Those provisions authorized Congress to halt or reverse a decision made by the President or an agency (through rulemaking or adjudication)[7] by taking some action short of passing a law to reverse the action, such as passing a resolution in one chamber of Congress or by passing a joint resolution in both chambers (but not presenting the measure to the President for approval).

The first legislative veto provision was enacted by Congress in the Economy Act of 1932, and was included in response to a request from President Hoover, who wanted to reorganize departments within the Executive Branch, rather than having Congress reorganize the governmental structure.[8] The law authorized the President to reorganize

[7] Historically, the legislative veto was used most frequently to "veto" rules, as opposed to decisions made through adjudication.

[8] *See* Henry B. Hogue, *Presidential Reorganization Authority: History, Recent Initiatives, and Options for Congress*, Congressional Research Service #R42852 (Dec. 11, 2012).

the executive branch by issuing an Executive Order and transmitting it to Congress.[9] Under the law, the President's order would take effect 60 days after he transmitted it to Congress, but it would not take effect if, within those 60 days, EITHER house of Congress passed a resolution disapproving the Executive Order.[10] By 1983, Congress had included almost 300 legislative veto provisions in almost 200 different statutes.[11]

Apart from the constitutional concerns, addressed below, opponents of legislative vetoes criticized the implementation of the tool on several grounds. First, the tool enabled regulated entities to get a "second bite at the apple" and have agency decisions overturned after the regulated entities were unsuccessful in persuading the agency to make a different decision than the one being overturned. Second, the tool enabled persons to circumvent the proceedings, and procedural protections built into agency decision-making processes. Third, the tool created inefficiencies for agencies in regulatory planning. Agencies frequently balance multiple factors when making decisions and make some decisions based on the fact that they have made other decisions. Legislative vetoes interfere with that planning when Congress invalidates decisions made by agencies that are prerequisites for other decisions.[12]

The system of legislative vetoes came crashing down in 1983, when the Supreme Court, in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), held legislative vetoes unconstitutional. The case is reproduced below.

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument (From Oyez)
Case Background (From Quimbee)
Chadha: The Story of an Epic Constitutional Struggle – B.H. Clark

## IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA

**462 U.S. 919 (1983)**

**CHIEF JUSTICE BURGER** delivered the opinion of the Court.

Chadha is an East Indian who was born in Kenya and holds a British passport. He was lawfully admitted to the United States in 1966 on a nonimmigrant student visa. His visa expired on June 30, 1972. On October 11, 1973, the

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9 *Id.*

10 *Id.*

11 While the provisions were included in numerous statutes, Congress only exercised the veto power 255 times between 1932 and 1983. *See* C.L. Norton, *Usage of the Congressional Veto: Approval and Disapproval Resolutions Introduced, Adopted, Rejected or Not Acted Upon*, 1932-1983, Washington, D.C.: Library of Congress, Congressional Research Service, Report No. 84-114 Gov 11 (1984).

12 Critics of the tool also raised several policy concerns. First, they argued that Congress was encouraged to delegate broadly because they could readily halt or reverse agency actions through legislative vetoes. In addition, they argued that inclusion of the veto encouraged Congress to avoid making difficult policy decisions when enacting legislation and prevent the Executive Branch from making those policy decisions by halting or reversing Executive action with the legislative veto. *See* Stanley C. Brubaker, *Slouching Toward Constitutional Duty: The Legislative Veto and the Delegation of Authority*, 1 Const. Comm. 81, 92 (1984).

District Director of the Immigration and Naturalization Service ordered Chadha to show cause why he should not be deported for having "remained in the United States for a longer time than permitted." Pursuant to § 242(b) of the Immigration and Nationality Act (Act), a deportation hearing was held before an Immigration Judge on January 11, 1974. Chadha conceded that he was deportable for overstaying his visa, and the hearing was adjourned to enable him to file an application for suspension of deportation under § 244(a)(1) of the Act. * * *

After Chadha submitted his application for suspension of deportation, the deportation hearing was resumed on February 7, 1974. On the basis of evidence adduced at the hearing, affidavits submitted with the application, and the results of a character investigation conducted by the INS, the Immigration Judge, on June 25, 1974, ordered that Chadha's deportation be suspended. The Immigration Judge found that Chadha met the requirements of § 244(a)(1): he had resided continuously in the United States for over seven years, was of good moral character, and would suffer "extreme hardship" if deported. Pursuant to § 244(c)(1) of the Act, the Immigration Judge suspended Chadha's deportation and a report of the suspension was transmitted to Congress. * * *

Once the Attorney General's recommendation for suspension of Chadha's deportation was conveyed to Congress, Congress had the power under § 244(c)(2) of the Act, to veto the Attorney General's determination that Chadha should not be deported. Section 244(c)(2) provides:

> "(2) In the case of an alien specified in paragraph (1) of subsection (a) of this subsection -- ""if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings." * * *

On December 12, 1975, Representative Eilberg, Chairman of the Judiciary Subcommittee on Immigration, Citizenship, and International Law, introduced a resolution opposing "the granting of permanent residence in the United States to [six] aliens," including Chadha. * * * The resolution was passed without debate or recorded vote. Since the House action was pursuant to § 244(c)(2), the resolution was not treated as an Art. I legislative act; it was not submitted to the Senate or presented to the President for his action.

After the House veto of the Attorney General's decision to allow Chadha to remain in the United States, the Immigration Judge reopened the deportation proceedings to implement the House order deporting Chadha. Chadha moved to terminate the proceedings on the ground that § 244(c)(2) is unconstitutional. The Immigration Judge held that he had no authority to rule on the constitutional validity of § 244(c)(2). On November 8, 1976, Chadha was ordered deported pursuant to the House action.

Chadha appealed the deportation order to the Board of Immigration Appeals, again

contending that § 244(c)(2) is unconstitutional. The Board held that it had "no power to declare unconstitutional an act of Congress," and Chadha's appeal was dismissed. * * *

Chadha filed a petition for review of the deportation order in the United States Court of Appeals for the Ninth Circuit. The Immigration and Naturalization Service * * * joined him in arguing that § 244(c)(2) is unconstitutional.

[T]he Court of Appeals held that the House was without constitutional authority to order Chadha's deportation. * * * [W]e now affirm. * * *

III

A

We turn now to the question whether action of one House of Congress under § 244(c)(2) violates strictures of the Constitution. * * * [T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives -- or the hallmarks -- of democratic government * * *

Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process. Since the precise terms of those familiar provisions are critical to the resolution of these cases, we set them out verbatim. Article I provides:

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate *and* House of Representatives."

Art. I, § 1.

> "Every Bill which shall have passed the House of Representatives *and* the Senate, *shall,* before it becomes a law, be presented to the President of the United States. . . ."

Art. I, 7, cl. 2

> "*Every* Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) *shall* be presented to the President of the United States; and before the Same shall take Effect, *shall* be approved by him, or being disapproved by him, *shall* be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill."

Art. I, § 7, cl. 3. (Emphasis added.) These provisions of Art. I are integral parts of the constitutional design for the separation of powers. * * *

B

*The Presentment Clauses*

The records of the Constitutional Convention reveal that the requirement that all legislation be presented to the President before becoming law was uniformly accepted by the Framers. Presentment to the President and the Presidential veto were considered so

imperative that the draftsmen took special pains to assure that these requirements could not be circumvented. During the final debate on Art. I, § 7, cl. 2, James Madison expressed concern that it might easily be evaded by the simple expedient of calling a proposed law a "resolution" or "vote," rather than a "bill." As a consequence, Art. I, § 7, cl. 3 was added.

The decision to provide the President with a limited and qualified power to nullify proposed legislation by veto was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed. It is beyond doubt that lawmaking was a power to be shared by both Houses and the President. * * *

C

*Bicameralism*

The bicameral requirement of Art. I, § § 1, 7, was of scarcely less concern to the Framers than was the Presidential veto, and indeed the two concepts are interdependent. By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their belief, already remarked upon in connection with the Presentment Clauses, that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials. * * * Hamilton argued that a Congress comprised of a single House was antithetical to the very purposes of the Constitution. * * *

These observations are consistent with what many of the Framers expressed, none more cogently than Madison in pointing up the need to divide and disperse power in order to protect liberty:

> "In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches, and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit."

The Federalist No. 51, p. 324. * * *

The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings. The President's unilateral veto power, in turn, was limited by the power of two-thirds of both Houses of Congress to overrule a veto, thereby precluding final arbitrary action of one person. It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure. * * *

IV

The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to

exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

Although not "hermetically" sealed from one another, the powers delegated to the three Branches are functionally identifiable. When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it. * * *

Beginning with this presumption, we must nevertheless establish that the challenged action under § 244(c)(2) is of the kind to which the procedural requirements of Art. I, § 7, apply. Not every action taken by either House is subject to the bicameralism and presentment requirements of Art. I. Whether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form, but upon "whether they contain matter which is properly to be regarded as legislative in its character and effect."

Examination of the action taken here by one House pursuant to § 244(c)(2) reveals that it was essentially legislative in purpose and effect. In purporting to exercise power defined in Art. I, § 8, cl. 4, to "establish an uniform Rule of Naturalization," the House took action that had the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch. Section 244(c)(2) purports to authorize one House of Congress to require the Attorney General to deport an individual alien whose deportation otherwise would be canceled under § 244. The one-House veto operated in these cases to overrule the Attorney General and mandate Chadha's deportation; absent the House action, Chadha would remain in the United States. Congress has acted, and its action has altered Chadha's status. * * *

Neither the House of Representatives nor the Senate contends that, absent the veto provision in § 244(c)(2), either of them, or both of them acting together, could effectively require the Attorney General to deport an alien once the Attorney General, in the exercise of legislatively delegated authority[16], had determined the alien should remain in the United States. Without the challenged provision in § 244(c)(2), this could have been achieved, if at all, only by legislation requiring deportation. * * *

The nature of the decision implemented by the one-House veto in these cases further manifests its legislative character. After long experience with the clumsy, time-consuming private bill procedure, Congress made a deliberate choice to delegate to the Executive

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[16] Congress protests that affirming the Court of Appeals in these cases will sanction "lawmaking by the Attorney General * * * To be sure, some administrative agency action -- rulemaking, for example -- may resemble "lawmaking." This Court has referred to agency activity as being "quasi-legislative" in character. Clearly, however, "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." When the Attorney General performs his duties pursuant to § 244, he does not exercise "legislative" power. The bicameral process is not necessary as a check on the Executive's administration of the laws, because his administrative activity cannot reach beyond the limits of the statute that created it -- a statute duly enacted pursuant to Art. I, §§ 1, 7. The constitutionality of the Attorney General's execution of the authority delegated to him by § 244 involves only a question of delegation doctrine.

Branch, and specifically to the Attorney General, the authority to allow deportable aliens to remain in this country in certain specified circumstances. It is not disputed that this choice to delegate authority is precisely the kind of decision that can be implemented only in accordance with the procedures set out in Art. I. Disagreement with the Attorney General's decision on Chadha's deportation -- that is, Congress' decision to deport Chadha -- no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked. * * *

Since it is clear that the action by the House under § 244(c)(2) was not within any of the express constitutional exceptions authorizing one House to act alone, and equally clear that it was an exercise of legislative power, that action was subject to the standards prescribed in Art. I. * * *

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President. With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

V

We hold that the congressional veto provision in § 244(c)(2) is * * * unconstitutional. Accordingly, the judgment of the Court of Appeals is

*Affirmed.*

**JUSTICE POWELL**, concurring in the judgment.

The Court's decision, based on the Presentment Clauses, Art. I, 7, cls. 2 and 3, apparently will invalidate every use of the legislative veto. The breadth of this holding gives one pause. Congress has included the veto in literally hundreds of statutes, dating back to the 1930's. Congress clearly views this procedure as essential to controlling the delegation of power to administrative agencies. * * * In my view, the cases may be decided on a narrower ground. When Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country, it has assumed a judicial function in violation of the principle of separation of powers. Accordingly, I concur only in the judgment.

I

* * *

B

The Constitution does not establish three branches with precisely defined boundaries. * * * Functionally, the [separation of powers] doctrine may be violated in two ways. One branch may interfere impermissibly with the other's performance of its constitutionally assigned function. Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another. These cases present the latter situation. * * *

On its face, the House's action appears clearly adjudicatory. The House did not enact a general rule; rather, it made its own determination that six specific persons did not comply with certain statutory criteria. It thus undertook the type of decision that traditionally has been left to other branches. Even if the House did not make a *de novo* determination, but simply reviewed the Immigration and Naturalization Service's findings, it still assumed a function ordinarily entrusted to the federal courts. Where, as here, Congress has exercised a power "that cannot possibly be regarded as merely in aid of the legislative function of Congress," the decisions of this Court have held that Congress impermissibly assumed a function that the Constitution entrusted to another branch. * * *

The impropriety of the House's assumption of this function is confirmed by the fact that its action raises the very danger the Framers sought to avoid -- the exercise of unchecked power. In deciding whether Chadha deserves to be deported, Congress is not subject to any internal constraints that prevent it from arbitrarily depriving him of the right to remain in this country. Unlike the judiciary or an administrative agency, Congress is not bound by established substantive rules. Nor is it subject to the procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal, that are present when a court or an agency adjudicates individual rights. The only effective constraint on Congress' power is political, but Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to "the tyranny of a shifting majority." * * *

In my view, when Congress undertook to apply its rules to Chadha, it exceeded the scope of its constitutionally prescribed authority. I would not reach the broader question whether legislative vetoes are invalid under the Presentment Clauses.

**JUSTICE WHITE**, dissenting.

The prominence of the legislative veto mechanism in our contemporary political system and its importance to Congress can hardly be overstated. It has become a central means by which Congress secures the accountability of executive and independent agencies. Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or, in the alternative, to abdicate its lawmaking function to the Executive Branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role. Accordingly, over the past five decades, the legislative veto has been placed in nearly 200 statutes. The device is known in every field of governmental concern: reorganization, budgets, foreign affairs, war powers, and regulation of trade, safety, energy, the environment, and the economy. * * *

The history of the legislative veto also makes clear that it has not been a sword with which Congress has struck out to aggrandize itself at the expense of the other branches * * * Rather, the veto has been a means of defense, a reservation of ultimate authority necessary if Congress is to fulfill its designated role under Art. I as the Nation's lawmaker. While the President has often objected to particular legislative vetoes, generally those left in the hands of congressional Committees, the Executive has more often agreed to legislative review as the price for a broad delegation of authority. To be sure, the President may have preferred unrestricted power, but that could be precisely why Congress thought it essential to retain a check on the exercise of delegated authority. * * *

III

* * *

The power to exercise a legislative veto is not the power to write new law without bicameral approval or Presidential consideration. The veto must be authorized by statute, and may only negative what an Executive department or independent agency has proposed. On its face, the legislative veto no more allows one House of Congress to make law than does the Presidential veto confer such power upon the President. * * *

The history of the Immigration and Nationality Act makes clear that § 244(c)(2) did not alter the division of actual authority between Congress and the Executive. At all times, whether through private bills, or through affirmative concurrent resolutions, or through the present one-House veto, a permanent change in a deportable alien's status could be accomplished only with the agreement of the Attorney General, the House, and the Senate. * * *

The central concern of the presentment and bicameralism requirements of Art. I is that, when a departure from the legal *status quo* is undertaken, it is done with the approval of the President and both Houses of Congress -- or, in the event of a Presidential veto, a two-thirds majority in both Houses. This interest is fully satisfied by the operation of § 244(c)(2). The President's approval is found in the Attorney General's action in recommending to Congress that the deportation order for a given alien be suspended. The House and the Senate indicate their approval of the Executive's action by not passing a resolution of disapproval within the statutory period. Thus, a change in the legal *status quo* -- the deportability of the alien -- is consummated only with the approval of each of the three relevant actors. The disagreement of any one of the three maintains the alien's preexisting status: the Executive may choose not to recommend suspension; the House and Senate may each veto the recommendation. The effect on the rights and obligations of the affected individuals and upon the legislative system is precisely the same as if a private bill were introduced but failed to receive the necessary approval.

## Questions and Comments

**1. Bicameralism and presentment:** The majority held that Congress' decision to overrule the Attorney General's decision was "legislative" in purpose and effect, so it had to comply with the requirements of the bicameralism and presentment clauses of the Constitution. Why did the majority conclude that the action was "legislative"? Are all actions taken by the legislature legislative? In what ways did Congress' action violate the

bicameralism and presentment clauses of the Constitution? Would the Court have upheld Congress' action if the decision to overrule the Attorney General was made through a resolution passed by both the House and Senate?

**2. Delegation:** Although *Chadha* focused on the validity of the statutory provision authorizing Congress to overrule the Attorney General's decision, all three opinions spend a little time discussing the nature of the delegation of authority to the Attorney General to make the initial decision. Does the majority believe that Congress is delegating legislative authority to the Attorney General when it gives the Attorney General the authority to decide whether to cancel deportation of an alien?

**3. Functionalism v. formalism:** Scholars and judges often take one of two approaches to issues involving separation of powers—***formalism*** and ***functionalism***. *See* M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 Va. L. Rev. 1127 (2000). Under the ***formalist*** approach, each branch of government is assigned specific powers by the Constitution in the vesting clauses. Formalists identify the power that is being exercised in a case as legislative, executive, or judicial and will conclude that separation of powers principles are violated if a branch is exercising a power outside of the power vested to it by the Constitution. ***Functionalists***, on the other hand, concede that there may be some overlap of powers between the three branches, but that the overlap should be limited to prevent encroachments into the ***core functions*** of other branches. Which of the three opinions reproduced above adopts a formalist approach to separation of powers and which opinions adopt a functionalist approach?

**4. Nature of Congress' action:** The majority's holding that the legislative veto in the Immigration and Nationality Act violated the bicameralism and presentment clauses inevitably meant that hundreds of other legislative vetoes were unconstitutional, since they were structured in a similar fashion. Justice Powell, in his concurring opinion, and Justice White, in dissent, preferred to avoid that result. Instead of focusing on the bicameralism and presentment issue addressed in the majority opinion, Justice Powell focused on the nature of Congress' action. Did Justice Powell agree with the majority that Congress' decision to overrule the Attorney General was a legislative act? How did that impact Justice Powell's consideration of the constitutional validity of Congress' action? What are the different ways that Justice Powell suggested separation of powers principles could be violated and which applied in this case?

**5. Justice White's dissent:** Justice Burger, Justice Powell, and Justice White agree that the legislative veto is an efficient tool to facilitate delegation of authority to administrative agencies while retaining a measure of control over their decision-making. Justice Burger, for the majority, argues that the fact that a law "is efficient, convenient, and useful in facilitating functions of government * * * will not save it if it is contrary to the Constitution." Justice White, in dissent, does not argue that courts can uphold unconstitutional laws simply because they are efficient. However, he argues that the legislative veto provision of the Immigration and Nationality Act is not unconstitutional. How does he justify his conclusion? Does Justice White address Justice Powell's argument that Congress' action is invalid because it is taking an adjudicatory action?

**VIDEO LECTURE**

**Click here for a video lecture on *INS v. Chadha* by Professor Stephen Johnson.**

**6. Alternatives to legislative vetoes:** In addition to legislative vetoes, Congress frequently included other provisions in statutes to retain some level of control over agencies' exercise of discretion in administering the statutes. These other provisions did not violate the bicameralism and presentment requirements of the Constitution but did not provide Congress with the same degree of control over agency decisions as legislative vetoes. For instance, many statutes included ***implementation delay provisions ("report and wait")***. Those provisions (1) require agencies, when taking certain actions, to report the actions to Congress in a specific manner; and (2) delay the effective date of the agencies' actions for a specific period of time, in order to give Congress the opportunity to pass legislation to prevent the action or take other measures short of legislative action to convince the agency to decline to act. Other statutes included ***consultation provisions***, which required agencies to consult with Congress in a specific manner before taking certain actions.

**7. Congressional Review Act:** A little over a decade after the Supreme Court held legislative vetoes unconstitutional, Congress passed the ***Congressional Review Act*** as Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996, as a means of providing Congressional control over agencies' rulemaking decisions. The law provides that before a rule can take effect, agencies must submit the rule to both chambers of Congress and the Comptroller General, along with any required cost-benefit analyses and documents demonstrating compliance with numerous federal laws and executive orders. *See* 5 U.S.C. § 801. For ***major rules*** (rules having an impact of $100 million dollars per year on the economy), after the rule has been provided to Congress, the rule ***cannot take effect for 60 days*** and ***can't take effect at all if Congress passes a joint resolution disapproving the rule during those 60 days***. *Id.* The law creates a streamlined process for Congress to adopt the joint resolution, limits debate on the resolution, limits amendments to the resolution, cuts out referral to various committees, and limits public hearings. *Id.* § 802. If Congress passes the joint resolution, the Congressional Review Act makes it clear that the revocation of the rule is not subject to judicial review and the law provides that agencies may not reissue the rule or adopt a rule that is substantially the same as the rule that was disapproved after Congress disapproved it. *Id.* §§ 801, 805. The law has also been recently interpreted to apply to agency guidance documents.

Congress only exercised the authority of the statute to disapprove an agency rule once between 1996 and 2016. In 2017, however, Congress used the authority to overturn 14

rules that were approved by the Obama Administration.

**8. State legislative vetoes:** States have also adopted legislative vetoes over the years. *See* L. Harold Levinson, *Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives*, 24 Wm. & Mary L. Rev. 79 (1982). *Chadha* does not control their constitutionality, which is a question that would be resolved based on the states' constitutions. *See, e.g. Mead v. Arnell*, 791 P.2d 410 (Idaho 1990) (upholding a legislative veto through a concurrent resolution of both chambers); *Opinion of the Justices*, 431 A.2d 783 (N.H. 1981) (striking down a legislative veto).

**Congressional Review Act Resources**

- Congressional Research Service: The Congressional Review Act: A Brief Overview
- Congressional Review Act – U.S. Code
- Government Accountability Office (GAO): CRA Materials and Reports
- National Conference of State Legislators: CRA Overview and Tracking
- George Washington University: CRA Tracker

## C. Other Congressional Controls Over Agencies

Although the Supreme Court struck down the legislative veto in *INS v. Chadha* and there are limits on the rules that Congress can disapprove under the Congressional Review Act, Congress has many other tools that it uses to control agencies' exercise of discretion to implement and administer statutes.

### 1. Detailed Legislation

First, since agencies are creatures of the legislature and only have authorities provided to them by statute, Congress and state legislatures can exercise significant control over agencies by addressing issues very specifically in statutes (and thus limiting the discretion of agencies), limiting agencies' authority to interpret or administer various provisions of statutes, limiting agencies' authority to administer statutes (or sections of statutes) through rulemaking or adjudication, and including detailed procedures for agencies to follow when exercising their discretion. While these approaches increase legislative control over agencies, they sacrifice many of the benefits of broader delegation outlined at the beginning of this chapter. In addition, it may be difficult for Congress or a state legislature to reach consensus on issues to address them more specifically in legislation. At the federal level, however, the Supreme Court's adoption of the major questions doctrine (see Chapter 7) and increasing hostility towards administrative agencies is providing impetus for more detailed Congressional legislation.

Congress can also use legislative threats as a tool to influence agency actions. If members of Congress oppose an agency rule, policy, or adjudicative decision, they might threaten to amend the statute that authorizes the agency to take the action to rescind its

authority to take the action. More drastically, they may threaten to impose greater limits on the agency's authority or eliminate the agency completely.

### 2. Appropriations

Congress and state legislatures also have significant control over agencies because agencies rely on the legislature for funding to exist and administer their statutory responsibilities. The statutes that create agencies and provide agencies with powers and responsibilities may "authorize" the expenditure of funds to administer the statute, but they do not actually provide funds to the agencies to operate. At the federal level, and in most states, the legislature must appropriate funds annually to enable agencies to operate, so the legislature can exercise significant control over agency actions each year through the appropriations process.[13]

Congress and state legislatures can use this power to influence agency decision-making by reducing funding (or threatening to reduce funding) for an agency when the agency is taking actions which the legislators do not support. Similarly, they can reward agencies or encourage them to move more aggressively in specific areas by increasing funding when agencies are taking actions they support. More directly, though, legislatures can impose restrictions on funding provided to agencies, providing that the funding cannot be used for specific programs or to make specific decisions.[14] Although Congressional rules of procedure technically forbid substantive limits or riders in appropriations bills, many are included in those bills and enacted into law.

At the federal level, some agencies, such as the Federal Reserve and the Consumer Financial Protection Bureau, do not rely on annual appropriations to operate. Consequently, Congress has less power to influence their actions through the appropriations process.

### 3. Oversight Hearings

Congress and state legislatures exercise oversight over agencies as another means of control. Legislative committees with expertise in areas regulated by agencies are usually assigned jurisdiction over legislation involving those agencies. Those committees exercise oversight of the agencies in a variety of ways, the most formal of which are ***oversight hearings***.[15] Committees may hold oversight hearings as a routine matter or

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[13] At the federal level, Congress has broad authority to determine how it will spend money. *See* U.S. CONST., Art. I, §§ 8,9.

[14] There are limits to the effectiveness of this power, however. Appropriations decisions will be made by members of the Appropriations Committee in Congress, while concerns about agencies' decision-making in administering statutes will be raised by members of other Committees that oversee those agencies. If, for instance, members of the House Energy and Commerce Committee disapprove of a decision made by the Environmental Protection Agency in administering the Clean Water Act, those members must communicate their disapproval to members of the Appropriations Committee and convince the members of the Appropriations Committee that limits on the agency's funding are necessary.

[15] For an empirical analysis of the effectiveness of oversight in influencing agency action, *see* Brian D. Feinstein, *Congress in the Administrative State*, 95 Wash. U. L. Rev. 1187 (2018). While the Constitution doesn't explicitly address Congressional oversight, the Supreme Court has

they may hold hearings in response to an agency action or a crisis in an area regulated by the agency. They may hold hearings to gather information from agencies (to assist them in determining whether additional legislative action is needed or to determine the amount or limitations on appropriations) or to express their concerns or opinions regarding the way the agency administers a statute. The legislators could also use the hearing as a vehicle to remind an agency that the legislature has appropriations and other legislative powers that it could exercise if the agency pursued an approach which the legislators did not support. A benefit of hearings as a tool to control agency action is that they are less formal than legislation. They can also be used to shape public opinion on issues of concern to the legislators.

Video of Oversight Hearing – Click on the image to view

In addition to holding hearings, committees can exercise oversight by requesting information from agencies outside of the hearing process, conducting investigations into agency activities, and expressing opinions and concerns to agencies directly or through the press.[16]

Not surprisingly, legislative oversight may be less aggressive in legislative chambers that are controlled by the same political party as the chief executive. In addition, it may be less aggressive if legislators on the committee charged with oversight are captured by the regulated community or are more concerned with other priorities, such as fundraising and constituent servicing.[17]

### 4. Appointment and Removal

In addition to the controls outlined above, Congress plays a role in the appointment and removal of agency officials. Since agencies are created by statute, Congress or state legislatures outline the way agency officials are appointed and removed. The Constitution limits Congress regarding the extent to which it can control the appointment and removal of officers, and that will be discussed in the next section of this chapter, which will focus on controls exerted by the Executive Branch over agencies, including Executive Branch control over appointment and removal of agency officials.

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held that the "power of Congress to conduct investigations is inherent in the legislative process." *See* *Watkins v. United States*, 354 U.S. 178, 187 (1957). The Legislative Reorganization Act of 1946 requires all House and Senate standing committees to "exercise continuous watchfulness of the execution [of laws] by the administrative agencies."

[16] *See* Manning & Stephenson, *supra* note 4, at 625.

[17] *See* William N. Eskridge Jr., James J. Brudney, Josh Chafetz, Philip F. Frickey, & Elizabeth Garrett, CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY, 6TH ED. 953 (West Acad. Pub. 2020). Committees may also decline to hold hearings even though they feel that hearings would be useful if the chamber in which the committee is situated, as a whole, feels differently about the agency and the committee fears that hearings could motivate the chamber to enact legislative changes that the committee opposes. *See* Feinstein, *supra* note 15, at 1193-94.

**CALI SECTION QUIZ**

Before moving on to the next section, why not try a short quiz on the material you just read at www.cali.org/lesson/19748. It should take about 20 minutes to complete.

## IV. Executive Branch Control Over Agencies

The Executive Branch wields many of the same types of controls over agencies as does Congress. Both branches play a role in the ***appointment and removal*** of agency officials, depending on the nature of the officials. In addition, the Executive Branch plays an important role in the development of ***new legislation*** for agencies and the ***appropriations*** process for agencies. The President can use those powers to influence agencies to interpret and administer statutes in a manner consistent with the policies of the President. For many agencies, the President can also control the positions that the agencies take in ***litigation*** and whether the agencies pursue enforcement actions in court. The President can communicate his or her policy preferences to agencies through ***Executive Orders*** or more informally.

The degree of control that the President has over agencies varies depending on whether the agencies are ***executive agencies*** or ***independent agencies***. Both types of agencies are created by Congress through legislation, but independent agencies are created to be subject to less control by the President.

***Executive agencies*** are under the direct control of the President. Executive agencies include cabinet agencies, like the Department of Commerce and Department of Health and Human Services, but also some agencies that are not in the cabinet, like the Environmental Protection Agency. In executive agencies, the head of the agency is appointed by, and serves at the pleasure of, the President, and the agency has a single leader (usually a secretary or administrator), rather than a collegial governing structure. In many cases, Congress has created executive agencies within other executive agencies. For instance, the Federal Aviation Administration (FAA) is part of the Department of Transportation and the Internal Revenue Service (IRS) is part of the Treasury Department.

***Independent agencies*** usually have several decision-makers who work together to make decisions, instead of a single secretary or administrator.[18] Many of the independent

[18] The Paperwork Reduction Act of 1980 lists the following independent agencies that were in existence at the time: the Board of Governors of the Federal Reserve System, the Civil Aeronautics Board, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance

agencies are designated as “commissions” or “boards” and are administered by “commissioners” or board members, with one of the commissioners or board members serving as the Chair. Commissioners or board members generally serve for a term of years rather than at the pleasure of the President and can generally only be removed “for cause”. In many independent agencies, the terms of commissioners are staggered to end during different presidential administrations. In some cases, statutes require bipartisan political representation on commissions or boards. Some examples of independent agencies include the Nuclear Regulatory Commission (NRC), Securities and Exchange Commission (SEC) and the Federal Communications Commission (FCC).

In many cases, similar rules apply to executive agencies and independent agencies. For instance, both types of agencies are governed by the Administrative Procedure Act (APA), which outlines the procedures agencies must use when making decisions, the circumstances in which agency actions can be challenged in court, and the standards for judicial review of agency decisions. Similarly, the analysis that courts will use to determine whether an agency decision complies with due process will be the same regardless of whether the agency is an executive agency or an independent agency. The biggest differences between independent agencies and executive agencies relate to limits on the President’s control over the agencies.

## A. Appointment and Removal

One of the central powers that the President has over agencies is the power to appoint and remove agency officials. Pursuant to the Constitution, the President’s power to appoint agency officers (but not necessarily inferior officers) is shared with the Senate, and the President may or may not have the power to appoint inferior officers, depending on the statute creating the agency officers. Since the Constitution does not define “inferior officers,” the Supreme Court has clarified that term in several decisions, discussed below.

> The President … shall nominate, and by and with the advice and consent of the Senate, shall appoint … officers of the United States …: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments. U.S. Const., Art. II, § 2.

While the Constitution explicitly addresses the President’s power to appoint agency officials, it is silent regarding the President’s removal power. The Supreme Court

Corporation, the Federal Energy Regulatory Commission, the Federal Home Loan Bank Board, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Rate Commission, and the Securities and Exchange Commission. More recent independent agencies include the Consumer Financial Protection Bureau, the Federal Retirement Thrift Investment Board and the Surface Transportation Board.

addressed that question, as well as the question of Congress' power to limit the President's appointment and removal authorities, in the following cases.

## MYERS V. UNITED STATES

**272 U.S. 52 (1926)**

**Resources for the Case**

Unedited Opinion (From Justia)
Oyez Resources
Factual Background (From Quimbee)
Video Summary (Prof. Stevenson – South Texas College of Law)
Story of the Case – Prof. J. Entin

**MR. CHIEF JUSTICE TAFT** delivered the opinion of the Court.

President/Chief Justice Taft – Public Domain

This case presents the question whether, under the Constitution, the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate.

Myers * * * was, on July 21, 1917, appointed by the President, by and with the advice and consent of the Senate, to be a postmaster of the first class at Portland, Oregon, for a term of four years. On January 20, 1920, Myers' resignation was demanded. He refused the demand. On February 2, 1920, he was removed from office by order of the Postmaster General, acting by direction of the President. February 10th, Myers sent a petition to the President and another to the Senate Committee on Post Offices, asking to be heard if any charges were filed. He protested to the Department against his removal, and continued to do so until the end of his term. He pursued no other occupation, and drew compensation for no other service during the interval. On April 21, 1921, he brought this suit in the Court of Claims for his salary from the date of his removal * * * In August, 1920, the President made a recess appointment of one Jones, who took office September 19, 1920. * * *

By the [statute] under which Myers was appointed with the advice and consent of the Senate as a first-class postmaster, it is provided that

> "Postmasters of the first, second and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended according to law."

The Senate did not consent to the President's removal of Myers during his term. If this statute, in its requirement that his term should be four years unless sooner removed by the President by and with the consent of the Senate, is valid, the appellant * * * is entitled to recover his unpaid salary for his full term * * * The Government maintains that the requirement is invalid for the reason that, under Article II of the Constitution the

President's power of removal of executive officers appointed by him with the advice and consent of the Senate is full and complete without consent of the Senate. If this view is sound, the removal of Myers by the President without the Senate's consent was legal * * * We are therefore confronted by the constitutional question, and cannot avoid it.

The relevant parts of Article II of the Constitution are as follows:

> "Section 1. The executive Power shall be vested in a President of the United States of America."
>
> "Section 2. The President * * * shall nominate, and by and with the advice and consent of the Senate, shall appoint … officers of the United States …: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the Courts of law, or in the Heads of Departments. * * *
>
> "Section 4. The President, Vice President and all civil Officers of the United States shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other High Crimes and Misdemeanors." * * *

The question where the power of removal of executive officers appointed by the President by and with the advice and consent of the Senate was vested was presented early in the first session of the First Congress. There is no express provision respecting removals in the Constitution, except as Section 4 of Article II, above quoted, provides for removal from office by impeachment. * * *

The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President, alone and unaided, could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this Court. As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that, as part of his executive power, he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that, as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible. It was urged that the natural meaning of the term "executive power" granted the President included the appointment and removal of executive subordinates. If such appointments and removals were not an exercise of the executive power, what were they? They certainly were not the exercise of legislative or judicial power in government as usually understood. * * *

The power to prevent the removal of an officer who has served under the President is different from the authority to consent to or reject his appointment. When a nomination is made, it may be presumed that the Senate is, or may become, as well advised as to the fitness of the nominee as the President, but, in the nature of things, the defects in ability or intelligence or loyalty in the administration of the laws of one who has served as an

officer under the President are facts as to which the President, or his trusted subordinates, must be better informed than the Senate, and the power to remove him may, therefore, be regarded as confined, for very sound and practical reasons, to the governmental authority which has administrative control. The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal. * * *

It is reasonable to suppose also that, had it been intended to give to Congress power to regulate or control removals in the manner suggested, it would have been included among the specifically enumerated legislative powers in Article I, or in the specified limitations on the executive power in Article II. The difference between the grant of legislative power under Article I to Congress, which is limited to powers therein enumerated, and the more general grant of the executive power to the President under Article II, is significant. * * *

Made responsible under the Constitution for the effective enforcement of the law, the President needs as an indispensable aid to meet it the disciplinary influence upon those who act under him of a reserve power of removal. * * * The degree of guidance in the discharge of their duties that the President may exercise over executive officers varies with the character of their service as prescribed in the law under which they act. The highest and most important duties which his subordinates perform are those in which they act for him. In such cases, they are exercising not their own, but his, discretion. This field is a very large one. It is sometimes described as political. Each head of a department is and must be the President's alter ego in the matters of that department where the President is required by law to exercise authority. * * *

In all such cases, the discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it. In this field, his cabinet officers must do his will. He must place in each member of his official family, and his chief executive subordinates, implicit faith. The moment that he loses confidence in the intelligence, ability, judgment or loyalty of anyone of them, he must have the power to remove him without delay. To require him to file charges and submit them to the consideration of the Senate might make impossible that unity and coordination in executive administration essential to effective action.

The duties of the heads of departments and bureaus in which the discretion of the President is exercised and which we have described are the most important in the whole field of executive action of the Government. There is nothing in the Constitution which permits a distinction between the removal of the head of a department or a bureau, when he discharges a political duty of the President or exercises his discretion, and the removal of executive officers engaged in the discharge of their other normal duties. The imperative reasons requiring an unrestricted power to remove the most important of his subordinates

in their most important duties must, therefore, control the interpretation of the Constitution as to all appointed by him. * * *

We come now to consider an argument advanced and strongly pressed on behalf of the complainant, that this case concerns only the removal of a postmaster; that a postmaster is an inferior officer; that such an office was not included within the legislative decision of 1789, which related only to superior officers to be appointed by the President by and with the advice and consent of the Senate. * * *

The power to remove inferior executive officers, like that to remove superior executive officers, is an incident of the power to appoint them, and is in its nature an executive power. The authority of Congress given by the excepting clause to vest the appointment of such inferior officers in the heads of departments carries with it authority incidentally to invest the heads of departments with power to remove. It has been the practice of Congress to do so and this Court has recognized that power. The Court also has recognized * * * that Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal. But the Court never has held, nor reasonably could hold * * * that the excepting clause enables Congress to draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of that clause and to infringe the constitutional principle of the separation of governmental powers.

Assuming then the power of Congress to regulate removals as incidental to the exercise of its constitutional power to vest appointments of inferior officers in the heads of departments, certainly so long as Congress does not exercise that power, the power of removal must remain where the Constitution places it, with the President, as part of the executive power, in accordance with the legislative decision of 1789 which we have been considering. * * *

Our conclusion on the merits * * * is that Article II grants to the President the executive power of the Government, *i.e.,* the general administrative control of those executing the laws, including the power of appointment and removal of executive officers -- a conclusion confirmed by his obligation to take care that the laws be faithfully executed; that Article II excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices; that Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate's consent; that the provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, in the work of the executive are limitations to be strictly construed, and not to be extended by implication; that the President's power of removal is further established as an incident to his specifically enumerated function of appointment by and with the advice of the Senate, but that such incident does not, by implication, extend to removals the Senate's power of checking appointments, and finally that to hold otherwise would make it impossible for the

President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed. * * *

For the reasons given, we must therefore hold that the provision of the law of 1876, by which the unrestricted power of removal of first-class postmasters is denied to the President, is in violation of the Constitution, and invalid.

**MR. JUSTICE HOLMES**, dissenting.

* * * The arguments drawn from the executive power of the President, and from his duty to appoint officers of the United States (when Congress does not vest the appointment elsewhere), to take care that the laws be faithfully executed, and to commission all officers of the United States, seem to me spider's webs inadequate to control the dominant facts.

We have to deal with an office that owes its existence to Congress, and that Congress may abolish tomorrow. Its duration and the pay attached to it while it lasts depend on Congress alone. Congress alone confers on the President the power to appoint to it, and at any time may transfer the power to other hands. With such power over its own creation, I have no more trouble in believing that Congress has power to prescribe a term of life for it free from any interference than I have in accepting the undoubted power of Congress to decree its end. I have equally little trouble in accepting its power to prolong the tenure of an incumbent until Congress or the Senate shall have assented to his removal. The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.

The separate opinion of **MR. JUSTICE MCREYNOLDS.**

* * * Nothing short of language clear beyond serious disputation should be held to clothe the President with authority wholly beyond congressional control arbitrarily to dismiss every officer whom he appoints except a few judges. There are no such words in the Constitution, and the asserted inference conflicts with the heretofore accepted theory that this government is one of carefully enumerated powers under an intelligible charter. * * *

If the phrase "executive power" infolds the one now claimed, many others heretofore totally unsuspected may lie there awaiting future supposed necessity, and no human intelligence can define the field of the President's permissible activities. * * *

The legislature is charged with the duty of making laws for orderly administration obligatory upon all. * * * We have no such thing as three totally distinct and independent departments; the others must look to the legislative for direction and support. "In republican government, the legislative authority necessarily predominates." * * *

Generally, the actual ouster of an officer is executive action; but to prescribe the conditions under which this may be done is legislative. * * *

**MR. JUSTICE BRANDEIS**, dissenting.

The contention that Congress is powerless to make consent of the Senate a condition of removal by the President from an executive office rests mainly upon the clause in § 1 of Article II which declares that "The executive Power hall be vested in a President." The argument is that appointment and removal of officials are executive prerogatives; that the grant to the President of "the executive Power" confers upon him, as inherent in the office, the power to exercise these two functions without restriction by Congress * * * The simple answer to the argument is this: the ability to remove a subordinate executive officer, being an essential of effective government, will, in the absence of express constitutional provision to the contrary, be deemed to have been vested in some person or body. But it is not a power inherent in a chief executive. The President's power of removal from statutory civil inferior offices, like the power of appointment to them, comes immediately from Congress. * * * [T]he Constitution has confessedly granted to Congress the legislative power to create offices, and to prescribe the tenure thereof, and it has not in terms denied to Congress the power to control removals. To prescribe the tenure involves prescribing the conditions under which incumbency shall cease. * * *

To imply a grant to the President of the uncontrollable power of removal from statutory inferior executive offices involves an unnecessary and indefensible limitation upon the constitutional power of Congress to fix the tenure of inferior statutory offices. * * *

The separation of the powers of government did not make each branch completely autonomous. It left each in some measure dependent upon the others, as it left to each power to exercise, in some respects, functions in their nature executive, legislative and judicial. Obviously the President cannot secure full execution of the laws, if Congress denies to him adequate means of doing so. Full execution may be defeated because Congress declines to create offices indispensable for that purpose. Or because Congress, having created the office, declines to make the indispensable appropriation. Or because Congress, having both created the office and made the appropriation, prevents, by restrictions which it imposes, the appointment of officials who in quality and character are indispensable to the efficient execution of the law. If, in any such way, adequate means are denied to the President, the fault will lie with Congress. The President performs his full constitutional duty if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted.

Checks and balances were established in order that this should be "a government of laws, and not of men." * * * The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy. In order to prevent arbitrary executive action, the Constitution provided in terms that presidential appointments be made with the consent of the Senate, unless Congress should otherwise provide, and this clause was construed by Alexander Hamilton in The Federalist, No. 77, as requiring like consent to removals.

## Questions and Comments

**1. Statute:** What procedure and criteria did the statute at issue in *Myers* establish for appointment and removal of postmasters?

**2. Constitutional appointment powers:** What role does the Constitution assign to the President for the appointment of officers? Does it assign Congress a role in the appointment of officers?

**3. Constitutional removal powers:** Does the Constitution explicitly address the power of the President or Congress to remove officers? If so, what does it provide?

**4. President's removal powers per the majority:** Where did the majority find a power in the President to remove officers, and how broad was that power? Is the majority adopting a formalist or functionalist approach to separation of powers?

**5. Congress' removal powers per the majority:** Did the majority find that Congress could impose limits on the President's power to remove officers, other than inferior officers, or participate in the decision to remove officers, other than inferior officers? Why or why not? The Supreme Court addressed the question of whether Congress could retain authority to remove executive officers in 1986, in *Bowsher v. Synar*, 478 U.S. 714 (1986). In that case, the Court reviewed provisions of the Balanced Budget and Emergency Deficit Control Act of 1985 (Act) ("Gramm-Rudman-Hollings Act") that authorized the Comptroller-General to carry out various executive powers to administer the statute. Since the Comptroller-General was authorized to be removed from office by Congress at any time under a different statute, the Court held that the provisions in the Gramm-Rudman-Hollings Act that delegated executive powers to the Comptroller-General violated separation of powers, as Congress cannot retain the power to remove an officer who exercises executive powers.

**6. Definition of "officer":** The Constitution does not define "officer" and the *Myers* Court did not provide a definition for the term. However, the Court has provided some guidance regarding the scope of "officers" in the years since *Myers*. In *Buckley v. Valeo*, 424 U.S. 1 (1976), for instance, the Court distinguished persons who gather information and conduct investigations (who are NOT officers) from persons who perform adjudicatory, legislative, or implementation functions (who MAY BE officers). More recently, in 2018, in *Lucia v. SEC*, 138 S.Ct. 2044 (2018), the Supreme Court held that an officer is an individual who holds a "continuing position established by law" and who exercises "significant authority pursuant to the laws of the United States."

**7. Nature of officer's duties:** Did the majority draw any distinction regarding the nature and scope of the President's appointment and removal power over officers based on whether the officer made political decisions? Based on whether the officer exercised legislative or adjudicative functions?

**8. Inferior officers:** The majority drew a distinction between "officers" and "inferior officers" because the Constitution authorizes Congress to vest the appointment of "inferior

officers" in the President alone, the Courts of law, or Heads of Departments. Assuming that Congress delegates to the President the power to appoint an inferior officer, did the majority conclude that the President has authority to remove inferior officers? If so, why? Did the majority conclude that Congress can limit the President's authority to remove inferior officers? Did the majority conclude that Congress can be involved in the decision to remove inferior officers? Note that the statute in this case vested the appointment of postmasters in the President with the advice and consent of the Senate. Is that important?

**9. Definition of "inferior officers":** In *Myers*, the majority did not articulate a test for determining whether an officer is an "inferior officer" because it did not have to decide whether the postmaster was an inferior officer. The majority held that Congress could only limit the President's power to remove inferior officers if Congress vested the appointment power over those officers in the President alone, the Courts of law, or the Heads of Departments, and the statute at issue in the case vested the appointment power in the President with the advice and consent of the Senate. Some courts have determined whether an officer is an "inferior officer" by focusing on where Congress vests the appointment authority. In 1988, however, in *Morrison v. Olson*, 487 U.S. 654 (1988), the Supreme Court identified several factors that it deemed relevant in determining whether an officer was an "inferior officer," including whether the person (1) is subject to removal by a higher officer; (2) has narrow jurisdiction; or (3) has a limited tenure. Several years later, in *Edmonds v. United States*, 520 U.S. 651 (1997), Justice Scalia wrote that *Morrison* did not purport to set forth a definitive test for determining whether an officer is an "inferior officer" and he suggested that an "inferior officer" is, at a minimum, an officer "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."

The Court has also addressed the question of whether a person is merely an "employee," as opposed to an "inferior officer." *See, e.g. Lucia v. Securities and Exchange Commission*, 138 S.Ct. 2044 (2018) (holding that ALJs in the SEC are "officers," rather than "employees," because they exercise "significant authority" pursuant to the laws of the United States, and that they must be appointed consistent with the Appointments Clause of the Constitution); *Freytag v. Commissioner*, 501 U.S. 868 (1991) (finding that special trial judges in the Tax Court are "inferior officers" since they exercise "significant authority").

**10. Dissenting Justices:** The majority opinion in Myers was written by Chief Justice Taft. As a former President of the United States, it is not surprising that his opinion stresses the importance of a strong and unified Executive Branch. Justices Holmes, McReynolds, and Brandeis did not read the Constitution to provide the Executive Branch with such expansive authority. Why does each dissent? Would you characterize their opinions as functionalist or formalist?

**VIDEO LECTURE**

**Click here for a video lecture on *Myers v. United States* by Professor Stephen Johnson.**

*Myers* involved Congressional limits on an officer within the Executive Branch and the broad holding in the case has been generally limited to officers in executive agencies, rather than independent agencies. The Supreme Court addressed the issue of Congressional control over the removal of officers in independent agencies a few years after *Myers*, in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

**Resources for the Case**

Unedited Opinion (From Justia)
Oyez Resources
Factual Background (From Quimbee)
Video Summary (Prof. Stevenson – South Texas College of Law)
Story of the FTC – Prof. E.P. Herring

## HUMPHREY'S EXECUTOR V. UNITED STATES

**295 U.S. 602 (1935)**

**MISTER JUSTICE SUTHERLAND** delivered the opinion of the Court.

Plaintiff brought suit in the Court of Claims against the United States to recover a sum of money alleged to be due the deceased for salary as a Federal Trade Commissioner from October 8, 1933, when the President undertook to remove him from office, to the time of his death on February 14, 1934. * * *

William E. Humphrey, * * * on December 10, 1931, was nominated by President Hoover to succeed himself as a member of the Federal Trade Commission, and was confirmed by the United States Senate. He was duly commissioned for a term of seven years expiring September 25, 1938; and, after taking the required oath of office, entered upon his duties. On July 25, 1933, President Roosevelt addressed a letter to the commissioner asking for his resignation, on the ground "that the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection," but disclaiming any reflection upon the commissioner personally or upon his services. * *

After some further correspondence upon the subject, the President, on August 31, 1933, wrote the commissioner expressing the hope that the resignation would be forthcoming, and saying:

> "You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade

> Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence."

The commissioner declined to resign, and on October 7, 1933, the President wrote him:

> "Effective as of this date, you are hereby removed from the office of Commissioner of the Federal Trade Commission."

Humphrey never acquiesced in this action, but continued thereafter to insist that he was still a member of the commission, entitled to perform its duties and receive the compensation provided by law at the rate of $10,000 per annum. * * *

The Federal Trade Commission Act, creates a commission of five members to be appointed by the President by and with the advice and consent of the Senate, and § 1 provides:

> "Not more than three of the commissioners shall be members of the same political party. * * * [Commissioners] shall be appointed for terms of seven years. * * * Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. . . ." * * *

The question first to be considered is whether, by the provisions of § 1 of the Federal Trade Commission Act, already quoted, the President's power is limited to removal for the specific causes enumerated therein. * * * The statute fixes a term of office, in accordance with many precedents. The first commissioners appointed are to continue in office for terms of three, four, five, six, and seven years, respectively, and their successors are to be appointed for terms of seven years -- any commissioner being subject to removal by the President for inefficiency, neglect of duty, or malfeasance in office. The words of the act are definite and unambiguous. * * *

But if the intention of that no removal should be made during the specified term except for one or more of the enumerated causes were not clear upon the face of the statute, as we think it is, it would be made clear by a consideration of the character of the commission and the legislative history which accompanied and preceded the passage of the act. The commission is to be nonpartisan, and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly *quasi*-judicial and *quasi*-legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts "appointed by law and informed by experience." The legislative reports in both houses of Congress clearly reflect the view that a fixed term was necessary to the effective and fair administration of the law. * * *

[The report of the Senate Committee on Interstate Commerce declared] that one advantage which the Commission possessed * * * lay in the fact of its independence, and that it was essential that the commission should not be open to the suspicion of partisan direction. * * *

The debates in both houses demonstrate that the prevailing view was that the commission was not to be "subject to anybody in the government, but . . . only to the people of the United States"; free from "political domination or control" or the "probability or possibility of such a thing"; to be "separate and apart from any existing department of the government -- not subject to the orders of the President." * * *

Thus, the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates all combine to demonstrate the Congressional intent to create a body of experts who shall gain experience by length of service -- a body which shall be independent of executive authority *except in its selection,* and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. To the accomplishment of these purposes it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute. And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office.

We conclude that the intent of the act is to limit the executive power of removal to the causes enumerated, the existence of none of which is claimed here, and we pass to the second question. * * *

To support its contention that the removal provision of § 1, as we have just construed it, is an unconstitutional interference with the executive power of the President, the government's chief reliance is *Myers v. United States*. That case has been so recently decided, and the prevailing and dissenting opinions so fully review the general subject of the power of executive removal, that further discussion would add little of value to the wealth of material there collected. * * * [T]he narrow point actually decided was only that the President had power to remove a postmaster of the first class without the advice and consent of the Senate as required by act of Congress. In the course of the opinion of the court, expressions occur which tend to sustain the government's contention, but these are beyond the point involved, and, therefore do not come within the rule of *stare decisis.* Insofar as they are out of harmony with the views here set forth, these expressions are disapproved. * * *

The office of a postmaster is so essentially unlike the office now involved that the decision in the *Myers* case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the *Myers* case finds support in the theory that such an officer is merely one of the units in the executive department, and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is. Putting aside dicta, which may be followed if sufficiently persuasive but which are not controlling, the necessary reach of the decision goes far enough to include all purely executive officers. It goes no farther; much less does it include an officer who occupies no place in the

executive department, and who exercises no part of the executive power vested by the Constitution in the President.

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave, and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in respect of "unfair methods of competition" -- that is to say, in filling in and administering the details embodied by that general standard -- the commission acts in part *quasi*-legislatively and in part *quasi*-judicially. In making investigations and reports thereon for the information of Congress under 6, in aid of the legislative power, it acts as a legislative agency. Under § 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function -- as distinguished from executive power in the constitutional sense -- it does so in the discharge and effectuation of its *quasi*-legislative or *quasi*-judicial powers, or as an agency of the legislative or judicial departments of the government.

If Congress is without authority to prescribe causes for removal of members of the trade commission and limit executive power of removal accordingly, that power at once becomes practically all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution. The Solicitor General, at the bar, apparently recognizing this to be true, with commendable candor, agreed that his view in respect of the removability of members of the Federal Trade Commission necessitated a like view in respect of the Interstate Commerce Commission and the Court of Claims. We are thus confronted with the serious question whether not only the members of these *quasi*-legislative and *quasi*-judicial bodies, but the judges of the legislative Court of Claims, exercising judicial power, continue in office only at the pleasure of the President.

We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating *quasi*-legislative or *quasi*-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted, and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will.

The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others has often been stressed, and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the

Constitution, and in the rule which recognizes their essential coequality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. * * *

The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments. * * *

The result of what we now have said is this: whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend upon the character of the office; the *Myers* decision, affirming the power of the President alone to make the removal, is confined to purely executive officers, and, as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed except for one or more of the causes named in the applicable statute. To the extent that, between the decision in the *Myers* case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise.

## Questions and Comments

**1. Statute:** What procedure and criteria did the statute at issue in *Humphrey's Executor* establish for appointment and removal of Commissioners? Did the statute provide any role for Congress in the removal decision, as in *Myers*?

**2. Grounds for removal:** The Court focuses first on whether the President has authority under the statute to remove a Commissioner for reasons other than those listed in Section 1. What does the Court conclude and why?

**3. *Myers*:** If the Court had applied the ruling in *Myers*, presuming that the Commissioner was not an inferior officer, would it be appropriate for Congress to impose conditions on the President's power to remove the Commissioner? Why did the Court find that *Myers* was not an appropriate precedent to rely upon in this case? What did the Court say the *Myers* Court held?

**4. Broad reading and narrow reading:** After *Humphrey's Executor* was decided, it was not clear how broadly the Court's decision should be applied. Is the Court holding that Congress can limit the President's power to remove Commissioners because they are in an independent agency (broad formalist reading of the decision), because they are authorized to make particular types of decisions (narrower functionalist reading of the decision), or because they are in an independent agency and are authorized to make particular types of decisions?

**5. Rationale:** Why does the Court conclude that Congress can limit the President's power to remove the Commissioners of the Federal Trade Commission?

Most commentators and courts interpreted *Humphrey's Executor* to indicate that Congress could limit the President's power to remove an agency officer (i.e. limiting the President to removal for cause) as long as the officer was in an ***independent agency*** and was authorized to exercise ***quasi-legislative or quasi-judicial powers***. In fact, in *Weiner v. United States*, 357 U.S. 349 (1958), the Supreme Court held that the President could only remove the Commissioner of the War Claims Commission, an independent agency official who exercised quasi-judicial powers, *for cause* even though the statute creating the Commission did not include a limit on the President's removal power.[19]

**VIDEO LECTURE**

**Click here for a video lecture on *Humphrey's Executor v. United States* by Professor Stephen Johnson.**

In 1988, in *Morrison v. Olson*, 487 U.S. 654 (1988), the Supreme Court turned its focus back to Congressional limits on the President's power to remove ***executive officers***, the question it originally addressed in *Myers.* The officer in *Morrison*, however, was an "inferior officer," rather than a principal officer.[20] In *Morrison,* the Court reviewed the constitutionality of the independent counsel provisions of the Ethics in Government Act.[21] The statute authorized the Attorney General to appoint an "independent counsel" in specific circumstances and granted the independent counsel the full investigative and prosecutorial powers of the Justice Department.[22] The statute limited the Attorney General's authority to remove an independent counsel, however, to circumstances where there was "good cause, physical disability, mental incapacity, or any other condition that substantially impair[ed] the performance of such independent counsel's duties."[23]

In reviewing the constitutionality of the limits, the Court suggested that the question of whether Congress can limit the President's power to remove an officer should not turn solely on whether the officer is an executive officer or on the nature of functions carried out by the officer, but on "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."[24] The Court indicated

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19 The statute did not include *any* provision that addressed the removal of Commissioners.
20 487 U.S. at 671.
21 28 U.S.C. §§ 49, 591 *et seq.*
22 487 U.S. at 661-62.
23 *Id.* at 663.
24 *Id.* at 691.

that because the independent counsel had "limited jurisdiction and tenure and lack[ed] policymaking or significant administrative authority," it "[did] not see how the President's need to control the exercise of [the prosecutor's] discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President."[25] The Court further wrote that the good cause removal provision did not "impermissibly burden the President's power to control or supervise the independent counsel, as an executive official, in the exercise of his or her duties under the act."[26]

While the Court upheld the limits on the President's power to remove independent agency officers and inferior executive officers in *Humphrey's Executor, Weiner,* and *Morrison*, the Court rejected Congressional limits on the President's removal power over agency officers in two cases decided after *Morrison.*

First, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), the Court reviewed the constitutionality of removal limits in the Sarbanes-Oxley Act of 2002. In that statute, Congress created a Public Company Oversight Board to regulate the accounting industry, and the Board exercised broad executive powers.[27] The statute authorized the Securities and Exchange Commission (SEC) to oversee members of the Board and to remove them "only for good cause."[28] Pursuant to other statutory limits, members of the SEC can be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office."[29] Consequently, the Sarbanes-Oxley Act created a situation where Congress had limited the President's ability to remove principal officers who were in turn limited in removing inferior officers who were exercising broad executive powers.

Although the Court previously separately upheld "good cause" limits on the President's power to remove principal officers (in *Humphrey's Executor*) and upheld "good cause" limits on the power of principal executive officers to remove "inferior officers" (in *Morrison*), the *Free Enterprise* Court held that the multilevel protection from removal established by the Sarbanes-Oxley Act was "contrary to Article II's vesting of the executive power in the President."[30] The Court held that the "President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them. … [T]he President cannot remove an officer who enjoys more than one level of good cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly. That judgment is instead committed to another officer,

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25 *Id.* at 691-92.
26 *Id.* at 692.
27 561 U.S. at 484-85.
28 *Id.* at 486.
29 *Id.* at 487.
30 *Id.* at 484.

who may or may not agree with the President's determination, and whom the President cannot remove simply because the officer disagrees with him."[31]

Ten years after the Court decided *Free Enterprise*, in *Selia Law LLC v. Consumer Financial Protection Bureau*, 140 S.Ct. 2183 (2020), the Court reviewed the constitutionality of Congressional limits on the President's power to remove the Director of the Consumer Financial Protection Bureau (CFPB), "an independent regulatory agency tasked with ensuring that consumer debt products are safe and transparent." As the Court noted, the Director "wield[ed] vast rulemaking, enforcement and adjudicatory authority over a significant portion of the U.S. economy."[32] However, the statute creating the CFPB provided that the President could only remove the Director for "inefficiency, neglect, or malfeasance."[33]

While the *Humphrey's Executor* Court held that Congress could limit the President's power to remove Commissioners of the FTC because it was an independent agency and the Commissioners were exercising quasi-judicial and quasi-legislative authority, the Court did not rely on *Humphrey's Executor* to uphold the limits on the President's power to remove the CFPB Director (even though the CFPB was an independent agency exercising legislative and adjudicative authority). Instead, the Court instructed that the President has broad power to remove agency officers because Article II vests executive power in the President and charges the President to "take Care that the Laws be faithfully executed."[34] The Court explained that it had "recognized only two exceptions to the President's unrestricted removal power," in *Humphrey's Executor* and *Morrison,* and the case at bar was distinguishable from both.[35]

Significantly, the Court characterized *Humphrey's Executor* as a case where it held that "Congress could create expert agencies led by a group of principal officers removable by the President only for good cause."[36] The *Selia* Court reasoned that the CFPB was not an expert agency led by a group of principal officers, but led by a single Director, so the case was not controlled by *Humphrey's Executor.* Since the case was not controlled by *Humphrey's Executor*, the Court suggested that it could only uphold the Congressional limits on the President's authority in the case if it created another exception to the President's broad removal authority, which it was not willing to do. The *Selia* Court wrote:

> "We are now asked to extend [*Humphrey's Executor* and *Morrison*] to a new configuration: an independent agency that wields significant executive power and is run by a single individual who cannot be removed by the President unless certain statutory criteria are met. We decline to take that step. While we need not and do not revisit our prior decisions allowing certain limits on the President's removal

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31 *Id.*
32 140 S.Ct. at 2191.
33 *Id.* at 2193.
34 *Id.* at 2197.
35 *Id.* at 2192.
36 *Id.*

> power, there are compelling reasons not to extend those precedents to the novel context of an independent agency led by a single Director. Such an agency lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control."[37]

In summary, when the President has broad authority to remove officers in agencies, that is a significant means of controlling the agencies, even if the President does not exercise that authority to remove the officers. There are, however, in some cases, political costs for the President associated with removing agency officers, which may prevent the President from pursuing what is, ultimately, a draconian option.

## Problem 1-2

A.

Assume that Congress recently enacted the **Department of Environmental Protection Act**, which includes the following provisions:

**Section 1. Establishment of the Environmental Protection Agency as an Executive Department**

The Environmental Protection Agency is hereby redesignated as the Department of Environmental Protection and shall be an executive department in the executive branch of the Government. The Department shall be administered under the supervision and direction of a Secretary of the Environment.

**Section 2. Appointment and Removal**

The President may appoint a Secretary of the Department with the advice and consent of the Senate, and the President may remove the Secretary for good cause.

Is the statute constitutional? Why or why not?

B.

Assume that Congress recently enacted **The Federal Health Care Cost Control Act** described in Problem 1-1, creating the Federal Health Care Costs Commission (Section 1) and providing the Commission with the authority, by rule or order, to set maximum prices for healthcare products and services that are generally fair and equitable (Section 2).

In addition, assume that the statute includes Section 3, which provides, "In cases of extreme hardship, the Commission may waive the maximum price limitations for an individual provider." Finally, Section 4 provides "The President shall appoint Commissioners of the FHCCC with the advice and consent of the Senate, and the President may remove a Commissioner only for good cause." Is this statute constitutional? Why or why not?

Would your answer be different if the removal language in Section 4 provided that "the President, with the advice and consent of the Senate, may remove a Commissioner only for good cause"?

## B. Control Over Appropriations, Legislative Changes, and Litigation

The President has many tools to control agencies' interpretation and administration of statutes other than the appointment and removal powers. For instance, while Congress is a primary player in the ***appropriations process***, the President also plays an important role in initiating the process. The Budget and Accounting Act of 1921 established the framework for the development, by the President, of a consolidated federal budget proposal that must be submitted to Congress each year. The Office of Management and Budget (OMB) in the White House coordinates the development of the budget proposal.[38] ***Executive agencies*** submit annual budget proposals to OMB, which reviews the proposals and determines the level of funding and funding priorities for each agency to be included in the President's budget proposal.[39] The President is required to submit a proposal to Congress no later than the first Monday of February each year.[40] However, the proposal is not binding on Congress and merely provides recommendations from the Executive Branch.[41] Congress ultimately enacts annual appropriations legislation, which is sent to the President for signature.[42] After the appropriations legislation is enacted, OMB plays a continuing role in the expenditure of the appropriated funds, as agencies must submit apportionment requests to OMB to obtain the funds, or a portion of the funds that OMB determines should be apportioned to the agencies.[43] Thus, for agencies that do not implement the President's policies or programs, the President can recommend budget cuts at the beginning of the budgeting process and can withhold funds after Congress enacts appropriations legislation. The power of the purse, therefore, is an

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[38] *See* White House, *Office of Management and Budget*, *accessible at:* https://www.whitehouse.gov/omb/ (last visited March 13, 2023).

[39] *See* Congressional Research Service, *The Executive Budget Process: An Overview,* Report for Congress, R42633, 2-3 (July 27, 2012), *accessible at:* https://crsreports.congress.gov/product/pdf/R/R42633 (last visited March 13, 2023).

[40] *See* 31 U.S.C. §1105. President Biden's Budget proposal for Fiscal Year 2024 can be found at: https://www.whitehouse.gov/wp-content/uploads/2023/03/budget_fy2024.pdf

[41] *See The Executive Budget Process, supra* note 39, Summary.

[42] For a brief overview of the Federal Budgeting and Appropriations Process, *see* National Science Foundation, *The Federal Budgeting and Appropriations Process (Accessible), available at:* https://www.nsf.gov/about/congress/federal_budgeting_accessible.jsp (last visited March 13, 2023). The President does not have the authority to veto individual items in appropriations legislation, so the President must sign the legislation or veto the entire legislation. Although Congress attempted, in the Line Item Veto Act of 1996, to provide the President with the ability to veto individual items in a budget, the Supreme Court struck down the legislation as unconstitutional. *See Clinton v. City of New York*, 524 U.S. 417 (1998). While the Supreme Court struck down the line item veto at the federal level, governors in several States have the authority to veto individual budget items.

[43] *See The Executive Budget Process, supra* note 39, at 6-7.

important tool that the President can use to influence agencies' interpretation and administration of statutes.[44]

The President, through OMB, also exerts control over the ***legislative agenda*** of ***executive agencies***. Proposals to amend statutes to provide agencies with more power, eliminate programs or responsibilities, or clarify the jurisdiction of agencies or the meaning of provisions in statutes must be reviewed by OMB and presented to Congress through that office. Although agencies provide advice to members of Congress in the drafting of legislation, as discussed more fully in the next chapter of this book, the President has established procedures to supervise and coordinate their legislative activities. OMB Circular A-19 requires agencies to (1) submit their annual legislative program to OMB for coordination and clearance; (2) submit "proposed legislation" (which includes proposals for or endorsements of proposed legislation) to OMB for preclearance; and (3) submit "reports" on proposed legislation to OMB for preclearance. "Reports" include "any written expression of official views prepared by an agency on a pending bill for (1) transmittal to any committee, member, officer or employee of Congress, or staff of any committee or member, or (2) presentation as testimony before a congressional committee."[45] Consequently, agencies will have a difficult time pursuing legislation that does not align with the President's views.[46]

The President can also influence the positions that ***executive agencies*** take in ***litigation*** and the manner and extent to which they enforce statutes in court. While several ***independent agencies*** can represent themselves in court[47], most executive agencies must rely on the Department of Justice to bring actions and defend actions on their behalf in court.[48] If a President decides that agencies should not enforce particular statutes or provisions of statutes in court or should not interpret statutes in a particular manner when agencies are defending their actions in court, the President's word is final, as long as the Attorney General follows the directives of the President. Although there has been little empirical investigation of the topic, many scholars argue that the President's control over executive agencies' litigation positions and priorities influences their interpretation and administration of statutes.[49]

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44 *See* Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 Yale L. J. 2182 (2016).

45 *See* OMB Circular A-19, §5e.

46 *See* Meena Bose & Andrew Rudalevige, EXECUTIVE POLICYMAKING:THE ROLE OF OMB IN THE PRESIDENCY (Brookings Inst. Press 2020), *accessible at:* https://www.jstor.org/stable/10.7864/j.ctvktrvm6 (last visited March 13, 2023).

47 *See* C. Joseph Ross Daval, *Litigating Authority for the FDA*, 100 Wash. U. L. Rev. 175, 178 (2022).

48 *See* 28 U.S.C. §§ 516, 519; 5 U.S.C. §3106.

49 *See, e.g.,* Daval, *supra* note 46, at 180; Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 Admin. L. Rev. 1345, 1360 (2000).

## C. Executive Orders

The President can convey their views on policies and the interpretation and administration of statutes to agencies in many ways, both informal and formal. One of the more visible ways that the President conveys their views to agencies is through Executive Orders. Executive Orders are directives from the President to agencies, indicating the manner in which agencies should exercise the discretion delegated to them in interpreting and administering statutes.[50] There are few procedural requirements for issuing *or repealing* Executive Orders, other than publication in the Federal Register.[51]

President George Washington issued the first Executive Order in 1789 and every President since has issued Executive Orders.[52] While the Constitution does not explicitly address Executive Orders, the President's power to issue Executive Orders derives from the Article II executive authority and the power to "take care" that the laws be faithfully executed.[53]

Presidents have issued Executive Orders that address issues that range from the mundane, such as the creation of advisory boards within agencies, to very controversial issues, including the creation of internment camps during World War II, the suspension of habeas corpus during the Civil War, and the integration of the armed forces in the middle of the twentieth century.[54] There are, however, important limits on the President's authority when issuing Executive Orders. First, the President cannot make law by issuing an Executive Order.[55] The President can merely direct agencies, where they have discretion to interpret statutes, to exercise that discretion in a manner consistent with the President's policy preferences. The orders only apply to the extent permitted by law.

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50 *See* Congressional Research Service, *Executive Orders: Issuance, Modification, and Revocation,* Report for Congress, RS20846, 1 (Apr. 16, 2014), *accessible at:* https://sgp.fas.org/crs/misc/RS20846.pdf (last accessed March 13, 2023). While many Executive Orders are directed to some independent agencies as well as Executive agencies, the President has fewer controls over independent agencies, as noted above.

51 *Id.* at 2. Saturday Night Live, the television sketch comedy show, produced an amusing parody of the difference between laws and Executive Orders, which is available at: https://www.youtube.com/watch?v=JUDSeb2zHQ0 (last visited March 13, 2023).

52 *See, Executive Orders: Issuance, Modification, and Revocation, supra* note 50, at 2. The American Presidency Project has compiled a list of the number of Executive Orders issued by each President. *See* American Presidency Project, *Executive Orders, accessible at:* https://www.presidency.ucsb.edu/statistics/data/executive-orders (last visited March 13, 2023). While most Presidents issue a few dozen orders each year, President Franklin D. Roosevelt issued more than 300 per year. *Id.* Executive Orders issued since 1994 are searchable on the Federal Register's webpage, *see* Federal Register, *Executive Orders, accessible at:* https://www.federalregister.gov/presidential-documents/executive-orders (last visited March 13, 2023).

53 *See, Executive Orders: Issuance, Modification, and Revocation, supra* note 50, at 2. The President's authority may also derive from statutes. *Id.*

54 *Id.* at 2-3.

55 *Id.* at 1. *See also Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952).

Second, Executive Orders do not directly create any rights or duties for private parties and are generally not subject to direct judicial challenge by private parties.[56] However, agencies' actions to *implement* Executive Orders are frequently reviewable.

For decades, Presidents have used Executive Orders to centralize review of the regulations adopted by executive agencies and to shape the way agencies consider the costs of the regulations. The centralized review process was initially implemented by President Reagan in 1980, through Executive Order 12291[57], but President Clinton replaced that order with Executive Order 12866, which still governs regulatory development by ***executive agencies***.[58] Executive Order 12866 assigns OMB a gatekeeping role in the development of agency regulations. The order establishes a series of principles that apply to all agency regulation, encouraging agencies to explore alternatives to regulation, base regulatory decisions on scientific, technical, and economic data, involve state, local and tribal officials, and the public in development of regulations, avoid duplicative regulation, consider the costs and benefits of regulation, and write regulations in plain language.[59] More importantly, though, for "significant regulatory actions,"[60] the order requires agencies to prepare an assessment of the costs and benefits of the regulation and to submit the assessment to OMB when OMB reviews the agency's rule before it is published as a proposed or final rule.[61] Pursuant to the order,

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[56] Today, most Executive Orders today include the following boilerplate language: "This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person." *See, e.g.* Executive Order 14008, *Executive Order on Tackling the Climate Crisis at Home and Abroad,* §301(c) (Jan. 27, 2021), *accessible at*: https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/ (last visited March 13, 2023).

[57] Less formal white House review of agency regulations began shortly after public interest agencies, like the EPA, were created in the 1970s. *See* Jim Tozzi, *OIRA'S Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding,* 63 Admin. L. Rev. 37 (2011).

[58] The Executive Order exempts independent agencies from much of its coverage. *See* Executive Order 12866, *Regulatory Planning and Review,* §3(b) (Sept. 30, 1993) (defining "agency" for purposes of the Executive Order), *accessible at:* https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf (last visited March 13, 2023).

[59] *Id.* §1(b).

[60] The order defines a "significant regulatory action" as a regulatory action that is likely to result in a rule that may "(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order." *Id.* §3(f).

[61] *Id.* §6(a)(3)(B).

agencies should not adopt rules unless they determine "that the benefits … justify the costs."[62] If OMB concludes that an agency's rule does not comply with the requirements of the Executive Order, the agency cannot publish the rule until it changes the rule or resolves its disagreement over the rule with the White House.[63]

Executive Order 12866 also imposes important planning responsibilities on agencies, including independent agencies. Pursuant to the order, agencies must prepare a "unified regulatory agenda" that identifies all of the regulations under development or review by the agencies.[64] The agenda must also include a "regulatory plan" that outlines "the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter."[65]

While Executive Order 12866 is the most significant order used by the President to centralize review of agency regulations, Presidents have issued several other important Executive Orders that require agencies to consider various factors when adopting rules,

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62 *Id.* §1(b)(6).

63 *Id.* §§6(b); 7; & 8. Supporters of the regulatory review process established by Executive Order 12866 argue that it improves the legitimacy of agency rules because the process increases the involvement of the President, who is accountable to the people as an elected official. *See* Lisa Schultz Bressman, Edward L. Rubin & Kevin M. Stack, *The Regulatory State 3d ed.* 710 (Wolters Kluwer 2020). They also argue that the process improves the efficacy and efficiency of agency rulemaking, since OIRA can ensure consistency in rulemaking and avoid conflicts and redundancies in rulemaking. *Id.* at 711. Critics, on the other hand, argue that OIRA focuses more on costs than benefits in conducting cost-benefit analyses, so it undervalues the benefit of regulations. *Id.* They also complain that (1) OIRA doesn't have the resources to adequately review rules in a timely manner; (2) OIRA is involved too late in the process; and (3) the OIRA review process provides regulated entities an opportunity to exert undue influence over agency decision-making in a non-transparent manner. *Id.* One of the strongest defenses of aggressive OIRA review of agency regulations was penned by now Justice Elena Kagan, who argued that strong presidential control over regulatory agencies and decision-making promoted democratic accountability. *See* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2001). For opposing views on the benefits of the OIRA review process, compare Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 26 Harv. L. Rev. 1838 (2013) (defending the process) with Sidney A. Shapiro, *Does OIRA Improve the Rulemaking Process? Cass Sunstein's Incomplete Defense*, 39 ABA Admin. & Reg. L. News 1, 6-8 (Fall 2013) (expressing skepticism about Sunstein's defense).

64 Executive Order 12866, §4(b).

65 *Id.* §4(c). The plan must include a summary of alternatives to the proposed actions and estimates of anticipated costs and benefits; a statement of the need for each action; and the agency's schedule for action; among other information. *Id.* The Office of Information and Regulatory Affairs within OMB carries out OMB's regulatory oversight and provides access to agencies' unified agendas and regulatory plans through its "Reginfo" web platform. *See* OIRA, *Unified Agenda of Regulatory and Deregulatory Actions, accessible at:* https://www.reginfo.gov/public/do/eAgendaMain (last visited March 13, 2023). Users can also search the OIRA database for information regarding the status of OMB reviews of agencies' regulations at: https://www.reginfo.gov/public/jsp/EO/eoDashboard.myjsp (last visited March 13, 2023).

including Executive Order 13132[66], designed to advance principles of federalism; Executive Order 12630[67], designed to prevent "takings" of private property; and Executive Order 12898[68], designed to advance environmental justice.

**CALI SECTION QUIZ**

Before moving on to the next section, why not try a short quiz on the material you just read at www.cali.org/lesson/19749. It should take about 10 minutes to complete.

66 *See* Executive Order 13132, *Federalism* (Aug. 4, 1999).

67 *See* Executive Order 12630, *Governmental Actions And Interference With Constitutionally Protected Property Rights* (Mar. 15, 1988).

68 *See* Executive Order 12898, *Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations* (Feb. 11, 1994).

# Chapter 2:
## The Legislative Process


Brookfield Sausage – Public Domain

### I. How a Bill Becomes a Law

Any exploration of statutory interpretation must begin with an exploration of the way in which a bill becomes a law. Although most judges focus primarily on the text of statutes to ascertain meaning, some judges examine other sources to determine the purpose or intent of the enacting legislature, or to identify the bargains with interest groups that motivated the legislature to adopt the language it did. Judges willing to look for clues to statutory meaning may find them in the legislative history for the statute, reviewing statements made or documents produced at various points in the lawmaking process, as well as amendments to the statute that were offered or rejected at various points in the process. When one understands how the legislative process works, one can better understand why statements were made, documents were produced, or amendments were offered or rejected during the process, and one can decide how much weight courts should accord those actions in interpreting the statute. Even if a judge is not willing to consider legislative history when interpreting a statute, they may be willing to examine the

structure of the statute, the use of language in other parts of the statute, or other statutes to interpret the statute. Once again, though, when one understands the sequence of procedural events that led the legislature to include particular language in a statute, one can better understand whether the shorthand rules that apply to interpreting statutes based on their structure make sense when interpreting that language. In short, therefore, regardless of one's philosophical approach to interpreting statutes, by understanding HOW laws are made, one can better understand WHY statutes include the language that is ultimately included and why the language may be ambiguous.

Accordingly, the first section of this chapter focuses on the process Congress uses to enact legislation. The chapter focuses on ***federal*** legislation, but most states follow processes that are similar in many respects to the federal process (although Nebraska has a unicameral legislature). A significant portion of this first section focuses on the traditional approach to federal lawmaking that many readers may remember portrayed in the Schoolhouse Rock Classic, *I'm Just a Bill*, which you can watch here if you're nostalgic. However, increasingly, Congress is bypassing that traditional process and enacting laws through "unorthodox" approaches, which will be described at the end of this section.

## A. Constitutional Limits

***Bicameralism*** – Art. I, § 1; § 7, cl.2

***Presentment*** - Art. I, § 7, cls. 2, 3

At the outset, it is important to note that there are some basic constitutional limits on Congressional law-making. Most significantly, a bill cannot become a law unless a bill containing the same language is adopted by the House of Representatives and the Senate. This is the ***bicameralism*** requirement of Article I. In addition, the ***presentment*** clauses of the Constitution require that legislation must be presented to the President before it can become law. As will be noted later in this section, legislation can become a law without the President's signature in some cases, BUT it must be ***presented*** to the President for signature to satisfy the constitutional presentment requirement. Finally, the Constitution limits Congress' law-making authority by specifically ***enumerating*** Congress' powers. Congress may only enact laws within its enumerated powers. The Internal Revenue Code, for example, is enacted pursuant to Congress' Article I, section 8 power "to lay and collect taxes," while most federal environmental laws, like the Clean Water Act, are enacted pursuant to Congress' enumerated power "to regulate commerce."

While the Constitution imposes those limits on Congressional lawmaking, Article I, § 5 grants the House and Senate authority to establish their own rules of procedure for enacting laws. As a result, there are some important differences in the legislative procedures used in the House and the Senate. The differences, in part, reflect the differences between the two chambers of Congress. The House of Representatives is much larger than the Senate and was established to be "uniquely responsive to the will

of the people,"[69] whereas the Senate was established as a check on the House, to protect the rights of small states and political minorities.[70] James Madison argued that the Senate was an important safeguard against the "fickleness and passion" that influence the public and members of the House and George Washington is reputed to have called the Senate the "saucer" to "cool" House legislation, just as a saucer was used to cool hot tea during the era.[71] Consequently, you will notice that the Senate has adopted several procedural tools to encourage more deliberative consideration of legislation, while the House imposes fewer roadblocks to the enactment of legislation. As a result, the House generally approves many more bills than the Senate during each Congress.[72]

Saucer – Public Domain

The following chart outlines the major differences between the structure of the House and Senate contributing to the differences in the nature of lawmaking in the two chambers.

| House of Representatives | Senate |
|---|---|
| 435 voting members[73] | 100 voting members |
| Representation for states is proportional to state population | Each state has two representatives |
| Each member represents a district that is usually only a portion of a state | Each member represents the entire state |
| Members are elected for 2 year terms | Members are elected for 6 year terms |

69 United States House of Representatives, History of the House, available at: https://www.house.gov/the-house-explained/history-of-the-house

70 United States Senate, Origins and Development, available at: https://www.senate.gov/artandhistory/history/common/briefing/Origins_Development.htm

71 United States Senate, Senate Created, available at: https://www.senate.gov/artandhistory/history/minute/Senate_Created.htm

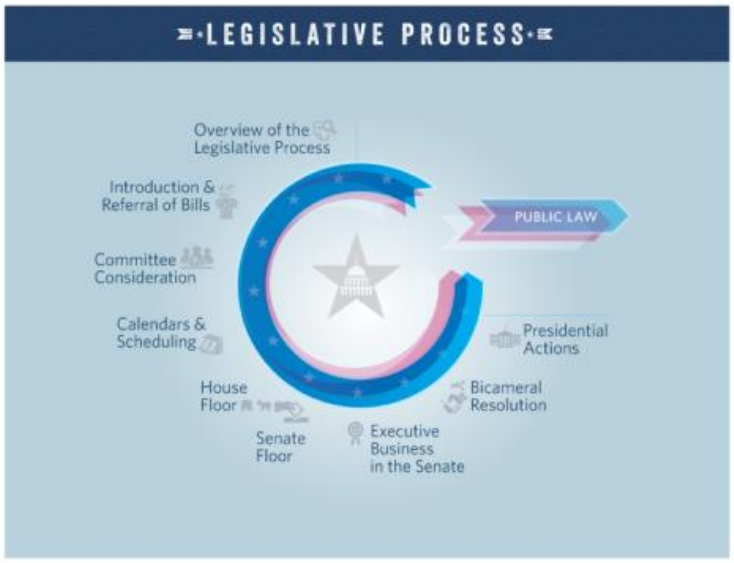
72 According to data available on Congress.gov, in the 116th Congress, the House approved 777 bills, while the Senate approved 262.

73 *See* Apportionment Act of 1911, Pub. L. 62-5, 37 Stat. 13

Since House members represent smaller, often homogenous districts and must stand for election every two years, they tend to pursue more partisan and short-term legislative agendas than Senators, who represent entire states and only stand for election every six years.

## B. The Traditional Legislative Process

### Introduction and Committee Referral




Although much legislation is adopted through "unorthodox" measures today, the traditional process begins with the introduction of a bill by one or more members of Congress. While a bill must eventually pass both chambers, it can originate in either chamber, except that revenue legislation (taxing and appropriations) must originate in the House.[74] Occasionally, companion bills are introduced in the House and Senate simultaneously. When a bill is introduced in either chamber, it is assigned a number, based on the chronological order of introduction. Bills originating in the House are assigned a number beginning with the prefix "H.R.," while bills originating in the Senate are assigned a number beginning with the prefix "S."[75] If a bill is not enacted into law during the term[76] of Congress in which it is introduced, it dies at the end of the term.

After a bill is introduced, the legislative process differs in the two chambers. The speaker of the House, with the advice of the House Parliamentarian, refers the bill to one or more standing committees having jurisdiction over the subject matter of the bill. There are twenty standing committees in the House, and it is not unusual for there to be some dispute regarding which committee or committees have jurisdiction over a bill. If the bill is referred to multiple committees, one committee is usually designated as the lead

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74 U.S. CONST., Art. I, § 7, cl. 1. Treaties and Presidential nominations are approved by the Senate alone.

75 Joint resolutions require bicameralism and presentment and are assigned numbers using the prefixes "H.J.Res." and "S.J.Res." Concurrent resolutions must be passed by both chambers, but only express the sentiments of both chambers and are not laws, so they do not require presentment to the President. They are assigned numbers using the prefixes "H.Cons.Res." and "S.Con. Res." Finally, a simple resolution is passed by only one chamber and does not have the force of law. Simple resolutions are assigned numbers using the prefixes "H.Res." and "S.Res."

76 Each term of Congress consists of two one-year "sessions".

committee, but the bill must be reported out of all assigned committees before it can ultimately be brought to the floor.

In the Senate, after a bill is assigned a number, it must be read three times before it is ultimately adopted. Normally, the bill is read once when it is initially introduced and is read a second time before being referred to a committee unless there is an objection. While legislation does not need to be referred to a committee in the Senate, most legislation is assigned by the majority leader of the Senate, with the advice of the Senate Parliamentarian, to one or more of the sixteen standing committees in the Senate having jurisdiction over the subject matter of the bill.

**Committee Consideration**

In both the House and the Senate, once a bill is assigned to a committee, the committee chair has significant discretion in determining how the bill will be managed in the committee. The committee chair is a member of the political party in the majority in the chamber in which the committee sits, and a majority of the members of each committee are members of that party.

*Senate Comm. Hearing on Drilling in ANWR (click to view)*

When a bill is assigned to a committee, the committee chair could decide to take no action on the bill and simply kill it in committee.[77] Alternatively, the committee chair could hold hearings on the bill. Committees hold hearings to gather information about the issues and potential effects of legislation, to build a record in support of the legislation (which might be relied on by other legislators or courts in some cases), or simply for political purposes. Witnesses (who may be agency officials, experts in the subject matter addressed in the legislation, representatives of potentially regulated entities, or representatives of interest groups) provide oral or written testimony at hearings and answer questions from members of the committee. The chair has significant discretion to decide whether and when to schedule hearings, what witnesses to call to testify at hearings, and what witnesses to call to provide written statements, rather than to testify.

If a committee reports the bill out of committee, the committee will usually "mark up" the bill before reporting the bill out of the committee. Committee "mark-up" is a process that

[77] Committees also generally have subcommittees focusing on a smaller category of issues within the committee's jurisdiction, and the committee chair could refer legislation to a subcommittee for review before the legislation is considered by the committee. When the bill is referred to a subcommittee, the subcommittee may take the same type of actions as are described in this section for committees. If the subcommittee approves the bill, it will report the bill back to the committee for action.

involves debating and voting on amendments to the bill. Once again, the committee chair retains discretion to determine the timing and nature of the mark-up process. Click here to watch a video of a mark-up of legislation by the House Energy and Commerce Committee. If the committee ultimately votes to approve the bill, with or without amendments, the committee will prepare a report on the bill. The report will include the text of the bill, describe its purposes, and explain the reasons for the committee's recommendations on the bill. In some cases, the report will include separate statements from the minority members of the committee. For an example of a committee report, you can click here to view the Senate Environment and Public Works Committee report on the Frank R. Lautenberg Chemical Safety for the 21st Century Act.

**Calendaring, Floor Debate, and Amendment**

Calendar – N.C.The Duke
CC BY-SA 4.0

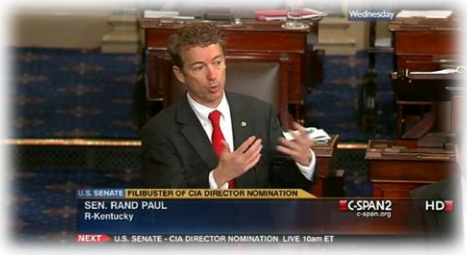
In the House, after a bill is reported out of committee, it is placed on a calendar for consideration. Calendaring a bill does not guarantee debate on the House floor, as the House leadership ultimately decides which bills will be considered and when. A bill can be brought to the House floor in one of two ways. In some cases, if 2/3 of the voting members of the House agree, a bill can be brought to the House floor under the "suspension of the rules" procedure, which limits debate to 40 minutes and does not allow members to offer amendments.

In other cases, the House Rules Committee prepares a special "rule" (a simple House resolution) establishing the process by which debate on the bill will take place on the House floor. The rule will include the text of the bill and any limits on the timing of debate and the number, type, or manner of making amendments to the bill. Click here to see an example of a rule. The rule is reported from the Rules Committee to the House and voted on by the members. If the rule is approved, the House generally resolves itself into the "Committee of the Whole House on the State of the Union" and considers the bill according to the terms of the rule. In the "Committee of the Whole House," amendments can be introduced and approved by a simple majority and the votes of individual members are not recorded. The "Committee of the Whole House," however, cannot ultimately approve legislation for the House, so, after debate and amendments are completed, the Committee rises and reports the bill to the whole House, as amended, and the House votes, by voice vote, on whether to approve the bill as reported by the Committee.[78]

Regardless of how a bill gets to the House floor, House rules require introduced amendments must be germane (on the precise subject of the legislation). There is no requirement that amendments be germane in the Senate, though. In fact, there are far fewer limits on debate or amendments in the Senate than in the House.

[78] Members can request voice votes be taken on amendments adopted by the Committee of the Whole House.

In the Senate, legislation can reach the floor in a number of ways. In some cases, the Senate majority leader can work out a "unanimous consent agreement" outlining the limits on debate and amendment of legislation that will be brought to the floor. If the Senators approve a unanimous consent agreement, the legislation is brought to the floor and considered according to the procedures outlined in the agreement. However, since a unanimous consent agreement must be unanimous, individual Senators have a lot of power to prevent legislation from moving forward through this process. When a unanimous consent agreement is being negotiated, any Senator may inform the majority leader that they object to unanimous consent, in which case they are said to have put a "hold" on the bill.



Senator Rand Paul filibustering

Legislation can be brought to the Senate floor by the majority leader without a unanimous consent agreement, but without an agreement, the normal rules of Senate debate apply. Under the normal rules, most issues considered by the Senate (including a motion to proceed on a bill, a motion to amend a bill, and a motion to approve a bill) are not subject to any limits on debate. A simple majority vote of the Senators to end debate on a bill, amendment, or other motion will not be sufficient to end debate, so Senators can "filibuster," or in effect, insist on endless debate to delay or prevent final votes on bills, amendments, or motions. In addition, as noted above, Senate rules allow members to introduce wholly unrelated amendments to a bill, which can lead to wide-ranging and unpredictable debate.

If a bill is being considered on the Senate floor under the normal Senate rules, the only way to end debate on a motion is to invoke "cloture." Senate Rule XXII provides that Senators can limit debate on a bill amendment or motion by a supermajority vote. If 3/5 of the members voting (60 senators) agree, further consideration of the bill can be limited to 30 hours, during which time amendments can be limited to a pre-approved list of germane amendments. After the 30 hours of debate, the Senate will take a final vote on the bill, and the final vote only requires a simple majority for approval.

## Reconciling Bills

Once a bill is approved by either the House or the Senate, it must be approved by the other chamber and presented to the President for signature before it can become a law. When one chamber passes a bill, it is prepared in official form (***engrossed***) and sent to the other chamber. At that point, there are a few options. First, the second chamber might pass the bill as it was sent, using the normal process for enacting legislation in that chamber. The bill will then be prepared in its final form (***enrolled***) and sent to the President for signature. If, however, the second chamber, in considering the bill, makes any changes to the bill passed by the first chamber, the second chamber will send the amended bill back to the first chamber for approval. The same options are then available to the first chamber. It can approve the amended bill that it received from the second

chamber or make amendments and send the bill back to the second chamber. The process of sending a bill back and forth between chambers is called "amendment exchange," and may continue until both chambers pass the same bill.

If the two chambers have passed separate bills and cannot reconcile them through "amendment exchange," the leaders in both chambers can agree to establish a "conference committee." Conference committees are composed of members from the House and Senate, usually chosen from members on the committees in each chamber that have jurisdiction over the legislation. The conference committee attempts to negotiate an agreement on a compromise bill that includes elements from each of the competing bills. While the committee is not supposed to alter text previously approved by both chambers in their consideration of the bills, committees frequently violate that rule in practice. If the committee can create a bill that is supported by a majority of the conferees from both chambers, the committee prepares a "conference report" for the proposed legislation.[79] The format of the conference committee report is similar to other committee reports, in that it includes the text of the proposed legislation, describes the purposes of the legislation, and explains the reasons for the committee's recommendations in the bill and the reasons for the committee's decisions to reconcile conflicting provisions. As with other committee reports, the committee report may include a minority report explaining the areas in which some members disagree with the report and the reasons for their disagreement. The conference committee report is then sent to both chambers to be approved through the normal legislative process for each chamber. If the report is approved by both chambers, the legislation will be enrolled and sent to the President for signature.

**Presentment and Presidential Action**

After the legislation passes both chambers, it is presented to the President as an enrolled bill, and the President has ten days to sign or veto the bill.[80] If the President signs the bill, it becomes a law. If the President does nothing within the ten days, the bill becomes a law without his signature. If, however, the President vetoes the bill, it is returned to the chamber where it originated.[81] If 2/3 of the members in that chamber vote to over-ride the veto, it is sent to the other chamber. If 2/3 of the members of the second chamber also vote to over-ride the veto, the bill becomes a law over the President's veto and without the President's signature.

Once a bill has been signed by the President or has been approved without the President's signature, it is sent to the Office of the Federal Register, assigned a Public

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[79] The Conference Committee report for the FAA Modernization and Reform Act of 2012 is accessible here and you can search for Committee reports on Congress.gov through this link.

[80] The President's veto power and Congress' power to over-ride the veto derive from Article I, § 7 of the Constitution.

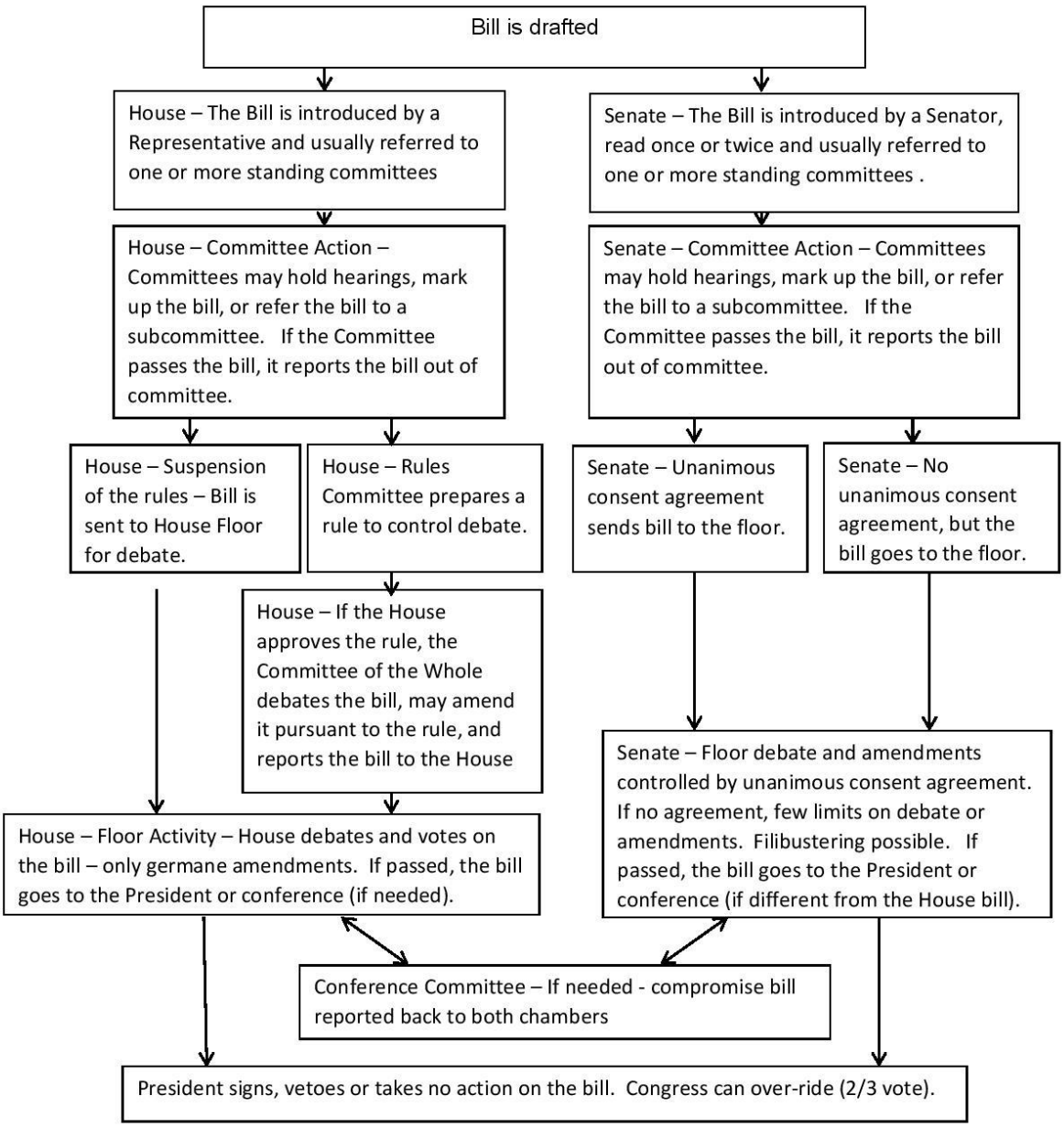
[81] The President can only veto an entire bill, not a portion of the bill. The "line item veto" was held invalid by the Supreme Court in Clinton v. New York, 524 U.S. 417 (1998).

Law number (again, based on the chronological order in which it was passed), and included in the Statutes at Large.

## *Resources*

- How Our Laws are Made (Congress.gov); Enactment of a Law (Congress.gov)
- Legislative Process Videos (Congress.gov)
- Summary of the Legislative Process provided by the House and the Senate
- Congress.gov (daily activities of Congress, including hearings and votes)
- Resources from the House of Representatives and the Senate
- Standing Rules of the House
- Standing Rules of the Senate
- Federalist Papers (Full text)
- Glossary of Legislative Terms – Congress.gov; Senate Glossary
- Search for legislation, committee reports, Cong. Record on Congress.gov
- Search for committee hearings on Gov.info; Sample Committee hearing video
- Video of Congressional hearings and proceedings – Congress.gov; CSPAN
- Video of Floor Proceedings from the House and Senate
- State Legislative Websites
- Library of Congress research guides for state legislative materials
- I'm Just a Bill – Schoolhouse Rock
- Model Statute and Rule Construction Act (National Conference of Commissioners of Uniform State Laws)

## *Flowchart of the Typical Legislative Process*



## Questions and Comments

**1. Vetogates:** Laws are very difficult to pass. From 2001 through 2021, less than 4% of all bills that were introduced in the House or Senate were enacted into law. *See* govtrack, *Statistics and Historical Comparison*. After reading the description of the traditional legislative process above, you probably understand why. The process includes numerous "vetogates," or procedural requirements that opponents of legislation can use to kill legislation. *See* McNollgast*, Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 720 (1992). How many can you identify? The existence of so many vetogates necessitates "supermajority" support to pass legislation in most cases.

**2. Persuasive voices:** If a judge is willing to look at legislative history to interpret a statute, the judge may be willing to accord more deference to statements or actions taken by certain individuals rather than others because the judge believes that the actor played a significant role in controlling the shape of the law that is being interpreted. Based on the description of the traditional legislative process outlined above, which legislators might be viewed as influential actors in shaping the legislation?

**3. The filibuster:** Perhaps the most famous example in popular culture of the endless debate associated with the filibuster is the speech given by Jimmy Stewart in *Mr. Smith Goes to Washington*. Although the Senate changed its rules in 1975 to provide that Senators could prevent votes on bills, amendments, and other motions simply by indicating their intent to filibuster, without actually having to speak continuously, Senators continue to engage in such theatrics on occasion for political purposes. Some of the more noteworthy examples of Senate filibustering over the past few decades are Senator Ted Cruz's recitation of Green Eggs and Ham and Senator Rand Paul's 13 hour filibuster on the nomination of a CIA Director.

The filibuster is a creation of the Senate and is not required by the Constitution. In fact, it was originally used in the House beginning in 1789, but the House stopped using it in 1841. The Senate limited the ability of Senators to curtail debate as early as 1806 and adopted a right of unlimited debate in 1856. In 1917, the Senate amended its rules to allow a vote of 2/3 of the Senate to end debate. After the filibuster process was used repeatedly to prevent enactment of civil rights legislation in the 1960s, the Senate modified its rules in 1975 to allow 60 Senators to defeat a filibuster. The Senate modified its rules again in 2013 to allow a simple majority of Senators to vote to end debate on most Presidential nominees, other than Supreme Court Justices. In 2017, the Senate again amended its rules to allow a simple majority of Senators to vote to end debate on Supreme Court nominations.

What goals is the filibuster supposed to advance? Does it advance those goals today? Should the filibuster be eliminated or modified in some manner? For a look at the issue as seen by late night television comedians, you might want to check out these videos by John Oliver and Trevor Noah.

**4. The Congressional Record:** The Congressional Record is the official record of the proceedings and debates of Congress and is available online at: https://www.congress.gov/congressional-record. Legislators may "revise and extend" the remarks made on the floor of the House and Senate, so the Congressional Record includes many statements that were never actually made in Congress. Those statements, however, are generally preceded in the Congressional Record by a "bullet" symbol (•).

**5. Theories of the Legislative Process**: Academics have advanced several theories to describe how the legislative process works. Conceptually, they can be divided into ***interest group (pluralist)***, ***proceduralist***, and ***institutional*** theories.[82]

Under any of the *"**interest group theories**,"* ***interest groups***[83] play an important role in the legislative process. "***Interest group liberals***" view interest groups as a positive influence on the legislative process, because they arise in every sector of our lives and can check the influence of other groups in the bargaining for legislation.[84] For interest group liberals, legislators will adopt moderate and well-considered laws because they have been presented with a range of options, understand the variety of interests of groups, and seek to find an equilibrium that balances all those competing interests.[85]

***Public choice theorists*** are less optimistic about the role of interest groups in the development of legislation. Contrary to the rosy predictions of interest group liberals, most of the interest groups that form represent small groups of citizens with narrow interests, rather than large groups of citizens with diverse interests.[86] According to public choice theory, legislators have an interest in re-election and are inclined to act in that interest. Since they understand that the interest groups are more likely than the larger diffuse public to be able to influence the outcome of their next election campaign, they advance legislation that benefits those interest groups.[87]

In contrast to the interest group theories, ***proceduralist*** theorists focus on legislation as the output of a complex set of procedures designed to encourage public deliberation about legislative proposals and to provide an opportunity for minority views to be

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82 *See* William N. Eskridge, Jr., Philip P. Frickey, & Elizabeth Garrett, LEGISLATION AND STATUTORY INTERPRETATION 67 (Foundation Press 2000).

83 James Madison defined "interest groups" as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of the citizens, or to the permanent and aggregate interests of the community." *See* The Federalist No. 10.

84 *See* Theodore Lowi, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 51 (2d ed. 1979).

85 *See* Eskridge, Frickey & Garrett, *supra* note 82, at 83. Supporters of this theory assert that interest groups counter oppressive government and provide members of the public with meaningful opportunities to participate in the legislative process. *Id.* at 83-84.

86 *See* Mancur Olson, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

87 *See* Eskridge, Frickey & Garrett, *supra* note 82, at 91-94.

meaningfully considered.[88] Proceduralists commend the system of vetogates outlined in the prior section of this chapter as tools to advance the goals of deliberation and consideration of a diversity of viewpoints.[89] While vetogates make legislating difficult, proceduralists often point out that one of the goals of the Framers of the Constitution was to reduce the amount of legislation.[90]

***Institutional theories***, like ***positive political theory***, provide a third conceptual vision of the legislative process. Under positive political theory, legislators understand that other political actors will influence the outcome of legislation, so they act in anticipation of those actors to ensure that the legislation will ultimately reflect the legislators' preferences.[91] Thus, when legislators develop legislation, they develop it in a manner that they think will win the support of the other actors involved in the legislative process (the median legislator and the President) and even the Supreme Court, which may ultimately be asked to review the law.[92]

## C. "Unorthodox" Lawmaking

Over the last half century, Congress has become increasingly polarized. According to a 2017 Quorum analysis, bipartisan legislative efforts decreased by 30% between 1989 and 2017. Similarly, a 2014 Pew Research Center report found that members of Congress voted along purely ideological lines in 93% of the roll call votes in the 113th Congress. As members of Congress have adopted increasingly partisan positions, legislative gridlock has become the norm. Between 1973 and 1992, each Congress enacted an average of 697 laws. *See* govtrack, *Statistics and Historical Comparison*. Between 2011 and 2020, however, each Congress only enacted about half as many laws (339). *Id.* It is not hard to understand why the legislative process has been grinding to a halt when a polarized Congress has, at its disposal, the arsenal of "vetogates" described in the preceding section.

Nevertheless, just as "life finds a way,"[93] Congress has found ways to enact ***some*** important legislation outside of the traditional processes. Dubbed "unorthodox lawmaking" by political scientist Barbara Sinclair[94], Congress has increasingly turned to ***appropriations legislation***, the ***reconciliation process***, and ***omnibus legislation*** as vehicles to enact major legislation, including the Affordable Care Act and major tax cuts

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88 *Id.* at 68-81.

89 *Id.* at 78-81.

90 *See* The Federalist No. 73.

91 *See* Eskridge, Frickey & Garrett, *supra* note 82, at 97-103; Daniel Rodriguez & Barry Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation,* 151 U. Pa. L. Rev. 1417 (2003); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 Geo. L. Rev. 523 (1992).

92 *See* Bressman, Rubin & Stack, supra note 63, at 59. The "median legislator" is "the legislator in the middle necessary to secure majority support for the legislation." *Id.*

93 JURASSIC PARK (Universal Pictures 1993) (Warning provided by Dr. Ian Malcom).

94 Barbara Sinclair, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (1st ed 1997).

by Presidents Trump and Bush. As will be apparent below, all those processes are ***less transparent*** and involve ***more centralized control by party leaders*** than the traditional processes. In the first year of the 112th Congress, only 7 (8%) of the 91 bills that were enacted followed the traditional legislative process, with committee consideration in both chambers.[95] Committees play a much smaller role in "unorthodox lawmaking" as major laws are not referred to committees, ***or*** are referred to several committees simultaneously, with the committee outputs being blended by the House Speaker or Senate Majority Leader into the legislation that will be enacted. Of the 91 bills enacted during the first session of the 112th Congress, 41% were not considered by committees in either chamber.[96] Conference committees are even rarer in "unorthodox lawmaking," and only three of the 91 bills in the first session of the 112th Congress were considered by a conference committee.[97]

Appropriations legislation and the reconciliation process have become significant alternatives to the traditional legislative process. Traditionally, according to House and Senate rules, appropriations bills were designed to provide funding for existing laws and were not supposed to create new substantive law.[98] Those limits are not based on the Constitution, however, and can be waived. As a result, legislators have begun to use the budget "reconciliation" process to enact major legislation outside of the traditional process. In 1974, Congress passed the Congressional Budget Act of 1974 to establish procedures for reconciling the two budget resolutions that are often considered by Congress each year.[99] Pursuant to that law, reconciliation legislation cannot be filibustered in the Senate, and legislators cannot add nongermane amendments to the legislation in either chamber.[100] Thus, the reconciliation process avoids several of the important "vetogates" of the traditional legislative process. Although the 1974 law was merely designed as a vehicle to reconcile the two budget resolutions that were being considered annually by Congress, legislators have expanded the use of the process to pass major substantive legislation. There are limits on Congress' use of the reconciliation process, as the legislation enacted through that process must be budget-related, but Congress has used the process to enact portions of the Affordable Care Act, as well as major tax cuts during the Bush and Trump Administrations, and the American Rescue Plan Act of 2021 (COVID-19 Stimulus Package).

The enactment of the Affordable Care Act also involved omnibus lawmaking, another major form of "unorthodox lawmaking." With omnibus legislation, a variety of legislative

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95 *See* Lisa Schultz Bressman and Abbe R. Gluck, *Statutory Interpretation From the inside: An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 Stan. L. Rev. 725, 762 (2014).

96 *Id.*

97 *Id.*

98 *See* James V. Saturno, *Limitations in Appropriations Measures: An Overview of Procedural Issues,* Cong. Res. Serv. No. R41634, Nov. 30, 2016, available at: https://fas.org/sgp/crs/misc/R41634.pdf

99 P.L. 93-344, 88 Stat. 297 (93d Cong., 2d Sess. 1974).

100 *Id.*

proposals, sometimes including budget proposals, are bundled together in a single legislative proposal. The proposals have often been previously introduced as separate bills and may have been considered by separate committees, in the current Congress or a prior Congress. Congressional leaders in the House and Senate combine the multiple legislative proposals, which often address very diverse subjects, into a single "omnibus" bill. That bill is then considered by the House and Senate as a whole, without referral to committees. In recent sessions of Congress, 12% of major legislation has been omnibus legislation.[101] Similarly, between 1986 and 2016, 191 of the 390 appropriations laws were enacted through omnibus legislation.[102]

## Questions and Comments

**1. What is lost?** Unorthodox lawmaking has the obvious advantage of allowing Congress to enact laws with less than a supermajority of support by avoiding many of the "vetogates" of the traditional process. But at what cost? What values are lost or compromised when Congress adopts laws using "unorthodox" lawmaking?

### Problem 2-1: Finding Legislative History for Free

**Click here for a video tutorial on how to navigate Congress.gov**

1. One can locate a lot of legislative history on federal laws for free through Congress.gov. To search for legislative history on Congress.gov, click on the "more options" dropdown in the search bar on the Congress.gov homepage. With that selection, one can easily search for legislation by bill or public law number, containing specific terms, introduced by specific members, or acted upon by specific committees. Using that tool (or any other research tool), how many laws were enacted by the 115th Congress and the 116th Congress? For the 116th Congress, (a) how many of those laws originated in the House and how many originated in the Senate; (b) which Senator sponsored the most bills that were enacted into law?; (c) how many bills considered by the Senate Environment and Public Works committee were enacted into law?; (d) what policy area was the subject of the most bills that were enacted into law; (e) how many bills were vetoed that eventually became law; and (f) which bill had the most co-sponsors? In the 100th Congress, how many bills were vetoed that eventually became law?

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101 *See* Bressman, Rubin & Stack, *supra* note 63, at 54.

102 *See* James V. Saturno & Jessica Tollestrup, *Omnibus Appropriations Act: Overview of Recent Practices,* Cong. Res. Serv. Rep. No. RL32473, January 14, 2016, available at: https://fas.org/sgp/crs/misc/RL32473.pdf

## Problem 2-1 (continued)

2. From Congress.gov, one can also find detailed information about the legislative process for all bills introduced in each Congress (at least going back to the 93d Congress, before which the history is not as comprehensive), regardless of whether they are ultimately enacted into law. How many bills and resolutions were introduced in the 116th Congress? How many of those addressed environmental protection? How many of the environmental protection bills did ***not*** become law? How many of those environmental protection bills that didn't become law passed at least one chamber? How many bills and resolutions were introduced in the 96th Congress? How many of those addressed environmental protection?

3. Now, let's take a look at a law that was enacted to see how Congress.gov can provide detailed history regarding the legislative process. In 1980, Congress passed the Superfund law, also known as the "Comprehensive Environmental Response, Compensation and Liability Act of 1980." What is the Public Law Number for that law, in which chamber was the legislation originally introduced, and who was the sponsor of the bill? Were there any co-sponsors? When the bill was introduced in the House, was it referred to any committees and were the referrals simultaneous or consecutive? Did the House committee(s) amend the legislation before reporting it out? When the bill came to the House floor the first time, was it brought to the floor pursuant to a rule or under suspension of the rules? Was the bill amended on the House floor? After the bill passed the House, it was sent to the Senate. Was it referred to any committees in the Senate? Did it come to the Senate floor with or without unanimous consent? From the legislative history, you'll note the Senate ultimately passed the House bill, even though the Senate had been considering a similar bill, S. 1480, which was introduced in the Senate almost a year earlier than the House bill. The Senate ultimately passed the House bill with amendments, though, so the bills had to be reconciled. Did the House pass the bill as amended by the Senate, or was the bill sent to a conference committee? How many Representatives voted in favor of the bill as amended by the Senate that was returned to the House?

4. The 242-page American Rescue Plan Act of 2021 (COVID legislation) is an example of the more recent "unorthodox" lawmaking. In which chamber did the bill originate and was it assigned to any committees in that chamber? How much time did the House allow for debate on the legislation? Was the bill referred to any committee in the Senate? Was the bill brought to the Senate floor with unanimous consent? Why was there no filibustering of the bill in the Senate? How many amendments were proposed to the bill on the Senate floor and how many passed the Senate? Take a look at the cost estimates prepared for the bill by the Congressional Budget Office as passed by the Senate on March 6, 2021. How much of an increase in the budget did the CBO estimate the legislation would have between 2021 and 2030?

## Problem 2-1 (continued)

5. You can also search for Congressional Committee reports on Congress.gov (beginning with the 104th Congress). The Safe Drinking Water Act was amended in 1996 by Public Law Number 104-182. You'll notice this legislation was adopted through fairly traditional processes and was reviewed by the Senate Environment and Public Works Committee. When the Senate sent the legislation to the House, the House amended it to adopt a different bill previously considered through the House Commerce Committee, so the Senate's version was not sent to a House committee. Since the House and Senate adopted significantly different bills, the chambers decided to appoint a conference committee to reconcile the two bills. You will note that both the Senate Environment Committee and the Conference Committee prepared reports for the legislation. What are the report numbers for each report? According to the Senate committee report, what event motivated Congress to propose the legislation? According to the report, did the Senate committee hold any hearings on the legislation? How many Senators on the Committee voted in favor of the report from the Committee? The conference committee report notes that the House and Senate bills took different approaches regarding "maximum contaminant level goals" for carcinogens. Did the conferees ultimately adopt the House or Senate approach in the compromise legislation?

6. You can also search the Congressional Record by date or individual legislators to find remarks related to consideration of legislation. If, for instance, you want to read remarks related to the consideration of the Safe Drinking Water Act Amendments on the Senate floor on November 29, 1996, access that day's issue. After the bill was read, which Senator made remarks? (Hint: His remarks begin on page S17734.) Debate on the bill passed by the Senate (see above) began in the House on July 17, 1996. Immediately after the bill was read and after Representative Bliley moved to amend the bill by substituting the House version of the law, Representative Stupak rose to raise concerns about the legislation. What was the nature of his concerns?

7. Web pages for Congressional committees are also a valuable source of free legislative history. You can access them from govinfo. (Note that govinfo is not linking to the official committee web pages, and many committees have their own web pages with more or similar information.) Through the govinfo interface, in addition to bills and reports from the committee, you can access information relating to hearings, committee prints, and other documents. For instance, from govinfo, you can discover that the Senate Committee on Environment and Public Works held a hearing on February 21, 2021 (117th Congress) addressing "Investing in Transportation …" Who were the witnesses at that hearing? According to Senator Carper's opening remarks, how much money has Congress put into emergency funds over the 10 years prior to the hearing to supplement the Highway Trust Fund to address our aging infrastructure needs? Although you cannot access the video for that hearing from govinfo, archived video for many of the hearings is available through CSPAN or on committees' webpages. For instance, the video for the Senate Environment Committee's February 21 hearing is archived on its website. (Note – The permalink for that hearing is also accessible here.)

# II. The Legislative Drafting Process

The preceding sections focused on how a bill becomes a law under the traditional legislative process and "unorthodox" processes. But how does a bill become a bill? Who drafts legislation? Although legislation can only be introduced in Congress by members of Congress, Senators and Representatives rarely write any legislation on their own and most members of Congress read very little of the actual statutory text in the legislation on which they vote. There are four general categories of legislative drafters, including (1) ***individual members of Congress***; (2) ***Congressional committees***; (3) ***the Executive Branch*** (usually administrative agencies); and (4) ***interest groups***.

**Individual Members**

Senators or Representatives may author proposed legislation individually or with one or more other members of Congress. In those circumstances, though, the legislators generally rely on either (1) their personal staff or (2) staff from the Congressional Offices of Legislative Counsel to draft the actual legislative text. On their personal staff, members of Congress employ ***legislative staff*** and ***communications staff***. Communications staff do ***not*** generally draft any legislation and focus primarily with assisting the member on serving their constituents and getting re-elected. Legislative staff, on the other hand, focus primarily on policy development and are involved in drafting legislation for the member, if the legislation will be drafted by anyone on the member's staff. While legislative staffers focus primarily on policy development, they cannot ignore the member's re-election and constituent service goals when drafting legislation for the member. The amount of expertise that a legislative staffer has on a particular issue will often depend on the size of the member's legislative staff. If the member has a small legislative staff, each staff member will need to focus on a broader range of policy matters.

As noted above, members of Congress do not rely solely on their own staff to draft legislation. Both the House of Representatives and the Senate have an ***Office of Legislative Counsel***. Unlike the staff of individual members, the Office of Legislative Counsel is non-partisan and works with members of both parties and with Congressional committees to draft legislation or to edit or review legislation. According to a survey of legislative drafters conducted by Professors Lisa Bressman and Abbe Gluck, most of the drafting of statutory text is done by the Offices of Legislative Counsel, rather than by legislative staff of individual members.[103]

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[103] *See Bressman & Gluck, supra* note 95, at 740. Legislative bodies have even begun to use artificial intelligence tools to assist with the legislative drafting. *See* Mohar Chatterjee, *Machines That Draft Law: They're Heeeere,* Politico, Dec. 14, 2023, *accessible at:* https://www.politico.com/newsletters/digital-future-daily/2023/02/14/machines-that-draft-laws-theyre-heeeere-00082858 (last visited June 13, 2023).

## Congressional Committees

A second category of legislative drafters is Congressional committees. Once again, it is generally not the legislators who sit on the committees doing the drafting. Instead, legislation drafted by committees is frequently drafted by ***legislative staff*** for the committee. Legislative staff are hired by the Committee chair and the ranking members of the committee, so they work, in essence, for the chair and ranking members. Compared to the legislative staff of individual members, the legislative staff of committees have a much narrower policy focus and generally have much deeper expertise in the policy area. Unlike legislative staff for individual members, they do not have any incentive to draft legislation that will advance the re-election prospects for individual members or the interests of specific states or geographic districts. In addition to their own legislative staff, committees also frequently rely on the House and Senate Offices of Legislative Counsel to draft, edit, or review legislation for them, just as individual members rely on those offices.

Committee drafted legislation can come in a variety of forms, as illustrated in the following table:

| | |
|---|---|
| **Partisan Committee Drafting** | Committee staff from one party draft legislation to be supported by that party. |
| **Bipartisan Committee Drafting** | Committee staff from both parties draft legislation to be supported by both parties. |
| **Bipartisan Bicameral Drafting** | Committee staff from both parties in both chambers draft legislation to be supported by both parties in both chambers. |
| **Multi-Committee Drafting** | Committees work together to draft legislation that will be referred to multiple committees. |

Through the survey of legislative drafters discussed above, Professors Bressman and Gluck found great diversity in the drafting processes used by different committees, as committees frequently have different drafting rules and conventions and employ different procedures for drafting.[104] Professors Bressman and Gluck also found that when committees are involved in drafting legislation, they frequently draft bills in a manner that allows the committee to maintain jurisdiction over the law after it is enacted.[105]

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104 *Id.* at 752.

105 *Id.* at 753.

### Agencies

EPA Headquarters Building – Public Domain

Administrative agencies, usually within the Executive branch (but sometimes independent agencies), are a third major category of legislative drafters. As part of a 2015 survey of agency staff engaged in rulemaking conducted for the Administrative Conference of the United States (ACUS), Professor Christopher Walker found that 78% of the agency respondents indicated that their agency "always or often" is involved in drafting statutes administered by their agency.[106] Agencies may be involved in the drafting process in several different ways, as they may (1) draft legislation on behalf of the Executive Branch (for the President); (2) draft legislation on behalf of individual members of Congress or on behalf of Congressional committees; or (3) provide informal advice (technical assistance) on legislation to members of Congress or Congressional committees. Professor Walker's 2015 survey found that agencies provide technical assistance on virtually all bills enacted directly affecting their agency.[107]

Just as members of Congress do not, in most cases, personally draft the bills they introduce, the President of the United States does not draft legislation the White House advances to Congress. Instead, agencies usually draft such legislation and send it to the White House for review before the President sends it on to Congress.[108] While agencies draft legislation for the White House, agencies also draft and review legislation for Congress. Agencies often have expertise that Congress lacks, and agencies prefer to get involved in the legislative process early to prevent Congress from moving forward with legislation that includes mistakes, conflicts with agencies' policies, or creates implementation problems for agencies. However, agencies do not have unlimited authority to work with Congress on their own.

The President has established procedures to supervise and coordinate agencies' legislative activities through the Office of Management and Budget (OMB) within the White House. OMB Circular A-19 requires agencies to (1) submit their annual legislative program to OMB for coordination and clearance; (2) submit "proposed legislation" (which includes proposals for or endorsements of proposed legislation) to OMB for preclearance; and (3) submit "reports" on proposed legislation to OMB for preclearance. "Reports" include "any written expression of official views prepared by an agency on a pending bill

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106 *See* Christopher J. Walker, *Federal Agencies in the Legislative Process: Technical Assistance in Statutory Drafting, Final Report to the Administrative Conference of the United States* 2 (Nov. 2015) (hereinafter "ACUS Report").

107 *Id.*

108 The President has the Constitutional authority to "recommend to [Congress] such measures as he shall judge necessary and expedient." U.S. CONST., art. II, § 3.

for (1) transmittal to any committee, member, officer or employee of Congress, or staff of any committee or member, or (2) presentation as testimony before a congressional committee." *See* OMB Circular A-19, § 5e. However, agencies do not need to submit legislation to OMB for clearance if they prepare it "as a drafting service for a congressional committee or a member of Congress, provided that they state in their transmittal letters that the drafting service does not constitute a commitment with respect to the position of the Administration or the agency." *Id.* § 7i.

In light of the OMB guidance, if agencies draft legislation for members of Congress or Congressional committees or provide "official" drafting or editing suggestions to Congress, the agencies must have their work pre-cleared by OMB. On the other hand, "unofficial" advice on legislation (including drafting and editing legislation) provided by agencies does not have to be pre-cleared by OMB. Consequently, agencies frequently provide "technical assistance" to members of Congress and Congressional committees throughout the legislative process without obtaining OMB clearance. In fact, most agency legislative drafting is done through these unofficial channels. OMB Circular A-19 requires agencies to advise OMB of technical assistance requests that they receive and to provide OMB with a copy of their response to any requests, *id.,* but Professor Walker's 2015 survey of agency staff found that agencies generally do not comply with those requirements and that OMB has not made any systematic effort to enforce those requirements.[109] Professor Walker's study also demonstrated that agencies provide technical assistance to members of Congress regardless of the political affiliations of the members.[110] While Congress almost always accepts agencies' technical comments, members and committees are less likely to accept agencies' policy or substantive comments.[111]

Most agencies employ their own ***legislative counsel***, charged with drafting and reviewing legislation in the same way that the House and Senate Legislative Counsel provide those services for Congress. However, agencies' legislative counsel are not the only agency staff members who provide drafting assistance to Congress or the Executive Branch. Agencies usually follow one of the following models for coordinating legislative drafting and technical assistance requests within the agency[112]:

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109 *See* Walker, *ACUS Report, supra* note 106, at 10.

110 *Id.*

111 *See* Jarrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 Geo. Wash. L. Rev. 451, 481 (2017).

112 See Walker, *ACUS Report, supra* note 27, at 28-29.

| | |
|---|---|
| **Centralized Legislative Counsel Model (predominant model)** | Legislative Counsel is the primary drafter of legislation and technical assistance responses. |
| **Decentralized Agency Experts Model** | Legislative Affairs Office is the official Congressional liaison, but technical assistance requests are addressed by bureau level policy and program experts and attorneys—Legislative Counsel plays a limited role. |
| **Centralized Legislative Affairs Office (more frequently used with independent agencies)** | Legislative Affairs Office is the official contact for technical assistance requests and provides responses to Congress for those requests—coordinating with the agency policy and program experts and attorneys, including Legislative Counsel. |

### Interest Groups

Interest groups are the final category of legislative drafters. In some cases, the Executive Branch may work with industry groups (including regulated industries) and/or public interest groups or other regulatory beneficiaries to draft legislation. In other cases, interest groups, industry representatives, academics, individual policy experts, or organizations like ACUS or the American Law Institute may draft legislation on behalf of Members of Congress or Congressional committees. Legislators may also rely on uniform laws or model laws to draft legislation. This process is ubiquitous at the state level. A 2019 USA Today investigation found that more than 10,000 bills were introduced in state legislatures in the preceding eight years that were based on uniform or model legislation prepared by special interest groups. A large percentage of those state laws were based on laws drafted by the American Legislative Exchange Council (ALEC), which describes itself as a "membership organization of state legislators dedicated to the principles of limited government, free markets and federalism."[113]

***Resources***

- Center for Public Integrity Report re: Model Laws
- Ghostwriting the Government (Harvard Political Review)
- Last Week Tonight with John Oliver – State Legislatures and ALEC

[113] *See* ALEC, *About ALEC, accessible at:* https://www.alec.org/about/

## Questions and Comments

**1. Rationales for drafting legislation:** Professor Jesse Cross has observed that members of Congress occasionally draft legislation or include text in legislation even though they do not want courts to implement the legislation or text.[114] In some cases, the audience for the legislation or text is constituents, and the legislation or text is drafted to indicate to the constituents that the member hears their concerns and supports them. "Message bills" are frequently introduced by members to make a political statement, even though they have no chance of being enacted as laws.[115] In other cases, Cross argues, the audience for legislation or text in legislation is agencies, and the language is included to direct agencies to take certain actions or implement certain policies regardless of whether courts will enforce the directives.[116] Members include the language because Congress can influence or control agency action in ways that do not require judicial enforcement.[117] Finally, in some cases, the audience for text in legislation is the nonpartisan Congressional offices like the Congressional Budget Office.[118] Members may include language in legislation, for instance, to obtain a favorable budget score from the Congressional Budget Office in its review of legislation. Professor Cross argues that, in interpreting statutes, courts should ignore (i.e. not enforce) language included by Congress to address the non-judicial audiences outlined above. Should Congress ignore such language that is enacted into law? How could such language be identified?

**2. Agency technical assistance:** As noted above, agencies routinely provide technical assistance to Members of Congress and Congressional committees regardless of the political affiliation of the requester. Why might agencies be so willing to provide technical assistance? Although Congress frequently seeks agency technical assistance on legislation, structural roadblocks within agencies have generally prevented agencies from providing technical assistance on appropriations legislation.[119] As Congress increasingly relies on appropriations legislation and the reconciliation process to enact laws, most of the benefits for Congress and agencies are lost.

**3. Drafters of unorthodox legislation:** As Congress enacts more legislation through omnibus bills and reconciliation bills, which persons or entities play a more central role in the drafting process and which persons or entities are involved less frequently in the drafting process?

**4. Drafting manuals:** When Members of Congress or Congressional Committees draft legislation, they frequently rely on drafting manuals that outline uniform rules and conventions to be used for drafting. Recognizing what those rules and conventions say

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114 *See* Jesse M. Cross, *When Courts Should Ignore Statutory Text*, 26 Geo. Mason L. Rev. 453, 457 (2018).

115 *See* Ganesh Sitaraman, *The Origins of Legislation*, 91 Notre Dame L. Rev. 79, 109 (2015).

116 See Cross, *supra* note 114, at 457-458.

117 Id.

118 Id.

119 *See* Walker, *ACUS Report, supra* note 106, at 11, 16.

can assist a court in determining why text is (1) written in a particular manner; (2) included in legislation; or (3) included in a specific location in the legislation. The Offices of Legislative Counsel for the House and for the Senate each have drafting manuals that they ask members to follow when drafting legislation. The manual for the House is available here. The Office of Legislative Counsel for the House also provides members with an "Introduction to Legislative Drafting" and a handy "Quick Guide." In addition to those drafting manuals, Congressional committees frequently implement their own style guides and rules. Committees may also take different approaches to legislative drafting. Some committees, for example, engage in "conceptual drafting," where the committee debates and amends legislation using narratives about what the text should accomplish, rather than using the actual text.[120]

Just as Congress relies on drafting manuals, many agencies have adopted legislative drafting manuals which are not always identical to Congressional drafting manuals. Thus, if a court focuses on the identity of the drafter when engaging in statutory interpretation, it would be helpful for the court to be familiar with the rules and conventions set forth in agency drafting manuals, as well as the drafting manuals of the Congressional Offices of Legislative Counsel and Congressional committees.

## III. Anatomy of a Law

Most laws have a similar structure that is most apparent when examining the law as enacted, before the law is codified. This section outlines the basic structure of a law using the Toxic Substances Control Act (TSCA) as an example. Not every law includes all of the types of provisions identified in this section, and not every law is structured in precisely the order outlined in this section. Nevertheless, most federal laws are organized in a manner roughly approximating the structure outlined in this section. The first page of TSCA, including the table of contents, is reproduced below.

[120] *See* Bressman & Gluck, *supra* note 95, at 750.

Public Law 94-469
94th Congress

# An Act

To regulate commerce and protect human health and the environment by requiring testing and necessary use restrictions on certain chemical substances, and for other purposes.

Oct. 11, 1976
[S. 3149]

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

Toxic Substances Control Act.

**SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.**

This Act may be cited as the "Toxic Substances Control Act".

15 USC 2601 note.

TABLE OF CONTENTS



**SEC. 2. FINDINGS, POLICY, AND INTENT.**

15 USC 2601.

(a) FINDINGS.—The Congress finds that—

(1) human beings and the environment are being exposed each year to a large number of chemical substances and mixtures;

(2) among the many chemical substances and mixtures which are constantly being developed and produced, there are some whose manufacture, processing, distribution in commerce, use, or disposal may present an unreasonable risk of injury to health or the environment; and

(3) the effective regulation of interstate commerce in such chemical substances and mixtures also necessitates the regulation of intrastate commerce in such chemical substances and mixtures.

(b) POLICY.—It is the policy of the United States that—

(1) adequate data should be developed with respect to the effect of chemical substances and mixtures on health and the environ-

At the broadest level, most laws have the following three components: (1) ***Introductory Material***; (2) ***The Core Provisions of the Law*** (establishing and implementing rights and duties); and (3) ***Ancillary Provisions***.

## A. Introductory Material

Most statutes include the following provisions as introductory material: (1) ***Public Law Number***; (2) ***Long Title and Enacting Clause***; (3) ***Short Title***; (4) ***Findings and Purposes***; and (5) ***Definitions***. As noted above, for federal laws, legislation is assigned a Public Law Number when enacted based on the chronological order of enactment. For TSCA, the Public Law Number is Public Law 94-469, signifying it was the 469th law enacted by the 94th Congress. If you look at the example above, you will notice that the law was enacted on October 11, 1976, and published on page 2003 of Volume 90 of the Statutes at Large (more on that in the next section of this chapter). You will also notice that the bill enacted into law was originally introduced as S.3149.

### Long Title and Enacting Clause

Immediately after the Public Law Number, legislation usually includes a long title and an enacting clause. According to the House Drafting Manual, the long title should "accurately and briefly describe what a bill does." The title gives legislators and the public general notice regarding the purpose or function of the law. In TSCA, above, the long title is the provision that begins with "An Act [t]o regulate commerce …" Immediately following the long title is the enacting clause. Technically, only material following the enacting clause is enacted into law. In TSCA, the enacting clause is the clause that begins, "Be it enacted …"

### Short Title

Many laws include a short title after the enacting clause, and the House Drafting Manual recommends including them for major legislation or to facilitate cross-references in statutes. As the name suggests, the short title is a condensed title (often an acronym) that is added for political or marketing purposes, or to make it easier to refer to the bill generally. The "popular names" listing in the U.S. Code generally refers to the short titles of statutes. As will be discussed later, some courts examine titles (including the long and short titles) to determine the meaning of ambiguous provisions in statutes. The short title of TSCA—The Toxic Substances Control Act—is flagged above with the heading "Short Title."

### Findings and Purposes

Following the short title of the law, laws frequently include legislative findings and a listing of the purposes for the law. The "purposes" generally outline Congress' goals and objectives in enacting the law, while the findings often include more detailed factual findings and outline the reasons why the law was enacted. The findings section may also be used to identify the constitutional basis for the law. As noted later in this book, some courts will look at the purposes section to aid in interpreting ambiguous provisions in the

law to achieve the purposes established for the law. The House Drafting Manual counsels against including purpose sections in laws (which it claims are redundant), except to identify the constitutional basis for the law. Section 2 of TSCA, above, is an example of a findings and purposes section.

### Definitions

If laws include definitions that apply across the law, they are often collected in a single "definitions" section. While that section is often included in the introductory section, some laws include a "definitions" section towards the end of the law. If laws include definitions only applying to portions of the law, those definitions will be included in the portion of the law to which they will apply rather than in the general "definitions" section. The "definitions" section is included to provide shorthand references to entities or provisions of the statutes referenced repeatedly throughout the law; to clarify legislative intent when the law includes a term that could have multiple meanings; or to replace the ordinary meaning of a term with a different meaning. The Clean Water Act, for instance, defines "navigable waters" as "waters of the United States," indicating that the "navigable waters" do not necessarily need to be "navigable." Section 3 of TSCA is the law's "Definition" section and includes definitions for "State" (to clarify that the District of Columbia and various U.S. territories and possessions are States), "process" (providing a technical definition for a term that could have several general meanings), and "distribute in commerce" (an important term that outlines the scope of activities regulated under the law).

## B. Core Provisions of the Law

The second general portion of a law is the portion outlining the core provisions of the law. This usually includes provisions that ***create rights or duties*** and provisions that ***implement and enforce*** the rights and duties created by the law. Although the two sections will be described separately, it is not always easy to separate the two types of provisions in practice, as the law may include provisions that simultaneously create a duty and establish a penalty for violating that duty. A law may provide, for instance, that "Any person who operates a vehicle in a park may be fined $100 for each offense," without including a separate provision that states "No person may operate a vehicle in a park."

### Rights and Duties

The core provisions of most laws are the provisions establishing rights and duties. The provisions prohibit or require specific conduct, set standards and outline the scope of standards, and may impose obligations on government actors as well as the public. The provisions may also incentivize, rather than require, private conduct. TSCA Sections 4 (establishing testing requirements), 5 (requiring manufacturing and processing notices), 6 (providing for the regulation of hazardous chemical substances and mixtures), 8 (establishing recordkeeping and reporting requirements), and 16 (prohibited acts) are some examples of rights and duties provisions.

### Implementation and Enforcement

The other core provisions of most laws are the provisions setting forth procedures, sanctions, and remedies for implementing and enforcing the rights and duties created by the law. If the statute creates an agency or gives the agency enforcement and implementation authorities, those will usually be included in this section of the law. TSCA Sections 11 (inspections and subpoenas), 16 (penalties), 17 (specific enforcement and seizure), and 20 (citizens' civil actions) are some examples of implementation and enforcement provisions.

## C. Ancillary Provisions

The last general portion of a law is the portion addressing ancillary matters. This portion usually appears at the end of the law. Some of the provisions that may be included in this portion of the law include ***effective dates***, ***authorization and appropriations provisions***, and conforming ***amendments***. In rare cases, ***sunset provisions***, terminating the law on a specific date or when certain conditions have been met, are also included in this portion of the law.

### Effective Date

Federal laws are generally effective upon enactment. Congress can delay the effective date for the law generally or for specific provisions of the law by specifying alternate effective dates. Even though TSCA was enacted in October, 1976, Congress, in Section 31 of the Act, delayed the effective date until January 1, 1977.

### Authorization and Appropriations Provisions

If the government needs to spend money to implement and enforce a law, the law frequently includes provisions authorizing specific amounts of money to be appropriated to a government agency or actor for specific time periods for purposes specified in the "authorization" provision. An ***authorization provision*** is different from an ***appropriations provision***. An authorization provision "authorizes" an appropriation but does not actually make an appropriation of money to the government. An appropriations provision, on the other hand, actually appropriates money from the Treasury to be paid to the government agency or actor for a specific time period and for a specific purpose. TSCA, in Section 29, includes an authorization provision.

### Conforming Amendments

Conforming amendments address how to reconcile the law with existing laws and include (1) ***renumbering of existing code sections***; (2) ***repeals of existing laws***; (3) ***severability clauses***; and (4) ***preemption clauses***.

Repeals by implication are disfavored, so Congress usually includes explicit provisions in laws to repeal existing law(s) or portions of existing law(s) if it intends the new law to supersede the existing law(s).

***Severability clauses*** are included to address the manner in which a court should interpret a statute if a portion of the statute is held to be unconstitutional or is otherwise invalidated. When a court invalidates a portion of a statute, it must determine whether the rest of the statute can still be enforced or whether the entire statute should be invalidated because a portion of it was held to be invalid. If the court concludes that Congress would have intended to have the remainder of the statute enforced even though a portion of the statute was invalidated, the court will ***sever*** the invalid portion from the remainder of the statute and enforce the rest. If, on the other hand, the court determines that Congress would not have intended to have the remainder of the statute enforced without the invalid portion, the court will invalidate the whole statute, finding that the provision is ***inseverable***. In a severability clause (or inseverability clause), Congress can indicate whether it intends that specific portions of the law are severable from the rest of the law or whether the entire law should be invalidated if those provisions are invalidated. Congress might include such clauses when it anticipates that there may be provisions that could be invalidated. Most courts treat ***severability clauses*** as evidence of Congress' intent, though, rather than adopting bright line rules that the clause resolves the statutory interpretation issue. There is no severability clause in TSCA.

***Preemption clauses*** in federal laws address whether the law will displace state law, so that states cannot enforce state legislation or common law in the area addressed in the federal law. Even without an express provision addressing preemption, though, a court might find that a federal law implicitly preempts state law. Section 18 of TSCA includes a provision that preempts state law in limited circumstances, but otherwise provides that states can continue to enforce their own laws.

## D. Structure Conventions

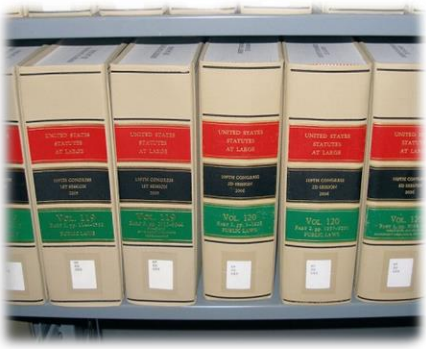
As you browse through TSCA or other statutes, you will notice that federal laws follow some general conventions regarding structure, usually established by the drafting manuals of the Office of Legislative Counsel. For instance, as in TSCA, many laws include a table of contents in the introductory material. If a law is very long, it is often divided into separate "Titles," each of which address discrete topics. Sections and subsections of laws often have headings or titles, and the House Drafting Manual suggests that section headings should be used for all sections if they are used at all. The laws also generally follow standard numbering conventions. Other than titles, the top level components of laws are "sections," and they are numbered beginning with 1. Proceeding downward, sections are followed by subsections (labeling starting with (a)); paragraphs (labeling starting with (1)); sub-paragraphs (labeling starting with (A)); clauses (labeling starting with (i)); and sub-clauses (labeling starting with (I)).

## Problem 2-2: Anatomy of a Statute

Find the statute that created the Federal Motor Carrier Safety Administration and identify the Public Law Number, Long Title, and Short Title of the statute. In addition, answer the following questions about the statute:

1. What is the number of the bill that became the statute?
2. Where was Section 1 of the statute codified in the United States Code?
3. Does the statute include a separate section defining terms for purposes of the statute?
4. What findings did Congress make regarding the number of crashes involving motor carriers or the need for inspections of motor carriers?
5. What is the first purpose identified by Congress for the statute?
6. The statute creates the Federal Motor Carrier Safety Administration (FMCA). Is that agency an independent regulatory agency? Does the statute require that the Administrator have any special skills or background? Note that Title I of the statute creates the agency and transfers money and various responsibilities to the agency.
7. What powers and duties are assigned to the Federal Motor Carrier Safety Administration under the statute? Does Congress, in Title II, assign the agency any additional duties?
8. Does the statute include any provisions authorizing expenditures to implement motor carrier safety?
9. What is the effective date of the statute?
10. In Title II of the statute, Congress amends many other statutes to address motor carrier safety. Does the statute require the Secretary of Transportation to implement any of those requirements through rulemaking? If so, which sections of the statute require the Secretary to implement requirements through rulemaking?
11. Does Congress, in Title II of the statute, provide the Secretary of Transportation with authority to implement any of the requirements of the statute through adjudication (i.e. by issuing an order)? If so, which sections authorize the Secretary to make decisions through adjudication?
12. Section 201(a) amends Section 31310(b)(1) of Title 49 of the U.S. Code to include additional grounds for disqualifying persons from operating a commercial motor vehicle. How long is a person disqualified from operating a commercial motor vehicle under that provision?
13. Section 202(a) amends Section 30311(a)(6) of Title 49 of the U.S. Code to include additional obligations for States in overseeing motor carrier safety. What are the repercussions, for states, if they do not comply with the requirements of 49 U.S.C. § 31311(a)?
14. Does the statute create any new civil penalties or provide the Secretary with the authority to impose new or additional civil penalties beyond those in existence at the time of the enactment of the statute?
15. Does the statute creating the FMCA include a severability provision or preemption provision?

# IV. The Codification Process



Statutes at Large – Photo by Coolceasar CC BY-SA 3.0

When a federal law is first enacted, it is assigned a Public Law number as discussed above, and it is published as a "slip law" by the Government Publishing Office (GPO). At the end of each session of Congress[121], the GPO compiles that session's slip laws into ***Statutes at Large***. The ***Statutes at Large*** reproduces the laws from each session exactly as enacted by Congress. The printed edition of the ***Statutes at Large*** is ***legal evidence*** of the laws, concurrent resolutions, proclamations by the President, and proposed and ratified amendments to the Constitution. *See* 1 U.S.C. § 112. After laws are published as slip laws and published in the ***Statutes at Large***, they are "codified," or incorporated into the United States Code.

The ***United States Code*** (U.S. Code) was envisioned as a harmonized compilation of all of the laws of the United States, "***general and permanent in nature***."[122] Whereas the Statutes at Large is organized chronologically by date of enactment, the U.S. Code arranges and consolidates statutes based on the subjects that they address. As of 2021, the U.S. Code was divided into 53 different titles. The process of "codifying" laws in the U.S. Code is carried out by the ***Office of Law Revision Counsel*** of the House of Representatives (***OLRC***). As illustrated below, the OLRC often re-organizes laws or removes sections of the laws in the codification process to create a more readable and uniform code, so the laws, when codified, usually do not look the same in the U.S. Code as in the Statutes at Large.

Within the U.S. Code, there are actually two types of law: ***positive law*** and ***non-positive law***.[123] Approximately half of the titles in the U.S. Code have been arranged by the OLRC into harmonized compilations from the law found in the Statutes at Large. Those compilations were then submitted to Congress and Congress enacted them into law.[124] Once Congress enacts a title of the U.S. Code into law, it is ***positive law*** and replaces the Statutes at Large as legal evidence of the law.[125] Once a title is positive law, Congress must make all future amendments to that title by reference to the specific sections of the

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121 As of December, 2023, GPO had only published the Statutes at Large through 2017 on its website.

122 Act of June 27, 1866, ch. 140, 14 Stat. 74.

123 Section 205(c) of House Resolution No. 988, 93d Congress, as enacted into law by Public Law 93-554 (2 U.S.C. 285b), provides the mandate for positive law codification.

124 For an example of a bill that codifies a title as positive law, see Public Law 111-314, which enacted Title 51 of the Code.

125 1 U.S.C. § 204.

title to be amended.[126] The titles preceded by an asterisk on this listing provided by OLRC have been enacted into positive law.

The remaining titles in the U.S. Code have been arranged into harmonized compilations of the law by OLRC but have not yet been enacted into law by Congress. Those titles are ***non-positive law*** and are merely ***prima facie evidence*** of the law. If there is a conflict between the text in the non-positive law titles of the U.S. Code and the text in the Statutes at Large, the text in the Statutes at Large takes precedence over the text in the non-positive law titles of the U.S. Code. *See United States v. Ward*, 131 F.3d 335, 339-40 (3d Cir 1997).

The process of "codifying" a law undertaken by the OLRC varies depending on whether the law to be codified is amending positive law or non-positive law. With every law, OLRC reviews each provision of the law to decide ***whether*** and ***where*** the provision will be included in the U.S. Code. OLRC has greater discretion when codifying ***non-positive law*** than when codifying positive law. For non-positive law, OLRC must first determine which sections of the law are "***general and permanent***," because only general and permanent provisions are included in the U.S. Code.[127] Appropriations provisions, for instance, are not permanent, so OLRC generally will not include them in the U.S. Code. If OLRC determines that a provision of a statute is general and permanent, it will then decide ***where*** to place it in the U.S. Code. If the law amends an existing provision of law, OLRC will simply amend the existing provision in the U.S. Code. However, if the provision is completely new, OLRC has significant discretion in deciding how to incorporate the provision into the U.S. Code. As a result, provisions in a single law may be codified in multiple different titles of the U.S. Code. In addition, in many cases, OLRC may choose to include text enacted by Congress in explanatory notes in the U.S. Code rather than in stand-alone sections of the Code. OLRC does not consult with Congress when codifying non-positive laws.

When Congress enacts a law that should be codified in a title of the U.S. Code enacted as ***positive law***, OLRC has less discretion in codifying the law. As noted above, for positive law titles, Congress is supposed to indicate, in any amendment, the sections of the positive law to be amended. When Congress does that, OLRC has no discretion to change or re-organize the law in any way. However, if Congress enacts a law that closely relates to a title of positive law, but does not directly amend the positive law, OLRC must either (1) include the law in a note following a section of the positive law title, or (2) incorporate the law into a non-positive law title, as described in the preceding paragraph.[128]

As is evident from the discussion above, although the codification process is supposed to create a more organized and uniform compilation of the laws of the United States, it

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126 *See* Jarrod Shobe, *Codification and the Hidden Work of Congress*, 67 U.C.L.A. L. Rev. 640, 645 (2020).

127 *Id.* at 656.

128 *Id.* at 658.

creates some problems. First, most bills enacted by Congress end up being codified in several different titles in the U.S. Code.[129] Consequently, when reading the U.S. Code it is often difficult to determine which law created the provision one is reading, as the U.S. Code does not necessarily include all of the provisions of a law sequentially and separated from provisions of any other law.[130] More importantly, many sections of a law may be omitted from the U.S. Code version because they are not "general and permanent," and the headings or numbering for provisions may be removed or reorganized. Finally, OLRC includes many provisions of law enacted by Congress in the editorial notes for other provisions of the U.S. Code.[131] Those provisions are difficult to locate and, because of the way in which the notes are included, it may be difficult to determine which material in the notes was enacted by Congress, as opposed to purely editorial notes added by OLRC.[132] The types of statutory provisions most frequently included in the notes are effective dates, short titles, regulations, rules of construction, purposes, findings, savings provisions, and study and reporting requirements.[133]

## Questions and Comments

**1. Unorthodox lawmaking:** Many federal laws are being enacted through omnibus legislation and through appropriations legislation (and reconciliation). Because omnibus bills are drafted by many different committees or entities and may address many different substantive areas of law, they tend to be long and include more errors and inconsistencies than laws enacted through the traditional processes.[134] Consequently, there are many more "rough edges" that need to be smoothed out by OLRC in codification and many more opportunities for OLRC to misinterpret Congressional intent when reorganizing and removing provisions from the law. Because omnibus laws include so many different provisions addressing different topics, the laws will usually be codified across an even broader scope of titles than laws that address a narrower topic(s).[135] In general, the law as codified will likely reflect OLRC's work to a greater extent than laws enacted through the traditional processes.

Laws passed through the reconciliation process that include appropriations provisions also create codification problems for OLRC. While appropriations laws are not supposed to include substantive provisions, as noted above, Congress frequently ignores that self-imposed rule. As a result, laws passed through "unorthodox" lawmaking may include appropriations provisions that also include substantive law requirements.[136] While OLRC

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129 *Id.* at 661.

130 *Id.* The notes in the Code usually identify the statute originally creating the provision, as well as any statutes amending it, but will not specify which language in the provision was originally included and which language was changed in the amendments*. Id.*

131 *Id.* at 666-667.

132 *Id.*

133 *Id.*

134 *Id.* at 674-675.

135 *Id.*

136 *Id.* at 676.

will not codify appropriations provisions because they are not general and permanent, it must take extra care to identify substantive provisions intertwined with appropriations provisions which should be codified.[137]

**2. Alternative compilations of the "Code":** In addition to the official version of the U.S. Code, there are several unofficial versions maintained by other entities, where the structure of the laws more closely resembles the structure of the original laws enacted by Congress. Many of the entities maintain unofficial versions of the U.S. Code in order to assist them in interpreting the laws or in drafting new laws. The Office of Legislative Counsel for the House of Representatives, for example, maintains a collection of laws that either do not appear in the U.S. Code or have been included in a title of the Code not enacted into positive law. Similarly, many federal agencies maintain a collection of the laws that they administer or that affect them directly.[138] As with the Office of Legal Counsel, the laws in the agency collection more closely resemble the structure of the original laws and include all of the language enacted by Congress. Finally, private companies, including West (Thomson Reuters) (U.S. Code Annotated) and LexisNexis (U.S. Code Service), publish their own versions of the U.S. Code. Professor Jesse Cross raises concerns that the establishment of alternative, easier to understand versions of the code creates an "uneven playing field for those groups that likely already have a disadvantage in accessing and understanding the law."[139]

**CALI CHAPTER QUIZ**

Now that you've finished Chapter 2, why not try a short quiz on the material at www.cali.org/lesson/19750. It should take about 30 minutes to complete.

137 *Id.*
138 *Id.* at 682-683.
139 *Id.* at 644.

# Chapter 3:

## Theories of Interpretation

> "The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."
>
> HENRY M. HART, JR. & ALBERT M. SACKS

## I. Introduction

The first two chapters of this book focused on the relative powers of Congress and the Executive Branch in the creation of statutes and the procedures that Congress uses to make statutes. This chapter shifts the focus to courts and the interpretation of statutes. As noted above, many statutes adopted after the New Deal delegate powers to agencies to implement and administer statutes. Consequently, agencies often interpret statutes before courts interpret them. While the way agencies interpret statutes can have significant impacts on the public and can affect the manner in which courts interpret those statutes, those impacts and effects will be addressed later in this book. This chapter focuses, instead, on statutory interpretation by ***courts***.

Judges use various ***theories*** and ***tools*** to interpret statutes, regardless of whether the statutes involve administrative agencies, but judges modify their interpretive approach to some extent when administrative agencies are involved. Agencies rely on many of the same theories and tools when deciding, in the absence of judicial direction, how to interpret ambiguous statutes, as do lawyers when counseling and advocating for clients.

***Theories*** are the broad, general philosophical approaches to statutory interpretation, and focus on the goals of statutory interpretation. Theories address questions such as (1) whether laws should be interpreted based simply on the text as enacted; (2) whether they should be interpreted in a manner that advances the intent of the enacting legislature, even though that interpretation creates tension with the language enacted; (3) whether they should be interpreted in a manner that advances the overall purposes of the legislation; and (4) whether they should be interpreted dynamically, to evolve to address changes in the law and society.

***Tools***, on the other hand, are the specific rules and canons that courts apply to interpret statutes once they have chosen a theory to use when interpreting the statute. Some examples of traditional rules and canons of statutory interpretation are (1) language in a statute that can have multiple meanings should be interpreted according to the ordinary meaning of the language; and (2) when a word that can have several meanings is used in a list of other words, the word should be interpreted to have a meaning that is consistent with the meanings of the other words with which it is used. This chapter will focus on the ***theories*** of statutory interpretation. The ***tools*** are covered in subsequent chapters.

## II. Lack of Uniformity in Statutory Interpretation

Take heed, readers, if you hope that this book will identify a consistent, uniform approach for statutory interpretation by courts. As Henry Hart & Albert Sacks, leaders of the "Legal Process" movement in the 1950s, observed (and as many have echoed since then), "[t]he hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."[140] While many judges rely on particular theories, few judges are dogmatic in their adherence to a single theory and judges routinely apply the canons and other tools of interpretation in seemingly inconsistent ways across the spectrum of cases that they decide.[141] Significantly, while courts give "stare decisis" effect to the interpretations of the ***language*** of statutes, they do ***not*** give any "stare decisis" effect to the ***methods*** that are used to interpret statutes (methodological stare decisis). Unlike most other areas of law, judges do not accord any precedential value to the ***theories*** or ***tools*** used to interpret statutes by higher courts (including the Supreme Court) or by their own court, even when they are interpreting a statute that they, or a higher court, has already interpreted.[142] Thus, even though a court may have interpreted a statutory term according to its primary dictionary definition in one case, in a later case, the same or a lower court might interpret another section of that same statute broadly to achieve the underlying purposes of the statute, ignoring a primary dictionary definition.

Critics argue that the lack of uniformity and consistency makes it difficult for the public and lawyers to predict how courts will interpret statutes and gives courts too much discretion to interpret statutes based on personal preferences rather than legislative

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140 HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). *See also,* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 14 (Amy Gutmann ed., 1997).

141 *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 Harv. L. Rev. 1298, 1302 (2018).

142 *Id.* For an examination of lower courts' responses to Supreme Court statutory interpretation decisions, *see* Aaron-Andrew O. Bruhl, *Communicating the Canons: How Lower Courts React When the Supreme Court Changes the Rules of Statutory Interpretation,* 100 Minn. L. Rev. 481 (2015).

preferences.[143] Even though judges frequently apply canons of construction (***tools***) to interpret statutes, Karl Llewellyn famously illustrated decades ago that most canons have a counter-canon that could be argued to apply in similar circumstances to suggest a different interpretation of the statute than the interpretation suggested by the primary canon.[144] Accordingly, critics argue that the ad-hoc application of canons allows judges to point to authority to support whatever interpretation aligns with their policy preferences.[145]

Many states have attempted to create a more consistent and uniform system of statutory interpretation by adopting statutory directives. A statutory directive is a provision enacted by the legislature that clearly indicates to courts the legislature's intentions regarding how a statute or provisions in the statute should be interpreted.[146] State legislatures have frequently enacted canons of construction or entire codes of construction as statutory directives.[147] At the federal level, Congress has been more sparing in the adoption of statutory directives. Professor Abbe Gluck maintains that Congress has adopted "thousands" of rules of construction, but most of the federal rules of construction are preemption clauses, savings clauses, and severability clauses, which are narrowly targeted to address specific issues in individual statutes.[148] One of the few general statutory directives adopted at the federal level is the Dictionary Act, which states, among other things, that singular terms in federal statutes include plural terms, words used in the present tense include the present and future tense, and words importing the masculine gender also include the feminine gender.[149]

Several commentators have advocated for adoption of broader federal statutory directives to address the cacophony of statutory interpretation in federal courts. Professor Nicholas Rosenkranz has proposed that Congress and the courts adopt Federal Rules of Statutory Interpretation through a process similar to the process used to codify the Federal Rules

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143 *See, e.g.,* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085, 2141-2142 (2002).

144 *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 Vand. L. Rev. 395 (1950).

145 *See* Rosenkranz, *supra* note 143, at 2142.

146 *See* Linda D. Jellum, *"Which is to Be Master,"The Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 U.C.L.A. L. Rev. 837 (2009).

147 *See* Rosenkranz, *supra* note 143, at 2089-90 (noting that all 50 states and the District of Columbia have interpretive codes and citing many of the statutory provisions); Glen Staszewski, *The Dumbing Down of Statutory Interpretation,* 95 B.U. L. Rev. 209, 217 (2015); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 Yale L. L. J. 1750, 1786 (2010).

148 *See* Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 Wm. & Mary L. Rev. 753, 791-792, 802-803 (2013). *See also* Jarrod Shobe, *Congressional Rules of Interpretation,* 63 Wm & Mary L. Rev. 1997 (2022) (identifying thousands of Congressional "rules of interpretation" in the U.S. Code and criticizing judges for relying on canons that have not been enacted as law).

149 1 U.S.C. § 1.

of Evidence and Federal Rules of Civil Procedure.[150] Thus far, though, Congress has not significantly expanded its use of statutory directives and there remains no uniform, consistent approach to statutory interpretation in American courts.

## Questions and Comments

**1. Constitutional authority:** Does the Constitution address whether courts or Congress can, or should, establish rules regarding the interpretation of statutes? What is the role of the courts under Article III? Is there authority in Article I for Congress to establish rules that courts should use when interpreting statutes? Are there any constitutional limits on the rules that Congress could require courts to follow when interpreting statutes? *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085, 2091, 2102-2121, 2156 (2002). *See also* Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. Univ.L. Rev. 871, 918-919 (2015); Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 Wm. & Mary L. Rev. 753, 803 (2013), *citing* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 244-245 (2012); Linda D. Jellum, *"Which is to Be Master," The Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 U.C.L.A. L. Rev. 837, 841-842, 947, 879, 890-896 (2009); Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. Rev. 1239, 1246 (2002).

**2. Expertise and accountability:** If both Congress and courts have constitutional authority to establish rules regarding the interpretation of statutes, what arguments might be made in favor of having one branch establish such rules, based on factors including expertise and accountability? Should such rules be established retroactively on a case-by-case basis or proactively and holistically? How would your response to that question impact which branch would be better situated to establish such rules?

**3. Broad rules of statutory interpretation v. narrow rules of statutory interpretation:** Are there any concerns raised by a legislatively created rule of statutory interpretation that applies generally to all statutes, or all statutes of a specific type, as opposed to a legislatively created rule of statutory interpretation that applies to a single statute? *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115

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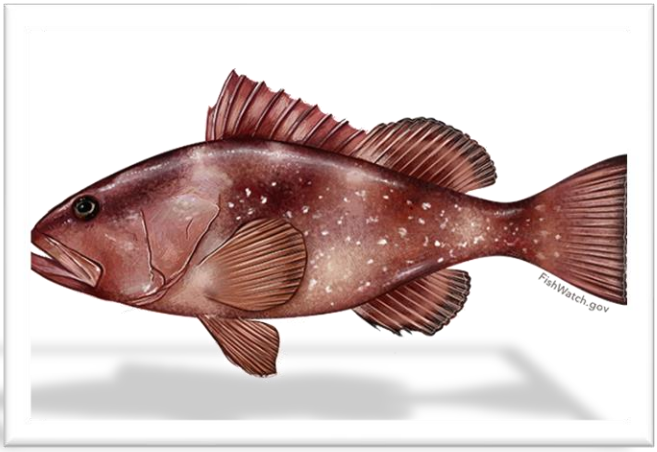
[150] *See* Rosenkranz, *supra* note 143. As an alternative to Rosenkranz' proposal, Gary O'Connor has argued in favor of the adoption of a Restatement of Statutory Interpretation. *See* Gary E. O'Connor, *Restatement (First) of Statutory Interpretation*, 7 N.Y.U. J. Legis. & Pub. Pol'y. 333, 334 (2003). However, some commentators suggest that neither federal rules nor a Restatement is necessary as consensus methods of statutory interpretation are developing and that an influential book authored by Justice Antonin Scalia and Brian Garner could serve as a *de facto* treatise on interpreting statutes. *See* Lawrence M. Solan, *Is it Time for a Restatement of Statutory Interpretation?*, 79 Brooklyn L. Rev. 733 (2014).

Harv. L. Rev. 2085, 2113-2114 (2002); Jellum, *"Which is to Be Master,"* supra, at 837, 841-42, 879, 895-896.

**4. Codification and rules of statutory interpretation:** As noted in the prior chapter, when statutes are codified, rules of statutory construction are often moved to sections of the U.S. Code that are separate from other portions of the statute to which they apply or are simply included in editorial notes in the Code. Consequently, lawyers and judges may fail to apply those rules when interpreting the statute. This problem is exhibited quite clearly in the U.S. Supreme Court's decision in *Yates v. United States*, 574 U.S. 528 (2015).



Red Grouper – Public Domain Photo by NOAA

In that case, the Court was interpreting a section of Title 18 of the U.S. Code that imposes sanctions on anyone who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence an investigation by a federal agency." 18 U.S. C. § 1519. John Yates was a commercial fisherman who ordered a crew member to toss a red grouper into the sea to prevent federal authorities from confirming that he harvested undersized fish. 574 U.S. at 528 (Click here for a video of his story.) The government maintained that the fish that was thrown overboard was a "tangible object," and that Yates had, therefore, violated Section 1519 of Title 18. *Id.* A plurality of the Court rejected the government's argument, relying, in part, on the location of Section 1519 within Title 18 and the fact that the title of Section 1519 is "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy." *Id.* at 529. Justice Alito authored a concurring opinion that also relied, in part, on the title of the section. *Id.* at 552. However, neither of those opinions or the opinion of the dissenting Justices noted that Title 18 includes a provision, tucked into a note by the codifiers, that states that "[n]o inference of a legislative construction is to be drawn by reason of the [location] … in which any particular section is placed, nor by reason of the catchlines used in such title."[151] All of the Justices ignored, or were unaware of, the rule of construction adopted by Congress for Title 18 of the U.S. Code, which was relegated to the notes in the Code.

[151] *See* Act June 25, 1948, ch. 645, § 19, 62 Stat. 862.

## III. Role of the Court – Faithful Agent or Junior Partner?

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The theory of interpretation that a court will adopt when interpreting a statute will depend, to some extent, on the court's view of the relationship between the Judicial Branch and the Legislative Branch. Most judges, and most theories, are based on the idea that courts are the "***faithful agents***" of the legislature.[152] When they interpret statutes, judges strive to give effect to the intent of the legislature, rather than substituting their own policy views.[153] The "faithful agent" model relies, in part, on a fiction that there is a "***unitary drafter***" of legislation."[154] The model is rooted in the constitutional separation of powers, whereby Congress, not courts, has the power to make laws.[155] Most of the major theories of interpretation, including textualism, purposivism, and intentionalism, described below, are based on the "faithful agent" model, although the theories diverge with respect to identifying the appropriate way to effectuate the legislature's intent.[156]

There is, however, a competing model that is much less widely embraced. In lieu of a "faithful agent" model, some judges envision their role as "***junior partners***" of the legislature.[157] Those judges reject the view that their role is limited to implementing the legislature's intent and they believe that courts should enrich statutory law by interpreting laws consistent with contemporary values, even if such interpretations conflict with unambiguous

Handshake – Illustration by Wickey-nl - CC BY-SA 3.0

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152 *See, e.g.*, Abbe R. Gluck and Lisa Schultz Bressman, *Statutory Interpretation from the Inside - An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I,* 65 Stan. L. Rev. 901 (2013); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 110 (2010); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 10 n.26 (2006); Eskridge, Frickey & Garrett, supra note 82, at 5-8; John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1 (2001).

153 *See* Cross, *When Courts Should Ignore Statutory Text*, *supra* note 114, at 453; Abner J. Mikva & Eric Lane, LEGISLATIVE PROCESS 103 (2d ed. 2002).

154 *See* Gluck & Bressman, *supra* note 152, at 915.

155 See , Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. Rev. 1239, 1250-1254 (2002); Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. Chi. L. Rev. 501, 520 (1948).

156 *See* Barrett, *supra* note 152, at 112-113 (contrasting textualism and purposivism).

157 *See* Mark Seidenfeld, *Textualism's Theoretical Bankruptcy and Its Implication for Statutory Interpretation,* 100 B.U. L. Rev. 1817 (2020).

statutory text.[158] This model is the foundation for the "dynamic" theory of interpretation discussed below.[159]

Regardless of whether statutory interpretation theories are based on a "faithful agent" or "junior partner" model, the theories generally espouse a "***universalist***" approach to statutory interpretation, in the sense that they are applied in the same manner regardless of the statute that is being interpreted.[160] A judge interpreting a statute through textualism will interpret the statute using the same canons, presumptions, and tools regardless of the subject matter of the statute or the way the statute was enacted. Increasingly, however, academics are advocating for "***anti-universalist***" application of the theories, where the theories are applied differently based on the subject matter of the statute being interpreted or the procedures used to enact the statute.[161]

**Theories of Interpretation**

- Textualism
- Purposivism
- Intentionalism
- Imaginative Reconstruction
- Dynamic Statutory Interpretation

The following sections of this chapter introduce the major theories of statutory interpretation. Although this chapter will not focus on the specific tools (canons, *etc*.) used to interpret statutes, it will introduce some of them. As you read the cases, you will discover that a judge's choice of a theory of interpretation may influence which tools the judge will use to interpret a statute. The most extreme textualists, for instance, will not consult legislative history to interpret statutory language. The two major theories of statutory interpretation today are ***textualism*** and ***purposivism***. This chapter will introduce those theories as well as three other theories that are less popular today but have historical significance: (1) ***intentionalism***; (2) ***imaginative reconstruction***; and (3) ***dynamic statutory interpretation***.

## Questions and Comments

**1. Are courts really acting as "faithful agents" of the legislature?** Prior to her elevation to the Supreme Court, Justice Amy Cohen Barrett argued that many substantive canons of statutory construction are designed to advance specific policy objectives, independent of the intent of the enacting legislature (*i.e.* canons to avoid interference with

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158 *See* Barrett, *supra* note 152, at 113-114. *See* also Seidenfeld, *supra* note 157, at 1834.

159 *See* Barrett, *supra* note 152, at 113-114. *See also* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 Colum. L. Rev. 990, 995-996 (2001) (arguing that the judicial power in Article III includes an equitable power to alter statutory text); William N. Eskridge, *Textualism, the Unknown Ideal?,* 96 Mich. L. Rev. 1509, 1522-32 (1998).

160 *See* Bressman & Gluck, *supra* note 95, at 797; Sitaraman, *supra* note 115, at 116. Professor Ganesh Sitaraman attributes the universalism, in part, to the acceptance by most theories of the fiction of a unitary drafter. *Id.*

161 *See* Sitaraman, *supra* note 115, at 116-119; Bressman & Gluck, *supra* note 95, at 797.

the powers of states or local governments, the rule of lenity; *etc*.) and that judges, even textualist judges, who apply those canons to interpret statutes are adopting a dynamic approach to statutory interpretation, rather than acting as "faithful agents" of the legislature. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 116 (2010).

Similarly, Professors Abbe Gluck and Lisa Bressman surveyed 137 attorneys who drafted legislation for Congress and determined that, in many cases, the drafters were unaware of canons of statutory construction and did not draft statutes with those canons in mind. Abbe R. Gluck and Lisa Schultz Bressman, *Statutory Interpretation from the Inside - An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 906-907, 947 (2013). Considering those findings, Gluck and Bressman suggest that using those canons to interpret statutes does not necessarily advance Congress' intent in many cases. *Id.* at 913-917.

Professor Jesse Cross also argues that courts fail to act as "faithful agents" of the legislature at times, but he bases his criticism on judicial enforcement of statutory language that was enacted for non-judicial audiences. *See* Jesse M. Cross, *When Courts Should Ignore Statutory Text*, 26 Geo. Mason L. Rev. 453 (2018). Cross asserts that Congress frequently includes language in statutes that was directed to agencies, constituents, or other non-judicial audiences and which was never intended to be enforced. *Id.* at 457. By interpreting the statutes to enforce that language, Cross argues that courts are ignoring the intent of Congress. *Id.*

**2. Other goals for judicial interpretation of statutes?** If courts are not simply agents of the legislature when interpreting statutes, what other roles should courts play? Professors Bressman and Gluck discuss whether courts could interpret statutes in ways (1) that could force Congress to change the ways that it drafts laws (in response to the judicial methods of interpretation); (2) to impose coherence on the U.S. Code; or (3) to make laws more predictable for the public. *See* Gluck & Bressman, *supra*, at 905, 917, 950, 961. Are those appropriate roles for the Judicial Branch?

**3. Anti-universalist proposals:** The arguments for anti-universalist application of theories of interpretation are most forceful when focused on modifying approaches to interpretation based on the procedures used to enact statutes. For instance, the whole act rule is a canon of construction relied upon frequently by textualists that provides that words that are used in multiple places within a statute should be interpreted to have the same meaning. The canon is based on the fiction that Congress, when drafting the statute, was acting holistically, and was aware of all the instances where a term was used within the statute when it used the term in the statute and intended for the term to have the same meaning every time that it was used. While that fiction may not be unreasonable when applied to some short statutes adopted through the traditional law-making procedures, it is not defensible when applied to complex statutes adopted though omnibus law-making. As noted in the prior chapter, in many cases, omnibus bills are created by combining many laws that were developed independently without reference to

each other. Thus, it does not make sense to apply the canon to such a statute. Accordingly, anti-universalist supporters would argue that textualists should apply the canon differently, or not apply the canon at all, when interpreting omnibus statutes.

**4. Different statutory interpretation approaches for different courts?** Some scholars have even suggested that different courts should adopt different approaches to statutory interpretation based on the institutional characteristics of the reviewing court. For instance, since a higher-level appellate court will likely hear fewer cases and have more resources than lower courts, it may be appropriate for lower courts to rely on simpler rules and canons to interpret statutes, instead of relying on in-depth analysis of legislative history and intricate analysis of the text. *See* Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 Cornell L. Rev. 433 (2012). Similarly, since judges in some courts are elected while others are appointed, it may be more appropriate for judges who are elected to rely on purposivist theories of interpretation, since the public can vote them out of office if they disagree with the interpretive approach adopted by the judges. *See* Aaron-Andrew P. Bruhl & Ethan J. Lieb, *Elected Judges and Statutory Interpretation*, 79 U. Chi. L. Rev. 1215 (2012). What are the advantages and disadvantages of varying the method of interpretation based on the position of the court within the judicial hierarchy or the manner in which the judges are selected? Are there constitutional justifications for adopting different methods of interpretation?

**CALI SECTION QUIZ**

Before moving on to the next section, why not try a short quiz on the material you just read at www.cali.org/lesson/19751. It should take about 15 minutes to complete.

# IV. Textualism

## A. The Theory

The predominant theory of interpretation applied at both the federal level and the state level is textualism. As the name implies, textualists interpret statutes by focusing on the ***ordinary meaning*** of the enacted text. They look for the meaning "that a ***reasonable person*** would gather from the text of the law, placed alongside the remainder of the corpus juris [the body of law]" (***objective meaning***).[162] Textualists will frequently examine

[162] *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Amy Gutmann ed., 1997). As Judge Frank Easterbrook has observed, textualists "look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of words." *See*

the ***structure*** of the statute and the ***context*** in which language is used in the statute to determine the ordinary meaning of the text but are generally reluctant to consult ***legislative history*** or other ***extrinsic sources*** to interpret the text.[163] ***New textualists***, a modern incarnation of textualism, will never examine legislative history.[164] Some textualists will not even rely on grammar rules, canons of construction, or other extrinsic sources unless the text that is being interpreted is ***ambiguous or absurd***, although most textualists will rely on those sources without making that initial determination.[165] In general, though, if the ordinary meaning of the text is clear, textualists will not adopt an interpretation of the text that conflicts with that ordinary meaning unless the application of the statute according to its ordinary meaning leads to an ***absurd result***.[166]

Although the textualist theory of interpretation is based on the "faithful agent" model of the judicial / legislative relationship, textualists do not search beyond the text for legislative intent because they believe that the text is the best evidence of the legislature's intent.[167] Textualists fulfill their role as "faithful agents" of the legislature by dutifully implementing the text enacted by the legislature. From a constitutional standpoint, textualists maintain that only the text (and not legislative history or other extrinsic sources) was enacted by the legislature into law through the process of bicameralism and presentment, so courts allow members of the legislature to circumvent those procedures when courts rely on legislative history and other extrinsic sources to interpret the meaning of the text enacted into law.[168] In addition, many textualists assert that it is inappropriate to search beyond a statute's text to ascertain legislative intent because there is no single

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Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 Harv. J.L. & Pub. Pol'y 59, 65 (1988).

163 *See* Molot, *supra* note 152, at 2-4. Textualists may also examine the language, structure and context of ***other statutes*** to interpret text in a statute.

164 *See* Eskridge, Brudney, Chafetz, Frickey & Garrett, *supra* note 17, at 499-500.

165 *See* Linda D. Jellum, THE LEGISLATIVE PROCESS, STATUTORY INTERPRETATION, AND ADMINISTRTATIVE AGENCIES 89 (Carolina Academic Press 2016).

166 The "absurd result" exception is discussed in the next chapter of this book.

167 *See* Seidenfeld, *supra* note 157, at 1821; Barrett, *supra* note 152, at 112. As Justice Barrett notes, "The legislative process is path-dependent and riddled with compromise. … The language may appear awkward because competing factions agree "to split the difference between competing principles." To respect the deals that are inevitably struck along the way, the outcome of this complex process – the statutory text – must control." Barrett, *supra* note 152, at 112-113. *See also* Bressman, Rubin, & Stack, *supra* note 63, at 157 ("By sticking to the text, courts can confine … groups to the deals they extracted …").

168 *See* Seidenfeld, supra note 157, at 1827; Scalia, *Common Law Courts, supra* note 23, at 17; John F. Manning, *Textualism and Legislative Intent*, 91 Va. L. Rev. 419, 445 (2005). *See also* Linda D. Jellum & David Charles Hricik, MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES AND LAWYERING STRATEGIES 45 (Carolina Academic Press 2d ed. 2009); Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter and History in Statutory Interpretation*, 100 Colum. L. Rev. 901, 951 (2000).

intent for any legislation.[169] A legislature is a "they," not an "it."[170] Accordingly, the search for a collective intent on behalf of a legislature from sources extrinsic to the text is pointless.[171]

While textualists believe that textualism is the only theory of interpretation supported by the federal constitution, they maintain that it has many other benefits. First, because it focuses on the ordinary meaning of the text as understood by reasonable readers, the theory gives the public clear notice of what the law requires.[172] Members of the public do not have to research legislative history, reconstruct legislative intent, or try to figure out the goals of the legislature in order to determine the rights and obligations created by a law. They simply must read the law.

Textualists also claim that textualism reduces opportunities for judicial activism and ideological decision-making, while purposivism enables judges to make law.[173] They argue that "focusing on 'genuine but unexpressed legislative intent' invites the danger that judges 'will in fact pursue their own objectives and desires' and, accordingly, encroach into the legislative function by making, rather than interpreting, statutory law."[174] If a statute is outdated because of changes in social values or other changes in the legal landscape, textualists argue that it is up to the legislature, not courts, to update the statute.[175] If courts enforce the statutes as written, the legislature can amend them if it (and the public) demand change.

Finally, textualists assert that consistent application of textualism by courts would improve the legislative process because it would reduce the incentive for legislators to try to pad

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169 *See* Seidenfeld, *supra* note 157, at 1824; John F. Manning, *Without the Pretense of Legislative Intent*, 130 Harv. L. Rev. 2397, 2425-31 (2017); Gluck & Bressman, *supra* note 152, at 915, 965. *See also* Max Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863, 872 (1930).

170 *See* Kenneth Shepsle, *Congress is a 'They,' Not an 'It': Legislative Intent as Oxymoron*, 12 Intl Rev. L & Econ. 239 (1992). Nevertheless, supporters of "intentionalist" interpretation of statutes counter that groups can have common goals or a common agenda, even though the individual members of the group have different motives. *See* Jellum, *supra* note 165, at 103; Eskridge, et al, *supra* note 25, at 422-424.

171 *See* Seidenfeld, *supra* note 157, at 1824; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L. J. 511, 517 ("[T]he quest for the 'genuine' legislative intent is probably a wild-goose chase anyway.").

172 *See* Gluck & Bressman, *supra* note 152, at 913; Seidenfeld, *supra* note 157, at 1819, 1848.

173 *See* Seidenfeld, *supra* note 157, at 1819; Scalia, *Common Law Courts, supra* note 23, at 17-18; Molot, *The Rise and Fall of Textualism, supra* note 152, at 25-26. *See also* Gluck & Posner, *supra* note 141, at 1321. Professor Mark Seidenfeld notes that "[b]y standard accounts of comparative institutional advantage, courts are institutionally inferior to the legislature for making policy, not only because they are much less politically accountable but also because they have less ability to inform themselves about the substantive implications of their interpretations." *Id.* at 1840.

174 *See* Congressional Research Service, *Statutory Interpretation: Theories, Tools and Trends* 14, C.R.S. Rep. No. R45153 (April 5, 2018).

175 *See* Seidenfeld, *supra* note 157, at 1821, 1843-1844.

legislative history or otherwise manipulate the legislative process to influence the interpretation of statutes.[176]

## Questions and Comments

**1. Notice to the public:** While some supporters of textualism tout its value in providing clear notice to the public regarding the rights and duties created by laws, some strains of textualism are also originalist, focusing on the meaning of text as it was understood at the time that the statute was enacted. How would that impact the extent to which textualist interpretations of statutes provide clear notice to the public about rights and duties?

**2. Textualism and codification Issues:** Textualists often interpret language in statutes by examining the structure of the statute, the context in which the language is used in the statute, and occasionally the titles of sections in the statute. As noted in the prior chapter, though, when statutes are codified in the U.S. Code, provisions in statutes are reorganized and often scattered throughout different titles in the Code. In addition, language included in statutes may be left out of the Code entirely or placed in editorial notes. What implications does this have for textualist interpretation of statutes? Would it be more appropriate to interpret statutes by examining sources other than the Code? *See* Jarrod Shobe, *Codification and the Hidden Work of Congress*, 67 U.C.L.A. L. Rev. 640 (2020).

**3. Waiting for Congress to act:** Textualists prefer to allow Congress to update statutes when they no longer make sense in light of changes in society or the underlying legal landscape. Does that approach make sense today? Why might Congress not act to change a statute? *See* Mark Seidenfeld, *Textualism's Theoretical Bankruptcy and Its Implication for Statutory Interpretation*, 100 B.U. L. Rev. 1817, 1844 (2020).

### B. Textualism in Action

The dissenting opinion of Justice Thomas in *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004) provides a nice example of textualism in action. The case focused on whether the Age Discrimination in Employment Act (ADEA), which had been interpreted to prohibit discrimination against older workers in favor of younger workers, also prohibited ***discrimination against younger workers in favor of older workers***. The majority focused on the purpose and history of the ADEA, as well as its text, to conclude that the Act did ***not***

General Dynamics HQ – Photo by Nwalser7 – CC BY-SA 4.0

[176] *See* Gluck & Bressman, *supra* note 152, at 913; Bressman, Rubin & Stack, *supra* note 63, at 340.

prohibit discrimination against younger workers in favor of older workers. Justice Thomas, in a dissent joined by Justice Kennedy, concluded that the plain meaning of the statute was clear and prohibited all discrimination based on age. The pertinent statutory language examined by the Court is reproduced below, followed by the majority's description of the factual and procedural background of the case, and then Justice Thomas' dissenting opinion. The oral argument for the case is here.

## Statutory Provisions

**29 U.S.C. § 623(a): Employer practices**

It shall be unlawful for an employer—

(1) to … discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; …

**29 U.S.C. § 623(e): Printing or publication of notice or advertisement indicating preference, limitation, etc.**

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment…indicating any preference, limitation, specification, or discrimination, based on age.

**29 U.S.C. § 623(f): Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause**

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, …

**29 U.S.C. § 631(a): Individuals at least 40 years of age**

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

## Factual Background and Procedural History (from Justice Souter's Majority Opinion)

In 1997, a collective-bargaining agreement between petitioner General Dynamics and the United Auto Workers eliminated the company's obligation to provide health benefits to subsequently retired employees, except as to then-current workers at least 50 years old. Respondents (collectively, Cline) were then at least 40 and thus protected by the Act, *see* 29 U.S.C. § 631(a), but under 50 and so without promise of the benefits. All of them objected to the new terms, although some had retired before the change in order to get

the prior advantage, some retired afterwards with no benefit, and some worked on, knowing the new contract would give them no health coverage when they were through.

Before the Equal Employment Opportunity Commission (EEOC or Commission) they claimed that the agreement violated the ADEA, because it "discriminate[d against them] … with respect to … compensation, terms, conditions, or privileges of employment, because of [their] age," §623(a)(1). The EEOC agreed and invited General Dynamics and the union to settle informally with Cline.

When they failed, Cline brought this action against General Dynamics, combining claims under the ADEA and state law. The District Court called the federal claim one of "reverse age discrimination," upon which, it observed, no court had ever granted relief under the ADEA. *** It dismissed in reliance on the Seventh Circuit's opinion in *Hamilton v. Caterpillar Inc.*, ***, that "the ADEA 'does not protect … the younger against the older,' " ***

A divided panel of the Sixth Circuit reversed, *** with the majority reasoning that the prohibition of §623(a)(1), covering discrimination against "any individual … because of such individual's age," is so clear on its face that if Congress had meant to limit its coverage to protect only the older worker against the younger, it would have said so. *** The court acknowledged the conflict of its ruling with earlier cases *** from the First Circuit, but it criticized the cases going the other way for paying too much attention to the "hortatory, generalized language" of the congressional findings incorporated in the ADEA. *** The Sixth Circuit drew support for its view from the position taken by the EEOC in an interpretive regulation. ***

We granted certiorari to resolve the conflict among the Circuits, 538 U.S. 976 (2003).

## GENERAL DYNAMICS LAND SYSTEMS, INC., V. DENNIS CLINE ET AL.

**540 U.S. 581 (2004)**

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument (From the Oyez Project)
Case Background (From Quimbee)
Video Summary (Prof. Stevenson – South Texas College of Law)

**JUSTICE THOMAS**, with whom **JUSTICE KENNEDY joins**, dissenting.

This should have been an easy case. The plain language of 29 U.S.C. § 623(a)(1) mandates a particular outcome: that the respondents are able to sue for discrimination against them in favor of older workers. The agency charged with enforcing the statute has adopted a regulation and issued an opinion as an adjudicator, both of which adopt this natural interpretation of the provision. And the only portion of legislative history relevant to the question before us is consistent with this outcome. Despite the fact that these traditional tools of statutory interpretation lead inexorably to the conclusion that respondents can state a claim for discrimination against the relatively young, the Court, apparently disappointed by this result, today adopts a

different interpretation. In doing so, the Court, of necessity, creates a new tool of statutory interpretation, and then proceeds to give this newly created "social history" analysis dispositive weight. Because I cannot agree with the Court's new approach to interpreting anti-discrimination statutes, I respectfully dissent.

I

"The starting point for [the] interpretation of a statute is always its language," *Community for Creative Non-Violence* v. *Reid,* *** and "courts must presume that a legislature says in a statute what it means and means in a statute what it says there," *Connecticut Nat. Bank* v. *Germain* ***. Thus, rather than looking through the historical background of the Age Discrimination in Employment Act of 1967 (ADEA), I would instead start with the text of §623(a)(1) itself, and if "the words of [the] statute are unambiguous," my "judicial inquiry [would be] complete." ***.

The plain language of the ADEA clearly allows for suits brought by the relatively young when discriminated against in favor of the relatively old. The phrase "discriminate … because of such individual's age," 29 U.S.C. § 623(a)(1), is not restricted to discrimination because of relatively *older* age. If an employer fired a worker for the sole reason that the worker was under 45, it would be entirely natural to say that the worker had been discriminated against because of his age. I struggle to think of what other phrase I would use to describe such behavior. I wonder how the Court would describe such incidents, because the Court apparently considers such usage to be unusual, atypical, or aberrant. See *ante* *** (concluding that the "common usage of language" would exclude discrimination against the relatively young from the phrase "discriminat[ion] … because of [an] individual's age").

The parties do identify a possible ambiguity, centering on the multiple meanings of the word "age." As the parties note, "age," does have an alternative meaning, namely "[t]he state of being old; old age." American Heritage Dictionary 33 (3d ed. 1992); see also Oxford American Dictionary 18 (1999); Webster's Third New International Dictionary 40 (1993). First, this secondary meaning is, of course, less commonly used than the primary meaning, and appears restricted to those few instances where it is clear in the immediate context of the phrase that it could have no other meaning. The phrases "hair white with age," American Heritage Dictionary, *supra,* at 33, or *"eyes … dim with age,"* Random House Dictionary of the English Language 37 (2d ed. 1987), cannot possibly be using "age" to include "young age," unlike a phrase such as "he fired her because of her age."

Second, the use of the word "age" in other portions of the statute effectively destroys any doubt. The ADEA's advertising prohibition, 29 U.S.C. § 623(e), and the bona fide occupational qualification defense, §623(f)(1), would both be rendered incoherent if the term "age" in those provisions were read to mean only "older age."[177] Although it is true

[177] Section 623(f)(1) provides a defense where "age is a bona fide occupational qualification." If "age" were limited to "older age," then §623(f)(1) would provide a defense only where a defense is not needed, since under the Court's reading, discrimination against the relatively young is always legal under the ADEA. Section 623(e) bans the "print[ing] … [of] any notice or advertisement relating to … indicating any preference, limitation, specification, or discrimination … based on age." Again, if "age" were read to

that the " 'presumption that identical words used in different parts of the same act are intended to have the same meaning' " is not "rigid" and can be overcome when the context is clear, *** the presumption is not rebutted here. As noted, the plain and common reading of the phrase "such individual's age" refers to the individual's chronological age. At the very least, it is manifestly unclear that it bars *only* discrimination against the relatively older. Only by incorrectly concluding that §623(a)(1) clearly and unequivocally bars only discrimination as "against the older," *ante*, at 8, can the Court then conclude that the "context" of §§623(f)(1) and 623(e) allows for an alternative meaning of the term "age." *Ante*, at 13—14.

The one structural argument raised by the Court in defense of its interpretation of "discriminates … because of such individual's age" is the provision limiting the ADEA's protections to those over 40 years of age. See 29 U.S.C. § 631(a). At first glance, this might look odd when paired with the conclusion that §623(a)(1) bars discrimination against the relatively young as well as the relatively old, but there is a perfectly rational explanation. Congress could easily conclude that age discrimination directed against those under 40 is not as damaging, since a young worker unjustly fired is likely to find a new job or otherwise recover from the discrimination. A person over 40 fired due to irrational age discrimination (whether because the worker is too young or too old) might have a more difficult time recovering from the discharge and finding new employment. ***

This plain reading of the ADEA is bolstered by the interpretation of the agency charged with administering the statute. A regulation issued by the Equal Employment Opportunity Commission (EEOC) adopts the view contrary to the Court's, 29 CFR § 1625.2(a) (2003), and the only binding EEOC decision that addresses the question before us also adopted the view contrary to the Court's, see *Garrett* v. *Runyon*, *** I agree with the Court that we need not address whether deference under *Chevron U.S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* *** would apply to the EEOC's regulation in this case. See *ante*, at 16. Of course, I so conclude because the EEOC's interpretation is consistent with the best reading of the statute. The Court's position, on the other hand, is untenable. Even if the Court disagrees with my interpretation of the language of the statute, it strains credulity to argue that such a reading is so unreasonable that an agency could not adopt it. To suggest that, in the instant case, the "regular interpretive method leaves no serious question, not even about purely textual ambiguity in the ADEA," *ante*, at 18, is to ignore the entirely reasonable (and, incidentally, correct) contrary interpretation of the ADEA that the EEOC and I advocate.

Finally, the only relevant piece of legislative history addressing the question before the Court–whether it would be possible for a younger individual to sue based on discrimination against him in favor of an older individual–comports with the plain reading of the text. Senator Yarborough, in the only exchange that the parties identified from the

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mean only "older age," an employer could print advertisements asking only for young applicants for a new job (where hiring or considering only young applicants is banned by the ADEA), but could not print advertisements requesting only older applicants (where hiring only older applicants would be legal under the Court's reading of the ADEA).

legislative history discussing this particular question, confirmed that the text really meant what it said. See 113 Cong. Rec. 31255 (1967). *** Although the statute is clear, and hence there is no need to delve into the legislative history, this history merely confirms that the plain reading of the text is correct.

II

Strangely, the Court does not explain why it departs from accepted methods of interpreting statutes. It does, however, clearly set forth its principal reason for adopting its particular reading of the phrase "discriminate … based on [an] individual's age" in Part III—A of its opinion. "The point here," the Court states, "is that we are not asking in the abstract how the ADEA uses the word 'age,' but seeking the meaning of the whole phrase 'discriminate … because of [an] individual's age.' As we have said, *social history* emphatically points to the sense of age discrimination as aimed against the old, and this idiomatic understanding is confirmed by legislative history." *Ante*, at 14 (emphasis added). The Court does not define "social history," although it is apparently something different from legislative history, because the Court refers to legislative history as a separate interpretive tool in the very same sentence. Indeed, the Court has never defined "social history" in any previous opinion, probably because it has never sanctioned looking to "social history" as a method of statutory interpretation. Today, the Court takes this unprecedented step, and then places dispositive weight on the new concept.

It appears that the Court considers the "social history" of the phrase "discriminate … because of [an] individual's age" to be the principal evil that Congress targeted when it passed the ADEA. In each section of its analysis, the Court pointedly notes that there was no evidence of widespread problems of anti-youth discrimination, and that the primary concerns of Executive Branch officials and Members of Congress pertained to problems that workers generally faced as they increased in age. The Court reaches its final, legal conclusion as to the meaning of the phrase (that "ordinary people employing the common usage of language" would "talk about discrimination because of age [as] naturally [referring to] discrimination against the older," *ibid.*) only after concluding both that "the ADEA was concerned to protect a relatively old worker from discrimination that works to the advantage of the relatively young" and that "[t]here is … no record indication that younger workers were suffering at the expense of their elders, let alone that a social problem required a federal statute to place a younger worker in parity with an older one." *Ibid*. Hence, the Court apparently concludes that if Congress has in mind a particular, principal, or primary form of discrimination when it passes an anti-discrimination provision prohibiting persons from "discriminating because of [some personal quality]," then the phrase "discriminate because of [some personal quality]" only covers the principal or most common form of discrimination relating to this personal quality.

***

As the ADEA clearly prohibits discrimination because of an individual's age, whether the individual is too old or too young, I would affirm the Court of Appeals. Because the Court resorts to interpretive sleight of hand to avoid addressing the plain language of the ADEA, I respectfully dissent.

## Questions and Comments

**1. Language at issue:** What was the language of the statute that the Court was interpreting? Does Justice Thomas suggest that the Court should examine any extrinsic sources to determine whether the statutory language is ambiguous? What are the different meanings of the statutory language identified by Justice Thomas? Does Justice Thomas believe that reasonable people understand one meaning, which is more commonly understood, as the meaning of the language? Does the majority believe that the statutory language is clear or ambiguous?

**2. Context:** Textualists will often examine the structure of a statute and the context in which language is used to determine the meaning of the language. What other sections of the statute did Justice Thomas examine to determine the meaning of the language in issue? What presumption regarding the usage of language within a statute does Justice Thomas rely on to interpret the language at issue and what conclusion does he draw from the usage of the language in other sections of the statute? How does Justice Thomas reconcile his interpretation of the statute with 29 U.S.C. § 631(a)?

**3. Agency interpretations:** As you learn more about statutory interpretation, you will discover that courts frequently defer to the reasonable interpretation of statutory language adopted by an agency charged with administering the statute when the language is ambiguous. In this case, the EEOC was charged with administering the ADEA and had adopted a regulation that provided that the ADEA prohibited discrimination against younger workers as well as older workers. *See* 29 C.F.R. § 1625.2 (2003) (providing "It is unlawful … for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over.") The United States filed an amicus brief in the case, supporting the approach taken by the EEOC. Did Justice Thomas defer to the EEOC's reading of the statute because the statute was ambiguous, and the agency's interpretation was reasonable? Did the majority reject the EEOC's interpretation because it was unreasonable? The EEOC's current interpretation of the statute appears on its website— "It is not illegal for an employer or other covered entity to favor an older worker over a younger one, even if both workers are age 40 or older."

**4. Legislative history:** Based on Justice Thomas' statement at the outset of his dissent ("if the words of the statute are unambiguous, my judicial inquiry would be complete"), is it necessary for him to examine the legislative history of the ADEA to interpret the language at issue? Why, then, do you think he examined the legislative history, and what did he find when looking there?

**5. Social history:** Textualists believe that the language adopted by Congress is the best expression of Congress' intent, so they are reluctant to examine the history of the enactment of statutes or the purposes of Congress in enacting statutes. From reading Justice Thomas' dissent, does it appear that the majority opinion considered those issues? How much weight does Justice Thomas believe the majority gave that evidence and how much weight does he believe courts should accord to such evidence?

**6. Statutory directives:** While federal judges can choose to apply any of the theories of interpretation, many states have adopted statutory directives that require judges to

follow a particular approach when interpreting statutes. To the extent that states have addressed this issue in directives, they usually have required judges to interpret statutes using textualism. *See, e.g.,* CONN. GEN. STAT. ANN. § 1-2z; COLO. REV. STAT. § 2-4-203; HAW. REV. STAT. ANN. § 1-15; 1 PA. CONS. STAT. § 1921(b). Why do you believe that legislatures prefer textualism? What should that indicate generally about these theories of interpretation?

**7. When should a textualist use tools beyond the text?** In a dissenting opinion in *Chisom v. Roemer*, 501 U.S. 380 (1991), Justice Scalia wrote, "I thought we had adopted a regular method for interpreting the meaning of language in a statute: first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not -- and especially if a good reason for the ordinary meaning appears plain -- we apply that ordinary meaning." While Scalia's opinion in *Chisom* and Thomas' opinion in *General Dynamics* are both textualist opinions, do you notice any difference in the way that the opinions discuss when it is appropriate to consult tools of interpretation beyond the text?

# V. Purposivism

The other major, and clearly distinct, theory of interpretation used by some judges today is purposivism. This approach grew out of the legal process school of legal theory in the 1950s and is most frequently associated with Henry M. Hart and Albert M. Sacks.[178] Purposivist judges believe that legislatures enact laws for specific purposes and that laws should be interpreted to advance those purposes.[179] Hart and Sacks described the purposivist methodology as follows:

> "(1) Decide what purpose ought to be attributed to the statute and any subordinate provision of it …; and then
>
> (2) Interpret the words of the statute immediately in question so as to carry out [that] purpose as best it can, making sure however, that it does not give the words either -
>
> (a) a meaning they cannot bear, or
>
> (4) a meaning that would "violate any established policy of clear statement."

Henry M. Hart & Albert M. Sacks, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994).

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178 *See* Henry M. Hart & Albert M. Sacks, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1148 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994).

179 *See* Robert A. Katzman, JUDGING STATUTES 31 (2014).

## A. Identify the Purpose; Advance the Purpose

The first two steps outlined above are most frequently associated with the purposivist approach to interpreting statutes. When interpreting statutory language, purposivists (1) identify the purpose of the statute; and (2) interpret the statute in the manner that advances that purpose. Whereas textualists are reluctant to consult extrinsic sources, purposivists will examine a range of sources to ascertain the purpose of a statute, including not only the text and structure of the statute, but also the legislative history and the history of enactment of the statute (focusing on the problems that motivated the legislature to enact the law.)[180] Hart & Sacks described several guidelines to use in identifying the purpose of a statute. First, they stressed the importance of an ***enacted statement of purpose***[181] included in the text of the legislation as a primary source for determining the purpose of the statute, "if it appears [that the statement was] designed to serve as a guide to interpretation, is consistent with the words and context of the statute and is relevant to the question of meaning at issue."[182] Second, they cautioned that identifying the purpose of a statute can be difficult because "purposes may be shaped with differing degrees of definiteness" and "purposes may exist in hierarchies" (recognizing that there ***may be multiple purposes*** for a statute).[183] Third, they counseled that the interpreter should try to determine the purpose that was envisioned by the ***enacting legislature***, not by focusing on "the short- run currents of political expedience that swirl around a legislative session," but assuming that the legislature was made up of "reasonable persons pursuing reasonable purposes reasonably."[184] Fourth, they argued that, in ascertaining purpose, it is appropriate to examine the state of the law immediately before enactment of the statute, its development before that, and general public knowledge of what was considered to be the mischief that needed remedying.[185] Fifth, even though the interpreter's goal is to determine the purpose of the statute intended by the enacting legislature, Hart & Sacks maintained that judicial, administrative, and popular construction of a statute after its enactment are relevant in attributing a purpose to the statute.[186]

## B. What About the Text?

While the purposivist approach to statutory interpretation is usually associated with the two-step analysis outlined above, Hart & Sacks stressed that a statute should not be interpreted to give the words "a meaning they cannot bear" in order to achieve the purpose

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180 *See* Congressional Research Service, *supra* note 35, at 12-13.

181 The previous chapter examined the structure of statutes, including the purposes and findings provisions in statutes. For a good discussion of enacted purposes, *see* Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. Chi. L. Rev. 669 (2019).

182 *See* Hart & Sacks, *supra* note 178, at 1374.

183 *Id.* at 1374-1380.

184 *Id.*

185 *Id.*

186 *Id.* As a last resort, Hart & Sacks suggested that courts could determine legislative purpose based on "an appropriate presumption drawn from some general policy of the law." *Id.*

of the statute. Thus, like textualists, purposivists will generally ***begin their interpretation of a statute with the text of the statute***. If the statutory language is clear ("unmistakable"), most purposivists will stop there and will not proceed further to examine the purposes of the statute.[187] Occasionally, though, purposivists will follow that analysis to determine ***if*** the statutory language is ambiguous. If the statutory language ***is*** ambiguous, purposivists will follow the two-step analysis outlined above. Finally, in some extreme cases, when the text of a statute is clear, but leads to an absurd result or a result the legislature clearly could not have intended, purposivists will depart from the plain meaning of the text and engage in the two-step analysis outlined above.[188]

## C. Foundation for the Theory

Purposivists, like textualists, generally view themselves as *"**faithful agents***" of the legislature.[189] However, while textualists believe that statutory language is the best evidence of legislative intent, purposivists are willing to consult a wider variety of sources to ascertain the intent of the enacting legislature. In that regard, purposivists resemble intentionalists, another group of theorists discussed below. However, while purposivists and intentionalists examine similar sources to determine the intent of the enacting legislature, intentionalists focus on identifying the specific intent of the legislature regarding the interpretive issue before the court, while purposivists focus on identifying the general purpose that the enacting legislature was trying to achieve and interpret the statute to achieve that purpose.[190] Consequently, if the social and legal landscape of the nation have changed significantly between the time a law was enacted and the time it is being interpreted, a purposivist judge might adopt a dynamic interpretation of a statute that carries out the purposes of the enacting legislature, even though the enacting legislature might have intended a different interpretation of the statute based on the social and legal landscape that existed at the time of enactment. In light of the possibility that purposivist judges could interpret statutes in such a dynamic fashion, some academics

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187 *Id.* at 1125.

188 After courts engage in the two step analysis outlined above and ensure that the interpretation does not conflict with a clear textual reading of the statute, Hart & Sacks indicate that courts should ensure that the interpretation does not "violate any established policy of clear statement." *See* Hart & Sacks, *supra* note 178, at 1374. Those policies include, but are not limited to, policies against criminalizing conduct that is not thought to be blameworthy and policies against impinging on constitutionally protected values. *Id.* at 1376-1377. Before a purposivist judge adopts a statutory interpretation that violates such policies, Hart & Sacks counsel that the judge must ascertain that the legislature has spoken "with more than [the] ordinary clearness" on the issue. *Id.*

189 *See* Barrett, *supra* note 152, at 112-113.

190 *See* Bressman, Rubin & Stack, *supra* note 63, at 155. Purposivists are more skeptical than intentionalists that it is possible to determine the specific intent of the enacting legislature, given the complexities of the legislative process and the reality that the legislature may not have a shared intent.

suggest that purposivists might be more willing to view themselves as partners to the legislature, rather than faithful agents.[191]

## D. Criticisms of the Approach

Critics of purposivism complain that problems arise in implementing the theory because statutes frequently have multiple purposes, so judges must choose one purpose from many to engage in the two-step analysis of purposivism. Critics argue that (1) judges are ill equipped to determine which purpose predominates because the processes by which laws are made are too complex and the records of that process are contradictory or unavailable; and (2) judges are inappropriately making the law and doing so based on ideological judgments when choosing which purpose predominates.[192] Codification idiosyncrasies also complicate the identification of statutory purposes, as enacted purposes provisions of statutes are frequently relegated to editorial notes in the U.S. Code or left out of the Code entirely.[193]

Detractors of purposivism also challenge the implementation of the second step of the traditional purposivism analysis, arguing that it is not always clear which interpretation of a statute best advances the purpose of a statute even when there may be consensus regarding the purpose. Here again, critics complain that judges may choose the interpretation that best advances the statutory purpose based on ideological considerations.

## E. Purposivism in Action

Perhaps the best example of purposivism (and most well-known) is the Supreme Court's 1892 decision, *Church of the Holy Trinity v. United States*, which is reproduced below. The statutory language at issue and the title of the statute have been bolded and italicized below.

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191 *See* Seidenfeld, *supra* note 157, at 1821.

192 *See* Manning, *supra* note 29, at 430; Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 18, 20-21, 376-378 (2012). Justice Scalia and Bryan Garner argue that purposivism is too easily manipulable, allowing the judge to ignore the text and "achieve what [the judge] believes to be the provision's purpose." *See* Scalia & Garner, *supra* at 18.

193 *See* Jarrod Shobe, *Codification and the Hidden Work of Congress*, *supra* note 126, at 643, 667, 688. In that regard, the codification process could be contributing to the modern trend away from purposivism.

**Resources for the Case**

Unedited Opinion (From Justia)
Video Summary (Prof. Stevenson – South Texas College of Law)
The Story of the Case (by Professor Carol Chomsky)

## CHURCH OF THE HOLY TRINITY V. UNITED STATES

**143 U.S. 457 (1892)**

**MR. JUSTICE BREWER** delivered the opinion of the Court.


Church of the Holy Trinity – Public Domain

Plaintiff in error is a corporation duly organized and incorporated as a religious society under the laws of the State of New York. E. Walpole Warren was, prior to September, 1887, an alien residing in England. In that month the plaintiff in error made a contract with him by which he was to remove to the City of New York and enter into its service as rector and pastor, and in pursuance of such contract, Warren did so remove and enter upon such service. It is claimed by the United States that this contract on the part of the plaintiff in error was forbidden by 23 Stat. 332, c. 164, and an action was commenced to recover the penalty prescribed by that act. The circuit court held that the contract was within the prohibition of the statute, and rendered judgment accordingly, *** and the single question presented for our determination is whether it erred in that conclusion.

The ***first section*** describes the act forbidden, and is in these words:

***"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that from and after the passage of this act it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration, of any alien or aliens, any foreigner or foreigners, into the United States, its territories, or the District of Columbia under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its territories, or the District of Columbia."***

It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words "labor" and "service" both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added "of any kind," and further, as noticed by the circuit judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers, and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute because

not within its spirit nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act. * * *

[As the Court noted in *United States v.* Kirby, 7 Wall. 482, 486:] "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always therefore be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter. The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted 'that whoever drew blood in the streets should be punished with the utmost severity' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edw. II which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire, 'for he is not to be hanged because he would not stay to be burnt.' And we think that a like common sense will sanction the ruling we make, that the act of Congress which punishes the obstruction or retarding of the passage of the mail, or of its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder." * * *

Among other things which may be considered in determining the intent of the legislature is the title of the act. We do not mean that it may be used to add to or take from the body of the statute, but it may help to interpret its meaning. * * * ***[T]he title of this act is "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its territories, and the District of Columbia."*** Obviously the thought expressed in this reaches only to the work of the manual laborer, as distinguished from that of the professional man. No one reading such a title would suppose that Congress had in its mind any purpose of staying the coming into this country of ministers of the gospel, or, indeed, of any class whose toil is that of the brain. The common understanding of the terms "labor" and "laborers" does not include preaching and preachers, and it is to be assumed that words and phrases are used in their ordinary meaning. So whatever of light is thrown upon the statute by the language of the title indicates an exclusion from its penal provisions of all contracts for the employment of ministers, rectors, and pastors.

Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy, and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body. *** The situation which called for this statute was briefly but fully stated by MR. JUSTICE BROWN

when, as district judge, he decided the case of *United States v. Craig,* 28 F. 795, 798: "The motives and history of the act are matters of common knowledge. It had become the practice for large capitalists in this country to contract with their agents abroad for the shipment of great numbers of an ignorant and servile class of foreign laborers, under contracts by which the employer agreed, upon the one hand, to prepay their passage, while, upon the other hand, the laborers agreed to work after their arrival for a certain time at a low rate of wages. The effect of this was to break down the labor market and to reduce other laborers engaged in like occupations to the level of the assisted immigrant. The evil finally became so flagrant that an appeal was made to Congress for relief by the passage of the act in question, the design of which was to raise the standard of foreign immigrants and to discountenance the migration of those who had not sufficient means in their own hands, or those of their friends, to pay their passage."

It appears also from the petitions and in the testimony presented before the committees of Congress that it was this cheap, unskilled labor which was making the trouble, and the influx of which Congress sought to prevent. It was never suggested that we had in this country a surplus of brain toilers, and least of all that the market for the services of Christian ministers was depressed by foreign competition. Those were matters to which the attention of Congress or of the people was not directed. So far, then, as the evil which was sought to be remedied interprets the statute, it also guides to an exclusion of this contract from the penalties of the act.

A singular circumstance throwing light upon the intent of Congress is found in this extract from the report of the Senate committee on education and labor recommending the passage of the bill: "The general facts and considerations which induce the committee to recommend the passage of this bill are set forth in the report of the committee of the house. The committee report the bill back without amendment, although there are certain features thereof which might well be changed or modified in the hope that the bill may not fail of passage during the present session. Especially would the committee have otherwise recommended amendments, substituting for the expression, 'labor and service,' whenever it occurs in the body of the bill, the words 'manual labor' or 'manual service,' as sufficiently broad to accomplish the purposes of the bill, and that such amendments would remove objections which a sharp and perhaps unfriendly criticism may urge to the proposed legislation. The committee, however, believing that the bill in its present form will be construed as including only those whose labor or service is manual in character, and being very desirous that the bill become a law before the adjournment, have reported the bill without change." P. 6059, Congressional Record, 48th Cong. And referring back to the report of the committee of the house, there appears this language: "It seeks to restrain and prohibit the immigration or importation of laborers who would have never seen our shores but for the inducements and allurements of men whose only object is to obtain labor at the lowest possible rate, regardless of the social and material wellbeing of our own citizens, and regardless of the evil consequences which result to American laborers from such immigration. This class of immigrants care nothing about our institutions, and in many instances never even heard of them. They are men whose

passage is paid by the importers. They come here under contract to labor for a certain number of years. They are ignorant of our social condition, and, that they may remain so, they are isolated and prevented from coming into contact with Americans. They are generally from the lowest social stratum, and live upon the coarsest food, and in hovels of a character before unknown to American workmen. They, as a rule, do not become citizens, and are certainly not a desirable acquisition to the body politic. The inevitable tendency of their presence among us is to degrade American labor and to reduce it to the level of the imported pauper labor." Page 5359, Congressional Record, 48th Congress.

We find, therefore, that the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the committee of each house, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap unskilled labor.

But, beyond all these matters, no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation. The commission to Christopher Columbus, prior to his sail westward, is from "Ferdinand and Isabella, by the grace of God, King and Queen of Castile," etc., and recites that "it is hoped that by God's assistance some of the continents and islands in the ocean will be discovered," etc. The first colonial grant, that made to Sir Walter Raleigh in 1584, was from "Elizabeth, by the grace of God, of England, Fraunce and Ireland, Queene, defender of the faith," etc., and the grant authorizing him to enact statutes of the government of the proposed colony provided that "they be not against the true Christian faith nowe professed in the Church of England." * * *

If we examine the constitutions of the various states, we find in them a constant recognition of religious obligations. Every Constitution of every one of the forty-four states contains language which, either directly or by clear implication, recognizes a profound reverence for religion, and an assumption that its influence in all human affairs is essential to the wellbeing of the community. * * *

Even the Constitution of the United States, which is supposed to have little touch upon the private life of the individual, contains in the First Amendment a declaration common to the constitutions of all the states, as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," etc., and also provides in Article I, Section 7, a provision common to many constitutions, that the executive shall have ten days (Sundays excepted) within which to determine whether he will approve or veto a bill. * * *

If we pass beyond these matters to a view of American life, as expressed by its laws, its business, its customs, and its society, we find everywhere a clear recognition of the same truth. Among other matters, note the following: the form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words of all wills, "In

the name of God, amen;" the laws respecting the observance of the Sabbath, with the general cessation of all secular business, and the closing of courts, legislatures, and other similar public assemblies on that day; the churches and church organizations which abound in every city, town, and hamlet; the multitude of charitable organizations existing everywhere under Christian auspices; the gigantic missionary associations, with general support, and aiming to establish Christian missions in every quarter of the globe. These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation. In the face of all these, shall it be believed that a Congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation? * * *

The judgment will be reversed, and the case remanded for further proceedings in accordance with this opinion.

**VIDEO LECTURE**

**Click here for a video lecture on *Church of the Holy Trinity v. United States* by Professor Stephen Johnson.**

## Questions and Comments

**1. Plain meaning:** As noted above, even purposivists generally begin their statutory analysis by examining the text to determine whether it is clear or ambiguous. What is the statutory language in the Alien Contract Labor Act that the Court is examining and what is the statutory interpretation question that the Court is trying to resolve? Does the Court conclude that the text clearly addresses the question before the Court? Why or why not? Is there a purely textualist argument that could be made to support the Court's conclusion (based on the exemptions listed in section 5 of the statute)?

**2. Departing from the plain meaning:** Contrary to the approach suggested by Hart & Sacks and followed by most purposivists, the Court rejects the clear, unambiguous meaning of the text and adopts an alternative interpretation of the statute. When does the Court suggest that it is acceptable to depart from clear statutory text? Does Justice Brewer believe that judges are legislating when they depart from clear text?

**3. Titles:** In order to determine the purpose of the enacting legislature, purposivists will frequently examine the text of the statute as well as the structure of the statute. The majority in the instant case examines the long title of the statute to aid in identifying the

statute's purpose. What does Justice Brewer conclude based on the long title? Do you agree with his reasoning? Is the long title of a statute enacted by Congress?

**4. Other extrinsic sources used to determine the statute's purpose:** In addition to examining the text and structure of a statute to determine its purpose, purposivists frequently look at the history of enactment of the statute, focusing on the problems that existed at the time of enactment and the pressure that was put on the legislature to address those problems. What events did Justice Brewer suggest motivated Congress to enact the Alien Contract Labor Act? What was the "mischief" or "evil" to which Congress was responding?

**5. Legislative history:** In clear contrast to the approach taken by many textualists, purposivists frequently explore legislative history to determine the purpose of statutes. Which portions of the legislative history did Justice Brewer examine and what purpose did he suggest those excerpts supported? There are many different types of legislative history that can be considered, including statements of individual legislators at hearings, statements by sponsors of legislation, and committee reports. Supporters of the use of legislative history identify some types of legislative history as more persuasive than others. Would the portions of the legislative history cited by the Court be particularly persuasive? Why or why not?

**6. A religious nation:** Why does the Court spend so much time focusing on the fact that the United States was "a religious people" and "a Christian nation"? Is that relevant to determining the purpose of the prohibition? Are there constitutional implications?

**7. Postscript:** In 1891, while *Holy Trinity* was being litigated, Congress amended the Alien Contract Labor Act to explicitly exclude ministers but did not apply the new statute to pending proceedings. *See* Act of March 3, 1891, 26 Stat. 1084, 1085. How should that impact the Court's interpretation of the prior version of the law that was being reviewed in *Holy Trinity?*

## Professional Identity Formation/Professional Responsibility

The *Holy Trinity* Court based its holding, in part, on a conclusion that the United States is a "Christian nation." Arguably, the Court raised the issue because it was relevant in determining the purpose or intent of the enacting legislature, but it raises a larger question for lawyers and law students. What influence does, or should, your religion or faith system have on your practice of law? Are there values or beliefs from your faith system that will help you counsel and serve your client? Are they limited to ethical beliefs and values or are there other beliefs and values? How should or will you respond if there is a conflict between those values and beliefs and the interests expressed by your client, assuming that the client is not expressing an interest in pursuing illegal or unethical ends? How, if at all, does Rule 1.2 of the Model Rules of Professional Conduct limit your ability to address such conflicts?

## F. Conflicting Purposes

One of the criticisms to purposivism noted above is that statutes may have multiple purposes and purposivism gives judges the power to choose which purpose predominates, enabling them to choose the interpretation that aligns with their ideological preferences. *Daigle v. Shell*, which follows, is an example of a case decided, in part, based on the purpose of a statute (CERCLA) that has dueling purposes. The history of CERCLA is outlined here and the cleanup plan for the waste site in the case is here.

### DAIGLE V. SHELL

**972 F.2d 1527 (10th Cir. 1992)**

**BALDOCK**, Circuit Judge.

This *** case arises from the cleanup effort at the Rocky Mountain Arsenal (the Arsenal), a federally controlled Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) site near Commerce City, Colorado. 42 U.S.C.A. § 9601 *et seq.* The Plaintiffs-appellees, a group of individuals who reside near the Arsenal, seek "response costs" from Defendants-appellants Shell Oil Company (Shell) and the Government for medical monitoring under CERCLA § 107(a), 42 U.S.C.A. § 9607(a) * * * Plaintiffs contend that they suffered personal injury and property damage as a result of airborne pollutants released during the joint cleanup effort at the Arsenal by Shell and the Government.

Rocky Mountain Arsenal South Plant Chemical Storage Tanks – Public Domain

Shell filed a Rule 12(b)(6) motion to dismiss the CERCLA claim * * * The Government filed a separate Rule 12(b)(6) motion to dismiss the CERCLA claim * * * With some uncertainty because of the factual immaturity of the case and the complete lack of appellate guidance, the district court denied the motions to dismiss the CERCLA medical monitoring claims. * * *

Shell and the Government appeal, contending that "response costs" under CERCLA § 107(a) do not encompass medical monitoring costs. * * *

We reverse the rulings denying dismissal of the CERCLA § 107(a) "response cost" claims against Shell and the Government. * * * The case is remanded to the district court for proceedings consistent with this opinion.

**I. Background**

This controversy stems from the year 1956, when the Army constructed and began using Basin F, a ninety-three acre hazardous waste surface impoundment on the Arsenal. The Army, as operator of the Arsenal, used Basin F to impound hazardous waste generated from its chemical warfare agent, chemical product and incendiary munition manufacturing activities. In addition, Shell used Basin F under lease from the Army to impound hazardous waste generated in its herbicide and pesticide manufacturing activities on the Arsenal. The combined activities of the Army and Shell on the Arsenal resulted in one of the worst hazardous waste pollution sites in the country, and Basin F is only a small portion of the problem. Army officials have estimated that the twenty-seven square mile Arsenal has 120 contamination sites which contain huge quantities of liquid and solid wastes, some of which is unique because of the mixture of private herbicide and pesticide manufacturing activities with Army munitions manufacturing activities. * * * Earnest response to these problems began in 1984, when the Army, with guidance from EPA, began a Remedial Investigation and Feasibility Study (RI/FS) pursuant to CERCLA § 104, 42 U.S.C.A. § 9604. The purpose of this study was to identify contamination sites and determine the feasibility of proposed responses. As part of this extremely long and complex process, the Army identified fourteen specific sites which needed Interim Response Actions (IRA's) to stop the spread of contaminants so as to protect human health and the environment. As indicated by their classification, these actions were to take place in the interim, before the implementation of a permanent, remedial response. Basin F was among the fourteen priority sites.

Hazardous wastes apparently had leaked from Basin F into the surrounding environment for many years before the IRA finally began in April 1988. The IRA was taken as a joint effort by the Army and Shell in agreement with EPA and the State of Colorado. In accordance with the agreed upon plan, the government contracted Ebasco Constructors, Inc., a private contractor, to transfer the liquid hazardous waste from Basin F to on-site storage tanks and lined surface impoundments, move contaminated solids into a lined and capped waste pile, and place a clay cap, top soil and vegetation over soils remaining

within the Basin. The bulk of this year-long process ended in March 1989 with the capping of the solid waste pile.

The parties involved in the Arsenal cleanup have litigated extensively in an effort to assign responsibility under CERCLA and various state statutes for the cleanup. This case, however, centers not on the necessary costs of the IRA but on alleged injuries resulting from the cleanup effort itself. The containment effort stirred up noxious odors and airborne pollutants that blew over Plaintiffs' residences, most of which were located in a trailer park one-and-a-half miles due west of Basin F. Some Plaintiffs registered complaints at least by December 1988, but the government decided that the odors were "a source of intermittent discomfort which [was] outweighed by the long-term benefit to the community of the removal activity conducted at Basin F." * * * Plaintiffs allege that this "intermittent discomfort" brought on property and economic damages and a variety of ailments ranging from conjunctivitis to skin rashes as well as the possibility of latent disease. * * *

**II. Medical Monitoring**

Plaintiffs seek the establishment of a fund to finance longterm "medical monitoring" or "medical surveillance" designed to detect the onset of any latent disease that may have been caused by exposure to toxic fumes stirred up during the Basin F cleanup. In their amended complaint, Plaintiffs state that the fund and the monitoring are necessary "to assist plaintiffs and class members in the prevention or early detection and treatment of chronic disease." * * * This type of action has been increasingly recognized by state courts as necessary given the latent nature of many diseases caused by exposure to hazardous materials and the traditional common law tort doctrine requirement that an injury be manifest. *In re Paoli RR. Yard PCB Litigation,* 916 F.2d 829, 849 (3d Cir.1990) (citing cases), *cert. denied,* 111 S.Ct. 1584 (1991). State tort law, however, is not at issue here. Plaintiffs instead seek redress in CERCLA § 107(a) private right of recovery for "response costs." Whether § 107(a) response costs include medical monitoring is an issue of first impression in the courts of appeals, although several district courts have decided the issue. * *

We turn first to the purpose and structure of CERCLA Congress enacted CERCLA to facilitate the expeditious cleanup of environmental contamination caused by hazardous waste releases. *See Colorado v. Idarado Mining Co.,* 916 F.2d 1486, 1488 (10th Cir. 1990), *cert. denied,* 111 S.Ct. 1584 (1991). In furtherance of this purpose, the Act establishes several mechanisms to respond to releases or threatened releases and delineates the respective powers and rights of governmental entities and private parties. *Id.* At issue here is § 107(a), which is designed to further the overall objective of shifting liability for cleanup costs to responsible parties. *Id.* The statute provides that certain responsible parties may be sued for ***

> (B) *any other necessary costs of response incurred by any other person consistent with the national contingency plan;* *** and

> (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

42 U.S.C.A. § 9607(a)(4) (emphasis supplied). *** At issue is whether Plaintiffs' monitoring claim falls within the subsection (B) private right of recovery for "any other necessary costs of response...."

In keeping with its notorious lack of clarity, CERCLA leads us down a convoluted path to the definition of "any other necessary costs of response." Actually, the drafters did not directly define the phrase as a whole, opting instead to define only the term "response." CERCLA § 101(25), 42 U.S.C.A. § 9601(25). A "response" is a "removal action" or a "remedial action." *Id.* "Removal actions," in turn, are actions designed to effect an interim solution to a contamination problem:

> "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to *monitor,* assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or *the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare* or to the environment, which may otherwise result from a release or threat of release. * * *

42 U.S.C.A. § 9601(23) (emphasis supplied). "Remedial actions," on the other hand, are designed to effect a permanent solution to the contamination problem:

> "remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, * * * and *any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment....*

42 U.S.C.A. § 9601(24) (emphasis supplied).

In arguing for affirmance of the district court's denial of Defendants' 12(b)(6) motions, Plaintiffs direct our attention to the emphasized language, which in both definitions refers to "monitoring" in the "public health and welfare" context. They argue that this plain language clearly covers the monitoring costs they seek, citing *Brewer v. Ravan,* 680 F.Supp. 1176 (M.D.Tenn. 1988), and several cases which cursorily arrived at the same result as *Brewer.* * * Applying what it considered the plain language of the definitions, the *Brewer* court held that § 9601 "removal" and "remedial" costs encompass medical monitoring as long as the monitoring is "conducted *to assess the effect of the release or*

*discharge on public health or to identify potential public health problems presented by the release." Id.* at 1179. This holding apparently was persuasive to the district court in this case, although it did not write a memorandum in support of its ruling.

Plaintiffs correctly assert that certain monitoring costs are recoverable as "removal action" or "remedial action" "response costs." The express statutory language admits of no other result; however, we think Plaintiffs and the *Brewer* court go awry in affording a broad sweep to the "public health and welfare" language in the definitions. Several district courts, led by the comprehensive analysis in *Coburn v. Sun Chemical Corp.,* 28 Env't Rep.Cas. (BNA) 1665, 1988 WL 120739 (E.D.Pa. Nov. 9, 1988), have expressly rejected *Brewer* as too broad, basing their conclusion on an examination of the plain language of the definitions in context with the overall structure and history of CERCLA. * * * Defendants base their argument for reversal on the reasoning of these courts.

Turning to the context of the "monitoring" and "health and welfare" language, we note that both definitions are directed at containing and cleaning up hazardous substance releases. For example, the "monitor[ing]" allowed for under the "removal action" definition relates under the plain statutory language only to an evaluation of the extent of a "release or threat of release of hazardous substances." 42 U.S.C.A. § 9601(23). And the "remedial action" definition expressly focuses only on actions necessary to "prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment." *Id.* § 9601(24).

Plaintiffs, however, concentrate on the additional § 9601(23) phrase referring to "other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare...." They contend that this should be read broadly to cover any type of monitoring that would mitigate health problems. Medical monitoring would mitigate the potential individual health problems of Plaintiffs, but the general provision for prevention or mitigation of "damage to public health or welfare" must be interpreted consistently with the specific examples of "removal costs" enumerated in the definition. * * * The specific examples all prevent or mitigate damage to public health by preventing contact between the spreading contaminants and the public. See, for example, the suggested actions regarding fencing, alternate water supplies, and temporary housing. *Supra* p. 1534. Although the statute provides that "removal" costs are not limited to these specific examples, we think it only reasonable under traditional statutory canons of construction to conclude that any other recoverable costs must at least be of a similar type. *See Ambrogi,* 750 F.Supp. at 1247 (discussing ejusdem generis). Long term health monitoring of the sort requested by Plaintiffs — "to assist plaintiffs and class members in the prevention or early detection and treatment of chronic disease," * * * clearly has nothing to do with preventing contact between a "release or threatened release" and the public. The release has already occurred.

Our limited construction of the definition of "response costs" is supported by reference to legislative history, "sparse" as it is. *** Plaintiffs' request for medical monitoring to allow "prevention or early detection and treatment of chronic disease" smacks of a cause of

action for damages resulting from personal injury. And the history of the enactment of CERCLA reveals that both houses of Congress considered and rejected any provision for recovery of private damages unrelated to the cleanup effort, including medical expenses. Each chamber of Congress considered Bills which contained provisions for causes of action for certain economic damages and for personal injury. For example, the original House Bill contained a provision for private recovery of "all damages for personal injury, injury to real or personal property, and economic loss, resulting from such release or threatened release." *** This provision did not make it out of committee, and the final Bill as enacted by the House included no provision for medical expense recovery. *** The Senate Bill also contained a provision for private recovery of "all out-of-pocket medical expenses, including rehabilitation costs or burial expenses, due to personal injury." *** But this provision was later deleted by amendment, and H.R. 7020 was ultimately substituted as a compromise bill, amended, enacted by both chambers and signed into law without any reference to medical expenses.

District courts examining this evolution have looked to statements of Senator Randolph, the cosponsor of the compromise bill, for explanation. *** Senator Randolph expressly acknowledged the intentional deletion of any private cause of action for personal injury; the Senator stated that "[w]e have deleted the Federal cause of action for medical expenses or income loss." *** Given Senator Randolph's status as a cosponsor of the compromise bill, we find his statements a reliable indicator of Congressional intent to exclude "medical expenses" from recovery. His remarks, as well as statements from other Senators and Representatives throughout the evolution of CERCLA, confirm the obvious implication that Congress intentionally deleted all personal rights to recovery of medical expenses from CERCLA. * * *

Given the language of the response costs definitions and the history and structure of CERCLA, we hold that the medical monitoring which Plaintiffs seek is not recoverable under CERCLA § 107(a). We therefore reverse the district court's order denying Shell's and the Government's motion to dismiss.

## Questions and Comments

**1. Plain meaning:** In *Holy Trinity*, as in most cases, the Court began its opinion with a discussion of the plain meaning of the text in question. The court in *Daigle* “turns first” to the purpose of CERCLA to interpret the text. What was the statutory interpretation question that the court was trying to resolve? Purposivist judges focus on the purpose of the statute to resolve ambiguity, to confirm the plain meaning of statutory text, or, in unusual cases (like *Holy Trinity*), to interpret the text contrary to its plain meaning. Did the statutory text in *Daigle* have a clear meaning? Was the court examining the purpose of CERCLA to confirm plain meaning, resolve ambiguity, or reach an interpretation inconsistent with or contrary to its plain meaning?

**2. Dueling purposes:** The court and the plaintiffs focused on two distinct purposes of CERCLA. What were the two purposes of CERCLA discussed in the opinion? There

were no dissenting judges in *Daigle*. However, can you articulate a purposivist reading of CERCLA that would support the plaintiffs' claim for medical monitoring costs?

**3. Text and context:** The *Daigle* court determined the purpose of CERCLA based on the text of several sections of CERCLA other than Section 107(a), which did not define "response costs." Why did the court conclude that the text used in those other provisions demonstrated that Congress did not include Section 107(a) in CERCLA to advance the purposes identified by the plaintiffs? How did the plaintiffs argue that those same provisions demonstrated that Congress included Section 107(a) to advance the purposes that they identified?

**4. Legislative history:** As in *Holy Trinity,* the *Daigle* court consulted legislative history to assist in resolving the statutory interpretation question. (The legislative history for CERCLA is available here.) However, is the court examining the legislative history to determine the general purpose of CERCLA or to ascertain the enacting legislature's specific intent regarding the issue in this case? What does the court find in the legislative history? Are the types of legislative history cited by the court more or less persuasive than the types of legislative history cited by the *Holy Trinity* Court? As you read the cases in this book, you will find that it is often difficult to label opinions as textualist, purposivist, or any other "ist," because judges may include analyses based on multiple theories in a single opinion.

**5. Health assessment or health effects studies:** Why couldn't the plaintiffs recover medical monitoring costs under Section 107(a)(4)(D)?

**6. Post-script:** Several other circuit courts later addressed the issue in *Daigle* and reached the same conclusion as the Tenth Circuit, despite the dueling purposes of CERCLA. *See* *Giovanni v. United States Dep't of the Navy*, 906 F.3d 94, 106-110 (3d Cir. 2018); *Syms v. Olin Corp.*, 408 F.3d 95, 105 (2d Cir. 2005); *Price v. United States Navy*, 39 F.3d 1011, 1016-17 (9th Cir. 1994).

## G. Advancing the Purpose

As noted above, just as critics complain that purposivism allows judges too much discretion to identify the purpose of statutes, critics also complain that judges have too much discretion in determining whether a particular interpretation of a statute advances the purposes of the statute. In the following case, the court was interpreting a statute that had conflicting purposes, so the court had to determine which purpose controlled and whether the actions taken by a government agency were consistent with the court's chosen purpose. Although the court and the government defendants ultimately agree, in the case, on the primary purpose of the statute at issue, the court and government disagree regarding whether the government decision that was challenged was consistent with that purpose. The plans referenced in the opinion are available here.

## GREATER YELLOWSTONE COALITION V. KEMPTHORNE

### 577 F.SUPP. 2D 183 (D.D.C. 2008)

**EMMET G. SULLIVAN**, District Judge.

The instant case represents the latest in a series of challenges to the regulations promulgated by the National Park Service ("NPS") concerning snowmobile use in the National Parks. The regulations currently at issue propose new restrictions on recreational snowmobiling in Yellowstone and Grand Teton National Parks and the John D. Rockefeller Jr. Memorial Parkway (collectively "the parks"). There are two plaintiffs in this action. The first is the Greater Yellowstone Coalition, a group of conservation organizations that "take an active interest in maintaining the integrity of the National Park System." * * * The second Plaintiff is the National Parks Conservation Association ("NPCA"), the largest national organization in the United States dedicated to the protection and enhancement of the National Park System. * * * Defendants are the National Park Service, Dirk Kempthorne, in his official capacity as the Secretary of the Interior, Mary Bomar in her official capacity as Director of the National Park Service, and Mike Snyder in his official capacity as Director of the Intermountain Region of the U.S. National Park Service (collectively "NPS").

Snowmobile photo – Public Domain

The new Winter Use Plan ("WUP," "Rule," or "Plan") promulgated by Defendants allows 540 recreational snowmobiles and eighty-three snowcoaches to enter Yellowstone National Park every day. * * * Plaintiffs *** claim that the plan violates the NPS Organic Act * * * Specifically, Plaintiffs' arguments focus on the WUP's substantive and procedural deficiencies as they relate to the plan's impacts on the parks' natural soundscapes, air quality, and wildlife. Agreeing that there are no facts in dispute, Plaintiffs and Defendants have filed cross-motions for summary judgment. The Court held a hearing on the motions on August 27, 2008, and the parties filed short post-hearing briefs. Upon consideration of the motions, the responses and replies thereto, oral argument at the hearing, the post-hearing briefs, the applicable law, and the entire administrative record in this case, the Court **GRANTS** Plaintiffs' Motion for Summary Judgment and **DENIES** Defendants' Motion. The 2007 Winter Use Plan, the 2007 Final Environmental Impact Statement ("FEIS"), and the 2007 Record of Decision ("ROD") are hereby vacated and remanded to the agency for proceedings consistent with this opinion.

## I. Procedural History

This Court's involvement in the ongoing series of cases regarding Yellowstone's winter management began in 1997 and has continued nearly without pause to the present day. *** Over the years, environmental and recreation groups have challenged the Park Service's restrictions on the use of snowmobiles in the parks, with the more recent controversies growing out of a year 2000 Record of Decision ("2000 ROD") which found that the use of snowmobiles at present levels so harmed the integrity of the parks' resources and values that it violated the NPS Organic Act. *** In light of this finding, in 2001, NPS published a Final Rule calling for the eventual phase-out of personal snowmobiles in the parks, and instead recommended continued winter access through the use of a snowcoach mass transit system. *** The "phase-out rule," promulgated by the Clinton administration, was published the day after President George W. Bush took office and was immediately stayed pending a review of the Rule by the new administration. *** In response to litigation brought by snowmobile manufacturers and enthusiasts, NPS prepared a Supplemental EIS ("SEIS") in 2003. The SEIS proposed a dramatic change of course. In place of the planned phase-out, NPS set a new limit of 950 snowmobiles per day in Yellowstone. *** Following two lawsuits in this Court and one in the District of Wyoming, NPS put into effect a "Temporary Winter Use Plan" which allowed a daily limit of 720 snowmobiles. Under the temporary plan, all snowmobiles entering the parks were required to meet "best available technology" standards for noise and emissions and were also required to be accompanied by a commercial guide. This temporary plan was to be in effect for three winter seasons, from 2004 through 2007, and then replaced with a long-term winter use plan in 2007/2008. It is the new long-term plan that is the subject of the instant case.

On September 24, 2007, NPS published its Winter Use Plan Final Environmental Impact Statement ("FEIS"). The complete plan was published in a November 20, 2007 Record of Decision ("2007 ROD"). The 2007 ROD claims to address this "Court's various concerns regarding the winter use 2003 Supplemental EIS" and allows 540 recreational snowmobiles per day, subject to "best available technology" [air pollution] standards, (hereinafter, "BAT"), 100% commercial guiding, and a requirement that all snowmobilers travel in groups of eleven or less. The Rule also requires that all snowcoaches and administrative snowmobiles implement BAT standards by 2011. *** On November 20 and 21, 2007, two lawsuits were filed in this Court by GYC and NPCA, respectively. * * * [Both lawsuits claimed that] the 2007 Final Rule violates the National Park Service Organic Act * * * The cases were consolidated by Order of this Court on March 19, 2008.

The Plan at issue was selected as one of seven alternatives analyzed [by the Park Service.] The alternatives ranged from a "no action" alternative which would have ended all oversnow vehicle ("OSV") use in the parks, to an "expanded recreational use" alternative which would have allowed up to 1025 snowmobiles per day. The details of the Winter Use Plan (also known as "Alternative 7" in the FEIS) are as follows. Recreational snowmobiles are limited to 540 per day in Yellowstone and snowcoaches are limited to

eighty-three per day. All snowmobiles must meet Best Available Technology ("BAT") standards for emissions and noise. Snowcoaches and administrative snowmobiles (including park staff and concessionaires) must also meet BAT standards by the 2011-2012 winter season. All snowmobiles must be accompanied by commercial guides and must travel in groups of one to eleven. * * *

[The court then noted that the government's plan was also challenged in court in separate actions by the State of Wyoming, Park County, and several snowmobile trade groups. Those plaintiffs argued that the limit of 540 snowmobiles per day in the plan was too restrictive and the rule violated the Organic Act. Those cases were brought in Wyoming and the federal defendants sought to have this case transferred to Wyoming, but the court denied the defendants' request.]

**II. Legal Standards**

* * *

3. Governing Statutory Mandates

* * * NPS is *** bound by specific statutory mandates that define the Service's mission and impose independent requirements upon the agency. Plaintiffs challenge the WUP as contrary to the National Park Service Organic Act * * *

The NPS was created in 1916 and charged with the duty to

> promote and regulate the use of the . . . national parks, monuments, and reservations hereinafter specified . . . by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C. § 1. Congress supplemented and clarified these provisions through the General Authorities Act in 1970, and again through enactment of the "Redwood Amendment" in 1978. That Act, as amended, reinforced that management of the parks "shall be consistent with the Organic Act" and declared that the "protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park Service and shall not be exercised in derogation of the values and purposes for which these areas have been established, except as may have been or shall be directly and specifically provided by Congress." *** The NPS's 2006 Management Policies, which interpret the above directives, designate the Organic Act as "the most important statutory directive for the National Park Service." ***

**III. DISCUSSION 1. Statutory Interpretation of Conservation Mandate**

As an initial matter, both parties agree that the Organic Act imposes a "conservation mandate" upon NPS, and that that mandate is articulated in § 1.4.3 of the 2006 NPS

Policies. However, the parties disagree over precisely what the mandate requires and when it is triggered. Section 1.4.3 provides, in its entirety,

> The fundamental purpose of the national park system, established by the Organic Act and reaffirmed by the General Authorities Act, as amended, begins with a mandate to conserve park resources and values. This mandate is independent of the separate prohibition on impairment and applies all the time with respect to all park resources and values, even when there is no risk that any park resources or values may be impaired. NPS managers must always seek ways to avoid, or to minimize to the greatest extent practicable, adverse impacts on park resources and values. However, the laws do give the Service the management discretion to allow impacts to park resources and values when necessary and appropriate to fulfill the purposes of the park, so long as the impact does not constitute impairment of the affected resources and values.
>
> The fundamental purpose of all parks also includes providing for the enjoyment of park resources and values by the people of the United States. The enjoyment that is contemplated by the statute is broad; it is the enjoyment of all the people of the United States and includes enjoyment both by people who visit the parks and by those who appreciate them from afar. It also includes deriving benefit (including scientific knowledge) and inspiration from the parks, as well as other forms of enjoyment and inspiration. Congress, recognizing that the enjoyment by future generations of the national parks can be ensured only if the superb quality of park resources and values is left unimpaired, has provided that when there is a conflict between conserving resources and values and providing for enjoyment of them, conservation is to be predominant. This is how courts have consistently interpreted the Organic Act.

NPS Policies, § 1.4.3.

Relying on the above passage, NPS argues that the conservation mandate of the Organic Act is only triggered when the impacts from a particular use rise to the level of "unacceptable impacts." *** Defendants paraphrase the mandate as follows: "[i]f unacceptable impacts are found, the Service deems the proposed use of park recourses to be in conflict with their conservation and therefore prohibits the proposed use." *** Applying this theory to the instant case, Defendants argue that because NPS has determined that the impacts of snowmobiling are "acceptable," then there is no "conflict" between conservation and use, and therefore the requirement that conservation predominate is not implicated. *** NPS reasons that the above-referenced "management discretion to allow impacts" encompasses the decision to allow the WUP's admittedly adverse impacts to the parks' natural soundscape, air quality, and wildlife, because those impacts do not conflict with conservation.

At the hearing, NPS argued that the adverse impacts of snowmobiling are acceptable because the Organic Act allows adverse impacts if they are unavoidable and appropriate. * * *

Plaintiffs strenuously disagree with this characterization of the Organic Act. While recognizing that the NPS has broad discretion to carry out its mission, Plaintiffs contend that the WUP impermissibly permits adverse impacts to park resources merely to provide another form of recreation. *** Plaintiffs argue that *** NPS has not explained how snowmobiling is "necessary and appropriate to fulfill the purposes of the park" such that the adverse impacts are acceptable, nor have they explained how the Plan seeks "ways to avoid, or to minimize to the greatest extent practicable, adverse impacts on park resources and values." ***

Plaintiffs point out that under the temporary use plan in place over the past three years, NPS's own "adaptive management thresholds" for air quality and soundscape protection have been exceeded on multiple occasions without generating a response from NPS. *** Plaintiffs argue that because actual daily use under the temporary plan has averaged only between 260-290 snowmobiles, and NPS's own thresholds for noise and air pollution have been exceeded in spite of the low numbers, allowing up to 540 snowmobiles per day will effectively double the environmental harms seen under the temporary plan. Plaintiffs insist that this result cannot be squared with the Organic Act, regardless of how NPS chooses to define "conflict."

The Court agrees. The Organic Act clearly states, and Defendants concede, that the fundamental purpose of the national park system is to conserve park resources and values. Section 1.4.3 of the NPS Policies, which provides the NPS's official interpretation of the Organic Act, states that "conservation is to be predominant."

Defendants claim that the Act "establishes the fundamental purposes of conservation and enjoyment but is silent as to how those two purposes should be analyzed." *** While it is true that the Act is "silent as to the specifics of Park management," *** Defendants' own official interpretation of the Organic Act explicitly instructs NPS on how to balance conservation and enjoyment. Namely, in the case of a conflict, "conservation is to be predominant." NPS Policies, § 1.4.3. Moreover, while it is true that "enjoyment" is also a fundamental purpose of the parks, enjoyment is qualified in the Organic Act in a way that conservation is not. The Organic Act charges NPS with the duty to "provide for the enjoyment" of the parks' resources and values in "such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1. This is not blanket permission to have fun in the parks in any way the NPS sees fit. As Plaintiffs articulated at the hearing, the "enjoyment" referenced in the Organic Act is not enjoyment for its own sake, or even enjoyment of the parks generally, but rather the enjoyment of "the scenery and natural and historic objects and the wildlife" in the parks in a manner that will allow future generations to enjoy them as well. *Id.* Accordingly, while NPS has the discretion to balance the "sometimes conflicting policies of resource conservation and visitor enjoyment in determining what activities should be permitted or prohibited," *** that

discretion is bounded by the terms of the Organic Act itself. NPS cannot circumvent this limitation through conclusory declarations that certain adverse impacts are acceptable, without explaining why those impacts are necessary and appropriate to fulfill the purposes of the park. *See* NPS Policies, § 1.4.3.

The limits on NPS's discretion have been recognized by this Circuit. In *Daingerfield*, this Circuit upheld the NPS's choice of an interchange design that NPS had concluded "would have the least deleterious effect on the environment." 40 F.3d at 446. The Court noted that the Organic Act "gives the Park Service broad, but not unlimited discretion in determining *what actions are best calculated to protect Park resources.*" *Id.* (emphasis added). While not explicitly holding that NPS is required to choose the least deleterious option, the Circuit did cite with approval to the District Court's observation that "the only choice left to the Park Service was to approve the least intrusive interchange possible, which it did, or refuse to approve any interchange at all." *Id.* at n. 3. Accordingly, at the very least, NPS is required to exercise its discretion in a manner that is "calculated to protect park resources" and genuinely seeks to minimize adverse impacts on park resources and values. *See Daingerfield*, 40 F.3d at 446; NPS Policies, § 1.4.3. * * *

The record contains many compelling examples of the magnitude of this decision, but none more so than a letter from eleven former National Park Service Directors. *** Dated March 26, 2007, the letter was written in response to the original "preferred alternative" for the WUP, which would have allowed 720 snowmobiles per day, a proposal the former directors urged "would radically contravene both the letter and spirit of the 2006 Management Policies." *** While that number was ultimately reduced to 540, the letter contends that further reducing the limit to zero, "while expanding public access on modern snowcoaches, would further improve the park's health." *** Relying on the same studies found in the FEIS, the former directors argue that increasing snowmobile use over the current average of 250 snowmobiles per day would increase air and noise pollution and "sidestep a recent recommendation by Park Service scientists" that traffic should be kept "at or below current levels, not expanded."

* * *

[The Court then concluded that the snowmobile plan adopted by the Park Service would impair park resources and cause unacceptable impacts on the parks. Ultimately, therefore, the court concluded that the plan violated the Organic Act.]

Plaintiffs' Motion for Summary Judgment is **GRANTED** and Defendants' Cross-Motion for Summary Judgment is **DENIED.** The Winter Use Plan, 2007 ROD, and 2007 FEIS are vacated and remanded to the agency for proceedings consistent with this opinion. An appropriate Order accompanies this Memorandum Opinion.

## Questions and Comments

**1. Changes in the interpretation of the statute:** As you read the factual background of the case, you probably noticed that the National Park Service frequently changed its

rules regarding the appropriate number of recreational snowmobiles authorized per day in Yellowstone. You may have recognized that the Park Service rules changed regularly when Presidential administrations changed. As you read this book, you will notice that this is a common trend when agencies are authorized to administer and interpret statutes. Later chapters will focus on the procedures that agencies must follow and the analyses that agencies must conduct when changing rules, so those issues will be addressed then.

**2. Plain meaning:** As in *Daigle*, the *Greater Yellowstone* court did not begin with an examination of the plain meaning of the statutory text. The plaintiffs were arguing that the National Park Service (NPS) violated the National Park Service Organic Act by approving a plan that allowed 540 recreational snowmobiles to be used each day in Yellowstone. Did the text of the Organic Act clearly address whether it was appropriate for the NPS to authorize the use of 540 snowmobiles per day?

**3. Purposes:** What were the competing purposes of the Organic Act that the court identified in Section 1 of the Organic Act? How did the court determine which purpose controlled and which purpose did the court determine controlled? Did the court examine other provisions of the Organic Act to read Section 1 in context? Did the court examine the legislative history to ascertain the enacting Congress' intent regarding the conflicting purposes? Did the court discuss the circumstances surrounding the enactment of the legislation, as the Court did in *Holy Trinity?*

**4. Section 1.4.3:** The court spends a considerable amount of time focusing on Section 1.4.3 to determine that the conservation purpose of the Organic Act takes precedence over other purposes of the Act when there is a conflict between the purposes. Section 1.4.3, however, is not a statute, but is part of a series of policies adopted by the NPS to implement the Organic Act and other authorities. You will recall that Hart & Sacks suggested that it was appropriate to consider subsequent administrative interpretations of a statute to determine the purpose of the statute. Later chapters will focus directly on the weight courts give to agencies' interpretations of statutes, but this case introduces the principle.

**5. Advancing the purpose of the statute:** Once the court concludes that the conservation purpose of the Organic Act takes precedence over other purposes, the court must still determine whether the NPS' rule that allows 540 recreational snowmobiles to access Yellowstone National Park each day is consistent with the conservation purpose of the Act. How does the NPS argue that the statute should be interpreted to carry out the conservation purpose while also allowing uses of the park that provide for enjoyment of the National Parks? Does the court agree with the NPS' reading of the statute? You will notice that the Court again is relying on the agency's policies in Section 1.4.3. As you read more cases in this book, you will notice that it is not unusual for courts to rely on agencies' interpretations of statutes to guide their interpretation of the statutes. Why does the NPS believe that its rule is consistent with its interpretation in Section 1.4.3? Does the court agree? Why or why not?

## H. Comparing Textualism and Purposivism

In their most extreme forms, textualism and purposivism are clearly distinct theories of statutory interpretation. Historically, there was also an ideological divide between adherents of the opposing theories. Traditionally, the leaders in the textualist movement were ideological conservatives, while the leaders in the purposivist movement were ideological liberals.[194] Some academics have speculated that conservative judges and academics oppose purposivism because an exploration of statutory purposes tends to broaden the scope of government regulatory authority in statutes.[195] Similarly, ideological conservatives prefer that decisions are made by democratically accountable decision-makers, and argue that textualism constrains judges from basing their decisions on their personal views.[196]

While the contrast between textualism and purposivism is clear when the theories are applied in their most extreme forms, few judges adopt such extreme approaches, and many scholars believe that the theories are converging.[197] Regardless of which theory they adopt, most judges begin their analysis with the text. As Justice Elena Kagan has observed, "We're all textualists now."[198] In practice, many textualists are willing to consider extrinsic sources of interpretation if the text is ambiguous and many purposivists delay any focus on such sources until an examination of the text demonstrates that it is ambiguous.[199] In fact, few judges identify themselves as adhering rigidly to a single theory and many judges apply aspects of both

Justice Kagan Photo – Oyez Project – CC BY-SA 3.0

194 *See* Stuart Minor Benjamin & Kristen M. Renberg, *The Paradoxical Impact of Scalia's Campaign Against Legislative History,* 105 Cornell L. Rev. 1023 (2020).

195 *Id.* at 1044.

196 *Id.* at 1046-1047. Critics of textualism counter, though, that judges can use the canons of statutory interpretation equally adeptly in textualism to interpret statutes in a manner that aligns with their ideology. *See* Robin Kundis Craig, *The Stevens/Scalia Principle and Why It Matters: Statutory Conversations and a Cultural Critical Critique of the Strict Plain Meaning Approach*, 79 Tul. L. Rev. 955, 972 (2005); Albert C. Lin, *Erosive Interpretation of Environmental Law in the Supreme Court's 2003-04 Term,* 42 Houston L. Rev. 565, 580-581, 601-602 (2005); Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences,* 45 Vand. L. Rev. 647, 649 (1992).

197 *See* Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685 (2014); Molot, *The Rise and Fall of Textualism, supra* note 152, at 3; Caleb Nelson, *What is Textualism?*, 91 Va. L. Rev. 347, 348 (2005).

198 *See* Justice Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes* at 8:28 (Nov. 17, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg.

199 *See* Gluck & Posner, supra note 141, at 1300-1301; Congressional Research Service, *supra* note 35, at 16-17. "New textualists" will examine statutory purposes when the purpose can be derived from the text of the statute and the purpose is defined clearly. Modern purposivists tend to justify purposivist interpretations as consistent with the statutory text.

theories on a case by case basis (as well as other theories described below).[200]

Perhaps the best example of the convergence of the theories is the Supreme Court's 2015 decision in *King v. Burwell*, 135 S.Ct. 2480 (2015), described by some as "textually constrained purposivism."[201] The oral argument for the case is available here.

**KING V. BURWELL**

**135 S.Ct. 2480 (2015)**

**CHIEF JUSTICE ROBERTS** delivered the opinion of the Court.

* * *

I

A

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument (From the Oyez Project)
Case Background (From Quimbee)
Video Summary – Pt. 1 / Pt. 2 (Prof. Stevenson – South Texas College of Law)
Briefs in the Case – Scotus Blog

The Patient Protection and Affordable Care Act [Affordable Care Act] ***grew out of a long history of failed health insurance reform. In the 1990s, several States began experimenting with ways to expand people's access to coverage. One common approach was to impose a pair of insurance market regulations—a "guaranteed issue" requirement, which barred insurers from denying coverage to any person because of his health, and a "community rating" requirement, which barred insurers from charging a person higher premiums for the same reason. Together, those requirements were designed to ensure that anyone who wanted to buy health insurance could do so.

The guaranteed issue and community rating requirements achieved that goal, but they had an unintended consequence: They encouraged people to wait until they got sick to buy insurance. Why buy insurance coverage when you are healthy, if you can buy the same coverage for the same price when you become ill? This consequence—known as "adverse selection"—led to a second: Insurers were forced to increase premiums to account for the fact that, more and more, it was the sick rather than the healthy who were buying insurance. And that consequence fed back into the first: As the cost of insurance rose, even more people waited until they became ill to buy it.

This led to an economic "death spiral." As premiums rose higher and higher, and the number of people buying insurance sank lower and lower, insurers began to leave the market entirely. As a result, the number of people without insurance increased dramatically.

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200 In their survey of 42 federal appellate court judges, Abbe Gluck and Judge Richard Posner found that none of the judges was willing to associate themselves with textualism without some qualification and none identified as purposivists. *See* Gluck & Posner, *supra* note 141, at 1301-1303.

201 *See* Michael J. Cedrone, *Supreme Silence and Precedential Pragmatism: King v. Burwell and Statutory Interpretation in the Federal Courts of Appeals*, 103 Marq. L. Rev. 43 (2019).

* * *

B

The Affordable Care Act adopts *** three key reforms [to address those problems.] First, the Act adopts the guaranteed issue and community rating requirements. The Act provides that "each health insurance issuer that offers health insurance coverage in the individual . . . market in a State must accept every . . . individual in the State that applies for such coverage." 42 U. S. C. §300gg–1(a). The Act also bars insurers from charging higher premiums on the basis of a person's health. §300gg.

Second, the Act generally requires individuals to maintain health insurance coverage or make a payment to the IRS. 26 U. S. C. §5000A. Congress recognized that, without an incentive, "many individuals would wait to purchase health insurance until they needed care." 42 U. S. C. §18091(2)(I). So Congress adopted a coverage requirement to "minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums." *** Congress also provided an exemption from the coverage requirement for anyone who has to spend more than eight percent of his income on health insurance. 26 U. S. C. §§5000A(e)(1)(A), (e)(1)(B)(ii).

Third, the Act seeks to make insurance more affordable by giving refundable tax credits to individuals with household incomes between 100 percent and 400 percent of the federal poverty line. §36B. * * *

These three reforms are closely intertwined. As noted, Congress found that the guaranteed issue and community rating requirements would not work without the coverage requirement. §18091(2)(I). And the coverage requirement would not work without the tax credits. * * *

C

In addition to those three reforms, the Act requires the creation of an "Exchange" in each State where people can shop for insurance, usually online. 42 U. S. C. §18031(b)(1). An Exchange may be created in one of two ways. First, the Act provides that "[e]ach State shall . . . establish an American Health Benefit Exchange . . . for the State." *Ibid.* Second, if a State nonetheless chooses not to establish its own Exchange, the Act provides that the Secretary of Health and Human Services "shall . . . establish and operate such Exchange within the State." §18041(c)(1).

The issue in this case is whether the Act's tax credits are available in States that have a Federal Exchange rather than a State Exchange. The Act initially provides that tax credits "shall be allowed" for any "applicable taxpayer." 26 U. S. C. §36B(a). The Act then provides that the amount of the tax credit depends in part on whether the taxpayer has enrolled in an insurance plan through "an Exchange *established by the State* under section 1311 of the Patient Protection and Affordable Care Act [hereinafter 42 U. S. C. §18031]." 26 U. S. C. §§36B(b)–(c) (emphasis added). * * *

At this point, 16 States and the District of Columbia have established their own Exchanges; the other 34 States have elected to have HHS do so.

D

Petitioners are four individuals who live in Virginia, which has a Federal Exchange. They do not wish to purchase health insurance. In their view, Virginia's Exchange does not qualify as "an Exchange established by the State under [42 U. S. C. §18031]," so they should not receive any tax credits. That would make the cost of buying insurance more than eight percent of their income, which would exempt them from the Act's coverage requirement. * * *

II

* * *

The parties dispute whether Section 36B authorizes tax credits for individuals who enroll in an insurance plan through a Federal Exchange. Petitioners argue that a Federal Exchange is not "an Exchange established by the State under [42 U. S. C. §18031]," * * * The Government responds that * * * the phrase "an Exchange established by the State under [42 U. S. C. §18031]" should be read to include Federal Exchanges. Brief for Respondents 20–25.

* * *

It is *** our task to determine the correct reading of Section 36B. If the statutory language is plain, we must enforce it according to its terms. *** But oftentimes the "meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *** So when deciding whether the language is plain, we must read the words "in their context and with a view to their place in the overall statutory scheme." *** Our duty, after all, is "to construe statutes, not isolated provisions." ***

A

We begin with the text of Section 36B. As relevant here, Section 36B allows an individual to receive tax credits only if the individual enrolls in an insurance plan through "an Exchange established by the State under [42 U. S. C. §18031]." * * *

First, all parties agree that a Federal Exchange qualifies as "an Exchange" for purposes of Section 36B. *** Section 18031 provides that "[e]ach State shall . . . establish an American Health Benefit Exchange . . . for the State." §18031(b)(1). Although phrased as a requirement, the Act gives the States "flexibility" by allowing them to "elect" whether they want to establish an Exchange. §18041(b). If the State chooses not to do so, Section 18041 provides that the Secretary "shall . . . establish and operate *such Exchange* within the State." §18041(c)(1) (emphasis added).

By using the phrase "such Exchange," Section 18041 instructs the Secretary to establish and operate the *same* Exchange that the State was directed to establish under Section

18031. See Black's Law Dictionary 1661 (10th ed. 2014) (defining "such" as "That or those; having just been mentioned"). In other words, State Exchanges and Federal Exchanges are equivalent—they must meet the same requirements, perform the same functions, and serve the same purposes. * * * A Federal Exchange therefore counts as "an Exchange" under Section 36B.

Second, we must determine whether a Federal Exchange is "established by the State" for purposes of Section 36B. At the outset, it might seem that a Federal Exchange cannot fulfill this requirement. After all, the Act defines "State" to mean "each of the 50 States and the District of Columbia"—a definition that does not include the Federal Government. 42 U. S. C. §18024(d). But when read in context, "with a view to [its] place in the overall statutory scheme," the meaning of the phrase "established by the State" is not so clear. ***

After telling each State to establish an Exchange, Section 18031 provides that all Exchanges "shall make available qualified health plans to qualified individuals." 42 U. S. C. §18031(d)(2)(A). Section 18032 then defines the term "qualified individual" in part as an individual who "resides in the State that established the Exchange." §18032(f)(1)(A). And that's a problem: If we give the phrase "the State that established the Exchange" its most natural meaning, there would be *no* "qualified individuals" on Federal Exchanges. But the Act clearly contemplates that there will be qualified individuals on *every* Exchange. As we just mentioned, the Act requires all Exchanges to "make available qualified health plans to qualified individuals"—something an Exchange could not do if there were no such individuals. §18031(d)(2)(A). And the Act tells the Exchange, in deciding which health plans to offer, to consider "the interests of qualified individuals . . . in the State or States in which such Exchange operates"—again, something the Exchange could not do if qualified individuals did not exist. §18031(e)(1)(B). This problem arises repeatedly throughout the Act. See, *e.g.*, §18031(b)(2) (allowing a State to create "one Exchange . . . for providing . . . services to both qualified individuals and qualified small employers," rather than creating separate Exchanges for those two groups).

These provisions suggest that the Act may not always use the phrase "established by the State" in its most natural sense. Thus, the meaning of that phrase may not be as clear as it appears when read out of context.

Third, we must determine whether a Federal Exchange is established "under [42 U. S. C. §18031]." This too might seem a requirement that a Federal Exchange cannot fulfill, because it is Section 18041 that tells the Secretary when to "establish and operate such Exchange." But here again, the way different provisions in the statute interact suggests otherwise.

The Act defines the term "Exchange" to mean "an American Health Benefit Exchange established under section 18031." §300gg–91(d)(21). If we import that definition into Section 18041, the Act tells the Secretary to "establish and operate such 'American

Health Benefit Exchange established under section 18031.'" That suggests that Section 18041 authorizes the Secretary to establish an Exchange under Section 18031, not (or not only) under Section 18041. Otherwise, the Federal Exchange, by definition, would not be an "Exchange" at all. ***

This interpretation of "under [42 U. S. C. §18031]" fits best with the statutory context. All of the requirements that an Exchange must meet are in Section 18031, so it is sensible to regard all Exchanges as established under that provision. In addition, every time the Act uses the word "Exchange," the definitional provision requires that we substitute the phrase "Exchange established under section 18031." If Federal Exchanges were not established under Section 18031, therefore, literally none of the Act's requirements would apply to them. * * *

The upshot of all this is that the phrase "an Exchange established by the State under [42 U. S. C. §18031]" is properly viewed as ambiguous. The phrase may be limited in its reach to State Exchanges. But it is also possible that the phrase refers to *all* Exchanges—both State and Federal—at least for purposes of the tax credits. * * * But State and Federal Exchanges would differ in a fundamental way if tax credits were available only on State Exchanges—one type of Exchange would help make insurance more affordable by providing billions of dollars to the States' citizens; the other type of Exchange would not.

* * *

The Affordable Care Act contains more than a few examples of inartful drafting. (To cite just one, the Act creates three separate Section 1563s. See 124 Stat. 270, 911, 912.) Several features of the Act's passage contributed to that unfortunate reality. Congress wrote key parts of the Act behind closed doors, rather than through "the traditional legislative process." Cannan, A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History, 105 L. Lib. J. 131, 163 (2013). And Congress passed much of the Act using a complicated budgetary procedure known as "reconciliation," which limited opportunities for debate and amendment, and bypassed the Senate's normal 60-vote filibuster requirement. *Id.,* at 159–167. As a result, the Act does not reflect the type of care and deliberation that one might expect of such significant legislation. * * *

Anyway, we "must do our best, bearing in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." * * *

B

Given that the text is ambiguous, we must turn to the broader structure of the Act to determine the meaning of Section 36B. * * * Here, the statutory scheme compels us to reject petitioners' interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very "death spirals" that Congress designed the Act to avoid. See *New York State Dept. of Social*

*Servs.* v. *Dublino*, 413 U. S. 405, 419–420 (1973) ("We cannot interpret federal statutes to negate their own stated purposes.").

* * *

The combination of no tax credits and an ineffective coverage requirement could well push a State's individual insurance market into a death spiral. One study predicts that premiums would increase by 47 percent and enrollment would decrease by 70 percent. *** Another study predicts that premiums would increase by 35 percent and enrollment would decrease by 69 percent. *** And those effects would not be limited to individuals who purchase insurance on the Exchanges. Because the Act requires insurers to treat the entire individual market as a single risk pool, 42 U. S. C. §18032(c)(1), premiums outside the Exchange would rise along with those inside the Exchange. ***

It is implausible that Congress meant the Act to operate in this manner. See *National Federation of Independent Business* v. *Sebelius*, 567 U. S. 519 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (slip op., at 60) ("Without the federal subsidies . . . the exchanges would not operate as Congress intended and may not operate at all."). Congress made the guaranteed issue and community rating requirements applicable in every State in the Nation. But those requirements only work when combined with the coverage requirement and the tax credits. So it stands to reason that Congress meant for those provisions to apply in every State as well.

* * *

D

Petitioners' arguments about the plain meaning of Section 36B are strong. But while the meaning of the phrase "an Exchange established by the State under [42 U. S. C. §18031]" may seem plain "when viewed in isolation," such a reading turns out to be "untenable in light of [the statute] as a whole." *** In this instance, the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase.

Reliance on context and structure in statutory interpretation is a "subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself." *** For the reasons we have given, however, such reliance is appropriate in this case, and leads us to conclude that Section 36B allows tax credits for insurance purchased on any Exchange created under the Act. Those credits are necessary for the Federal Exchanges to function like their State Exchange counterparts, and to avoid the type of calamitous result that Congress plainly meant to avoid.

* * *

The judgment of the United States Court of Appeals for the Fourth Circuit is

Affirmed.

**JUSTICE SCALIA**, with whom **JUSTICE THOMAS** and **JUSTICE ALITO** join, dissenting.

The Court holds that when the Patient Protection and Affordable Care Act says "Exchange established by the State" it means "Exchange established by the State or the Federal Government." That is of course quite absurd, and the Court's 21 pages of explanation make it no less so.

I

* * *

This case requires us to decide whether someone who buys insurance on an Exchange established by the Secretary gets tax credits. You would think the answer would be obvious—so obvious there would hardly be a need for the Supreme Court to hear a case about it. In order to receive any money under §36B, an individual must enroll in an insurance plan through an "Exchange established by the State." The Secretary of Health and Human Services is not a State. So an Exchange established by the Secretary is not an Exchange established by the State—which means people who buy health insurance through such an Exchange get no money under §36B.

Words no longer have meaning if an Exchange that is *not* established by a State is "established by the State." It is hard to come up with a clearer way to limit tax credits to state Exchanges than to use the words "established by the State." And it is hard to come up with a reason to include the words "by the State" other than the purpose of limiting credits to state Exchanges. * * * Under all the usual rules of interpretation, in short, the Government should lose this case. But normal rules of interpretation seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved.

II

* * *

The Court persists that [the statute] "would make little sense" if no tax credits were available on federal Exchanges. *Ante,* at 14. Even if that observation were true, it would show only oddity, not ambiguity. Laws often include unusual or mismatched provisions. The Affordable Care Act spans 900 pages; it would be amazing if its provisions all lined up perfectly with each other. This Court "does not revise legislation . . . just because the text as written creates an apparent anomaly."

* * *

III

For its next defense of the indefensible, the Court turns to the Affordable Care Act's design and purposes. *** This reasoning suffers from no shortage of flaws. To begin with, "even the most formidable argument concerning the statute's purposes could not overcome the clarity [of ] the statute's text." *** Statutory design and purpose matter only

to the extent they help clarify an otherwise ambiguous provision. Could anyone maintain with a straight face that §36B is unclear?

* * *

Compounding its errors, the Court forgets that it is no more appropriate to consider one of a statute's purposes in isolation than it is to consider one of its words that way. No law pursues just one purpose at all costs, and no statutory scheme encompasses just one element. Most relevant here, the Affordable Care Act displays a congressional preference for state participation in the establishment of Exchanges: Each State gets the first opportunity to set up its Exchange, 42 U. S. C. §18031(b); States that take up the opportunity receive federal funding for "activities . . . related to establishing" an Exchange, §18031(a)(3); and the Secretary may establish an Exchange in a State only as a fallback, §18041(c). But setting up and running an Exchange involve significant burdens—meeting strict deadlines, §18041(b), implementing requirements related to the offering of insurance plans, §18031(d)(4), setting up outreach programs, §18031(i), and ensuring that the Exchange is self-sustaining by 2015, §18031(d)(5)(A). A State would have much less reason to take on these burdens if its citizens could receive tax credits no matter who establishes its Exchange. (Now that the Internal Revenue Service has interpreted §36B to authorize tax credits everywhere, by the way, 34 States have failed to set up their own Exchanges. *Ante,* at 6.) So even if making credits available on all Exchanges advances the goal of improving healthcare markets, it frustrates the goal of encouraging state involvement in the implementation of the Act. *This* is what justifies going out of our way to read "established by the State" to mean "established by the State or not established by the State"?

* * *

IV

Perhaps sensing the dismal failure of its efforts to show that "established by the State" means "established by the State or the Federal Government," the Court tries to palm off the pertinent statutory phrase as "inartful drafting." *Ante,* at 14. This Court, however, has no free-floating power "to rescue Congress from its drafting errors." *** Only when it is patently obvious to a reasonable reader that a drafting mistake has occurred may a court correct the mistake. The occurrence of a misprint may be apparent from the face of the law, as it is where the Affordable Care Act "creates three separate Section 1563s." * * * The occurrence of a misprint may also be apparent because a provision decrees an absurd result—a consequence "so monstrous, that all mankind would, without hesitation, unite in rejecting the application." *** But §36B does not come remotely close to satisfying that demanding standard. It is entirely plausible that tax credits were restricted to state Exchanges deliberately—for example, in order to encourage States to establish their own Exchanges. We therefore have no authority to dismiss the terms of the law as a drafting fumble.

* * *

V

The Court's decision reflects the philosophy that judges should endure whatever interpretive distortions it takes in order to correct a supposed flaw in the statutory machinery. That philosophy ignores the American people's decision to give *Congress* "[a]ll legislative Powers" enumerated in the Constitution. Art. I, §1. They made Congress, not this Court, responsible for both making laws and mending them. This Court holds only the judicial power—the power to pronounce the law as Congress has enacted it. We lack the prerogative to repair laws that do not work out in practice, just as the people lack the ability to throw us out of office if they dislike the solutions we concoct. We must always remember, therefore, that "[o]ur task is to apply the text, not to improve upon it." ***

Trying to make its judge-empowering approach seem respectful of congressional authority, the Court asserts that its decision merely ensures that the Affordable Care Act operates the way Congress "meant [it] to operate." *Ante,* at 17. First of all, what makes the Court so sure that Congress "meant" tax credits to be available everywhere? Our only evidence of what Congress meant comes from the terms of the law, and those terms show beyond all question that tax credits are available only on state Exchanges. More importantly, the Court forgets that ours is a government of laws and not of men. That means we are governed by the terms of our laws, not by the unenacted will of our lawmakers. "If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent." *** In the meantime, this Court "has no roving license . . . to disregard clear language simply on the view that . . . Congress 'must have intended' something broader." ***

Even less defensible, if possible, is the Court's claim that its interpretive approach is justified because this Act "does not reflect the type of care and deliberation that one might expect of such significant legislation." *** It is not our place to judge the quality of the care and deliberation that went into this or any other law. A law enacted by voice vote with no deliberation whatever is fully as binding upon us as one enacted after years of study, months of committee hearings, and weeks of debate. Much less is it our place to make everything come out right when Congress does not do its job properly. It is up to Congress to design its laws with care, and it is up to the people to hold them to account if they fail to carry out that responsibility.

Rather than rewriting the law under the pretense of interpreting it, the Court should have left it to Congress to decide what to do about the Act's limitation of tax credits to state Exchanges.

* * *

Perhaps the Patient Protection and Affordable Care Act will attain the enduring status of the Social Security Act or the Taft-Hartley Act; perhaps not. But this Court's two decisions on the Act will surely be remembered through the years. The somersaults of statutory interpretation they have performed ("penalty" means tax, "further [Medicaid] payments to

the State" means only incremental Medicaid payments to the State, "established by the State" means not established by the State) will be cited by litigants endlessly, to the confusion of honest jurisprudence. And the cases will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others and is prepared to do whatever it takes to uphold and assist its favorites.

I dissent.

## Questions and Comments

**1. Statutory language:** What was the text being interpreted by the Court and what interpretive question was the Court trying to resolve? What did the challengers argue the text meant and what did the government argue it meant? Which interpretation did the majority adopt and which interpretation did the dissent adopt?

**2. Plain meaning:** In classic textualist form, the dissent argues that the plain meaning of the Affordable Care Act is clear, so the Court must interpret it according to its plain meaning. Does the majority agree that the plain meaning is clear? Does the Court determine whether the text is ambiguous before or after examining other portions of the statute? The dissent argues that courts should depart from the plain meaning only when applying it according to its plain meaning leads to an absurd result. Does the majority agree? Does the dissent believe that applying the statute according to its plain meaning would be absurd?

**3. Purposivism:** After concluding that the text is ambiguous, the majority suggests that its interpretation of the statute is necessary to achieve the purposes of the statute. In many ways, the opinion has purposivist tones, as the Court, at the outset of the opinion, discusses the circumstances that led to the enactment of the statute and explains, in Part II.B. why its interpretation of the statute advances the purposes for which the statute was enacted. The majority claims to be acting as a "faithful agent" of Congress, implementing its will, and justifies its reliance on the text by arguing that the language in the statute is ambiguous. Why does the majority say that its interpretation is necessary to advance the purpose of the Affordable Care Act? When does the dissent argue that it is appropriate to interpret statutes to achieve their purposes? What is the alternative purpose that the dissent argues the majority ignored in the case?

**4. Unorthodox lawmaking:** The majority notes that there are several provisions in the Affordable Care Act that are the result of "inartful drafting," related to the unorthodox manner in which the statute was enacted. Does the majority believe that the statute should be interpreted differently than other statutes drafted in more traditional ways? Does the dissent agree? For an interesting discussion of the legislative history of the ACA, *see* John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*,105 L. Lib. J. 131 (2013), cited by the Court.

**5. Proper roles:** In what ways does the dissent believe that the majority has stepped out of its proper judicial role? If the statutory language as drafted is truly unworkable, what remedy does the dissent suggest is appropriate for such legislative "mistakes"?

**6. Impact on decision-making in the appellate courts:** As noted in Chapter 2, courts do not generally accord methodological stare decisis to statutory interpretation canons or theories. While *King v. Burwell* established important administrative law principles (that were edited out of the opinion above), the decision seems to have had little effect on the statutory interpretation methodology employed by federal appellate courts. In a 2019 article, Professor Michael Cedrone examined seventy-two federal appellate court decisions that cited *King v. Burwell* in the two years following the decision and he found that the decision did not spark a new purposivist revolution in the courts. Instead, he found "a dynamic landscape in which courts seem relatively uncommitted to ideological battles over interpretive principles [and where courts] freely pursue the best reading of statutory text through textual and purposive means." *See* Michael J. Cedrone, *Supreme Silence and Precedential Pragmatism: King v. Burwell and Statutory Interpretation in the Federal Courts of Appeals*, 103 Marq. L. Rev. 43, 47 (2019).

# VI. Other Theories of Interpretation

While textualism and purposivism are the predominant theories of statutory interpretation today, judges have relied on other theories in the past and still rely, to some extent, on other theories today. One theory that is closely related to purposivism is ***intentionalism***. Intentionalist judges interpret statutes to ascertain the intent of the ***enacting legislature*** on the ***specific issue*** before the court.[202] They look at statutes through a similar lens as purposivists in that they focus on the text, legislative history, and the conditions at the time of enactment of a statute to determine the legislature's intent, as those sources most directly bear on the legislature's intent.[203] Like purposivists, they start by focusing on the text of the statute, but they may turn to extrinsic sources once they have determined that the statute's text is ambiguous or they may examine the sources to determine that the text is ambiguous or absurd.[204] Not surprisingly, as intentionalists search for the intent of the enacting legislature, the theory is based on the "faithful agent" model of the judicial/legislative relationship.[205] Intentionalists differ from purposivists in the level of generality of their inquiries into legislative intent. While purposivists attempt to determine the general purposes for which a statute was enacted and interpret the statute to advance those purposes, intentionalists search for the ***actual intent*** of the enacting legislature on the specific question that the court is trying to resolve.[206]

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202 *See* See, e.g., Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. Pa. L. Rev. 117, 123-24 (2009).

203 *See* Bressman, Rubin, & Stack, *supra* note 63, at 155.

204 *Id.* at 328. *See also* Jellum, *supra* note 165, at 102-104.

205 *See* William N. Eskridge, Jr., DYNAMIC STATUTORY INTERPRETATION 14 (1994); Jellum, *supra* note 165, at 102-103.

206 *See* Bressman, Rubin, & Stack, *supra* note 63, at 155.

Critics argue that the search for legislative intent is futile because the legislature does not have a collective intent or because the collective intent cannot be discovered through the means utilized through an examination of legislative history or the other means used by intentionalists.[207] Even though groups can have collective intents, detractors of intentionalism criticize the efforts of intentionalists to determine the intent through examination of legislative history and statements of individual legislators.[208] After all, critics argue, it is not clear whether a court, in ascertaining the intent of the enacting legislature, should put more weight on the views expressed by the 51st Senator whose vote was needed to pass the bill, the 67th Senator whose vote was needed to break the filibuster on the bill, or any other member of Congress or committee in Congress.[209] Textualists also criticize intentionalists because intentionalists, like purposivists, examine legislative history and other extrinsic sources to interpret statutory meaning and they argue that the legislature only enacts the text that is included in statutes, and not the intent behind the text.[210]

Roscoe Pound: Public Domain

A modern offshoot of intentionalism is the ***imaginative reconstruction*** theory of statutory interpretation. It was first proposed by Dean Roscoe Pound in 1907[211], and later championed by Judge Richard Posner.[212] Under the theory, the court acknowledges that the enacting legislature probably did not have an actual intent regarding the statutory interpretation question it is trying to resolve, but the court attempts to reconstruct what the enacting legislature would have intended if it thought about the question.[213] As with intentionalism, judges applying this theory rely on legislative history and the circumstances surrounding the enactment of the legislation, as well as the text of the statute, to help reconstruct what the enacting legislature would have intended if faced with the interpretive question.[214] Judges will consider the values and attitudes of the legislators at the time the statute was enacted, as well as "any sign of legislative intent regarding the freedom with which" judges should interpret the statute.[215] Like all the theories discussed so far, it is based on the "faithful agent" model of the relationship between the judiciary and the legislature. Imaginative reconstruction is challenged on the same grounds as other theories that look beyond the

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207 *See* Eskridge, Brudney, Chafetz, Frickey, & Garrett, *supra* note 17, at 422-423; Jellum, *supra* note 165, at 103.

208 *Id.* at 423-324. *See also* Bressman, Rubin & Stack, *supra* note 63, at 326-327; Jellum, *supra* note 165, at 103.

209 *See* Jellum, supra note 165, at 103. *See also* Bressman, Rubin & Stack, *supra* note 63, at 325.

210 *See* Bressman, Rubin & Stack, *supra* note 63, at 328.

211 *See* Roscoe Pound, *Spurious Interpretation,* 7 Colum. L. Rev. 379 (1907).

212 *See* Bressman, Rubin & Stack, *supra* note 63, at 156.

213 *Id. See also* Jellum, *supra* note 165, at 109.

214 *See* Jellum, supra note 165, at 109.

215 *See* Richard A. Posner, *Statutory Interpretation in the Classroom and in the Courtroom,* 50 U. Chi. L. Rev. 800, 817-818 (1983).

statutory text and look for intent of a collective body[216] but is also criticized because judges using the theory are not seeking to enforce the law passed by the legislature, but the law that the legislature would have passed (but didn't) if it had considered the statutory interpretation question before the court. Justice Rehnquist's opinion in *Leo Sheep v. United States*, 440 U.S. 668 (1979), is a good example of an opinion utilizing the imaginative reconstruction theory.

A final theory of interpretation that is used less frequently is ***dynamic statutory interpretation***. Unlike the other theories, this theory views judges as partners of the legislature, rather than "faithful agents."[217] The theory was championed by Professor William Eskridge and resembles common law decision-making, in that judges interpret the law to change over time as social views and the legal landscape change.[218] With dynamic interpretation, it is entirely possible that a judge could interpret a statute in a way that the judge acknowledges the enacting legislature would not have intended because the social values and underlying law have changed in the years since the statute was enacted.[219] Eskridge argues, for instance, that even though the 1964 Congress would not have intended to approve affirmative action programs, the Supreme Court, in its 1979 decision in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), may have used dynamic statutory interpretation to interpret the 1964 Civil Rights Act to authorize such programs, in order to achieve the goals of the statute.[220]

Even though dynamic statutory interpretation is rarely used as an independent theory of interpretation, it has been criticized more than most other theories. First, to the extent that the theory allows judges to interpret statutes in ways that the legislature would not have intended, critics assert that the theory violates separation of powers principles ***and*** is bad from a policy perspective because judges do not have the expertise to make law based on the changed social and legal landscape and judges do not have the democratic accountability of legislators. Second, to the extent that the theory allows judges to ignore the text of statutes in order to update them, it reduces public notice of what the law requires and disrupts public planning. Finally, the theory gives judges too much power to make decisions based on personal and ideological preferences. Supporters of the theory counter, though, that dynamic interpretation is a fairer and more just method of

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216 *See* Jellum, supra note 165, at 109.

217 *Id.* at 127. *See also* Seidenfeld, *supra* note 157, at 1821.

218 *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479 (1987).

219 *Id.* Eskridge argued that "[i]nterpretation is not an archaeological discovery, but a dialectical creation. Interpretation is not mere exegesis to pinpoint historical meaning, but hermeneutics to apply that meaning to current problems and creations." *Id.* at 1482. While "purposivist" judges might read a statute dynamically to advance the enacting legislature's goals differently than the enacting legislature may have, in light of changes in society and the law, "dynamic statutory interpretation" envisions a more expansive method of interpreting statutes that is not hinged directly to the actual or imagined intent of the enacting legislature.

220 *See* Eskridge, Brudney, Chafetz, Frickey, & Garrett, *supra* note 17, at 422-423; Jellum, *supra* note 165, at 73-74.

interpretation and more consistent with public perception of what the law should be, based on current understanding of the meaning of the law in society.

The following case demonstrates the dynamic statutory interpretation theory. A news story about the case, with an interview with the plaintiff, is available here.

## HIVELY V. IVY TECH COMMUNITY COLLEGE OF INDIANA

**853 F.3d 339 (7th Cir. 2017)**

**WOOD**, Chief Judge.

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers subject to the Act to discriminate on the basis of a person's "race, color, religion, sex, or national origin...." 42 U.S.C. § 2000e-2(a). For many years, the courts of appeals of this country understood the prohibition against sex discrimination to exclude discrimination on the basis of a person's sexual orientation. The Supreme Court, however, has never spoken to that question. In this case, we have been asked to take a fresh look at our position in light of developments at the Supreme Court extending over two decades. We have done so, and we conclude today that discrimination on the basis of sexual orientation is a form of sex discrimination. We therefore reverse the district court's judgment dismissing Kimberly Hively's suit against Ivy Tech Community College and remand for further proceedings.

I

Hively is openly lesbian. She began teaching as a part-time, adjunct professor at Ivy Tech Community College's South Bend campus in 2000. Hoping to improve her lot, she applied for at least six full-time positions between 2009 and 2014. These efforts were unsuccessful; worse yet, in July 2014 her part-time contract was not renewed. Believing that Ivy Tech was spurning her because of her sexual orientation, she filed * * * this action in the district court. [The court dismissed Hively's lawsuit and she appealed to this court. A panel of this court affirmed the district court's decision, noting that this circuit and most other circuits have held that Title VII's prohibition against discrimination based on sex does not apply to discrimination based on sexual orientation. This court then agreed to rehear the case en banc.]

II

A

The question before us is not whether this court can, or should, "amend" Title VII to add a new protected category to the familiar list of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Obviously that lies beyond our power. We must decide instead what it means to discriminate on the basis of sex, and in particular, whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex. This

is a pure question of statutory interpretation and thus well within the judiciary's competence.

Much ink has been spilled about the proper way to go about the task of statutory interpretation. One can stick, to the greatest extent possible, to the language enacted by the legislature; one could consult the legislative history that led up to the bill that became law; one could examine later actions of the legislature (i.e. efforts to amend the law and later enactments) for whatever light they may shed; and one could use a combination of these methods. * * *

Few people would insist that there is a need to delve into secondary sources if the statute is plain on its face. Even if it is not pellucid, the best source for disambiguation is the broader context of the statute that the legislature - in this case, Congress - passed.

* * *

Our interpretive task is guided *** by the Supreme Court's approach in the closely related case of *Oncale*, where it had this to say as it addressed the question whether Title VII covers sexual harassment inflicted by a man on a male victim:

> We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits discriminat[ion]... because of ... sex in the terms or conditions of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

523 U.S. at 79-80 *** The Court could not have been clearer: the fact that the enacting Congress may not have anticipated a particular application of the law cannot stand in the way of the provisions of the law that are on the books.

It is therefore neither here nor there that the Congress that enacted the Civil Rights Act in 1964 and chose to include sex as a prohibited basis for employment discrimination (no matter why it did so) may not have realized or understood the full scope of the words it chose. Indeed, in the years since 1964, Title VII has been understood to cover far more than the simple decision of an employer not to hire a woman for Job A, or a man for Job B. The Supreme Court has held that the prohibition against sex discrimination reaches sexual harassment in the workplace, *** including same-sex workplace harassment, ***; it reaches discrimination based on actuarial assumptions about a person's longevity, ***; and it reaches discrimination based on a person's failure to conform to a certain set of gender stereotypes ***. It is quite possible that these interpretations may also have surprised some who served in the 88th Congress. Nevertheless, experience with the law

has led the Supreme Court to recognize that each of these examples is a covered form of sex discrimination. * * *

[The court then analyzed Hively's claim that "sex discrimination" includes discrimination on the basis of sexual orientation under the "comparative method" employed in other cases, in which the court attempts to determine whether the plaintiff had described a situation in which, holding all other things constant and changing only her sex, she would have been treated the same way. The court concludes that if Hively were a man who was married to, living with, or dating a woman, and all other facts remained the same, Ivy Tech would not have fired her. Accordingly, the court held that Ivy Tech was disadvantaging her in the case because she was a woman, rather than a man. Thus, they were discriminating against her based on her sex. The court also held that Ivy Tech's actions were discrimination based on sex under the associational theory adopted by the Supreme Court in *Loving v. Virginia* and similar cases.]

III

Today's decision must be understood against the backdrop of the Supreme Court's decisions, not only in the field of employment discrimination, but also in the area of broader discrimination on the basis of sexual orientation. We already have discussed the employment cases, especially *Hopkins* and *Oncale.* The latter line of cases began with *Romer v. Evans*, 517 U.S. 620 (1996), in which the Court held that a provision of the Colorado Constitution forbidding any organ of government in the state from taking action designed to protect "homosexual, lesbian, or bisexual" persons violated the federal Equal Protection Clause. Romer was followed by *Lawrence v. Texas*, 539 U.S. 558 (2003), in which the Court found that a Texas statute criminalizing homosexual intimacy between consenting adults violated the liberty provision of the Due Process Clause. Next came United States v. Windsor, 133 S.Ct. 2675 (2013), which addressed the constitutionality of the part of the Defense of Marriage Act (DOMA) that excluded a same-sex partner from the definition of "spouse" in other federal statutes. The Court held that this part of DOMA "violate[d] basic due process and equal protection principles applicable to the Federal Government."*** Finally, the Court's decision in [Obergefell v. Hodges, 576 U.S. 644 (2015)] held that the right to marry is a fundamental liberty right, protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *** The Court wrote that "[i]t is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality." ***

It would require considerable calisthenics to remove the "sex" from "sexual orientation." The effort to do so has led to confusing and contradictory results, as our panel opinion illustrated so well. The EEOC concluded *** that such an effort cannot be reconciled with the straightforward language of Title VII. ***

This is not to say that authority to the contrary does not exist. As we acknowledged at the outset of this opinion, it does. But this court sits en banc to consider what the correct rule of law is now in light of the Supreme Court's authoritative interpretations, not what

someone thought it meant one, ten, or twenty years ago. The logic of the Supreme Court's decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe that line.

* * *

We hold ***that a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes. It was therefore wrong to dismiss Hively's complaint for failure to state a claim. The judgment of the district court is REVERSED and the case is REMANDED for further proceedings.

**POSNER**, Circuit Judge, concurring.

I agree that we should reverse, and I join the majority opinion, but I wish to explore an alternative approach that may be more straightforward.

* * *

[I]nterpretation can mean giving a fresh meaning to a statement (which can be a statement found in a constitutional or statutory text) — a meaning that infuses the statement with vitality and significance today. An example of this *** form of interpretation - the form that in my mind is most clearly applicable to the present case - is the Sherman Antitrust Act, enacted in 1890, long before there was a sophisticated understanding of the economics of monopoly and competition. Times have changed; and for more than thirty years the Act has been interpreted in conformity to the modern, not the nineteenth-century, understanding of the relevant economics. The Act has thus been updated by, or in the name of, judicial interpretation - the form of interpretation that consists of making old law satisfy modern needs and understandings. And a common form of interpretation it is, despite its flouting "original meaning." Statutes and constitutional provisions frequently are interpreted on the basis of present need and present understanding rather than original meaning — constitutional provisions even more frequently, because most of them are older than most statutes.

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.

* * *

It is well-nigh certain that homosexuality, male or female, did not figure in the minds of the legislators who enacted Title VII. *** [W]hat is certain is that the word "sex" in Title VII had no immediate reference to homosexuality; many years would elapse before it could be understood to include homosexuality.

A diehard "originalist" would argue that what was believed in 1964 defines the scope of the statute for as long as the statutory text remains unchanged, and therefore until changed by Congress's amending or replacing the statute. But as I noted earlier, statutory and constitutional provisions frequently are interpreted on the basis of present need and understanding rather than original meaning. * * *

Nothing has changed more in the decades since the enactment of the statute than attitudes toward sex.

[Judge Posner then described the changes in society and the changes in case law upholding same sex marriage and providing protections for persons based on their sexual orientation.]

I am reluctant however to base the new interpretation of discrimination on account of sex in Title VII on such cases as *Oncale v. Sundowner Offshore Services, Inc*., 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998), a case of sexual harassment of one man by other men, held by the Supreme Court to violate Title VII's prohibition of sex discrimination. ***

Another decision we should avoid in ascribing present meaning to Title VII is Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), which Hively argues protects her right to associate intimately with a person of the same sex. That was a constitutional case, based on race. It outlawed state prohibitions of interracial marriage. It had nothing to do with the recently enacted Title VII. ***

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 ***, 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 sets them apart from the heterosexual members of their genetic sex (male or female) *** 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; and to paraphrase Holmes, "We must consider what this country has become in deciding what that [statute] has reserved."

* * *

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. This is something courts do fairly frequently to avoid statutory obsolescence and concomitantly to avoid placing the entire burden of updating old statutes on the legislative branch. We

should not leave the impression that we are merely the obedient servants of the 88th Congress (1963-1965), carrying out their wishes. We are not. We are taking advantage of what the last half century has taught.

**SYKES**, Circuit Judge, with whom **BAUER** and **KANNE**, Circuit Judges, join, dissenting.

Any case heard by the full court is important. This one is momentous. All the more reason to pay careful attention to the limits on the court's role. The question before the en banc court is one of statutory interpretation. The majority deploys a judge-empowering, common-law decision method that leaves a great deal of room for judicial discretion. So does Judge Posner in his concurrence. Neither is faithful to the statutory text, read fairly, as a reasonable person would have understood it when it was adopted. The result is a statutory amendment courtesy of unelected judges. Judge Posner admits this; he embraces and argues for this conception of judicial power. The majority does not, preferring instead to smuggle in the statutory amendment under cover of an aggressive reading of loosely related Supreme Court precedents. Either way, the result is the same: the circumvention of the legislative process by which the people govern themselves.

Respect for the constraints imposed on the judiciary by a system of written law must begin with fidelity to the traditional first principle of statutory interpretation: When a statute supplies the rule of decision, our role is to give effect to the enacted text, interpreting the statutory language as a reasonable person would have understood it at the time of enactment. We are not authorized to infuse the text with a new or unconventional meaning or to update it to respond to changed social, economic, or political conditions.

In a handful of statutory contexts, Congress has vested the federal courts with authority to consider and make new rules of law in the common-law way. The Sherman Act is the archetype of the so-called "common-law statutes," but there are very few of these and Title VII is not one of them. *** So our role is interpretive only; we lack the discretion to ascribe to Title VII a meaning it did not bear at its inception. Sitting en banc permits us to overturn our own precedents, but in a statutory case, we do not sit as a common-law court free to engage in "judicial interpretive updating," as Judge Posner calls it, or to do the same thing by pressing hard on tenuously related Supreme Court opinions, as the majority does.

Judicial statutory updating, whether overt or covert, cannot be reconciled with the constitutional design. The Constitution establishes a procedure for enacting and amending statutes: bicameralism and presentment. See U.S. CONST. art. I, § 7. Needless to say, statutory amendments brought to you by the judiciary do not pass through this process. That is why a textualist decision method matters: When we assume the power to alter the original public meaning of a statute through the process of interpretation, we assume a power that is not ours. The Constitution assigns the power to make and amend statutory law to the elected representatives of the people. However welcome today's decision might be as a policy matter, it comes at a great cost to representative self-government.

I

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual ... because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Sexual orientation is not on the list of forbidden categories of employment discrimination, and we have long and consistently held that employment decisions based on a person's sexual orientation do not classify people on the basis of sex and thus are not covered by Title VII's prohibition of discrimination "because of sex." *** This interpretation has been stable for many decades and is broadly accepted; all circuits agree that sexual-orientation discrimination is a distinct form of discrimination and is not synonymous with sex discrimination. ***

Today the court jettisons the prevailing interpretation and installs the polar opposite. Suddenly sexual-orientation discrimination is sex discrimination and thus is actionable under Title VII. What justification is offered for this radical change in a well-established, uniform interpretation of an important — indeed, transformational — statute? My colleagues take note of the Supreme Court's "absence from the debate."*** What debate? There is no debate, at least not in the relevant sense. Our long-standing interpretation of Title VII is not an outlier. From the statute's inception to the present day, the appellate courts have unanimously and repeatedly read the statute the same way, as my colleagues must and do acknowledge. *** The Supreme Court has had no need to weigh in, and the unanimity among the courts of appeals strongly suggests that our long-settled interpretation is correct.

Of course, there is a robust debate on this subject in our culture, media, and politics. Attitudes about gay rights have dramatically shifted in the 53 years since the Civil Rights Act was adopted. Lambda Legal's proposed new reading of Title VII — offered on behalf of plaintiff Kimberly Hively at the appellate stage of this litigation — has a strong foothold in current popular opinion.

This striking cultural change informs a case for legislative change and might eventually persuade the people's representatives to amend the statute to implement a new public policy. But it does not bear on the sole inquiry properly before the en banc court: Is the prevailing interpretation of Title VII — that discrimination on the basis of sexual orientation is different in kind and not a form of sex discrimination — wrong as an original matter? * * *

B

To a fluent speaker of the English language — then and now — the ordinary meaning of the word "sex" does not fairly include the concept of "sexual orientation." The two terms are never used interchangeably, and the latter is not subsumed within the former; there is no overlap in meaning. Contrary to the majority's vivid rhetorical claim, it does not take "considerable calisthenics" to separate the two. *** The words plainly describe different traits, and the separate and distinct meaning of each term is easily grasped. More

specifically to the point here, discrimination "because of sex" is not reasonably understood to include discrimination based on sexual orientation, a different immutable characteristic. Classifying people by sexual orientation is different than classifying them by sex. The two traits are categorically distinct and widely recognized as such. There is no ambiguity or vagueness here. * * *

C

This commonsense understanding is confirmed by the language Congress uses when it does legislate against sexual-orientation discrimination. For example, the Violence Against Women Act prohibits funded programs and activities from discriminating "on the basis of actual or perceived race, color, religion, national origin, sex, gender identity, ... sexual orientation, or disability." 42 U.S.C. § 13925(b)(13)(A) (emphases added). *** The federal Hate Crimes Act is another example. It imposes a heightened punishment for causing or attempting to cause bodily injury "to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person." 18 U.S.C. § 249(a)(2)(A) (emphases added). Other examples can be found elsewhere in the U.S. Code. * * *

State and local antidiscrimination laws likewise distinguish between sex discrimination and sexual-orientation discrimination by listing them separately as distinct forms of unlawful discrimination. * * *

I could go on, but the point has been made. This uniformity of usage is powerful objective evidence that sexual-orientation discrimination is broadly recognized as an independent category of discrimination and is not synonymous with sex discrimination.

II

My colleagues in the majority superficially acknowledge Ulane's "truism" that sex discrimination is discrimination based on a person's biological sex. *** As they see it, however, even if sex discrimination is understood in the ordinary way, sexual-orientation discrimination is sex discrimination because "it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex." ***

Not true. An employer who refuses to hire homosexuals is not drawing a line based on the job applicant's sex. He is not excluding gay men because they are men and lesbians because they are women. His discriminatory motivation is independent of and unrelated to the applicant's sex. Sexism (misandry and misogyny) and homophobia are separate kinds of prejudice that classify people in distinct ways based on different immutable characteristics. Simply put, sexual-orientation discrimination doesn't classify people by sex; it doesn't draw male/female distinctions but instead targets homosexual men and women for harsher treatment than heterosexual men and women. * * *

This brings me back to where I started. The court's new liability rule is entirely judge-made; it does not derive from the text of Title VII in any meaningful sense. The court has arrogated to itself the power to create a new protected category under Title VII. Common-

law liability rules may judicially evolve in this way,but statutory law is fundamentally different. Our constitutional structure requires us to respect the difference.

It's understandable that the court is impatient to protect lesbians and gay men from workplace discrimination without waiting for Congress to act. Legislative change is arduous and can be slow to come. But we're not authorized to amend Title VII by interpretation. The ordinary, reasonable, and fair meaning of sex discrimination as that term is used in Title VII does not include discrimination based on sexual orientation, a wholly different kind of discrimination. Because Title VII does not by its terms prohibit sexual-orientation discrimination, Hively's case was properly dismissed. I respectfully dissent.

## Questions and Comments

**1. Statutory interpretation question:** What was the statutory interpretation question that the court was trying to resolve? Was there any prior appellate court or Supreme Court precedent directly addressing that question?

**2. Faithful agent or partner?** The majority and Judge Posner, concurring, adopt dynamic readings of the statute. Does he or the majority see the court as a faithful agent of the legislature? Does either attempt to interpret the statute in a way that is consistent with the intent of the enacting legislature?

**3. Differing approaches:** The majority and Judge Posner take different paths to the conclusion that “discrimination based on sex” includes discrimination based on sexual orientation. How does the majority justify its reading of the statute and how does Judge Posner differ though reaching the same result? Does either opinion focus on the plain meaning of the text, the structure of the statute, the legislative history, or the circumstances leading to its enactment?

**4. Dynamic interpretation:** Both the majority and Judge Posner discuss the changes in social views and attitudes and the changes in the legal landscape between the time that the Civil Rights Act was enacted in 1964 and the time of the decision as justifications for updating the law. Does Judge Posner suggest that the approach that he is taking in the case is an approach that should be used when interpreting every statute? Does the dissent agree that courts should update outdated laws or interpret them in a common law manner? Why or why not?

**5. Textualism:** The opinion of the dissenting judges outlines the classical textualist interpretation of the statute. Why does the dissent argue that “discrimination based on sex” should not be interpreted to include discrimination based on sexual orientation? In 2020, the Supreme Court held, in *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020), that discrimination based on sexual orientation violates Title VII. Justice Gorsuch, for the majority, adopted a textualist reading of the statute, holding that it is impossible to discriminate against a person based on sexual orientation without discriminating against them, in part, based on sex. Justices Kavanaugh and Alito, in separate dissents, also

relied on textualism, but they concluded that discrimination based on sexual orientation does *not* violate Title VII.

**6. Theories of interpretation:** To the extent that a court—using dynamic statutory interpretation—ignores the clear meaning of a statute and other evidence of a contrary intent by the enacting legislature, that opinion will likely be criticized on the grounds that the court is making law and violating constitutional principles of separation of powers. Putting aside that extreme situation, Professor Nicholas Rosenkranz argues that the Constitution does not require courts to apply specific theories of interpretation. *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085 (2002). As a corollary, then, Congress could include directives in legislation that require courts to apply specific theories when interpreting particular statutes. Even without such explicit directives, Professor Kevin Stack argues that modern regulatory statutes impose a duty on agencies to implement the statutes that they enforce in accordance with the purposes the statutes establish. *See* Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. Rev. 871, 876 (2015).

## Problem 3-1: The Case of the Speluncean Explorers

In a classic 1949 law review article, Professor Lon Fuller explored the dueling theories of statutory interpretation and the proper roles of the legislative, judicial, and executive branches through a series of fictional judicial opinions addressing an appeal of a murder conviction for several explorers who resorted to cannibalism when trapped in a cave. You can read the article, Lon L. Fuller, *The Case of the Speluncean Explorers,* 62 Harv. L. Rev. 616 (1949) through JSTOR or HeinOnline. After you read the article, answer the following questions:

1. What was the statutory language at issue in the case and did the statute include any exceptions to the prohibited activity?
2. Which Justices adopted a textualist interpretation of the statute and what is the textualist interpretation? Neither of the Justices who adopts a textualist interpretation of the statute necessarily believes that the defendants should be executed. Why, then, does each of those Justices suggest that the statute should be interpreted according to its plain meaning? Is any Justice concerned with the "rule of law"?
3. Which Justice would have overturned the defendants' conviction based on purposivism and what was the purposivist reading of the statute set forth by that Justice? When does that Justice suggest that courts should depart from a literal reading of a statute? Two other Justices criticize the purposivist approach in their opinions. On what grounds do they criticize the approach as applied to the facts of this case?

## Problem 3-1: The Case of the Speluncean Explorers (continued)

4. On what grounds would Justice Handy overturn the defendants' convictions? On what theory is Justice Handy relying? What criticisms might be raised regarding the manner in which Justice Handy decided the case? Is Handy's approach more or less defensible than Justice Foster's reliance on "natural law"?

5. Do any of the Justices discuss the authority of courts to correct legislative mistakes? Is there disagreement among the Justices regarding the proper role for courts?

## Professional Identity Formation/Professional Responsibility

Although the fictional case of the Speluncean Explorers focused on an issue of statutory interpretation, the government has discretion to determine whether and when to prosecute persons for violations of the law. Imagine that you are the prosecutor charged with deciding whether to bring an action for murder against the defendants in the case. What personal values and traits would you rely on to help you determine whether to bring the action against the defendants? What impact would a decision to prosecute or decline prosecution have on the defendants, the relatives of Whetmore and society at large? What other information would you want to know to help you determine whether to prosecute? Why? If fidelity to the law is one of the virtues of a professional lawyer, *see* Patrick Emery Longan, Daisy Hurst Floyd, & Timothy Floyd, THE FORMATION OF PROFESSIONAL IDENTITY, 6-7 (Routledge, 2020), how would that impact your choice?

## Problem 3-2: No Vehicles in the Park

In the spring of 1940, a teenager injured ten pre-school children while driving his car through the Springfield Veterans Park in Springfield, Ames. Two weeks later, several children were riding bicycles through the Midway Community Park and struck a group of picknickers. These were only a few of a series of highly publicized accidents in public parks in the State of Ames during that year.

In response to those events, Representative Linda Jolly introduced a bill in the state House of Representatives to prohibit the operation of vehicles in public parks. During debate on the bill on the House floor, Representative Mykel Symons introduced an amendment to the bill that would include a definition of the word "vehicle" to include any mechanized mode of transportation. Symons argued that it was necessary to define the term because it was not clear that the term "vehicle" would include radio-controlled airplanes. "Radio controlled aircraft are a nuisance in our parks," Symons argued, "as they are loud, difficult to control, and have collided with people and their property when their operators could not control them." Representative Jolly rose to speak after Representative Symons and said, "everyone already knows that vehicles include mechanized modes of transportation, whether on land, sea or air, so we don't need to say that in the statute." Representative Symons' proposed amendment was ultimately voted down in the House.

When the bill was being considered in the Senate Transportation Committee, Senator Dylan Flood noted his concern that the House bill could be read to prohibit the operation of radio-controlled airplanes in parks. "One of the most popular past times at many of our parks," he noted, "is the operation of radio-controlled airplanes. It's also a source of revenue since we require hobbyists to get a permit to fly the planes in the parks. I hope we are not going to prohibit those planes in parks." In response, Senator Mira Patel assured Senator Flood, "We have no intention of banning radio-controlled airplanes under this law. Our concern is with the vehicles that are driving through the park. We don't need to exempt radio-controlled airplanes in the law because vehicles transport people and cargo and radio-controlled airplanes do not transport anything."

After the House and Senate passed different versions of the proposed law, a conference committee reconciled the competing versions. One significant portion of the conference report addressed the goals of the law, stating "This statute is necessary to protect public health and safety and to reduce air pollution."

The law that was enacted by the Ames legislature, "The Public Park Health and Safety Act of 1940," included the following provisions that are noteworthy for this problem:

## Problem 3-2 (Continued)

**Section 1. Findings and Purposes**

(a) There has been a sharp increase in the number of accidents in parks caused by automobiles, bicycles, motorcycles, and other vehicles colliding with park visitors.

(b) Noise levels increase, on the average, 20 decibels, when vehicles are driven through parks. Prolonged exposure to higher noise levels can cause hearing loss.

(c) It is necessary to limit the operation of vehicles in public parks in order to protect public health and safety.

**Section 2. Vehicles in the Park**

No vehicles may be operated in any public park.

**Section 8. Citizen Suits**

Any person may sue any other person who violates any provision of this Act. The district court shall have jurisdiction to award penalties of not more than $1000 for each offense.

It is now almost a century since Ames enacted the Public Park Health and Safety Act, but a question concerning interpretation of the law has arisen. Earlier this year, the Springfield Department of Parks and Recreation began using drones for surveillance in the public parks in Springfield after several of the playgrounds in the parks had been vandalized. Several community members are upset that the Parks Department is using drones and feel that the city is illegally invading their privacy by operating the drones in the parks while they are in the parks. They sued the Parks Department under Section 8 of the Public Park Health and Safety Act, arguing that the Parks Department is violating Section 2 of the Act. The Parks Department has filed a motion for summary judgment, arguing that drones are not “vehicles” under the Act.

In resolving the statutory interpretation question, a court might look at some dictionary definitions for the term vehicle. The most recent version of the Cambridge Dictionary defines “vehicle” as “a machine, usually with wheels and an engine, used for transporting people or goods, especially on land.” The Merriam Webster Dictionary defines the term as (1) “a means of carrying or transporting something” and (2) “a piece of mechanized equipment.”

## Problem 3-2 (Continued)

Some additional information about drones and the State of Ames may be helpful to the court in resolving the interpretive question in this case.

First, although some forms of drones have existed since the mid-19th century, drones like the ones used today and used by the Springfield Parks Department did not exist in 1940 and have only been widely used by individuals over the past few decades. They are similar to radio-controlled airplanes in some ways, but are quieter, are not generally operated with gasoline, and do not generally cause air pollution. In addition, drones are easier to control than the radio-controlled airplanes that were in existence in the 1940s and can be operated outside of the line of vision of the operator, with the assistance of cameras and GPS technology that did not exist in the 1940's. Consequently, they are generally much safer to operate than the radio-controlled airplanes of the 1940's. Nevertheless, in cases of pilot error or occasional technical malfunctions, drones may crash and injure persons or damage property. Most drones like the ones operated by the Parks Department are only a few pounds, but some drones can be much larger. The drones used by the Parks Department carry four cameras, but each weigh only a few grams. In most cases, a collision with a drone like the ones used by the Parks Department will only cause minor injuries or harm to property.

A majority of the drones in the United States are produced in factories in the State of Ames. The state derives significant tax revenue from the companies producing drones in the State. Operation of drones, as a hobby, is very popular in Ames, and the parks in the state generally welcome visitors to fly their drones in the parks in designated areas and during designated times. In fact, the Midway Community Parks hosts an annual "National Drone Fly-In," attracting visitors from dozens of different states. Two of the sports franchises in the State of Ames are named after drones, or particular models of drones.

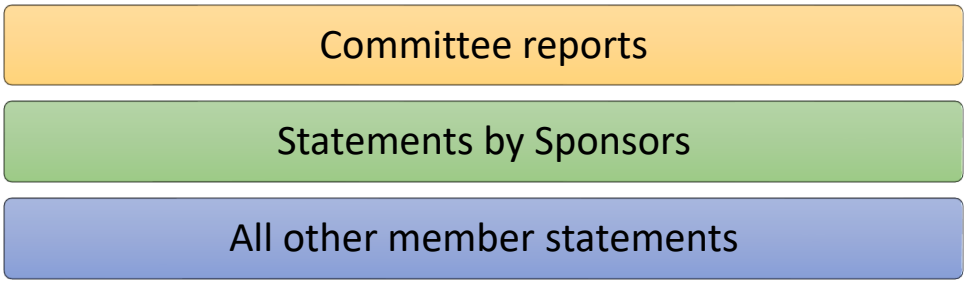
Armed with that background information, draft two opinions on the motion for summary judgment, choosing from the following options:

1. A textualist opinion, holding that a drone is not a vehicle.
2. A purposivist opinion, holding that a drone is a vehicle.
3. A purposivist opinion, holding that a drone is not a vehicle.
4. An intentionalist opinion, holding that a drone is or is not a vehicle.
5. An opinion using dynamic interpretation, holding that a drone is a vehicle.

The opinions should include some boilerplate language appropriate to each theory regarding whether, and when, the court is willing to look beyond the text to consider extrinsic sources and the role of the court versus the legislature in interpreting the law.

## VII. The Importance of Legislative History

As early as the late 19th century, the Supreme Court endorsed House and Senate committee reports as a legitimate statutory interpretation tool.[221] Similarly, until the 1970s, there was almost universal consensus on the Supreme Court and among scholars that it was appropriate to rely on legislative history to interpret statutes and that there was a hierarchy of reliability across the different types of legislative history sources.[222] The generally accepted hierarchy from that era is outlined below.[223]




In the 1970's, citations to legislative history increased dramatically and courts began to cite the secondary types of legislative history with increasing frequency.[224] In the 1980's, however, several prominent federal appellate judges, led by D.C. Circuit Judge (and later Justice) Antonin Scalia, strongly criticized reliance on legislative history of any type.[225] In his confirmation hearings for the Supreme Court, Scalia noted that "if he could create the world anew," he would get rid of legislative history.[226] Judges and academics took sides in a debate that often divided along ideological lines and aligned with specific statutory interpretation theories. Conservative judges and textualist interpreters tended to oppose the reliance on legislative history, while liberal judges and purposivist interpreters supported it.[227] Overall, citations to legislative history in the federal courts declined in

Justice Scalia – Photo by the Supreme Court – Public Domain

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221 *See* Benjamin & Renberg, *supra* note 54, at 1029. *See, e.g. Duplex Printing Press Co. v. Deering,* 254 U.S. 443, 474 (1921).

222 *Id.* at 1025-1026.

223 *See* Jesse M. Cross, *Legislative History in the Modern Congress*, 57 Harv. J. on Legisl. 91, 151 (2020).

224 *See* Benjamin & Renberg, *supra* note 221, at 1031.

225 *Id.* at 1025-1026.

226 *Id.* at 1037-1038. During his career on the Supreme Court, Justice Scalia often wrote separate opinions simply to avoid joining with an opinion that cited legislative history. *See, e.g., S.D. Warren Co. v. Maine Bd. of Environmental Protection,* 547 U.S. 370 (2006) (Scalia, J., joining the opinion of the Court except as to Part III-C, discussing legislative history); *Williams v. Taylor,* 529 U.S. 362, 399 (2000) (Scalia, J., joining Justice O'Connor's opinion of the Court as to Part II except as to footnote discussing legislative history).

227 *See* Benjamin & Renberg, *supra* note 221, at 1027.

response to the anti-legislative history movement of the 1980's and the increasing popularity of textualism as a theory of interpretation.[228]

Opponents of legislative history criticize its use on several grounds. First, as noted above, strict textualists oppose reliance on legislative history because only the text of the statute was enacted through the constitutional process, so only the text is the law.[229] Second, opponents argue that there is often no guarantee that members of the legislature read or were aware of various forms of legislative history and certainly no evidence that they voted for or against the legislation because of the legislative history.[230] Third, opponents assert that reliance on legislative history encourages members of the legislature to strategically include material in the legislative history to "pad" it to encourage courts to adopt a particular reading of the statute, even though it was not embodied in the text of the statute.[231] Fourth, critics argue reliance on legislative history enables judges to legitimize decision-making based on personal preferences, because it is easy to support any reading of a statute through selective citation to legislative history.[232] Critics frequently cite former D.C. Circuit Judge Harold Leventhal, who reportedly said that "the use of legislative history [was] the equivalent of entering a crowded dinner party and looking over the heads of the guests for one's friends."[233] Fifth, opponents assert that some legislative history, like some statutory text, is directed to non-judicial audiences, like agencies, interest groups, other members of the legislature, and other congressional bodies, so it should not be relevant to the interpretation of the statute.[234] Finally, some critics base their opposition to reliance on legislative history on an opposition to a search for legislative intent. As noted earlier, some interpreters argue that it is inappropriate to try to interpret statutes based on the intent of the enacting legislature because the legislature did not have any collective intent or it is impossible to determine what that intent was.[235]

Despite these criticisms, most of the statutory interpretation theories, other than new textualism, approve of the use of legislative history, at least to clarify ambiguities, and most judges will examine legislative history on some occasions.[236] There is less agreement today, though, regarding the hierarchy of reliability of legislative history sources. Professor Victoria Nourse, for example, rejects a strict ranking based on the type

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228 *Id.* at 1051.

229 *Id.* at 1041. *See also* Gluck & Bressman, *supra* note 152, at 965. Along similar lines, some critics argue that reliance on committee reports represents an unconstitutional delegation of law-making authority to subdivisions of Congress. *See* Gluck & Bressman, *supra* note 152, at 965.

230 *See* Benjamin & Renberg, *supra* note 221, at 1041-1042.

231 *Id. See also* Gluck & Bressman, *supra* note 152, at 965.

232 *See* Benjamin & Renberg, *supra* note 221, at 1044-1045.

233 *Id.* at 1046-1047.

234 *See* Gluck & Bressman, *supra* note 152, at 965, 973; Sitaraman, supra note 115, at 109-110.

235 *See* Gluck & Bressman, *supra* note 152, at 965; Seidenfeld, *supra* note 157, at 1824-1829.

236 *See* Gluck & Posner, *supra* note 141, at 1324-1326.

of source and focuses more closely on the timing of the evidence (later is better) and how directly it addresses the statutory interpretation question at issue.[237] Professors Abbe Gluck and Lisa Bressman surveyed Congressional drafters regarding the drafting of legislative history to solicit their views regarding the reliability of various types of legislative history and found that the drafters felt (1) committee reports and conference committee reports were the most reliable forms of legislative history; (2) floor statements by members opposed to legislation were the least reliable form of legislative history; (3) party leaders' floor statements supporting legislation were less reliable than statements of other members on the floor; and (4) legislative history is generally less reliable for laws enacted through unorthodox processes, because it may not involve committee consideration or it may be a confusing combination of materials from several different committees.[238] Other academics agree that the manner in which legislation is enacted should impact the weight attributed to specific types of legislative history.[239]

Finally, Professor Jesse Cross interviewed Congressional staffers to ascertain who is responsible for drafting various types of legislative history, what level of expertise they possess in the subject matter of the legislation, and what incentive they have to draft legislative history that accurately describes the legislation.[240] He determined that committee reports are generally drafted by committee legislative staff, statements of committee chairs and ranking members are also drafted by committee legislative staff, statements of other members of Congress at hearings or markups are generally drafted by member legislative staff, and floor statements of members are drafted by member

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237 *See* Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules,* 122 Yale L. J, 70 (2012).

238 *See* Gluck & Bressman, *supra* note 152, at 977-979. The drafters suggested that party leaders statements were less reliable because they were not necessarily involved in drafting the legislation, but were focused instead, on shepherding the legislation through the law-making process. *Id.* In general, the drafters were reluctant to endorse any legislative history created outside of the committee process. *Id.*

239 *See* Sitaraman, supra note 115, at 119-121; Bressman & Gluck, *supra* note 95, at 760-761. Professor Ganesh Sitaraman, for instance, argues that when legislation is drafted through a bipartisan committee process, the statements of members of both parties who supported the legislation could be relevant, while if the legislation was drafted through a partisan committee process, only statements from the party members who drafted the legislation would be relevant. *See* Sitaraman, supra note 115, at 119-120. Similarly, Sitaraman argues that Committee Chairs do not always play the same role in navigating bills through the committee for every bill and that individual members of the committee may play greater roles than the Chair in some cases, so it may not make sense to accord the same level of deference to statements from Committee Chairs for every bill. *Id.* at 120. The Congressional drafters who were surveyed by Professors Bressman and Gluck almost unanimously agreed that the process by which a statute is enacted affects how it, and the legislative history, is drafted. *See* Bressman & Gluck, *supra* note 95, at 760. The drafters said that legislative history for omnibus bills is confused and more likely erroneous. *Id.* at 761. For appropriations legislation, though, they suggested that legislative history is central and important to its drafting. *Id.*

240 *See* Cross, *Legislative History, supra* note 223.

communications or legislative staff.[241] Based on the interviews, he also concluded that (1) committee legislative staff have the most expertise in the subject matter of legislation, knowledge regarding the legislation, and motivation to report the details of the legislation accurately; (2) communications staff of individual members have little expertise in the subject matter of legislation and an incentive to draft statements that serve the members' political interests in re-election, rather than reporting the details of the legislation accurately; and (3) legislative staff of individual members have an intermediate level of expertise in the subject matter of legislation and may have some incentive to spin the legislative history in the same manner as communications staff of individual members.[242] Professor Cross then proposed a new ***hierarchy of reliability*** of legislative history materials, based on the identity of the author; the competence and expertise of the author; the author's actual knowledge of the details of the legislative "deal"; and the professional motivation or incentive of the author to report the "deal" accurately.[243] The new hierarchy that he proposed follows.[244]


241 *Id.* at 126-138.

242 *Id.* at 96. Regarding legislative staff of committees, Cross concluded that "a focus on policy development leads these staffers to possess high levels of: (1) policy specialization; (2) policy expertise; (3) knowledge of particular bills; and (4) motivation to draft precise and accurate legislative products." *Id.* He concluded that legislative staff of individual members performed less well on those dimensions because of "a hybrid focus that straddles policy development and reelection efforts." *Id.* Regarding communications staff of individual members, Cross concluded that "[b]ecause member communications staff adopt an exclusive focus on constituent relations and reelection efforts, they perform particularly poorly on each of these dimensions." *Id.*

243 *Id.* In determining what factors to consider in creating a hierarchy of reliability, Professor Cross was guided by the work of Professor William Eskridge, who associated reliability of legislative history with the following questions: "How likely does this source reflect the views or assumptions of the enacting Congress? Is there a danger of strategic manipulation by individual Members or biased groups seeking to "pack" the legislative history? How well-informed is the source?" *Id.*

244 *Id.* In addition to the reliability of the drafters, Professor Cross argues that opposing party review of committee reports provides an important institutional check on committee reports, further justifying including them at the top of the hierarchy of legislative history. *Id.*

## Questions and Comments

1. **Legislators do not read or write the legislative history:** As noted above, some critics argue that courts should not consult legislative history to interpret statutes because members of the legislature generally do not read, are not aware of, and do not write legislative history. However, legislators frequently do not read and hardly ever write the statutory text, *see* Ganesh Sitaraman, *The Origins of Legislation*, 91 Notre Dame L. Rev. 79, 121 (2015), so legislative history supporters argue that it makes little sense to discount the reliability of legislative history on those grounds.

**2. Ideology and reliance on legislative history:** Professors Stuart Minor Benjamin and Kristen Renberg reviewed all the federal appellate court majority opinions published between 1965 and 2011 (over 240,000 opinions) to determine whether the political affiliation of judges or the longevity of service of judges correlated to their willingness to rely on legislative history in the wake of the anti-legislative history movement. *See* Stuart Minor Benjamin & Kristen M. Renberg, *The Paradoxical Impact of Scalia's Campaign Against Legislative History*, 105 Cornell L. Rev. 1023 (2020). Not surprisingly, they found that Republican judges and judges appointed in the 1980's and later were less likely than their counterparts to cite floor statements and committee hearings, which are generally viewed as less reliable sources of legislative history. *Id.* at 1027. Paradoxically, though, they found that those same judges were ***more likely*** than their counterparts to cite committee reports. *Id.* at 1028. Thus, Benjamin and Renberg concluded that the post-1980's attacks on legislative history had the paradoxical effect of encouraging Republican and post-Reagan judges to increase reliance on reliable forms of legislative history, rather than jettisoning reliance on all forms of legislative history. *Id.*

### CALI CHAPTER QUIZ

Now that you've finished Chapter 3, why not try a short quiz on the material at www.cali.org/lesson/19752. It should take about 30 minutes to complete.

# Chapter 4:

# Intrinsic Sources of Interpretation

## I. Introduction

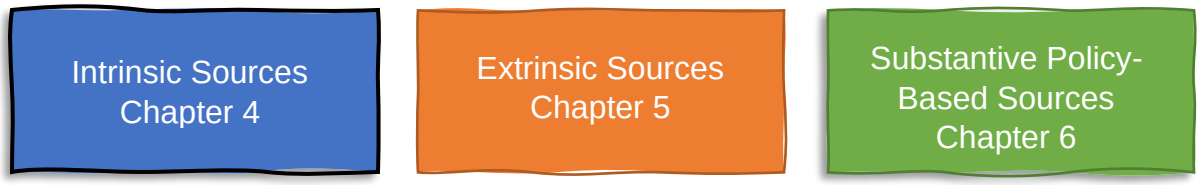
Regardless of which theory of interpretation judges adopt, there are three sources of interpretive tools that they utilize to find the meaning of a statute: (1) intrinsic sources; (2) extrinsic sources; and (3) substantive policy-based sources. This book covers each of those categories of sources in separate chapters, beginning with the intrinsic sources.

The ***intrinsic sources*** focus on the words of the statute and the context in which words are used within the statute itself. Intrinsic sources include textual canons and contextual canons that draw inferences from the words that are chosen by the legislature, the manner in which the words are used in the provision being interpreted, and the manner in which the provision being interpreted fits within the context of the statute.

When judges examine sources beyond the statute itself, including other statutes, the context of enactment of the statute, the process by which the statute was enacted, legislative action or inaction that follows the enactment of the statute, or the comprehensive code in which the statute is situated, they are examining ***extrinsic sources***, which will be covered in Chapter 5.

Finally, judges sometimes interpret statutes in ways to advance specific substantive policies, such as avoiding interpretations of statutes that may be unconstitutional or avoiding interpretations of statutes that impose punitive sanctions without appropriate notice. Those ***substantive policy-based sources*** will be examined in Chapter 6.

***Sources of Interpretation***




### A. Canons

You probably have noticed a few references in this book to “canons” of construction. The term refers generally to “a broad collection of linguistic and substantive principles that

judges might apply to resolve statutory interpretation questions."[245] Canons are guides for interpretation, rather than rules per se, and originated in British common law. Many of the "rules" discussed in the chapters of this book detailing intrinsic, extrinsic, and substantive policy-based sources of interpretation are, in fact, canons of construction. Although many of the canons are text-based, judges routinely apply the canons regardless of whether they are interpreting a statute using the textualist theory or any other theory.[246]

There are several rationales that have been suggested as justifications for judicial reliance on canons of construction to interpret statutes, including (1) the canons reflect the manner in which legislative drafters think about language when they draft statutes, so application of the canons advances the intent of the legislature; (2) judicial application of the canons encourages the legislature to draft statutes in ways that are consistent with the canons; and (3) application of the canons will lead to consistent interpretation of statutes by courts, making their meaning more predictable for those regulated by, or impacted by, the statutes.[247]

While consistent application of the canons would provide greater notice to the public regarding the meaning of statutes, canons are not mandatory[248], and there is no set of rules that establishes a hierarchy of canons or provides guidance regarding when canons should determine the outcome of a statutory interpretation question.[249] Indeed, most judges use the canons flexibly, without articulating precise explanations for their choice of one canon over a conflicting canon.[250] Judges generally support their reasoning with multiple canons and rarely find themselves bound to a single canon.[251]

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[245] *See* Kristin E. Hickman & R. David Hahn, *Categorizing Chevron*, 81 Ohio State L.J. 611, 635 (2020). Comprehensive lists of, and analyses of, the various canons of construction can be found in the leading treatise on statutory interpretation, *see* SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION (Norman Singer & J.D. Shambie Singer eds. 2008-2014), and in an oft-cited tome by Justice Scalia. *See* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (Thomson West ed. 2012). For a discussion of what makes an interpretive approach a "canon", *see* Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars,* 97 Texas L. Rev. 163 (2018) (examining, as potential criteria, (1) frequency of use; (2) longevity; (3) justification; and (4) whether the Court definitively declared or announced the rule as a rule of general applicability).

[246] *See* Gluck & Posner, *supra* note 141, at 1302. Based on a survey of 42 federal appellate court judges, though, Gluck and Posner concluded that younger judges were more likely than the older judges to rely on the canons to decide statutory interpretation questions. *Id.*

[247] *See* Gluck and Bressman, *Statutory Interpretation from the Inside - An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, *supra* note 152, at 905.

[248] *See Chickasaw Nation v. United States,* 534 U.S. 84, 93 (2001).

[249] *See* David S. Louk*, The Audiences of Statutes,* 105 Cornell Law Review 137, 150 (2019); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2119 (2016).

[250] *See* Scalia & Garner, *supra* note 192, at 59. In his statutory interpretation tome, Justice Scalia counsels, "No canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions." *Id.*

[251] *See* Hickman & Hahn, *supra* note 245, at 635-636.

## B. Criticism of the Canons and History of Reliance on the Canons

> "When it comes to presenting a proposed construction in court, there is an accepted conventional vocabulary. … [T]he accepted convention still, unhappily requires discussion as if only one single correct meaning could exist. ***Hence there are two opposing canons on almost every point***. … Every lawyer must be familiar with them all: they are still needed tools of argument."
>
> Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to Be Construed*, 3 Vand. L. Rev. 395, 401 (1950).

In 1950, in the landmark article quoted above, Professor Karl Llewellyn observed that for almost every canon of construction that suggests that statutory language should be interpreted in a particular manner, there is another canon that suggests that the same language should be interpreted in a different manner.[252] Critics have echoed Llewellyn's concerns for decades, arguing that judges have significant discretion to interpret statutes in a manner that comports with their philosophical or political leanings by choosing the appropriate canon or canons that support their pre-determined reading of the statute. The concern about judicial abuse is exacerbated by the lack of any standards that govern when courts should apply canons in the event of conflicts. At the same time, though, reliance on the canons can create the impression that judges are making neutral decisions.[253]

Justice Kagan expressed concerns about the Court's use of the canons in 2022, in her dissenting opinion in *West Virginia v. United States*, when she wrote, "Some years ago, I remarked that '[w]e're all textualists now.' ... It seems I was wrong. The current Court is only textualist when being so suits it. When that method would frustrate broader goals, special canons … magically appear as get out of text free cards."[254]

Judicial reliance on the canons of construction has waxed and waned over the years. In the 1950's, after Professor Llewellyn's criticisms and the rise of the legal process movement, there was a decline in the use of canons by courts.[255] However, with the rise

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[252] See Llewellyn, *supra* note 144, at 401. *See also* Anita S. Krishnakumar, *Dueling Canons,* 65 Duke L. J. 909) (2016) (finding that Justices in the Roberts Court dueled extensively over textual canons and that the canons did not constrain the Justices to vote against ideology).

[253] *See* Ryan D. Doerfler, *Late Stage Textualism*, 2022 Sup. Ct. Rev. forthcoming (2022) (describing canons as "tools of legal mystification, providing the appearance of law to what [are], ultimately, acts of discretion.").

[254] *See West Virginia v. EPA,* 142 S.Ct. 2587 (2022) (Kagan, J., dissenting).

[255] *See* Doerfler, *supra* note 253, at 4-7.

of modern textualism in the 1980's, there was a corresponding rise in the use of canons, as textualists argued that the canons were a more valid way to interpret a statute than legislative history.[256] Textualists asserted that the canons helped provide consistency in statutory interpretation, limited the opportunity for political decisions by judges, and provided better notice to the public about what statutes mean.[257] While textualists championed the use of the canons, they were pragmatic, rather than dogmatic, in their use, and stressed that the canons were merely an aid to interpretation and should not be applied rigidly.[258]

Professor Ryan Doerfler argues that "late stage textualists" have now abandoned the position that the canons are flexible in favor of a position that statutes generally may have only one plausible reading that can be determined based on the canons.[259]

## Questions and Comments

**1. Do the canons reflect Congressional drafting practices?** Professors Abbe Gluck and Lisa Schultz Bressman surveyed 137 congressional counsel and persons charged with drafting legislation to determine whether they were aware of various canons of construction and whether they drafted legislation with the canons in mind. *See* Abbe R. Gluck and Lisa Schultz Bressman, *Statutory Interpretation from the Inside - An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901 (2013). They found that drafters were aware of some of the canons and drafted legislation based on them but were aware of other canons and did not draft legislation based on them. In addition, they found that drafters were unaware of other canons, so they did not draft legislation based on them (although in some cases, they drafted legislation that was consistent with the assumptions underlying the canons). Consequently, in many cases, it is a fiction to say that courts should rely on canons because they reflect Congressional drafting practices. If that is correct, should courts continue to rely on the canons to interpret statutes? What are the other rationales for judicial reliance on canons?

**2. Do the canons correspond to the way the public reads statutes?** Kevin Tobia, Brian Slocum, and Victoria Nourse point out that critics often question whether canons of construction reflect how ordinary people reading a statute would understand the words of the statute. *See* Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Statutory Interpretation from the Outside*, 122 Col. L. Rev. 213, 221 (2022). In response to that question, they surveyed 4500 demographically representative people across the United States and a sample of more than 100 first year law students in the United States to determine which

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[256] *Id.* at 7-12.
[257] *Id.* at 9-12.
[258] *Id.* at 11. The malleable use of the canons, though, created tension with the textualists assertion that the canons provided predictability and constraint to judicial decision-making.
[259] *Id.* at 3. Doerfler suggests that the shift has been driven, since 2015, by a rejection by the Republican party of non-interventionist doctrines, the embrace, by the party, of judicial intervention in policymaking, and the appointment of judges that favor judicial intervention. *Id.*

(if any) of the interpretive canons actually reflect how ordinary people understand language. As with the Gluck/Bressman study, Tobia, Slocum, and Nourse found that some of the canons reflected the public's ordinary understanding of language, while some of the canons did not. Should that affect whether courts continue to rely on the canons to interpret statutes? Tobia, Slocum, and Nourse found that for most canons, the conclusions about whether the canon reflected ordinary understanding of language were the same regardless of whether the audience surveyed was the general public or the law students. The researchers also concluded that ordinary people often interpret rules non-literally, which, they argued, undercuts a focus on literalism in statutory interpretation.

**3. Formal rules for selection of canons:** Justice Kavanaugh and many others have argued that there should be clear rules that identify when canons should be applied and which canons take precedence over other canons. Kavanaugh reasons, "if we could achieve more agreement ahead of time on the rules of the road, there would be many fewer disputed calls in actual cases. That in turn would be enormously beneficial to the neutral and impartial rule of law, and to the ideal and reality of a principled, nonpartisan judiciary." Why have such rules not been adopted? What difficulties might be encountered in creating and applying such rules?

**4. Criteria for canons:** Much has been written about the criteria for "canonization" of rules of statutory interpretation. *See, e.g.,* Tobia, Slocum, & Nourse, *supra*, at 289 (identifying "historical pedigree, longevity, regularity of use" or other indication of longstanding usage as traditional criteria, but advocating for empirical legitimization as a criteria for canonization); Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163, 181–90 (2018) (identifying as potential tests or measures the frequency of Supreme Court use; longevity of the rule; and justifications for the rule, while eschewing a requirement that the Court declare a canon's specific existence). For a more generous definition, *see* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 147 (1993) (referring to canons as "background principles of interpretation that are used in statutory construction").

**CALI SECTION QUIZ**

Before moving on to the next section, why not try a short quiz on the material you just read at www.cali.org/lesson/19753. It should take about 10 minutes to complete.

# II. The Plain Meaning

## A. Plain Meaning and Ordinary Meaning

Regardless of the theory of interpretation that they utilize, most judges begin their analysis of any statutory interpretation question with the text of the statute.[260] As Justice Elena Kagan has observed, "We're all textualists now."[261] One of the most fundamental canons of construction, ***the plain meaning rule***, addresses the interpretation of statutory text and provides that a statute is to be interpreted in accordance with its plain meaning. If the meaning of the text is clear, therefore, the statute must be applied according to its terms, even if application of the plain meaning yields a result that seems unreasonable, unfair, or a poor policy choice. Courts will, however, explore sources beyond the plain meaning of a statute's text and adopt an interpretation that isn't clearly obvious from the text when the language of the statute is ambiguous or absurd (or, occasionally to address a scrivener's error). Those exceptions will be explored in Part III of this chapter.

The ***ordinary meaning rule*** appears, at first glance, to be similar to the plain meaning rule, but it addresses the manner in which courts should determine the plain meaning of a statute, whereas the plain meaning rule addresses the binding nature of the plain meaning of a statute. Under the ordinary meaning rule, "words are to be understood in their ordinary everyday meanings."[262] The ordinary meaning is not, therefore, always the literal meaning of a word. Application of the rule is harder than it sounds, though. For instance, consider the word "strike," which has 250 definitions in the Oxford English Dictionary.[263] As a noun, "strike" could mean a refusal to work; a sudden military attack; a pitched ball in the strike zone in baseball; an act of striking; or a discovery of gold or other minerals, among other meanings.[264] As a verb, it could mean to aim or deliver a blow; to delete something; to lower a flag usually in surrender; to become ignited; to stop work in order to force an employer to comply with demands; or to make a beginning, among other meanings.[265] While words can have multiple meanings, the ordinary meaning rule stresses that words must be read in context, so the rule counsels that words should be understood to have their contextually appropriate ordinary meaning. Thus,

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[260] See Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Statutory Interpretation from the Outside*, 122 Col. L. Rev. 213, 215 (2022).

[261] *See* Justice Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes* at 8:28 (Nov. 17, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg. Between 2005 and 2017, the Roberts Court relied on "text" and "plain meaning" in 50% of the Court's majority opinions. *See* Anita S. Krishnakumar, *Cracking the Whole Code Rule*, 96 N.Y.U. L. Rev. 76, 97 (2021).

[262] *See* Scalia & Garner, *supra* note 192, at 69.

[263] *See* Dave Fisher, *Which English Word Has The Most Definitions?*, The Spruce Crafts, Sept. 29, 2019, *accessible at:* https://www.thesprucecrafts.com/which-word-has-the-most-definitions-4077796

[264] *See* https://www.merriam-webster.com/dictionary/strike

[265] *Id.*

when a labor and employment statute prohibits a strike by employees, it is probably not referring to a discovery of gold or minerals by employees.

The following case excerpt provides a brief introduction to the ordinary meaning rule and the rationales for the rule, but also demonstrates the potential for disagreements regarding the ordinary meaning of language. In the case, *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020), the Supreme Court addressed the same question that the 7th Circuit addressed in *Hively v. Indiana Tech Community College of Indiana,* covered in Chapter 3 of this book. Both the majority and dissenting opinions adopt textualist readings of the statute and focus on the ordinary meaning of the language in the statute, but reach different conclusions regarding whether Title VII prohibits discrimination based on sexual orientation.

The statute at issue in the case provides that it is "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise ***to discriminate against*** any individual . . . ***because of such individual's*** race, color, religion, ***sex,*** or national origin." 42 U.S.C. § 2000e–2(a)(1) (emphasis added).

## BOSTOCK V. CLAYTON COUNTY

**140 S.Ct. 1731 (2020)**

**Resources for the Case**

Unedited Opinion (From Justia)
Civil Rights Act of 1964 (P.L. 88-352)
42 U.S.C. § 2000e-2 (From LII)
Oral Argument Audio (From Oyez)
Briefs in the Case – Scotus Blog
Case Background (From Quimbee)
Video Summary (Prof. Stevenson – South Texas College of Law)
Washington Post Story About the Case

**JUSTICE GORSUCH** delivered the opinion of the Court.

* * * In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The 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. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

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. * * *

II

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. * * *

With this in mind, our task is clear. We must determine the ordinary public meaning of Title VII's command that it is "unlawful . . . for an employer 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." §2000e–2(a)(1). To do so, we * * * begin by examining the key statutory terms in turn before assessing their impact on the cases at hand * * *.

A

The only statutorily protected characteristic at issue in today's cases is "sex"—and that is also the primary term in Title VII whose meaning the parties dispute. * * * [W]e proceed on the assumption that "sex" signified what the employers suggest, referring only to biological distinctions between male and female. * * *

Still, that's just a starting point. The question isn't just what "sex" meant, but what Title VII says about it. Most notably, the statute prohibits employers from taking certain actions "because of " sex. And, as this Court has previously explained, "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.

This can be a sweeping standard. Often, events have multiple but-for causes. So, for example, if a car accident occurred both because the defendant ran a red light and because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision. * * * When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision. So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law. * * * No doubt, Congress could have taken a more parsimonious approach. As it has in other statutes, it could have added "solely" to indicate that actions taken "because of" the confluence of multiple factors do not violate the law. * * * Or it could have written "primarily

because of " to indicate that the prohibited factor had to be the main cause of the defendant's challenged employment decision. * * * But none of this is the law we have. * * *

As sweeping as even the but-for causation standard can be, Title VII does not concern itself with everything that happens "because of" sex. The statute imposes liability on employers only when they "fail or refuse to hire," "discharge," "or otherwise . . . discriminate against" someone because of a statutorily protected characteristic like sex. * * *

[T]he question becomes: What did "discriminate" mean in 1964? As it turns out, it meant then roughly what it means today: "To make a difference in treatment or favor (of one as compared with others)." Webster's New International Dictionary 745 (2d ed. 1954). To "discriminate against" a person, then, would seem to mean treating that individual worse than others who are similarly situated. * * * In so-called "disparate treatment" cases like today's, this Court has also held that the difference in treatment based on sex must be intentional. * * * So, taken together, an employer who intentionally treats a person worse because of sex— such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII. * * *

B

From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. * * *

The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, 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. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

**JUSTICE KAVANAUGH**, dissenting.

* * * [T]he plaintiffs here * * * have advanced a novel and creative argument. They contend that discrimination "because of sexual orientation" and discrimination "because of sex" are actually not separate categories of discrimination after all. Instead, the theory goes, discrimination because of sexual orientation always qualifies as discrimination because of sex: When a gay man is fired because he is gay, he is fired because he is attracted to men, even though a similarly situated woman would not be fired just because she is attracted to men. According to this theory, it follows that the man has been fired, at least as a literal matter, because of his sex. Under this literalist approach, sexual orientation discrimination automatically qualifies as sex discrimination, and Title VII's prohibition against sex discrimination therefore also prohibits sexual orientation discrimination—and actually has done so since 1964, unbeknownst to everyone. Surprisingly, the Court today buys into this approach. * * * For the sake of argument, I will assume that firing someone because of their sexual orientation may, as a very literal matter, entail making a distinction based on sex. But to prevail in this case with their literalist approach, the plaintiffs must also establish one of two other points. The plaintiffs must establish that courts, when interpreting a statute, adhere to literal meaning rather than ordinary meaning. Or alternatively, the plaintiffs must establish that the ordinary meaning of "discriminate because of sex"—not just the literal meaning—encompasses sexual orientation discrimination. The plaintiffs fall short on both counts.

*First,* courts must follow ordinary meaning, not literal meaning. And courts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase. There is no serious debate about the foundational interpretive principle that courts adhere to ordinary meaning, not literal meaning, when interpreting statutes. * * * [A]s Professor Manning put it, proper statutory interpretation asks "how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context. This approach recognizes that the literal or dictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of language and, in particular, of legal language." * * *

Judges adhere to ordinary meaning for two main reasons: rule of law and democratic accountability. A society governed by the rule of law must have laws that are known and understandable to the citizenry. And judicial adherence to ordinary meaning facilitates the democratic accountability of America's elected representatives for the laws they enact. Citizens and legislators must be able to ascertain the law by reading the words of the statute. * * *

When there is a divide between the literal meaning and the ordinary meaning, courts must follow the ordinary meaning. Next is a critical point of emphasis in this case. The difference between literal and ordinary meaning becomes especially important when—as in this case—judges consider phrases in statutes. (Recall that the shorthand version of the phrase at issue here is "discriminate because of sex.") Courts must heed the ordinary meaning of the phrase as a whole, not just the meaning of the words in the phrase. That

is because a phrase may have a more precise or confined meaning than the literal meaning of the individual words in the phrase. * * *

If the usual evidence indicates that a statutory phrase bears an ordinary meaning different from the literal strung-together definitions of the individual words in the phrase, we may not ignore or gloss over that discrepancy. * * *

Bottom line: Statutory Interpretation 101 instructs courts to follow ordinary meaning, not literal meaning, and to adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase.

*Second,* in light of the bedrock principle that we must adhere to the ordinary meaning of a phrase, the question in this case boils down to the ordinary meaning of the phrase "discriminate because of sex." Does the ordinary meaning of that phrase encompass discrimination because of sexual orientation? The answer is plainly no.

On occasion, it can be difficult for judges to assess ordinary meaning. Not here. Both 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. * * *

As to common parlance, few in 1964 (or today) would describe a firing because of sexual orientation as a firing because of sex. As commonly understood, sexual orientation discrimination is distinct from, and not a form of, sex discrimination. The majority opinion acknowledges the common understanding, noting that the plaintiffs here probably did not tell their friends that they were fired because of their sex. Ante, at 16. That observation is clearly correct. In common parlance, Bostock and Zarda were fired because they were gay, not because they were men. Contrary to the majority opinion's approach today, this Court has repeatedly emphasized that common parlance matters in assessing the ordinary meaning of a statute, because courts heed how "most people" "would have understood" the text of a statute when enacted. * * *

[Justice Kavanaugh then cited other federal and state statutes, federal regulations, and prior Supreme Court decisions to support his argument that discrimination based on sexual orientation is different from discrimination based on sex.]

In sum, all of the usual indicators of ordinary meaning— common parlance, common usage by Congress, the practice in the Executive Branch, the laws in the States, and the decisions of this Court—overwhelmingly establish that sexual orientation discrimination is distinct from, and not a form of, sex discrimination. The usage has been consistent across decades, in both the federal and state contexts. * * *

To tie it all together, the plaintiffs have only two routes to succeed here. Either they can say that literal meaning overrides ordinary meaning when the two conflict. Or they can say that the ordinary meaning of the phrase "discriminate because of sex" encompasses sexual orientation discrimination. But the first flouts long-settled principles of statutory

interpretation. And the second contradicts the widespread ordinary use of the English language in America.

## Questions and Comments

**1. Rationales for the ordinary meaning rule:** Do Justice Gorsuch and Justice Kavanaugh agree on the rationales for the ordinary meaning rule? What are they?

**2. Literalism v. textualism:** Justice Kavanaugh accuses the majority of adopting a literalist interpretation of the statute. How does a literalist interpretation differ from an ordinary meaning approach? Do you agree that the majority has adopted a literalist reading of the statute? Note how Justice Gorsuch examines each element of the statutory phrase separately, while Justice Kavanaugh examines the entire phrase together. Is the whole equal to the sum of its parts?

**3. Reasonable people:** Note that Justice Kavanaugh suggests that the meaning of language under the ordinary meaning rule is based on the meaning understood by a reasonable person, reading the language in context. Many courts formulate the test using this "reasonable person" focus. What other sources did Justice Kavanaugh. In dissent, examine to identify the "ordinary meaning" of the statutory language? Was that appropriate as a means of identifying "ordinary meaning"?

**4. Ordinary meaning at the time of enactment:** Both Justice Gorsuch and Justice Kavanaugh argue that the ordinary meaning of language should be determined based on the ordinary meaning at the time of enactment of the statute. Does that advance the twin rationales identified for the ordinary meaning rule?

**5. Disagreements over ordinary meaning:** Justice Gorsuch and Justice Kavanaugh analyze the same language in this case and each claim to base their interpretation on the ordinary meaning of the language used in the statute but reach different conclusions regarding that ordinary meaning. This is not at all surprising. Professor Anita Krishnakumar reviewed all the Supreme Court statutory interpretation decisions from the 2005 through 2010 terms and found that in over 42.7% of "the Court's divided vote cases in which at least one opinion argued that the statute had an ordinary or plain meaning, an opposing opinion countered that the statute had a different ordinary meaning." *See* Anita Krishnakumar, *Metarules for Ordinary Meaning*, 134 Harv. L. Rev. 167, 175 (2021). She also found that "in 41.2% of the cases in which majority and dissenting opinions disagreed about a statute's plain meaning, one opinion advocated adopting the … 'prototypical' meaning of the word at issue while the other focused on the broad or legalist meaning of the word." *Id.* Just as judges disagree over ordinary meaning, empirical research confirms that laypersons frequently disagree about the ordinary meaning of statutory terms. *Id.*

**6. Increasing citations to the ordinary meaning rule:** An analysis of over 6 million cases in Harvard's Caselaw Access Project demonstrated that, over the past 50 years, citations to "ordinary meaning" in cases has tripled, while citations to "legislative history"

have dropped to half of what they were at their peak. *See* Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Statutory Interpretation from the Outside*, 122 Col. L. Rev. 213, 217 (2022).

**7. Audience for ordinary meaning:** The Congressional drafting manual and many state drafting guidelines suggest that legislators should consider their audience when drafting statutes. *See* OFFICE OF THE LEGISLATIVE COUNSEL, U.S. HOUSE OF REPRESENTATIVES, 104TH CONG., HLC NO. 104-1, HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE 5 (1995). However, courts often do not take the audience to whom statutes are directed into account in interpreting the statute. *See* David S. Louk, *The Audiences of Statutes*, 105 Cornell Law Review 137, 140 (2019). David Louk argues that this is problematic because "[b]road variation exists in the knowledge, training, sophistication, resources, and interpretive context of different first-order statutory audiences, as well as the interpretive intermediaries who assist them in ascertaining their legal rights and obligations. Moreover, statutes seek to alter the behavior of their audiences in very different ways: some apply conduct rules directly to the public at large, others conscript third-party interpreters to assist statutory audiences in meeting their legal obligations, and others direct official audiences to develop and implement specific rules from broad, intransitive mandates." *Id.* at 161. Accordingly, he argues that courts should interpret statutes with a focus on the audience to whom the statutory language in question is directed, acknowledging that different portions of a statute may be directed to different audiences. *Id.* He also argues that judges should be more explicit in their opinions regarding their interpretation of the statute in light of the audience to whom the statutory provisions are directed. *Id.* at 147. Professor Anita Krishnakumar agrees, suggesting that different sources (i.e. specialized corpora v. dictionaries) might be consulted to identify the ordinary meaning of language depending on the audience to whom the language in a statute is directed. *See* Krishnakumar, *supra*, at 174. Justice Scalia, on the other hand, argued that the meaning of a statute can be understood without reference to its audience. *See* Jesse M. Cross, *When Courts Should Ignore Statutory Text*, 26 Geo. Mason L. Rev. 453, 460 (2018).

Professor Krishnakumar also notes that some statutory provisions, such as provisions regarding cost-shifting among litigants, jurisdiction or other matters of court procedure, may be directed at a judicial audience, rather than laypersons. Accordingly, she suggests that the legislature or judiciary should establish default rules to identify the intended audience for particular types of statutes, with the understanding that courts would then interpret the provisions of those statutes in ways that correspond to the meanings attributed to the language of the statutes by the intended audiences. *See* Krishnakumar, *supra*, at 171-172.

**8. Nonjudicial audiences for statutory text:** Rather than addressing the audience for statutes as relevant to the determination of the ordinary meaning of language used in statutes, Professor Jesse Cross argues that statutes are often written for nonjudicial audiences, and that ***some*** statutory language directed to those audiences should not be enforced by the judiciary at all. *See* Cross, *supra*. Specifically, he notes that some language in statutes is included as rhetoric to indicate support for constituents' views,

some language is included to provide directives to agencies that will be implementing the statute, and some language is included to seek direction from nonpartisan Congressional offices. *Id.* at 457-458. None of that language, he argues, needs to be judicially enforced. *Id.*

Dictionary Picture – Dr. Marcus Gossler – CC BY-SA 3.0

## B. Ordinary Meaning and Dictionaries

Since the ordinary meaning of language may be subjective, courts frequently consult dictionaries as an aid in identifying the ordinary meaning of statutory language. Courts relied on dictionaries as an aid to interpreting the ordinary meaning of language long before the rise of textualism, with the Supreme Court citing dictionaries as early as 1785.[266] However, citations to dictionaries have increased dramatically over the past thirty-five years, as citations to legislative history have decreased. The U.S. Supreme Court, for instance, cited dictionaries in 225 opinions between 2000 to 2010, while it only cited them in 16 opinions in the 1960s.[267] Reliance on dictionaries as aids to interpreting the ordinary meaning of language provides "an aura of objectivity, precision and certainty" to the court's resolution of interpretive questions.[268] The following opinion illustrates the extent to which the Supreme Court relies on dictionaries as an interpretive aid in some cases.

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[266] *See Respublica v. Steele,* 2 U.S. (2 Dall.) 92, 92 (1785). Between 1800 and 1969, however, the Court only cited dictionaries in 149 opinions. *See* James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 Wm & Mary L. Rev. 483, 494 (2013).

[267] *See* Gluck & Bressman, *supra* note 152, at 938. *See also* Brudney & Baum, *supra* note 266, at 488 (describing a study that reviewed 150 majority, concurring and dissenting opinions from 1986 to 2011 in criminal law, labor and employment law, and business and commercial law, and finding and found an increase in citations to dictionaries from a level of 3% during the Burger Court to 33% during the Roberts Court).

[268] *See* Brudney & Baum, *supra* note 266, at 500. Professors Brudney and Baum assert that the Supreme Court increased its reliance on dictionaries (a supposedly neutral tool of interpretation) in the 1970's and 1980's in response to charges that the Court was making politically motivated decisions, after Congress had legislatively overturned many of the Court's decisions involving civil rights and criminal law. *Id.*


Japanese Baseball Stadium – Photo by 江戸村のとくぞう− CC BY-SA 4.0

## KOUICHI TANIGUCHI, V. KAN PACIFIC SAIPAN, LTD.

**566 U.S. 560 (2012)**

**Resources for the Case**

Unedited Opinion (From Justia)
Court Interpreters Act (P.L. 95-539)
28 U.S.C. § 1920 (From LII)
Oral Argument Audio (From Oyez)
Factual Background (From Quimbee)
Kouichi Taniguchi Baseball Stats

**JUSTICE ALITO** delivered the opinion of the Court.

The costs that may be awarded to prevailing parties in lawsuits brought in federal court are set forth in 28 U. S. C. §1920. The Court Interpreters Act amended that statute to include "compensation of interpreters." §1920(6) * * * The question presented in this case is whether "compensation of interpreters" covers the cost of translating documents. Because the ordinary meaning of the word "interpreter" is a person who translates orally from one language to another, we hold that "compensation of interpreters" is limited to the cost of oral translation and does not include the cost of document translation.

I

This case arises from a personal injury action brought by petitioner Kouichi Taniguchi, a professional baseball player in Japan, against respondent Kan Pacific Saipan, Ltd., the owner of a resort in the Northern Mariana Islands. Petitioner was injured when his leg

broke through a wooden deck during a tour of respondent's resort property. * * * Due to * * * alleged injuries, he claimed damages for medical expenses and for lost income from contracts he was unable to honor. After discovery concluded, both parties moved for summary judgment. The United States District Court for the Northern Mariana Islands granted respondent's motion on the ground that petitioner offered no evidence that respondent knew of the defective deck or otherwise failed to exercise reasonable care.

In preparing its defense, respondent paid to have various documents translated from Japanese to English. After the District Court granted summary judgment in respondent's favor, respondent submitted a bill for those costs. Over petitioner's objection, the District Court awarded the costs to respondent as "compensation of interpreters" under §1920(6). * * * The United States Court of Appeals for the Ninth Circuit affirmed both the District Court's grant of summary judgment and its award of costs. * * *

Because there is a split among the Courts of Appeals on this issue, we granted certiorari. 564 U. S. ___ (2011).

II

* * *

B

To determine whether the item "compensation of interpreters" includes costs for document translation, we must look to the meaning of "interpreter." That term is not defined in the Court Interpreters Act or in any other relevant statutory provision. When a term goes undefined in a statute, we give the term its ordinary meaning. * * * The question here is: What is the ordinary meaning of "interpreter"? Many dictionaries in use when Congress enacted the Court Interpreters Act in 1978 defined "interpreter" as one who translates spoken, as opposed to written, language. The American Heritage Dictionary, for instance, defined the term as "[o]ne who translates orally from one language into another." American Heritage Dictionary 685 (1978). The Scribner-Bantam English Dictionary defined the related word "interpret" as "to translate orally." Scribner Bantam English Dictionary 476 (1977). Similarly, the Random House Dictionary defined the intransitive form of "interpret" as "to translate what is said in a foreign language." Random House Dictionary of the English Language 744 (1973) (emphasis added). And, notably, the Oxford English Dictionary defined "interpreter" as "[o]ne who translates languages," but then divided that definition into two senses: "a. [a] translator of books or writings," which it designated as obsolete, and "b. [o]ne who translates the communications of persons speaking different languages; spec. one whose office it is to do so orally in the presence of the persons; a dragoman." 5 Oxford English Dictionary 416 (1933); see also Concise Oxford Dictionary of Current English 566 (6th ed. 1976) ("One who interprets; one whose office it is to translate the words of persons speaking different languages, esp. orally in their presence"); Chambers Twentieth Century Dictionary 686 (1973) ("one who translates orally for the benefit of two or more parties speaking different languages: . . . a translator (obs.)").

Pre-1978 legal dictionaries also generally defined the words "interpreter" and "interpret" in terms of oral translation. The then-current edition of Black's Law Dictionary, for example, defined "interpreter" as "[a] person sworn at a trial to interpret the evidence of a foreigner . . . to the court," and it defined "interpret" in relevant part as "to translate orally from one tongue to another." Black's Law Dictionary 954, 953 (rev. 4th ed. 1968); see also W. Anderson, A Dictionary of Law 565 (1888) ("One who translates the testimony of witnesses speaking a foreign tongue, for the benefit of the court and jury"); 1 B. Abbott, Dictionary of Terms and Phrases Used in American or English Jurisprudence 639 (1878) ("one who restates the testimony of a witness testifying in a foreign tongue, to the court and jury, in their language"). But see Ballentine's Law Dictionary 655, 654 (3d ed. 1969) (defining "interpreter" as "[o]ne who interprets, particularly one who interprets words written or spoken in a foreign language," and "interpret" as "to translate from a foreign language").

Against these authorities, respondent relies almost exclusively on Webster's Third New International Dictionary (hereinafter Webster's Third). The version of that dictionary in print when Congress enacted the Court Interpreters Act defined "interpreter" as "one that translates; esp: a person who translates orally for parties conversing in different tongues." Webster's Third 1182 (1976). The sense divider esp (for especially) indicates that the most common meaning of the term is one "who translates orally," but that meaning is subsumed within the more general definition "one that translates." See 12,000 Words: A Supplement to Webster's Third 15a (1986) (explaining that esp "is used to introduce the most common meaning included in the more general preceding definition"). For respondent, the general definition suffices to establish that the term "interpreter" ordinarily includes persons who translate the written word. Explaining that "the word 'interpreter' can reasonably encompass a 'translator,'" the Court of Appeals reached the same conclusion. * * * We disagree.

That a definition is broad enough to encompass one sense of a word does not establish that the word is ordinarily understood in that sense. * * * The fact that the definition of "interpreter" in Webster's Third has a sense divider denoting the most common usage suggests that other usages, although acceptable, might not be common or ordinary. It is telling that all the dictionaries cited above defined "interpreter" at the time of the statute's enactment as including persons who translate orally, but only a handful defined the word broadly enough to encompass translators of written material. * * * Although the Oxford English Dictionary, one of the most authoritative on the English language, recognized that "interpreter" can mean one who translates writings, it expressly designated that meaning as obsolete. * * * Were the meaning of "interpreter" that respondent advocates truly common or ordinary, we would expect to see more support for that meaning. We certainly would not expect to see it designated as obsolete in the Oxford English Dictionary. Any definition of a word that is absent from many dictionaries and is deemed obsolete in others is hardly a common or ordinary meaning.

Based on our survey of the relevant dictionaries, we conclude that the ordinary or common meaning of "interpreter" does not include those who translate writings. Instead, we find that an interpreter is normally understood as one who translates orally from one language to another. This sense of the word is far more natural. As the Seventh Circuit put it: "Robert Fagles made famous translations into English of the Iliad, the Odyssey, and the Aeneid, but no one would refer to him as an English language 'interpreter' of these works." * * *

To be sure, the word "interpreter" can encompass persons who translate documents, but because that is not the ordinary meaning of the word, it does not control unless the context in which the word appears indicates that it does. Nothing in the Court Interpreters Act or in §1920, however, even hints that Congress intended to go beyond the ordinary meaning of "interpreter" and to embrace the broadest possible meaning that the definition of the word can bear.

If anything, the statutory context suggests the opposite: that the word "interpreter" applies only to those who translate orally. As previously mentioned, Congress enacted §1920(6) as part of the Court Interpreters Act. The main provision of that Act is §2(a), codified in 28 U. S. C. §§1827 and 1828. * * * Particularly relevant here is §1827. As it now reads, that statute provides for the establishment of "a program to facilitate the use of certified and otherwise qualified interpreters in judicial proceedings instituted by the United States." §1827(a). Subsection (d) directs courts to use an interpreter in any criminal or civil action instituted by the United States if a party or witness "speaks only or primarily a language other than the English language" or "suffers from a hearing impairment" "so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer, or so as to inhibit such witness' comprehension of questions and the presentation of such testimony." §1827(d)(1). As originally enacted, subsection (k) mandated that the "interpretation provided by certified interpreters . . . shall be in the consecutive mode except that the presiding judicial officer . . . may authorize a simultaneous or summary interpretation." §1827(k) * * *

In its current form, subsection (k) provides that interpretation "shall be in the simultaneous mode for any party . . . and in the consecutive mode for witnesses," unless the court directs otherwise. The simultaneous, consecutive, and summary modes are all methods of oral interpretation and have nothing to do with the translation of writings. Taken together, these provisions are a strong contextual clue that Congress was dealing only with oral translation in the Court Interpreters Act and that it intended to use the term "interpreter" throughout the Act in its ordinary sense as someone who translates the spoken word. As we have said before, it is a "'normal rule of statutory construction' that 'identical words used in different parts of the same act are intended to have the same meaning.'" * * *

[The Court then bolstered its decision with a discussion of the technical meaning of the term "interpreter." The technical meaning rule will be discussed in the next section of this book.]

In sum, both the ordinary and technical meanings of "interpreter," as well as the statutory context in which the word is found, lead to the conclusion that §1920(6) does not apply to translators of written materials.

## Questions and Comments

**1. Publication date of dictionaries:** When a judge chooses a dictionary to use to aid in the interpretation of the ordinary meaning of language, the judge has a lot of choices regarding which dictionary or dictionaries to consult. One question that judges must consider is whether to consult modern dictionaries or dictionaries that were in existence at the time of enactment of the legislation. Courts have not adopted standardized rules to address that issue. *See* James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 Wm & Mary L. Rev. 483, 490 (2013) (finding, in a study of 150 Supreme Court opinions issued between 1986 and 2011, that 40% of the majority opinions included at least one citation to a dictionary published near the time of enactment and 45% included a citation to a dictionary published near the time the case was filed); Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 Ariz. St. L.J. 275, 332-333 (1998). What are the rationales for choosing either type of dictionary? Which of the two options would more likely appeal to textualists? Which approach did the Court take in this case? Commentators have noted that because of the way in which dictionaries are compiled and published, there is a lag between the usage of language and its incorporation in a dictionary. *See* Brudney & Baum, *supra,* at 511; Aprill, *supra,* at 286-287. Justice Scalia and others have suggested, therefore, that judges who intend to consult dictionaries that were in existence at the time of enactment of legislation should consult dictionaries that are published a few years after the enactment of the legislation, to account for that lag time. *See* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 418-419 (Thomson West ed. 2012).

**2. General dictionaries v. specialized dictionaries:** Another issue that a judge must confront when choosing a dictionary to use to interpret the ordinary meaning of language is whether to use a general dictionary or a specialized dictionary. Which approach did the Court use in this case? Does the Court explain why it chose to consult either general dictionaries or specialized dictionaries? Are there criteria that guide a court in deciding whether to consult general dictionaries, legal dictionaries, or other specialized dictionaries? Was it significant that the case involved the meaning of a legal term and that the provision being interpreted may have been targeted at a judicial audience? In their study of 150 Supreme Court opinions issued between 1986 and 2011, James Brudney and Lawrence Baum found that judges cited general dictionaries in 74% of the majority opinions in which dictionaries were cited, cited legal dictionaries in 45% of those opinions, and cited both general and legal dictionaries in 24% of those opinions. *See* Brudney & Baum, *supra*, at 529. When courts cite legal dictionaries, they almost always cite Black's Law Dictionary. *See* Aprill, *supra,* at 311. Professor Ellen Aprill notes that legal dictionaries primarily base their definitions of terms on legal opinions, frequently lower

federal court opinions or state court opinions, which she argues undermines their authority for controlling statutory meaning. *Id.* at 300.

**3. Number of dictionaries cited:** How many dictionaries did the *Taniguchi* Court cite to support its reading of the statute? Is there a required number of dictionaries that must be consulted? To the extent that dictionaries conflict, does a court merely count the number of dictionaries that support the various meanings and choose the meaning that is supported by the most dictionaries?

**4. Authoritative nature of dictionaries?** Note that the Court relied solely on dictionaries to determine the ordinary meaning of the term "interpreters" in the statute (other than a passing reference to remarks from the 7th Circuit suggesting that no one would refer to a person who translated the Iliad into English as an interpreter of the Iliad). The Court appeared to view the dictionaries in this case as the best and only source for finding the meaning of the statutory term. Might the case have been decided differently if the Court had considered the purpose of the provision allowing award of costs to litigants?

Courts take different approaches regarding the authoritative nature of dictionaries in interpreting statutes. Based on their study of Supreme Court opinions mentioned above, James Brudney and Lawrence Baum identified three different approaches courts take with respect to using dictionaries to ascertain ordinary meaning. They describe them as (1) "way station opinions, in which a Justice consults relevant dictionary meanings, recognizes that they are indeterminate or otherwise unhelpful, and concludes that the search for statutory meaning requires reliance on different contextual factors"; …(2) "ornamental role opinions, in which a Justice invokes dictionary meanings as support but in fact other resources—canons, precedent, legislative history and purpose, policy consequences, agency deference—carry far more weight in the Court's reasoning"; and (3) "barrier opinions, in which a Justice invokes the dictionary in conjunction with related "ordinary meaning" arguments as effectively dispositive." *See* Brudney & Baum, *supra,* at 493. They determined that the ornamental role opinions are the most prevalent form of opinions. *Id.* They also noted that the barrier opinions tended to be authored most frequently by conservative Justices. *Id.*

**5. Context:** Critics of the use of dictionaries as a means of determining ordinary meaning of language frequently stress that the ordinary meaning of language must be determined in context, whereas dictionaries are acontextual. *See* Brudney & Baum, *supra,* at 502; SCALIA & GARNER, *supra,* at 418-419. As Justice Stevens has cautioned, "[d]ictionaries can be useful aids in statutory interpretation, but they are no substitute for close analysis of what words mean as used in a particular statutory context." *See* *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 240 (1994) (Stevens, J., dissenting). Did the *Taniguchi* Court acknowledge the importance of context in determining whether interpreters included persons who translate written materials?

**6. Literalism:** Did the Court adopt a literal interpretation of the statutory term "interpreters?" One of the conclusions that Professors Tobia, Slocum, and Nourse

reached based on their study of laypersons' familiarity with canons of construction, discussed in the prior section of this book, was that the public tend to understand language non-literally. *See, e.g.,* Tobia, Slocum, & Nourse, *supra*, at 275. How might that finding affect a court's willingness to focus on dictionaries to identify ordinary meaning if the goal of interpreting a statute according to its ordinary meaning is, in part, to ensure that the public are on notice of the meaning of the statute?

**7. Order of presentation of definitions:** Just as there are no rigid rules regarding which dictionaries judges should consult to find ordinary meaning, there are no rigid rules that determine whether conflicting definitions take precedence based on their order of presentation in a dictionary, although individual judges may often indicate that they relied on a particular definition because it was the first definition listed in the dictionary. Definitions might be listed in dictionaries based on (1) "historical order, with the first sense listed being the earliest ascertainable"; (2) "frequency of use, with the first sense listed being the one that recurs most often"; or (3) "structural coherence, explained in one dictionary preface as 'an effort to arrange a complex word in a psychologically meaningful order ... so that the word can to some extent be perceived as a structured unit rather than a string of unrelated senses.'" *See* Brudney & Baum, *supra*, at 513-514. Accordingly, the first definition in a dictionary is not always the most frequently adopted definition for a word. Justice Scalia's statutory interpretation tome recommends that interpreters consult the prefatory sections of dictionaries to seek explanations of the method chosen to order definitions in a dictionary that will be used to interpret a statute. *See* SCALIA & GARNER, *supra,* at 418-419. Note, though, that even if a judge can determine which of several conflicting definitions may be the most prevalent definition for a word, the ordinary meaning of language in a statute must always be determined in context, so the definition that may be the most prevalent is not always the appropriate definition based on the context in which language is used in a statute.

**8. Criticism regarding the use of dictionaries to determine ordinary meaning:** Because there are no rules regarding which dictionaries judges should use to find ordinary meaning of language, or how to choose among dictionaries or dictionary definitions when there is a conflict, and because judges rarely explain the basis for their choice of particular dictionaries or definitions, critics frequently argue that judges use dictionaries arbitrarily and subjectively to support readings of statutes that align with their partisan political viewpoints (despite defending their use as neutral and objective). *See* Aprill, *supra*, at 281-282; Gluck & Bressman, *supra,* at 955; A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol'y 71, 72 (1994). Professors Brudney and Baum raise this criticism based on their review of Supreme Court decisions between 1986 and 2011, from which they concluded, "The Court's tendency to rely on one or at most two dictionaries per case, the wide variation in dictionary brand preferences among the Justices, the fact that even Justices with 'preferred' dictionaries are far from consistent in usage across individual cases, and the absence of a coherent approach to the time period distinction between statutory enactment and lawsuit filing, combine to suggest that this comparatively novel interpretive

resource is being applied in strikingly subjective ways." *See* Brudney & Baum, *supra*, at 512-513.

**9. Nature of dictionaries:** Critics have also argued that dictionaries are an inappropriate tool to rely on to determine the ordinary meaning of language because dictionaries are designed to be descriptive, rather than prescriptive. *See* Brudney & Baum, *supra*, at 502, 508; S.I. Hayakawa, *How Dictionaries Are Made* (1939), in THE SEAGULL READER: ESSAYS 129,130-31 (Joseph Kelly ed., 2d ed. 2008) ("The writer of a dictionary is a historian, not a lawgiver."). In addition, critics argue that "because dictionaries are … inevitably incomplete and subject to severe constraints on length, they are not properly used to dictate the meaning of a particular word in a particular statute." *See* Aprill, *supra,* at 285. Professor Ellen Aprill also argues that the sources used in creating dictionaries "tend to overrepresent the volume of conservative speech and writing, which is that of the educated classes, and underrepresent the speech and writing by and for people who are relatively uneducated." *Id.* at 292.

**10. Reliance on dictionaries by legislative drafters:** Gluck and Bressman's study of legislative drafters, discussed in an earlier section of this chapter, found that more than half of the drafters suggested that they never used dictionaries in drafting legislation. *See* Gluck & Bressman, *supra*, at 938. If that is correct, should courts continue to consult dictionaries to clarify the ordinary meaning of language in statutes?

**11. Do all judges rely on dictionaries?** Judges may rely on dictionaries to clarify the ordinary meaning of language regardless of the theory of interpretation that they are using to interpret the statute. While the use of dictionaries has increased significantly over time, Professor Abbe Gluck and Judge Richard Posner surveyed 42 federal appellate judges and found that only 17 advocated using dictionaries. *See* Gluck & Posner, *supra,* at 1317. The other judges indicated that they rarely consulted dictionaries or only consulted them "(1) to ascertain technical or specialized meaning; or (2) to determine if a word has multiple meanings, which they might do by consulting several dictionaries." *Id.* at 1317.

**12. Corpus linguistics as an alternative:** In lieu of dictionaries, some academics are advocating the use of corpus linguistics as a means of determining the ordinary meaning of language. *See, e.g.* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 Yale L. J. 788 (2018). Lee and Mouritsen describe the process as follows: "Corpus linguistics is an empirical approach to the study of language that involves large, electronic databases of text known as corpora … A corpus is a body or database of naturally occurring language. Corpus linguists draw inferences about language from data gleaned from 'real world' language in its natural habitat – in books, magazines, newspapers, and even transcripts of spoken language." *Id.* at 828. Through an analysis of the corpus data, linguists can determine the relative frequency of different uses of word meaning in naturally occurring language and can help clarify where there is ambiguity regarding the meaning of words. *Id.* at 829. Whereas dictionary definitions tend to be broad and expansive, corpus linguistics analysis tends to provide prototypical uses of

words. *See* Anita Krishnakumar, *Metarules for Ordinary Meaning*, 134 Harv. L. Rev. 167, 168 (2021).

## *Resources*

- Brittanica
- Cambridge Dictionary
- Dictionary.com
- The Free Dictionary
- Law.com (Legal dictionary)
- The Law Dictionary (Legal dictionary from Black's Law Dictionary)
- Macmillan Dictionary
- Merriam Webster Dictionary
- Oxford Dictionaries

The two cases presented in this chapter so far, *Bostock* and *Taniguchi* were edited to limit the focus in the excerpts to very specific issues regarding ordinary meaning and dictionaries. However, as noted above, in most cases, a court's discussion of dictionary meanings, or of the ordinary meaning of language to a reasonable person, is only part of a broader analysis of statutory language. The following case excerpt provides a more realistic example of the ordinary meaning analysis as part of a broader analysis of statutory meaning.

**Resources for the Case**

Unedited Opinion (From Justia)
Omnibus Crime Control and Safe Streets Act of 1968 (P.L. 90-351)
18 U.S.C. § 924 (From LII)
Oral Argument Audio (From Oyez)
Factual Background (From Quimbee)

## FRANK J. MUSCARELLO V. UNITED STATES

**524 U.S. 125 (1998)**

**JUSTICE BREYER** delivered the opinion of the Court.

A provision in the firearms chapter of the federal criminal code imposes a 5-year mandatory prison term upon a person who "uses or carries a firearm" "during and in relation to" a "drug trafficking crime." 18 U.S.C. § 924(c)(1). The question before us is whether the phrase "carries a firearm" is limited to the carrying of firearms on the person. We hold that it is not so limited. Rather, it also applies to a person who knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car, which the person accompanies.

I

The question arises in two cases, which we have consolidated for argument. The defendant in the first case, Frank J. Muscarello, unlawfully sold marijuana, which he carried in his truck to the place of sale. Police officers found a handgun locked in the truck's glove compartment. During plea proceedings, Muscarello admitted that he had "carried" the gun "for protection in relation" to the drug offense, * * * though he later claimed to the contrary, and added that, in any event, his "carr[ying]" of the gun in the glove compartment did not fall within the scope of the statutory word "carries." * * *

The defendants in the second case, Donald Cleveland and Enrique Gray-Santana, placed several guns in a bag, put the bag in the trunk of a car, and then traveled by car to a proposed drug-sale point, where they intended to steal drugs from the sellers. Federal agents at the scene stopped them, searched the cars, found the guns and drugs, and arrested them.

In both cases the Courts of Appeals found that the defendants had "carrie[d]" the guns during and in relation to a drug trafficking offense. * * * We granted certiorari to determine whether the fact that the guns were found in the locked glove compartment, or the trunk, of a car, precludes application of §924(c)(1). We conclude that it does not.

II

A

We begin with the statute's language. The parties vigorously contest the ordinary English meaning of the phrase "carries a firearm." Because they essentially agree that Congress intended the phrase to convey its ordinary, and not some special legal, meaning, and because they argue the linguistic point at length, we too have looked into the matter in more than usual depth. Although the word "carry" has many different meanings, only two are relevant here. When one uses the word in the first, or primary, meaning, one can, as a matter of ordinary English, "carry firearms" in a wagon, car, truck, or other vehicle that one accompanies. When one uses the word in a different, rather special, way, to mean, for example, "bearing" or (in slang) "packing" (as in "packing a gun"), the matter is less clear. But, for reasons we shall set out below, we believe Congress intended to use the word in its primary sense and not in this latter, special way.

Consider first the word's primary meaning. The Oxford English Dictionary gives as its first definition "convey, originally by cart or wagon, hence in any vehicle, by ship, on horseback, etc." 2 Oxford English Dictionary 919 (2d ed. 1989); see also Webster's Third New International Dictionary 343 (1986) ( first definition: "move while supporting ( as in a vehicle or in one's hands or arms)"); The Random House Dictionary of the English Language Unabridged 319 (2d ed. 1987) ( first definition: "to take or support from one place to another; convey; transport").

The origin of the word "carries" explains why the first, or basic, meaning of the word "carry" includes conveyance in a vehicle. See The Barnhart Dictionary of Etymology 146 (1988) (tracing the word from Latin "carum," which means "car" or "cart"); 2 Oxford English

Dictionary, supra , at 919 (tracing the word from Old French "carier" and the late Latin "carricare," which meant to "convey in a car"); The Oxford Dictionary of English Etymology 148 (C. Onions ed. 1966) (same); The Barnhart Dictionary of Etymology, supra , at 143 (explaining that the term "car" has been used to refer to the automobile since 1896).

The greatest of writers have used the word with this meaning. See, e.g. , the King James Bible, 2 Kings 9:28 ("[H]is servants carried him in a chariot to Jerusalem"); id. , Isaiah 30:6 ("[T]hey will carry their riches upon the shoulders of young asses"). Robinson Crusoe says, "[w]ith my boat, I carry'd away every Thing." D. Defoe, Robinson Crusoe 174 (J. Crowley ed. 1972). And the owners of Queequeg's ship, Melville writes, "had lent him a [wheelbarrow], in which to carry his heavy chest to his boardinghouse." H. Melville, Moby Dick 43 (U. Chicago 1952). This Court, too, has spoken of the "carrying" of drugs in a car or in its "trunk." * * *

These examples do not speak directly about carrying guns. But there is nothing linguistically special about the fact that weapons, rather than drugs, are being carried. Robinson Crusoe might have carried a gun in his boat; Queequeg might have borrowed a wheelbarrow in which to carry, not a chest, but a harpoon. And, to make certain that there is no special ordinary English restriction (unmentioned in dictionaries) upon the use of "carry" in respect to guns, we have surveyed modern press usage, albeit crudely, by searching computerized newspaper databases-both the New York Times database in Lexis/Nexis, and the "US News" database in Westlaw. We looked for sentences in which the words "carry," "vehicle," and "weapon" (or variations thereof) all appear. We found thousands of such sentences, and random sampling suggests that many, perhaps more than one third, are sentences used to convey the meaning at issue here, i.e., the carrying of guns in a car. * * * [The Court then cites specific examples of the usage of the term between 1988 and 1994 in the New York Times, Boston Globe, Colorado Springs Gazette, and San Diego Union-Tribune.]

Now consider a different, somewhat special meaning of the word "carry"-a meaning upon which the linguistic arguments of petitioners and the dissent must rest. The Oxford English Dictionary's twenty-sixth definition of "carry" is "bear, wear, hold up, or sustain, as one moves about; habitually to bear about with one." 2 Oxford English Dictionary, supra , at 921. Webster's defines "carry" as "to move while supporting," not just in a vehicle, but also "in one's hands or arms." Webster's Third New International Dictionary, supra , at 343. And Black's Law Dictionary defines the entire phrase "carry arms or weapons" as "To wear, bear or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person." Black's Law Dictionary 214 (6th ed. 1990).

These special definitions, however, do not purport to limit the "carrying of arms" to the circumstances they describe. No one doubts that one who bears arms on his person "carries a weapon." But to say that is not to deny that one may also "carry a weapon" tied to the saddle of a horse or placed in a bag in a car. Nor is there any linguistic reason to

think that Congress intended to limit the word "carries" in the statute to any of these special definitions. To the contrary, all these special definitions embody a form of an important, but secondary, meaning of "carry," a meaning that suggests support rather than movement or transportation, as when, for example, a column "carries" the weight of an arch. 2 Oxford English Dictionary, supra , at 919, 921. In this sense a gangster might "carry" a gun (in colloquial language, he might "pack a gun") even though he does not move from his chair. It is difficult to believe, however, that Congress intended to limit the statutory word to this definition imposing special punishment upon the comatose gangster while ignoring drug lords who drive to a sale carrying an arsenal of weapons in their van.

We recognize, as the dissent emphasizes, that the word "carry" has other meanings as well. But those other meanings, ( e.g. , "carry all he knew," "carries no colours"), * * * are not relevant here. And the fact that speakers often do not add to the phrase "carry a gun" the words "in a car" is of no greater relevance here than the fact that millions of Americans did not see Muscarello carry a gun in his car. The relevant linguistic facts are that the word "carry" in its ordinary sense includes carrying in a car and that the word, used in its ordinary sense, keeps the same meaning whether one carries a gun, a suitcase, or a banana. * * *

B

We now explore more deeply the purely legal question of whether Congress intended to use the word "carry" in its ordinary sense, or whether it intended to limit the scope of the phrase to instances in which a gun is carried "on the person." We conclude that neither the statute's basic purpose nor its legislative history support circumscribing the scope of the word "carry" by applying an "on the person" limitation.

This Court has described the statute's basic purpose broadly, as an effort to combat the "dangerous combination" of "drugs and guns." Smith v. United States, 508 U.S. 223, 240 (1993). And the provision's chief legislative sponsor has said that the provision seeks "to persuade the man who is tempted to commit a Federal felony to leave his gun at home." 114 Cong. Rec. 22231 (1968) (Rep. Poff) * * *

From the perspective of any such purpose (persuading a criminal "to leave his gun at home") what sense would it make for this statute to penalize one who walks with a gun in a bag to the site of a drug sale, but to ignore a similar individual who, like defendant Gray-Santana, travels to a similar site with a similar gun in a similar bag, but instead of walking, drives there with the gun in his car? How persuasive is a punishment that is without effect until a drug dealer who has brought his gun to a sale (indeed has it available for use) actually takes it from the trunk (or unlocks the glove compartment) of his car? It is difficult to say that, considered as a class, those who prepare, say, to sell drugs by placing guns in their cars are less dangerous, or less deserving of punishment, than those who carry handguns on their person.

We have found no significant indication elsewhere in the legislative history of any more narrowly focused relevant purpose. * * * [The Court then provides an analysis of several

statements in the legislative history to support the Court's interpretation of the term "carry".] * * *

C

We are not convinced by petitioners' remaining arguments to the contrary. * * *

Finally, petitioners and the dissent invoke the "rule of lenity." The simple existence of some statutory ambiguity, however, is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree. * * * To invoke the rule, we must conclude that there is a " 'grievous ambiguity or uncertainty' in the statute." * * * Certainly, * * * there is no "grievous ambiguity" here. The problem of statutory interpretation in this case is indeed no different from that in many of the criminal cases that confront us. Yet, this Court has never held that the rule of lenity automatically permits a defendant to win.

In sum, the "generally accepted contemporary meaning" of the word "carry" includes the carrying of a firearm in a vehicle. The purpose of this statute warrants its application in such circumstances. The limiting phrase "during and in relation to" should prevent misuse of the statute to penalize those whose conduct does not create the risks of harm at which the statute aims.

For these reasons, we conclude that the petitioners' conduct falls within the scope of the phrase "carries a firearm."

**JUSTICE GINSBURG**, with whom **THE CHIEF JUSTICE**, **JUSTICE SCALIA**, and **JUSTICE SOUTER** join, dissenting.

It is uncontested that §924(c)(1) applies when the defendant bears a firearm, i.e. , carries the weapon on or about his person "for the purpose of being armed and ready for offensive or defensive action in case of a conflict." Black's Law Dictionary 214 (6th ed. 1990) * * * The Court holds that, in addition, "carries a firearm," in the context of §924(c)(1), means personally transporting, possessing, or keeping a firearm in a vehicle, anyplace in a vehicle.

Without doubt, "carries" is a word of many meanings, definable to mean or include carting about in a vehicle. But that encompassing definition is not a ubiquitously necessary one. Nor, in my judgment, is it a proper construction of "carries" as the term appears in §924(c)(1). In line with [this Court's precedent in *Bailey v. United States*] and the principle of lenity the Court has long followed, I would confine "carries a firearm," for §924(c)(1) purposes, to the undoubted meaning of that expression in the relevant context. I would read the words to indicate not merely keeping arms on one's premises or in one's vehicle, but bearing them in such manner as to be ready for use as a weapon. * * *

B

Unlike the Court, I do not think dictionaries, surveys of press reports, or the Bible, tell us, dispositively, what "carries" means embedded in §924(c)(1). On definitions, "carry" in

legal formulations could mean, inter alia , transport, possess, have in stock, prolong (carry over), be infectious, or wear or bear on one's person.

At issue here is not "carries" at large but "carries a firearm." The Court's computer search of newspapers is revealing in this light. Carrying guns in a car showed up as the meaning "perhaps more than one third" of the time. * * * One is left to wonder what meaning showed up some two thirds of the time. Surely a most familiar meaning is, as the Constitution's Second Amendment ("keep and bear Arms") * * * and Black's Law Dictionary * * * indicate: "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person."

On lessons from literature, a scan of Bartlett's and other quotation collections shows how highly selective the Court's choices are. * * * If "[t]he greatest of writers" have used "carry" to mean convey or transport in a vehicle, so have they used the hydra-headed word to mean, inter alia , carry in one's hand, arms, head, heart, or soul, sans vehicle. Consider, among countless examples: "[H]e shall gather the lambs with his arm, and carry them in his bosom." The King James Bible, Isaiah 40:11. "And still they gaz'd, and still the wonder grew, That one small head could carry all he knew." O. Goldsmith, The Deserted Village, ll. 215-216, in The Poetical Works of Oliver Goldsmith 30 (A. Dobson ed. 1949). "There's a Legion that never was 'listed, That carries no colours or crest." R. Kipling, The Lost Legion, st. 1, in Rudyard Kipling's Verse, 1885-1918, p. 222 (1920). "There is a homely adage which runs, 'Speak softly and carry a big stick; you will go far.' " T. Roosevelt, Speech at Minnesota State Fair, Sept. 2, 1901, in J. Bartlett, Familiar Quotations 575:16 (J. Kaplan ed. 1992). These and the Court's lexicological sources demonstrate vividly that "carry" is a word commonly used to convey various messages. Such references, given their variety, are not reliable indicators of what Congress meant, in §924(c)(1), by "carries a firearm." * * *

[The dissenting Justices then compared the language used in the statute to the language used in other firearms statutes to support an argument that carry should be read in a more limited manner.]

II

* * *

"Carry" bears many meanings * * * Notably in view of the Legislature's capacity to speak plainly, and of overriding concern, the Court's inquiry pays scant attention to a core reason for the rule of lenity: "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.' * * * [G]iven two readings of a penal provision, both consistent with the statutory text, we do not choose the harsher construction. The Court, in my view, should

leave it to Congress to speak " 'in language that is clear and definite' " if the Legislature wishes to impose the sterner penalty.

## Questions and Comments

**1. Statutory interpretation issue:** What was the interpretation question that the Court was trying to resolve and how did the government and the defendant argue that the statute should be interpreted regarding which dictionary or dictionaries to consult?

**2. Interpretive theories:** What theory of interpretation did the majority use? Does the majority limit its focus to intrinsic sources of interpretation? What theory of interpretation does the dissent use?

**3. Ordinary meaning:** What sources did the majority consult to determine the ordinary meaning of "carries a firearm"? Did the majority find that the meaning of the phrase was ambiguous? Did the majority focus on the meaning of the word "carries" in the statutory context? Does the dissent examine conceptually different sources to ascertain the ordinary meaning of "carries a firearm"? Does the dissent focus on the meaning of the word "carries" in the statutory context?

**4. Dictionaries:** Does the majority explain its rationale for choosing the dictionaries that it chooses to ascertain the ordinary meaning of "carries a firearm"? What weight does the majority place on the order in which dictionary definitions appear? Does the Court discuss whether the dictionaries that it consulted were dictionaries in existence at the time that the statute was enacted? Note that the majority includes a legal dictionary in its review of dictionary definitions. Is there any reason why a legal dictionary would be authoritative in interpreting the phrase at issue in the case?

**5. Purpose:** How does the majority's identification of the purpose of the statute influence its interpretation of the phrase "carries a weapon"?

**6. Rule of lenity:** Note that the dissent relies, in part, on the rule of lenity to justify a narrow interpretation of the statute. That canon counsels for a narrow interpretation of statutes that impose penal sanctions. Notice the difference in the way that the majority and the dissent described the manner in which that canon functions. The canon will reappear in several other cases in this book and will be explored in detail in Chapter 6.

**VIDEO LECTURE**

**Click here for a video lecture on *Muscarello v. United States* by Professor Stephen Johnson.**

## C. Technical Meaning

While courts normally examine dictionaries or attempt to ascertain how a reasonable person would understand language when determining the ***ordinary meaning*** of statutory language, courts will depart from those approaches under the ***technical meaning rule***. Under this rule, if a word or phrase has a technical meaning in a particular context (i.e. business, trade, or discipline), a court will interpret the word or phrase in accordance with that technical meaning if the word or phrase is used in a statute in that context.[269] Application of the rule, therefore, requires 2 findings: (1) a word or phrase has a technical meaning in a specific context; and (2) the statute being interpreted is one in which the word or phrase is being used in that context. Many of the cases applying this rule involve interpretation of legal terms, *See, e.g.,* Barber v. Gonzalez, 347 U.S. 637 (1954) (applying a technical meaning of "entry" under immigration laws instead of the word's ordinary meaning); Dickens v. Puryear, 276 S.E. 2d 325, 330 (N.C. 1981), but the rule extends more broadly to address words or phrases with technical meanings in a broad range of disciplines. The case that follows is a classic example of the canon and focuses on whether a tomato is a fruit or a vegetable under the Tariff Act of 1883.

Tomatoes – Photo by Luigi Chiesa – CC BY-SA 3.0

[269] *See* Scalia & Garner, *supra* note 192, at 73.

## NIX V. HEDDEN

**149 U.S. 304 (1893)**

**Resources for the Case**

Unedited Opinion (From Justia)
Tariff Act of 1883
Video Summary (Prof. Stevenson – South Texas College of Law)

**MR. JUSTICE GRAY** * * * delivered the opinion of the court.

The single question in this case is whether tomatoes, considered as provisions, are to be classed as 'vegetables' or as 'fruit,' within the meaning of the tariff act of 1883. [Under the Tariff Act, businesses must pay a tax on imported vegetables, but not on imported fruit.]

The only witnesses called at the trial testified that neither 'vegetables' nor 'fruit' had any special meaning in trade or commerce different from that given in the dictionaries, and that they had the same meaning in trade to-day that they had in March, 1883.

The passages cited from the dictionaries define the word 'fruit' as the seed of plaints, or that part of plaints which contains the seed, and especially the juicy, pulpy products of certain plants, covering and containing the seed. These definitions have no tendency to show that tomatoes are 'fruit,' as distinguished from 'vegetables,' in common speech, or within the meaning of the tariff act.

There being no evidence that the words 'fruit' and 'vegetables' have acquired any special meaning in trade or commerce, they must receive their ordinary meaning. Of that meaning the court is bound to take judicial notice, as it does in regard to all words in our own tongue; and upon such a question dictionaries are admitted, not as evidence, but only as aids to the memory and understanding of the court. * * *

Botanically speaking, tomatoes are the fruit of a vine, just as are cucumbers, squashes, beans, and peas. But in the common language of the people, whether sellers or consumers of provisions, all these are vegetables which are grown in kitchen gardens, and which, whether eaten cooked or raw, are, like potatoes, carrots, parsnips, turnips, beets, cauliflower, cabbage, celery, and lettuce, usually served at dinner in, with, or after the soup, fish, or meats which constitute the principal part of the repast, and not, like fruits generally, as dessert.

The attempt to class tomatoes as fruit is not unlike a recent attempt to class beans as seeds, of which Mr. Justice Bradley, speaking for this court, said: 'We do not see why they should be classified as seeds, any more than walnuts should be so classified. Both are seeds, in the language of botany or natural history, but not in commerce nor in common parlance. On the other hand in speaking generally of provisions, beans may well be included under the term 'vegetables.' As an article of food on our tables, whether baked or boiled, or forming the basis of soup, they are used as a vegetable, as well when ripe as when green. This is the principal use to which they are put. Beyond the common knowledge which we have on this subject, very little evidence is necessary, or can be produced.'

## Questions and Comments

**1. Application of the technical meaning rule:** Did the Court apply the technical meaning rule in this case and interpret vegetable or fruit according to a technical definition? Why or why not? Why was the expert witness asked to testify about the meaning of the terms "fruit" and "vegetables" in 1883?

**2. Ordinary meaning:** What weight does the Court suggest it should accord dictionaries in ascertaining whether tomatoes are fruits or vegetables? Are the dictionaries helpful in resolving the statutory interpretation question? What other method did the Court use to determine the ordinary meaning of the terms "fruits" and "vegetables"? What tests did the Court use to determine whether tomatoes were fruits or vegetables and on what authority did it rely to support those tests?

**3. Change the statute, change the result?** Imagine that Congress has enacted a statute that provides grants for scientific research on fruits and that a scientist conducting research on tomatoes was denied a grant because the grantor determined that tomatoes were not fruits. If the scientist challenged that decision in court, would the court interpret fruit according to its general, ordinary meaning, or a technical meaning?

**4. Determining whether the technical meaning should apply:** Courts consider several factors when determining whether a technical meaning should be used instead of an ordinary meaning. If legal terms used in a statute have settled meanings at common law, courts will frequently interpret those terms according to their common law meanings unless it is clear that the legislature intended to depart from the common law meaning. *See, United States v. Wells*, 519 U.S. 482, 491 (1997). If terms appear in context with other technical terms, that is another factor that often leads a court to adopt the technical meaning of a term. *See St. Clair v. Commonwealth*, 140 S.W. 3d 510, 569 (Ky. 2004). Further, if the term is directed to a technical audience, rather than the general public, a court will be more likely to apply the technical meaning of the term. *See O'Hara v. Luckenbach Steamship Co.*, 269 U.S. 364 (1926).

**5. Identifying the technical meaning:** Identification of the technical meaning of a term may often require expert testimony. Scientific or technical dictionaries may be sufficient, but general dictionaries are an incomplete source of definitions for technical and scientific terms. Professor Ellen Aprill describes the limitations of general dictionaries as follows: "Lexicographers * * * approach technical and general vocabularies differently. General words are defined on the basis of citations illustrating actual usage * * * The meaning of scientific entries, on the other hand, are IMPOSED on the basis of expert advice * * * Technical vocabulary in general dictionaries thus does not have the same empirical foundations as general vocabulary. Definitions will tend to reflect the particular point of view of the experts. Other points of view may well be excluded." *See* Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 Ariz. St. L.J. 275, 301-302 (1998).

**6. Statutorily defined terms:** While courts will depart from the ordinary meaning of a word or phrase when it has a technical meaning and is used in a statute in that context, courts will also depart from the ordinary meaning of a word or phrase when the legislature has included a definition for the word or phrase in the statute that is different from the ordinary meaning of the word or phrase. For instance, in the federal hazardous waste law, Congress defined "solid waste" to include various liquids and gases.[270] Similarly, in the Clean Water Act, Congress defined "navigable waters" broadly to include all "waters of the United States," navigable or not.[271] The following case is a good example of a court interpreting a statutorily defined term in a way that seems at odds with its ordinary meaning.

**Resources for the Case**

Unedited Opinion (From Court's website)
California Fish and Game Code (Incl. Cal. Endangered Species Act)
Petition to Add Bee Species
Review of Petition to Add Bee Species (Cal. Dept. of Fish & Wildlife)

## ALMOND ALLIANCE OF CALIFORNIA V. CALIFORNIA FISH & GAME COMMISSION

**79 Cal. App. 5th 337 (Cal., 3d App. Dist. 2022)**

**ROBIE, J.**

The California Endangered Species Act (Act) (Fish & Game Code, § 2050 et seq.) directs the Fish and Game Commission (Commission) to "establish a list of endangered species and a list of threatened species." (§ 2070.) The issue presented here is whether the bumble bee, a terrestrial invertebrate, falls within the definition of fish, as that term is used in the definitions of endangered species in section 2062, threatened species in section 2067, and candidate species (i.e., species being considered for listing as endangered or threatened species) in section 2068 of the Act. More specifically, we must determine whether the Commission exceeded its statutorily delegated authority when it designated four bumble bee species as candidate species under consideration for listing as endangered species.

We first reaffirm and expand upon our conclusion in *California Forestry Association v. California Fish and Game Commission* (2007) [a prior judicial decision] that section 45 [of the Fish & Game Code] defines fish as the term is used in sections 2062, 2067, and 2068 of the Act. * * * That means the Commission has the authority to list an invertebrate as an endangered or threatened species. We next consider whether the Commission's authority is limited to listing only aquatic invertebrates. We conclude the answer is, "no." Although the term fish is colloquially and commonly understood to refer to aquatic species, the term of art employed by the Legislature in the definition of fish in section 45 is not so limited.

We acknowledge the scope of the definition is ambiguous but also recognize we are not interpreting the definition on a blank slate. The legislative history supports the liberal

[270] *See* 42 U.S.C. § 6903(27).
[271] *See* 33 U.S.C. § 1362(7).

interpretation of the Act (the lens through which we are required to construe the Act) that the Commission may list any invertebrate as an endangered or threatened species. * * *

## FACTUAL AND PROCEDURAL BACKGROUND

### I

### *The Definition of Fish in Section 45*

Section 45 is located in chapter 1, "general definitions" * * * of division 0.5, "general provisions and definitions" * * * of the code. Prior to 1969, section 45 defined fish as "wild fish, mollusks, or crustaceans, including any part, spawn or ova thereof." In 1969, the Legislature amended section 45 * * * to add invertebrates and amphibia to the definition of fish. * * * Section 45 has been amended only once since 1969 — in 2015 * * * , when the Legislature made nonsubstantive stylistic changes, modifying the definition to read "`[f]ish' means a wild fish, mollusk, crustacean, invertebrate, amphibian, or part, spawn, or ovum of any of those animals." * * *

When [the 1969 amendment] was moving through the Legislature, the Department and Natural Resources Agency submitted an enrolled bill report in support of the bill, stating "[t]he expanded definition of fish will permit closer control and monitoring of the harvest of species such as starfish, sea urchins, sponges and worms, and the . . . Commission will be authorized to make regulations deemed necessary for proper protection and management of these species." * * * The Department of Finance also submitted an enrolled bill report regarding [the legislation]. The Department of Finance therein stated: "By expanding the definition of fish as proposed in this bill, it will be possible for the . . . Commission to regulate the taking of amphibians (frogs) and invertebrates, such as starfish, sea urchins, anemones, jellyfish and sponges." * * *

Section 2 in the same chapter as section 45 provides the definition of fish governs the [Fish and Game Code] and regulations adopted under the code, "[u]nless the provisions or the context otherwise requires."

### II

### *The 1970 Endangered and Rare Animals Legislation*

[The Court then discussed the history of the 1970 Endangered and Rare Animals Law, the law that preceded the California Endangered Species Act. That law defined “endangered animal” and “rare animal” to include fish and the definition of fish, for the law, was the definition in Section 45 of the Fish and Game Code. In discussing the prior law, the Court noted that the California Fish and Game Commission listed the Trinity bristle snail as a rare animal in 1980. The snail is a terrestrial gastropod that is both a mollusk and an invertebrate. The Commission listed it because mollusks fit within the Section 45 definition of “fish.” Four years later, California enacted the California Endangered Species Act (the law at issue in the case) to replace the Endangered and Rare Animals Law. ] * * *

V

*The Act Generally*

* * * [When the legislature enacted the California Endangered Species Act in 1984, the legislature ] declared in the Act "the policy of the state to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat." (§ 2052.) * * * The Act identifies the species subject to protection as "native species or subspecies of a bird, mammal, fish, amphibian, reptile, or plant." (§§ 2062, 2067 & 2068.) Under [the Act], a ‘native species or subspecies’ qualifies as ‘endangered’ if it ‘is in serious danger of becoming extinct throughout all, or a significant portion, of its range * * * (§ 2062.) * * * When it enacted the Act, the Legislature further declared, "[a]ny species determined by the [C]ommission as `endangered' on or before January 1, 1985, is an `endangered species.'" (§ 2062.) "A `native species or subspecies' qualifies as `threatened' if it is `not presently threatened with extinction,' but `is likely to become an endangered species in the foreseeable future in the absence of . . . special protection and management efforts.' (§ 2067.) * * * When it enacted the Act, the Legislature also declared, "[a]ny animal determined by the [C]ommission as `rare' on or before January 1, 1985, is a `threatened species.'" (§ 2067.) * * * The Act defines "`[c]andidate species'" as "a native species or subspecies of a bird, mammal, fish, amphibian, reptile, or plant that the [C]ommission has formally noticed as being under review by the [D]epartment for addition to either the list of endangered species or the list of threatened species, or a species for which the [C]ommission has published a notice of proposed regulation to add the species to either list." (§ 2068.) Like the 1970 Legislation, the Act does not contain a definition of fish. * * *

VII

*The Current Dispute*

In October 2018, the public interest groups petitioned the Commission to list four species of bumble bee as endangered species: the Crotch bumble bee, the Franklin bumble bee, the Suckley cuckoo bumble bee, and the Western bumble bee (collectively the four bumble bee species). * * * [In June, 2019, the Commission provided notice that the four bumblebee species were ‘candidate species’ as defined by Section 2068 of the Act and petitioners filed a lawsuit in trial court challenging that decision. The trial court granted the petition, finding that invertebrates in Section 45 of the California Fish and Game Code only includes marine invertebrates.] * * *

DISCUSSION

I

*Standard of Review and Rules of Statutory Construction*

* * * The sole assertion in this appeal is that the Commission had no statutory authority to designate the four bumble bee species as candidate species under section 2068

because bumble bees cannot fit within the definitions of endangered species in section 2062 or threatened species in section 2067. * * *

In resolving the question of statutory interpretation, "`"[o]ur fundamental task . . . is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute."" * * * We generally give words their usual and ordinary meaning. * * * Where, however, the Legislature has provided a technical definition of a word, we construe the term of art in accordance with the technical meaning. * * * In performing this function, we are tasked with liberally construing the Act to effectuate its remedial purpose. * * * If there is no ambiguity, we presume the lawmakers meant what they said, and we apply the term or phrase in accordance with that meaning. "`"If, however, the statutory terms are ambiguous, then we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history."' * * * While we exercise our independent judgment in interpreting a statute, we give deference to an agency's interpretation if warranted by the circumstances." * * *

II

*Section 45 Defines Fish Within the Meaning of Sections 2062, 2067, and 2068*

* * * Petitioners argue section 45 does not apply through section 2 to define fish as used in sections 2062, 2067, and 2068 because the context requires otherwise. They rely on the rule against surplusage, which provides courts should 'avoid, if possible, interpretations that render a part of a statute surplusage.' * * * Petitioners assert the application of section 45 'would render the Legislature's act of expressly including 'amphibian' in the definitions of 'threatened', 'endangered' and 'candidate' species a meaningless act' because it would fail to 'give meaning to every word and phrase' given amphibian is included in the definition of fish in section 45 as well. * * * It is true the application of section 45 creates tension with the Legislature's inclusion of amphibian in sections 2062, 2067, and 2068, because amphibian is already included in the definition of fish in section 45. The rule against surplusage is not, however, an infallible canon. The canon is merely a 'guide for ascertaining legislative intent, it is not a command.' Statutory interpretation canons, like the rule against surplusage, must heed to legislative intent.' * * *

When it enacted the Act, the Legislature was aware the Department and the Commission had used section 45 to interpret fish as the term was used in the 1970 Legislation's definitions of endangered and rare animals. * * * Like the definitions of endangered and rare animals in former section 2051, the definitions of endangered and threatened species in sections 2062, 2067, and 2068 include fish, without providing any associated definition in the Act. * * * Had the Legislature disagreed with the Department's and the Commission's application of section 45's definition of fish to the definitions of endangered and rare animals in the 1970 Legislation, as was the established practice in 1984, the Legislature could have said so or provided a different definition for fish in sections 2062, 2067, and 2068 of the Act. The Legislature did neither. The Legislature also could have

modified the definition in section 45 if it wished to remove invertebrates from that definition. The Legislature again took no action. Legislative acquiescence in the face of a responsible agency's known construction of a statutory term indicates the Legislature did not intend to disturb the agency's interpretation. * * *

Rather than providing any indicia of disagreeing with the Department's and the Commission's interpretation, the Legislature ratified their interpretation. The Legislature expressly provided prior listings under the 1970 Legislation would meet the definitions of endangered and threatened species in the Act. * * * In doing so, the Legislature confirmed a terrestrial mollusk and invertebrate, the Trinity bristle snail, was a threatened species within the meaning of section 2067, and two crustaceans met the definitions of endangered and threatened species within the meaning of sections 2062 and 2067. * * * The Legislature's overt act in that regard cannot be ignored.

The only way the mollusk and two crustaceans could be endangered or threatened species is by application of section 45 to sections 2062 and 2067. The Legislature thus expressly sanctioned the application of section 45 to those provisions of the Act. Moreover, the Legislature amended section 45 in 2015 * * *, years after this court concluded in *California Forestry Association* that section 45 applies to sections 2062 and 2067. The Legislature made only nonsubstantive changes to section 45 in 2015. * * * Had the Legislature disagreed with this court's conclusion in 2007 that section 45 applied to define fish as used in sections 2062 and 2067, it could have amended section 45 (or the definitions in the Act) at any point thereafter to clarify its contrary intent. The Legislature took no such action. * * *

III

*The Commission May List Any Invertebrate*

*Meeting the Requirements of Sections 2062, 2067, and 2068*

Petitioners assert, if section 45 applies to sections 2062, 2067, and 2068, the term invertebrates should be read as limited to only aquatic invertebrates, thereby excluding terrestrial insects * * *

We certainly agree section 45 is ambiguous as to whether the Legislature intended for the definition of fish to apply to purely aquatic species. A fish, as the term is commonly understood in everyday parlance, of course, lives in aquatic environments. As the Department and the Commission note, however, the technical definition in section 45 includes mollusks, invertebrates, amphibians, and crustaceans, all of which encompass terrestrial and aquatic species. Moreover, by virtue of the express language in section 2067, the Trinity bristle snail - a terrestrial mollusk and invertebrate - is a threatened species under the Act and could have qualified as such only within the definition of fish under section 45. In the end, we do our best to determine the Legislature's intent when it enacted the Act, while construing the Act liberally, as we must. * * *

We conclude that a liberal interpretation of the Act, supported by the legislative history and the express language in section 2607 that a terrestrial mollusk and invertebrate is a threatened species (express language we cannot ignore), is that fish defined in section 45, as a term of art, is not limited solely to aquatic species. Accordingly, a terrestrial invertebrate, like each of the four bumble bee species, may be listed as an endangered or threatened species under the Act. * * *

For the foregoing reasons, we agree with the Department and the Commission that the Commission may list any invertebrate as an endangered or threatened species under 2062 and 2067, if the invertebrate meets the requirements of those statutes, and thus may also designate any invertebrate as a candidate species under section 2068, if the species or subspecies may otherwise qualify as an endangered or threatened species.

## Questions and Comments

**1. Statutory interpretation questions:** The court, in this case, had to decide two separate statutory interpretation questions. What were they?

**2. Application of Section 45 to the California Endangered Species Act:** Did the California Endangered Species Act include a definition for the term "fish"? Why did the court conclude that the Section 45 definition of "fish" applied to the term as used in the California Endangered Species Act? Did the court discuss the ordinary meaning of the term in that portion of the opinion? What role did precedent and legislative action or inaction play in the court's interpretation?

**3. The "whole code" rule:** Chapter 5 will examine various extrinsic sources of interpretation, including the "whole code rule," which suggests that courts will read language in a statute in context of the larger code in which they exist, if they are part of a larger code. What role did that play in the court's resolution of the first statutory interpretation question?

**4. Theory of interpretation:** What theory of interpretation does the court seem to be adopting to resolve the question of whether "fish" can include terrestrial invertebrates, like bumble bees?

**5. Ordinary meaning of fish:** Does the court consult dictionaries to determine the ordinary meaning of "fish"? Would the ordinary reasonable person understand the term "fish" to include bumble bees? Is the language ambiguous? Why does the court depart from the ordinary meaning of "fish" in deciding whether the Fish and Game Commission can identify bumble bees as "candidate species" under the Endangered Species Act?

**6. Grandfathering listings under the Endangered and Rare Animals Law:** In finding that the term "fish," as used in Section 45 and incorporated into the definition of candidate species in the Endangered Species Act, was not limited to aquatic invertebrates, the court relied, in part, on the fact that the California legislature, in enacting the Endangered Species Act, provided that species that were listed as endangered or rare under the predecessor statute were automatically included as endangered or

threatened under the Endangered Species Act. Since a terrestrial invertebrate had been listed as a rare species under the predecessor statute (on the basis that it was a "fish" under section 45) and was automatically included as a threatened species under the Endangered Species Act, the court concluded that the legislature must have intended to have the term "fish" be read broadly enough to include terrestrial invertebrates, in general. Is there another possible reading of that legislative history? Might the legislature have had a different intent when grandfathering the prior listings?

**7. Deference to agency interpretation:** One other factor that influenced the court's reading of the statute was the interpretation of the statute by the California Fish and Game Commission. You'll note that the court referred, at times, to the deference owed to an agency's interpretation of a statute. That issue will be covered more fully in Chapter 7 of this book.

## Professional Identity Formation/Professional Responsibility

How were the environmental groups and farming interests in the *Almond Alliance* case impacted by the state agency's decision to protect the bees as fish? Rule 3.1 of the Model Rules of Professional Conduct states that lawyers may not "bring or defend a proceeding … unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Since the California appellate court agreed with the environmental groups and state agency in the case that bees are "fish" under the state's Endangered Species Act, it may be difficult to argue that the lawyer for the environmental groups violated the rules of professional conduct, even though it appears that the appellate court relied on some tortured reasoning to uphold the agency's determination. In light of the variety of theories of interpretation that can be applied by courts and the countless, often conflicting, canons that can be applied by courts to interpret statutes, does the model rule impose any realistic limit on a lawyer's choice to bring a lawsuit advocating for a particular interpretation of a statute? What other virtues or traits might influence a lawyer to refrain from advocating for an extreme interpretation of a statute? As a lawyer, how would you counsel a client regarding the likelihood of success of an extreme interpretation of a statute? Would that discussion be different if the client were less sophisticated (i.e., not an environmental group or farming alliance)?

## Problem 4-1

In 1945, the Ames legislature enacted the "Ames Highway Act" to authorize the construction of a system of highways across the state, in order to increase economic development opportunities in the state and encourage tourism in the state. In order to provide funding for the highway system, the statute included the following provision:

> **Section 10. Tolls**
>
> The Ames Transportation Department shall establish a fee schedule for vehicles that are operated on the State's toll roads. Each vehicle that is operated on a toll road shall pay a fee of $1.00 to access the toll road, except that the Transportation Department may impose an additional fee for the operation of trucks on the State's toll roads.

The statute was later amended to authorize the Transportation Department to increase the fees established under Section 10 based on inflation. Pursuant to the authority in Section 10 and the statutory amendments, the Ames Transportation Department is planning to establish a new fee schedule for tolls. Under the new fee schedule, sport utility vehicles (SUVs) will be assessed toll fees at the rate established for "trucks."

A.

You represent an advocacy group that opposes government regulation and taxation. The group does not believe that sport utility vehicles should be assessed toll fees at the rate established for trucks. What arguments would you make against the Department's proposed interpretation of the statute and what arguments would the Department make to support its proposed fee schedule?

The following facts should be useful as you consider the arguments. First, the 1940 edition of the New American Dictionary defined "truck" as (1) "a large vehicle used to transport people or goods"; (2) "a motor vehicle designed to transport cargo." The most recent version of Webster's dictionary defines "truck" as "a wheeled vehicle used for moving heavy articles," and the most recent version of the Oxford Dictionary defines "truck" as (1) "a motorized vehicle equipped with a swivel for hauling a trailer"; (2) "a large road vehicle that is used for transporting large amounts of goods."

Through your research, you also found a survey conducted by the Pew Research Institute regarding pollution limits for vehicles which suggested that most of the people surveyed did not think of SUVs as trucks. The United States Environmental Protection Agency, nevertheless, imposes the same pollution limits on SUVs as trucks, basing the limits on the weight of the vehicles. The average weight of an SUV is 5,000 pounds, while the average weight of a passenger car is 4100 pounds.

**Problem 4-1 (continued)**

You also learned that within the transportation sector (an industry group composed of the companies that provide services to move people, goods, or the infrastructure to do so), "truck" is defined as "A tractor which carries cargo in a body (van, tank, etc.) which is mounted to its chassis, possibly in addition to a trailer which is towed by the tractor."

The government, in establishing the increased fee for SUVs, relies, in part on the fact that SUVs are generally built on a pickup truck platform (unlike minivans, which are generally built on a passenger car platform).

B.

How would the arguments for each side be different if Section 10 included a definition for "truck" as "a vehicle with a gross vehicle weight that exceeds 4500 pounds"?

**CALI SECTION QUIZ**

Before moving on to the next section, why not try a short quiz on the material you just read at www.cali.org/lesson/19754. It should take about 10 minutes to complete.

## III. Departing from the Plain Meaning

The preceding part of this chapter introduced ***the plain meaning rule***, but then turned its focus to the variety of methods that courts will use to find ***the ordinary meaning*** of words or phrases, in order to apply ***the plain meaning rule***. This part of the chapter returns to the plain meaning rule to focus on ***exceptions*** to the rule that courts should interpret language in a statute according to its plain meaning. In general, there are three situations where courts will frequently interpret a statute in a manner other than in accordance with its "plain meaning," including: (1) when the language of the statute is ***ambiguous***, so that there is no plain meaning; (2) when interpreting the statute according to its plain meaning would lead to an ***absurd result***; or (3) when the language used in the statute is the result of a clear ***scrivener's error***.

## A. Ambiguity

Of the three exceptions to the plain meaning rule, the most common is the exception that applies when the language of the statute is ambiguous. Language in a statute may be ambiguous because language is inherently ambiguous, or because the legislature intentionally used ambiguous language.[272] Courts apply the plain meaning exception in both circumstances, though, without generally focusing on ***why*** the language in a statute is ambiguous.


Ambiguity Gif – Created by Basile Morin – CC BY-SA 4.0

If the language of a statute is ambiguous, the court may turn to sources beyond the ordinary meaning of the text to ascertain the meaning of the language, but decisions applying this exception to the plain meaning rule usually add the ***caveat*** that the interpretation adopted by the court must still be a ***reasonable interpretation of the statute***.[273] While many judges will examine extrinsic sources to determine the meaning of language in a statute ***once they have concluded it is ambiguous***[274], some judges are willing to examine those sources to determine ***whether*** the language of a statute is ambiguous in the first place.[275]

Perhaps the most vexing issue involved in applying this exception to the plain meaning rule, though, is identifying whether or when language in a statute is ambiguous. Many courts suggest that language is ambiguous ***when two or more reasonable interpretations of the statute are possible***. A narrower test, adopted by some courts,

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[272] *See* Victoria F. Nourse & Jane S. Schachter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. Rev. 575, 610-611 (2002) (noting that the pressures of time and compromise contribute to intentional and unintentional ambiguity in legislation); Scalia & Garner, *supra* note 192, at 32-33. Justice Scalia contrasts ambiguity and vagueness, though, suggesting that "ambiguity is almost always the result of carelessness or inattention", while vagueness is "often intentional." *Id.* at 32.

[273] *See* Jellum, THE LEGISLATIVE PROCESS, STATUTORY INTERPRETATION, AND ADMINISTRATIVE AGENCIES, supra note 165, at 181. Critics will note that what constitutes a "reasonable interpretation of the statute" introduces subjectivity into the analysis and raises issues similar to the question of when language in a statute is "ambiguous." Justice Scalia has famously suggested that "the acid test of whether a word can reasonably bear a particular meaning is whether you could use the word in that sense at a cocktail party without having people look at you funny." *See Johnson v. United States*, 529 U.S. 694, 718 (2000) (Scalia, J., dissenting).

[274] *See Milner v. Dept. of the Navy*, 562 U.S. 562, 574 (2011) (suggesting that legislative history is used to resolve ambiguity, rather than to create it); *Brueswitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011).

[275] *See* Jellum & Hricik, *supra* note 168, at 100-101.

is that language is ambiguous when it is ***equally susceptible to two or more interpretations***.

Once a court determines that the language in a statute is ambiguous, the range of sources that they consider to resolve the ambiguity depends, to a large degree, on the theory of interpretation that they are using to interpret the statute.

The following case involves the analysis of ambiguous language in a Connecticut statute concerning taxation of real property. The central statutory provision being interpreted was General Statutes § 12-62n, which provided: "(a) For the purposes of this section: (1) 'Apartment property' means a building containing five or more dwelling units used for human habitation, the parcel of land on which such building is situated, and any accessory buildings or other improvements located on such parcel; * * * (3) 'Residential property' means a building containing four or fewer dwelling units used for human habitation, the parcel of land on which such building is situated, and any accessory buildings or other improvements located on such parcel."

## HARTFORD/WINDSOR HEALTHCARE PROPS, LLC V. CITY OF HARTFORD

**298 Conn. 191 (2010)**

**Resources for the Case**

Unedited Opinion (From Justia)
Conn. Gen. Stat. 12-62n (Casetext)
Hartford, Ct Zoning regulations
Chelsea Place Care Center (with virtual tour)

**VERTEFEUILLE, J.**

The dispositive issue in this appeal is whether the trial court properly affirmed the decision of [the City of Hartford to classify] two parcels of real estate on which nursing homes were located as commercial properties for purposes of real estate taxation on the ground that the nursing homes did not contain "dwelling units used for human habitation" to otherwise be deemed apartment property or residential for the purposes of General Statutes § 12-62n(a)(1) and (3). * * * Each of the plaintiffs is the owner of a parcel of real estate in Hartford that is occupied by a nursing home. The nursing homes are divided into residential rooms, most of which are occupied by two patients. Each room contains bedroom furnishings and a bathroom with a sink and toilet, with central bathing facilities on each floor. The rooms do not contain a kitchen; each nursing home has a central kitchen that provides the patients with three meals a day. During their stay at the facility, patients receive full-time nursing and rehabilitative care from the nursing home staff.

Pursuant to § 12-62n, in 2006, the city adopted a system of real estate taxation in which the effective rate of taxation for a particular parcel depends on whether the property is classified as residential property, apartment property or commercial property. Under this system, commercial property is subjected to a substantially higher rate of taxation. For the purposes of the grand list of October 1, 2006, the city's tax assessor classified the plaintiffs' nursing homes as commercial property. [The plaintiffs contested the

classifications administratively and ultimately challenged the classifications in court. The trial court affirmed the City's classification of the properties as commercial property and the plaintiffs appealed the court's decision.]

The issue of whether a nursing home is properly classified for tax assessment purposes as "apartment property" under § 12-62n(a)(1) presents a question of statutory construction, over which we exercise plenary review. * * * "The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply.... When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature.... [General Statutes] § 1-2z directs us first to consider " the text of the statute itself and its relationship to other statues. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered...." When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter.... A statute is ambiguous if, when read in context, it is susceptible to more than one reasonable interpretation.... Additionally, statutory silence does not necessarily equate to ambiguity....

"[W]e are [also] guided by the principle that the legislature is always presumed to have created a harmonious and consistent body of law.... [T]his tenet of statutory construction ... requires us to read statutes together when they relate to the same subject matter.... Accordingly, [i]n determining the meaning of a statute... we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction * * * As a result, it is well settled that when two incongruent readings of a statute are equally plausible, the statute is ambiguous. * * *

Pursuant to § 1-2z, we begin with the text of the statute. * * * Section 12-62n(a)(1) defines "`[a]partment property"' as "a building containing five or more dwelling units used for human habitation, the parcel of land on which such building is situated, and any accessory buildings or other improvements located on such parcel...." * * * The statute, however, neither defines nor provides any indication of what constitutes "dwelling units used for human habitation...." * * * "In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly." General Statutes § 1-1(a). "If a statute or regulation does not sufficiently define a term, it is appropriate to look to the common understanding of the term as expressed in a dictionary." * * * The word "apartment" is defined with substantial similarity in a number of dictionaries, each referring to use by an individual or a family for a residence. For example, the American Heritage Dictionary of the English Language (3d Ed. 1992) defines "apartment" as "[a] room or

suite of rooms designed as a residence and generally located in a building occupied by more than one household ... [a] suite of rooms within a larger building set aside for a particular purpose or person." See also Random House Unabridged Dictionary (2d Ed. 1993) (defining "apartments" as "a set of rooms used as a dwelling by one person or one family"); Black's Law Dictionary (6th Ed. 1990) ("apartment house" means "[a] building arranged in several suites of connecting rooms, each suite designed for independent housekeeping, but with certain mechanical conveniences, such as heat, light, or elevator services, in common to all persons occupying the building"). These definitions do not seem applicable to a patient's room in a nursing home because the room is shared with another patient and it does not contain all the necessary elements of a residence, such as bathing and kitchen facilities.

Because the legislature chose to define "`[a]partment property'" as a property containing "dwelling units used for human habitation"; General Statutes § 12-62n(a)(1); but did not define this phrase, we next turn to the dictionary to define the term "dwelling." See, e.g., Black's Law Dictionary, supra ("dwelling" means "the apartment or building, or group of buildings, occupied by a family as a place of residence"); Webster's Third New International Dictionary ("dwelling" means "a building or construction used for residence: abode, habitation"); American Heritage Dictionary of the English Language, supra ("dwelling" means "[a] place to live in; an abode"); Random House Unabridged Dictionary, supra ("dwelling" means "a building or place of shelter to live in; place of residence; abode; home"). We conclude, based on our textual analysis, that § 12-62n is not plain and unambiguous in that it is not clear from the language of the statute whether a patient's room in a nursing home constitutes a dwelling unit used for human habitation within the meaning of § 12-62n(a)(1). We, therefore, consult extratextual sources to determine the legislature's intent in adopting § 12-62n. General Statutes § 1-2z.

We first turn to the legislative history. Although our review of the legislative history of § 12-62n does not shed light on the precise issue of whether the legislature intended to include nursing homes within the classification of apartment property, we are nonetheless guided in a general sense by the purposes underlying this legislation. Representative Art Feltman, who represented Hartford in the General Assembly, explained the * * * purpose underlying the bill as follows: "A major reason why the ... Greater Hartford Chamber of Commerce is supporting this [b]ill and has been lobbying in favor of this [b]ill in the hallways is because it is the goal of everyone to increase the rate of [home ownership]. And home ownership only happens if homes are affordable, and the taxes are affordable, and in order to make sure, [to provide an incentive for] people to come to Hartford and to buy homes and to be owner-occupants, be it downtown or in the neighborhoods, we can't hit them with a 50 [percent] tax increase as soon as they get here." * * * Representative Feltman's remarks make clear that the bill that became § 12-62n was intended to help individuals purchase homes in Hartford and then reside in them. This purpose is not furthered by including nursing homes within the definition of apartment property because the patients that reside in the nursing homes are not owners of the properties; they do not purchase the properties. Moreover, in the present case, the parties stipulated that the

fees for 90 percent of the patients at the nursing homes are paid by medicaid through the state department of social services at a rate that is based on an administrative formula. The fees for the remaining patients are paid either through the federal medicare program, private insurance or by payments from the assets of the patients. Although a component of the administrative formula used to assess fees for the medicaid residents is based on the municipal real estate tax paid by the nursing homes, the overwhelming majority of the patients of the nursing homes personally would not realize any savings from a change in the rates charged to medicaid. For both of these reasons, we conclude that including nursing homes within the classification of apartment property would not further the purpose of the legislation.

Returning to the text of § 12-62n with this legislative purpose in mind, we can see that the statute benefits two types of property: residential property and apartment property, both as defined in the statute, and both of which could be "owner occupied," consistent with the intent of the statute. It seems highly unlikely that a nursing home would be owner occupied, and, therefore, giving a nursing home owner the tax benefit of § 12-62n would not be consistent with legislative intent. In addition, we note that the legislature chose to use the specific term "apartment property" to describe one of the two types of property that benefit from § 12-62n. The legislature did not choose to employ any broader terms, such as "multi-family property" or "multi-occupant property," terms that might encompass the nursing homes, with their multi-occupant rooms, that are at issue in the present appeal. The decision to use the term "apartment" in lieu of other terms thus suggests that the legislature intended the benefit of § 12-62n to apply only to buildings that contain apartments.

Other provisions in our statutes demonstrate that the legislature is aware that there are various types of different residential healthcare facilities and that it knows how to make specific reference to a "nursing home" when it intends to do so. For instance, the legislature has identified several types of residential healthcare facilities and included nursing homes in the definition of "`[i]nstitutions'" that are licensed by the state. See General Statutes § 19a-490(a) ("`[i]nstitution' means a hospital, residential care home, health care facility for the handicapped, nursing home, rest home ... substance abuse treatment facility"). The text of § 19a-490(a) thus indicates that the legislature knows how to use the specific term "nursing home" in our statutes when it intends to and thus suggests to us that its failure to use that term in § 12-62n was purposeful. * * *

[The court then discussed a lower court decision in Connecticut that held that a nursing home was not a “residential dwelling” under a different Connecticut statute as support for its conclusion that nursing homes are not apartments for purposes of 12-62n. It also cited, as support, a Massachusetts court decision that held that nursing homes were commercial properties, rather than residential properties, for purposes of a Massachusetts tax statute.]

* * * On the basis of the legislative intent of § 12-62n, which was to keep taxes on residential property low in order to promote home ownership and owner occupied

dwellings, and the use of the term "apartment property" in the statute, as opposed to making specific reference to nursing homes in § 12-62n, and in reliance on the reasoning of our Appellate Court and the Massachusetts Supreme Judicial Court as cited herein, we conclude that the trial court properly determined that the plaintiffs' nursing homes do not contain dwelling units and therefore do not constitute "apartment property" within the meaning of § 12-62n.

## Questions and Comments

**1. Statutory directives:** Was the court's analysis guided by any statutory directives? If so, what rules did the Connecticut legislature enact to address the interpretation of a statute's text? Does the directive address whether a court should consider extrinsic evidence when determining whether language is ambiguous, as opposed to after determining that language is ambiguous?

**2. Test for ambiguity:** Two tests for determining ambiguity were identified in the material introducing this case. The "two reasonable interpretations" standard is frequently articulated by courts, but Professor Linda Jellum criticizes it, on the basis that it is too loose, and would lead to findings of ambiguity in significantly more cases if it were actually applied as stated. *See* Linda D. Jellum, THE LEGISLATIVE PROCESS, STATUTORY INTERPRETATION, AND ADMINISTRATIVE AGENCIES 183 (ed. Carolina Academic Press, 2016). She suggests that the "equally susceptible" standard, though cited less frequently, may be a preferable standard. *Id.* at 184. Would judges adopting a textualist theory of interpretation prefer either test? How about judges adopting a purposivist theory? What test(s) did the court in the *Hartford* case identify as the test for determining whether language in a statute is ambiguous? What test do you think that the court actually used?

**3. Meaning of apartment property:** Why did the court consult dictionaries to determine whether the nursing home was an "apartment property"? Did the court discuss the ordinary meaning of "apartment"? Based on the court's discussion of the term "apartment," did it seem like there were two reasonable interpretations of the term? (One including nursing homes and one excluding them?) Did the court's analysis suggest that the language was equally susceptible of both interpretations? If not, why did the court look further at the definition of "dwelling"?

**4. Meaning of dwelling:** Did the statute define "dwelling unit"? Looking at the dictionary definitions of "dwelling," did the court conclude that there was a clear answer regarding whether nursing home units were dwelling units? Do you agree with the court?

**5. Sources to consult in the event of ambiguity:** Note that the court identified a variety of sources that it should consult to ascertain the meaning of text when the text is ambiguous. As noted above, the court's approach is merely one approach to resolving ambiguity. What were the sources that the court suggested should be consulted to determine the meaning of an ambiguous statute?

**6. Legislative history:** How did the court use the legislative history to determine whether nursing homes were "apartment properties"? Was the court using an intentionalist theory? After finding that the statutory language was ambiguous, how did the court use the text of the statute and other statutes to clarify the meaning of "apartment properties"?

**7. Precedent:** Note that the court also justified its decision by citing a lower court decision in Connecticut and a Massachusetts court decision. These are statutory interpretation techniques that will be explored in other parts of this book. What criticism might you raise, though, to the reliance on either of those decisions to interpret Connecticut General Statutes § 12-62n?

**8. How ambiguous is ambiguous?** Justice Kavanaugh complains that "there is often no good or predictable way for judges to determine whether statutory text contains 'enough' ambiguity" to trigger ambiguity-dependent statutory interpretation rules. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118 (2016). He notes that "It turns out that there are at least two separate problems facing … judges. … First, judges must decide how much clarity is needed to call a statute clear. If the statute is 60-40 in one direction, is that enough to call it clear? How about 80-20? … Second, let's imagine that we could agree on an 80-20 clarity threshold. … Even if we say that 80-20 is the necessary level of clear, how do we apply that 80-20 formula to particular text? Determining the level of ambiguity in a given piece of statutory language is often not possible in any rational way. One judge's clarity is another judge's ambiguity." *Id.* at 2136. Kavanuagh notes that the Supreme Court has admitted that "there is no errorless test for identifying or recognizing 'plain' or 'unambiguous' language." *Id.* at 2138, *citing* *United States v. Turkette*, 452 U.S. 576, 580 (1981). Accordingly, Kavanaugh argues that judges' policy preferences may, consciously or unconsciously, bias them towards finding that language is or isn't ambiguous, depending on the manner in which the judges wish to interpret the statute. *Id.* Kavanaugh then suggests the following solution to the conundrum: "[S]tatutory interpretation could proceed in a two-step process. First, courts could determine the ***best reading*** of the text of the statute by interpreting the ***words of the statute***, taking account of the ***context of the whole statute***, and applying any other ***appropriate semantic canons of construction***. Second, once judges have arrived at the best reading of the text, they can apply—openly and honestly—***any substantive canons*** (such as plain statement rules or the absurdity doctrine) that ***may justify departure from the text***. Under this two-step approach, few if any statutory interpretation cases would turn on an initial finding of clarity versus ambiguity in the way that they do now" (emphasis added). *Id.* at 2144.

**10. Alternative triggers for ambiguity:** Professor Anita Krishnakumar suggests some alternative tests that could be used to determine when language is ambiguous and which would bring greater certainty and neutrality to the determination. *See* Anita Krishnakumar, *Metarules for Ordinary Meaning*, 134 Harv. L. Rev. 167, 179-182 (2021). First, she suggests that if dictionary definitions and corpus linguistics analysis identify

conflicting meanings for words, that could be viewed as prima facie evidence of ambiguity. *Id.* at 179-180. Second, she suggests that the lack of a clear and internally collective intuition among judges or laypeople about word meaning could be prima facie evidence of ambiguity. *Id.* Judicial disagreement could be indicated by divergence among judges or courts over a statute's ordinary meaning. *Id.* For laypeople, she suggests that courts could conduct a "robust" survey of laypeople regarding the meaning of language and, if there were substantial disagreement among the survey takers regarding the meaning of the language (i.e. less than 65% consensus), that would provide prima facie evidence of ambiguity. *Id.*

As you read the following case, think about the test[s] and tools that the majority and dissent use to identify ambiguity, and the theory of interpretation that they use to ascertain the meaning of the statutory language.

**Resources for the Case**

Unedited Opinion (From Justia)
Bankruptcy Code – P.L. 95-598
11 U.S.C. § 1146 (From LII)
Oral Argument Audio (From Oyez)
Picadilly's Website and Wikipedia Entry

## FLORIDA DEPT. OF REVENUE V. PICADILLY CAFETERIAS, INC.

**554 U.S. 33 (2008)**

**JUSTICE THOMAS** delivered the opinion of the Court.

The Bankruptcy Code provides a stamp-tax exemption for any asset transfer "under a plan confirmed under [Chapter 11]" of the Code. 11 U. S. C. §1146(a). [Ed. Note: "Stamp taxes" are taxes imposed on legal documents, usually involving the transfer of assets or property.] Respondent Piccadilly Cafeterias, Inc., was granted an exemption for assets transferred after it had filed for bankruptcy but before its Chapter 11 plan was submitted to, and confirmed by, the Bankruptcy Court. Petitioner, the Florida Department of Revenue, seeks reversal of the decision of the Court of Appeals upholding the exemption for Piccadilly's asset transfer. Because we hold that §1146(a)'s stamp-tax exemption does not apply to transfers made before a plan is confirmed under Chapter 11, we reverse the judgment below.

I

Piccadilly was founded in 1944 and was one of the Nation's most successful cafeteria chains until it began experiencing financial difficulties in the last decade. On October 29, 2003, Piccadilly declared bankruptcy under Chapter 11 of the Bankruptcy Code * * * and requested court authorization to sell substantially all its assets * * * Piccadilly prepared to sell its assets as a going concern and sought an exemption from any stamp taxes on the eventual transfer under §1146(a) of the Code. The Bankruptcy Court conducted an auction in which the winning bidder agreed to purchase Piccadilly's assets for $80 million.

On January 26, 2004, as a precondition to the sale, Piccadilly entered into a global settlement agreement with * * * [creditors that] dictated the priority of distribution of the

sale proceeds among Piccadilly's creditors. On February 13, 2004, the Bankruptcy Court approved the proposed sale and settlement agreement [and] * * * ruled that the transfer of assets was exempt from stamp taxes under §1146(a). The sale closed on March 16, 2004.

Piccadilly filed its initial Chapter 11 plan in the Bankruptcy Court on March 26, 2004, and filed an amended plan on July 31, 2004. The plan provided for distribution of the sale proceeds in a manner consistent with the settlement agreement. Before the Bankruptcy Court confirmed the plan, Florida filed an objection, seeking a declaration that the $39,200 in stamp taxes it had assessed on certain of Piccadilly's transferred assets fell outside §1146(a)'s exemption because the transfer had not been "under a plan confirmed" under Chapter 11. On October 21, 2004, the bankruptcy court confirmed the plan [and denied Florida's objection. Florida appealed the decision and the Court of Appeals for the 11th Circuit affirmed the bankruptcy court's decision.] * * *

We granted certiorari * * * to resolve the conflict among the Courts of Appeals as to whether §1146(a) applies to preconfirmation transfers.

II

Section 1146(a), entitled "Special tax provisions," provides: "The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax." (Emphasis added.) Florida asserts that §1146(a) applies only to post-confirmation sales; Piccadilly contends that it extends to preconfirmation transfers as long as they are made in accordance with a plan that is eventually confirmed. * * *

A

Florida contends that §1146(a)'s text unambiguously limits stamp-tax exemptions to post-confirmation transfers made under the authority of a confirmed plan. It observes that the word "confirmed" modifies the word "plan" and is a past participle, i.e., "[a] verb form indicating past or completed action or time that is used as a verbal adjective in phrases such as baked beans and finished work." American Heritage Dictionary 1287 (4th ed. 2000). Florida maintains that a past participle indicates past or completed action even when it is placed after the noun it modifies * * *. Thus, it argues, the phrase "plan confirmed" denotes a "confirmed plan"—meaning one that has been confirmed in the past.

Florida further contends that the word "under" in "under a plan confirmed" should be read to mean "with the authorization of" or "inferior or subordinate" to its referent, here the confirmed plan. * * * Florida points out that, in the other two appearances of "under" in §1146(a), it clearly means "subject to." Invoking the textual canon that " 'identical words used in different parts of the same act are intended to have the same meaning,' " * * * , Florida asserts the term must also have its core meaning of "subject to" in the phrase "under a plan confirmed." Florida thus reasons that to be eligible for §1146(a)'s

exemption, a transfer must be subject to a plan that has been confirmed subject to §1129 * * * Florida concludes that a transfer made prior to the date of plan confirmation cannot be subject to, or under the authority of, something that did not exist at the time of the transfer—a confirmed plan.

Piccadilly counters that the statutory language does not unambiguously impose a temporal requirement. It contends that "plan confirmed" is not necessarily the equivalent of "confirmed plan," and that had Congress intended the latter, it would have used that language, as it did in a related Code provision. * * * Piccadilly also argues that "under" is just as easily read to mean "in accordance with." It observes that the variability of the term "under" is well-documented, noting that the American Heritage Dictionary 1395 (1976) provides 15 definitions, including "[i]n view of," "because of," "by virtue of," as well as "[s]ubject to the restraint … of." * * * Although "under" appears several times in §1146(a), Piccadilly maintains there is no reason why a term of such common usage and variable meaning must have the same meaning each time it is used, even in the same sentence. * * * Piccadilly thus concludes that the statutory text—standing alone—is susceptible of more than one interpretation. * * *

While both sides present credible interpretations of §1146(a), Florida has the better one. To be sure, Congress could have used more precise language—i.e., "under a plan that has been confirmed"—and thus removed all ambiguity. But the two readings of the language that Congress chose are not equally plausible: Of the two, Florida's is clearly the more natural. The interpretation advanced by Piccadilly and adopted by the Eleventh Circuit—that there must be "some nexus between the pre-confirmation transfer and the confirmed plan" for §1146(a) to apply * * * places greater strain on the statutory text than the simpler construction advanced by Florida * * *.

[In Part B of its opinion, the majority rejected several arguments raised by Picadilly that the meaning of Section 1146(a) of the Bankruptcy Code was ambiguous when read in context of other provisions of the Code. The arguments were based on the text of other provisions of the Code as well as the statutory context of Section 1146(a). In Part C of the opinion, the majority noted that a substantive policy canon of statutory interpretation provides that "courts should proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly authorized." The majority concluded that the canon required it to interpret the exemption in Section 1146(a) narrowly. Substantive policy canons are explored at length in Chapter 6 of this book.] * * *

As for Picadilly's argument that reading §1146(a) to allow preconfirmation transfers to be taxed while exempting others moments later would amount to an "absurd" policy, we reiterate that " 'it is not for us to substitute our view of . . . policy for the legislation which has been passed by Congress.' " Hechinger, 335 F. 3d, at 256. That said, we see no absurdity in reading §1146(a) as setting forth a simple, bright-line rule instead of the complex, after-the-fact inquiry Piccadilly envisions. * * * [T]o the extent the "practical realities" of Chapter 11 reorganizations are increasingly rendering post-confirmation

transfers a thing of the past, * * * it is incumbent upon the Legislature, and not the Judiciary, to determine whether §1146(a) is in need of revision.

III

The most natural reading of §1146(a)'s text, the provision's placement within the Code, and applicable substantive canons all lead to the same conclusion: Section 1146(a) affords a stamp-tax exemption only to transfers made pursuant to a Chapter 11 plan that has been confirmed. Because Piccadilly transferred its assets before its Chapter 11 plan was confirmed by the Bankruptcy Court, it may not rely on §1146(a) to avoid Florida's stamp taxes.

**JUSTICE BREYER**, with whom **JUSTICE STEVENS** joins, dissenting.

The Bankruptcy Code provides that the "transfer" of an asset "under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax." 11 U. S. C. §1146(a) * * * In this case, the debtor's reorganization "plan" provides for the "transfer" of assets. But the "plan" itself was not "confirmed under section 1129 of this title" (i.e., the Bankruptcy Judge did not formally approve the plan) until after the "transfer" of assets took place. * * *

Hence we must ask whether the time of transfer matters. Do the statutory words "under a plan confirmed under section 1129 of this title" apply only where a transfer takes place "under a plan" that at the time of the transfer already has been "confirmed under section 1129 of this title"? Or, do they also apply where a transfer takes place "under a plan" that subsequently is "confirmed under section 1129 of this title"? The Court concludes that the statutory phrase applies only where a transfer takes place "under a plan" that at the time of transfer already has been "confirmed under section 1129 of this title." In my view, however, the statutory phrase applies "under a plan" that at the time of transfer either already has been or subsequently is "confirmed." In a word, the majority believes that the time (pre- or post-transfer) at which the bankruptcy judge confirms the reorganization plan matters. I believe that it does not. (And construing the provision to refer to a plan that simply "is" confirmed would require us to read fewer words into the statute than the Court's construction, which reads the provision to refer only to a plan "that has been" confirmed * * *.

The statutory language itself is perfectly ambiguous on the point. Linguistically speaking, it is no more difficult to apply the words "plan confirmed" to instances in which the "plan" subsequently is "confirmed" than to restrict their application to instances in which the "plan" already has been "confirmed." * * * Nor can I find any text-based argument that points clearly in one direction rather than the other. * * *

The canons of interpretation offer little help. And he majority, for the most part, seems to agree. It ultimately rests its interpretive conclusion upon this Court's statement that courts "must proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly expressed." * * * But when, as here, we interpret a provision

the express point of which is to exempt some category of state taxation, how can [that] statement * * * prove determinative? * * *

The absence of a clear answer in text or canons, however, should not lead us to judicial despair. Consistent with Court precedent, we can and should ask a further question: Why would Congress have insisted upon temporal limits? What reasonable purpose might such limits serve? * * * The statute's purpose is apparent on its face. It seeks to further Chapter 11's basic objectives: (1) "preserving going concerns" and (2) "maximizing property available to satisfy creditors." * * * As an important bankruptcy treatise notes, "[i]n addition to tax relief, the purpose of the exemption of [§1146(a)] is to encourage and facilitate bankruptcy asset sales." * * * It furthers these objectives where, e.g., asset transfers are at issue, by turning over to the estate (for the use of creditors or to facilitate reorganization) funds that otherwise would go to pay state stamp taxes on plan-related transferred assets. The requirement that the transfers take place pursuant to a reorganization "plan" that is "confirmed" provides the bankruptcy judge's assurance that the transfer meets with creditor approval and the requirements laid out in §1129.

How would the majority's temporal limitation further these statutory objectives? It would not do so in any way. From the perspective of these purposes, it makes no difference whether a transfer takes place before or after the plan is confirmed. In both instances the exemption puts in the hands of the creditors or the estate money that would otherwise go to the State in the form of a stamp tax. In both instances the confirmation of the related plan assures the legitimacy (from bankruptcy law's perspective) of the plan that provides for the assets transfer.

Moreover, one major reason why a transfer may take place before rather than after a plan is confirmed is that the preconfirmation bankruptcy process takes time. * * * And a firm (or its assets) may have more value (say, as a going concern) where sale takes place quickly. * * * Thus, an immediate sale can often make more revenue available to creditors or for reorganization of the remaining assets. Stamp taxes on related transfers simply reduce the funds available for any such legitimate purposes. And insofar as the Court's interpretation of the statute reduces the funds made available, that interpretation inhibits the statute's efforts to achieve its basic objectives. * * *

What conceivable reason could Congress have had for silently writing into the statute's language a temporal distinction with such consequences? The majority can find none. It simply says that the result is not "'absurd' " and notes the advantages of a "bright-line rule." * * * I agree that the majority's interpretation is not absurd and do not dispute the advantages of a clear rule. But I think the statute supplies a clear enough rule—transfers are exempt when there is confirmation and are not exempt when there is no confirmation. And I see no reason to adopt the majority's preferred construction (that only transfers completed after plan confirmation are exempt), where it conflicts with the statute's purpose.

Of course, we should not substitute "our view of … policy" for the statute that Congress enacted. * * * But we certainly should consider Congress' view of the policy for the statute it created, and that view inheres in the statute's purpose. "Statutory interpretation is not a game of blind man's bluff. Judges are free to consider statutory language in light of a statute's basic purposes." * * * It is the majority's failure to work with this important tool of statutory interpretation that has led it to construe the present statute in a way that, in my view, runs contrary to what Congress would have hoped for and expected.

## Questions and Comments

**1. Statutory interpretation question:** What statutory interpretation question was the court trying to resolve? How did Florida say the statute should be interpreted? How did Picadilly say the statute should be interpreted?

**2. Test for ambiguity:** What test did the majority use to determine whether the language was ambiguous? What test did the dissent use? What did the majority and dissent conclude regarding whether the language was ambiguous?

**3. Extrinsic sources:** Did the majority or dissent examine extrinsic sources to determine whether the statutory language was ambiguous? Did the majority or dissent examine extrinsic sources on finding that the language was ambiguous (or to confirm a finding that the language was not ambiguous)?

**4. Theories:** What theory of interpretation did the majority use and how did it reach its conclusion regarding the proper interpretation of the statutory language? What theory did the dissent use and how did it reach its conclusion?

**5. Absurdity:** Note that the case discusses the second exception to the plain meaning—absurdity. Picadilly raises an "absurdity" argument that the majority quickly rejects. Is Picadilly's argument truly an absurdity challenge, or a disagreement with a legislative policy choice? Does the dissent believe that Picadilly is asking the court to rewrite the Bankruptcy Code to advance a different policy objective?

**6. Need for rules?** The disagreement between the majority and dissent regarding whether the language in the case is ambiguous is another example of Justice Kavanaugh's criticism regarding the subjectivity of the "ambiguity" analysis. According to Justice Kavanaugh, "to make judges more neutral and impartial in statutory interpretation cases, we should carefully examine the interpretive rules of the road and try to settle as many of them in advance as we can. Doing so would make the rules more predictable in application. * * * That * * * would be enormously beneficial to the neutral and impartial rule of law, and to the ideal and reality of a principled, nonpartisan judiciary." *See* Kavanaugh, *supra*, at 2121. "For me, one overarching goal is to make judging a neutral, impartial process in all cases * * * To be sure, some may conceive of judging more as a partisan or policymaking exercise in which judges should or necessarily must bring their policy and philosophical predilections to bear on the text at hand. I disagree with that vision of the federal judge in our constitutional system. The American rule of law, as I see it,

depends on neutral, impartial judges who say what the law is, not what the law should be. Judges are umpires, or at least should always strive to be umpires. * * * In my view, this goal is not merely personal preference but a constitutional mandate in a separation of powers system." *Id.* at 2120.

## B. Absurdity

Rabbit with waffle hat – Photo by H. Akutagawa – CC By-SA 3.0

The second widely accepted exception to the plain meaning rule is the "absurd result" exception, which was introduced in the *Holy Trinity* case in Chapter 3. Sometimes referred to as "the Golden Rule," it counsels that courts may adopt an interpretation of a statute that departs from the plain meaning of the language in a statute when application of that plain meaning to the facts of the case would lead to an "absurd result."[276]

The rule was articulated in the Supreme Court by Chief Justice Marshall early in the 19th century in *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 203 (1819). It was first applied by the Court to read a statute against its plain meaning fifty years later in *U.S. v. Kirby*, 74 U.S. (Wall.) 482 (1869). In that case, the Court concluded that arresting a mail carrier on murder charges was not a violation of a statute that prohibited willful obstruction of the mail or of mail carriers, even though the arrest would be "obstruction" according to the plain meaning of the statute. *Id.*

The rationale behind the exception is that legislatures act rationally and do not intend absurd applications of statutes, but they may not anticipate every application of the words used in the statute when enacting the statute. Judges, therefore, should have the power to ignore the plain meaning of text when it is clear that the plain meaning leads to an absurd result (which the legislature could not have intended). As the *Kirby* Court wrote, "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to * * * an absurd consequence, and it will always be presumed that the legislature intended exceptions to its language which would avoid results of this character." *Id.* at 483.

Since the exception aims to carry out the intent of the legislature at the expense of the text of the statute, it is favored more by purposivists and intentionalists, but it is also applied by textualists.[277] Although the exception is applied by theorists of all stripes, it has been described by the Supreme Court as a "last resort" and is used somewhat sparingly.[278]

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[276] *See* Scalia & Garner, *supra* note 192, at 234-239. The rule dates back to British common law. *See* William Blackstone, *Commentaries on the Laws of England,* § 2, at 60 (4th ed. 1770).
[277] *See* Manning & Stephenson, supra note 4, at 116, 119.
[278] *See Barnhart v. Sigmon Coal Co,* 534 U.S. 438, 441 (2002).

Just as there are disagreements regarding the standard that applies to determine whether language is "ambiguous," courts articulate the standard for "absurdity" in widely varying ways. In *Sturges,* Chief Justice Marshall suggested that courts could depart from the plain meaning of statutory text when "the absurdity and injustice of applying the provision to the case, would be so monstrous that all mankind would, without hesitation, unite in rejecting the application." *See* 17 U.S. at 203.[279] Along a similar vein, judges have suggested that the exception applies when an interpretation would shock the moral conscience.[280] At the other end of the spectrum, courts have, on occasions, suggested that the plain meaning of language can be absurd when it appears contrary to legislative intent[281] or irrational.[282]

As was the case with the ambiguity exception, there is no consensus regarding the proper way to interpret the language of a statute once a court has determined that the plain meaning would lead to an absurd result. Much will depend on the theories of interpretation adopted by the judges. Justice Scalia counsels, however, that courts must not depart significantly from the plain meaning in the event of an absurd result.[283] Most commentators agree that courts generally require that the alternative interpretation adopted by a court must be a reasonable interpretation of the statute. The following case examines the application of the Federal Advisory Committee Act to the ABA's review of judicial nominees for the President.

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[279] Justice Scalia cited the *Sturges* test as a standard in his dissenting opinion in *King v. Burwell.*

[280] *See* Robbins v. Chronister, 402 F.3d 1047, 1056 (10th Cir. 2005) (Hartz, J., dissenting).

[281] *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892); Robbins v. Chronister, 402 F.3d 1047, 1050 (10th Cir. 2005).

[282] *See* Green v. Bock Laundry Machine Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

[283] *See* Scalia & Garner, *supra* note 192, at 234 ("If an easy correction is not possible, the absurdity stands.")

Department of Justice Headquarters Building – Photo by Coolcaesar – CC BY-SA 3.0

## PUBLIC CITIZEN V. DEPARTMENT OF JUSTICE

**491 U.S. 440 (1989)**

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument Audio (From Oyez)
Federal Advisory Committee Act (P.L. 92-463)
5 U.S.C. App. §§ 1-16 (From LII)
Factual Background (From Quimbee)
Video Summary (Prof. Stevenson – South Texas College of Law)

**JUSTICE BRENNAN** delivered the opinion of the Court.

The Department of Justice regularly seeks advice from the American Bar Association's Standing Committee on Federal Judiciary regarding potential nominees for federal judgeships. The question before us is whether the Federal Advisory Committee Act (FACA) * * * applies to these consultations, and, if it does, whether its application [violates Article II of the Constitution, violates separation of powers; or infringes the First amendment right of members of the American bar Association.] We hold that FACA does not apply to this special advisory relationship. We therefore do not reach the constitutional questions presented.

**I**

A

The Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" Supreme Court Justices and, as established by Congress, other federal judges. * * * Since 1952, the President, through the Department of Justice, has requested advice from the American Bar Association's Standing Committee on Federal Judiciary (ABA Committee) in making such nominations. * * * Prior to announcing the names of nominees for judgeships on the courts of appeals, the district courts, or the Court of International Trade, the President, acting through the Department of Justice, routinely requests a potential nominee to complete a questionnaire drawn up by the ABA Committee and to submit it to the Assistant Attorney General for the Office of Legal Policy, to the chair of the ABA Committee, and to the committee member (usually the representative of the relevant judicial Circuit) charged with investigating the nominee. * * * The potential nominee's answers and the referral of his or her name to the ABA Committee are kept confidential. The committee member conducting the investigation then reviews the legal writings of the potential nominee, interviews judges, legal scholars, and other attorneys regarding the potential nominee's qualifications, and discusses the matter confidentially with representatives of various professional organizations and other groups. The committee member also interviews the potential nominee, sometimes with other committee members in attendance.

Following the initial investigation, the committee representative prepares for the chair an informal written report describing the potential nominee's background, summarizing all interviews, assessing the candidate's qualifications, and recommending one of four possible ratings: "exceptionally well qualified," "well qualified," "qualified," or "not qualified." * * * The chair then makes a confidential informal report to the Attorney General's Office. * * * If the Justice Department * * * request[s] a formal report, the committee representative prepares a draft and sends copies to other members of the ABA Committee, together with relevant materials. A vote is then taken, and a final report approved. The ABA Committee conveys its rating -- though not its final report -- in confidence to the Department of Justice * * * After considering the rating and other information the President and his advisors have assembled, including a report by the Federal Bureau of Investigation and additional interviews conducted by the President's judicial selection committee, the President then decides whether to nominate the candidate. If the candidate is in fact nominated, the ABA Committee's rating, but not its report, is made public at the request of the Senate Judiciary Committee.

B

FACA was born of a desire to assess the need for the "numerous committees, boards, commissions, councils, and similar which have been established to advise officers and agencies in the executive branch of the Federal Government." § 2(a), as set forth in 5 U.S.C.App. § 2(a). Its purpose was to ensure that new advisory committees be established only when essential, and that their number be minimized; that they be terminated when they have outlived their usefulness; that their creation, operation, and duration be subject to uniform standards and procedures; that Congress and the public

remain apprised of their existence, activities, and cost; and that their work be exclusively advisory in nature. § 2(b). * * *

[Section 10(a)(1) of FACA provides that advisory committee meetings “shall be open to the public,” and Section 10(b) requires that advisory committee minutes, records and reports must be made available to the public. Section 3(2) of FACA defines “advisory committee” as “any committee, board, commission, council, conference, panel, task force, or similar group, * * * which is * * * (B) established or utilized by the President, or (C) Established or utilized by one or more agencies”. In October, 1986, Washington Legal Foundation (WLF) sued the Justice Department when the ABA Committee refused to provide reports and meeting minutes to WLF. WLF asked the district court of the District of Columbia to declare that the ABA Committee was an advisory committee under FACA and to issue an injunction preventing the Justice Department from utilizing the ABA Committee until it complied with FACA. The district court dismissed the action and WLF appealed the decision.] * * *

III

A

There is no doubt that the Executive makes use of the ABA Committee, and thus "utilizes" it in one common sense of the term. As the District Court recognized, however, "reliance on the plain language of FACA alone is not entirely satisfactory." * * * “Utilize" is a woolly verb, its contours left undefined by the statute itself. Read unqualifiedly, it would extend FACA's requirements to any group of two or more persons, or at least any formal organization, from which the President or an Executive agency seeks advice. * * * We are convinced that Congress did not intend that result. A nodding acquaintance with FACA's purposes, as manifested by its legislative history and as recited in § 2 of the Act, reveals that it cannot have been Congress' intention, for example, to require the filing of a charter, the presence of a controlling federal official, and detailed minutes any time the President seeks the views of the National Association for the Advancement of Colored People (NAACP) before nominating Commissioners to the Equal Employment Opportunity Commission, or asks the leaders of an American Legion Post he is visiting for the organization's opinion on some aspect of military policy.

Nor can Congress have meant -- as a straightforward reading of "utilize" would appear to require -- that all of FACA's restrictions apply if a President consults with his own political party before picking his Cabinet. It was unmistakably not Congress' intention to intrude on a political party's freedom to conduct its affairs as it chooses, * * * or its ability to advise elected officials who belong to that party, by placing a federal employee in charge of each advisory group meeting and making its minutes public property. FACA was enacted to cure specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals; although its reach is extensive, we cannot believe that it was intended to cover every formal and informal consultation between the

President or an Executive agency and a group rendering advice.[9] As we said in *Church of the Holy Trinity v. United States*, 143 U. S. 457 (1892):

> "[F]requently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."

Where the literal reading of a statutory term would "compel an odd result," * * * we must search for other evidence of congressional intent to lend the term its proper scope. * * * "The circumstances of the enactment of particular legislation," for example, "may persuade a court that Congress did not intend words of common meaning to have their literal effect." * * *. [I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary, but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention, since the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." * * *

Consideration of FACA's purposes and origins in determining whether the term "utilized" was meant to apply to the Justice Department's use of the ABA Committee is particularly appropriate here, given the importance we have consistently attached to interpreting statutes to avoid deciding difficult constitutional questions where the text fairly admits of a less problematic construction. * * * It is therefore imperative that we consider indicators of congressional intent in addition to the statutory language before concluding that FACA was meant to cover the ABA Committee's provision of advice to the Justice Department

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[9] * * * JUSTICE KENNEDY refuses to consult FACA's legislative history -- which he later denounces, with surprising hyperbole, as "unauthoritative materials," * * *, although countless opinions of this Court, including many written by the concurring Justices, have rested on just such materials -- because this result would not, in his estimation, be "absurd," * * * Although this Court has never adopted so strict a standard for reviewing committee reports, floor debates, and other non-statutory indications of congressional intent, *and we explicitly reject that standard today,* * * * even if "absurdity" were the test, one would think it was met here. The idea that Members of Congress would vote for a bill subjecting their own political parties to bureaucratic intrusion and public oversight when a President or Cabinet officer consults with party committees concerning political appointments is outlandish. Nor does it strike us as in any way "unhealthy" * * * or undemocratic * * * to use all available materials in ascertaining the intent of our elected representatives, rather than read their enactments as requiring what may seem a disturbingly unlikely result, provided only that the result is not "absurd." Indeed, the sounder and more democratic course, the course that strives for allegiance to Congress' desires in all cases, not just those where Congress' statutory directive is plainly sensible or borders on the lunatic, is the traditional approach we reaffirm today.

in connection with judicial nominations. [The majority then cited evidence from the circumstances leading to enactment of the statute, the legislative history and the statute's purpose to support its reading of the statute that "Congress did not desire FACA to apply to the Justice Department's confidential solicitation of the ABA Committee's views on prospective judicial nominees".]

**JUSTICE KENNEDY**, with whom **THE CHIEF JUSTICE** and **JUSTICE O'CONNOR** join, concurring in the judgment.

[T]his suit presents two distinct issues of the separation of powers. The first concerns the rules this Court must follow in interpreting a statute passed by Congress and signed by the President. On this subject, I cannot join the Court's conclusion that the Federal Advisory Committee Act (FACA), * * * does not cover the activities of the American Bar Association's Standing Committee on Federal Judiciary in advising the Department of Justice regarding potential nominees for federal judgeships. The result seems sensible in the abstract; but I cannot accept the method by which the Court arrives at its interpretation of FACA, which does not accord proper respect to the finality and binding effect of legislative enactments. * * *

**I**

The statutory question in this suit is simple enough to formulate. FACA applies to "any committee" that is "established or utilized" by the President or one or more agencies, and which furnishes "advice or recommendations" to the President or one or more agencies. * * * The only question we face * * * is whether the ABA Committee is "utilized" by the Department of Justice or the President.

There is a ready starting point, which ought to serve also as a sufficient stopping point, for this kind of analysis: the plain language of the statute. Yet the Court is unwilling to rest on this foundation, for several reasons. One is an evident unwillingness to define the application of the statute in terms of the ordinary meaning of its language. We are told that "utilize" is "a woolly verb, * * * and therefore we cannot be content to rely on what is described, with varying levels of animus, as a "literal reading," * * * a "literalistic reading," * * * and a dictionary reading" of this word * * * . We also are told in no uncertain terms that we cannot rely on (what I happen to regard as a more accurate description) "a straightforward reading of *utilize.*'" * * * Reluctance to working with the basic meaning of words in a normal manner undermines the legal process. This case demonstrates that reluctance of this sort leads instead to woolly judicial construction that mars the plain face of legislative enactments.

The Court concedes that the Executive Branch "utilizes" the ABA Committee in the common sense of that word. * * * This should end the matter. The Court nevertheless goes through several more steps to conclude that, although "it seems to us a close question," * * * Congress did not intend that FACA would apply to the ABA Committee.

Although I believe the Court's result is quite sensible, I cannot go along with the unhealthy process of amending the statute by judicial interpretation. Where the language of a statute is clear in its application, the normal rule is that we are bound by it. There is, of course, a legitimate exception to this rule, which the Court invokes, * * *and with which I have no quarrel. Where the plain language of the statute would lead to "patently absurd consequences," * * * that "Congress could not *possibly* have intended," * * * (emphasis added), we need not apply the language in such a fashion. When used in a proper manner, this narrow exception to our normal rule of statutory construction does not intrude upon the lawmaking powers of Congress, but rather demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way.

This exception remains a legitimate tool of the Judiciary, however, only as long as the Court acts with self-discipline by limiting the exception to situations where the result of applying the plain language would be, in a genuine sense, absurd, *i.e.,* where it is quite impossible that Congress could have intended the result, * * * and where the alleged absurdity is so clear as to be obvious to most anyone. A few examples of true absurdity are given in the *Holy Trinity* decision cited by the Court, * * *such as where a sheriff was prosecuted for obstructing the mails even though he was executing a warrant to arrest the mail carrier for murder, or where a medieval law against drawing blood in the streets was to be applied against a physician who came to the aid of a man who had fallen down in a fit. * * * In today's opinion, however, the Court disregards the plain language of the statute not because its application would be patently absurd, but rather because, on the basis of its view of the legislative history, the Court is "fairly confident" that "FACA should [not] be construed to apply to the ABA Committee." * * * I believe the Court's loose invocation of the "absurd result" canon of statutory construction creates too great a risk that the Court is exercising its own "WILL instead of JUDGMENT," with the consequence of "substituti[ng] [its own] pleasure to that of the legislative body." * * *

The Court makes only a passing effort to show that it would be absurd to apply the term "utilize" to the ABA Committee according to its common sense meaning. It offers three examples that we can assume are meant to demonstrate this point: the application of FACA to an American Legion Post should the President visit that organization and happen to ask its opinion on some aspect of military policy; the application of FACA to the meetings of the National Association for the Advancement of Colored People (NAACP) should the President seek its views in nominating Commissioners to the Equal Employment Opportunity Commission; and the application of FACA to the national committee of the President's political party should he consult it for advice and recommendations before picking his Cabinet. * * *

None of these examples demonstrates the kind of absurd consequences that would justify departure from the plain language of the statute. A common-sense interpretation of the term "utilize" would not necessarily reach the kind of *ad hoc* contact with a private group that is contemplated by the Court's American Legion hypothetical. Such an interpretation would be consistent, moreover, with the regulation of the General Services Administration

(GSA) interpreting the word "utilize," which the Court in effect ignores. * * * As for the more regular use contemplated by the Court's examples concerning the NAACP and the national committee of the President's political party, it would not be at all absurd to say that, under the Court's hypothetical, these groups would be "utilized" by the President to obtain "advice or recommendations" on appointments, and therefore would fall within the coverage of the statute. Rather, what is troublesome about these examples is that they raise the very same serious constitutional questions that confront us here (and perhaps others as well). * * * The Court confuses the two points. The fact that a particular application of the clear terms of a statute might be unconstitutional does not, in and of itself, render a straightforward application of the language absurd, so as to allow us to conclude that the statute does not apply. * * *

II

Although I disagree with the Court's conclusion that FACA does not cover the Justice Department's use of the ABA Committee, I concur in the judgment of the Court because, in my view, the application of FACA in this context would be a plain violation of the Appointments Clause of the Constitution.

## Questions and Comments

**1. Statutory interpretation question:** What statutory interpretation question was the Court trying to resolve?

**2. Test for absurdity:** What test did the majority use to decide whether the plain meaning interpretation of the statutory language was “absurd”? How did the concurring justices’ standard differ, if at all? Was that the reason for the different interpretations of the language? The disagreement between the majority and concurring justices regarding whether the plain meaning interpretation was absurd is not unusual and demonstrates the subjectivity involved in determining whether interpretation of language according to its plain meaning is absurd, even if agreement could be reached regarding what the standard means (which there wasn’t in this case). As Justice Kavanaugh has observed, “one person’s reasonableness may be another person’s absurdity.” *See* Kavanaugh, *supra,* at 2156.

**3. Plain meaning of “utilize”:** Why was there not more discussion by the majority or concurring justices about the plain meaning of “utilize”? Unlike cases covered earlier in this chapter, there were no citations to dictionary definitions and both the majority and concurring justices seemed to quickly agree that the President and DOJ “utilized” the ABA Committee as the term “utilize” is commonly understood.

**4. Sources used to determine whether the plain meaning is absurd:** Did the majority consult extrinsic sources to determine ***whether*** the plain meaning interpretation of the statute was absurd, or did it only consult those sources ***after*** determining that the plain meaning was absurd? Does Justice Kennedy consult extrinsic sources to determine ***whether*** the plain meaning of the statute was absurd? What does footnote 9 tell us about

the different approaches taken by the majority and Justice Kennedy regarding when it is appropriate to consult legislative history to interpret statutory language? Note that extrinsic sources might be used by judges, in some cases, after finding that the plain meaning interpretation of a statute is absurd to ***confirm*** the legislature's intent for the absurd result, as well as to demonstrate that the legislature did not intend the absurd result.

**5. Majority's rationale:** Once the majority concluded that a plain meaning interpretation of the statute would be absurd, how did they reach the conclusion that FACA did not cover the consultations between the ABA Committee and the DOJ or the President?

**6. Unconstitutionality of the majority's statutory interpretation:** Justice Kennedy, concurring, asserts that the majority's method of statutory interpretation violates separation of powers. Why? Note that this challenge could be raised to the application of any of the exceptions to the plain meaning rule. If courts apply the plain meaning of statutes to facts in ways that lead to absurd results, what will be the legislative response?

**7. Concurring v. dissenting:** Justice Kennedy, concurring, asserts that the plain meaning of FACA indicates that the President and DOJ are utilizing the ABA Committee in a way that triggers FACA disclosure requirements and that such a reading of the statute is not absurd. Why, then, is Justice Kennedy concurring, rather than dissenting?

**8. Broader implications:** Is the majority more concerned about whether the application of FACA to the President's consultations with the ABA Committee would be absurd, or whether a broad reading of "utilize" under FACA would lead to regulation of various other organizations, which would be absurd? If that's the concern, how does Justice Kennedy suggest that the Court could address that concern?

Illustration of a scrivener – Public domain

## C. Scrivener's Error

The third generally accepted exception to the plain meaning rule is the exception for "***scrivener's errors***." There are times when the legislature makes an ***obvious drafting error***, such as omitting obvious words or punctuation, including extra words or punctuation, spelling words incorrectly, or including a phrase that doesn't make sense in context. Under the "scrivener's error" exception, courts will ignore the plain meaning reading of the statute to adopt a reading that fixes the obvious "scrivener's error."

For instance, the Supreme Court has applied the doctrine to fix a punctuation error, *see* *United States National Bank of Oregon v. Independent Insurance Agents of America Inc.*, 508 U.S. 439, 462 (1993); the U.S. Court of Appeals for the Second Circuit has used it to correct a typographical error, *see* *United States v. Scheer*, 729 F.2d 164, 169 (2d Cir.

1984) (changing "upon request of the … request" to "upon receipt of the … request"); and the U.S. Court of Appeals for the Sixth Circuit has used it to correct the cross-reference to an improper section of a statute, *see* *United States v. Coatam*, 245 F.3d 553, 557 (6th Cir. 2001). The doctrine is similar to the absurdity doctrine, in that the application of the plain meaning with the scrivener's error yields an absurd result in many cases, but there may be situations where the legislative error is clear, but the plain meaning interpretation of the statute with the error ***is not*** absurd.

The difficulty that arises with this doctrine, as with the other exceptions to the plain meaning rule, is determining when language in a statute ***is*** a scrivener's error and doesn't actually reflect Congressional intent. Accordingly, courts apply the exception ***narrowly***. Justice Scalia has asserted that "[o]nly when it is patently obvious to a reasonable reader that a drafting mistake has occurred may a court correct the mistake."[284]

In the following case, the majority refuses to correct what the challengers claim is a clear scrivener's error, while the dissent applies the exception. The challengers in the case failed to file mining claims for federal lands by a statutory deadline and forfeited claims worth several million dollars. The dispute centers on the timing of the filing deadline.

## UNITED STATES V. LOCKE

**471 U.S. 84 (1985)**

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument Audio (From Oyez)
FLPMA of 1976 (P.L. 94-579)
43 U.S.C. § 1744 (From LII)
Factual Background (From Quimbee)
Video Summary (Prof. Stevenson – South Texas College of Law)
Mining Claims in Ely, NV

**JUSTICE MARSHALL** delivered the opinion of the Court.

* * *

I

* * *

Congress in 1976 enacted [the Federal Land Policy and Management Act (FLPMA)] * * *. Section 314 of the Act establishes a federal recording system that is designed both to rid federal lands of stale mining claims and to provide federal land managers with up-to-date information that allows them to make informed land management decisions. For claims located before FLPMA's enactment, the federal recording system imposes two general requirements. First, the claims must initially be registered with the BLM by filing, within three years of FLPMA's enactment, a copy of the official record of the notice or certificate of location. * * * Second, in the year of the initial recording, and "prior to December 31" of every year after that, the claimant must file with state officials and with BLM a notice of intention to hold the claim, an affidavit of assessment work performed on the claim, or a detailed reporting form. * * * Section 314(c) of the Act provides that failure to comply with either of these requirements "shall

[284] *See* *King v. Burwell*, 135 S.Ct. 2480, 2504-2505 (2015) (Scalia, J., dissenting).

be deemed conclusively to constitute an abandonment of the mining claim . . . by the owner." 43 U.S.C. § 1744(c).

The second of these requirements -- the annual filing obligation -- has created the dispute underlying this appeal. Appellees, four individuals engaged "in the business of operating mining properties in Nevada," purchased in 1960 and 1966 10 unpatented mining claims on public lands near Ely, Nevada. * * * Throughout the period during which they owned the claims, appellees complied with annual state law filing and assessment work requirements. In addition, appellees satisfied FLPMA's initial recording requirement by properly filing with BLM a notice of location, thereby putting their claims on record for purposes of FLPMA.

At the end of 1980, however, appellees failed to meet on time their first annual obligation to file with the Federal Government. After allegedly receiving misleading information from a BLM employee, appellees waited until December 31 to submit to BLM the annual notice of intent to hold or proof of assessment work performed required under § 314(a) of FLPMA, 43 U.S.C. § 1744(a). As noted above, that section requires these documents to be filed annually "prior to December 31." Had appellees checked, they further would have discovered that BLM regulations made quite clear that claimants were required to make the annual filings in the proper BLM office "on or before December 30 of each calendar year." * * * Thus, appellees' filing was one day too late.

[The appellees filed a lawsuit in federal district court, alleging that the government's action was an unconstitutional taking of their property and denied them due process. The court agreed that the government's action deprived them of due process and held that the appellees had substantially complied with the FLPMA filing requirements by filing their claim on December 31.]

III

A

Before the District Court, appellees asserted that the § 314(a) requirement of a filing "prior to December 31 of each year" should be construed to require a filing "on or before December 31." Thus, appellees argued, their December 31 filing had in fact complied with the statute, and the BLM had acted ultra vires in voiding their claims.

Although the District Court did not address this argument, the argument raises a question sufficiently legal in nature that we choose to address it even in the absence of lower court analysis. * * * It is clear to us that the plain language of the statute simply cannot sustain the gloss appellees would put on it. As even counsel for appellees conceded at oral argument, § 314(a) "is a statement that Congress wanted it filed by December 30th. I think that is a clear statement. . . ." * * * While we will not allow a literal reading of a statute to produce a result "demonstrably at odds with the intentions of its drafters," * * * with respect to filing deadlines a literal reading of Congress' words is generally the only proper reading of those words. To attempt to decide whether some date other than the one set

out in the statute is the date actually "intended" by Congress is to set sail on an aimless journey, for the purpose of a filing deadline would be just as well served by nearly any date a court might choose as by the date Congress has in fact set out in the statute. "Actual purpose is sometimes unknown," * * * and such is the case with filing deadlines; as might be expected, nothing in the legislative history suggests why Congress chose December 30 over December 31, or over September 1 (the end of the assessment year for mining claims, 30 U.S.C. § 28), as the last day on which the required filings could be made. But "[d]eadlines are inherently arbitrary," while fixed dates "are often essential to accomplish necessary results." * * * Faced with the inherent arbitrariness of filing deadlines, we must, at least in a civil case, apply by its terms the date fixed by the statute. * * * Moreover, BLM regulations have made absolutely clear since the enactment of FLPMA that "prior to December 31" means what it says. * * *

[W]e are not insensitive to the problems posed by congressional reliance on the words "prior to December 31." * * * But the fact that Congress might have acted with greater clarity or foresight does not give courts a carte blanche to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do. "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." * * * Nor is the Judiciary licensed to attempt to soften the clear import of Congress' chosen words whenever a court believes those words lead to a harsh result. * * * On the contrary, deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that "the legislative purpose is expressed by the ordinary meaning of the words used." * * * "Going behind the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously' even under the best of circumstances." * * * When even after taking this step nothing in the legislative history remotely suggests a congressional intent contrary to Congress' chosen words, and neither appellees nor the dissenters have pointed to anything that so suggests, any further steps take the courts out of the realm of interpretation and place them in the domain of legislation. The phrase "prior to" may be clumsy, but its meaning is clear. * * * Under these circumstances, we are obligated to apply the "prior to December 31" language by its terms. * * *

**JUSTICE STEVENS**, with whom **JUSTICE BRENNAN** joins, dissenting.

The Court's opinion is contrary to the intent of Congress * * * and unjustly creates a trap for unwary property owners. First, the choice of the language "prior to December 31," when read in context in 43 U.S.C. § 1744(a) is, at least, ambiguous, and, at best, "the consequence of a legislative accident, perhaps caused by nothing more than the unfortunate fact that Congress is too busy to do all of its work as carefully as it should.

In my view, Congress actually intended to authorize an annual filing at any time prior to the close of business on December 31st, that is, prior to the end of the calendar year to which the filing pertains. * * *

I

Congress enacted § 314 of the Federal Land Policy and Management Act to establish for federal land planners and managers a federal recording system designed to cope with the problem of stale claims, and to provide "an easy way of discovering which Federal lands are subject to either valid or invalid mining claim locations." I submit that the appellees' actions in this case did not diminish the importance of these congressional purposes; to the contrary, their actions were entirely consistent with the statutory purposes, despite the confusion created by the "inartful draftsmanship" of the statutory language.

A careful reading of § 314 discloses at least three respects in which its text cannot possibly reflect the actual intent of Congress. First, the description of what must be filed in the initial filing and subsequent annual filings is quite obviously garbled. Read literally, § 314(a)(2) seems to require that a notice of intent to hold the claim and an affidavit of assessment work performed on the claim must be filed "on a detailed report provided by § 28-1 of Title 30." One must substitute the word "or" for the word "on" to make any sense at all out of this provision. This error should cause us to pause before concluding that Congress commanded blind allegiance to the remainder of the literal text of § 314.

Second, the express language of the statute is unambiguous in describing the place where the second annual filing shall be made. If the statute is read inflexibly, the owner must "file in the office of the Bureau" the required documents. Yet the regulations that the Bureau itself has drafted, quite reasonably, construe the statute to allow filing in a mailbox, provided that the document is actually received by the Bureau prior to the close of business on January 19th of the year following the year in which the statute requires the filing to be made. A notice mailed on December 30, 1982, and received by the Bureau on January 19, 1983, was filed "in the office of the Bureau" during 1982 within the meaning of the statute, but one that is hand-delivered to the office on December 31, 1982, cannot be accepted as a 1982 "filing." * * *

In light of the foregoing, I cannot believe that Congress intended the words "prior to December 31 of each year" to be given the literal reading the Court adopts today. The statutory scheme requires periodic filings on a calendar-year basis. The end of the calendar year is, of course, correctly described either as "prior to the close of business on December 31," or "on or before December 31," but it is surely understandable that the author of § 314 might inadvertently use the words "prior to December 31" when he meant to refer to the end of the calendar year. As the facts of this case demonstrate, the scrivener's error is one that can be made in good faith. The risk of such an error is, of course, the greatest when the reference is to the end of the calendar year. That it was in fact an error seems rather clear to me, because no one has suggested any rational basis for omitting just one day from the period in which an annual filing may be made, and I would not presume that Congress deliberately created a trap for the unwary by such an omission.

It would be fully consistent with the intent of Congress to treat any filing received during the 1980 calendar year as a timely filing for that year. Such an interpretation certainly does not interfere with Congress' intent to establish a federal recording system designed to cope with the problem of stale mining claims on federal lands. * * * Additionally, a sensible construction of the statute does not interfere with Congress' intention to provide "an easy way of discovering which Federal lands are subject to either valid or invalid mining claim locations." * * * I have no doubt that Congress would have chosen to adopt a construction of the statute that filing take place by the end of the calendar year if its attention had been focused on this precise issue.

## Questions and Comments

**1. Statutory interpretation question:** What statutory interpretation question was the court trying to resolve?

**2. Purposes of the statute:** Both the majority and dissent discuss the purposes of the statute. Does the majority discuss whether its reading of the statute advances the purposes of the statute? Does the dissent?

**3. Scrivener's error:** Why does the majority conclude that the statute should be interpreted as written? Does it consult any extrinsic sources to determine whether the language used by Congress reflects its actual intent? Why does the dissent believe that the language used by Congress was a "scrivener's error"? Are the majority and dissent each searching for legislative intent? Could the dissent have advocated for the December 31 deadline without relying on the "scrivener's error" exception?

**4. Fixing the mistake:** Once a court has identified language in a statute as a scrivener's error, it is usually easy for the court to "fix" the error because it normally has identified the language as a "scrivener's error" because it is apparent that the legislature really intended to write the statute in a different way (punctuating differently, spelling differently, referencing a different section, etc.). Thus, the analysis of whether a statute includes a scrivener's error and how the statute should be interpreted to fix that error are usually combined. Note that the majority determined that the statutory language was not an error, in part, because the majority could not identify any other statutory deadline that would clearly have been chosen by Congress instead of December 30 ("nothing * * * suggests why Congress chose December 30 over December 31, or over September 1"; "deadlines are inherently arbitrary"). Do you find that argument compelling? The dissent did not.

**5. Estoppel:** The majority opinion noted that the challengers filed their claims on December 31 after "receiving misleading information from a BLM employee." That didn't impact the Court's statutory interpretation, though. Estoppel rarely lies against the government unless one can demonstrate "affirmative misconduct" by the government.

**6. Regulations:** Both the majority and dissent referenced the regulations adopted by the Bureau of Land Management in interpreting the FLPMA. Chapter 7 of this book will

focus in detail on the role that agency regulations play in statutory interpretation. The majority, in *Locke*, used the regulations as further support for its reading of the statute, while the dissent used them to support an argument that the statutory language should be read flexibly.

### CALI SECTION QUIZ

Before moving on to the next section, why not try a short quiz on the material you just read at www.cali.org/lesson/19755. It should take about 10 minutes to complete.

### Problem 4-2

In 1954, the Ames legislature enacted "the Organized Crime and Gambling Act." Section 2 of the statute provides that "Gambling is prohibited unless the State of Ames has issued a license that authorizes the gambling," and Section 3 of the statute provides that "Any person who violates Section 2 may be imprisoned for up to six months for a first offense, and five years for each subsequent offense." Section 1(b) of the statute includes the following legislative findings: "(i) Casino gaming is heavily influenced by organized crime syndicates. (ii) Regardless of the involvement of organized crime, gambling in any form has deleterious impacts on the persons gambling, their families and society. These impacts include increased crime rates associated with gambling, as well as increased divorce rates and increased rates of mental illness among persons who routinely gamble."

Last week, you were contacted by Mike Williams, a graduate student who organized an NCAA College Basketball Tournament "pool" at his university. Students paid $5 to enter the "pool" and attempted to identify the winner of every basketball game in the annual NCAA College Basketball Tournament. The entrant who correctly chose the most winning teams won a prize equal to half of the entry fees paid by all of the participants. Forty students participated in the pool, which raised $200. The State of Ames has charged Williams with violating the Organized Crime and Gambling Act based on his role in setting up the pool. On what bases can you argue that Mr. Williams did not violate the statute, and on what bases can the State argue that he has violated the statute? Is the statute ambiguous or absurd? What information should be consulted to determine whether the statute is ambiguous or absurd and what information should be consulted to interpret the statute if it is ambiguous or absurd?

**Problem 4-2 (continued)**

The following information will be useful in framing the arguments. First, the initial definition that appeared for "gamble" in the 1950 Webster's Dictionary was "to engage in reckless or hazardous behavior." The definitions for "gamble" in the most recent version of the New International Dictionary are: "(1) to bet on an uncertain outcome, as of a contest; (2) to take a risk in the hope of gaining an advantage or a benefit." You also recognize that most people would say that they don't think that participating in a college basketball tournament pool is gambling, even though they would admit that it probably is, under a literal interpretation of the term, gambling.

There is also some interesting legislative history for the statute. For instance, at a hearing on the legislation before the House Committee on Commerce, the sponsor of the bill stated, "Gambling in any form is evil and immoral. The time for this law is long overdue." In addition, the Conference Committee for the legislation included the following statements: (1) Regulation of gambling is necessary because of the large amounts of money that are involved in gambling. (2) This legislation is necessary to root out the unwelcome influence of organized crime."

Finally, as you read the statute more closely, you notice that Section 2(b) provides "The prohibition in this section does not apply to lotteries operated by the State or to bingo and similar games of chance operated by charities."

## IV. Punctuation and Grammar Canons

Presuming that courts are not departing from the plain meaning of text under one of the exceptions discussed in the preceding part, they will, under the plain meaning rule, begin their statutory analysis with the text.

While the British common law rule was that "[p]unctuation is no part of the statute,"[285] U.S. courts today generally read statutes consistent with ***punctuation*** rules unless it is inconsistent with the ordinary meaning of the language being interpreted.[286] While the Supreme Court has indicated that "the meaning of a statute will typically heed the

[285] *See Hammock v. Loan and Trust Co.,* 105 U.S. (15 Otto) 77, 84-85 (1881).

[286] *See* Scalia & Garner, *supra* note 192, at 161 ("Punctuation is a permissible indicator of meaning."); 2A JABEZ GRIDLEY SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47.15 at 346 (7th ed. Norman Singer ed.) ("An act should be read as punctuated unless there is some reason to do otherwise").

commands of its punctuation,"[287] the Court has also suggested, in several cases, that courts should not slavishly apply punctuation rules that frustrate legislative intent.[288]

Just as courts will consider punctuation when interpreting the plain meaning of statutory text, they will apply the normal rules of ***grammar*** as an aid to interpreting language.[289] As applied, the punctuation and grammar canons might help demonstrate that language has a clear meaning or they may demonstrate that it is ambiguous. Both the grammar canon and punctuation canon are based on an assumption that legislators draft statutes following the normal rules of grammar and punctuation.

## A. Commas

Comma – Photo by Dvdgmz – CC BY-SA 3.0

Many statutory interpretation disputes center on the placement and meaning of a comma, or lack of a comma. For instance, in *Primate Protection League v. Tulane Educ. Fund*, 500 U.S. 72 (1991), the Supreme Court was interpreting 28 U.S.C. § 1442(a)(1), a statutory provision that allowed a defendant to remove a lawsuit filed in state court to federal court if the defendant was "[a]ny officer of the United States or any agency thereof, or person acting under him, * * * " The defendant, National Institutes of Health, sought removal of the case as an agency of the United States. In response, the Court wrote:

> We find that, when construed in the relevant context, the first clause of § 1442(a)(1) grants removal power to only one grammatical subject, "[a]ny officer," which is then modified by a compound prepositional phrase: "of the United States or [of] any agency thereof." Several features of § 1442(a)(1)'s grammar and language support this reading. The first is the statute's punctuation. * * * If the drafters of § 1442(a)(1) had intended the phrase "or any agency thereof" to describe a separate category of entities endowed with removal power, they would likely have employed the comma consistently. That is, they would have separated

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[287] *See United States National Bank of Oregon v. Independent Ins. Agents of North America*, 508 U.S. 439, 454 (1993) (Souter, J.)

[288] *See, e.g. Costanzo v. Tillinghast*, 287 U.S. 341, 344 (1932) ("Punctuation is not decisive of the construction of a statute. Upon like principle we should not apply the rules of syntax to defeat the evident legislative intent."); *Barrett v. Van Pelt,* 268 U.S. 85, 91 (1925) ("Punctuation is a minor, and not a controlling, element in interpretation, and courts will disregard the punctuation of a statute, or re-punctuate it, if need be, to give effect to what otherwise appears to be its purpose and true meaning.")

[289] *See Acadia v. Ohio Power Co.,* 498 U.S. 73, 79 (1990); *United States v. Ron Pair Enterprises, Inc.,* 489 U. S. 235, 489 U. S. 241 (1989) (statute's meaning is "mandated" by its "grammatical structure").

"or any agency thereof" from the language preceding it, in the same way that a comma sets apart the subsequent clause, which grants additional removal power to persons "acting under" federal officers. Absent the comma, the natural reading of the clause is that it permits removal by anyone who is an "officer" either "of the United States" or of one of its agencies.

Secondly, the language that follows "[a]ny officer of the United States or any agency thereof" confirms our reading of that clause. The subsequent grant of removal authority to any "person acting under him" makes little sense if the immediately preceding words -- which ought to contain the antecedent for "him" -- refer to an agency, rather than to an individual."

500 U.S. at 79-80.

While the location or absence of a comma may frequently spark a statutory interpretation dispute, the inclusion or exclusion of the "oxford" or "serial" comma can have significant consequences. When a sentence includes a list of three or more items, the "serial" comma is placed after the penultimate item in the list.[290] A sentence may have different meanings depending on whether a serial comma is used. For instance, compare: (1) Miguel went to work with his parents, Julia and Hernando; to (2) Miguel went to work with his parents, Julia, and Hernando. In the first sentence, Miguel is going to work with his parents (whose names are Julia and Hernando). In the second sentence, Miguel is going to work with at least four people (his parents—plural—Julia, and Hernando).

For an example that may have more significant legal ramifications, compare the following provisions that might be included in a will: (1) I leave all of my property in equal shares to Donna, Isabel, Alberto, Jean and Inez; and (2) I leave all of my property in equal shares to Donna, Isabel, Alberto, Jean, and Inez. In the first provision, Donna, Isabel, or Alberto may argue that the estate should be divided into quarters, with Jean and Inez receiving one quarter and the other three beneficiaries each receiving a quarter. In the second provision, it is clearer that the estate should be divided into five shares, equally distributed to each of the five beneficiaries.

Although the inclusion or exclusion of a serial comma may have significant impacts on the meaning of a sentence, many writers do not use serial commas[291] and some legislative drafting manuals direct drafters to omit it.[292]

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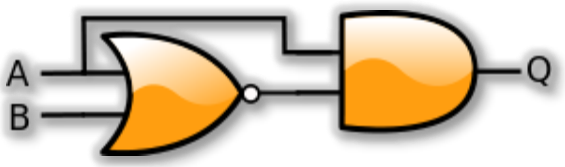
290 *See* The Editor's Manual, *Serial or Oxford Comma: When is it Used?, accessible at:* https://editorsmanual.com/articles/serial-comma/ (last accessed July 27, 2022).

291 *See* Grammarly, *What is the Oxford Comma (or Serial Comma), accessible at:* https://www.grammarly.com/blog/what-is-the-oxford-comma-and-why-do-people-care-so-much-about-it/ (last accessed July 27, 2022) (noting that the Associate Press style manual does not require the use of serial commas).

292 *See, e.g., Arizona Legislative Drafting Manual* 83 (2011-2012).

## B. Conjunctive v. Disjunctive



And/Or Logic Circuit – by Pluke – CC BY-SA 3.0

In general, courts will interpret "and" to be a conjunctive term and "or" to be a "disjunctive" term, according to normal grammar rules.[293] As Professor Linda Jellum notes, "or" means "either," while "and" means "all."[294] Thus, if a statute requires that a person "be 16 years of age or older, have completed a state approved driver training course, and have completed 60 hours of on-road driving instruction under the supervision of an instructor licensed by the state" in order to take a driving test, a person will not be able to take the test unless they have met ALL of the requirements listed in the statute. If, on the other hand, the statute requires that a person "have completed a state approved driving course or have completed 60 hours of on-road driving instruction under the supervision of an instructor licensed by the state" in order to take a driving test, the person may take the driving test if they have met EITHER of the requirements listed in the statute. The terms will be interpreted in context, though, according to the canon. Like all punctuation and grammar canons, they will not be applied woodenly when it would frustrate legislative intent. For instance, if the statute above required that a person "be 16 years of age or older, have completed a state approved driver training course, or have completed 60 hours of on-road driving instruction under the supervision of an instructor licensed by the state" in order to take a driving test, strict application of the conjunctive v. disjunctive canon would lead to an interpretation of the statute that allows a person to take a driving test as long as they meet any of the three requirements. Thus, a person who is 10 years old, but has completed 60 hours of on-road driving instruction under the supervision of an instructor licensed by the state could take a driving test. While that would be consistent with the canon regarding conjunctive and disjunctive terms, it would conflict with what would be obvious legislative intent. Thus, either the court would likely ignore the canon or treat the drafting as a scrivener's error.

Although "and" generally signifies "all" and "or" generally signifies "either," there are times when the terms are used in a context where they do not carry their normal meanings. For instance, when Congress provided in the APA that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review," *see* 5 U.S.C. § 704, it meant that ***either*** type of agency action is reviewable in court. It did not mean that an agency action had to meet both criteria in the statutory provision in order to be reviewable in court. Just as "and" might be understood in context to mean "or" in some cases, the Supreme Court has recognized that "or" is often used as a "careless substitute" for "and."[295] Consequently, while "and" and "or" are normally given their grammatical meanings when used in statutes, courts

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293 *See* Scalia & Garner, *supra* note 192, at 116; 1A JABEZ GRIDLEY SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION (7th ed. Norman Singer ed.).

294 *See* Jellum, *supra* note 165, at 241.

295 *See DeSylva v. Ballentine,* 351 U.S. 570, 573 (1956).

may depart from those meanings depending on the context in which the words are used[296] (which is true for most of the grammar and punctuation canons).

## C. Mandatory v. Discretionary

In general, courts will interpret the term "shall" in a statute as signifying a "mandatory" requirement and will interpret "may" as "discretionary."[297] Thus, when Congress provided, in the Clean Air Act, that EPA "shall" prescribe air pollution standards for pollutants that may endanger public health, *see* 42 U.S.C. § 7521(a)(1), the Supreme Court held that once EPA determines that a pollutant may endanger public health, it does not have any discretion regarding whether to establish air pollution standards for the pollutant.[298] If, on the other hand, the statute had provided that EPA "may" prescribe standards, the Court would likely have concluded that EPA had discretion to decide whether to establish air pollution standards or to address the pollution problems using other tools available to it under the statute.

As with all textual canons, though, context matters. Thus, if a statute provides that a challenge to an agency decision "may be filed within 30 days of the decision," a court might interpret that language as ***requiring*** persons to file their challenges within 30 days or be foreclosed from filing their challenges after that time. Conversely, in a case that involved review of a municipal ordinance that provided that the police "shall" order persons to disperse, the Supreme Court held that the language did ***not*** deprive the police of discretion.[299]

In the following politically charged case, the majority and dissent spar over the meaning of "may" in a federal immigration statute.

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[296] Scalia and Garner note that nuances are particularly likely when the terms are used with negatives, plurals and various other specific wordings. *See* Scalia & Garner, *supra* note 192, at 116.

[297] *See, e.g., National Association of Homebuilders v. Defenders of Wildlife,* 551 U.S. 644, 661-662 (2007); *Lopez v. Davis,* 531 U.S. 230, 241 (2001); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 35 (1998); Scalia & Garner, *supra* note 192, at 112. "Must" is also often interpreted to be mandatory when used with a condition precedent, while "should" is often interpreted to be discretionary. *See* Jellum, *supra* note 165, at 247-248.

[298] *See Massachusetts v. EPA,* 549 U.S. 497 (2007);

[299] *See Chicago v. Morales,* 527 U.S. 41 (1999). In another decision, the Court acknowledged that "shall" might have the same meaning as "may" in some contexts, *see* Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 432-433 n.9 (1995) ("legal writers sometimes use, or misuse, 'shall' to mean 'should,' 'will', or even 'may').

U.S. / Mexico Border Wall – Photo by Amyyfory – CC BY-SA 4.0

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument Audio (From Oyez)
Immigration and Nationality Act (INA) of 1952; INA of 1990
8 U.S.C. § 1225 (From LII)
Migrant Protection Protocols (2019)
Termination of MPP (2021)
Briefs in the Case – Scotus Blog

## BIDEN V. TEXAS

**142 S.Ct. 2528 (2022)**

**CHIEF JUSTICE ROBERTS** delivered the opinion of the Court.

In January 2019, the Department of Homeland Security—under the administration of President Trump—established the Migrant Protection Protocols. That program provided for the return to Mexico of non-Mexican aliens who had been detained attempting to enter the United States illegally from Mexico. On Inauguration Day 2021, the new administration of President Biden announced that the program would be suspended the next day, and later that year

sought to terminate it. The District Court and the Court of Appeals, however, held that doing so would violate the Immigration and Nationality Act, concluding that the return policy was mandatory so long as illegal entrants were being released into the United States. * * * The * * * [question presented is] whether the Government's rescission of the Migrant Protection Protocols violated the Immigration and Nationality Act

I

A

On December 20, 2018, then-Secretary of Homeland Security Kirstjen Nielsen announced a new program called Remain in Mexico, also known as the Migrant Protection Protocols (MPP). * * * MPP provided that certain non-Mexican nationals arriving by land from Mexico would be returned to Mexico to await the results of their removal proceedings under 8 U. S. C. §1229a. * * * MPP was implemented pursuant to express congressional authorization in the Immigration and Nationality Act (INA), which provides that "[i]n the case of an alien . . . who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title." * * * 8 U. S. C. §1225(b)(2)(c). * * * A separate provision of the same section of the INA states that if "an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title." §1225(b)(2)(A). Due to consistent and significant funding shortfalls, however, DHS has never had "sufficient detention capacity to maintain in custody every single person described in section 1225." * * *

In January 2019, DHS began implementing MPP, initially in San Diego, California, then in El Paso, Texas, and Calexico, California, and then nationwide. By December 31, 2020, DHS had enrolled 68,039 aliens in the program. * * *

[Following the change in Presidential administrations, however, the Biden administration terminated the program and the States of Texas and Missouri brought a lawsuit in the Northern District of Texas to challenge the termination. The district court entered judgment for the States and the U.S. Court of Appeals for the Fifth Circuit affirmed the district court's decision.]

III

Section 1225(b)(2)(C) provides: "In the case of an alien . . . who is arriving on land . . . from a foreign territory contiguous to the United States, the [Secretary] may return the alien to that territory pending a proceeding under section 1229a." Section 1225(b)(2)(C) plainly confers a discretionary authority to return aliens to Mexico during the pendency of their immigration proceedings. This Court has "repeatedly observed" that "the word 'may' clearly connotes discretion." * * * The use of the word "may" in section 1225(b)(2)(C) thus makes clear that contiguous-territory return is a tool that the Secretary "has the authority, but not the duty," to use. * * *

Respondents and the Court of Appeals concede this point. * * * They base their interpretation instead on section 1225(b)(2)(A), which provides that, "in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title." Respondents and the Court of Appeals thus urge an inference from the statutory structure: Because section 1225(b)(2)(A) makes detention mandatory, they argue, the otherwise-discretionary return authority in section 1225(b)(2)(C) becomes mandatory when the Secretary violates that detention mandate.

The problem is that the statute does not say anything like that. The statute says "may." And "may" does not just suggest discretion, it "clearly connotes" it. * * * Congress's use of the word "may" is therefore inconsistent with respondents' proposed inference from the statutory structure. If Congress had intended section 1225(b)(2)(C) to operate as a mandatory cure of any noncompliance with the Government's detention obligations, it would not have conveyed that intention through an unspoken inference in conflict with the unambiguous, express term "may." It would surely instead have coupled that grant of discretion with some indication of its sometimes-mandatory nature—perhaps by providing that the Secretary "may return" certain aliens to Mexico, "unless the government fails to comply with its detention obligations, in which case the Secretary must return them." The statutory grant of discretion here contains no such caveat, and we will not rewrite it to include one. * * *

The principal dissent emphasizes that section 1225(b)(2)(A) requires detention of all aliens that fall within its terms. * * * While the Government contests that proposition, we assume arguendo for purposes of this opinion that the dissent's interpretation of section 1225(b)(2)(A) is correct, and that the Government is currently violating its obligations under that provision.[5] Even so, the dissent's conclusions regarding section 1225(b)(2)(C) do not follow. Under the actual text of the statute, Justice Alito's interpretation is practically self-refuting. He emphasizes that "'[s]hall be detained' means 'shall be detained,' " post, at 9, and criticizes the Government's "argument that 'shall' means 'may,' " post, at 10. But the theory works both ways. Congress conferred contiguous-territory return authority in expressly discretionary terms. "'[M]ay return the alien' means 'may return the alien.' " The desire to redress the Government's purported violation of section 1225(b)(2)(A) does not justify transforming the nature of the authority conferred by section 1225(b)(2)(C).

[5] For this reason, Justice Alito misunderstands our analysis in insisting that our opinion authorizes the Government to release aliens subject to detention under section 1225(b)(2)(A). * * * We need not and do not decide whether the detention requirement in section 1225(b)(2)(A) is subject to principles of law enforcement discretion, as the Government argues, or whether the Government's current practices simply violate that provision.

[The majority then provided further support for its statutory interpretation by citing the historical context in which the provision at issue was adopted, the consistent interpretation over three decades by every Presidential administration of the provision as discretionary, and the foreign affairs problems that would arise if the provision was interpreted as mandatory.]

**JUSTICE ALITO**, with whom **JUSTICE THOMAS** and **JUSTICE GORSUCH** join, dissenting.

*** * ***

The Court is not only wrong to reach the merits of this case, but its analysis of the merits is seriously flawed. First, the majority errs in holding that the INA does not really mean what it says when it commands that the aliens in question "shall" be detained pending removal or asylum proceedings unless they are either returned to Mexico or paroled on a case-by-case basis. * * *

A

* * * the INA gives DHS three options regarding the treatment of the aliens in question while they await removal or asylum proceedings. They may be (1) detained in this country or (2) returned to Mexico or (3) paroled on a case-by-case basis. Congress has provided no fourth option, but the majority now creates one. According to the majority, an alien who cannot be detained due to a shortage of detention facilities but could be returned to Mexico may simply be released. That is wrong.

1

The language of 8 U. S. C. §1225(b)(2)(A) is unequivocal. With narrow exceptions that are inapplicable here, it provides that every alien "who is an applicant for admission" and who "the examining immigration officer determines . . . is not clearly and beyond a doubt entitled to be admitted . . . shall be detained for a [removal] proceeding." (Emphasis added.) Six years ago, the Government argued strenuously that this requirement is mandatory, and its brief could hardly have been more categorical or emphatic in making this point. * * *

[We] correctly accepted that argument, which was central to our holding [in Jennings v. Rodriguez, 583 U. S. ***, *** (2018) . But now, in an about-face, the Government argues that "shall be detained" actually means "may be detained." * * * The Government was correct in Jennings and is wrong here. "[S]hall be detained" means "shall be detained." The Government points out that it lacks the facilities to detain all the aliens in question, and no one questions that fact. But use of the contiguous-return authority would at least reduce the number of aliens who are released in violation of the INA's command. * * *

2

The majority's chief defense of the Government's rejection of MPP is based on a blinkered method of statutory interpretation that we have firmly rejected. The majority largely

ignores the mandatory detention requirement imposed by §1225(b)(2)(A) and, instead, reads the contiguous-return provision, §1225(b)(2)(C), in isolation. That provision says that the Secretary "may" return aliens to the country from which they entered, not that the Secretary must do so, and for the majority, that is enough to show that use of that authority is not required.

That reading ignores "the statutory structure" of the INA, * * * and wrongly "confine[s] itself to examining a particular statutory provision in isolation." * * * We have an obligation to read the INA as a "coherent regulatory scheme." * * * And if we follow that canon, the majority's interpretation collapses.

Read as a whole, the INA gives DHS discretion to choose from among only three options for handling the relevant category of inadmissible aliens. The Government must either: (1) detain them, (2) return them to a contiguous foreign nation, or (3) parole them into the United States on an individualized, case-by-case basis. These options operate in a hydraulic relationship: When it is not possible for the Government to comply with the statutory mandate to detain inadmissible aliens pending further proceedings, it must resort to one or both of the other two options in order to comply with the detention requirement to the greatest extent possible.

## Questions and Comments

**1. Statutory interpretation question:** Which section of the Immigration Act is the Court interpreting? How did the States argue the section should be interpreted? How did the government argue that the section should be interpreted?

**2. Section 1225(b)(2)(A):** Have the States challenged the government's failure to detain aliens pursuant to Section 1225(b)(2)(A) in this lawsuit? Is the Court asked to decide whether the government has violated that provision of the immigration statute? Think about the Court's *Chicago v. Morales* decision, mentioned above, as you read footnote 5 of the *Biden v. Texas* majority opinion.

**3. May v. shall:** Why does the majority conclude that the statute provides the government with discretion regarding whether to return aliens to Mexico? Why does the dissent argue that the government has no discretion? How does the statutory structure implicitly convert the "may" in 1225(b)(2)(C) to a "shall"? How does the majority respond to the dissent's argument?

**4. Executive Branch interpretation:** Note that the government had consistently interpreted Section 1225(b)(2)(C) as discretionary for decades. That had some influence on the majority's reading of the statute and will be explored in more detail in Chapter 7.

## D. Masculine v. Feminine / Singular v. Plural

Although most of the grammar and punctuation canons counsel that words should be interpreted consistent with normal punctuation and grammar rules, there are two canons that diverge from that approach.

The first is the canon that addresses the use of singular terms in statutes. According to the canon, in the absence of a contrary indication, the singular includes the plural (and vice versa).[300] Legislators traditionally drafted most statutes with reference to persons and things in the singular, so the canon recognizes that the use of the singular in a statute does not necessarily reflect legislative intent to limit the scope of a statute to the singular. In one of the few situations where Congress has legislated rules of statutory interpretation, it codified this canon through the Dictionary Act, which provides that "In determining the meaning of any act or resolution of Congress, unless the context otherwise indicates, words importing the singular include and apply to several persons, parties, or things; words importing the plural include the singular * * *"[301] Note, though, that courts will ignore the canon when applying the canon would frustrate legislative intent.

The other canon that defies typical grammar rules addresses the use of gender terms in statutes. Under the canon, in the absence of a contrary indication, the masculine includes the feminine (and vice versa).[302] Once again, legislators traditionally drafted statutes using masculine terms, regardless of whether the legislators intended to limit the scope to men.[303] Thus, interpreting masculine references to apply only to men would not necessarily advance the legislature's intent. The canon has been codified through the Dictionary Act, which provides that "words importing the masculine gender include the feminine as well."[304] Although the canon, as traditionally articulated in caselaw and statutory directives, only addresses masculine and feminine genders, the rationale behind the canon would support a broader application of the canon, such that masculine references in statutes would be read to apply to all persons, regardless of gender.[305] In addition, increasingly, legislative drafting norms are changing, so that statutes are written using gender-neutral terms.

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300 *See* Scalia & Garner, *supra* note 192, at 129.

301 *See* 1 U.S.C. § 1. Many states have also included the canon in their statutory directives. *See* Jellum, *supra* note 165, at 242.

302 *See* Scalia & Garner, *supra* note 192, at 129.

303 *See* Jellum, *supra* note 165, at 246-247.

304 *See* 1 U.S.C. § 1. The Dictionary Act does ***not,*** however, provide that words having the feminine gender include the masculine. In light of historical Congressional drafting practices, though, it is unlikely that there are many (if any) statutes where Congress included a feminine reference and did not intend to limit its focus to that gender.

305 *But see* Or. Rev. Stat. 174.110(2) (West 2015) ("Words used in the masculine gender may include the feminine and the neuter.")

## E. Series Qualifiers and the Last Antecedent

There are two other canons that are faithful to the traditional rules of grammar and punctuation, but they can yield conflicting interpretations of statutes because the underlying grammatical and punctuation rules conflict. These are the "series qualifier" canon and the doctrine of the "last antecedent."

The "***series qualifier***" canon provides that "when there is a straightforward, parallel construction that involves all nouns or verbs in a series," a modifier at the beginning or end of the list "normally applies to the entire series."[306] Thus, in the phrase "forcibly assaults, resists, opposes, impedes, intimidates or interferes with," "forcibly" modifies each of the verbs in the list that follows it.[307] Similarly, "a corporation or partnership registered in Delaware" refers to corporations registered in Delaware or partnerships registered in Delaware. Grammatically, though, when a determiner (a, the, some, etc.) is added to the list, the qualifier will not necessarily modify the entire list. Thus, "a corporation or a partnership registered in Delaware" would likely be interpreted to mean a corporation registered in any state or a partnership registered in Delaware.[308] In theory, though, the canon is limited to situations where there is "a straightforward, parallel construction that involves all nouns or verbs in a series." Thus, Justice Kagan has argued that the canon should not apply when the items in a list are so disparate that the modifying clause does not make sense when applied to them all, such as when a friend tells you that they hope to someday meet "a President, Supreme Court Justice, or actor involved with Star Wars."[309]

The doctrine of "***the last antecedent***" may conflict with the "series qualifier" canon in some cases because the doctrine provides that "a limiting clause or phrase * * * should ordinarily be read as modifying only the noun or phrase that it immediately follows."[310] Consequently, in *Lockhart v. United States,* the Supreme Court interpreted the phrase "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward" to include "aggravated sexual abuse" and "sexual abuse," regardless of whether those activities involved a minor or ward, and "abusive sexual conduct involving a minor or ward."[311] With the rise of textualism, there has been a significant increase in the use of the "last antecedent" rule in the Supreme Court and federal circuits.[312] Both canons, like all of the textual canons, are context-dependent, so that courts will not apply them rigidly

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306 *See* Scalia & Garner, *supra* note 192, at 147.
307 *See* Long v. United States, 199 F.2d 717, 719 (4th Cir. 1952).
308 *See* Scalia & Garner, *supra* note 192, at 148-149. *See also* Paroline v. United States, 572 U.S. 434, 447 (2014) (citing *Porto Rico Railway, Light & Power Co.* v. *Mor*, 253 U.S. 345, 348 (1920)); United States v. Bass, 404 U.S. 336, 339–340 (1971).
309 *See* Lockhart v. United States, 136 S.Ct. 958 (2016) (Kagan, J. dissenting).
310 *See* Barnhart v. Thomas, 540 U.S. 20, 26 (2003).
311 *Id.*
312 *See* Joseph Kimble, *The Doctrine of the Last Antecedent, the Example in Barnhart, Why Both are Weak and How Textualism Postures,* 16 Scribes J. of Legal Writing 5 (2014-15).

if the context of the language being interpreted suggests that the legislature did not intend the interpretation that would flow from the normal rules of grammar.

The "last antecedent" rule may be overcome, in some cases, by a punctuation canon that provides, "Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma."[313] According to that rule, if the phrase in *Lockhart* referred to "aggravated sexual abuse, sexual abuse, or abusive sexual conduct, involving a minor or ward," the phrase "involving a minor or ward" would modify all of the other offenses.

The following case involves a conflict between the series qualifier canon and the doctrine of the last antecedent.

Surfing on a cell phone – Free Clip Art – CC BY-SA 4.0

Surfing the Web – Free Clip Art – CC BY-SA 4.0

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument Audio (From Oyez)
Telephone Consumer Protection Act (P.L. 102-243)
47 U.S.C. § 227 (From LII)
Briefs in the Case – Scotus Blog
Text and Telemarketing After Duguid (From Nixon Peabody)

## FACEBOOK V. DUGUID

**141 S.Ct. 1163 (2021)**

**JUSTICE SOTOMAYOR** delivered the opinion of the Court.

The Telephone Consumer Protection Act of 1991 (TCPA) proscribes abusive telemarketing practices by, among other things, imposing restrictions on making calls with an "automatic telephone dialing system." As defined by the TCPA, an "automatic telephone dialing system" is a piece of equipment with the capacity both "to store or

[313] 2A JABEZ GRIDLEY SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47.33 (7th ed. Norman Singer ed.).

produce telephone numbers to be called, using a random or sequential number generator," and to dial those numbers. 47 U. S. C. §227(a)(1). The question before the Court is 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." It does not. To qualify as an "automatic telephone dialing system," a device must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator.

I

A

* * * In 1991, Congress passed the TCPA to address "the proliferation of intrusive, nuisance calls" to consumers and businesses from telemarketers. * * * Advances in automated technology made it feasible for companies to execute large-scale telemarketing campaigns at a fraction of the prior cost, dramatically increasing customer contacts. Infamously, the development of "robocall" technology allowed companies to make calls using artificial or prerecorded voices, obviating the need for live human callers altogether.

This case concerns "automatic telephone dialing systems" (hereinafter autodialers), which revolutionized telemarketing by allowing companies to dial random or sequential blocks of telephone numbers automatically. * * *

B

Petitioner Facebook, Inc., maintains a social media platform with an optional security feature that sends users "login notification" text messages when an attempt is made to access their Facebook account from an unknown device or browser. * * * In 2014, respondent Noah Duguid received several login-notification text messages from Facebook, alerting him that someone had attempted to access the Facebook account associated with his phone number from an unknown browser. But Duguid has never had a Facebook account and never gave Facebook his phone number. Unable to stop the notifications, Duguid brought a putative class action against Facebook. He alleged that Facebook violated the TCPA by maintaining a database that stored phone numbers and programming its equipment to send automated text messages to those numbers each time the associated account was accessed by an unrecognized device or web browser. * * *

II

Section 227(a)(1) defines an autodialer as: "equipment which has the capacity - "(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and "(B) to dial such numbers."

Facebook argues 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 one ("produce"). We conclude that the clause modifies both, specifying how the equipment must either "store" or "produce" telephone numbers. Because Facebook's notification system neither stores nor produces numbers "using a random or sequential number generator," it is not an autodialer.

A

We begin with the text. Congress defined an autodialer in terms of what it must do ("store or produce telephone numbers to be called") and how it must do it ("using a random or sequential number generator"). The definition uses a familiar structure: a list of verbs followed by a modifying clause. Under conventional rules of grammar, "[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." * * * The Court often applies this interpretative rule, usually referred to as the "series-qualifier canon." * * * This canon generally reflects the most natural reading of a sentence. Imagine if a teacher announced that "students must not complete or check any homework to be turned in for a grade, using online homework-help websites." It would be strange to read that rule as prohibiting students from completing homework altogether, with or without online support.

Here, the series-qualifier canon recommends qualifying both antecedent verbs, "store" and "produce," with the phrase "using a random or sequential number generator." That recommendation produces the most natural construction, as confirmed by other aspects of §227(a)(1)(A)'s text.

To begin, the modifier at issue immediately follows a concise, integrated clause: "store or produce telephone numbers to be called." * * * The clause "hangs together as a unified whole," * * * using the word "or" to connect two verbs that share a common direct object, "telephone numbers to be called." It would be odd to apply the modifier ("using a random or sequential number generator") to only a portion of this cohesive preceding clause.

This interpretation of §227(a)(1)(A) also "heed[s] the commands of its punctuation." * * * Recall that the phrase "using a random or sequential number generator" follows a comma placed after the phrase "store or produce telephone numbers to be called." As several leading treatises explain, "'[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); see also 2A N. Singer & S. Singer, Sutherland Statutes and Statutory Construction §47:33, pp. 499–500 (rev. 7th ed. 2014); Scalia & Garner 161–162. The comma in §227(a)(1)(A) thus further suggests that Congress intended the phrase "using a random or sequential number generator" to apply equally to both preceding elements.

Contrary to Duguid's view, this interpretation does not conflict with the so-called "rule of the last antecedent." Under that rule, "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." * * * The rule of the last antecedent is context dependent. This Court has declined to apply the rule where, like here, the modifying clause appears after an integrated list. * * * Moreover, even if the rule of the last antecedent were relevant here, it would provide no help to Duguid. The last antecedent before "using a random or sequential number generator" is not "produce," as Duguid needs it to be, but rather "telephone numbers to be called." There is "no grammatical basis," * * * for arbitrarily stretching the modifier back to include "produce," but not so far back as to include "store."

In sum, Congress' definition of an autodialer requires that in all cases, whether storing or producing numbers to be called, the equipment in question must use a random or sequential number generator. This definition excludes equipment like Facebook's login notification system, which does not use such technology.

[The Court also held that the statutory context supported its reading of the statute.]

**JUSTICE ALITO**, concurring in the judgment.

I agree with the Court that an "automatic telephone dialing system," as defined in the Telephone Consumer Protection Act of 1991, must have the capacity to "store . . . telephone numbers" by "using a random or sequential number generator." 47 U. S. C. §227(a)(1)(A). I also agree with much of the Court's analysis * * * on this question.

I write separately 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.

According to the majority's recitation of this canon, "'[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.' " * * *

The Court refers to this canon as a "rul[e] of grammar." * * * Yet * * * interpretive canons "are not 'rules' of interpretation in any strict sense but presumptions about what an intelligently produced text conveys." * * * "Perhaps more than most of the other canons, [the series-qualifier canon] is highly sensitive to context. * * *

The Court writes that the series-qualifier canon "generally reflects the most natural reading of a sentence," * * * and maybe that is so. * * * But it is very easy to think of sentences that clearly go against the canon: "At the Super Bowl party, she ate, drank, and cheered raucously."

“On Saturday, he relaxes and exercises vigorously.” “When his owner comes home, the dog wags his tail and barks loudly.” “It is illegal to hunt rhinos and giraffes with necks longer than three feet.” “She likes to swim and run wearing track spikes.”

In support of its treatment of the series-qualifier canon, the Court offers this example of a sentence in which the natural reading corresponds with the interpretation suggested by the canon: “[S]tudents must not complete or check any homework to be turned in for a grade, using online homework-help websites.” * * * I certainly agree that the adverbial phrase in this sentence (“using online homework-help websites”) modifies both of the verbs it follows (“complete” and “check”) and not just the latter. But that understanding has little to do with syntax and everything to do with our common understanding that teachers do not want to prohibit students from doing homework. We can see this point clearly if we retain the same syntax but replace the verb “complete” with any number of other verbs that describe something a teacher is not likely to want students to do, say, “ignore,” “overlook,” “discard,” “lose,” “neglect,” “forget,” “destroy,” “throw away,” or “incinerate” their homework. The concept of “using online homework-help websites” to do any of those things would be nonsensical, and no reader would interpret the sentence to have that meaning—even though that is what the series-qualifier canon suggests.

The strength and validity of an interpretive canon is an empirical question, and perhaps someday it will be possible to evaluate these canons by conducting what is called a corpus linguistics analysis, that is, an analysis of how particular combinations of words are used in a vast database of English prose. * * * If the series-qualifier canon were analyzed in this way, I suspect we would find that series qualifiers sometimes modify all the nouns or verbs in a list and sometimes modify just the last noun or verb. It would be interesting to see if the percentage of sentences in the first category is high enough to justify the canon. But no matter how the sentences with the relevant structure broke down, it would be surprising if “the sense of the matter” did not readily reveal the meaning in the great majority of cases. * * *

That is just my guess. Empirical evidence might prove me wrong, but that is not what matters. 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.

Appellate judges spend virtually every working hour speaking, listening to, reading, or writing English prose. 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.

For these reasons, I respectfully concur in the judgment.

## Questions and Comments

**1. Statutory interpretation question:** What was the phrase that the Court was trying to interpret? How did Facebook argue that it should be interpreted? How did Duguid argue that it should be interpreted?

**2. Series qualifier canon:** How should the phrase be interpreted according to the series qualifier canon?

**3. Doctrine of the last antecedent:** How should the phrase be interpreted under the "last antecedent" rule?

**4. Rationale of majority:** How did the majority interpret the language and why? Why does the majority reject the doctrine of the "last antecedent"?

**5. Concurring opinion:** Does Justice Alito believe that the majority's interpretation of the statute is not consistent with the series qualifier canon? What weight does he suggest courts should give to the canons of construction? What role does he suggest corpus linguistics could play in validating canons of construction?

**6. Do the canons reflect the way we use language?** Justice Alito's concurring opinion questions whether the canons accurately reflect the way that the public uses language. If the public doesn't use language in the manner in which the canons assume, interpreting statutes according to the canons will not provide clear notice to the public regarding the meaning of statutes. As noted earlier, Professors Kevin Tobia, Brian Slocum, and Victoria Nourse conducted empirical research on this issue and found that survey participants did not generally interpret language in ways consistent with the "last antecedent" rule, the disjunctive canon, or the "expressio unius" canon, which will be covered in the next part of this chapter. *See* Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Statutory Interpretation from the Outside*, 122 Col. L. Rev. 213, 271 (2022). There was strong evidence, however, to suggest that they interpreted language in ways consistent with the conjunctive canon, number canon, mandatory and discretionary canons, masculine gender canon, series qualifier canon, and the noscitur a sociis canon, which will be covered in the next part of this chapter. *Id.* There was some evidence to suggest that they interpreted language in ways consistent with the serial comma canon and the ejusdem generis canon (next chapter), but the evidence regarding the feminine gender canon was equivocal. *Id.*

**7. More recent canon proposals:** In addition to the canons identified above, academics have proposed canons addressing the use of "any," *see* James J. Brudney & Ethan J. Lieb, *Any,* 49 B.Y.U. L. Rev. 2 (2023), and the use of "causation" language. *See* Sandra F. Sperino, *The Causation Canon,* 108 Iowa L. Rev. 703 (2023).

# V. Textual Canons

There are several textual canons that courts use to interpret words in a statute based on their relation to other words in the same sentence or statutory provision. The most common (all with Latin names) are: (1) ***noscitur a sociis***; (2) ***ejusdem generis***; and (3) ***expressio unius***. In most cases, judges, regardless of the theory of interpretation that they employ, will utilize these canons to interpret language in a statute at the outset and will not defer the use of the canons until the court determines that the statutory language is ambiguous.[314]

## A. Noscitur A Sociis

According to the ***noscitur a sociis*** canon, a word "is known by its associates."[315] Words can have many meanings, so the noscitur a sociis canon counsels that the meaning of a word should be interpreted in the context of the words with which it is used.[316] The most common application of the canon is to limit the meaning of a general term to a subset of all of the things it covers.[317]

In some cases, the canon is applied to determine the meaning of a term included within a list. In those cases, the court tries to determine the shared trait among the items in the list. Thus, in *Jarecki v. G.D. Searle & Co.,* the Supreme Court determined that "discovery" in a tax statute that provided for special tax treatment of income "resulting from exploration, discovery, or prospecting" did not include income from products patented by a drug manufacturer and camera manufacturer.[318] Although the innovations patented by the companies were "discoveries" under one meaning of the word, the Court read the term "discovery" to be limited to "the discovery of mineral resources," since the term was used in context with exploration and prospecting.[319]

Since courts applying the canon interpret a word in a list based on the common traits that the word shares with the other words in the list, judges may disagree on the common trait that the other items in the list share, which can lead to disagreement regarding the proper interpretation of the word at issue. For instance, in *People v. Vasquez,* the Michigan Supreme Court was asked to determine whether a defendant who lied to a police officer about his age "obstructed" the officer within the meaning of a statute that imposed sanctions on any person who knowingly and wilfully "obstruct[ed], resist[ed], oppose[d],

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[314] *But see* Yates v. United States, 574 U.S. 528 (2015) (Kagan, J., dissenting) (arguing that noscitur a sociis and ejusdem generis should be used to "resolve ambiguity", rather than to help determine the meaning of a term).

[315] *See* Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961). *See also* Scalia & Garner, *supra* note 192, at 195.

[316] *See* SUTHERLAND, *supra* note 49, § 47.16, at 352.

[317] *See* Scalia & Garner, *supra* note 192, at 196. Alternatively, some academics suggest that its common application is to limit the meaning of a broad term to a more narrow subset of meaning.

[318] *See supra* note 71.

[319] *Id.*

assault[ed], beat or wound[ed]" an officer.[320] The majority concluded that the defendant did not obstruct the officer because all of the words used in the statutory provision involved threatened or actual physical interference, and lying to an officer did not involve such interference.[321] The dissent disagreed with the majority on the application of the noscitur a sociis canon to the words in the statute, arguing that all of the words used in the statute involved any interference with an officer, rather than physical interference, so lying to an officer involved interference.[322] If there is no common element shared by the items in a list, though, courts will not apply the canon.[323]

The canon is not limited to lists, though, and can be used when interpreting any word used in the context of another word. Thus, if the tax statute at issue in *Jarecki v. G.D. Searle & Co.* applied to income "resulting from prospecting or discovery," the Court could have applied the canon to interpret "discovery," even though it was not included in a list.

Similarly, in the following case, the Court relies on context to interpret language in a cost recovery statute, rather than looking for the common trait among a list of three or more items.

## LAGOS V. UNITED STATES

**138 S.Ct. 1684 (2018)**

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument Audio (From Oyez)
Mandatory Victims Restitution Act of 1996 (Title II of P.L. 104-132)
18 U.S.C. § 3663 (From LII)
Briefs in the Case – Scotus Blog

**JUSTICE BREYER** delivered the opinion of the Court.

The Mandatory Victims Restitution Act of 1996 requires defendants convicted of a listed range of offenses to

> "reimburse the victim for lost income and necessary child care, transportation, and other expenses *incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense*." 18 U. S. C. §3663A(b)(4) (emphasis added).

We must decide whether the words "investigation" and "proceedings" are limited to government investigations and criminal proceedings, or whether they include private investigations and civil proceedings. In our view, they are limited to government investigations and criminal proceedings.

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320 *See* 631 N.W.2d 711, 714 (Mich. 2001).
321 *Id*. at 716
322 *Id.*
323 *See Graham County Soil and Water Conservation Dist. V. U.S. ex rel. Wilson*, 559 U.S. 280 (2010).

I

The petitioner, Sergio Fernando Lagos, was convicted of using a company that he controlled (Dry Van Logistics) to defraud a lender (General Electric Capital Corporation, or GE) of tens of millions of dollars. The fraud involved generating false invoices for services that Dry Van Logistics had not actually performed and then borrowing money from GE using the false invoices as collateral. Eventually, the scheme came to light. Dry Van Logistics went bankrupt. GE investigated. The Government indicted Lagos. Lagos pleaded guilty to wire fraud. And the judge, among other things, ordered him to pay GE restitution.

The issue here concerns the part of the restitution order that requires Lagos to reimburse GE for expenses GE incurred during its own investigation of the fraud and during its participation in Dry Van Logistics' bankruptcy proceedings. The amounts are substantial (about $5 million), and primarily consist of professional fees for attorneys, accountants, and consultants. The Government argued that the District Court must order restitution of these amounts under the Mandatory Victims Restitution Act because these sums were "necessary . . . other expenses incurred during participation in the investigation . . . of the offense or attendance at proceedings related to the offense." §3663A(b)(4). The District Court agreed, as did the U. S. Court of Appeals for the Fifth Circuit. * * *

Lagos filed a petition for certiorari. And in light of a division of opinion on the matter, we granted the petition. * * *

II

The Mandatory Victims Restitution Act * * * requires * * * "reimburse[ment]" to "the victim for lost income and necessary child care, transportation, and other expenses *incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense*." §3663A(b)(4) (emphasis added).

We here consider the meaning of that italicized phrase. Specifically, we ask whether the scope of the words "investigation" and "proceedings" is limited to government investigations and criminal proceedings, or whether it includes private investigations and civil or bankruptcy litigation. We conclude that those words are limited to government investigations and criminal proceedings.

Our conclusion rests in large part upon the statute's wording, both its individual words and the text taken as a whole. The individual words suggest (though they do not demand) our limited interpretation. The word "investigation" is directly linked by the word "or" to the word "prosecution," with which it shares the article "the." This suggests that the "investigation[s]" and "prosecution[s]" that the statute refers to are of the same general type. And the word "prosecution" must refer to a government's criminal prosecution, which suggests that the word "investigation" may refer to a government's criminal investigation. A similar line of reasoning suggests that the immediately following reference to

"proceedings" also refers to criminal proceedings in particular, rather than to "proceedings" of any sort.

Furthermore, there would be an awkwardness about the statute's use of the word "participation" to refer to a victim's role in its own private investigation, and the word "attendance" to refer to a victim's role as a party in noncriminal court proceedings. A victim opting to pursue a private investigation of an offense would be more naturally said to "provide for" or "conduct" the private investigation (in which he may, or may not, actively "participate"). And a victim who pursues civil or bankruptcy litigation does not merely "atten[d]" such other "proceedings related to the offense" but instead "participates" in them as a party. In contrast, there is no awkwardness, indeed it seems perfectly natural, to say that a victim "participat[es] in the investigation" or "attend[s] . . . proceedings related to the offense" if the investigation at issue is a government's criminal investigation, and if the proceedings at issue are criminal proceedings conducted by a government.

Moreover, to consider the statutory phrase as a whole strengthens these linguistic points considerably. The phrase lists three specific items that must be reimbursed, namely, lost income, child care, and transportation; and it then adds the words, "and other expenses." §3663A(b)(4). Lost income, child care expenses, and transportation expenses are precisely the kind of expenses that a victim would be likely to incur when he or she (or, for a corporate victim like GE, its employees) misses work and travels to talk to government investigators, to participate in a government criminal investigation, or to testify before a grand jury or attend a criminal trial. At the same time, the statute says nothing about the kinds of expenses a victim would often incur when private investigations, or, say, bankruptcy proceedings are at issue, namely, the costs of hiring private investigators, attorneys, or accountants. Thus, if we look to *noscitur a sociis*, the well-worn Latin phrase that tells us that statutory words are often known by the company they keep, we find here both the presence of company that suggests limitation and the absence of company that suggests breadth. * * *

There are, of course, contrary arguments—arguments favoring a broad interpretation. The Government points out, in particular, that our narrow interpretation will sometimes leave a victim without a restitution remedy sufficient to cover some expenses (say, those related to his private investigation) which he undoubtedly incurred as a result of the offense. Leaving the victim without that restitution remedy, the Government adds, runs contrary to the broad purpose of the Mandatory Victims Restitution Act, namely, "to ensure that victims of a crime receive full restitution." * * *

But a broad general purpose of this kind does not always require us to interpret a restitution statute in a way that favors an award. After all, Congress has enacted many different restitution statutes with differing language, governing different circumstances. Some of those statutes specifically require restitution for the "full amount of the victim's losses," defined to include "any . . . losses suffered by the victim as a proximate result of the offense." See 18 U. S. C. §§2248(b), 2259(b), 2264(b), 2327(b). The Mandatory Victims Restitution Act, however, contains no such language; it specifically lists the kinds

of losses and expenses that it covers. Moreover, in at least one other statute Congress has expressly provided for restitution of "the value of the time reasonably spent by the victim in an attempt to remediate the intended or actual harm incurred by the victim from the offense." §3663(b)(6). Again the Mandatory Victims Restitution Act has no similar provision. And given those differences between the Mandatory Victims Restitution Act and other restitution statutes, we conclude that the considerations we have mentioned, particularly those based on a reading of the statute as a whole, tip the balance in favor of our more limited interpretation. * * *

For the reasons stated, we conclude that the words "investigation" and "proceedings" in the Mandatory Victims Restitution Act refer to government investigations and criminal proceedings. Consequently Lagos is not obliged to pay the portion of the restitution award that he here challenges.

## Questions and Comments

**1. Statutory interpretation question:** Is there a plain meaning argument to support a reading of "investigation" to include GE's investigations outside of the criminal prosecution and a reading of "proceeding" to include bankruptcy proceedings? If so, how does the Court use the "noscitur a sociis" canon to read those general terms more narrowly? How is the context in which the terms are used significant? Does the Court find that the language of the statute is ambiguous before applying the canon?

**2. Purpose:** Why did the government argue that an award of restitution for the costs of private investigations and civil proceedings would advance the purpose of the statute? Does the majority ignore the purpose of the statute? Why is the majority looking at the language used in other restitution statutes?

**3. Conflict with the rule against surplusage and the disjunctive canon:** The next part of this chapter (after this part focusing on textual canons) will focus on several structural canons, including a canon that provides that statutes should be interpreted in ways that give independent meaning to each word in the statute (the rule against surplusage). Note, though, that there could be a tension between that canon and noscitur a sociis when a court is interpreting a word used in a list and the interpretation of the word consistent with the other words in the list under noscitur a sociis seems duplicative of one or more words used in the list. Application of the noscitur a sociis canon would suggest that the court should interpret the word in the potentially duplicative manner, while the rule against surplusage would suggest that the word should be interpreted in a broader manner that gives it meaning independent of the other words in the list.

Similarly, the noscitur a sociis canon may conflict with the disjunctive canon. After all, application of the disjunctive canon would suggest that when items are connected by an "or", the items are independent and the statutory provision applies to *any* of the items. To the extent that the noscitur a sociis canon counsels judges to read words in a statute narrowly to be consistent with other words with which the language is used, it reduces the extent to which separate items have independent meaning.

**4. Legislative drafters and the general public:** Based on their survey of legislative drafters, Professors Abbe Gluck and Lisa Schultz Bressman concluded that most drafters were not aware of the name given to the noscitur a sociis canon, or its close relative, the ejusdem generis canon, but that most drafters employed the principles behind the canons in drafting. *See* Abbe R. Gluck and Lisa Schultz Bressman, *Statutory Interpretation from the Inside - An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 932-933 (2013). Similarly, in their research on language use, Professors Kevin Tobia, Brian Slocum, and Victoria Nourse found strong evidence to suggest that survey participants interpreted language in ways consistent with the noscitur a sociis canon and some evidence that they interpreted language in ways consistent with the ejusdem generis canon. *See* Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Statutory Interpretation from the Outside*, 122 Col. L. Rev. 213, 271 (2022).

## B. Ejusdem Generis

***Ejusdem generis*** is closely related to the noscitur a sociis canon and is, in fact, a specific application of the canon in a narrower context. Pursuant to the ejusdem generis canon (from the Latin phrase meaning "of the same kind, class, or nature"), "[w]here general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned" in the enumeration.[324] Accordingly, if a statute prohibited "cats, dogs, or other animals" in a park, the canon would require courts to interpret "animals" to be limited to "animals" that were similar (in some way) to cats and dogs.[325] Although the canon is applied most frequently when the general words ***follow*** a list, it may be applied when the general words precede a list.[326]

Justice Scalia suggested that there are two rationales for the application of the canon: (1) "When the initial terms all belong to an obvious and readily identifiable genus, one presumes that the speaker or writer has that category in mind for the entire passage"; and (2) when the residual term "is given its broadest application, it renders the prior enumeration superfluous."[327] As noted above, the canon is limited to cases in which a residual term is used with at least two other items in a list. Thus, the Supreme Court refused to apply the canon to interpret a provision of the Federal Tort Claims Act that addressed the waiver of sovereign immunity relating to the "detention of * * * any property

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[324] *See* Scalia & Garner, *supra* note 192, at 199. *See also Hall Street Associates, L.L.C. v. Mattel, Inc.,* 552 U.S. 576, 586 (2008). Some articulations of the canon refer to "catch-alls" or "residual terms", as opposed to "general terms."

[325] Justice Kavanaugh has criticized the application of the canon to the hypothetical legislation above, asserting, "That does not make a whole lot of sense to me. Why not read 'other animals' to mean 'other animals'?" *See* Kavanaugh, *supra* note 249, at 2160. Justice Kagan makes a similar argument in her dissent in the *Yates* case that follows this introduction to ejusdem generis.

[326] *See* 2A SUTHERLAND, *supra* note 49, §47.17 However, Justice Scalia strongly criticized courts and academics who advocated application of the canon when general words precede a list. *See* Scalia & Garner, *supra* note 192, at 202-205.

[327] *See* Scalia & Garner, *supra* note 192, at 199-200.

by any officer of customs of excise or any other law enforcement officer."[328] Writing for the Court in *Ali v. Bureau of Federal Prisons*, Justice Thomas argued that "[t]he phrase is disjunctive, with one specific and one general category, not * * * a list of specific items separated by commas and followed by a general or collective term."[329]

Application of the canon raises many of the same issues as are raised by application of the noscitur a sociis canon. Most importantly, there may frequently be disagreement between judges regarding the "common trait" that applies to all of the items in a list that accompanies a residual or catch-all term. For instance, in *Circuit City Stores, Inc. v. Adams,* the Supreme Court was called upon to decide whether retail employees were exempt from mandatory arbitration requirements under an exception that applied to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[330] Relying on ejusdem generis, the majority concluded that "any other class of workers engaged in foreign or interstate commerce" was limited to workers in transportation-related jobs, since the other terms used in the statutory provision, seamen and railroad employees, were engaged in transportation-related jobs.[331] The dissent, however, read the exemption to apply to workers engaged in interstate commerce, regardless of whether their jobs were transportation-related.[332] As was the case with noscitur a sociis, courts will not apply the canon if the items included in a list do not share some common trait. In that case, courts will apply the residual term in its broad context.

The following case involves the application of the ejusdem generis canon as well as the noscitur a sociis canon.

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328 *See Ali v. Bureau of Federal Prisons,* 552 U.S. 214, 218 (2008).

329 *Id.* at 225. Justice Thomas implicitly, rather than explicitly, must have concluded that the phrase "officer of customs of excise" referred to one specific type of officer, as opposed to "officers of customs" or "officers of excise" as separate types of officers. See Scalia & Garner, supra note 192, at 207. If he adopted the latter interpretation, the term "other law enforcement officer" would have been used in a list of at least two other terms.

330 *See* 532 U.S. 105 (2001).

331 *Id.* at 109.

332 *Id.* at 137-140 (Souter, J., dissenting). The dissent did not search for another common trait among the listed terms, but rather rejected the application of the ejusdem generis canon in favor of the ordinary meaning reading of the text.

Red Grouper Photo – Public Domain

## YATES V. UNITED STATES

**574 U.S. 528 (2015)**

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument Audio (From Oyez)
Sarbanes-Oxley Act of 2002 (P.L.107-204)
18 U.S.C. § 1519 (From LII)
Case Background (From Quimbee)
New York Times Story (w/photo)
Information about the boat
Briefs in the Case – Scotus Blog

**JUSTICE GINSBURG** announced the judgment of the Court and delivered an opinion, in which **THE CHIEF JUSTICE**, **JUSTICE BREYER**, and **JUSTICE SOTOMAYOR join**.

John Yates, a commercial fisherman, caught undersized red grouper in federal waters in the Gulf of Mexico. To prevent federal authorities from confirming that he had harvested undersized fish, Yates ordered a crew member to toss the suspect catch into the sea. For this offense, he was charged with, and convicted of, violating18 U.S.C. §1519, which provides:

> "Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both."

* * * Yates * * * maintains that fish are not trapped within the term "tangible object," as that term is used in §1519.

Section 1519 was enacted as part of the Sarbanes-Oxley Act of 2002,* * * legislation designed to protect investors and restore trust in financial markets following the collapse of Enron Corporation. A fish is no doubt an object that is tangible; fish can be seen, caught, and handled, and a catch, as this case illustrates, is vulnerable to destruction.

But it would cut §1519 loose from its financial-fraud mooring to hold that it encompasses any and all objects, whatever their size or significance, destroyed with obstructive intent. Mindful that in Sarbanes-Oxley, Congress trained its attention on corporate and accounting deception and cover-ups, we conclude that a matching construction of §1519 is in order: A tangible object captured by §1519, we hold, must be one used to record or preserve information.

I

[On August 23, 2007, officers of the Florida Fish and Wildlife Conservation Commission boarded the Miss Katie, a commercial fishing boat captained by Yates, to conduct an inspection of the boat for compliance with federal and state fishing laws and rules. During the inspection, the wildlife inspectors identified 72 red grouper that appeared to be less than 20 inches long, the minimum length allowed under federal conservation regulations, and placed them in crates separated from the rest of the catch. After the boat docked in Cortez, Florida, the fish in the crates had been replaced with other fish, and a crew member of the boat admitted to wildlife inspectors that he had, at Yates' direction, thrown overboard the undersized red grouper and replaced them with fish from the rest of the catch. Yates was subsequently indicted for destroying, concealing and covering up the fish to impede a federal investigation in violation of §1519. The trial court concluded that "tangible object" in Section 1519 included the fish that were destroyed and sentenced Yates to imprisonment for 30 days for violating the statute. The Eleventh Circuit affirmed and the Supreme Court granted certiorari.]

II

* * *

B

Familiar interpretive guides aid our construction of the words "tangible object" as they appear in §1519. * * * The words immediately surrounding "tangible object" in §1519—"falsifies, or makes a false entry in any record [or] document"—also cabin the contextual meaning of that term. * * * [W]e rely on the principle of noscitur a sociis—a word is known by the company it keeps—to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." * * * "Tangible object" is the last in a list of terms that begins "any record [or] document." The term is therefore appropriately read to refer, not to any tangible object, but specifically to the subset of tangible objects involving records and documents, i.e., objects used to record or preserve information. * * *

This moderate interpretation of "tangible object" accords with the list of actions §1519 proscribes. The section applies to anyone who "alters, destroys, mutilates, conceals, covers up, *falsifies, or makes a false entry in* any record, document, or tangible object" with the requisite obstructive intent. (Emphasis added). The last two verbs, "falsif[y]" and "mak[e] a false entry in," typically take as grammatical objects records, documents, or

things used to record or preserve information, such as logbooks or hard drives. See, e.g., Black's Law Dictionary 720 (10th ed. 2014) (defining "falsify" as "[t]o make deceptive; to counterfeit, forge, or misrepresent; esp., to tamper with (a document, record, etc.)"). It would be unnatural, for example, to describe a killer's act of wiping his fingerprints from a gun as "falsifying" the murder weapon. But it would not be strange to refer to "falsifying" data stored on a hard drive as simply "falsifying" a hard drive. * * *

A canon related to noscitur a sociis, ejusdem generis, counsels: "Where general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." * * * Had Congress intended "tangible object" in §1519 to be interpreted so generically as to capture physical objects as dissimilar as documents and fish, Congress would have had no reason to refer specifically to "record" or "document." The Government's unbounded reading of "tangible object" would render those words misleading surplusage.

Having used traditional tools of statutory interpretation to examine markers of congressional intent within the Sarbanes-Oxley Act and §1519 itself, we are persuaded that an aggressive interpretation of "tangible object" must be rejected. It is highly improbable that Congress would have buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial record-keeping.

[The Court also relied on the rule of lenity to read the statute narrowly.]

**JUSTICE ALITO**, concurring in the judgment.

This case can and should be resolved on narrow grounds. And though the question is close, traditional tools of statutory construction confirm that John Yates has the better of the argument. Three features of 18 U.S.C. §1519 stand out to me: the statute's list of nouns, its list of verbs, and its title. Although perhaps none of these features by itself would tip the case in favor of Yates, the three combined do so.

Start with the nouns. Section 1519 refers to "any record, document, or tangible object." The noscitur a sociis canon instructs that when a statute contains a list, each word in that list presumptively has a "similar" meaning. * * * A related canon, ejusdem generis teaches that general words following a list of specific words should usually be read in light of those specific words to mean something "similar." * * * Applying these canons to §1519's list of nouns, the term "tangible object" should refer to something similar to records or documents. A fish does not spring to mind—nor does an antelope, a colonial farmhouse, a hydrofoil, or an oil derrick. All are "objects" that are "tangible." But who wouldn't raise an eyebrow if a neighbor, when asked to identify something similar to a "record" or "document," said "crocodile"?

This reading, of course, has its shortcomings. For instance, this is an imperfect ejusdem generis case because "record" and "document" are themselves quite general. And there is a risk that "tangible object" may be made superfluous—what is similar to a "record" or

"document" but yet is not one? An e-mail, however, could be such a thing. * * * An e-mail, after all, might not be a "document" if, as was "traditionally" so, a document was a "piece of paper with information on it," not "information stored on a computer, electronic storage device, or any other medium." Black's Law Dictionary 587–588 (10th ed. 2014). E-mails might also not be "records" if records are limited to "minutes" or other formal writings "designed to memorialize [past] events." * * * A hard drive, however, is tangible and can contain files that are precisely akin to even these narrow definitions. Both "record" and "document" can be read more expansively, but adding "tangible object" to §1519 would ensure beyond question that electronic files are included. To be sure, "tangible object" presumably can capture more than just e-mails; Congress enacts "catchall[s]" for "known unknowns." * * * But where noscitur a sociis and ejusdem generis apply, "known unknowns" should be similar to known knowns, i.e., here, records and documents. This is especially true because reading "tangible object" too broadly could render "record" and "document" superfluous.

Next, consider §1519's list of verbs: "alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in." Although many of those verbs could apply to nouns as far-flung as salamanders, satellites, or sand dunes, the last phrase in the list—"makes a false entry in"—makes no sense outside of filekeeping. How does one make a false entry in a fish? "Alters" and especially "falsifies" are also closely associated with filekeeping. Not one of the verbs, moreover, cannot be applied to filekeeping—certainly not in the way that "makes a false entry in" is always inconsistent with the aquatic. * * *

[Justice Alito then argued that the title of Section 1519, "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy", suggested that the scope of the term "tangible object" should be limited to things that are similar to records.]

**JUSTICE KAGAN**, with whom **JUSTICE SCALIA**, **JUSTICE KENNEDY**, and **JUSTICE THOMAS** join, dissenting.

A criminal law,18 U. S. C. §1519, prohibits tampering with "any record, document, or tangible object" in an attempt to obstruct a federal investigation. This case raises the question whether the term "tangible object" means the same thing in §1519 as it means in everyday language—any object capable of being touched. The answer should be easy: Yes. The term "tangible object" is broad, but clear. Throughout the U. S. Code and many States' laws, it invariably covers physical objects of all kinds. And in §1519, context confirms what bare text says: All the words surrounding "tangible object" show that Congress meant the term to have a wide range. That fits with Congress's evident purpose in enacting §1519: to punish those who alter or destroy physical evidence—any physical evidence—with the intent of thwarting federal law enforcement.

The plurality instead interprets "tangible object" to cover "only objects one can use to record or preserve information." * * * The concurring opinion similarly, if more vaguely, contends that "tangible object" should refer to "something similar to records or documents"—and shouldn't include colonial farmhouses, crocodiles, or fish. * * * In my

view, conventional tools of statutory construction all lead to a more conventional result: A "tangible object" is an object that's tangible. I would apply the statute that Congress enacted and affirm the judgment below.

[In Part I, the dissenting Justices argue that (1) the ordinary meaning of "tangible object" clearly includes fish; (2) the term "tangible object" in other statutes has consistently been interpreted broadly in accordance with its ordinary meaning; (3) Congress' use of the term "any" preceding the list of items that includes "tangible object" demonstrates Congress' intent that the items in the list be interpreted broadly; (4) the three item list in Section 1519 is similar to lists used in other federal statutes that have been interpreted broadly; and (5) the legislative history and purpose of the statute support a broad reading of "tangible object."]

II

A

The plurality searches far and wide for anything—anything—to support its interpretation of §1519. But its fishing expedition comes up empty. * * * [The dissenting Justices then rebut the plurality's reliance on titles and the rule against surplusage to support its narrow interpretation of "tangible object.]

Getting nowhere with surplusage, the plurality switches canons, hoping that noscitur a sociis and ejusdem generis will save it. * * * The first of those related canons advises that words grouped in a list be given similar meanings. The second counsels that a general term following specific words embraces only things of a similar kind. According to the plurality, those Latin maxims change the English meaning of "tangible object" to only things, like records and documents, "used to record or preserve information." * * * But understood as this Court always has, the canons have no such transformative effect on the workaday language Congress chose.

As an initial matter, this Court uses noscitur a sociis and ejusdem generis to resolve ambiguity, not create it. Those principles are "useful rule[s] of construction where words are of obscure or doubtful meaning." * * * But when words have a clear definition, and all other contextual clues support that meaning, the canons cannot properly defeat Congress's decision to draft broad legislation. * * *

Anyway, assigning "tangible object" its ordinary meaning comports with noscitur a sociis and ejusdem generis when applied, as they should be, with attention to §1519's subject and purpose. Those canons require identifying a common trait that links all the words in a statutory phrase. * * * In responding to that demand, the plurality characterizes records and documents as things that preserve information—and so they are. But just as much, they are things that provide information, and thus potentially serve as evidence relevant to matters under review. And in a statute pertaining to obstruction of federal investigations, that evidentiary function comes to the fore. The destruction of records and documents prevents law enforcement agents from gathering facts relevant to official

inquiries. And so too does the destruction of tangible objects - of whatever kind. Whether the item is a fisherman's ledger or an undersized fish, throwing it overboard has the identical effect on the administration of justice. * * * For purposes of §1519, records, documents, and (all) tangible objects are therefore alike. * * *

And the plurality's invocation of §1519's verbs does nothing to buttress its canon-based argument. * * * The plurality observes that §1519 prohibits "falsif[ying]" or "mak[ing] a false entry in" a tangible object, and no one can do those things to, say, a murder weapon (or a fish). * * * But of course someone can alter, destroy, mutilate, conceal, or cover up such a tangible object, and §1519 prohibits those actions too. The Court has never before suggested that all the verbs in a statute need to match up with all the nouns. * * * And for good reason. It is exactly when Congress sets out to draft a statute broadly—to include every imaginable variation on a theme—that such mismatches will arise. To respond by narrowing the law, as the plurality does, is thus to flout both what Congress wrote and what Congress wanted. * * *

B

The concurring opinion is a shorter, vaguer version of the plurality's. It relies primarily on the noscitur a sociis and ejusdem generis canons, tries to bolster them with §1519's "list of verbs," and concludes with the section's title. * * * From those familiar materials, the concurrence arrives at the following definition: " 'tangible object' should mean something similar to records or documents." * * * In amplifying that purported guidance, the concurrence suggests applying the term "tangible object" in keeping with what "a neighbor, when asked to identify something similar to record or document," might answer. * * * "[W]ho wouldn't raise an eyebrow," the concurrence wonders, if the neighbor said "crocodile"? * * * Courts sometimes say, when explaining the Latin maxims, that the "words of a statute should be interpreted consistent with their neighbors." * * * The concurrence takes that expression literally.

But §1519's meaning should not hinge on the odd game of Mad Libs the concurrence proposes. No one reading §1519 needs to fill in a blank after the words "records" and "documents." That is because Congress, quite helpfully, already did so—adding the term "tangible object." The issue in this case is what that term means. So if the concurrence wishes to ask its neighbor a question, I'd recommend a more pertinent one: Do you think a fish (or, if the concurrence prefers, a crocodile) is a "tangible object"? As to that query, "who wouldn't raise an eyebrow" if the neighbor said "no"?

In insisting on its different question, the concurrence neglects the proper function of catchall phrases like "or tangible object." The reason Congress uses such terms is precisely to reach things that, in the concurrence's words, "do[ ] not spring to mind"—to my mind, to my neighbor's, or (most important) to Congress's. * * * As this Court recently explained: "[T]he whole value of a generally phrased residual [term] is that it serves as a catchall for matters not specifically contemplated—known unknowns." * * * Congress realizes that in a game of free association with "record" and "document," it will never think

of all the other things—including crocodiles and fish—whose destruction or alteration can (less frequently but just as effectively) thwart law enforcement. * * * And so Congress adds the general term "or tangible object"—again, exactly because such things "do[ ] not spring to mind."

The concurrence suggests that the term "tangible object" serves not as a catchall for physical evidence but to "ensure beyond question" that e-mails and other electronic files fall within §1519's compass. * * * But that claim is eyebrow-raising in its own right. Would a Congress wishing to make certain that §1519 applies to e-mails add the phrase "tangible object" (as opposed, say, to "electronic communications")? Would a judge or jury member predictably find that "tangible object" encompasses something as virtual as e-mail (as compared, say, with something as real as a fish)? If not (and the answer is not), then that term cannot function as a failsafe for e-mails.

The concurrence acknowledges that no one of its arguments can carry the day; rather, it takes the Latin canons plus §1519's verbs plus §1519's title to "tip the case" for Yates. * * * But the sum total of three mistaken arguments is . . . three mistaken arguments. They do not get better in the combining. And so the concurrence ends up right where the plurality does, except that the concurrence, eschewing the rule of lenity, has nothing to fallback on. * * *

[In Part III, the dissenting Justices argue that the plurality read the statute as it did because it felt that the law would impose disproportionate penalties if it were interpreted broadly. The real issue for the plurality, the dissenting Justices argue, is over-criminalization and excessive punishment in the U.S. Code. The dissenting Justices do not agree that reading the term "tangible object" according to its ordinary meaning would lead to over-criminalization and excessive punishment, but they argue that even if it did, "this Court does not get to rewrite the law."]

## Questions and Comments

**1. Statutory interpretation question:** What is the statutory interpretation question that the Court is trying to resolve? Note that Justice Ginsburg's opinion is a plurality opinion.

**2. Noscitur a sociis v. ejusdem generis:** How did the plurality interpret "tangible object" and how did it justify its decision based on noscitur a sociis and ejusdem generis? Can you distinguish the way the plurality used noscitur a sociis as opposed to ejusdem generis? Did the plurality use ejusdem generis to determine the meaning of a term in the list of verbs based on the other verbs used in the list? If not, how were the verbs relevant? Note that Justice Alito, in his concurrence, amplifies the plurality's argument regarding the verbs.

**3. Purpose and the common trait:** Does the plurality consider the purpose of the statute when identifying the common trait shared by the items in the list that includes "tangible object"? What did the plurality consider as the purpose of the statute?

**4. Surplusage:** How does the plurality use the rule against surplusage (which will be explored more fully in the next part of this chapter) to support its interpretation of "tangible object"? Justice Alito, in his concurrence, also addresses the surplusage question. What items does he believe Congress might have wanted to address as "tangible objects" that aren't records or documents?

**5. Ordinary meaning and use of the canons:** Does the dissent believe that the ordinary meaning of "tangible object" is clear or ambiguous? Does the dissent believe that canons like noscitur a sociis and ejusdem generis should be used to determine whether the ordinary meaning of language is clear or ambiguous?

**6. Dissent and the textual canons:** If it is necessary to examine textual canons to interpret "tangible object," how does the dissent suggest judges should identify the common trait of items for ejusdem generis and noscitur a sociis and how does that impact the dissent's reading of the meaning of "tangible object"? How does the dissent define "tangible object"? How does the dissent address the "verb" argument of the plurality and Justice Alito? How does the dissent address Justice Alito's suggestion that Congress added "tangible object" to address e-mails?

**7. What's really going on:** What does the dissent believe is the true motivation for the plurality's conclusion? Does the dissent feel the plurality is acting appropriately in its judicial role?

## C. Expressio Unius

"Expressio unius est exlusio alerius" roughly translates to "the inclusion of one thing means the exclusion of another."[333] The operation of the ***expressio unius*** canon, sometimes referred to as the negative implication canon[334], is probably best understood through an example. If a legislature enacts a law that prohibits the operation of "cars, trucks, motorcycles, and mopeds" on the sidewalk, a court applying the canon would likely find that the law does not prohibit bicycles or skateboards on the sidewalk.

When there is an omission in a statute, as there is in the example above when the statute does not address bicycles or skateboards, there are at least three distinct possibilities regarding legislative intent. Either (1) the legislature did not think about whether to prohibit the operation of bicycles or skateboards on the sidewalk, so the legislature did not address the issue in the statute; (2) the legislature thought about the issue, but could not reach agreement on whether to prohibit the operation of bicycles or skateboards on the sidewalk, so the legislature did not address the issue in the statute; or (3) the legislature did not want to prohibit the operation of bicycles or skateboards on the sidewalk, so the legislature intentionally did not include them in the list of prohibited vehicles in the statute when it had the opportunity to include them.

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333 *See* Jellum, *supra* note 165, at 302.

334 *See* Scalia & Garner, *supra* note 192, at 107.

The expressio unius canon is based on the third assumption above (i.e. that the omissions in statutes are intentional). Thus, under the canon, when a statutory provision explicitly expresses or includes particular things, things that are not expressly included are excluded.

The canon is applied most frequently when the legislature includes a list in a statute and the list does not include a residual (catch-all) item. However, the Supreme Court has counseled that the canon "does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence."[335] Thus, the canon is generally only applied to lists when there is some commonality among the items included in the list (so that the court can limit exclusions from the scope of the statute to items similar to the items included in the list, but not explicitly listed in the statute). The canon has more force as the enumeration of items in a statute becomes more specific.[336]

Although the canon applies most frequently when a court is interpreting a statutory provision that includes a list, the canon is not limited to those situations. For instance, imagine a legislature enacted an environmental statute that (1) prohibited industries from discharging pollution into rivers, lakes, and streams unless the industries obtained a permit; (2) required industries to file annual reports with the government that disclosed the amount of pollution that the industries discharged into rivers, lakes, and streams; and (3) required industries to reduce the amount of pollution that the industries discharged into rivers, lakes, and streams by at least 10% each year for five years. If the statute included a provision that explicitly authorized individuals to sue industries when the industries did not file the reports required by the statute, but the statute did not include any other provision that authorized individuals to sue industries for any other statutory violation, a court might apply the expressio unius canon to determine that the legislature did not intend to authorize individuals to sue industries for discharging pollution without obtaining a permit or for failing to reduce their pollution discharges by 10% each year.

As with all of the textual canons, the expressio unius canon is not a bright line rule and application of the canon is very dependent on context.

As noted above, the canon is based on an assumption that when there is an omission in a statute, the legislature explicitly considered everything that was omitted from the statute and intentionally left the omitted material out of the statute. Although the study conducted by Professors Gluck and Bressman indicated that the canon is one of the canons most recognized by legislative drafters and that they generally draft statutes with the canon in mind[337], many courts and academics have criticized the canon because it does not reflect

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335 *See* Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2008); Chevron U.S.A. Inc. v. Echaxabal, 536 U.S. 73, 81 (2002).

336 *See* Scalia & Garner, *supra* note 192, at 108.

337 *See* Gluck & Bressman, *supra* note 152 at 932-933.

the realities of legislative drafting.[338] The research conducted by Professors Tobia, Slocum, and Nourse provides further basis for challenge to the canon, as it demonstrates that members of the public do not normally interpret language in ways that are consistent with the expressio unius canon.[339] Despite the criticisms, the canon continues to be used widely.

**CALI SECTION QUIZ**

Before moving on to the next section, why not try a short quiz on the material you just read at www.cali.org/lesson/19756. It should take about 10 minutes to complete.

## Problem 4-3

In 1951, the Ames legislature enacted the Aircraft Passenger Safety Law, which included the following provisions:

**Section 1. Findings and Purposes**

(a) Commercial airline accidents in Ames over the past decade have injured hundreds of persons, including passengers and persons on the ground, and have caused millions of dollars of property damage.

(b) Although many accidents were caused by commercial aircraft, smaller private aircraft can cause harm to persons or property when they are not operated in a safe manner and regulation of all aircraft under this law is necessary to protect the health, safety and welfare of persons in and around aircraft.

[338] *See, Silvers v. Sony Pictures Entertainment, Inc.*, 402 F.3d 881, 899 (9th Cir. 2005) (referring to the canon as a generalization about language rather than a rule of construction); *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 676 (D.C. Cir. 1973) (finding the canon unreliable because "it stands on the faulty premise that all possible alternative or supplemental provisions were necessarily considered and rejected by the legislative draftsmen."). *See also* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 Duke L. J. 1215, 1250 (2001) ("Law professors consider [the] canon unreliable or … bogus.")

[339] *See* Tobia, Slocum & Nourse, supra note 260, at 261, 271.

**Problem 4-3 (continued)**

**Section 2. Prohibited conduct**

No person may operate a jet, biplane, turboprop, hot air balloon, blimp, helicopter, seaplane, or any other aircraft in a reckless or careless manner so as to endanger the life or property of any other person or the quiet enjoyment of any person's property.

In January of this year, Cindy Brady, a private investigator, was operating a drone (an unmanned flying device) to conduct surveillance. Unfortunately, while Brady was operating the remote controls for the drone, she was distracted by an incoming call on her cell phone and she crashed the drone into a grocery store window, injuring several shoppers and causing hundreds of dollars worth of damage to the store. The drone that Brady was using weighed 5 pounds, and most drones, other than military drones or drones used for commercial purposes, weigh less than 55 pounds.

The Ames Attorney General, who enforces the Ames Aircraft Passenger Safety Law, filed a complaint alleging that Brady violated Section 2 of the law. Assuming that Brady does not contest that she was operating the drone in a reckless or careless manner, how might you argue that she did not violate the statute and how would the State argue that she violated the statute?

It will be probably be helpful to know that Dictionary.com defines "aircraft" as "a machine capable of flying by means of buoyancy or aerodynamic forces" and the New American Dictionary (1945 ed.) defined "aircraft" as "a machine capable of transporting persons through the air."

# VI. Structural Canons

The structural canons of construction are the final category of ***intrinsic aids*** to statutory interpretation and include: (1) ***the whole act rule***; (2) ***the canon of consistent usage and meaningful deviation***; (3) ***the surplusage canon***; and (4) rules addressing the significance of ***preambles, titles, provisos, and purpose statements***. All of these canons prompt courts to consider the relationship of the statutory provision being interpreted to other provisions of the statute when interpreting the provision. The overriding principle behind all the canons is that the provision being interpreted must be interpreted in the context of the structure of the statute. Most of the canons assume that "the provisions of statutes fit together into a coherent whole."[340]

[340] *See* Richard E. Levy & Robert L. Glicksman, STATUTORY ANALYSIS IN THE REGULATORY STATE, 125 (Foundation Press ed. 2014).

## A. The Whole Act Rule

> "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."
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> *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)

The foundational structural canon, ***the whole act rule***, provides that statutory language should not be read in isolation, but must be interpreted in the context of all the provisions in the statute and the design of the statute as a whole.[341] The Supreme Court has applied the canon since the beginning of the nineteenth century.[342] As the Court noted more recently, under the whole act rule, "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes the meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."[343]

The canon is based on the presumption that the legislature enacts statutes as a single, integrated coherent document, using language consistently throughout, intending that the various provisions in the statute work together.[344] Accordingly, "any attempt to segregate any portion or exclude any other portion from consideration is almost certain to distort the legislative intent."[345] The presumption that underlies the canon is also the basis for ***the whole code rule***, a related canon that focuses on interpreting statutory provisions in relation to provisions in ***other statutes***.[346] Since the whole code rule focuses on extrinsic sources of statutory interpretation, it is addressed in the next chapter of this book.

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341 *See* *Dada v. Mukasey*, 554 U.S. 1, 16 (2008); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). In opinions that adopt a purposivist tone, the Court sometimes suggests that the statute should, under the whole act rule, look at the design of the statute as a whole "and to its object and policy." *See* *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991).

342 *See* *United States v. Fisher*, 6 U.S.(2 Cranch) 358 (1805).

343 *See* *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

344 *See* 2A Sutherland, *supra* note 49, §47.02.

345 *Id.*

346 The whole act rule and whole code rule are both rules that counsel courts to interpret statutes "in pari materia." "In pari materia", another Latin statutory interpretation phrase, means "on the same subject or matter." *See* In pari materia, *Merriam-Webster.com legal dictionary*, https://www.merriam-webster.com/legal/in%20pari%20materia As Professor Linda Jellum has observed, "in pari materia answers the question of which parts of an act or statutes in the entire code are relevant to the meaning of language in a particular statute." *See* Jellum, *supra* note 165, at 256.

Although the canon is a foundational canon, it has not avoided criticism. Most of the criticism is focused on the presumption that legislatures enact statutes as a coherent whole. Professors Richard Levy and Robert Glicksman, for example, argue:

> "the assumption of statutory coherence may not always be a valid one, especially in very large and complicated statutes. Although statutes are often drafted with care, the process of amendment and compromise may disrupt coherence. Thus, for example, the initial version of a bill may be drafted as a coherent whole, but an amendment added on the floor * * * might use different terminology or might be intended to undermine rather than further the statutory objectives. Sometimes, when the House and Senate versions of a bill are reconciled, the compromise involves mixing provisions from two different bills, which may introduce linguistic inconsistencies and functional incompatibilities."[347]

Professors Gluck and Bressman's survey of legislative drafters confirmed the criticisms of the canon, as the drafters emphasized that "the committee system, bundled legislative deals, and lengthy, multi-drafter statutes" undermine the assumption that underlies the whole act and whole code rules.[348]

The manner in which statutes are codified also complicates the application of the whole act rule. As noted in Chapter 2, at the federal level, after statutes are enacted, they are not codified in the same form in which they were enacted. Instead, provisions of a statute may be scattered across several sections of the code, reordered and renumbered, relegated to notes in the U.S. Code, or left out of the Code entirely. Thus, a judge applying the whole act rule to a federal statute cannot simply peruse the code sections surrounding the provision being interpreted, but should examine the Public Law that was enacted and published in the Statutes at Large in order to fully understand the design and structure of the statute and the context in which the statutory provision should be interpreted.[349]

Despite all the criticisms, judges using all theories of interpretation routinely begin their textual analysis with a reminder that courts must not read the text in isolation, but must read it in the context of the whole statute. Most of the other canons discussed in this part

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[347] *See* Levy & Glicksman, *supra* note 340, at 125. Similarly, addressing the assumption of a single legislative drafter and coherent legislation, Professor Linda Jellum argues that "[t]o suggest that one drafter … wrote the bill with internal consistency simply ignores the reality of the legislation process." *See* Jellum, *supra* note 165, at 258.

[348] *See* Gluck & Bressman, *supra* note 152, at 936. The assumption is even more of a fiction when applied to statutes developed through the unorthodox methods described in Chapter 2.

[349] In discussing the codification process, Professor Jarrod Shobe also notes that several titles of the U.S. Code have been codified as "positive law", with Congress intentionally choosing the organization and content of the titles, while other titles have not. *See* Shobe, *Codification and the Hidden Work of Congress*, supra note 126, at 657-658. Accordingly, he argues that "[a] much stronger version of the whole act rule and other continuity canons should apply to positive law enactments than nonpositive law enactments … [because] presumptions about the coherency and organization of [the positive law titles] can accurately be attributed to Congress." *Id.* at 647.

of the chapter are corollaries of the whole act rule, based on the idea that the legislature acted consistently and coherently in drafting the statute being interpreted.

## B. The Canon of Consistent Usage and Meaningful Deviation

The ***canon of consistent usage and meaningful deviation*** is a corollary to the whole act rule and incorporates two related principles. First, the canon provides that "[i]dentical words and phrases within the same statute should normally be given the same meaning"[350] (***consistent usage***). Thus, in *Commissioner of Internal Revenue v. Lundy*, the United States Supreme Court concluded that the term "claim" in 26 U.S.C. § 6512(b)(3) did not mean "a claim filed on a return" because the term "claim" was also used in 26 U.S.C. § 6511(a) in a way that made it clear that it could not mean "a claim filed on a return" for purposes of Section 6511(a) and the Court felt that Congress intended the term to have the same meaning in both sections of the Tax Code.[351] Second, the canon provides that when a legislature uses different words or phrases in different parts of a statute, the words or phrases have different meanings (***meaningful deviation***).[352] Thus, in *Lawrence v. Florida*, the Supreme Court noted that it was not necessary to interpret "pending" in 28 U.S.C. § 2244(d)(2) consistently with 28 U.S.C. § 2244(d)(1)(A) because the two sections used much different language.[353]

The context in which the words being interpreted are used throughout the statute is particularly significant in the case of this canon, and the Supreme Court has stressed that the consistent use presumption in the canon is "not rigid and readily yields whenever there is such variation in the connection in which the words are used as to reasonably warrant the conclusion that they were employed in different parts of the act with different

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350 *See* *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 231 (2007). *See also* *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990).

351 *See* 516 U.S. 235, 249-250 (1996).

352 *See* P. St. J. Langan, *Maxwell on the Interpretation of Statutes* 282 (12 ed. 1969) [hereinafter "Maxwell"]; *Lawrence v. Florida*, 549 U.S. 327, 333-334 (2007); *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 388-397 (1805).

353 *See* 549 U.S. at 333-334. In interpreting some statutes, there is an interplay between the expressio unius canon and the consistent usage canon. Thus, "[w]here Congress includes particular language in one section of a statute but omits it in another …, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *See* *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993).

intent."[354] Similarly, commentators have referred to the meaningful variation presumption as weak.[355]

Since the presumptions of consistent usage and meaningful variation are based on the assumption that the legislature adopts a coherent statute, the canon does not apply as strongly when the statute being interpreted has been amended over time and the court is comparing language in a section of the statute adopted by one legislature to language in a separate section of the statute adopted by a different legislature.[356]

To the extent that the canon of consistent usage and meaningful variation is based on the same assumption of a coherent legislative drafter that underlies the whole act rule, it has been subject to the same criticisms regarding the flaws in that assumption.[357] Supporters of the canon and the whole act canon have, however, argued that the canons could serve other important purposes, regardless of the validity of the assumptions underlying the canons. For instance, application of the canons can make the law coherent, even if the legislature did not draft it that way.[358] Regardless of the criticisms discussed above, courts routinely address the consistent use canon and explain why they diverge from it if they choose to not apply it.

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[354] *See* Environmental Defense v. Duke Energy Corp., 549 U.S. 561, 574 (2007). *See also* Scalia & Garner, *supra* note 192, at 171 ("Because it is so often disregarded, this canon is particularly defeasible by context"). For examples of cases where the Supreme Court interpreted the same word used in different parts of the same statute in different ways for different sections of the statute, *see* Watson v. United States, 552 U.S. 74, 82 (2007) (different meanings for "use") ; General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581, 594-597 (2004) (different meanings for "age").

[355] *See* Maxwell, *supra* note 352, at 286. *See also* Sebelius v. Auburn Regional Med. Ctr., 133 S.Ct. 817 (2013) (describing the canon as "a rule of thumb that can tip the scales"); Field v. Mans, 516 U.S. 59, 67-76 (1995) (noting that the negative implication rule does not apply when there is a reasonable explanation for variations in the use of language). Justice Kavanaugh has argued that the rule is frequently applied too rigidly and takes particular issue with the application of the rule to synonyms, arguing "if two different terms are normally synonyms, requiring them to be interpreted differently makes little sense." *See* Kavanaugh, *supra* note 249, at 2162.

[356] *See* Gutierrez v. Ada, 528 U.S. 250 (2000). Similarly, when a legislature enacts a statutory definition for a term and limits the scope of the definition to specific sections of the statute (i.e. For purposes of Title III of this Act, "person" means …), there is no reason to interpret the term used in different sections of the statute consistently with the definition provided for the specific sections of the statute.

[357] Professors Levy and Glicksman warn that "statutory incoherence may arise through human error, legislative processes, or the interplay with amendments." *See* Levy & Glicksman, *supra* note 340, at 131.

[358] *See* West Virginia v. Casey, 499 U.S. 83, 100-101 (1991).

## C. The Surplusage Canon

Another canon that is closely related to the whole act rule is the ***rule against surplusage***, which provides that no provision of a statute should be construed to be redundant.[359] Under the canon, every word should be interpreted to have an independent meaning and if the legislature uses two different words in a statute, the words should have different meanings.[360]

Army Surplus Store – Photo by Jaggery – CC BY-SA 2.0

Thus, in *Babbitt v. Sweet Home Chapter of Communities for A Great Oregon*, when the U.S. Supreme Court was asked to decide whether the term "harm" in the definition of "take" under Section 3 of the Endangered Species Act included indirect injuries as well as direct injuries, the Court noted that the term "take" was defined in Section 3 to include "harm" and nine other actions[361] and "unless the statutory term 'harm' encompasses indirect as well as direct injuries, the word has no meaning that does not duplicate the meaning of other words that § 3 uses to define 'take.'"[362] Accordingly, the Court interpreted "harm" to include indirect injuries in order to avoid interpreting the statute in a way that would make "harm" surplusage."[363]

Similarly, in *Circuit City Stores, Inc. v. Adams*, the U.S. Supreme Court was asked to decide whether an exemption from the Federal Arbitration Act's mandatory arbitration requirements applied to employment contracts generally, or had a more limited scope.[364]

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[359] *See* *Milner v. Dep't of the Navy*, 562 U.S. 562, 575 (2011) (interpretations that render statutory language superfluous are disfavored); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality opinion by Scalia, J.) (It is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant."). *See also* Maxwell, *supra* note 352, 36; Scalia & Garner, *supra* note 192, at 174-179.

[360] *See* Scalia & Garner, *supra* note 192, at 174 ("If possible, every word and every provision is to be given effect (verba cum effectu sunt accipienda). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.")

[361] Section 3 of the Endangered Species Act defines "take" to include ""harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *See* 16 U.S.C. §1532(19).

[362] *See* 515 U.S. 687, 698 (1995).

[363] *Id.*

[364] *See* 532 U.S. 105 (2001).

The exemption in the statute applied to “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”[365] The Court determined that the exclusion must apply narrowly to employment contracts of transportation workers (workers similar to seamen and railroad workers), because there would be no need to include the terms “seamen” and “railroad employees” in the statute if the term “other class of workers engaged in foreign or interstate commerce” included all employees in interstate commerce.[366] Those words would be surplusage.

The canon is very popular with courts[367] and is based on the fiction that legislatures carefully choose each word when drafting statutes and eliminate every extraneous word during the drafting process.[368] However, critics argue that those assumptions are clearly inconsistent with the realities of the legislative drafting process[369] and with the way that people speak and understand language.[370] In their study of legislative drafters, Professors Gluck and Bressman confirmed that legislators frequently include extraneous or duplicative language in statutes for emphasis or to satisfy supporters and interest groups.[371] Despite its popularity, only ten states have incorporated the canon into their statutory interpretation codes[372], and the U.S. Supreme Court has stressed that the canon, like all canons, is not absolute.[373] There is also an obvious tension between the canon and the noscitur a sociis canon, as noscitur a sociis counsels that ambiguous terms should be interpreted to have a meaning similar to the words with which they are used, while the rule against surplusage counsels that the terms should be interpreted to have an independent meaning.

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365 *See* 9 U.S.C. § 1.

366 *See* 532 U.S. at 114-115.

367 *See* John M. Golden, *Redundancy: When Law Repeats Itself,* 94 Tex. L. Rev. 629, 653-654 (2016) (concluding, based on a study of usage of the canons, that other canons “lag far behind”.) Professor Jesse Cross suggests that it is difficult to imagine a more central canon, as it underpins nine canons of interpretation. *See* Cross, *When Courts Should Ignore Statutory Text,* *supra* note 114, at 456.

368 *See* Jellum, *supra* note 165, at 296.

369 *Id. See also* Posner, *Statutory Interpretation - In the Classroom and the Courtroom*, *supra* note 215, at 812 ("[A] statute that is the product of compromise may contain redundant language as a by-product of the strains of the negotiating process.")

370 Justice Brett Kavanaugh Kavanaugh notes that "humans speak redundantly all the time, and it turns out that Congress may do so as well. Congress may do so inadvertently. Or Congress may do so intentionally in order to, in Shakespeare's words, make ‘double sure.’ Either way, statutes often have redundancies, whether intended or unintended." *See* Kavanaugh, *supra* note 249, at 2161.

371 *See* Gluck & Bressman, *supra* note 152, at 933-936.

372 *See* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 Geo. L.J. 341, 368 (2010).

373 *See United States v. Atlantic Research Corp.*, 551 U.S. 128, 137 (2007) ("our hesitancy to construe statutes to render language superfluous does not require us to avoid surplusage at all coss. It is appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction that threatens to render the entire provision a nullity." ) As Justice Scalia observed, “A court may well prefer ordinary meaning to an unusual meaning that will avoid surplusage.” *See* Scalia & Garner, *supra* note 192, at 176.

In response to the criticisms of the rule against surplusage, Professors Ethan Lieb and James Brudney advocate for the utilization of a "***belt and suspenders***" canon by courts.[374] The academics argue that legislatures often include text in statutes that is deliberately duplicative, redundant, and/or reinforcing for all the reasons outlined above.[375] Thus, they argue that courts should interpret the duplicative language according to its ordinary meaning even though that might seem to render the language surplusage.[376] They note that courts utilized this reasoning in interpreting statutes for centuries in cases where courts noted that language was used ex abundant cautela (out of an abundance of caution). The "belt and suspenders" canon has not been widely adopted but is occasionally referenced by courts today.[377]

## D. Preambles, Titles, Purpose Statements, and Provisos

When courts apply the whole act rule to examine the meaning of language in a statute in the context of the whole act, the "whole act" includes components of the legislation, including titles, preambles, purpose statements, and provisos. The general rule that applies to all of these components is the same. The components should not be used to support a reading of the statute at odds with the plain meaning of the text but can provide insight into the meaning of ambiguous language.

### 1. Titles

As noted in Chapter 2 of this book, titles come in several varieties. Statutes include some or all of the following: (1) a long title, which precedes the enacting clause of the statute and provides an accurate but brief description of the statute; (2) a short title, which follows the enacting clause and is added for political or marketing purposes, or to make it easier to refer to the statute; and (3) section titles, which describe the material included in the section of the statute.

At common law in England, titles were not included in the legislation that Parliament enacted, but were added by clerks, so British courts did not consider titles when interpreting legislation.[378] That is not the common approach today in federal or state legislatures, where legislators typically vote on statutes including titles.[379] Consequently, courts are generally willing to examine titles when interpreting statutes.[380] Since long titles

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374 *See* Ethan J. Leib & James J. Brudney, *The Belt-And-Suspenders Canon*, 105 Iowa L. Rev. 735 (2020).

375 *Id.* at 740 (noting that legislatures include extraneous or redundant language out of caution or to build consensus among lawmakers.)

376 *Id.*

377 Justice Scalia was not a fan of the canon, which he described as "ill-conceived but lamentably common." *See* Scalia & Garner, *supra* note 192, at 177.

378 *Id.* at 221.

379 *Id.*

380 However, in states where titles are added by a code publisher or, at the federal level, when the Office of Law Revision Counsel creates titles for code sections after the fact as part of codification, courts will normally not accord any weight to the titles when interpreting those statutes.

usually precede the enacting clause of legislation, they are not technically part of the enacted statute and some courts will refuse to consider them when interpreting a statute, but many courts consider long titles, short titles, and section titles as interpretive aids and apply the same rules to each.

As noted above, titles cannot control the plain meaning of statutory language, but they may be helpful in determining legislative intent when language is ambiguous.[381] The canon was applied in a few of the cases included earlier in this chapter and in Chapter 3. For instance, in *Yates v. United States*, both the plurality and concurring opinions examined the title of Section 519 ("Destruction, alteration, or falsification of records in Federal investigations and bankruptcy") when concluding that the term "tangible object" in that Section was limited to objects used for storing information or objects similar to records.[382] In addition, in *Church of the Holy Trinity v. United States*, the Supreme Court relied, in part, on the long title of the statute ("An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, it territories, and the District of Columbia") to conclude that the prohibition in the statute on importing aliens or foreigners to perform labor or service of any kind did not apply to clergymen, since the long title seemed to refer solely to manual laborers.[383]

### 2. Preambles, Findings and Purpose Statements

Preambles outline important facts or considerations that led to the enactment of legislation and often describe the goals or purposes of the legislation. Technically, the portion of a law that includes such findings of fact and purpose statements is only a preamble when it precedes the enacting clause of legislation, but courts and academics frequently refer to the material as the preamble regardless of whether it precedes or follows the enacting clause and most courts apply the same rules regardless of where the clauses are placed in legislation. Like titles, preambles or purpose statements cannot control plain meaning, but are an aid for interpreting ambiguous language.[384]

Traditionally, British courts accorded preambles great weight in determining the purposes of legislation, but American courts generally treat preambles similarly to other components of legislation. As noted in Chapter 3, enacted purpose clauses are viewed by purposivists as the best evidence of legislative purpose and Professor Jarrod Shobe has argued that courts should consult purpose clauses more frequently as a bridge

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381 *See, e.g. INS v. National Center for Immigrants' Rights, Inc*., 502 U.S. 183, 189 (1991); *INS v. St. Cyr*, 533 U.S. 289, 308 (2001); *Pennsylvania Dep't. of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998); *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998). *See also* 2A Sutherland, *supra* note 49 §47.03; Scalia & Garner, *supra* note 192, at 221.

382 *See supra* Chapter 4, Part V.B.

383 *See* 143 U. S. 457 (1892). Arguably, the majority used the long title to interpret the statute against its plain meaning, which applied to contracts "to perform labor or service of any kind", so the case is not the best example of the weight that courts traditionally accord to titles.

384 *See Sutton v. United Airlines, Inc*., 527 U.S. 471 (1999). *See also* Scalia & Garner, *supra* note 192, at 217 ("a preamble, purpose clause or recital is a permissible indicator of meaning."); 2A Sutherland, *supra* note 49, § 47.4.

between textualism and purposivism.[385] Unfortunately, Shobe also notes that statutory purpose clauses are frequently excluded or relegated to notes when federal legislation is codified by the Office of Law Revision Counsel.[386] That practice reduces the likelihood that courts can rely on the clauses to interpret ambiguous statutory language.[387]

### 3. Provisos

Provisos are clauses that impose limits on the application of statutes or create exceptions to general rules in statutes. They frequently begin with the language "provided that", but may be phrased using alternative language with the same effect. Unlike long titles or true preambles, provisos follow the enacting clause and are clearly part of the enacted legislation. The general rule regarding provisos is that they should be strictly ("narrowly") construed.[388] While provisos usually impose conditions on the material immediately preceding them[389], courts have, in several cases, concluded that provisos were not limited to modifying the immediately preceding clauses, based on context and other interpretive cues.[390]

**Problem 4-4**

Between 2010 and 2015, there was a significant increase in the number of food trucks and pop-up restaurants that were being operated in the State of Ames. Those dining options were driving many older independent (non-chain) restaurants out of business, so the Association of Independent Restaurants (AIR), a trade association representing independent restaurants, lobbied the state legislature, encouraging the legislature to pass a law that would require licenses and impose other limits on eateries in Ames in order to reduce competition with the independent restaurants. In response to the lobbying of the AIR, as well as several outbreaks of food borne illness in Ames, the Ames legislature enacted the Independent Restaurant Protection Act in 2017. Portions of the law are reproduced below.

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385 *See* Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. Chi. L. Rev. 669, 711-712 (2019).

386 According to Shobe, in 2007, only 27% of the enacted findings sections were placed in the main text of the code, while 27% were omitted altogether and the rest were put in notes. *See* Shobe, *Codification and the Hidden Work of Congress*, supra note 126, at 688. Similarly, 25% of the enacted purpose statements were omitted altogether. *Id.*

387 Professor Shobe argues that the codification practices de-emphasize the importance of statutory purposes and accelerate the trend toward textualist interpretations of statutes. *Id.* at 690.

388 *See* 2A Sutherland, *supra* note 49, at §47.8.

389 *See* Scalia & Garner, *supra* note 1, at 154.

390 *See Alaska v. United States*, 545 U.S. 75, 106 (2005); *McDonald v. United States*, 279 U.S. 12, 21 (1929).

## Problem 4-4 (continued)

P.L. 100

An Act

To regulate eateries to protect public health and safety and to protect independent restaurants.

*Be it enacted by the legislature of the State of Ames assembled,*

**Section 1. Short Title**

This Act may be cited as “The Independent Restaurant Protection Act”.

**Section 2. Findings and Goals**

(a) Independent restaurants are a vital resource for communities within the State of Ames, so it is essential that they are provided with the financial support that they need to operate profitably.

(b) As a consequence of limited regulatory oversight, there have been several incidents within the past few years where food trucks, grocery stores and restaurants, including independent restaurants, have sold contaminated food, leading to outbreaks of food borne illness within the State of Ames. Stricter regulation of food safety is necessary to limit such incidents in the future.

**Section 3. Food Safety**

A license is required to operate a bar, coffee shop, tavern, diner, food truck, or restaurant in the State of Ames.

**Section 4. Grants for Independent Restaurants**

(a) The fee for a license issued under Section 3 shall be $10,000 per year, except that the fee for a license issued to an independent restaurant under Section 3 shall be $100 per year.

(b) An “independent restaurant”, for purposes of this section, shall mean a restaurant that is not associated with a corporate chain and is run by the owner of the restaurant. The term shall not include delicatessens.

(c) Monies collected for licenses under Section 3 of this Act shall be deposited into a fund that shall be used to provide grants to assist independent restaurants.

## Problem 4-4 (continued)

Luna Sabbath owns and operates a grocery store (Sabbath Foods) in the town of Springfield in the State of Ames and she is concerned that she might be required to obtain a license for her grocery store under the Independent Restaurant Protection Act. Sabbath Foods is part of a national chain of grocery stores and the store sells roaster chickens and a variety of other pre-cooked meals to customers in the delicatessen section of the store. There is even a section of the store that has tables where shoppers can sit while they are in the store. How would the State argue that Sabbath's Grocery Store is required to obtain a license under Section 3 and how would Sabbath argue that a license is not required?

## CALI SECTION QUIZ

Now that you've finished Chapter 4, why not try a short quiz on the material you just read at www.cali.org/lesson/19757. It should take about 5 minutes to complete.

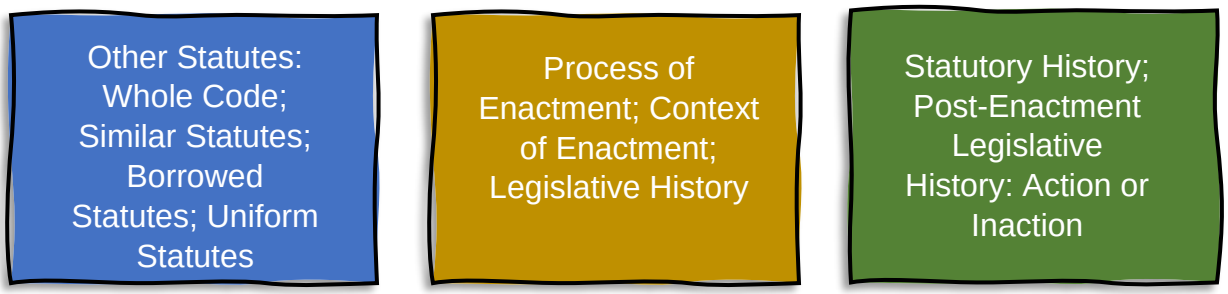
# Chapter 5:

## Extrinsic Sources of Interpretation

## I. Introduction

When judges interpret a statute by examining sources beyond the statute itself, they are examining ***extrinsic sources of interpretation***, which are the focus of this chapter. Extrinsic sources include other statutes (including the comprehensive code in which the statute is situated), the context of enactment of the statute, the process by which the statute was enacted, and legislative action or inaction that follows the enactment of the statute.[391]

***Extrinsic Sources***




Some structural canons of interpretation courts use to interpret the words of a statute under the whole act rule, such as the ***canon of consistent usage and meaningful deviation*** and the ***surplusage canon***, are also used by courts when interpreting the words of a statute when compared to other statutes or in the context of the entire code in which the statute is situated.

## II. Other Statutes

### A. The Whole Code Canon

The ***whole code canon*** is an extension of the ***whole act rule*** and directs courts to interpret text in light of the other statutes in the same code. The canon rests on the assumption that the legislature is aware of the minutiae of all other statutes in the code

391 While legislative history is an important extrinsic source, it is not addressed in this chapter. The types of legislative history are introduced in Chapter 2 and the manner in which legislative history is used is addressed in Chapter 3.

and chooses the words that it uses in legislation intentionally to be consistent with the other laws that have been previously enacted in the code. *See, e.g.* West Virginia v. Casey, 499 U.S. 83 (1991) (interpreting "attorney's fees" in 42 U.S.C. § 1988 to exclude expert witness fees, based on comparison to fee shifting provisions in several other statutes in the U.S. Code).[392] Justice Scalia, like many others, was skeptical about the validity of the fiction, but argued, in *Casey,* that the judiciary should interpret language in a code as part of a coherent whole to provide order to the code.[393]

Several criticisms have been leveled against the canon. First, the survey of legislative drafters carried out by Professors Gluck and Bressman, described in an earlier chapter, disclosed that very few legislators draft text to be consistent with text used across the code in which the statute is to be codified.[394] Second, even if drafters wanted to enact legislation that used language consistently throughout the code, the realities of the legislative process frequently frustrate that intent.[395]

Perhaps even more significantly, though, at the federal level, whether legislative language is included in the U.S. Code and where it is inserted in the Code is, as noted earlier, often decided by the Office of Legal Revision Counsel (OLRC), without the direction of Congress.[396] Provisions of a bill may be scattered across several sections of the Code,

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392 *See also* Arlington Central School District v. Murphy, 548 U.S. 291 (2006); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); Bennett v. Spear, 520 U.S. 154 (1997).

393 Scalia wrote, "Where a statutory term … is ambiguous, we construe it to contain that permissible meaning which fits most comfortably into the body of both previously and subsequently enacted law. We do so not because that precise accommodative meaning is what the lawmakers must have had in mind…, but because it is our role to make sense rather than nonsense out of the *corpus juris.*" 499 U.S. at 101-102. Justice Scalia has also argued that interpreting language consistently across a code will encourage Congress to draft statutory language consistently. *See* Scalia & Garner, *supra* note 192 at 51.

394 *See* Gluck & Bressman, *supra* note 152, at 936.

395 *Id.* at 937. Gluck and Bressman found that the language that is enacted into law is not necessarily consistent throughout the code because the modern legislative process involves "significant organizational barriers that the committee system, bundled legislative deals, and lengthy, multi-drafter statutes pose to the realistic operation of" the whole code rule and similar presumptions regarding the language adopted in statutes. *Id. See also* Victoria Nourse & Jane Schachter, The Politics of Legislative Drafting: A Congressional Case Study, 77 N.Y.U. L. Rev. 575 (2002).

396 *See* Shobe, Codification and the Hidden Work of Congress, *supra* note 126, at 656. The codification process is discussed in detail in Part IV of Chapter 2. Some of the titles of the Code are enacted as ***positive law***, though, when Congress enacts the entire title of the Code based upon a draft of existing law prepared by the OLRC. *See* Shobe, *supra*, at 657-658. While Congress plays a greater role in approving the format of the statutory provisions in those titles, the process of codifying a positive law title is generally not contentious, as the bill to create a new positive law title is not supposed to make substantive changes to the law. *Id.* To the extent that Congress codifies titles of the Code as positive law, Professor Shobe argues that canons such as the whole code canon should apply more strongly to those titles than to the portions of the Code that are non-positive law. *Id.* at 647, 693. In practice, though, courts generally fail to

reordered and renumbered, relegated to notes in the Code, or left out of the Code entirely.[397] Thus, the way statutory language is presented in the U.S. Code frequently provides an inaccurate or incomplete picture of Congressional intent.[398] For instance, in *Yates v. United States*, discussed in Chapter 4, a plurality of the Court relied, in part, on the heading of Section 1519 of Title 18 to interpret the meaning of the term "tangible object" in that section.[399] However, neither the plurality nor the concurring or dissenting Justices noted that Congress, when enacting Title 18 as positive law, included a provision in Title 18 that indicated that headings of sections should not be used to interpret the language of Title 18.[400] That prohibition was buried in a note at the beginning of Title 18.

Despite these criticisms, many courts continue to apply the whole code canon. However, a study by Professors Matthew Christiansen and William Eskridge of the Congressional response to the Supreme Court's statutory interpretation decisions found a statistically significant correlation between a Congressional override of the Court's decisions when they were based on the whole code or whole act rules.[401]

## B. Similar Statutes

A narrower canon related to the whole code canon is the canon that governs interpretation of ***similar statutes***. Under that canon, courts will interpret statutes that address the ***same subject matter*** harmoniously (frequently applying the canon of consistent usage and meaningful deviation and the surplusage canon across the statutes).[402] The canon is sometimes referred to as the ***in pari materia*** canon and is based on the reasoning that the legislature was aware of the text used in other statutes addressing the subject matter and intended to legislate consistently with those other statutes.[403] It applies most forcefully when courts are interpreting two or more statutes that were adopted at the same

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acknowledge the difference between positive law and non-positive law when interpreting statutory language. *Id.* at 659.

397 *Id.* at 643, 662-664, 666.

398 *Id.* at 646-647, 692-693. The Statutes at Large, on the other hand, provide a more accurate representation of Congress' intent. *Id.* at 695.

399 574 U.S. at 539.

400 *See* Act June 25, 1948, ch. 645, §19, 62 Stat. 862.

401 *See* Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions,*1967-2011, 92 Texas L. Rev. 1317, 1321 (2014).

402 *See, e.g., Wachovia Bank v. Schmidt,* 546 U.S. 303, 315-316 (2006); *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) (statutes addressing the same subject matter should be read "as if they were one law"). *See also* Scalia and Garner, *supra* note 192, at 252.

403 *Erlenbaugh, supra* note 12, at 243-244. That fiction only partially justifies the canon, though, because the canon directs courts to interpret statutes consistent with statutes on the same subject enacted before ***and after*** the statute, and the enacting legislature cannot, obviously, anticipate what laws a future legislature will enact on the same subject. *See* Scalia and Garner, *supra* note 192, at 252. As with the whole code rule, therefore, former Justice Scalia argues that the in pari materia canon is a means of implementing the Judicial Branch's duty to make the body of law "make sense". *Id.*

time, but it is applied broadly to statutes adopted at different times by different legislatures, as long as the statutes address the same subject matter.[404] Since the reasoning behind the in pari materia canon is similar to the reasoning behind the whole code canon, similar criticisms are raised with respect to the canon.[405] The following case demonstrates both the application of the canon and some of the difficulties inherent in doing so.

## SMITH V. CITY OF JACKSON

**544 U.S. 228 (2005)**

**JUSTICE STEVENS** announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and IV, and an opinion with respect to Part III, in which **JUSTICE SOUTER**, **JUSTICE GINSBURG** and **JUSTICE BREYER join**.

**Resources for the Case**

Unedited Opinion (From Justia)
Age Discrimination in Employment Act (P.L. 90-202)
Title VII of the Civil Rights Act of 1964 (P.L. 88-352)
29 U.S.C. § 623(a)(2) (From LII)
42 U.S.C. § 2000e-2 (From LII)
Case Background (From Quimbee)
Oral Argument Audio (From Oyez)

Petitioners, police and public safety officers employed by the city of Jackson, Mississippi (hereinafter City), contend that salary increases received in 1999 violated the Age Discrimination in Employment Act of 1967 (ADEA) because they were less generous to officers over the age of 40 than to younger officers. Their suit raises the question whether the "disparate-impact" theory of recovery announced in *Griggs* v. *Duke Power Co.,* 401 U. S. 424 (1971), for cases brought under Title VII of the Civil Rights Act of 1964, is cognizable under the ADEA. Despite the age of the ADEA, it is a question that we have not yet addressed. * * *

I

On October 1, 1998, the City adopted a pay plan granting raises to all City employees. The stated purpose of the plan was to "attract and retain qualified people, provide incentive for performance, maintain competitiveness with other public sector agencies and ensure equitable compensation to all employees regardless of age, sex, race and/or disability." * * * On May 1, 1999, a revision of the plan, which was motivated, at least in part, by the City's desire to bring the starting salaries of police officers up to the regional average, granted raises to all police officers and police dispatchers. Those who had less than five years of tenure received proportionately greater raises when compared to their former pay than those with more seniority. Although some officers over the age of 40 had less than five years of service, most of the older officers had more.

Petitioners are a group of older officers who filed suit under the ADEA claiming both that the City deliberately discriminated against them because of their age (the "disparate-treatment" claim) and that they were "adversely affected" by the plan because of their age

404 *Id.*

405 *See supra* notes 4-8, and accompanying text.

(the "disparate-impact" claim). The District Court granted summary judgment to the City on both claims. The Court of Appeals held that the ruling on the former claim was premature * * * , but it affirmed the dismissal of the disparate-impact claim. Over one judge's dissent, the majority concluded that disparate-impact claims are categorically unavailable under the ADEA. * * *

We granted the officers' petition for certiorari, and now hold that the ADEA does authorize recovery in "disparate-impact" cases comparable to *Griggs*. Because, however, we conclude that petitioners have not set forth a valid disparate-impact claim, we affirm.

II

During the deliberations that preceded the enactment of the Civil Rights Act of 1964, Congress considered and rejected proposed amendments that would have included older workers among the classes protected from employment discrimination. * * * Congress did, however, request the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected." * * * The Secretary's report, submitted in response to Congress' request, noted that there was little discrimination arising from dislike or intolerance of older people, but that "arbitrary" discrimination did result from certain age limits. * * * Moreover, the report observed that discriminatory effects resulted from "[i]nstitutional arrangements that indirectly restrict the employment of older workers." * * *

In response to that report Congress directed the Secretary to propose remedial legislation and then acted favorably on his proposal. As enacted in 1967, §4(a)(2) of the ADEA, now codified as 29 U. S. C. §623(a)(2), provided that it shall be unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age … ." Except for substitution of the word "age" for the words "race, color, religion, sex, or national origin," the language of that provision in the ADEA is identical to that found in §703(a)(2) of the Civil Rights Act of 1964 (Title VII). Other provisions of the ADEA also parallel the earlier statute. Unlike Title VII, however, §4(f)(1) of the ADEA contains language that significantly narrows its coverage by permitting any "otherwise prohibited" action "where the differentiation is based on reasonable factors other than age" (hereinafter RFOA provision).

III

In determining whether the ADEA authorizes disparate-impact claims, we begin with the premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes. * * * We have consistently applied that presumption to language in the ADEA that was "derived *in haec verba* from Title VII." * * * Our unanimous interpretation of §703(a)(2) of the Title VII in *Griggs* is therefore a precedent of compelling importance.

In *Griggs*, * * * [we] held that §703(a)(2) of Title VII did not require a showing of discriminatory intent. [In a footnote, Justice Stevens noted that the congressional goals cited in *Griggs* were remarkably similar to the goals cited in the Wirtz report that formed the basis for the ADEA].

While our opinion in *Griggs* relied primarily on the purposes of the Act, buttressed by the fact that the EEOC had endorsed the same view, we have subsequently noted that our holding represented the better reading of the statutory text as well. * * * Neither §703(a)(2) nor the comparable language in the ADEA simply prohibits actions that "limit, segregate, or classify" persons; rather the language prohibits such actions that "deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's" race or age. * * * Thus the text focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer.

*Griggs*, which interpreted the identical text at issue here, thus strongly suggests that a disparate-impact theory should be cognizable under the ADEA. * * *

The Court of Appeals' categorical rejection of disparate-impact liability, like Justice O'Connor's, rested primarily on the RFOA provision and the majority's analysis of legislative history. As we have already explained, we think the history of the enactment of the ADEA, with particular reference to the Wirtz Report, supports [our interpretation] concerning disparate-impact liability. * * *

The RFOA provision provides that it shall not be unlawful for an employer "to take any action otherwise prohibited under subsectio[n] (a) … where the differentiation is based on reasonable factors other than age discrimination … ." In most disparate-treatment cases, if an employer in fact acted on a factor other than age, the action would not be prohibited under subsection (a) in the first place. * * * In those disparate-treatment cases, * * * the RFOA provision is simply unnecessary to avoid liability under the ADEA, since there was no prohibited action in the first place. The RFOA provision is not, as Justice O'Connor suggests, a "safe harbor from liability," *post*, at 5 (emphasis deleted), since there would be no liability under §4(a). * * *

In disparate-impact cases, however, the allegedly "otherwise prohibited" activity is not based on age. * * * It is, accordingly, in cases involving disparate-impact claims that the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was "reasonable." Rather than support an argument that disparate impact is unavailable under the ADEA, the RFOA provision actually supports the contrary conclusion.

Finally, we note that both the Department of Labor, which initially drafted the legislation, and the EEOC, which is the agency charged by Congress with responsibility for implementing the statute, * * * have consistently interpreted the ADEA to authorize relief on a disparate-impact theory.

The text of the statute, as interpreted in *Griggs*, the RFOA provision, and the EEOC regulations all support petitioners' view. We therefore conclude that it was error for the Court of Appeals to hold that the disparate-impact theory of liability is categorically unavailable under the ADEA.

IV

[In Part IV, Justice Stevens concluded that the petitioners did not set forth a valid disparate impact claim and affirmed the Court of Appeals' judgment dismissing the claim.]

* * *

**JUSTICE O'CONNOR**, with whom **JUSTICE KENNEDY** and **JUSTICE THOMAS** join, concurring in the judgment.

"Disparate treatment … captures the essence of what Congress sought to prohibit in the [Age Discrimination in Employment Act of 1967 (ADEA)]. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age.* * * In the nearly four decades since the ADEA's enactment, however, we have never read the statute to impose liability upon an employer without proof of discriminatory intent. * * * I decline to join the Court in doing so today.

I would instead affirm the judgment below on the ground that disparate impact claims are not cognizable under the ADEA. The ADEA's text, legislative history, and purposes together make clear that Congress did not intend the statute to authorize such claims. Moreover, the significant differences between the ADEA and Title VII of the Civil Rights Act of 1964 counsel against transposing to the former our construction of the latter in *Griggs* v. *Duke Power Co.* Finally, the agencies charged with administering the ADEA have never authoritatively construed the statute's prohibitory language to impose disparate impact liability. Thus, on the precise question of statutory interpretation now before us, there is no reasoned agency reading of the text to which we might defer.

I

A

Our starting point is the statute's text. * * * Neither petitioners nor the plurality contend that the first paragraph, §4(a)(1), authorizes disparate impact claims, and I think it obvious that it does not. That provision plainly requires discriminatory intent, for to take an action against an individual "*because of* such individual's age" is to do so "by reason of" or "on account of" her age. See Webster's Third New International Dictionary 194 (1961). * * * Petitioners look instead to the second paragraph, §4(a)(2), as the basis for their disparate impact claim. But petitioners' argument founders on the plain language of the statute, the natural reading of which requires proof of discriminatory intent. Section 4(a)(2) uses the phrase "because of … age" in precisely the same manner as does the preceding

paragraph—to make plain that an employer is liable only if its adverse action against an individual is *motivated by* the individual's age. * * *

B

While §4(a)(2) of the ADEA makes it unlawful to intentionally discriminate because of age, §4(f)(1) clarifies that "[i]t shall not be unlawful for an employer … to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section … where the differentiation is based on reasonable factors other than age … ." 29 U. S. C. §623(f)(1). This "reasonable factors other than age" (RFOA) provision "insure[s] that employers [are] permitted to use neutral criteria" other than age, * * * even if this results in a disparate adverse impact on older workers. The provision therefore expresses Congress' clear intention that employers *not* be subject to liability absent proof of intentional age-based discrimination. * * *

II

[In Part II of the concurring opinion, Justice O'Connor argued that the legislative history, structure and purposes of the ADEA confirmed that Congress did not intend the statute to authorize disparate impact claims. She also argued that while disparate impact liability may be necessary Under Title VII of the Civil Rights Act to prevent the perpetuation of past racial discrimination, the ADEA was not motivated by any history of entrenched patterns of age discrimination, so disparate impact liability could not be justified under the ADEA, as it could be under Title VII, as a means of redressing the cumulative impacts of past discrimination.]

III

The plurality * * * [argues] that the relevant provision of the ADEA should be read *in pari materia* with the parallel provision of Title VII * * * The language of the ADEA's prohibitory provisions was modeled on, and is nearly identical to, parallel provisions in Title VII. * * * Because *Griggs*, *supra,* held that Title VII's §703(a)(2) permits disparate impact claims, the plurality concludes that we should read §4(a)(2) of the ADEA similarly. * * *

To be sure, where two statutes use similar language, we generally take this as "a strong indication that [they] should be interpreted *pari passu*." * * * But this is not a rigid or absolute rule, and it " 'readily yields' " to other indicia of congressional intent. * * * Accordingly, we have not hesitated to give a different reading to the same language—whether appearing in separate statutes or in separate provisions of the same statute—if there is strong evidence that Congress did not intend the language to be used uniformly. * * * Such is the case here.

First, there are significant textual differences between Title VII and the ADEA that indicate differences in congressional intent. Most importantly, whereas the ADEA's RFOA provision protects employers from liability for any actions not motivated by age, Title VII lacks any similar provision. In addition, the ADEA's structure demonstrates Congress' intent to combat intentional discrimination through §4's prohibitions while addressing

employment practices having a disparate impact on older workers through independent noncoercive mechanisms. There is no analogy in the structure of Title VII. Furthermore, as the Congresses that adopted *both* Title VII *and* the ADEA clearly recognized, the two statutes were intended to address qualitatively different kinds of discrimination. Disparate impact liability may have a legitimate role in combating the types of discrimination addressed by Title VII, but the nature of aging and of age discrimination makes such liability inappropriate for the ADEA.

Finally, nothing in the Court's decision in *Griggs* itself provides any reason to extend its holding to the ADEA. As the plurality tacitly acknowledges, the decision in *Griggs* was not based on any analysis of Title VII's actual language. Rather, the *ratio decidendi* was the statute's perceived *purpose*, *i.e.*,"to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." * * * In other words, the Court in *Griggs* reasoned that disparate impact liability was necessary to achieve Title VII's ostensible goal of eliminating the cumulative effects of historical racial discrimination. However, that rationale finds no parallel in the ADEA context, * * * and it therefore should not control our decision here.

Even venerable canons of construction must bow, in an appropriate case, to compelling evidence of congressional intent. In my judgment, the significant differences between Title VII and the ADEA are more than sufficient to overcome the default presumption that similar language is to be read similarly. * * *

## Questions and Comments

**1. Statutory interpretation question:** What was the statutory interpretation question that the Court was trying to resolve? What is the difference between a "disparate treatment" claim and a "disparate impact" claim? Which type of claims had been authorized by Title VII of the Civil Rights Act?

**2. Use of the canon by the plurality v. use of the canon by Justice O'Connor:** Note that Justice Stevens' plurality opinion relies almost exclusively on the similar statutes canon to support its interpretation of Section 4(a)(2) of the ADEA. Justice O'Connor's concurring opinion, on the other hand, begins with a plain meaning analysis of the text, followed by an analysis of the legislative history, structure, and purposes of the statute, and only addresses the similar statutes canon to rebut the plurality's reliance on the canon.

**3. Reliance on the canon:** Why did the plurality apply the similar statutes canon to interpret Section 4(a)(2) of the ADEA consistent with Section 703(a)(2) of Title VII of the Civil Rights Act of 1964? Did the Supreme Court in *Griggs* rely on the plain meaning of Section 703(a)(2) to conclude that Title VII of the Civil Rights Act authorized claims for disparate impact?

**4. Regulatory interpretation:** The plurality also justified its interpretation of Section 4(a)(2) of the ADEA on the ground that it was consistent with the interpretations of the Department of Labor, which had initially drafted the legislation, and the EEOC, the agency authorized by the ADEA to administer it. Similarly, in a concurring opinion that was omitted above, Justice Scalia relied heavily on the EEOC's interpretation of the ADEA as justification for his interpretation of the ADEA. Deference to agency interpretations is discussed at length in Chapter 7.

**5. Rebuttable presumption:** Although the similar statutes canon counsels courts to interpret statutes addressing the same subject matter consistently, especially when the statutes use similar language, the presumption of consistency is rebuttable. As Justice O'Connor indicates, in her concurring opinion, the canon "is not a rigid or absolute rule, and it 'readily yields' to other indicia of congressional intent. … [T]he meaning [of the same words] well may vary to meet the purposes of the law." Why did Justice O'Connor believe that the Court should not interpret Section 4(a)(2) of the ADEA consistently with Section 703(a)(2) of Title VII of the Civil Rights Act of 1964? Justice O'Connor also pointed out that *Griggs* was decided four years *after* the ADEA had been enacted. What significance should that have for its interpretation?

**6. Statutory structure - the "RFOA" provision:** The plurality and Justice O'Connor found different expressions of Congressional intent in the inclusion, in the ADEA, of Section 4(f)(1), the "reasonable factors other than age" provision. How did the plurality use that provision to support its interpretation of the ADEA to authorize "disparate impact" claims and how did Justice O'Connor use that provision to support her interpretation?

**7. Identifying similar statutes:** A few obvious difficulties arise when applying the similar statutes canon. First, when is a statute sufficiently "similar" so that a court should apply the canon? *See, e.g.* *West Virginia University Hospitals v. Casey*, 499 U.S. 83 (1991) (interpreting "reasonable attorneys fee" in 42 U.S.C. § 1988 consistently with the term as used in multiple statutes addressing a variety of subjects, including tax, environmental protection, consumer protection, utilities regulation, and civil rights, because the provisions in all of the statutes were "fee shifting" provisions); *Erlenbaugh v. United States*, 409 U.S. 239 (1972) (refusing to interpret 18 U.S.C. §§ 1952 and 1953 consistently, since 1953 focused specifically on illegal gambling while 1953 focused more broadly on "unlawful activity"); *United States v. Stewart*, 311 U.S. 60 (1940) (interpreting provisions of the Revenue Act and the Federal Farm Loan Act consistently because the statutes were enacted by the same Congress and the provisions included the same language); *City of Dania Beach v. FAA*, 628 F.3d 581 (D.C. Cir. 2010) (interpreting similar language in two federal transportation statutes differently). The canon does not apply, after all, simply because Congress uses the same language in two unrelated statutes.

Second, how should a court apply the canon when a statute is similar to multiple statutes, but the other statutes have not been interpreted consistently?

**VIDEO LECTURE**

**Click here for a video lecture on *Smith v. City of Jackson* by Professor Stephen Johnson.**

## C. Statutes from Other Jurisdictions

In some circumstances, courts will examine statutes from other jurisdictions and interpretations of those statutes as extrinsic sources of interpretation. The two times when this is likely to occur are (1) when the legislature that adopted the statute being interpreted modeled that statute on a statute from another jurisdiction ("***borrowed statutes***") or (2) when the statute being interpreted is based on a "***uniform***" or "***model***" statute.

### 1. Borrowed Statutes

Occasionally, a legislature will enact a statute that is modeled on a statute enacted by Congress or by another state. Similarly, Congress might enact a statute modeled on a state statute. In those circumstances, the "***borrowed statute***" canon provides that when a legislature models a statute on a statute from another jurisdiction, courts should presume that the "borrowing" legislature was aware of the manner in which that statute had been interpreted by the highest court of the other jurisdiction at the time that the legislature "borrowed" the statute, and that the borrowing legislature intended to have its statute interpreted in the same manner as the "borrowed" statute had been interpreted by the highest court of the other jurisdiction until that time. *See, e.g.,* *Van Horn v. William Blanchard Co.*, 438 A.2d 552 (N.J. 1981) (interpreting New Jersey comparative negligence statute consistent with Wisconsin statute upon which it was modeled).[406] Before a court applies the borrowed statute canon, it must find evidence in the statute or legislative history that the borrowing legislature had been aware of, and modeled, its statute on that other statute.

The following two opinions demonstrate the application of the canon and the limitations of the canon. In the first case, *Borek Cranberry Marsh, Inc. v. Jackson County*, 2010 WI 95 (Wis. 2010), the Wisconsin Supreme Court applies the canon to interpret a Wisconsin statute. The issue raised in *Borek* was presented to the Wisconsin Supreme Court again in *Cobb v. King*, 2022 WI 59 (Wis. 2022), and, after initially agreeing to hear the appeal,

406 *But see Zerbe v. State*, 583 P.2d 845, 846 (Alaska 1978) (refusing to interpret statute consistent with judicial interpretation of a lower court in the borrowed jurisdiction).

the Court dismissed the appeal as improvidently granted. However, two Justices authored a dissenting opinion, below, criticizing the Court's application of the canon in *Borek.*

Cranberry Bog – Public Domain

## BOREK CRANBERRY MARSH, INC. V. JACKSON COUNTY

**2010 WI 95 (Wis. 2010)**

**MICHAEL J. GABLEMAN, J.** This is a review of a published decision of the court of appeals reversing an order granting summary judgment to Jackson County. In 1977, Carl Nemitz purchased an easement from the County granting him sand removal and water flowage rights to County land adjacent to his property. The water flowage rights were granted to "CARL NEMITZ, his heirs, and assigns" while the sand removal rights were granted to "the Grantee," who is described in the deed as "CARL NEMITZ." Nemitz later transfered his land, along with his sand removal rights and water flowage rights, to Julius and Darlene Borek (the "Boreks"), who then transfered them to Borek Cranberry Marsh, Inc. ("BCM").

When BCM attempted to exercise the sand removal rights (now almost 30 years after the original conveyance to Nemitz), the County objected on the grounds that the sand removal rights were non-transferable. BCM brought suit, and the circuit court agreed with the County that the sand removal rights were non-transferable because they had been granted to Nemitz alone, and not "Nemitz, his heirs, and assigns" as the water flowage rights had been granted. The court of appeals reversed, holding that Wis. Stat. § 706.10(3) (1977-78), which makes words of inheritance unnecessary and creates a presumption in favor of transferability, required the court to interpret the deed as conveying transferable sand removal rights.

Thus, the question before us is whether the 1977 easement granted Nemitz a transferable right to remove sand from County land. We hold that it did. Wisconsin Stat. § 706.10(3) provides that every conveyance of an interest in land conveys full title to that interest unless the language of the conveyance indicates otherwise by express language or necessary implication. We conclude that the easement does not contain an express statement or necessary implication that only a limited, non-transferable right to remove sand was conveyed. We therefore affirm the decision of the court of appeals and remand for the circuit court to enter an order granting BCM's motion for summary judgment. * * *

III. DISCUSSION

The question before us is whether the sand removal rights conveyed in the easement between the County and Nemitz were personal to Nemitz, or whether they were fully transferable. * * *

It is clear that the water flowage rights and the sand removal rights in the deed between Nemitz and the County each constitutes an interest in the land. Both parties concede that the interpretive instructions in Wis. Stat. § 706.10(3) play a role in the proper interpretation of conveyances of land and interests in land. The dissent, however, challenges whether the statute applies to interests in land at all.

Wisconsin Stat. § 706.10(3) has existed in some form since 1874. The first iteration of the statute abrogated the common law rule by providing: "In all conveyances of land hereafter made in this state, words of inheritance shall not be necessary in order to create or convey a fee . . . ." § 1, ch. 316, Laws of 1874.

The legislature amended the statute in 1878 to provide:

> In conveyances of lands, words of inheritance shall not be necessary to create or convey a fee, and every grant of lands or any interest therein shall pass all the estate or interest of the grantor, unless the intent to pass a less estate or interest shall appear by express terms or be necessarily implied in the terms of such grant.

Wis. Stat. § 2206 (1878). The annotated version of the next published edition of the statutes (in 1889) states that this new statute was composed of the 1874 version, "with addition of words from the New York statute to give it full effect."

The New York statute upon which ours was based stated:

> The term "heirs" or other words of inheritance, shall not be requisite to create or convey an estate in fee; and every grant or devise of real estate, or any interest therein, hereafter to be executed, shall pass all the estate or interest of the grantor or testator, unless the intent to pass a less estate or interest shall appear by express terms, or be necessarily implied in the terms of such grant.

1 N.Y. Rev. Stat. pt. 2, ch. 1, tit. 5, § 1 (1835) (quoted in *Whitney v. Richardson*, 13 N.Y.S. 861, 862, (N.Y. Gen. Term 1891)). Faced with the question of whether that statute applied to easements, the Supreme Court of New York concluded that it did, holding that an easement was an "estate in fee" under the statute. *Whitney*, 13 N.Y.S. at 862 (interpreting *Nellis v. Munson*, 108 N.Y. 453, 15 N.E. 739, 741 (N.Y. 1888)); *see also* N.Y. Jur. 2d Easements, § 30 (1997) ("The statute providing that the term 'heirs' or other words of inheritance are not necessary to convey an estate in fee simple also applies to the creation of an easement . . .").[9] * * *

Unlike the dissent, we find the statute to be sufficiently clear that it applies to easements.

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[9] Other states with nearly identical language have similarly interpreted their statutes to include easements as well as conveyances of land. See, e.g., *Presbyterian Church of Osceola, Clarke County v. Harken*, 177 Iowa 195, 158 N.W. 692 (Iowa 1916); *Karmuller v. Krotz*, 18 Iowa 352 (1865); *Brown v. Redfern*, 541 S.W.2d 725 (Mo. Ct. App. 1976).

* * *

**REBECCA GRASSL BRADLEY, J**. *(dissenting)*.

> It must not be. There is no power in Venice Can alter a decree established. 'Twill be recorded for a precedent, And many an error by the same example Will rush into the state. It cannot be.

William Shakespeare, The Merchant of Venice act 4, sc. 1, ll. 215-19 (Jay L. Halio ed., 1993) (statement of the character Portia).

A majority of this court forgoes an opportunity to correct an objectively erroneous interpretation of law. In *Borek Cranberry Marsh, Inc. v. Jackson County*, this court created a flawed—yet binding—precedent, which requires lower courts to ignore the plain meaning of Wis. Stat. § 706.10(3). This court should adopt a meaning grounded in the statutory text.

Wisconsin Stat. § 706.10(3) states, "[i]n conveyances of lands words of inheritance shall not be necessary to create or convey a fee, and every conveyance shall pass all the estate or interest of the grantor unless a different intent shall appear expressly or by necessary implication in the terms of such conveyance." In *Borek*, this court held both clauses of § 706.10(3) apply to easements, although it acknowledged "a cursory reading of § 706.10(3) might suggest that its provisions do not govern easements[.]" It then muddled the language of the two clauses and concluded § 706.10(3) creates a presumption that an easement runs with the land unless the deed creating the easement "expressly or by necessary implication" says otherwise. Section 706.10(3) has nothing to say about whether an easement runs with the land or is personal and non-transferrable.

* * *

Error 2: Misapplying the Borrowed-Statute Doctrine

The majority in *Borek* started its statutory analysis by giving undue weight to pseudo-legislative history disguised as statutory history. The majority noted a predecessor statute to Wis. Stat. § 706.10(3) was partly based on a New York statute enacted in 1835. * * * In 1878, the legislature then amended the statute. * * * Well after 1878, New York's intermediate appellate court purportedly held "an easement" is "an estate in fee" under the New York statute.[7] Borek*., ¶19* (majority op.) (quoting *Whitney v. Richardson,* 13 N.Y.S. 861, 862, (N.Y. Gen. Term 1891)). Oddly, this New York case, *Whitney*, takes center stage in *Borek*'s analysis. * * *

The [Borek] majority appears to have relied on a corrupted version of the "***Borrowed-Statute*** Doctrine." *See* Garner et al., *The Law of Judicial Precedent*, at 716. According to a leading treatise, this doctrine holds:

> When one state enacts another state's statutory language that has a settled judicial interpretation, it is sometimes presumed that the settled interpretation is adopted with the statute. But this overstates the matter: properly viewed, the decision of the source state's high court on a point concerning the statute are merely persuasive precedents and are not binding on the courts of the borrowing state.

*Id.* This doctrine derives from the (questionable) presumption that when a state's legislature adopts a statute based on language in another state's statute, it is aware of how that language has been interpreted and desires that interpretation to be applied in its state. Multiple problems imbue the *Borek* majority's application of this doctrine.

First, the ***borrowed-statute*** doctrine does not apply unless the other state's interpretation was rendered before the statute was enacted. * * * The reason why is clear: a legislature does not have a crystal ball that tells it how some future court in another state will decide a case, so it obviously is not basing statutory language on that future decision. * * *

Wisconsin Stat. § 706.10(3)'s predecessor was adopted in 1878 (according to the *Borek* majority), and *Whitney*, the New York Supreme Court decision on which it relies, was decided over a decade later in 1891. *Whitney*, the *Borek* majority claimed, was based on a New York Court of Appeals decision, but even that decision was rendered in 1888—a full decade after the statutory enactment. *Borek, ¶19* (citing *Whitney,* 13 N.Y.S. at 862 (citing *Nellis v. Munson,* 108 N.Y. 453, (1888))). For this reason alone, the New York cases are no more persuasive than decisions from any other state * * * *See Sutherland* § 52:2 ("A subsequent construction in the state of origin is never more than 'persuasive,' and usually has no more weight than the interpretation of any similar statute from another jurisdiction.").

Second, *Whitney* is an intermediate appellate court decision. The ***borrowed-statute*** doctrine does not apply (or at least applies with much less force) to decisions of lower courts—regardless of when they were rendered. *Garner et al.*, *The Law of Judicial Precedent,* at 722; *see also Sutherland* § 52:2 ("Decisions from intermediate courts in the state of origin, and from administrative tribunals, have less effect than those of the highest court, because states normally adopt only decisions from a court of last resort when they adopt a statute."). Intermediate appellate courts decide an extraordinary number of cases, and whether a state legislature is aware of its own state intermediate appellate court's decisions is questionable—let alone those of another state. *See* * * * *Lewis v. State*, 32 Ariz. 182, (Ariz. 1927) ("It is the general rule that when we take a statute from a sister state we take it with the interpretation previously placed upon it by the court of last resort of that state. This, however, is not an absolute rule, and if we think the construction so given is not consonant with common sense, reason, and our public policy, we are not absolutely bound to accept it. Still less are we bound when the decision is one of an intermediate appellate court, and rendered after we have adopted the statute." (internal citation omitted)) * * *

Third, the *Borek* majority misread *Whitney* and *Nellis. Whitney* did not interpret the New York statute. In fact, it said very little on the topic at all. While the *Borek* majority leaves the impression *Whitney* thoroughly analyzed this issue, the entire discussion of the statute is little more than a quote of the statutory text followed by a conclusory statement * * *

*Nellis* is no more on point. As Chief Justice Abrahamson noted in dissent, that case did not interpret the New York statute on which the Wisconsin statute was partly based. *Nellis* interpreted another statute, on a related subject matter * * *

Error 3: Giving Too Much Weight to the ***Borrowed-Statute*** Doctrine

The *Borek* majority failed to recognize the limited reach of the ***borrowed-statute*** doctrine. Justice Antonin Scalia and Bryan A. Garner have called the canon "dubious[.]" *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 325-26 (2012). They asked rhetorically, "[h]ow is the competent lawyer (or the court, for that matter) to know that a statute has been 'copied' from that of another state?" As they explain, resort to legislative history is often inappropriate.

Whether the ***borrowed-statute*** doctrine can even be considered an intrinsic source of statutory meaning, as the *Borek* majority seemed to treat it, is doubtful. Indeed, at least one list of canons catalogs the doctrine under "extrinsic source canons." *See* William N. Eskridge, Jr. & Philip P. Frickey, Foreword*, Law as Equilibrium*, 108 Harv. L. Rev. 26, 100 (1994). The doctrine exists as a particular application of legislative history, which may occasionally be useful to resolve an ambiguity. *See* Garner et al., *The Law of Judicial Precedent,* at 717-18 ("[T]he ***borrowed-statute*** doctrine is actually a tenuous canon of construction that typically requires an extensive use of legislative history (which is hardly a recommendation for it in the eyes of traditionalists). Although some will consider the doctrine helpful as an occasional aid in statutory construction, it should never bind the courts when other interpretative tools indicate a better interpretation. The U.S. Supreme Court has viewed the principle this way[.]").

Additionally, overreliance on the ***borrowed-statute*** doctrine is inconsistent with this court's general hesitancy toward comparative law. Even if two states have similar statutes, they may have vastly **different** methods of statutory interpretation. "The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation." Henry M. Hart & Albert M. Sacks, *The Legal Process* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). While Wisconsin courts have long employed textualism, not every state does. * * * “This court has no apprehension about being a solitary beacon in the law if our position is based on a sound application of this state's jurisprudence." * * *

The *Borek* majority never declared Wis. Stat. § 706.10(3) ambiguous, so resort to extrinsic sources as the basis for interpreting the statute is impermissible. The opinion seems to search for ambiguity, but none exists. * * *

IV. CONCLUSION

* * *

The *Borek* majority erected a fence where one did not belong. In this case, the majority reinforces that fence, without so much as an explanation. I respectfully dissent.

## Questions and Comments

**1. Statutory interpretation question:** What was the statutory interpretation question that the Wisconsin Supreme Court was trying to decide in *Borek* and *Cobb*? Why did the *Borek* court interpret the Wisconsin statute in the manner that it did?

**2. Evidence of "borrowing":** As noted above, courts only apply the "borrowed statute" canon when they conclude that a statute being interpreted was modeled on a statute from another jurisdiction. Why did the *Borek* court conclude that it was appropriate to examine the interpretation of a New York statute to interpret the Wisconsin statute? What concerns does the *Cobb* dissent raise regarding the way a court decides whether a statute was modeled on another statute?

**3. Which precedent is borrowed with the statute?** The *Cobb* dissent criticized the *Borek* court for relying on *Whitney v. Richardson*, a New York State trial court decision from 1891, to interpret the Wisconsin statute, which was enacted in 1878 and modeled on the New York statute referenced by the *Whitney* court. Should a court in a borrowing jurisdiction rely on decisions from a trial level court from the source state to interpret its statute? Should a court in a borrowing jurisdiction rely on decisions in the source state issued after the statute had been enacted in the borrowing jurisdiction?

**4. Merely a presumption:** Although courts will presume, under the borrowed statute doctrine, that the borrowing legislature intended to have its statute interpreted consistently with the precedent from the highest court of the source jurisdiction, the presumption can be rebutted if the precedent from the source state conflicts with public policy of the borrowing state. *See* *Van Horn v. Blanchard*, 438 A.2d 552 (N.J. 1981) (dissenting opinion); *Lewis v. State*, 32 Ariz. 182 (Ariz. 1927) (cited above in *Cobb* dissent). The *Cobb* dissent did not cite a conflict between New York's interpretation and a "public policy" of Wisconsin. However, the dissent concluded that Wisconsin courts should not apply the borrowed statute canon at all under Wisconsin's approach to statutory interpretation. Why?

### 2. Model or Uniform Acts

While state legislatures may draft bills that are based on other state or federal laws, they may also draft bills based on uniform or model legislation drafted by bodies other than another legislature or Congress.[407] Uniform laws are intended to be adopted and

[407] The Harvard Law Library maintains a useful website to facilitate access to uniform and model laws. *See* Harvard Law School Library, *Uniform Laws and Model Acts,* https://guides.library.harvard.edu/law/unifmodelacts#s-lg-page-section-5857782 (last visited Jan.

interpreted in a uniform manner, whereas model laws are not developed with uniformity as a central goal.[408] Model laws may be developed by interest groups such as the American Legislative Exchange Council or the National Consumer Law Center, or non-partisan entities such as the American Law Institute.[409] Model laws drafted by advocacy organizations frequently embody the agenda of the organization.[410] Uniform laws, on the other hand, are drafted by the non-partisan Uniform Law Commission, which also drafts some model laws.[411] The approach that courts take when interpreting uniform or model laws differs in some ways from the approach they take when interpreting borrowed statutes.

### Uniform Acts

Uniform acts are developed by the Uniform Law Commission (ULC), also known as the National Conference of Commissioners on Uniform Laws.[412] The Commission is a "legislative drafting consortium of the state governments, operating in fields on law in which multi-state contacts or multi-state concerns make uniformity desirable."[413] It was

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16, 2023). Uniform Laws Annotated, published by Thomson Reuters, includes the text of model and uniform laws and identifies the jurisdictions that have adopted them. States might draft statutes based on uniform or model acts for many reasons including (1) because they intend the statutes to be interpreted uniformly with statutes in other jurisdictions; (2) because they are relying on the superior expertise of another entity to draft legislation; or (3) because they have limited time or resources to draft legislation, so it is more efficient to rely on another entity to draft the legislation. *See* Gregory A. Elinson & Robert H. Sitkof, *When a Statute Comes With a User Manual: Reconciling Textualism and Uniform Acts,* 71 Emory L. J. 1073, 1110-1112 (2022). When a state adopts legislation drafted by the Uniform Law Commission, in particular, there are advantages over adopting legislation drafted by interest groups because the Commission is a non-partisan government body that develops uniform laws through a public, formal and transparent process. *Id.* at 1109-1111.

[408] Although model laws are not developed with uniformity as a central goal, state courts might, nevertheless, consider judicial interpretations of such statutes adopted in other states when interpreting the model law in their own state.

[409] *See* American Law Institute, *Model Codes and Studies*, https://www.ali.org/publications/#publication-type-model-codes (last visited Jan. 16, 2023). The ALI developed the Model Penal Code and the Uniform Commercial Code. *Id.*

[410] The American Legislative Exchange Council drafts laws "dedicated to the principles of limited government, free markets, and federalism," s*ee* American Legislative Exchange Council, https://alec.org/ (last visited Jan. 16, 2023), while the National Consumer Law Center focuses on "economic justice for low-income and other vulnerable people …" *See* National Consumer Law Center, *About Us, https://www.nclc.org/about-us/* (last visited Jan. 16, 2023).

[411] Although the discussion of uniform laws in this section refers to laws drafted by the Uniform Law Commission, other entities have developed model laws with a stated goal of uniformity in the law. *See, e.g.,* National Association of Insurance Commissioners, *NAIC Model Laws,* https://content.naic.org/cipr-topics/naic-model-laws (last visited Jan. 16, 2023).

[412] *See* Uniform Law Commission, *About Us,* https://www.uniformlaws.org/aboutulc/overview (last visited Jan. 16, 2023).

[413] *See* John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error and Nonprobate Transfers,* 38 ACTEC L. J. 1,3 (2012).

created when several states that had created commissions on uniform laws met collectively in 1892 at the first conference of State Uniform Law Commissioners.[414] Since the early twentieth century, the Commission has included commissioners from every state.[415] Commissioners on the ULC are appointed by state governors, state legislators, or other state officials, as determined by each state's statute.[416] While states can appoint as many commissioners as their state legislation authorizes, each state only has one vote on the Commission.[417]

Before the ULC drafts a uniform act, it must determine (1) that the subject matter of the act "is appropriate for state legislation in view of the powers granted by the Constitution … to Congress"; and (2) that approval of the act would be consistent with the objectives of the ULC "to promote uniformity in the law among the several states where uniformity is desirable and practicable."[418] If the ULC decides to move forward with the development of a uniform act, it creates a drafting committee of commissioners to draft the law.[419] The committee is assigned an advisor from the ABA, who solicits input from the ABA, and the committee frequently invites relevant interest groups who will be affected by the legislation to participate in the drafting process.[420] The draft is presented for floor debate at an annual meeting of the entire Commission and is normally not adopted by the Commission until it has been presented at two separate meetings.[421]

The Committee ultimately adopts (1) the text of the uniform act[422], which always contains a provision that instructs courts that "in applying and construing [the] … Act, consideration must be given to promoting uniformity of the law with respect to its subject matter among States that enact it"[423]; and (2) official comments that accompany the text.[424] There are frequently comments for each provision of the uniform act, and the comments "describe the ULC's reasons for adopting the … text, the meaning of key terms, the extent to which

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414 *See* Elinson & Sitkof, *supra* note 17, at 1083-1084. The states had created the commissions after the American Bar Association formed a "Special Committee on Uniformity of State Legislation" in 1889. *Id.*

415 *Id.* at 1084. *See also* Uniform Law Commission, *Organization,* https://www.uniformlaws.org/aboutulc/overview (last visited Jan. 16, 2023).

416 *See* Elinson & Sitkof, *supra* note 17, at 1085.

417 *Id.*

418 *See Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Uniform and Model Acts,* UNIF. L. COMM., http://www.uniformlaws.org/projects/overview/newprojectcriteria (last visited Jan. 16, 2023).

419 *See* Elinson & Sitkof, *supra* note 17, at 1087.

420 *Id.*

421 *Id.* at 1089.

422 *Id.* at 1090. The Act must be approved by a majority of the jurisdictions present at the conference. *Id.*

423 *Id.* at 1090.

424 *Id.* at 1091. The comments are finalized *after* the Commission has approved the text of the Act. *Id.* at 1092-93.

the [text] represents a departure from the status quo, and important potential criticisms."[425] The ULC has adopted more than one hundred uniform acts.[426]

A uniform act and its comments have no effect on their own, but only have an effect when adopted by a state through the legislative process. States frequently adopt uniform acts verbatim[427], but a state may choose to adopt parts of a uniform act or to alter or amend a uniform act.[428] Generally, though, state legislatures retain the provision in the uniform act that promotes uniformity when interpreting one.[429] Some uniform acts have been adopted by nearly every state[430], while others have been adopted by very few.[431]

When a state adopts a uniform act, including a provision that counsels courts to apply the law in a manner that promotes uniformity, its courts will frequently strive to interpret the state statute in a manner that is consistent with the interpretation adopted by other courts that have interpreted the statutory provision at issue.[432] Although that seems logical under a purposivist or intentionalist approach, it is also consistent with a textualist approach, since the text of the statute counsels courts to interpret the statute to promote uniformity.[433]

Unlike the difficulty of doing so under the borrowed statute doctrine, courts will consider interpretations of the statute adopted by jurisdictions *after* the state enacted the uniform act, because consistent interpretation promotes uniformity, regardless of whether the statute had been interpreted in a particular way before the legislature adopted the uniform act.[434] While courts will generally attempt to interpret uniform acts in a manner that is

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425 *Id.* at 1091.

426 *See* Uniform Law Commission, *Current Acts,* https://www.uniformlaws.org/acts/catalog/current (last visited Jan. 16, 2023).

427 *See* Elinson & Sitkof, *supra* note 17, at 1094. In fact, the legislative drafting manuals of many states, including Arizona, Montana and Oregon, direct legislators to depart as little as possible from the ULC text. *Id.*

428 *Id.* at 1095.

429 *Id.*

430 The Uniform Electronic Transactions Act has been adopted in every state and the Uniform Anatomical Gift Act has been adopted in 48 states. *Id.* at 1093-94.

431 *Id.* at 1094.

432 *See, e.g. Blitz v. Beth Isaac Adas Israel Congregation*, 720 A.2d 912, 918 (Md. 1998); *Holiday Inns, Inc. v. Olsen,* 692 S.W. 2d 850, 853 (Tenn. 1985). Some states explicitly have adopted statutory directives that require courts in the state, generally, to interpret uniform acts in a way that effects the purpose of the laws to make uniform the laws of the states that enact the uniform law. *See, e.g.* TEX. GOV'T CODE ANN. § 311.028 (2015); HAW. REV. STAT. ANN. § 1-24 (2008); MINN. STAT. ANN. § 645.22 (1950). Difficulties arise, obviously, when a state is attempting to interpret a provision in a uniform law and two or more other jurisdictions have adopted conflicting interpretations of the provision.

433 *See* Elinson & Sitkof, *supra* note 17, at 1076-78.

434 When interpreting borrowed statutes, courts do not give weight to interpretations of statutes in the jurisdiction from which the statute was borrowed that are announced after the borrowed statute is enacted because the borrowing legislation would not have been aware of the interpretation of the other jurisdiction, so could not have intended to incorporate that interpretation

consistent with other jurisdictions, they frequently include a caveat that they will not do so when the interpretation antagonizes state public policies.[435]

One thorny issue that arises with the adoption of uniform acts is the weight to be accorded to the comments that accompany the uniform acts. In some ways, these are similar to legislative history, so courts adopting a purposivist or intentionalist theory of interpretation will likely find the comments to be useful interpretive tools. Textualists, on the other hand, often eschew legislative history and sources extrinsic to the statute's text. However, Professors Gregory Ellinson and Robert Sitkof argue that when a state adopts a uniform statute without making any alterations to the statute, the textual provision of the statute that counsels courts to interpret the statute to achieve uniformity requires even textualist courts to treat the ULC comments as persuasive authority when interpreting the statute.[436] If, however, a state makes significant alterations to the uniform statute when adopting it, Ellinson and Sitkof acknowledge that there would be less reason for textualists to rely on the ULC comments as persuasive authority.[437]

## Model Acts

The primary difference between model acts and uniform acts is that there is not a goal of uniformity associated with model acts. As noted above, model acts may be drafted by partisan or non-partisan organizations for a variety of purposes. The Uniform Law Commission even adopts model acts as well as uniform acts. The ULC adopts model acts, rather than uniform acts, when "uniformity may be a desirable objective, though not a principal objective, and the act may promote uniformity and minimize diversity even though a significant number of jurisdictions may not adopt the act in its entirety, or the purposes of the act can be substantially achieved even though it is not adopted in its entirety by every state."[438] Consequently, the special rules regarding interpretation of uniform acts outlined above do not generally apply to interpretation of model acts.[439]

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into the borrowed statute. However, when a state legislature adopts a uniform statute with the intent of having the statute interpreted uniformly across states, the legislature's intent is advanced by interpreting the statute consistently with interpretations of the statute in other states that are adopted *before or after* the state enacts the uniform statute.

435 *See, e.g.* Holiday Inns, Inc. v. Olsen, 692 S.W. at 853.

436 *See* Elinson & Sitkof, *supra* note 17, at 1078, 1080. Ellinson and Sitkoff cite *In re Trust D Under Last Will of Darby,* 234 P.3d 793 (Kan. 2010), as an example of a case where a court appropriately relied on ULC comments. *See* Elinson & Sitkof, *supra* note 17, at 1121.

437 *Id.*

438 *See* Uniform Law Commission, *What is a Model Act?,* https://www.uniformlaws.org/acts/overview/modelacts (last visited Jan. 16, 2023). As of January, 2023, the ULC had adopted 40 model acts, as opposed to 128 uniform acts. *See* Uniform Law Commission, *Model Acts,* https://my.uniformlaws.org/search?s=tags%3A%22Model%20Act%22&executesearch=true (last visited Jan. 16, 2023).

439 The ULC occasionally redesignates a uniform law as a model law when very few states adopt the law, as was the case with the Uniform Marital Property Act. *See* Elinson & Sitkof, *supra* note 17, at 1094. As Professor Lind a Jellum notes, since legislatures do not always make it

However, when a model act has been widely adopted in many jurisdictions, a court interpreting the act adopted by its state legislature may give weight to the interpretation of the model act by other jurisdictions that have adopted it, provided the interpretation does not conflict with the public policies of the state.[440]

## Problem 5-1

In 1995, the legislature of the State of Ames enacted the Coastal Protection Law. The law included the following provisions:

**Section 2. Findings and Purposes**

(a) Excess construction along the coast of Ames is causing coastal erosion and creating severe aquatic pollution problems.

(b) Several hurricanes have devastated the Ames coastline over the past few years, killing dozens of people and causing over $150 million worth of property damage. Limits on construction along the coastline are necessary to protect private property and public health and safety.

**Section 100. Oceanfront Development**

(a) Except as provided in subsection (b), no person may construct a house, store, factory, building, or any other structure within 100 feet of the ocean.

(b) Boardwalks, docks, and lifeguard towers may be constructed within 100 feet of the ocean.

clear that they are adopting a uniform or model act, "it may be necessary to check the legislative history to determine whether a model or uniform act adoption was intended." *See* Linda D. Jellum, THE LEGISLATIVE PROCESS, STATUTORY INTERPRETATION, AND ADMINISTRATIVE AGENCIES, *supra* note 165, at 405.

[440] *See* Jellum, *supra* note 165, at 405, *citing* Brown v. Arp. & Hammond Hardware Co., 141 P. 3d 673, 680 (Wyo. 2006).

## Problem 5-1 (continued)

Saint Stephen's church is located on oceanfront property in Sea Isle, Ames and the building is 110 feet from the ocean. Saint Stephen's Church would like to build an altar and cross adjacent to their church to hold services on the beach. The altar resembles a table and is 5 feet wide by 7 feet wide. The cross is 8 feet tall and 2 feet wide. The church leaders have selected a site for the altar and cross that is 75 feet from the ocean. Several neighbors, however, have objected to the altar and cross, alleging that the Ames Coastal Protection Law prohibits the church from building the altar and cross on the proposed location. A representative of the neighbors' group has contacted you for legal advice regarding the application of the Coastal Protection Law to the church's proposed activity.

In conducting research on the issue, you discovered that during the debates on the bill that became the Ames Coastal Protection Law, Senator Sabbath, the sponsor of the bill, indicated that she drafted the bill based on the Georgia Coastal Protection Law. That law contains language identical to the language in Section 100 of the Ames law. In 1992, a Georgia court of appeals held, in *Georgia v. Wilkins,* that Pete Wilkins could not build a shed to store tools on his property at a location that was 50 feet from the ocean, because the shed was a "structure."

In addition, you discovered that Section 3 of the Ames Noise Prevention Act provides that "No person may construct a band shell, outdoor stage, or any other structure that will be used for the performance of live music in a residential neighborhood." In 1990, the Ames Supreme Court held, in *Ames v. Suds'n'Spuds*, that a 10-foot by 20-foot wooden platform that was built in the bar's parking lot was a "structure." The court indicated that it was reading the term "structure" broadly to carry out the purposes of the statute to prevent noise.

Finally, you consulted the most recent edition of the Webster's Dictionary and discovered that the word "structure" is defined as (1) a building; (2) anything that has been built or constructed, regardless of size.

On what basis could you argue that construction of the altar and cross on the proposed location would be authorized? On what basis could the church argue that the law does not prohibit their proposed construction? (Note: You do not need to discuss whether application of the law to their activities would be potentially unconstitutional.)

## D. Resolving Conflicts Across Statutes in the Same Jurisdiction

Occasionally, statutory interpretation issues arise when two statutes in the same jurisdiction appear to conflict. The first step that courts take in such situations is to attempt to harmonize the two statutes, *i.e*. read them in a manner that avoids the conflict. *See, e.g.* *FDA v. Brown and Williamson*, 529 U.S. 120. 133 (2000); *Adirondack Medical Center v. Sebelius*, 740 F.3d 692, 698-99 (D.C. Cir. 2014) ("unless the compared statutes are 'irreconcilably conflicting' … it is our duty to harmonize the provisions and render each effective.") As with many canons, the directive to harmonize statutes is based on an assumption that the legislature acts rationally and does not intend to create conflicts when enacting legislation.[441]

If conflicts between the statutes cannot be reconciled, courts apply three canons, in the following order, to resolve the conflict. First, statutes which more specifically apply to the question at issue take precedence over general statutes, regardless of when the statutes were enacted. Second, if the first rule does not resolve the conflict, the statute that was adopted later controls over the earlier adopted statute. However, the second rule is limited by the third, which creates a presumption that the legislature will not implicitly repeal a statute.[442]

### 1. Subject Matter – General v. Specific

"The specific controls over the general"[443] is a familiar rule of statutory construction that applies to conflicts within the same statute[444] as well as conflicts between statutes in the same jurisdiction. When two statutes appear to conflict when applied to a specific factual scenario, the canon counsels courts to apply the statutory provision that more specifically

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441 Professor Linda Jellum suggests that the policy of reconciling conflicting statutes "is based on the assumptions that the legislature (1) was aware of all relevant statutes when it enacted the new one, (2) would have expressly repealed or amended an existing statute had it wanted the new statute to replace the existing one, and (3) failed to repeal the existing statute because the legislature intended for both statutes to exist in harmony." *See* Jellum, *supra* note 165, at 374. Professor Jellum, and others, note that those assumptions are fictions, as legislatures are rarely aware of all legislation from preceding legislatures, conflicts with prior statutes may not be apparent when new legislation is enacted, and there could be many reasons why a legislature chooses to not amend or repeal an existing statute. *Id. See also* Levy & Glicksman, *supra* note 340, at 139 (expressing skepticism that legislatures are aware of all conflicts when they enact legislation).

442 While most conflicts can be resolved through the application of those rules, some commentators assert that if the text of both statutes is irreconcilable, both are at the same level of generality and both were simultaneously adopted, courts should not give effect to either statute. *See* Scalia & Garner, supra note 192, at 189.

443 Generalia specialibus non derogant. *See* Scalia & Garner, *supra* note 192, at 183.

444 *See, e.g.*, *Bloate v. United States*, 559 U.S. 196, 207-208 (finding that 18 U.S.C. §3161(h)(1)(D) is more specific than 18 U.S.C. §§ 3161(h)(1) or 3161(h)(7), so controls over those sections).

addresses the issue before the court, as opposed to the statutory provision that more generally addresses the issue.[445]

The canon applies regardless of the timing of the enactment of the statutes. As the Supreme Court counseled in *Morton v. Mancari*, "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."[446] This is not surprising when the specific statute is enacted *after* the general statute, because presumably the legislature enacted the specific statute to treat the specific situation differently than it would have been treated under the pre-existing general statute. *See, e.g., Nebraska Equal Opportunity Commission v. State Empl. Rel. Sys.*, 471 N.W. 2d 398 (Neb. 1991). When the specific statute is enacted *before* the general statute, though, it cannot be presumed that the legislature that enacted the specific statute would be aware that a later legislature would adopt a conflicting general statute to which the specific statute would be an exception or that the later legislature would intend, when adopting the general statute, to silently create an exception in the general statute for the pre-existing specific statute. Nevertheless, the "specific controls over the general" canon applies equally in that situation. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). The canon applies even though a canon of construction discussed in the next section of this book counsels that later enacted statutes generally control over earlier enacted statutes when the statutes conflict.[447]

One of the thorniest issues that can arise when applying this canon is determining which statutory provision is more specific regarding a statutory interpretation question before the court when two statutes conflict. *See, e.g. Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976); *Palm Beach County Canvassing Board v. Harris*, 772 So. 2d 1220 (Fla. 2000); *Williams v. Commonwealth*, 829 S.W. 2d 942 (Ky. Ct. App. 1992). The following case demonstrates this dilemma.

## RADZANOWER V. TOUCHE ROSS & CO.

**426 U.S. 148 (1976)**

**JUSTICE STEWART** delivered the opinion of the Court.

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument Audio (From Oyez)
Securities Exchange Act of 1934
The National Bank Act

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445 The canon is not absolute but carries great weight. While the court applies the specific statute to the factual scenario before it, the general statute remains operative in cases where there is no conflict.

446 417 U.S. 535, 550-551 (1974). The canon is not absolute but carries great weight. As noted by the *Mancari* Court, a court may find an indication of legislative intent to apply the general statute to a factual scenario, even though a specific statute also appears to apply and conflicts with the general statute.

447 The "later enacted" canon is, however, merely based on a fiction that the later legislature is aware of earlier legislation and intentionally legislates to amend or repeal the earlier legislation.

This case requires us to determine which venue provision controls in the event a national banking association is sued in a federal court for allegedly violating the Securities Exchange Act of 1934: the broad venue provision of the Securities Exchange Act, which allows suits under that Act to be brought in any district where the defendant may be found, or the narrow venue provision of the National Bank Act, which allows national banking associations to be sued only in the district where they are established.

The petitioner, Hyman Radzanower, instituted a class action in the District Court for the Southern District of New York alleging, *inter alia,* that the respondent, First National Bank of Boston, a national banking association with its principal office in Boston, Mass. had violated the federal securities laws by failing to disclose to the Securities and Exchange Commission and the investing public its knowledge of certain adverse financial information about one of its customers, the TelePrompter Corporation, and of securities laws violations by that company. The complaint alleged that venue was proper under § 27 of the Securities Exchange Act of 1934, … 15 U.S.C. § 78aa, which provides that

> "[a]ny suit or action to enforce any liability or duty created [by or under the Securities Exchange Act] . . . may be brought in any such district [wherein any act or transaction constituting the violation occurred] or in the district wherein the defendant is found or is an inhabitant or transacts business. . . ."

The bank moved to dismiss the complaint as to it, asserting that venue as to it lay only under the venue provision of the National Bank Act (1878), 12 U.S.C. § 94. That section provides that

> "[a]ctions and proceedings against any [national banking] association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established. . . .] "

* * *

Section 94 [of the National Bank Act] provides that suits against a national banking association "may be had" in the federal district court for the district where such association is established. The Court has held that this grant of venue is mandatory and exclusive:

> "The phrase 'suits . . . may be had' was, in every respect, appropriate language for the purpose of specifying the precise courts in which Congress consented to have national banks subject to suit, and we believe Congress intended that in those courts alone could a national bank be sued against its will."

*Mercantile Nat. Bank v. Langdeau,* 371 U. S. 555 (1963) …The venue provision of the Securities Exchange Act, by contrast, allows suits under that Act to be brought anywhere that the Act is violated or a defendant does business or can otherwise be found. It is the petitioner's contention that, when a national bank is named as a defendant in a suit brought under the Securities Exchange Act, it loses the protection of the venue provisions of § 94 and may be sued in any federal judicial district where that Act was violated or

where it does business or can be found. For the reasons that follow, we cannot accept that contention.

It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.

> "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."

*Morton v. Mancari,* 417 U. S. 535, 550-551 (1974)

The reason and philosophy of the rule is that, when the mind of the legislator has been turned to the details of a subject and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions unless it is absolutely necessary to give the latter act such a construction in order that its words shall have any meaning at all." T. Sedgwick, The Interpretation and Construction of Statutory and Constitutional Law 98 (2d ed. 1874).

When Congress enacted the narrow venue provisions of the National Bank Act, it was focusing on the particularized problems of national banks that might be sued in the state or federal courts. When, 70 years later, Congress enacted the Securities Exchange Act, its focus was on the objective of promoting fair dealing in the securities markets, and it enacted a general venue provision applicable to the broad universe of potential defendants subject to the prohibitions of that Act. Thus, unless a "clear intention otherwise" can be discerned, the principle of statutory construction discussed above counsels that the specific venue provisions of § 94 are applicable to the respondent bank in this case.

The issue thus boils down to whether a "clear intention otherwise" can be discovered -- whether, in short, it can be fairly concluded that the venue provision of the Securities Exchange Act operated as a *pro tanto* repeal of § 94. [The Court then relied primarily on the canon of statutory construction that provides that repeals of statutes by implication are disfavored, which will be examined in the next section of this book, to determine that Congress did not intend to repeal Section 94 of the National Bank Act when it enacted the Securities Exchange Act, as neither of the exceptions to the presumption against implied repeals applied in the case].

It follows, under the general principles of statutory construction discussed above, that the narrowly drawn, specific venue provision of the National Bank Act must prevail over the broader, more generally applicable venue provision of the Securities Exchange Act. We conclude, therefore, that a national banking association is subject to suit under the Securities Exchange Act only in that district wherein it is established, and that the judgment before us must accordingly be affirmed.

*It is so ordered.*

**MR. JUSTICE STEVENS**, dissenting.

In my judgment, a brief reference to the history, purpose, and language of these two special venue statutes will provide a better guide to their meaning than the exposition of the doctrine of implied repeal found in the treatise on statutory construction written by Sedgwick in 1874. Indeed, if Sedgwick were to be our guide, I would heed this advice: "When acts can be harmonized by a fair and liberal construction it must be done."

It is worth repeating that both of these statutes are special venue statutes. Neither party relies on the general venue provision in 28 U.S.C. § 1391. One relies on a special statute for one kind of litigant -- national banks; the other relies on a special statute for one kind of litigation -- cases arising under the Securities Exchange Act of 1934. The precise issue before us involves only a tiny fraction of the cases in either special category: most litigation against national banks does not arise under the Securities Exchange Act; and most litigation arising under the Securities Exchange Act does not involve national banks. Thus, with equal logic, we might describe either statute as creating an exception from the somewhat more general provisions of the other.

The rule that the legislature presumably intended to give effect to the more specific statute could therefore be applied to support the petitioner, as well as the respondent bank, in this case. Similarly, without pausing to consider the reason why each statute was enacted, we might simply apply the rule that the more recent of two conflicting statutes shall prevail, rather than the rule that the special statute takes precedence over the general. But such abstract reasoning is less instructive than a consideration of the source and the need for the alleged conflict. Of special importance is an evaluation of the intent of Congress when it enacted these statutes.

The source of the special venue statute for national banks is the Act to Provide a National Currency enacted in 1863 and amended in 1864. When these statutes were enacted, Congress apparently assumed that the newly authorized national banks would not be subject to suit in state courts unless Congress gave its express consent. The fact that the statute was phrased in permissive language suggests that Congress' primary purpose was to give such consent. The mandatory construction given to that language a century later when the Court decided *Mercantile Nat. Bank v. Langdeau,* is consistent with that purpose, because it is unlikely that the Civil War Congress intended to authorize the several States to subject national banks to the potential harassment of defending litigation in places other than the county or city where the bank was located. This reason for placing a mandatory limiting construction on the authorization for suit in the state courts is not applicable to the separately enacted federal venue provision; for, in any event, the federal courts could only entertain such litigation against national banks as Congress might authorize.

In 1934, when Congress enacted the Securities Exchange Act, there was no reason for it to assume that the language in the special jurisdictional and venue provisions of that statute would not apply to national banks. *Langdeau* would not be decided until almost

30 years later, the language in the venue provision of the Civil War banking legislation was permissive, and there was no recognized policy reason supporting an exceptional venue privilege for national banks in federal litigation. There was no longer any doubt about the suability of national banks in either state or federal courts. Moreover, what once might have been regarded as the significant burden of requiring a fledgling bank to haul its records from one county to another within the State, would hardly justify treating banks differently from other litigants in the 20th century.

On the other hand, the special venue section included in the Securities Acts was specifically designed to implement an important legislative objective. Indeed, in construing the comparable provision in the 1933 statute, the Court held that its benefits are so crucial to the legislative purpose that they cannot be waived. In contrast, it is well settled that a national bank's special venue privilege is waivable. Manifestly, there is a difference between the importance of the policies underlying the two statutes.

But there is no necessary conflict. Since the two Acts can be harmonized by a fair and liberal construction, if we heed Sedgwick's counsel, that "must be done." As already noted, the actual wording of the earlier statute, which used the words "may be had" provides no conflict with a literal reading of the later Act. The conflict is created solely by this Court's interpretation of those words as, in effect, meaning that the trial of a case against a national bank "must be had" in the place specified by Congress, rather than the place specified by a state legislature. If we so read the statute, we need only conclude that any later enacted special venue statute which, by its own terms, applies to national banks should be read to mean what it says. Preoccupation with the ancient doctrine of implied repeal should not foreclose this simple construction of the plain language of the 1934 Act.

* * *

In sum, whatever canon of statutory construction is applied, I am persuaded that we are most apt to reflect the intent of Congress faithfully if we give effect to the plain meaning of the 1934 Act, and thereby place banks on an equal footing with other corporations which must defend litigation of this kind.

I therefore respectfully dissent.

## Questions and Comments

**1. Statutory interpretation question:** What was the statutory interpretation question that the Court was trying to resolve and how did the two statutes conflict?

**2. Is there a conflict?** The first step that courts should take when addressing a conflict between two statutes is to attempt to harmonize the statutes. Does the dissent believe that there is a conflict between the statutes? How would it harmonize the statutes?

**3. Specific v. general:** Which statutory provision did the majority determine was more specific regarding the issue and how did that influence the majority’s decision? Why

does the dissent reach a different conclusion as to which provision is more specific and how does that influence the dissent's position?

**4. Later enacted statute:** What significance does the majority give to the fact that the Securities Exchange Act was enacted after the National Bank Act? Note that the majority outlines a rationale for the precedence of the specific v. general canon even when a general statute is enacted after a specific statute. Does the dissent agree that the specific controls over the general regardless of the timing of enactment of conflicting statutes?

**5. Bright line rule or a presumption?** Does the majority treat the specific v. general canon as a bright line rule? If not, when does it say a general statute may take precedence over a specific statute and why does it conclude that the general statute does not take precedence in this case? Does the dissent believe that Congress has expressed a clear intent regarding which venue provision should apply in the case?

### 2. Timing – Later Enacted v. Presumption Against Implied Repeal

If a clear conflict exists between two statutes that are at the same level of generality (*i.e.* neither is more specific than the other), courts may resolve the conflict between the two by applying a canon that provides that the later enacted statute controls over the earlier one.[448] As Alexander Hamilton noted in the Federalist Papers, "[t]he rule which has obtained in the courts for determining [conflicting statutes'] relative validity is that the last in order of time shall be preferred to the first."[449] The rule is based on the understanding that legislatures cannot bind future legislatures, but a legislature may always repeal or modify the laws of preceding legislatures.[450]

When the later statute clearly and irreconcilably conflicts with the earlier one, courts will find that the later statute repealed the earlier statute, even though the later legislature did not explicitly indicate that it was repealing the earlier statute. *See* *Posadas v. National City Bank*, 296 U.S. 497 (1936).[451] Thus, in *Palm Beach County Canvassing Board v. Harris*, a case involving the State of Florida's requirements for counting ballots in the contested 2000 Presidential election, the Florida Supreme Court held that a statutory provision adopted in 1989 that indicated that returns filed late by counties "may" be ignored[452] superseded a provision adopted in 1951 that indicated that such returns "shall"

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448 *See* Levy & Glicksman, *supra* note 340 at 140; Scalia & Garner, *supra* note 192, at 327.

449 *See* *The Federalist*, No. 78, at 468 (Clinton Rossiter ed., 1961).

450 *See* Jellum, *supra* note 165, at 375.

451 The Supreme Court has indicated that it will infer a statutory repeal when a later statute "expressly contradict[s] the original act" or when a construction "is absolutely necessary … in order that [the] words [of the later statute] shall have any meaning at all." *Traynor v. Turnage*, 485 U.S. 535, 548 (1988).

452 Fla. Stat. §102.111(1).

be ignored[453], even though the 1989 statute did not explicitly repeal the provisions of the 1951 statute.[454]

The “later in time” canon is, however, constrained by an “implied repeal” canon that is much more widely applied. Pursuant to the implied repeal canon, repeals by implication are disfavored. Courts will presume that if a legislature intends to repeal a statute, it will do so expressly. *See* *National Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) (the intention to repeal must be “clear and manifest”); *Morton v. Mancari*, 417 U.S. 535 (1974). Unlike some of the clear statement rules that will be discussed later in this book, the Supreme Court has frequently consulted sources beyond the text of the statutes in the search for “clear and manifest” legislative intent to repeal. Two situations where the Supreme Court has been willing to find that there is a “clear and manifest” intent to repeal by implication are “(1) where provisions in the two acts are in irreconcilable conflict . . . ; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute . . .” *See* *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *Posada v. National City Bank*, 296 U.S. 497, 503 (1936).

The “implied repeal” discussion from the *Radzanower* opinion that was edited out in the portion of the opinion reproduced earlier in this chapter is reproduced below. As a reminder, the case involved a conflict between a venue provision in the 1864 National Bank Act that had been interpreted to require lawsuits against national banks to be brought in the district court where national banks were established and a venue provision in the 1934 Securities Exchange Act that authorized lawsuits under that statute to be brought in the district where violations of the Securities Exchange Act occurred or where the defendant transacted business.

## RADZANOWER V. TOUCHE ROSS & CO.

**426 U.S. 148 (1976)**

**JUSTICE STEWART** delivered the opinion of the Court.

* * *

"It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored.” There are, however, "two well settled categories of repeals by implication -- (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest. . . ." *Posadas v. National City Bank,* 296

453 Fla. Stat. §102.112(1).

454 772 So. 2d 1220, 1233-1236 (2000).

U. S. 497, 503 (1936). It is evident that the "two acts" in this case fall into neither of those categories.

The statutory provisions at issue here cannot be said to be in "irreconcilable conflict" in the sense that there is a positive repugnancy between them or that they cannot mutually coexist. It is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states the problem. Rather, "when two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective." *Morton v. Mancari, supra* at 417 U. S. 551. As the Court put the matter in discussing the interrelationship of the antitrust laws and the securities laws:

"Repeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes." *Silver v. New York Stock Exchange,* 373 U. S. 341, 357 (1963).

Here, the basic purposes of the Securities Exchange Act can be fairly served by giving full effect to the provisions of 12 U.S.C. § 94. The primary purpose of the Securities Exchange Act was not to regulate the activities of national banks as such, but "[t]o provide fair and honest mechanisms for the pricing of securities [and] to assure that dealing in securities is fair and without undue preferences or advantages among investors. . . ." H.R.Rep. No. 9229, p. 91 (1975)

Its venue provision, § 27, was intended to facilitate that goal by enabling suits to enforce rights created by the Act to be brought wherever a defendant could be found. The venue provision of the National Bank Act, § 94, was intended, on the other hand, "for the convenience of those [banking] institutions, and to prevent interruption in their business that might result from their books being sent to distant counties. . . ." *Charlotte Nat. Bank v. Morgan,* 132 U.S. 141, 145 (1889).

By allowing suits against national banks to be brought only pursuant to § 94, the purposes of that section will obviously be served. Yet application of § 94 will not "unduly interfere" with the operation of the Securities Exchange Act. * * * Section 94 will have no impact whatever upon the vast majority of lawsuits brought under that Act. In the tiny fraction of litigation where its effect will be felt, it will foreclose nobody from invoking the Act's provisions. Members of the investing public will still be free to bring actions against national banks under the Act. While suits against this narrow and infrequent category of defendants will have to be brought where the defendant is established, that is hardly an insurmountable burden in this day of easy and rapid transportation. Since it is possible for the statutes to coexist in this manner, they are not so repugnant to each other as to justify a finding of an implied repeal by this Court. It is simply not "necessary" that § 94 be repealed in part in order "to make the Securities Exchange Act work."

Moreover, it cannot be said either that "the later act covers the whole subject of the earlier one, and is clearly intended as a substitute," or that "the intention of the legislature to repeal [is] clear and manifest." The Securities Exchange Act of 1934 covers a "subject"

quite different from the National Bank Act. The 1934 Act was enacted primarily to halt securities fraud, not to regulate banks. Indeed, banks were specifically exempted from many provisions of the securities laws, and Congress almost contemporaneously enacted other specific legislation dealing with the problems arising from banks' involvement in the securities business. The passage of that legislation and the exemption of national banks from important provisions of the securities laws suggest, if anything, that Congress was reaffirming its view that national banks should be regulated separately by specific legislation applying only to them. And there is nothing in the legislative history of the Securities Exchange Act to support the view that Congress, in enacting it, gave the slightest consideration to the *pro tanto* repeal of § 94, let alone to indicate "that Congress consciously abandoned its [prior] policy," or that its intent to repeal § 94 *pro tanto* was "*clear and manifest.'"*

For these reasons, it is impossible to conclude that § 94 was partially repealed by implication in 1934. It follows, under the general principles of statutory construction discussed above, that the narrowly drawn, specific venue provision of the National Bank Act must prevail over the broader, more generally applicable venue provision of the Securities Exchange Act. We conclude, therefore, that a national banking association is subject to suit under the Securities Exchange Act only in that district wherein it is established, and that the judgment before us must accordingly be affirmed.

*It is so ordered.*

**JUSTICE STEVENS**, dissenting.

The rule that repeals by implication are not favored, like all other canons of statutory construction, is merely one of the guidelines to observe in the search for a construction which will best reflect the real intent of the legislature. When we are dealing with a well established and clearly defined old rule, it is usually reasonable to suppose that the legislative intent to change such a rule would be unambiguously expressed. Or if we are dealing with an old rule that is an established and important part of our national policy, we must be sure that it is not changed simply by inadvertent use of broad statutory language. Thus, if Congress intended to modify the long-settled practice of preferential hiring of Indians on Indian reservations, or to limit the coverage of a statute as important as the Sherman Act, a court would require an unambiguous expression of intent to make such a change; without such an expression, it is reasonable to believe that inadvertence, rather than an intent to repeal, is the actual explanation for the broad language that arguably changes the old rule. But if neither the existence of, nor the reason for, the old rule is clear at the time of the later enactment, there is no special reason for questioning the legislative intent to have the later statute mean exactly what it says. Specifically, in this case, since it is clear that Congress intended national banks to be covered by some sections of the Securities Exchange Act, but not others, and since the purpose of authorizing a broader venue in this type of litigation applies with equal force to national banks and other defendants, the canon of construction strikes me as an unreliable guide for ascertaining the true intent of Congress.

* * *

In sum, whatever canon of statutory construction is applied, I am persuaded that we are most apt to reflect the intent of Congress faithfully if we give effect to the plain meaning of the 1934 Act, and thereby place banks on an equal footing with other corporations which must defend litigation of this kind.

I therefore respectfully dissent.

## Questions and Comments

**1. Rebutting the presumption:** Note that the majority identifies and applies the two traditional exceptions to the presumption that Congress will not repeal statutes by implication. Why did the majority find that the two provisions were not "irreconcilable"? The dissent also believed that the two provisions could exist in harmony, but for different reasons. Look back at the portion of the opinion reproduced earlier to see how the dissent's reconciliation of the two venue provisions is different than the majority's reconciliation. Are the majority and dissent looking for the clear evidence of Congressional intent in the text of the statutes alone?

**2. Coverage of the whole subject; clear and manifest intent?** Why does the majority conclude that the Securities Exchange Act does not cover the whole subject of the National Bank Act? Does it limit its focus to the text of the statute? Even if neither of the two situations where courts will find implied repeal exists, courts can still find implied repeal if the intent of the later legislature to repeal the earlier legislation is "clear and manifest." Does the majority find that the 1934 legislature's intent to repeal the 1864 venue provision is "clear and manifest"?

**3. Dissent's views on the presumption:** Note that the dissent suggests a further limit on the application of the presumption against implied repeals. What is the limit that the dissent would impose on the canon? Note that courts have not generally limited the canon in the manner advocated by the dissent.

One of the most frequently cited cases that applied the implied repeal canon is *Morton v. Mancari,* which is reproduced below.


BIA Logo – Public Domain

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument Audio (From Oyez)
Indian Reorganization Act of 1934
Equal Employment Opportunity Act
Case Background (From Quimbee)

## MORTON V. MANCARI

### 417 U.S. 535 (1974)

**MR. JUSTICE BLACKMUN** delivered the opinion of the Court.

The Indian Reorganization Act of 1934, * * * 48 Stat. 984, 25 U.S.C. 461 et seq., accords an employment preference for qualified Indians in the Bureau of Indian Affairs (BIA or Bureau). Appellees, non-Indian BIA employees, challenged this preference as contrary to the anti-discrimination provisions of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. 2000e et seq. (1970 ed., Supp. II) * * * A three-judge Federal District Court concluded that the Indian preference under the 1934 Act was impliedly repealed by the 1972 Act. We noted probable jurisdiction in order to examine the * * * validity of this longstanding Indian preference.

I

Section 12 of the Indian Reorganization Act, 48 Stat. 986, 25 U.S.C. 472, provides:

> "The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions."

In June 1972, pursuant to this provision, the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, issued a directive (Personnel Management Letter No. 72-12) (App. 52) stating that the BIA's policy would be to grant a preference to qualified Indians not only, as before, in the initial hiring stage, but also in the situation where an Indian and a non-Indian, both already employed by the BIA, were competing for a promotion within the Bureau. The record indicates that this policy was implemented immediately.

Shortly thereafter, appellees, who are non-Indian employees of the BIA at Albuquerque, instituted this class action, on behalf of themselves and other non-Indian employees similarly situated, in the United States District Court for the District of New Mexico, claiming that the "so-called `Indian Preference Statutes,'" were repealed by the 1972 Equal Employment Opportunity Act.

* * *

II

The federal policy of according some hiring preference to Indians in the Indian service dates at least as far back as 1834. Since that time, Congress repeatedly has enacted various preferences of the general type here at issue. The purpose of these preferences, as variously expressed in the legislative history, has been to give Indians a greater

participation in their own self-government; to further the Government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life.

The preference directly at issue here was enacted as an important part of the sweeping Indian Reorganization Act of 1934. The overriding purpose of that particular Act was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically. Congress was seeking to modify the then-existing situation whereby the primarily non-Indian-staffed BIA had plenary control, for all practical purposes, over the lives and destinies of the federally recognized Indian tribes. * * * The solution ultimately adopted was to strengthen tribal government while continuing the active role of the BIA, with the understanding that the Bureau would be more responsive to the interests of the people it was created to serve.

One of the primary means by which self-government would be fostered and the Bureau made more responsive was to increase the participation of tribal Indians in the BIA operations. In order to achieve this end, it was recognized that some kind of preference and exemption from otherwise prevailing civil service requirements was necessary. Congressman Howard, the House sponsor, expressed the need for the preference:

> "The Indians have not only been thus deprived of civic rights and powers, but they have been largely deprived of the opportunity to enter the more important positions in the service of the very bureau which manages their affairs. * * * It should be possible for Indians with the requisite vocational and professional training to enter the service of their own people without the necessity of competing with white applicants for these positions. This bill permits them to do so." 78 Cong. Rec. 11729 (1934).

Congress was well aware that the proposed preference would result in employment disadvantages within the BIA for non-Indians. Not only was this displacement unavoidable if room were to be made for Indians, but it was explicitly determined that gradual replacement of non-Indians with Indians within the Bureau was a desirable feature of the entire program for self-government. Since 1934, the BIA has implemented the preference with a fair degree of success. The percentage of Indians employed in the Bureau rose from 34% in 1934 to 57% in 1972. This reversed the former downward trend and was due, clearly, to the presence of the 1934 Act. The Commissioner's extension of the preference in 1972 to promotions within the BIA was designed to bring more Indians into positions of responsibility and, in that regard, appears to be a logical extension of the congressional intent.

III

It is against this background that we encounter the first issue in the present case: whether the Indian preference was repealed by the Equal Employment Opportunity Act of 1972. Title VII of the Civil Rights Act of 1964, 78 Stat. 253, was the first major piece of federal legislation prohibiting discrimination in private employment on the basis of "race, color,

religion, sex, or national origin." 42 U.S.C. 2000e-2 (a). Significantly, 701 (b) and 703 (i) of that Act explicitly exempted from its coverage the preferential employment of Indians by Indian tribes or by industries located on or near Indian reservations. 42 U.S.C. 2000e (b) and 2000e-2 (i). This exemption reveals a clear congressional recognition, within the framework of Title VII, of the unique legal status of tribal and reservation-based activities. The Senate sponsor, Senator Humphrey, stated on the floor by way of explanation:

> "This exemption is consistent with the Federal Government's policy of encouraging Indian employment and with the special legal position of Indians." 110 Cong. Rec. 12723 (1964).

The 1964 Act did not specifically outlaw employment discrimination by the Federal Government. Yet the mechanism for enforcing longstanding Executive Orders forbidding Government discrimination had proved ineffective for the most part. In order to remedy this, Congress, by the 1972 Act, amended the 1964 Act proscribed discrimination in most areas of federal employment. In general, it may be said that the substantive anti-discrimination law embraced in Title VII was carried over and applied to the Federal Government. As stated in the House Report:

> "To correct this entrenched discrimination in the Federal service, it is necessary to insure the effective application of uniform, fair and strongly enforced policies. The present law and the proposed statute do not permit industry and labor organizations to be the judges of their own conduct in the area of employment discrimination. There is no reason why government agencies should not be treated similarly . . . ." H. R. Rep. No. 92-238, on H. R. 1746, pp. 24-25 (1971).

Nowhere in the legislative history of the 1972 Act, however, is there any mention of Indian preference.

Appellees assert, and the District Court held, that since the 1972 Act proscribed racial discrimination in Government employment, the Act necessarily, albeit sub silentio, repealed the provision of the 1934 Act that called for the preference in the BIA of one racial group, Indians, over non-Indians:

> "When a conflict such as in this case, is present, the most recent law or Act should apply and the conflicting Preferences passed some 39 years earlier should be impliedly repealed." Brief for Appellees 7.

We disagree. For several reasons we conclude that Congress did not intend to repeal the Indian preference and that the District Court erred in holding that it was repealed.

First: There are the above-mentioned affirmative provisions in the 1964 Act excluding coverage of tribal employment and of preferential treatment by a business or enterprise on or near a reservation. 42 U.S.C. 2000e (b) and 2000e-2 (i). These 1964 exemptions as to private employment indicate Congress' recognition of the longstanding federal policy of providing a unique legal status to Indians in matters concerning tribal or "on or near" reservation employment. The exemptions reveal a clear congressional sentiment that an

Indian preference in the narrow context of tribal or reservation-related employment did not constitute racial discrimination of the type otherwise proscribed. In extending the general anti-discrimination machinery to federal employment in 1972, Congress in no way modified these private employment preferences built into the 1964 Act, and they are still in effect. It would be anomalous to conclude that Congress intended to eliminate the longstanding statutory preferences in BIA employment, as being racially discriminatory, at the very same time it was reaffirming the right of tribal and reservation-related private employers to provide Indian preference. Appellees' assertion that Congress implicitly repealed the preference as racially discriminatory, while retaining the 1964 preferences, attributes to Congress irrationality and arbitrariness, an attribution we do not share.

Second: Three months after Congress passed the 1972 amendments, it enacted two new Indian preference laws. These were part of the Education Amendments of 1972, 86 Stat. 235, 20 U.S.C. 887c (a) and (d), and 1119a (1970 ed., Supp. II). The new laws explicitly require that Indians be given preference in Government programs for training teachers of Indian children. It is improbable, to say the least, that the same Congress which affirmatively approved and enacted these additional and similar Indian preferences was, at the same time, condemning the BIA preference as racially discriminatory. In the total absence of any manifestation of supportive intent, we are loathe to imply this improbable result.

Third: Indian preferences, for many years, have been treated as exceptions to Executive Orders forbidding Government employment discrimination. The 1972 extension of the Civil Rights Act to Government employment is in large part merely a codification of prior anti-discrimination Executive Orders that had proved ineffective because of inadequate enforcement machinery. There certainly was no indication that the substantive proscription against discrimination was intended to be any broader than that which previously existed. By codifying the existing anti-discrimination provisions, and by providing enforcement machinery for them, there is no reason to presume that Congress affirmatively intended to erase the preferences that previously had coexisted with broad anti-discrimination provisions in Executive Orders.

Fourth: Appellees encounter head-on the "cardinal rule . . . that repeals by implication are not favored." Posadas v. National City Bank, 296 U.S. 497, 503 (1936). * * * They and the District Court read the congressional silence as effectuating a repeal by implication. There is nothing in the legislative history, however, that indicates affirmatively any congressional intent to repeal the 1934 preference. Indeed, as explained above, there is ample independent evidence that the legislative intent was to the contrary.

This is a prototypical case where an adjudication of repeal by implication is not appropriate. The preference is a longstanding, important component of the Government's Indian program. The anti-discrimination provision, aimed at alleviating minority discrimination in employment, obviously is designed to deal with an entirely different and, indeed, opposite problem. Any perceived conflict is thus more apparent than real.

In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable. Clearly, this is not the case here. A provision aimed at furthering Indian self-government by according an employment preference within the BIA for qualified members of the governed group can readily co-exist with a general rule prohibiting employment discrimination on the basis of race. Any other conclusion can be reached only by formalistic reasoning that ignores both the history and purposes of the preference and the unique legal relationship between the Federal Government and tribal Indians.

Furthermore, the Indian preference statute is a specific provision applying to a very specific situation. The 1972 Act, on the other hand, is of general application. Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.

The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible . . . The intention of the legislature to repeal `must be clear and manifest.'" In light of the factors indicating no repeal, we simply cannot conclude that Congress consciously abandoned its policy of furthering Indian self-government when it passed the 1972 amendments.

We therefore hold that the District Court erred in ruling that the Indian preference was repealed by the 1972 Act.

## Questions and Comments

**1. Statutory interpretation question:** What is the statutory interpretation question that the Court was trying to resolve in this case? How did the challengers allege that the two statutes conflicted?

**2. Application of the presumption:** Although the majority identifies the presumption against implied repeals as a fourth justification for its conclusion that the Equal Employment Opportunity Act does not implicitly repeal the Indian preference in the Indian Reorganization Act of 1934, note that the first three justifications provided by the majority demonstrate that there is not a “clear and manifest” expression of Congressional intent to repeal the preference. In fact, the sources cited by the majority provide evidence of Congressional intent to retain the preference. Does the majority limit its focus in that discussion to the language of the Equal Employment Opportunity Act? Note that this is an example of the Court’s use of “statutory history,” a topic that will be discussed later in this chapter.

**3. Rebutting the presumption:** The majority ultimately cites the presumption against implied repeals as one of the justifications for its decision. Does it find that any of the exceptions to the presumption apply—i.e. that the two statutory provisions are

irreconcilable; that the second statute covers the whole subject of the earlier one; that there is clear and manifest expression of Congressional intent to repeal?

**4. Was the presumption even necessary?** If the majority concluded, as it did, (1) that the provisions of the Indian Reorganization Act of 1934 and the Equal Employment Opportunity Act did not conflict; and (2) that the Indian preference in the Indian Reorganization Act of 1934 was a specific statutory provision, while the Equal Employment Opportunity Act prohibition on discrimination based on race was a general statutory provision, was it necessary for the Court to rely on the presumption against implied repeal to decide the case?

**5. Strength of the presumption:** Although the presumption against implied repeals can be rebutted in some situations, it is very unusual for courts to find that the presumption has been rebutted. Indeed, in the 42 cases decided by the Supreme Court between 1981 and 2003 where the Court addressed the presumption, the Court found that an implied repeal in only one case. *See* Karen Petroski, Comment, *Retheorizing the Presumption Against Implied Repeals*, 92 Cal. L. Rev. 487, 539-40 (2004). The presumption is especially strong when both laws being considered were passed in the same session of Congress. *See* Sutherland, STATUTES AND STATUTORY CONSTRUCTION §23:18 (Norman J. Singer ed., 6th ed. 2002 rev.).

**6. Appropriations statutes and the presumption:** In *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190 (1978), the Supreme Court noted that the canon on implied repeals "applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act … [because] appropriations measures … have the limited and specific purpose of providing funds for authorized programs." Thus, one would not normally presume that the legislature was repealing substantive provisions of earlier statutes merely by providing funding for activities. The case was brought by citizens and conservation groups who argued that the Tennessee Valley Authority violated the Endangered Species Act by constructing the Tellico Dam, since the dam would jeopardize the critical habitat of the endangered snail darter and destroy its critical habitat. *Id.* at 156-163. While the litigation was proceeding, Congress enacted appropriations legislation that provided money for the completion of the dam. *Id.* at 164-167. One of the arguments that the government raised in defense of the litigation was that the appropriations legislation implicitly repealed the Endangered Species Act prohibitions on TVA's construction of the dam. As noted above, the Supreme Court rejected that argument. *Id.* at 189-193. After the Supreme Court issued its opinion, Congress passed new legislation to explicitly authorize the completion of the dam notwithstanding the Endangered Species Act or other environmental laws. Although the new legislation was also an appropriations law, the Supreme Court has upheld Congressional repeals of substantive law through appropriations measures when Congressional intent is clear. *See* *United States v. Will*, 449 U.S. 200 (1980).

## Problem 5-2

In 2000, the Ames legislature amended Section 700 of the State Administrative Procedure Act (Ames APA) to provide "Any action to challenge a regulation promulgated by an agency may be brought in the Ames courts of appeals and must be filed in those courts within 90 days after the regulations are finalized." The House report on the bill that became the amendments to the Ames APA indicated that it would not make sense to authorize lawsuits challenging rules to be brought in trial courts because the challenges to rules would be based on a record created by the agency, so it would not be necessary for a trial court to conduct fact-finding and develop a record of the agency's decision.

During debates on the bill, Representative Dutton proposed an amendment to the bill to change "may" to "shall," but Representative Wheeler argued that such an amendment was not necessary because the language in the bill was already mandatory. The proposed amendment did not pass.

In 2010, the Ames legislature enacted the Ames Private Property Protection Act. Section 1 of the Act, identifying the findings and purposes of the legislation, indicated that "the State and local governments have increasingly imposed requirements on property owners that limit their ability to use their property and diminish the value of their property. There should be a swift, expeditious and uniform process for property owners to challenge government actions that restrict private property rights." The statute created a broad private right of action that authorizes any person who alleges that a government entity has restricted their property rights to sue the government entity in court for an injunction to prevent the government from engaging in the action that is restricting their property rights. The statute also authorized courts to award the challengers money damages for any reduction in the value of their property rights caused by the government action. Section 10 of the Act, which addresses jurisdiction under the Act, provides: "Any person who alleges that a government action constitutes an unconstitutional taking of property should file their lawsuit in the Ames Court of Claims." The Ames Court of Claims is a specialized court that is assigned jurisdiction under various Ames statutes to resolve claims for money damages asserted against the State and other governmental entities. Decisions of the Court of Claims can be appealed to the Courts of Appeals in Ames.

Last month, the Ames Department of the Environment (a State government agency) adopted new regulations that defined the wetlands that were subject to regulation under the State's Clean Water Act. Tameika Douglas, a farmer, is concerned that the new regulations may prevent her from farming 100 acres of her property that include wetlands.

### Problem 5-2 (continued)

Shortly after the agency's regulations were published as final regulations, Tameika filed a lawsuit in the Ames Court of Claims under the Ames Private Property Act, arguing that the environmental regulations effected a "taking" of her property under the Ames Constitution. In her lawsuit, she sought a declaration that the regulations were invalid, but she did not seek money damages for the taking.

The Ames Department of the Environment filed a motion to dismiss the case in the Court of Claims, arguing that the court lacked jurisdiction because the Ames APA requires challenges to regulations to be brought in the state's appellate courts.

You are the law clerk for the judge reviewing the motion. What arguments can the Ames Department of the Environment advance in support of its position? What arguments can Tameika Douglas make in support of jurisdiction in the Court of Claims? Should the court grant the motion to dismiss?

## III. Process of Enactment; Context of Enactment; Legislative History

While courts may consult other statutes as extrinsic sources of interpretation, they will often consult evidence about the process of enactment, context of enactment and legislative history of the statute that they are interpreting before turning to an examination of other statutes. There is a caveat here, though. Judges applying textualism are far less likely to consult these sources than judges applying purposivism, intentionalism, or imaginative reconstruction theories of interpretation. Chapter 2 explored the use of legislative history and the legislative process as interpretive tools in detail, so that discussion will not be repeated here. Instead, this section focuses on the way courts may interpret a statute based on the context in which it was enacted. To the extent that they are willing to consider context, courts may focus on the background law that was in existence at the time the statute was enacted, the problems that motivated the legislature to enact the statute, the prevailing social views at the time the statute was enacted, and the role that interest groups played in enactment of the statute.

***Contextual Clues***

Judges will examine these context clues for different reasons based upon the theory of interpretation that they are employing. Purposivist judges applying the ***mischief rule***[455] are likely to examine these sources to identify the ***purpose*** of the statute that the enacting legislature was trying to promote.[456] Intentionalist judges and imaginative reconstructionist judges, on the other hand, are likely to examine the sources to discern the ***intent*** of the legislators who enacted the statute.

Judges will examine the ***law that was in existence at the time the statute was enacted*** because it will help courts understand the historical context in which the law was enacted, which could clarify the legislature's intent or purposes. There are two competing substantive canons that apply when a statute is enacted to address an issue that was addressed in common law (***remedial statutes*** canon; ***statutes in derogation of the common law*** canon), but they will be examined in the next chapter. Judicial examination of background law is not, however, limited to examination of the ***common law***, but includes ***statutes in the enacting jurisdiction and other jurisdictions at the time of enactment***. For the same reason that courts will examine the law that was in place at the time a statute is enacted in order to better understand the intent of the enacting legislature, they will examine the ***social views*** in existence at the time of enactment. *See, e.g.* *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

When legislation is enacted to respond to a specific identifiable problem, judges looking to interpret statutes according to their intent or purposes will frequently attempt to interpret the statute in a way that addresses that problem or reflects an understanding that the provision was enacted in an environment where that problem existed. Thus, judges interpreting the Federal Water Pollution Control Act Amendments of 1972 would likely acknowledge the widespread contamination of surface waters that led to events such as the spontaneous burning of the Cuyahoga River in 1969 and the failure of state water quality programs to limit surface water pollution when interpreting the statute. Similarly, judges interpreting the federal Superfund statute would interpret it in recognition of the fact that it was enacted to spur cleanup of spills of hazardous waste where there were inadequate means to address such cleanups under existing statutory or common law, such as in the case of Love Canal, shortly before enactment of the law.

Some judges may also consider the role that interest groups played in the enactment of legislation in interpreting statutes. *See, e.g.* *Mohasco Corp. v. Silver*, 447 U.S. 807, 819-820 (1980) ("The present language was clearly the result of a compromise. It is our task to give effect to the statute as enacted.") Under the "economic theory" of legislation, politicians with an interest in being reelected are motivated by market forces to enact laws that serve the interests of the broadest coalition of, or most powerful coalition of, interest

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455 The "mischief rule" provides that statutes should be interpreted in light of the "mischief and defect" they are intended to cure. *See* *Heydon's Case*, 76 Eng. Rep. 637 (Ex. 1584). *See also* Scalia & Garner, *supra* note 192, at 433-434.

456 *See* Anita S. Krishnakumar, *Statutory History*, 108 Va. L. Rev. 263, 326 (2022).

groups that are involved in lobbying for the legislation.[457] Under traditional economic theory, courts enforce the deals that are made by the interest groups and legislators, interpreting statutes in a manner that advances the interests of those interest groups.[458] That approach to statutory interpretation has come under widespread critique over the years.[459] Some academics have argued that courts should refuse to enforce provisions of statutes that appear to be the result of interest group bargains or to review such provisions more critically.[460] Others, like Professor Jonathan Macey, argue that courts should ignore the role that interest groups play in enacting legislation when interpreting statutes and focus on more traditional tools of statutory interpretation.[461] Although the economic theory of legislation influenced statutory interpretation methodologies in the late twentieth century, few judges rely on the theory to interpret statutes today.

The following case excerpt provides an example of the manner in which courts consider various aspects of the context of enactment of a statute when interpreting the statute. The case, *Church of the Holy Trinity v. United States*, was reproduced in part in Chapter 3. In the case, the Supreme Court was trying to determine whether a federal immigration statute that prohibited contracts with aliens or foreigners "to perform labor or service of any kind in the United States" applied to a contract between a church and a minister (rector).

## CHURCH OF THE HOLY TRINITY V. UNITED STATES

**143 U.S. 457 (1892)**

* * *

Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy, and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body. *** The situation which called for this statute was briefly but fully stated by MR. JUSTICE BROWN when, as district judge, he decided the case of *United States v. Craig,* 28 F. 795, 798: "The motives and history of the act are matters of common knowledge. It had become the

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457 *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model,* 86 Colum. L. Rev. 223, 224-228 (1986).

458 *See* Frank Easterbrook, *The Supreme Court, 1983 Term – Foreword: The Court and the Economic System,* 98 Harv. L. Rev. 4 (1984); William Landes & Richard Posner, *The Independent Judiciary in an Interest Group Prespective,* 18 J.L. & Econ. 875, 877-879 (1975).

459 *See, e.g.* William N. Eskridge Jr., *Dynamic Statutory Interpretation,* 135 U. Penn. L. Rev. 1479, 1511-1523 (1987) (arguing for dynamic statutory interpretation as opposed to interpreting laws as contracts between legislators and interest groups to be enforced by the judiciary).

460 *See* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Review?,* 101 Yale L. J. 31, 33 (1991); Macey, *supra* note 67, at 226; Richard A. Epstein, *Taxation, Regulation and Confiscation,* 20 Osgoode Hall L. J. 433, 438 (1982); Jerry Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law,* 54 Tul. L. Rev. 849, 849 (1980).

461 *See* Macey, *supra* note 67, at 227.

practice for large capitalists in this country to contract with their agents abroad for the shipment of great numbers of an ignorant and servile class of foreign laborers, under contracts by which the employer agreed, upon the one hand, to prepay their passage, while, upon the other hand, the laborers agreed to work after their arrival for a certain time at a low rate of wages. The effect of this was to break down the labor market and to reduce other laborers engaged in like occupations to the level of the assisted immigrant. The evil finally became so flagrant that an appeal was made to Congress for relief by the passage of the act in question, the design of which was to raise the standard of foreign immigrants and to discountenance the migration of those who had not sufficient means in their own hands, or those of their friends, to pay their passage."

It appears also from the petitions and in the testimony presented before the committees of Congress that it was this cheap, unskilled labor which was making the trouble, and the influx of which Congress sought to prevent. It was never suggested that we had in this country a surplus of brain toilers, and least of all that the market for the services of Christian ministers was depressed by foreign competition. Those were matters to which the attention of Congress or of the people was not directed. So far, then, as the evil which was sought to be remedied interprets the statute, it also guides to an exclusion of this contract from the penalties of the act.

* * *

But, beyond all these matters, no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation. The commission to Christopher Columbus, prior to his sail westward, is from "Ferdinand and Isabella, by the grace of God, King and Queen of Castile," etc., and recites that "it is hoped that by God's assistance some of the continents and islands in the ocean will be discovered," etc. The first colonial grant, that made to Sir Walter Raleigh in 1584, was from "Elizabeth, by the grace of God, of England, Fraunce and Ireland, Queene, defender of the faith," etc., and the grant authorizing him to enact statutes of the government of the proposed colony provided that "they be not against the true Christian faith nowe professed in the Church of England." * * *

If we examine the constitutions of the various states, we find in them a constant recognition of religious obligations. Every Constitution of every one of the forty-four states contains language which, either directly or by clear implication, recognizes a profound reverence for religion, and an assumption that its influence in all human affairs is essential to the wellbeing of the community. * * *

Even the Constitution of the United States, which is supposed to have little touch upon the private life of the individual, contains in the First Amendment a declaration common to the constitutions of all the states, as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," etc., and also provides in Article I, Section 7, a provision common to many constitutions, that the

executive shall have ten days (Sundays excepted) within which to determine whether he will approve or veto a bill. * * *

If we pass beyond these matters to a view of American life, as expressed by its laws, its business, its customs, and its society, we find everywhere a clear recognition of the same truth. Among other matters, note the following: the form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words of all wills, "In the name of God, amen;" the laws respecting the observance of the Sabbath, with the general cessation of all secular business, and the closing of courts, legislatures, and other similar public assemblies on that day; the churches and church organizations which abound in every city, town, and hamlet; the multitude of charitable organizations existing everywhere under Christian auspices; the gigantic missionary associations, with general support, and aiming to establish Christian missions in every quarter of the globe. These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation. In the face of all these, shall it be believed that a Congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation? * * *

## Questions and Comments

**1. Problem prompting legislature to act:** What was the problem (the mischief) that the Court determined motivated Congress to enact the immigration statute? Where did the Court find indications that was the problem? Where else might courts find that information? Note that courts sometimes take judicial notice of facts that help to identify the problem that motivated Congress to enact legislation. Is it necessary to interpret the statute to apply to the contract between the church and rector to address that mischief? For a more recent example of the Supreme Court interpreting a statute to avoid the problems that led to the enactment of the statute, *see* *King v. Burwell*, 576 U.S. 988 (2015) (discussing the need to interpret the Federal Affordable Care Act in a manner that would avoid the “death spirals” in the health insurance market that prompted Congress to enact the statute).

**2. Social views:** What social views did the Court find relevant to interpret the statute? Where did it find evidence of the social views that were in place at the time of enactment? How did those social views affect the Court’s interpretation of the statute? How should a court interpret a statute when the social views that were in existence at the time of enactment of the statute have dramatically changed between that time and the time that the statute is being interpreted?

**3. Interest groups:** The *Holy Trinity* Court did not address the role that interest groups played in the development of the statute at issue in that case. A good example of this approach, though, can be found in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147 (2000). In the case, the Court was asked to determine whether the Food and Drug Administration had authority under the Food, Drug, and Cosmetic Act (FDCA)

to regulate advertising of cigarettes, nicotine, and tobacco. In reviewing the history of the enactment of the FDCA, the Court noted "there is no evidence in the text of the FDCA or its legislative history that Congress in 1938 even considered the applicability of the Act to tobacco products. ***Given the economic and political significance of the tobacco industry at the time***, it is extremely unlikely that Congress could have intended to place tobacco within the ambit of the FDCA absent any discussion of the matter" (emphasis added). *Id.* The Court's statement demonstrates the potential relevance to courts, for statutory interpretation, of the role played by interest groups in enactment of statutes, but also demonstrates the functioning of another canon of statutory construction that is sometimes used by courts. ***The dog did not bark canon*** suggests that a court should not infer that the legislature would make a major change to the law or enact a major legislative provision without discussing the change or provision in the legislative history of the statute. *See, e.g., See* Linda D. Jellum, THE LEGISLATIVE PROCESS, STATUTORY INTERPRETATION, AND ADMINISTRATIVE AGENCIES 444 (ed. Carolina Academic Press, 2016) (noting that the canon derives from a passage in a Sherlock Holmes story—The Adventure of Silver Blaze). *But see* *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592 (1980) (rejecting the canon).

**CALI SECTION QUIZ**

Before moving on to the next section, why not try a short quiz on the material you just read at www.cali.org/lesson/19758. It should take about 30 minutes to complete.

## IV. Statutory History; Legislative Action or Inaction

While courts, when interpreting a statute, might examine the process of, or context of, enactment of ***that statute*** to gain insight into the meaning of the statute, courts might also examine the actions that subsequent legislatures take (1) ***after the statute is enacted***; (2) ***after the statute is interpreted by a court***; or (3) ***after the statute is interpreted by an administrative agency*** to gain insight into the meaning of the statute. The fact that subsequent legislatures either pass new statutes or fail to pass new statutes after those events occur may be viewed by courts as significant. ***Subsequent legislative action*** *or* ***subsequent legislative inaction*** may provide clues to the meaning of a statute. Professor Anita Krishnakumar recently noted that textualists are often willing to consult such ***statutory history*** (historical evolution of a statute from one version to the next) even though they condemn the reliance on ***legislative history***. *See* Anita S. Krishnakumar, *Statutory History*, 108 Va. L. Rev. 263, 264 (2022).[462] She also notes,

[462] Justice Scalia, for instance, writes, "[statutory history forms] part of the context of the statute, and unlike legislative history) can properly be presumed to have been before all members of the legislature when they voted." *See* Scalia & Garner, *supra* note 192, at 256. Professor Krishnakumar identifies "drafting history" (successive versions of a bill that precede enactment)

though, that there is substantial judicial discretion involved in inferring meaning from statutory history, so that it can be manipulated in ways similar to legislative history "to enhance judicial power at the expense of legislative authority." *Id.* at 314, 334.[463]

## A. Subsequent Legislative Action

There are several ways that legislative action ***after*** a statute is enacted or interpreted may be considered by courts in interpreting the statute. First, according to the ***reenactment canon***, when Congress reenacts a statute without making any material change in the text, courts will presume that Congress intended to affirm the interpretations of the statute that have been adopted by courts or agencies at that time. *See, e.g.* *Central Bank of Denver, N.A.v. First Interstate Bank of Denver*, 511 U.S. 164, 185 (1994); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).[464] Courts are more likely to apply the presumption if the prior interpretation of the statute was issued by the Supreme Court or the agency charged with administering the statute than if the interpretation comes from less authoritative sources. *See* *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335 (2005); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527-33 (1994). More generally, when a legislature codifies or re-codifies a statute, courts presume that the codification does not change the pre-existing law unless the legislature clearly expresses intent to change the law. *See* *Muniz v. Hoffman*, 422 U.S. 454 (1975); *Fourco Glass Co. v. Transmirra Corp.*, 353 U.S. 222 (1957).

Instead of merely reenacting a statute, Congress or state legislatures often make textual changes to a statute when amending it. The ***meaningful revision canon*** is a presumption adopted by courts when interpreting statutes in light of subsequent statutory enactments that make meaningful changes to the language of the statute.[465] Under the canon, when the legislature omits language in a new version of a statute that was in a prior version, courts will presume that the legislature intended to limit or otherwise change the scope of the new statute. *See, e.g.* *BNSF Railway Co. v. Loos*, 139 S.Ct. 893, 897 (2019) (Gorsuch, dissent) (reasoning that when Congress amended the Railroad Retirement Act definition of compensation to remove remuneration "for time lost,"

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and "amendment history" (changes to a statute by a subsequent Congress) as two types of "statutory history", but acknowledges that many textualists will only focus on "amendment history." *See* Krishnakumar*, supra* note 66, at 271-272.

463 Professor Krishnakumar also notes that reliance on statutory history is inconsistent with the textualist goal of identifying the meaning that an ordinary reader of text would have when interpreting a statute. *See* Krishnakumar*, supra* note 66, at 334. She notes that ordinary readers are (1) unlikely to have combed through the legislative record to compare different versions of the statute over time; and (2) unlikely to draw the nuanced inferences that courts draw from the differences in statutory versions. *Id.*

464 *See also* Krishnakumar*, supra* note 66, at 303-304 (discussing "effective reenactment", which includes reenactment of a statute with changed language where the court concludes that the change doesn't change the statute's earlier meaning).

465 In a review of opinions from the Roberts Court between the 2005 and 2018 terms that employed "statutory history", Professor Anita Krishnakumar determined that the Justices relied on the meaningful revision inference more than any other inferences. *Id.* at 298.

Congress intended to foreclose recovery of a railroad employee's work time lost due to an on the job injury as compensation under the Act). Conversely, when the legislature adds new language or replaces language from the prior statute, courts will presume that the legislature intended to extend the scope of the new statute. In either case, courts are presuming that the changes made by the legislature are intentional and meaningful.[466] Thus, when the United States Court of Appeals for the Eleventh Circuit had to determine whether persons whose communications are intercepted must be awarded actual damages under the federal Wiretap Act, it concluded that the award was discretionary because Congress had amended the statute in 1986 to provide that persons "may" be entitled to recover actual damages, whereas the prior statute had provided that persons "shall" be entitled to recover actual damages. *See* *DIRECTTV, Inc. v. Brown*, 371 F.3d 814, 817 (11th Cir. 2004).

In some cases, rather than examining statutes that amend a statute being interpreted to glean the meaning of that statute, courts will draw inferences from the enactment of *other* statutes that seem to confirm the interpretation of the statute being interpreted.[467] You have already seen an example of that in *Morton v. Mancari*, when the Supreme Court determined that Congress would not have intended, through the Equal Employment Opportunity Act, to eliminate the Indian preference in the Indian Reorganization Act at the same time that it was enacting other laws that provided preferential treatment for Native Americans. The inference is stronger when the other statutes being examined have been enacted by the same legislature that enacted the statute being reviewed, as in *Morton v. Mancari.* Nevertheless, courts apply this approach even when the other statutes being examined were enacted by legislatures after the statute being interpreted was enacted. The following case, *FDA v. Brown & Williamson*, is an example. In the case, the Supreme Court was asked to determine whether the Food and Drug Administration could regulate tobacco and cigarettes under the Food, Drug, and Cosmetic Act.


FDA Tobacco Warning – Public Domain

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument Audio (From Oyez)
FDA Regulations Being Challenged
Food, Drug, & Cosmetic Act

466 Not every change is meaningful, however, and legislatures sometimes make textual changes to statutes in amendments to clarify the language of a statute and confirm that the prior statute and amended statutes have the same meanings. *See* Levy & Glicksman, *supra* note 340, at 210.

467 Professor Krishnakumar refers to courts reliance on such statutes as interpretive tools as "underwrites." *See* Krishnakumar, *supra* note 66, at 306-307.

## FDA V. BROWN & WILLIAMSON TOBACCO CORP.

**529 U.S. 120 (2000)**

**JUSTICE O'CONNOR** delivered the opinion of the Court.

This case involves one of the most troubling public health problems facing our Nation today: the thousands of premature deaths that occur each year because of tobacco use. In 1996, the Food and Drug Administration (FDA), after having expressly disavowed any such authority since its inception, asserted jurisdiction to regulate tobacco products. *See* 61 Fed. Reg. 44619-45318. The FDA concluded that nicotine is a "drug" within the meaning of the Food, Drug, and Cosmetic Act (FDCA or Act), 52 Stat. 1040, as amended, 21 U. S. C. § 301 *et seq.,* and that cigarettes and smokeless tobacco are "combination products" that deliver nicotine to the body. 61 Fed. Reg. 44397 (1996). Pursuant to this authority, it promulgated regulations intended to reduce tobacco consumption among children and adolescents. The agency believed that, because most tobacco consumers begin their use before reaching the age of 18, curbing tobacco use by minors could substantially reduce the prevalence of addiction in future generations and thus the incidence of tobacco-related death and disease.

Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority "in a manner that is inconsistent with the administrative structure that Congress enacted into law." And although agencies are generally entitled to deference in the interpretation of statutes that they administer, a reviewing "court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.* S. *A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837, 842-843 (1984). In this case, we believe that Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products. Such authority is inconsistent with the intent that Congress has expressed in the FDCA's overall regulatory scheme and in the tobacco-specific legislation that it has enacted subsequent to the FDCA. In light of this clear intent, the FDA's assertion of jurisdiction is impermissible.

[The Court examined the text and structure of the statute and concluded that Congress clearly expressed its intent that the FDA did not have the authority to regulate tobacco and cigarette advertising under the Food, Drug and Cosmetic Act. After concluding its textual and structural analysis, the Court discussed the relevance of Congress' legislative actions in the years after the enactment of the Food, Drug and Cosmetics Act.]

* * *

In determining whether Congress has spoken directly to the FDA's authority to regulate tobacco, we must also consider in greater detail the tobacco-specific legislation that Congress has enacted over the past 35 years. At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. The "classic judicial task of reconciling many laws enacted over

time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand. * * *

Congress has enacted six separate pieces of legislation since 1965 addressing the problem of tobacco use and human health. Those statutes, among other things, require that health warnings appear on all packaging and in all print and outdoor advertisements, *see* 15 U. S. C. §§ 1331, 1333, 4402; prohibit the advertisement of tobacco products through "any medium of electronic communication" subject to regulation by the Federal Communications Commission (FCC), *see* §§ 1335, 4402(f); require the Secretary of HHS to report every three years to Congress on research findings concerning "the addictive property of tobacco," 42 U. S. C. § 290aa-2(b)(2); and make States' receipt of certain federal block grants contingent on their making it unlawful "for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18," § 300x-26(a)(1).

In adopting each statute, Congress has acted against the backdrop of the FDA's consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco absent claims of therapeutic benefit by the manufacturer. In fact, on several occasions over this period, and after the health consequences of tobacco use and nicotine's pharmacological effects had become well known, Congress considered and rejected bills that would have granted the FDA such jurisdiction. Under these circumstances, it is evident that Congress' tobacco-specific statutes have effectively ratified the FDA's long-held position that it lacks jurisdiction under the FDCA to regulate tobacco products. Congress has created a distinct regulatory scheme to address the problem of tobacco and health, and that scheme, as presently constructed, precludes any role for the FDA. * * *

Taken together, these actions by Congress over the past 35 years preclude an interpretation of the FDCA that grants the FDA jurisdiction to regulate tobacco products. We do not rely on Congress' failure to act-its consideration and rejection of bills that would have given the FDA this authority-in reaching this conclusion. Indeed, this is not a case of simple inaction by Congress that purportedly represents its acquiescence in an agency's position. To the contrary, Congress has enacted several statutes addressing the particular subject of tobacco and health, creating a distinct regulatory scheme for cigarettes and smokeless tobacco. In doing so, Congress has been aware of tobacco's health hazards and its pharmacological effects. It has also enacted this legislation against the background of the FDA repeatedly and consistently asserting that it lacks jurisdiction under the FDCA to regulate tobacco products as customarily marketed. Further, Congress has persistently acted to preclude a meaningful role for *any* administrative agency in making policy on the subject of tobacco and health. Moreover, the substance of Congress' regulatory scheme is, in an important respect, incompatible with FDA jurisdiction. Although the supervision of product labeling to protect consumer health is a

substantial component of the FDA's regulation of drugs and devices, *see* 21 U. S. C. § 352 (1994 ed. and Supp. III), [other federal statutes enacted subsequent to the FDCA] explicitly prohibit any federal agency from imposing any health-related labeling requirements on cigarettes or smokeless tobacco products, *see* 15 U. S. C. §§ 1334(a), 4406(a).

Under these circumstances, it is clear that Congress' tobacco-specific legislation has effectively ratified the FDA's previous position that it lacks jurisdiction to regulate tobacco. As in *Bob Jones Univ.* v. *United States,* 461 U. S. 574 (1983), "[i]t is hardly conceivable that Congress-and in this setting, any Member of Congress-was not abundantly aware of what was going on." Congress has affirmatively acted to address the issue of tobacco and health, relying on the representations of the FDA that it had no authority to regulate tobacco. It has created a distinct scheme to regulate the sale of tobacco products, focused on labeling and advertising, and premised on the belief that the FDA lacks such jurisdiction under the FDCA. As a result, Congress' tobacco-specific statutes preclude the FDA from regulating tobacco products as customarily marketed.

**JUSTICE BREYER**, with whom **JUSTICE STEVENS**, **JUSTICE SOUTER**, **and JUSTICE GINSBURG** join, dissenting.

* * *

III

In the majority's view, laws enacted since 1965 require us to deny jurisdiction, whatever the FDCA might mean in their absence. But why? Do those laws contain language barring FDA jurisdiction? The majority must concede that they do not. Do they contain provisions that are inconsistent with the FDA's exercise of jurisdiction? With one exception, see *infra,* at 184-185, the majority points to no such provision. Do they somehow repeal the principles of law that otherwise would lead to the conclusion that the FDA has jurisdiction in this area? The companies themselves deny making any such claim. Perhaps the later laws "shape" and "focus" what the 1938 Congress meant a generation earlier. But this Court has warned against using the views of a later Congress to construe a statute enacted many years before. See *Pension Benefit Guaranty Corporation* v. *LTV Corp.,* 496 U. S. 633, 650 (1990) (later history is a " 'hazardous basis for inferring the intent of an earlier' Congress" (quoting *United States* v. *Price,* 361 U. S. 304, 313 (1960))). And, while the majority suggests that the subsequent history "control[s] our construction" of the FDCA, this Court expressly has held that such subsequent views are not "controlling." *Haynes* v. *United States,* 390 U. S. 85, 87-88, n. 4 (1968); accord, *Southwestern Cable Co.,* 392 U. S., at 170 (such views have" 'very little, if any, significance' "); see also *Sullivan* v. *Finkelstein,* 496 U. S. 617, 632 (1990) (SCALIA, J., concurring) ("Arguments based on subsequent legislative history ... should not be taken seriously, not even in a footnote").

Regardless, the later statutes do not support the majority's conclusion. That is because, whatever individual Members of Congress after 1964 may have assumed about the FDA's

jurisdiction, the laws they enacted did not embody any such "no jurisdiction" assumption. And one cannot automatically *infer* an anti jurisdiction intent, as the majority does, for the later statutes are both (and similarly) consistent with quite a different congressional desire, namely, the intent to proceed without interfering with whatever authority the FDA otherwise may have possessed. As I demonstrate below, the subsequent legislative history is critically ambivalent, for it can be read *either* as (a) "ratif[ying]" a no-jurisdiction assumption, see *ante,* at 158, *or* as (b) leaving the jurisdictional question just where Congress found it. And the fact that both inferences are "equally tenable," prevents the majority from drawing from the later statutes the firm, anti jurisdiction implication that it needs.

Consider, for example, Congress' failure to provide the FDA with express authority to regulate tobacco - a circumstance that the majority finds significant. In fact, Congress *both* failed to grant express authority to the FDA when the FDA denied it had jurisdiction over tobacco *and* failed to take that authority expressly away when the agency later asserted jurisdiction. Consequently, the defeat of various different proposed jurisdictional changes proves nothing. This history shows only that Congress could not muster the votes necessary either to grant or to deny the FDA the relevant authority. It neither favors nor disfavors the majority's position.

The majority also mentions the speed with which Congress acted to take jurisdiction away from other agencies once they tried to assert it. But such a congressional response again proves nothing. On the one hand, the speedy reply might suggest that Congress somehow resented agency assertions of jurisdiction in an area it desired to reserve for itself-a consideration that supports the majority. On the other hand, Congress' quick reaction with respect to *other* agencies' regulatory efforts contrasts dramatically with its failure to enact any responsive law (at any speed) after the FDA asserted jurisdiction over tobacco more than three years ago. And that contrast supports the opposite conclusion.

* * *

The majority's historical perspective also appears to be shaped by language in the Federal Cigarette Labeling and Advertising Act (FCLAA). The FCLAA requires manufacturers to place on cigarette packages, etc., health warnings such as the following:

> "SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy." 15 U. S. C. § 1333(a).

The FCLAA has an express pre-emption provision which says that "[n]o statement relating to smoking and health, other than the statement required by [this Act], shall be required on any cigarette package." § 1334(a). This preemption clause plainly prohibits the FDA from requiring on "any cigarette package" any other "statement relating to smoking and health," but no one contends that the FDA has failed to abide by this prohibition. Rather, the question is whether the FCLAA's pre-emption provision does *more.* Does it forbid the FDA to regulate at all?

This Court has already answered that question expressly and in the negative. See *Cipollone* v. *Liggett Group, Inc.,* 505 U. S. 504 (1992). *Cipollone* held that the FCLAA's preemption provision does not bar state or federal regulation outside the provision's literal scope. *Id.,* at 518. And it described the pre-emption provision as "merely prohibit[ing] state and federal rulemaking bodies from mandating particular cautionary statements on cigarette labels .... "

This negative answer is fully consistent with Congress' intentions in regard to the pre-emption language. When Congress enacted the FCLAA, it focused upon the regulatory efforts of the Federal Trade Commission (FTC), not the FDA. Why would one read the FCLAA's pre-emption clause-a provision that Congress intended to limit even in respect to the agency directly at issue-so broadly that it would bar a different agency from engaging in any other cigarette regulation at all? The answer is that the Court need not, and should not, do so. And, inasmuch as the Court already has declined to view the FCLAA as pre-empting the entire field of tobacco regulation, I cannot accept that that same law bars the FDA's regulatory efforts here.

When the FCLAA's narrow pre-emption provision is set aside, the majority's conclusion that Congress clearly intended for its tobacco-related statutes to be the exclusive "response" to "the problem of tobacco and health," is based on legislative silence. Notwithstanding the views voiced by various legislators, Congress itself has addressed expressly the issue of the FDA's tobacco-related authority only once-and, as I have said, its statement was that the statute was *not* to "be construed to affect the question of whether the [FDA] has any authority to regulate any tobacco product." The proper inference to be drawn from *all* of the post-1965 statutes, then, is one that interprets Congress' general legislative silence consistently with this statement.

## Questions and Comments

**1. Precedential interpretation:** What was the precedential interpretation of the Food, Drug, and Cosmetic Act that was allegedly ratified by Congress' subsequent legislation? Was the interpretation the authoritative statement of a court or an agency?

**2. Authoritative nature of the precedent:** Recall that courts will be more likely to infer that legislation ratifies an interpretation of a statute when the interpretation is authoritative or well known. How does that affect the majority's interpretation of the statute? Does the dissent argue that the interpretation was unknown to legislators?

**3. Reliance on statutory history:** Note that the majority turns to statutory history only after determining that the text and structure of the statute demonstrate that the FDA lacks jurisdiction to regulate tobacco and cigarettes under the Food, Drug, and Cosmetic Act (FDCA). Note also that the majority utilizes the specific v. general and later enacted canons in support of its reading of statutory history. In a portion of the opinion that is edited out, the majority discusses *legislative inaction* as further support for its reading of the statute, but ultimately claims that its reading of the statute is based more on subsequent legislative *action* than *inaction*.

**4. Do the statutes explicitly address the statutory interpretation issue?** Do any of the statutes identified by the majority explicitly provide that the FDA cannot regulate tobacco or cigarettes under the FDCA? Why does the majority argue that the statutes indicate Congressional intent that the FDA cannot regulate those substances under the FDCA?

**5. Reliance on subsequent legislative enactments:** Does the dissent agree that it is appropriate to examine subsequent legislative action or inaction to interpret the scope of FDA's authority under the FDCA?

**6. Dissent's reading of the subsequent legislation:** Does the dissent agree that the statutes enacted after the FDCA demonstrate Congressional intent to preclude FDA regulation of tobacco and cigarettes under the FDCA? What does the dissent think they mean?

**7. Legislative overrides:** While Congress or legislatures may "underwrite" judicial or administrative interpretations of statutes by enacting legislation that affirms or builds on those interpretations, they may conversely "override" such interpretations by enacting legislation that clearly rejects those interpretations. *See, e.g., Skilling v. United States*, 561 U.S. 358 (2010) (finding that Congress enacted 18 U.S.C. § 1346 to override the Supreme Court's decision in *McNally v. United States* that the mail fraud statute does not include honest services fraud). Indeed, after the Supreme Court decided *Brown & Williamson*, Congress enacted legislation to provide the FDA with the statutory authority to regulate cigarette advertising in the manner that the agency had sought. *See* Family Smoking Prevention & Tobacco Control Act of 2009, Pub. L. No. 111-31, 123 Stat. 1776 (2009).

## B. Subsequent Legislative Inaction – Legislative Acquiescence and the Rejected Proposal Rule

While courts may examine subsequent legislative *action* to interpret statutes, they may also examine subsequent legislative *inaction*. Thus, if Congress or a legislature fails to enact legislation to overturn a judicial or agency interpretation of a statute, courts may presume that Congress *acquiesced* in that interpretation. *See, e.g. Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 733 (1975). *But see Rapanos v. United States*, 547 U.S. 715 (2006) (rejecting argument that Congress acquiesced in the Corps of Engineers' interpretation of "waters of the United States" under the Clean Water Act); *Alexander v. Sandoval*, 532 U.S. 275, 292-293 (2001). As with legislative *action*, courts are more likely to find ***legislative acquiescence*** when the underlying statutory interpretation is authoritative or well known.[468] Reliance on subsequent legislative *inaction* is criticized

[468] *See* Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 Geo. Wash. L. Rev. 317 (2005) (discussing problems raised when applying legislative acquiescence to precedents from the courts of appeal as opposed to the Supreme Court.)

more heavily than reliance on subsequent legislative *action*[469], because bicameral legislative action demonstrates legislative intent much more clearly than the legislature's failure to act. *See* *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164, 185 (1994) ("Congress may legislate … only through the passage of a bill that is passed by both Houses and signed by the President.") As noted in the earlier chapter addressing legislative history, there may be many non-substantive, procedural, or institutional reasons why a legislature fails to enact legislation other than because it agrees with the interpretation of a statute adopted by a court or agency.[470] Silence may mean nothing more than silence.[471] In addition, as the dissenting Justices noted in *Brown & Williamson*, above, if a goal, in interpreting statutes, is to discern the intent of the enacting legislature, actions of subsequent legislatures do not shed any light on that intent.

Nevertheless, some courts continue to rely on subsequent legislative inaction to interpret statutes. Courts are more likely to rely on the presumption of legislative acquiescence when it is clear that subsequent legislatures were aware of a judicial or agency interpretation of a statute[472], such as when legislation or an amendment are introduced to address the interpretation and the legislation or amendment does not pass. *See, e.g.,* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 144-147 (2000); *United States v. Johnson*, 481 U.S. 681, 686 n.6 (1987); *Runyon v. McCrary*, 427 U.S. 160 (1976); *Flood v. Kuhn*, 407 U.S. 258 (1972). In those circumstances, courts frequently rely on the ***rejected proposal rule*** to infer that the legislature's rejection of legislation to overturn an interpretation of a statute signifies legislative acquiescence in the interpretation.[473]

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469 *See* William N. Eskridge, Jr., *Interpreting Legislative Inaction,* 887 Mich. L. Rev. 67 (1988). *See also* Jellum, *supra* note 165, at 469 (discussing the myriad of reasons why legislatures may fail to amend statutes in the face of judicial or agency interpretation).

470 *See supra* Chapter 3, Part VII. *See also* Krishnakumar, *supra* note 66, at 333.

471 Professor Linda Jellum argues that courts might treat silence as acquiescence to prior *judicial* interpretations of statutes because stare decisis is applied very strictly with respect to judicial interpretation of statutes, so that if a legislature disagrees with a judicial interpretation of a statute, the legislature must act to overturn that interpretation if it disagrees with the interpretation because the courts are unlikely to do so. *See* Jellum, *supra* note 165, at 469.

472 *See* Levy & Glicksman, *supra* note 340, at 217.

473 Similar criticisms to the rejected proposal rule are raised as those that were addressed to the legislative acquiescence rule above. As Professor Anita Krishnakumar notes, when Congress fails to enact a proposal, "a majority of the members of Congress may have believed that the rejected proposal provided the better rule, but Congress may have run out of time during the legislative session to enact the proposal, or congressional leadership may not have cared enough about the issue to push it through the cumbersome legislative process; or members of the committee in charge of reviewing the proposal may have disagreed with the majority and killed the proposal; or legislators in one chamber may have favored the proposal, while legislators in the other chamber were too busy to take up the bill; or individual members who approve of the proposal may have been unwilling to vote for it because it contained other provisions they disagreed with." *See* Krishnakumar, *supra* note 66, at 333, n. 144.

The following two cases provide examples of the Supreme Court's treatment of legislative acquiescence. The first case, *Johnson v. Transportation Agency*, addresses legislative acquiescence to a judicial interpretation of a statute, while the second case, *Bob Jones University v. United States*, addresses legislative acquiescence to an agency's interpretation of a statute.

*Johnson v. Transportation Agency* involved allegations that an affirmative action plan established by the Transportation Agency of Santa Clara County violated Title VII of the Civil Rights Act of 1964, which prohibits employers from "depriv[ing] any individual of employment opportunities or otherwise adversely affect[ing] his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2. ("Section 703.") The Supreme Court previously upheld an affirmative action plan similar to the plan in *Johnson* in *Steelworkers v. Weber*, 443 U. S. 193 (1979).

## JOHNSON V. TRANSPORTATION AGENCY

**480 U.S. 616 (1987)**

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument Audio (From Oyez)
Civil Rights Act of 1964
Case Background (From Quimbee)

**JUSTICE BRENNAN** delivered the opinion of the Court.

Respondent, Transportation Agency of Santa Clara County, California, unilaterally promulgated an Affirmative Action Plan applicable, *inter alia,* to promotions of employees. In selecting applicants for the promotional position of road dispatcher, the Agency, pursuant to the Plan, passed over petitioner Paul Johnson, a male employee, and promoted a female employee applicant, Diane Joyce. The question for decision is whether, in making the promotion, the Agency impermissibly took into account the sex of the applicants in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The District Court for the Northern District of California, in an action filed by petitioner following receipt of a right-to-sue letter from the Equal Employment Opportunity Commission (EEOC), held that respondent had violated Title VII. The Court of Appeals for the Ninth Circuit reversed. We granted certiorari, 478 U.S. 1019 (1986). We affirm.

**I**

A

In December, 1978, the Santa Clara County Transit District Board of Supervisors adopted an Affirmative Action Plan (Plan) for the County Transportation Agency. The Plan implemented a County Affirmative Action Plan, which had been adopted, declared the County, because "mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons." Relevant to this case, the Agency Plan provides that, in making promotions to positions within a traditionally segregated job

classification in which women have been significantly underrepresented, the Agency is authorized to consider as one factor the sex of a qualified applicant.

In reviewing the composition of its workforce, the Agency noted in its Plan that women were represented in numbers far less than their proportion of the County labor force in both the Agency as a whole and in five of seven job categories. * * * Furthermore, women working at the Agency were concentrated largely in EEOC job categories traditionally held by women * * * As for the job classification relevant to this case, none of the 238 Skilled Craft Worker positions was held by a woman. The Plan noted that this underrepresentation of women in part reflected the fact that women had not traditionally been employed in these positions, and that they had not been strongly motivated to seek training or employment in them "because of the limited opportunities that have existed in the past for them to work in such classifications." The Plan also observed that, while the proportion of ethnic minorities in the Agency as a whole exceeded the proportion of such minorities in the County workforce, a smaller percentage of minority employees held management, professional, and technical positions.

The Agency stated that its Plan was intended to achieve

> "a statistically measurable yearly improvement in hiring, training and promotion of minorities and women throughout the Agency in all major job classifications where they are underrepresented."

As a benchmark by which to evaluate progress, the Agency stated that its long-term goal was to attain a workforce whose composition reflected the proportion of minorities and women in the area labor force. Thus, for the Skilled Craft category in which the road dispatcher position at issue here was classified, the Agency's aspiration was that, eventually, about 36% of the jobs would be occupied by women.

* * *

The Agency's Plan * * * set aside no specific number of positions for minorities or women, but authorized the consideration of ethnicity or sex as a factor when evaluating qualified candidates for jobs in which members of such groups were poorly represented. One such job was the road dispatcher position that is the subject of the dispute in this case.

B

On December 12, 1979, the Agency announced a vacancy for the promotional position of road dispatcher in the Agency's Roads Division. * * *

Nine of the applicants, including Joyce and Johnson, were deemed qualified for the job, and were interviewed by a two-person board. Seven of the applicants scored above 70 on this interview, which meant that they were certified as eligible for selection by the appointing authority. * * * Johnson was tied for second with a score of 75, while Joyce ranked next with a score of 73. A second interview was conducted by three Agency supervisors, who ultimately recommended that Johnson be promoted. Prior to the second

interview, Joyce had contacted the County's Affirmative Action Office because she feared that her application might not receive disinterested review. The Office in turn contacted the Agency's Affirmative Action Coordinator, whom the Agency's Plan makes responsible for, *inter alia,* keeping the Director informed of opportunities for the Agency to accomplish its objectives under the Plan. At the time, the Agency employed no women in any Skilled Craft position, and had never employed a woman as a road dispatcher. The Coordinator recommended to the Director of the Agency, James Graebner, that Joyce be promoted.

Graebner, authorized to choose any of the seven persons deemed eligible, thus had the benefit of suggestions by the second interview panel and by the Agency Coordinator in arriving at his decision. After deliberation, Graebner concluded that the promotion should be given to Joyce. As he testified:

> "I tried to look at the whole picture, the combination of her qualifications and Mr. Johnson's qualifications, their test scores, their expertise, their background, affirmative action matters, things like that. . . . I believe it was a combination of all those."

The certification form naming Joyce as the person promoted to the dispatcher position stated that both she and Johnson were rated as well qualified for the job. * * *

Petitioner Johnson filed a complaint with the EEOC, alleging that he had been denied promotion on the basis of sex in violation of Title VII. He received a right-to-sue letter from the EEOC on March 10, 1981, and on March 20, 1981, filed suit in the United States District Court for the Northern District of California. The District Court found that Johnson was more qualified for the dispatcher position than Joyce, and that the sex of Joyce was the "*determining factor* in her selection." The court acknowledged that, since the Agency justified its decision on the basis of its Affirmative Action Plan, the criteria announced in *Steelworkers v. Weber,* 443 U. S. 193 (1979), should be applied in evaluating the validity of the Plan. It then found the Agency's Plan invalid on the ground that the evidence did not satisfy *Weber's* criterion that the Plan be temporary. * * *

II

* * *

The assessment of the legality of the Agency Plan must be guided by our decision in *Weber, supra.* In that case, the Court addressed the question whether the employer violated Title VII by adopting a voluntary affirmative action plan designed to "eliminate manifest racial imbalances in traditionally segregated job categories." The respondent employee in that case challenged the employer's denial of his application for a position in a newly established craft training program, contending that the employer's selection process impermissibly took into account the race of the applicants. The selection process was guided by an affirmative action plan, which provided that 50% of the new trainees were to be black until the percentage of black skilled craftworkers in the employer's plant approximated the percentage of blacks in the local labor force. Adoption of the plan had

been prompted by the fact that only 5 of 273, or 1.83%, of skilled craftworkers at the plant were black, even though the workforce in the area was approximately 39% black. Because of the historical exclusion of blacks from craft positions, the employer regarded its former policy of hiring trained outsiders as inadequate to redress the imbalance in its workforce.

We upheld the employer's decision to select less senior black applicants over the white respondent, for we found that taking race into account was consistent with Title VII's objective of "break[ing] down old patterns of racial segregation and hierarchy." As we stated:

> "It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long' constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy."[7]

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[7] JUSTICE SCALIA's dissent maintains that *Weber's* conclusion that Title VII does not prohibit voluntary affirmative action programs "rewrote the statute it purported to construe." *Weber's* decisive rejection of the argument that the "plain language" of the statute prohibits affirmative action rested on (1) legislative history indicating Congress' clear intention that employers play a major role in eliminating the vestiges of discrimination, 443 U.S. at 443 U. S. 201-204, and (2) the language and legislative history of § 703(j) of the statute, which reflect a strong desire to preserve managerial prerogatives so that they might be utilized for this purpose. Id. at 443 U. S. 204-207. As JUSTICE BLACKMUN said in his concurrence in *Weber*,

> "[I]f the Court has misperceived the political will, it has the assurance that, because the question is statutory, Congress may set a different course if it so chooses."

Congress has not amended the statute to reject our construction, nor have any such amendments even been proposed, and we therefore may assume that our interpretation was correct.

JUSTICE SCALIA's dissent faults the fact that we take note of the absence of congressional efforts to amend the statute to nullify *Weber*. It suggests that congressional inaction cannot be regarded as acquiescence under all circumstances, but then draws from that unexceptional point the conclusion that any reliance on congressional failure to act is necessarily a "canard." The fact that inaction may not always provide crystalline revelation, however, should not obscure the fact that it may be probative to varying degrees. *Weber*, for instance, was a widely publicized decision that addressed a prominent issue of public debate. Legislative inattention thus is not a plausible explanation for congressional inaction. Furthermore, Congress not only passed no contrary legislation in the wake of *Weber*, but not one legislator even proposed a bill to do so. The barriers of the legislative process therefore also seem a poor explanation for failure to act. By contrast, when Congress has been displeased with our interpretation of Title VII, it has not hesitated to amend the statute to tell us so. For instance, when Congress passed the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k),

> "it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in [*General Electric Co. v. Gilbert*, 429 U. S. 125 (1976)]."

We noted that the plan did not "unnecessarily trammel the interests of the white employees," since it did not require "the discharge of white workers and their replacement with new black hirees." Nor did the plan create "an absolute bar to the advancement of white employees," since half of those trained in the new program were to be white. Finally, we observed that the plan was a temporary measure, not designed to maintain racial balance, but to "eliminate a manifest racial imbalance." As JUSTICE BLACKMUN'S concurrence made clear, *Weber* held that an employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an "arguable violation" on its part. Rather, it need point only to a "conspicuous . . . imbalance in traditionally segregated job categories." Our decision was grounded in the recognition that voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and that Title VII should not be read to thwart such efforts.

In reviewing the employment decision at issue in this case, we must first examine whether that decision was made pursuant to a plan prompted by concerns similar to those of the employer in *Weber.* Next, we must determine whether the effect of the Plan on males and nonminorities is comparable to the effect of the plan in that case. [The majority then concluded that the decision to hire Joyce was made pursuant to a plan prompted by concerns similar to those of the employer in *Weber* and the effect of the plan on males and nonminorities was similar to the effect of the plan in *Weber*.]

We therefore hold that the Agency appropriately took into account as one factor the sex of Diane Joyce in determining that she should be promoted to the road dispatcher position. The decision to do so was made pursuant to an affirmative action plan that represents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's workforce. Such a plan is fully consistent with Title VII, for it embodies the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace. Accordingly, the judgment of the Court of Appeals is

*Affirmed.*

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*Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U. S. 669, 462 U. S. 678 (1983). Surely, it is appropriate to find some probative value in such radically different congressional reactions to this Court's interpretations of the same statute.

As one scholar has put it,

> "When a court says to a legislature: 'You (or your predecessor) meant X,' it almost invites the legislature to answer: 'We did not.'"

G. Calabresi, A Common Law for the Age of Statutes 31-32 (1982). Any belief in the notion of a dialogue between the judiciary and the legislature must acknowledge that, on occasion, an invitation declined is as significant as one accepted.

**JUSTICE SCALIA**, with whom **THE CHIEF JUSTICE** joins, and with whom **JUSTICE WHITE** joins in Parts I and II, dissenting.

* * *

III

* * *

The majority * * * asserts that, since

> "Congress has not amended the statute to reject our construction, . . . we . . . may assume that our interpretation was correct."

This assumption, which frequently haunts our opinions, should be put to rest. It is based, to begin with, on the patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant. To make matters worse, it assays the current Congress' desires *with respect to the particular provision in isolation,* rather than (the way the provision was originally enacted) as part of a total legislative package containing many *quids pro quo.* Whereas the statute as originally proposed may have presented to the enacting Congress a question such as "Should hospitals be required to provide medical care for indigent patients, with federal subsidies to offset the cost?," the question theoretically asked of the later Congress, in order to establish the "correctness" of a judicial interpretation that the statute provides no subsidies, is simply "Should the medical care that hospitals are required to provide for indigent patients be federally subsidized?" Hardly the same question -- and many of those legislators who accepted the subsidy provisions in order to gain the votes necessary for enactment of the care requirement would not vote for the subsidy in isolation, now that an unsubsidized care requirement is, thanks to the judicial opinion, safely on the books. But even accepting the flawed premise that the intent of the current Congress, with respect to the provision in isolation, is determinative, one must ignore rudimentary principles of political science to draw any conclusions regarding that intent from the *failure* to enact legislation. The "complicated check on legislation," The Federalist No. 62, p. 378 (C. Rossiter ed. 1961), erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the *status quo,* as opposed to (2) inability to agree upon how to alter the *status quo,* (3) unawareness of the *status quo,* (4) indifference to the *status quo,* or even (5) political cowardice. * * * I think we should admit that vindication by congressional inaction is a canard.

## Questions and Comments

**1. Statutory interpretation question:** What was the statutory interpretation question that the Court was trying to resolve? What was the text in issue?

**2. Plain meaning:** A plain meaning reading of Section 703 of the Civil Rights Act of 1964 would seem to prohibit a plan like Santa Clara County's as one that deprives

Johnson of employment opportunities because of his sex. The majority, however, does not analyze the plain meaning of the statutory language because the Supreme Court previously held, in *Weber,* that, in some situations, an affirmative action plan would not violate Section 703. Thus, the focus of the majority and dissenting opinions was on whether the Court's decision in *Weber* controlled in *Johnson*, and whether the Court should depart from its decision in *Weber.*

**3. Legislative acquiescence:** The majority reasons that Congress' failure to overturn the Supreme Court's *Weber* decision indicates Congressional support for the Court's interpretation of Title VII. What weight does Justice Scalia, in dissent, argue that Congressional inaction is entitled to, and why? Does the majority argue that Congressional inaction always indicates Congressional acquiescence in judicial interpretations? What inference should be drawn from Congressional inaction in this case, according to the majority, and why?

**4. Trends in Congressional over-rides:** The frequency of Congressional over-rides of judicial interpretations of statutes has fluctuated over the years. The conventional wisdom, prior to 1990, was that Congress rarely overturned judicial interpretations of statutes. However, Professor William Eskridge found, in a 1991 study, that there was a significant increase between 1967 and 1990 in Congressional over-rides of Supreme Court decisions interpreting statutes. *See* William N. Eskridge Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 1 Yale L. J. 331 (1991). A decade and a half later, Professor Eskridge collaborated with Professor Matthew Christiansen to update his study and found that between 1991 and 1998, Congress continued to override a significant number of statutory decisions (86 overrides during that period), but that the rate at which Congress overrode such decisions between 1998 and 2011 declined dramatically. *See* Matthew Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 Tex. L. Rev. 1317, 1319 (2014). Interestingly, they found that when the Supreme Court rejected a federal agency decision during the study period, that decision was much more likely to be overridden by Congress than the average Supreme Court decision and that Congress adopted the agency's interpretation in 75% of the overrides. *Id.* at 1321. In the wake of the decline in Congressional overrides, Professors Eskridge and Christiansen propose that Congress create a statutory certification process that allows Congress to fast-track legislation to override a Supreme Court opinion if six Justices in a statutory case certify an issue to Congress. *Id.* at 1322. Professors Eskridge and Christiansen also note that the decline in Congressional overrides provides an opportunity, and a need, for agencies to update statutes. *Id.* at 1325. At the time they wrote their article, they asserted that the Supreme Court would be under pressure to acquiesce to the agencies' updates, based on traditional deference doctrines, *id.*, but that is questionable today, as judicial deference to agency statutory interpretation is eroding. *See infra,* Chapter 7.

## BOB JONES UNIVERSITY V. UNITED STATES

**461 U.S. 574 (1983)**

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument Audio (From Oyez)
Internal Rev. Code § 501(c)(3)
Internal Rev. Code § 170
Case Background (From Quimbee)
Story of the Case – Prof. Olatunde Johnson

**CHIEF JUSTICE BURGER** delivered the opinion of the Court.

We granted certiorari to decide whether petitioners, nonprofit private schools that prescribe and enforce racially discriminatory admissions standards on the basis of religious doctrine, qualify as tax-exempt organizations under § 501(c)(3) of the Internal Revenue Code of 1954.

**I**

A

Until 1970, the Internal Revenue Service granted tax-exempt status to private schools, without regard to their racial admissions policies, under § 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3) and granted charitable deductions for contributions to such schools under § 170 of the Code, 26 U.S.C. § 170.

On January 12, 1970, a three-judge District Court for the District of Columbia issued a preliminary injunction prohibiting the IRS from according tax-exempt status to private schools in Mississippi that discriminated as to admissions on the basis of race. *Green v. Kennedy,* 309 F. Supp. 1127, *appeal dism'd sub nom. Cannon v. Green,* 398 U.S. 956 (1970). Thereafter, in July, 1970, the IRS concluded that it could "no longer legally justify allowing tax-exempt status [under § 501(c)(3)] to private schools which practice racial discrimination." At the same time, the IRS announced that it could not "treat gifts to such schools as charitable deductions for income tax purposes [under § 170]." By letter dated November 30, 1970, the IRS formally notified private schools, including those involved in this litigation, of this change in policy, "applicable to all private schools in the United States at all levels of education."

On June 30, 1971, the three-judge District Court issued its opinion on the merits of the Mississippi challenge. *Green v. Connally,* 330 F. Supp. 1150, *summarily aff'd sub nom. Coit v. Green,* 404 U.S. 997 (1971). That court approved the IRS's amended construction of the Tax Code. The court also held that racially discriminatory private schools were not entitled to exemption under § 501(c)(3) and that donors were not entitled to deductions for contributions to such schools under § 170. The court permanently enjoined the Commissioner of Internal Revenue from approving tax-exempt status for any school in Mississippi that did not publicly maintain a policy of nondiscrimination.

The revised policy on discrimination was formalized in Revenue Ruling 71-447, 1971-2 Cum.Bull. 230:

> "Both the courts and the Internal Revenue Service have long recognized that the statutory requirement of being 'organized and operated exclusively for religious, charitable, . . . or educational purposes' was intended to express the basic common law concept [of 'charity']. . . . All charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy."

Based on the "national policy to discourage racial discrimination in education," the IRS ruled that

> "a [private] school not having a racially nondiscriminatory policy as to students is not 'charitable' within the common law concepts reflected in sections 170 and 501(c)(3) of the Code."

*Id.* at 231.

The application of the IRS construction of these provisions to petitioners, two private schools with racially discriminatory admissions policies, is now before us.

* * *

II

A

In Revenue Ruling 71-447, the IRS formalized the policy, first announced in 1970, that § 170 and § 501(c)(3) embrace the common law "charity" concept. Under that view, to qualify for a tax exemption pursuant to § 501(c)(3), an institution must show, first, that it falls within one of the eight categories expressly set forth in that section, and second, that its activity is not contrary to settled public policy.

Section 501(c)(3) provides that "[c]orporations . . . organized and operated exclusively for religious, charitable . . . or educational purposes" are entitled to tax exemption. Petitioners argue that the plain language of the statute guarantees them tax-exempt status. They emphasize the absence of any language in the statute expressly requiring all exempt organizations to be "charitable" in the common law sense, and they contend that the disjunctive "or" separating the categories in § 501(c)(3) precludes such a reading. Instead, they argue that, if an institution falls within one or more of the specified categories it is automatically entitled to exemption, without regard to whether it also qualifies as "charitable." The Court of Appeals rejected that contention and concluded that petitioners' interpretation of the statute "tears section 501(c)(3) from its roots."

It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute:

> "The general words used in the clause . . . , taken by themselves, and literally construed, without regard to the object in view, would seem to sanction the claim

> of the plaintiff. But this mode of expounding a statute has never been adopted by any enlightened tribunal -- because it is evident that, in many cases, it would defeat the object which the Legislature intended to accomplish. And it is well-settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, *but will take in connection with it the whole statute . . . and the objects and policy of the law. . . .*"

*Brown v. Duchesne*, 19 How. 183, 60 U. S. 194 (1857) (emphasis added).

Section 501(c)(3) therefore must be analyzed and construed within the framework of the Internal Revenue Code and against the background of the congressional purposes. Such an examination reveals unmistakable evidence that, underlying all relevant parts of the Code, is the intent that entitlement to tax exemption depends on meeting certain common law standards of charity -- namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy.

This "charitable" concept appears explicitly in § 170 of the Code. That section contains a list of organizations virtually identical to that contained in § 501(c)(3). It is apparent that Congress intended that list to have the same meaning in both sections.

[The majority then focused on the language of the statute, the history of the definition of “charity” in American law, the legislative history of the statute and prior statutes addressing tax exemptions for charity, and the purpose of the charitable exemption in the Internal Revenue Code to support an interpretation of the statute consistent with the interpretation adopted by the Internal Revenue Service in Revenue Ruling 71-447.]

* * *

D

The actions of Congress since 1970 leave no doubt that the IRS reached the correct conclusion in exercising its authority. It is, of course, not unknown for independent agencies or the Executive Branch to misconstrue the intent of a statute; Congress can and often does correct such misconceptions, if the courts have not done so. Yet, for a dozen years, Congress has been made aware -- acutely aware -- of the IRS rulings of 1970 and 1971. As we noted earlier, few issues have been the subject of more vigorous and widespread debate and discussion in and out of Congress than those related to racial segregation in education. Sincere adherents advocating contrary views have ventilated the subject for well over three decades. Failure of Congress to modify the IRS rulings of 1970 and 1971, of which Congress was, by its own studies and by public discourse, constantly reminded, and Congress' awareness of the denial of tax-exempt status for racially discriminatory schools when enacting other and related legislation make out an unusually strong case of legislative acquiescence in and ratification by implication of the 1970 and 1971 rulings.

Ordinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation. We have observed that "unsuccessful

attempts at legislation are not the best of guides to legislative intent." Here, however, we do not have an ordinary claim of legislative acquiescence. Only one month after the IRS announced its position in 1970, Congress held its first hearings on this precise issue. Exhaustive hearings have been held on the issue at various times since then. These include hearings in February, 1982, after we granted review in this case.

Nonaction by Congress is not often a useful guide, but the nonaction here is significant. During the past 12 years. there have been no fewer than 13 bills introduced to overturn the IRS interpretation of § 501(c)(3). Not one of these bills has emerged from any committee, although Congress has enacted numerous other amendments to § 501 during this same period, including an amendment to § 501(c)(3) itself. It is hardly conceivable that Congress -- and in this setting, any Member of Congress -- was not abundantly aware of what was going on. In view of its prolonged and acute awareness of so important an issue, Congress' failure to act on the bills proposed on this subject provides added support for concluding that Congress acquiesced in the IRS rulings of 1970 and 1971.

The evidence of congressional approval of the policy embodied in Revenue Ruling 71-447 goes well beyond the failure of Congress to act on legislative proposals. Congress affirmatively manifested its acquiescence in the IRS policy when it enacted the present § 501(i) of the Code, Act of Oct. 20, 1976, Pub.L. 94-568, 90 Stat. 2697. That provision denies tax-exempt status to social clubs whose charters or policy statements provide for "discrimination against any person on the basis of race, color, or religion." Both the House and Senate Committee Reports on that bill articulated the national policy against granting tax exemptions to racially discriminatory private clubs.

Even more significant is the fact that both Reports focus on this Court's affirmance of *Green v. Connally,* 330 F. Supp. 1150 (D.C. Cir. 1971), as having established that "discrimination on account of race is inconsistent with an *educational institution's* tax-exempt status." These references in congressional Committee Reports on an enactment denying tax exemptions to racially discriminatory private social clubs cannot be read other than as indicating approval of the standards applied to racially discriminatory private schools by the IRS subsequent to 1970, and specifically of Revenue Ruling 71-447.[27]

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[27] Reliance is placed on scattered statements in floor debate by Congressmen critical of the IRS's adoption of Revenue Ruling 71-447. See, e.g., Brief for Petitioner in No. 81-1, pp. 27-28. Those views did not prevail. That several Congressmen, expressing their individual views, argued that the IRS had no authority to take the action in question is hardly a balance for the overwhelming evidence of congressional awareness of and acquiescence in the IRS rulings of 1970 and 1971. Petitioners also argue that the Ashbrook and Dornan Amendments to the Treasury, Postal Service, and General Government Appropriations Act of 1980, reflect congressional opposition to the IRS policy formalized in Revenue Ruling 71-447. Those amendments, however, are directly concerned only with limiting more aggressive enforcement procedures proposed by the IRS in 1978 and 1979 and preventing the adoption of more stringent substantive standards. The Ashbrook Amendment, § 103 of the Act, applies only to procedures, guidelines, or measures adopted after August 22, 1978, and thus in no way affects the status of Revenue Ruling 71-447. In fact, both Congressman Dornan and Congressman Ashbrook

* * *

**JUSTICE REHNQUIST**, dissenting.

The Court points out that there is a strong national policy in this country against racial discrimination. To the extent that the Court states that Congress, in furtherance of this policy, could deny tax-exempt status to educational institutions that promote racial discrimination, I readily agree. But, unlike the Court, I am convinced that Congress simply has failed to take this action and, as this Court has said over and over again, regardless of our view on the propriety of Congress' failure to legislate, we are not constitutionally empowered to act for it.

In approaching this statutory construction question, the Court quite adeptly avoids the statute it is construing. This I am sure is no accident, for there is nothing in the language of § 501(c)(3) that supports the result obtained by the Court. Section 501(c)(3) provides tax-exempt status for:

> "Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

26 U.S.C. § 501(c)(3). With undeniable clarity, Congress has explicitly defined the requirements for § 501(c)(3) status. An entity must be (1) a corporation, or community chest, fund, or foundation, (2) organized for one of the eight enumerated purposes, (3) operated on a nonprofit basis, and (4) free from involvement in lobbying activities and political campaigns. Nowhere is there to be found some additional, undefined public policy requirement.

* * *

Perhaps recognizing the lack of support in the statute itself, or in its history, for the 1970 IRS change in interpretation, the Court finds that "[t]he actions of Congress since 1970 leave no doubt that the IRS reached the correct conclusion in exercising its authority," concluding that there is "an unusually strong case of legislative acquiescence in and ratification by implication of the 1970 and 1971 rulings." The Court relies first on several

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explicitly stated that their amendments would have no effect on prior IRS policy, including Revenue Ruling 71-447. These amendments therefore do not indicate congressional rejection of Revenue Ruling 71-447 and the standards contained therein.

bills introduced to overturn the IRS interpretation of § 501(c)(3). But we have said before, and it is equally applicable here, that this type of congressional inaction is of virtually no weight in determining legislative intent. These bills and related hearings indicate little more than that a vigorous debate has existed in Congress concerning the new IRS position.

The Court next asserts that "Congress affirmatively manifested its acquiescence in the IRS policy when it enacted the present § 501(i) of the Code," a provision that "denies tax-exempt status to social clubs whose charters or policy statements provide for" racial discrimination. Quite to the contrary, it seems to me that, in § 501(i), Congress showed that, when it wants to add a requirement prohibiting racial discrimination to one of the tax-benefit provisions, it is fully aware of how to do it.

* * *

This Court continuously has been hesitant to find ratification through inaction. *See United States v. Wise, supra.* This is especially true where such a finding

> "would result in a construction of the statute which not only is at odds with the language of the section in question and the pattern of the statute taken as a whole, but also is extremely far reaching in terms of the virtually untrammeled and unreviewable power it would vest in a regulatory agency."

Few cases would call for more caution in finding ratification by acquiescence than the present ones. The new IRS interpretation is not only far less than a longstanding administrative policy, it is at odds with a position maintained by the IRS, and unquestioned by Congress, for several decades prior to 1970. The interpretation is unsupported by the statutory language, it is unsupported by legislative history, the interpretation has led to considerable controversy in and out of Congress, and the interpretation gives to the IRS a broad power which, until now, Congress had kept for itself. Where in addition to these circumstances Congress has shown time and time again that it is ready to enact positive legislation to change the Tax Code when it desires, this Court has no business finding that Congress has adopted the new IRS position by failing to enact legislation to reverse it.

I have no disagreement with the Court's finding that there is a strong national policy in this country opposed to racial discrimination. I agree with the Court that Congress has the power to further this policy by denying § 501(c)(3) status to organizations that practice racial discrimination. But as of yet, Congress has failed to do so. Whatever the reasons for the failure, this Court should not legislate for Congress.

## Questions and Comments

**1. Statutory interpretation question:** What was the statutory interpretation question that the Court was trying to resolve? What text was at issue?

**2. Theory of interpretation:** What theory of interpretation does the majority rely upon in interpreting the Internal Revenue Code? Is the Court and the agency's reading consistent with the plain meaning of the text?

**3. Legislative acquiescence:** In this case, the majority draws inferences about the meaning of a statute from Congress' failure to overturn an *agency's* interpretation of a statute, as opposed to a *court's* interpretation of a statute. Is it more or less likely that Congress will be aware of an agency's interpretation of a statute than a court's interpretation of a statute? Recall that critics of legislative acquiescence argue that courts should not accord any meaning to Congress' failure to overturn interpretations of statutes by courts or agencies because Congress may not even be aware of the interpretations. Does the majority address that issue? (Whether it makes sense to assume that the legislature was aware of an agency's interpretation may depend on the way the agency announced its interpretation. Legislatures may be more likely to be aware of interpretations articulated in agency rulemakings than in agency adjudications or in agency guidance documents and policy statements (non-legislative rules). The various ways that agencies may announce their interpretations of statutes are discussed in Chapter 7 of this book.) Was Congress' reaction to the IRS' interpretation of the Internal Revenue Code similar to its action in *Johnson,* where it made no effort to overturn the Supreme Court's interpretation of Title VII? What Congressional *action*, as opposed to *inaction*, did the majority find significant in interpreting the Internal Revenue Code? What weight does the majority accord to statements by individual legislators in subsequent Congresses?

**4. Dissent:** What weight does the dissent attribute to Congress' failure to overturn the IRS' interpretation of the Internal Revenue Code? What about Congress' amendment of the Code in Section 501(i) in a way that the majority suggests demonstrates approval of the agency's interpretation of the Code? Why does the dissent believe that this is a particularly inappropriate case for the Court to interpret Congressional silence to constitute Congressional acquiescence to the agency's interpretation? How does the dissent argue that acquiescence would violate principles of separation of powers?

## C. Stare Decisis

Much of the discussion in the preceding section focuses on the meaning to be attributed to the legislature's action or inaction after a judicial or administrative interpretation of a statute. While the ***legislature's response to the judicial interpretation of a statute*** is a factor that courts might consider in interpreting the statute, one should not forget that it is even more important for the court to consider the ***prior judicial interpretation of the statute itself*** when interpreting a statute. Once a court has interpreted a statute, the principle of ***stare decisis***[474] limits courts' ability to change that interpretation.

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[474] The term derives from Latin, meaning "to stand by decided matters." *See Stare Decisis,* Merriam-Webster Dictionary, *accessible at*: https://www.merriam-webster.com/dictionary/stare%20decisis (last visited Jan. 24, 2023).

Pursuant to the principle of stare decisis, lower courts are bound by the decisions of higher courts in the same jurisdiction and courts generally should not reverse their own decisions except in exceptional circumstances.[475] The doctrine is designed (1) to create stability in the law, allowing persons to plan their activities knowing that the law will not change suddenly and unexpectedly; and (2) to promote objectivity in judicial decision-making.[476]

The doctrine applies with special force to judicial opinions that interpret statutes, as opposed to opinions that interpret the common law or the Constitution. Indeed, it is often referred to as a "super-strong presumption" for statutory opinions.[477] The presumption is heightened when applied to statutory opinions because Congress or state legislatures have more ability to overturn statutory opinions than constitutional opinions.[478] If a court gets a constitutional question "wrong," courts will be more likely to correct the error on their own, as opposed to waiting for the legislature to act. Similarly, while Congress and legislatures can "fix" "errors" in judicial opinions on common law questions, courts are more willing to revisit their common law interpretations than statutory interpretations because the common law was created by courts in the first place. When courts interpret statutes, however, the preference, in most cases, is for Congress or the legislature to "fix" any mistakes in judicial interpretation.[479] Hence the "super-strong presumption" of stare decisis.

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475 *See* Jellum, *supra* note 165, at 468. Some commentators argue that *stare decisis* also requires courts "to reason from precedents when there is none precisely on point." *See* William N. Eskridge Jr., Abbe R. Gluck, & Victoria F. Nourse, STATUTES, REGULATION AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES, 251 (West Acad. Pub. 2014).

476 *See* Jellum, *supra* note 165, at 467-468 (stare decisis furthers certainty in the law, faith in the judicial system, and gives the appearance of objectivity); Eskridge, et al., *supra* note 85, at 253-254 (identifying predictability and objectivity as goals of stare decisis); Manning & Stephenson, *supra* note 4, at 245 (stability and predictability); Eskridge, Brudney, Chafetz, Frickey, & Garrett, supra note 17, at 433-434 (West Acad. Pub. 2020) (predictability, certainty and constraint on judges).

477 *See* Levy & Glicksman, *supra* note 340, at 216; Jellum, *supra* note 165, at 468. Professor William Eskridge and colleagues argue, however, that the Court has relaxed stare decisis in antitrust cases. *See* Eskridge, Brudney, et. al, *supra* note 17, at 444.

478 *See* Levy & Glicksman, *supra* note 340, at 216, *citing* *Patterson v. McClean Credit Union*, 491 U.S. 164, 172-173 (1989); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130,139 (2008). *See also* Christiansen & Eskridge, supra note 401, at 1460 (noting that many scholars reject the super strong presumption based on an assumption that Congress no longer overrides "erroneous" judicial interpretations of statutes, but suggesting that earlier studies regarding Congressional failure to override such interpretations are flawed).

479 Some commentators suggest that courts accord prior statutory opinions heightened deference because of separation of powers principles, as Congress, rather than courts, should correct judicial mistakes in those instances. *See* Jellum, *supra* note 165, at 468.

The doctrine is not absolute, however. Two situations where courts will commonly overturn precedents that interpret statutes are (1) when the precedent was wrongly decided[480]; and (2) when the precedent is unworkable or outdated.[481]

The following case is a valuable case to explore the concept of stare decisis as well as to reinforce the relevance of subsequent Congressional action or inaction in interpreting statutes. *Flood v. Kuhn*, 407 U.S. 258 (1972), involved a challenge to the "reserve system" that existed in major league baseball at the time, which allowed baseball teams to unilaterally renew players' contracts subject to a minimum salary agreed upon in collective bargaining, and to assign the contract of a player to another team without the player's consent. Flood alleged that the reserve system violated antitrust laws, but Major League Baseball defended the lawsuit by arguing that baseball was exempt from the antitrust laws under Supreme Court precedent.

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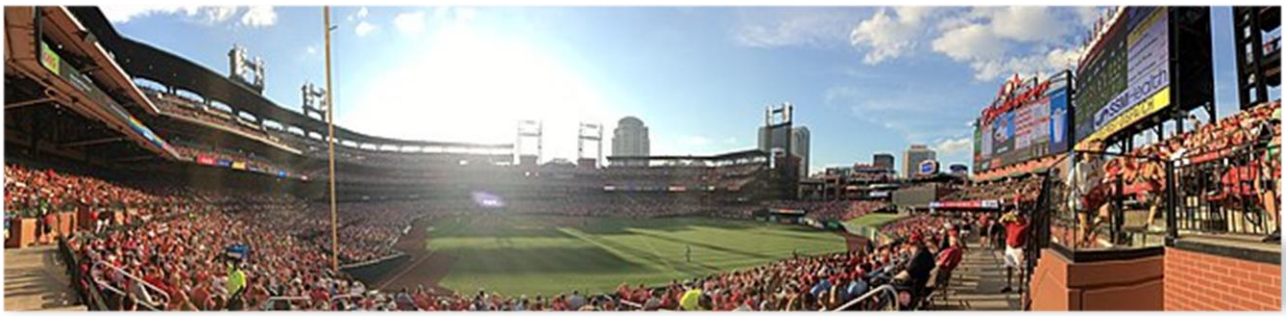
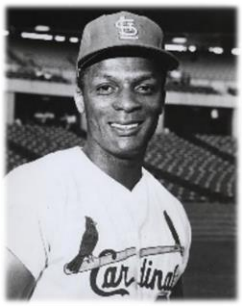
480 *See, e.g. Brown v. Board of Education*, 347 U.S. 483 (1954) (overturning *Plessy v. Ferguson*, 163 U.S. 537 (1896)). Professor Linda Jellum argues, however, that courts will be less likely to overturn prior statutory interpretations on the ground that they were wrongly decided because of the "super-strong" presumption that applies to statutory opinions. *See* Jellum, *supra* note 165, at 468.

481 *See* Eskridge, Brudney, et al., *supra* note 17, at 443. Professor Eskridge argues that statutory precedents are vulnerable to being overruled "if (1) there has been an 'intervening development in the law' that has rendered that precedent 'irreconcilable with competing legal doctrines or policies,' (2) the precedent has become 'a positive detriment to coherence and consistency in the law', either internally or in relation to policy objectives associated with other laws, and (3) the precedent has been proved outdated and contrary to [modern] understandings of justice and social welfare." *Id.* Justice Scalia and Brian Garner argue that several criteria should be considered when deciding whether to overturn judicial opinions interpreting statutes, including "(1) whether harm will be caused to those who justifiably relied on the decision, (2) how clear it is that the decision was textually and historically wrong, (3) whether the decision has been generally accepted by society, and (4) whether the decision permanently places courts in the position of making policy calls appropriate for elected officials." *See* Scalia & Garner, *supra* note 192, at 412. When the Supreme Court considers overturning constitutional precedent, as opposed to statutory precedent, it has indicated that it considers five factors regarding the precedent, including: (1) the quality of its reasoning; (2) the workability of the rule it established; (3) its consistency with other related decisions; (4) developments since the decision was handed down; and (5) reliance on the decision. *See Janus v. American Federation of State, County, and Municipal Employees, Council 31 et al.*, 138 S. Ct. 2448 (2018).



Busch Stadium in Saint Louis – Photo by Jordano53 – CC BY-SA 4.0



Curt Flood – Public Domain

Bowie Kuhn -Public Domain

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument Audio (From Oyez)
Case Background (From Quimbee)
The Reserve Clause (Baseball Ref.)
Ken Burns Documentary clip (YouTube)
Curt Flood: Retro Report – NY Times (YouTube)
One Man Out: Curt Flood v. Baseball (Book)
Curt Flood Obit. – NY Times

## FLOOD V. KUHN

**407 U.S. 258 (1972)**

**MR. JUSTICE BLACKMUN** delivered the opinion of the Court.

For the third time in fifty years, the Court is asked specifically to rule that baseball's reserve system is within the reach of the federal antitrust laws.[1] * * *

I

*The Game*

It is a century and a quarter since the New York Nine defeated the Knickerbockers 23 to 1 on Hoboken's Elysian Fields June 19, 1846, with Alexander Jay Cartwright as the instigator and the umpire. The teams were amateur, but the contest marked a significant

[1] The reserve system * * * centers in the uniformity of player contracts; the confinement of the player to the club that has him under the contract; the assignability of the player's contract; and the ability of the club annually to renew the contract unilaterally, subject to a stated salary minimum.

date in baseball's beginnings. That early game led ultimately to the development of professional baseball and its tightly organized structure.

The Cincinnati Red Stockings came into existence in 1869 upon an outpouring of local pride. With only one Cincinnatian on the payroll, this professional team traveled over 11,000 miles that summer, winning 56 games and tying one. Shortly thereafter, on St. Patrick's Day in 1871, the National Association of Professional Baseball Players was founded and the professional league was born.

The ensuing colorful days are well known. The ardent follower and the student of baseball know of General Abner Doubleday; the formation of the National League in 1876; Chicago's supremacy in the first year's competition under the leadership of Al Spalding and with Cap Anson at third base; the formation of the American Association and then of the Union Association in the 1880's; the introduction of Sunday baseball; inter-league warfare with cut-rate admission prices and player raiding; the development of the reserve "clause"; the emergence in 1885 of the Brotherhood of Professional Ball Players, and in 1890 of the Players League; the appearance of the American League, or "junior circuit," in 1901, rising from the minor Western Association; the first World Series in 1903, disruption in 1904, and the Series' resumption in 1905; the short-lived Federal League on the majors' scene during World War I years; the troublesome and discouraging episode of the 1919 Series; the home run ball; the shifting of franchises; the expansion of the leagues; the installation in 1965 of the major league draft of potential new players; and the formation of the Major League Baseball Players Association in 1966.

Then there are the many names, celebrated for one reason or another, that have sparked the diamond and its environs and that have provided tinder for recaptured thrills, for reminiscence and comparisons, and for conversation and anticipation in-season and off-season: Ty Cobb, Babe Ruth, Tris Speaker, Walter Johnson, Henry Chadwick, Eddie Collins, Lou Gehrig, Grover Cleveland Alexander, Rogers Hornsby, Harry Hooper, Goose Goslin, Jackie Robinson, Honus Wagner, Joe McCarthy, John McGraw, Deacon Phillippe, Rube Marquard, Christy Mathewson, Tommy Leach, Big Ed Delahanty, Davy Jones, Germany Schaefer, King Kelly, Big Dan Brouthers, Wahoo Sam Crawford, Wee Willie Keeler, Big Ed Walsh, Jimmy Austin, Fred Snodgrass, Satchel Paige, Hugh Jennings, Fred Merkle, Iron Man McGinnity, Three-Finger Brown, Harry and Stan Coveleski, Connie Mack, Al Bridwell, Red Ruffing, Amos Rusie, Cy Young, Smokey Joe Wood, Chief Meyers, Chief Bender, Bill Klem, Hans Lobert, Johnny Evers, Joe Tinker, Roy Campanela, Miller Huggins, Rube Bressler, Dazzy Vance, Edd Roush, Bill Wambsganess, Clark Griffith, Branch Rickey, Frank Chance, Cap Anson, Nap Lajoie, Sad Sam Jones, Bob O'Farrell, Lefty O'Doul, Bobby Veach, Willie Kamm, Heinie Groh, Lloyd and Paul Waner, Stuffy McInnis, Charles Comiske, Roger Bresnahan, Bill Dickey, Zack Wheat, George Sisler, Charlie Gehringer, Eppa Rixey, Harry Heilmann, Fred Clarke, Dizzy Dean, Hank Greenberg, Pie Traynor, Rube Waddell, Bill Terry, Carl Hubbell, Old Hoss Radbourne, Moe Berg, Rabbit Maranville, Jimmie Foxx, Lefty Grove. The list seems endless.

And one recalls the appropriate reference to the "World Serious," attributed to Ring Lardner, Sr.; Ernest L. Thayer's "Casey at the Bat"; the ring of "Tinker to Evers to Chance"; and all the other happenings, habits, and superstitions about and around baseball that made it the "national pastime" or, depending upon the point of view, "the great American tragedy."

## II

*The Petitioner*

The petitioner, Curtis Charles Flood, born in 1938, began his major league career in 1956 when he signed a contract with the Cincinnati Reds for a salary of $4,000 for the season. He had no attorney or agent to advise him on that occasion. He was traded to the St. Louis Cardinals before the 1958 season. Flood rose to fame as a center fielder with the Cardinals during the years 1958-1969. In those 12 seasons he compiled a batting average of .293. * * * He participated in the 1964, 1967, and 1968 World Series. He played errorless ball in the field in 1966, * * * has received seven Golden Glove Awards * * * [and] ranks among the 10 major league outfielders possessing the highest lifetime fielding averages. * * *

[A]t the age of 31, in October, 1969, Flood was traded to the Philadelphia Phillies of the National League in a multi-player transaction. He was not consulted about the trade. * * * In December, he complained to the Commissioner of Baseball and asked that he be made a free agent and be placed at liberty to strike his own bargain with any other major league team. His request was denied.

Flood then instituted this antitrust suit in January, 1970, in federal court for the Southern District of New York. The defendants (although not all were named in each cause of action) were the Commissioner of Baseball, the presidents of the two major leagues, and the 24 major league clubs. In general, the complaint charged violations of the federal antitrust laws and civil rights statutes * * * Petitioner sought declaratory and injunctive relief and treble damages. * * *

## IV

*The Legal Background*

A. *Federal Baseball Club v. National League*, 259 U. S. 200 (1922), was a suit for treble damages instituted by a member of the Federal League (Baltimore) against the National and American Leagues and others. * * * The main brief filed by the plaintiff with this Court discloses that it was strenuously argued, among other things, that the business in which the defendants were engaged was interstate commerce; that the interstate relationship among the several clubs, located as they were in different States, was predominant; that organized baseball represented an investment of colossal wealth; that it was an engagement in moneymaking; that gate receipts were divided by agreement between the home club and the visiting club; and that the business of baseball was to be distinguished from the mere playing of the game as a sport for physical exercise and diversion.

Mr. Justice Holmes, in speaking succinctly for a unanimous Court, said:

> "The business is giving exhibitions of baseball, which are purely state affairs. . . . But the fact that, in order to give the exhibitions, the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business. . . . [T]he transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money, would not be called trade or commerce in the commonly accepted use of those words. As it is put by the defendants, personal effort, not related to production, is not a subject of commerce. That which, in its consummation, is not commerce does not become commerce among the States because the transportation that we have mentioned takes place. * * * "
>
> "If we are right, the plaintiff's business is to be described in the same way, and the restrictions by contract that prevented the plaintiff from getting players to break their bargains and the other conduct charged against the defendants were not an interference with commerce among the States." * * *

B. * * *

In the years that followed, baseball continued to be subject to intermittent antitrust attack. The courts, however, rejected these challenges on the authority of Federal Baseball. In some cases stress was laid, although unsuccessfully, on new factors such as the development of radio and television, with their substantial additional revenues to baseball. For the most part, however, the Holmes opinion was generally and necessarily accepted as controlling authority. And in the 1952 Report of the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary, H.R.Rep. No. 2002, 82d Cong., 2d Sess., 229, it was said, in conclusion:

> "On the other hand, the overwhelming preponderance of the evidence established baseball's need for some sort of reserve clause. Baseball's history shows that chaotic conditions prevailed when there was no reserve clause. Experience points to no feasible substitute to protect the integrity of the game or to guarantee a comparatively even competitive struggle. The evidence adduced at the hearings would clearly not justify the enactment of legislation flatly condemning the reserve clause."

C. The Court granted certiorari, 345 U.S. 963 (1953), in the *Toolson [v. New York Yankees, Inc.,* 346 U.S. 356 (1953)]*, Kowalski,* and *Corbett* cases, and, by a short per curiam [opinion] affirmed the judgments of the respective courts of appeals in those three cases. *Federal Baseball* was cited as holding "that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws," and:

> "Congress has had the ruling under consideration, but has not seen fit to bring such business under these laws by legislation having prospective effect. The

> business has thus been left for thirty years to develop on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that, if there are evils in this field which now warrant application to it of the antitrust laws, it should be by legislation. Without reexamination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, supra,* so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws."

This quotation reveals four reasons for the Court's affirmance of *Toolson* and its companion cases: (a) Congressional awareness for three decades of the Court's ruling in *Federal Baseball,* coupled with congressional inaction. (b) The fact that baseball was left alone to develop for that period upon the understanding that the reserve system was not subject to existing federal antitrust laws. (c) A reluctance to overrule Federal Baseball with consequent retroactive effect. (d) A professed desire that any needed remedy be provided by legislation, rather than by court decree. * * *

[The majority then discussed three other cases involving the application of antitrust laws to other activities. In *United States v. Shubert*, 348 U. S. 222 (1955), the Supreme Court held that the "production of legitimate theatrical attractions throughout the United States and * * * operating theaters for the presentation of such attractions" was "trade or commerce" under the antitrust statutes, despite the Court's rulings in *Federal Baseball* and *Toolson*, which the Court said were limited to the question of whether baseball was exempt from the antitrust statutes. In *United States v. International Boxing Club*, 348 U. S. 236 (1955), decided the same day as *Shubert,* the Court held that "the business of promoting professional championship boxing contests" was not exempt from the antitrust laws, despite the Court's rulings in *Federal Baseball* and *Toolson.* The *International Boxing Club* Court wrote, ""The controlling consideration in *Federal Baseball* and *Hart* was * * * a very practical one -- the degree of interstate activity involved in the particular business under review. It follows that *stare decisis* cannot help the defendants here; for, contrary to their argument, *Federal Baseball* did not hold that all businesses based on professional sports were outside the scope of the antitrust laws. The issue confronting us is, therefore, not whether a previously granted exemption should continue, but whether an exemption should be granted in the first instance. And that issue is for Congress to resolve, not this Court." 348 U.S. at 348 U. S. 243. The third case discussed by the Court was *Radovich v. National Football League,* 352 U. S. 445 (1957), which focused on whether professional football was exempt from the antitrust laws. Once again, the Court refused to extend the baseball antitrust exemption to other businesses. Writing for the majority in *Radovich*, Justice Clark indicated that "the Court made its ruling in *Toolson* "because it was concluded that more harm would be done in overruling *Federal Baseball* than in upholding a ruling which, at best, was of dubious validity, and that "[a]ll this, combined with the flood of litigation that would follow its

repudiation, the harassment that would ensue, and the retroactive effect of such a decision, led the Court to the practical result that it should sustain the unequivocal line of authority reaching over many years." 352 U.S. at 352 U. S. 450. In *Radovich*, the Court said:]

> "[S]ince *Toolson* and *Federal Baseball* are still cited as controlling authority in antitrust actions involving other fields of business, we now specifically limit the rule there established to the facts there involved, *i.e.,* the business of organized professional baseball. As long as the Congress continues to acquiesce, we should adhere to -- but not extend -- the interpretation of the Act made in those cases. . . ."
>
> "If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer, aside from the distinctions between the businesses, that, were we considering the question of baseball for the first time upon a clean slate, we would have no doubts. But *Federal Baseball* held the business of baseball outside the scope of the Act. No other business claiming the coverage of those cases has such an adjudication. We therefore conclude that the orderly way to eliminate error or discrimination, if any there be, is by legislation, and not by court decision. Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation. The resulting product is therefore more likely to protect the industry and the public alike. The whole scope of congressional action would be known long in advance, and effective dates for the legislation could be set in the future without the injustices of retroactivity and surprise which might follow court action."

* * * Mr. Justice Harlan, joined by MR. JUSTICE BRENNAN, also dissented [in Radovitch] because he * * * was "unable to distinguish football from baseball." * * * [T]he dissenting Justices did not call for the overruling of the baseball decisions. They merely could not distinguish the two sports, and, out of respect for *stare decisis,*, voted to affirm.

G. Finally, in *Haywood v. National Basketball Assn.,* 401 U. S. 1204 (1971) , [the Court concluded that] * * * "Basketball . . . does not enjoy exemption from the antitrust laws."

H. This series of decisions understandably spawned extensive commentary, some of it mildly critical and much of it not; nearly all of it looked to Congress for any remedy that might be deemed essential.

I. Legislative proposals have been numerous and persistent. Since *Toolson,* more than 50 bills have been introduced in Congress relative to the applicability or nonapplicability of the antitrust laws to baseball. A few of these passed one house or the other. Those that did would have expanded, not restricted, the reserve system's exemption to other professional league sports. And the Act of Sept. 30, 1961, Pub.L. 87-331, and the merger addition thereto effected by the Act of Nov. 8, 1966, Pub.L. 89-800, § 6(b), were also expansive, rather than restrictive, as to antitrust exemption.

## V

In view of all this, it seems appropriate now to say that:

1. Professional baseball is a business, and it is engaged in interstate commerce.

2. With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball.

3. Even though others might regard this as "unrealistic, inconsistent, or illogical," *see Radovich,* the aberration is an established one, and one that has been recognized not only in *Federal Baseball* and *Toolson,* but in *Shubert, International Boxing,* and *Radovich,* as well, a total of five consecutive cases in this Court. It is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis,* and one that has survived the Court's expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball's unique characteristics and needs.

4. Other professional sports operating interstate -- football, boxing, basketball, and, presumably, hockey and golf -- are not so exempt.

5. The advent of radio and television, with their consequent increased coverage and additional revenues, has not occasioned an overruling of *Federal Baseball* and *Toolson.*

6. The Court has emphasized that, since 1922, baseball, with full and continuing congressional awareness, has been allowed to develop and to expand unhindered by federal legislative action. Remedial legislation has been introduced repeatedly in Congress, but none has ever been enacted. The Court, accordingly, has concluded that Congress as yet has had no intention to subject baseball's reserve system to the reach of the antitrust statutes. This, obviously, has been deemed to be something other than mere congressional silence and passivity.

7. The Court has expressed concern about the confusion and the retroactivity problems that inevitably would result with a judicial overturning of *Federal Baseball.* It has voiced a preference that, if any change is to be made, it come by legislative action that, by its nature, is only prospective in operation. * * *

This emphasis and this concern are still with us. We continue to be loath, 50 years after *Federal Baseball* and almost two decades after *Toolson,* to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.

Accordingly, we adhere once again to *Federal Baseball* and *Toolson,* and to their application to professional baseball. We adhere also to *International Boxing* and *Radovich,* and to their respective applications to professional boxing and professional football. If there is any inconsistency or illogic in all this, it is an inconsistency

and illogic of long standing that is to be remedied by the Congress, and not by this Court. * * * Under these circumstances, there is merit in consistency, even though some might claim that beneath that consistency is a layer of inconsistency. * * *

[W]hat the Court said in *Federal Baseball* in 1922, and what it said in *Toolson* in 1953, we say again here in 1972: the remedy, if any is indicated, is for congressional, and not judicial, action.

The judgment of the Court of Appeals is

*Affirmed.*

**MR. CHIEF JUSTICE BURGER**, concurring.

I concur in all but Part I of the Court's opinion but, like MR. JUSTICE DOUGLAS, I have grave reservations as to the correctness of *Toolson v. New York Yankees, Inc.,*; as he notes in his dissent, he joined that holding but has "lived to regret it." The error, if such it be, is one on which the affairs of a great many people have rested for a long time. Courts are not the forum in which this tangled web ought to be unsnarled. I agree with MR. JUSTICE DOUGLAS that congressional inaction is not a solid base, but the least undesirable course now is to let the matter rest with Congress; it is time the Congress acted to solve this problem.

**MR. JUSTICE DOUGLAS**, with whom **MR. JUSTICE BRENNAN** concurs, dissenting.

This Court's decision in *Federal Baseball Club v. National League,* made in 1922, is a derelict in the stream of the law that we, its creator, should remove. Only a romantic view of a rather dismal business account over the last 50 years would keep that derelict in midstream.

In 1922, the Court had a narrow, parochial view of commerce. With the demise of the old landmarks of that era, the whole concept of commerce has changed.

Under the modern decisions, the power of Congress was recognized as broad enough to reach all phases of the vast operations of our national industrial system.

An industry so dependent on radio and television as is baseball and gleaning vast interstate revenues would be hard put today to say with the Court in the *Federal Baseball* Club case that baseball was only a local exhibition, not trade or commerce.

Baseball is today big business that is packaged with beer, with broadcasting, and with other industries. * * *

If congressional inaction is our guide, we should rely upon the fact that Congress has refused to enact bills broadly exempting professional sports from antitrust regulation. The only statutory exemption granted by Congress to professional sports concerns broadcasting rights. 15 U.S.C. §§ 1291-1295. I would not ascribe a broader exemption through inaction than Congress has seen fit to grant explicitly.

There can be no doubt "that, were we considering the question of baseball for the first time upon a clean slate" we would hold it to be subject to federal antitrust regulation. The unbroken silence of Congress should not prevent us from correcting our own mistakes.

**MR. JUSTICE MARSHALL**, with whom **MR. JUSTICE BRENNAN** joins, dissenting.

* * *

This is a difficult case because we are torn between the principle of *stare decisis* and the knowledge that the decisions in *Federal Baseball Club v. National League,* and *Toolson v. New York Yankees, Inc,* are totally at odds with more recent and better reasoned cases.
* * *

Has Congress acquiesced in our decisions in *Federal Baseball* Club and *Toolson?* I think not. Had the Court been consistent and treated all sports in the same way baseball was treated, Congress might have become concerned enough to take action. But, the Court was inconsistent, and baseball was isolated and distinguished from all other sports. In *Toolson,* the Court refused to act because Congress had been silent. But the Court may have read too much into this legislative inaction.

Americans love baseball, as they love all sports. Perhaps we become so enamored of athletics that we assume that they are foremost in the minds of legislators, as well as fans. We must not forget, however, that there are only some 600 major league baseball players. Whatever muscle they might have been able to muster by combining forces with other athletes has been greatly impaired by the manner in which this Court has isolated them. It is this Court that has made them impotent, and this Court should correct its error.

We do not lightly overrule our prior constructions of federal statutes, but when our errors deny substantial federal rights, like the right to compete freely and effectively to the best of one's ability as guaranteed by the antitrust laws, we must admit our error and correct it. We have done so before, and we should do so again here.

To the extent that there is concern over any reliance interests that club owners may assert, they can be satisfied by making our decision prospective only. Baseball should be covered by the antitrust laws beginning with this case and henceforth, unless Congress decides otherwise.

## Questions and Comments

**1. Statutory interpretation question:** As noted above, the Court, in *Flood*, was asked to decide whether baseball is “commerce” regulated by the Sherman Antitrust law. The majority does not use textualism, purposivism, or other theories to discern the intent of Congress on this question. Instead, the focus of the Court’s opinion is on whether the case is controlled by the Court’s precedential decision on the issue fifty years earlier in *Federal Baseball*, as well as Congress’ failure to overturn the *Federal Baseball* decision.

**2. *Federal Baseball* and *Toolson*:** What was the rationale for the Court’s holding in *Federal Baseball?* Does that rationale still make sense in 1972, when the Court issued

its opinion in *Flood?* When the Court reaffirmed its *Federal Baseball* holding in *Toolson*, did the Court reaffirm the rationale underlying *Federal Baseball*? If not, why did the Court uphold the holding of *Federal Baseball*?

**3. Limiting the precedent:** In the 50 years between the Court's decision in *Federal Baseball* and its decision in *Flood*, the Court held that theatre productions, boxing, football, and basketball were all "commerce" subject to regulation under the antitrust laws. Did the Court identify anything in those cases, other than the precedent, that distinguished baseball from the other sports or activities? Without the precedent, did the *Radovich* Court believe that baseball was entitled to an exemption from the antitrust laws? This is an example of the intensity of the "super-strong presumption" of stare decisis relating to statutory opinions. In *Radovich,* Justices Brennan and Harlan felt that *Federal Baseball* was incorrectly decided, but they voted to extend the reach of that case to include football. Is that required by stare decisis?

**4. Legislative inaction:** What significance does the majority attribute to legislative action or inaction after *Federal Baseball*? What significance do Justices Douglas and Marshall attribute to legislative action or inaction in their separate opinions?

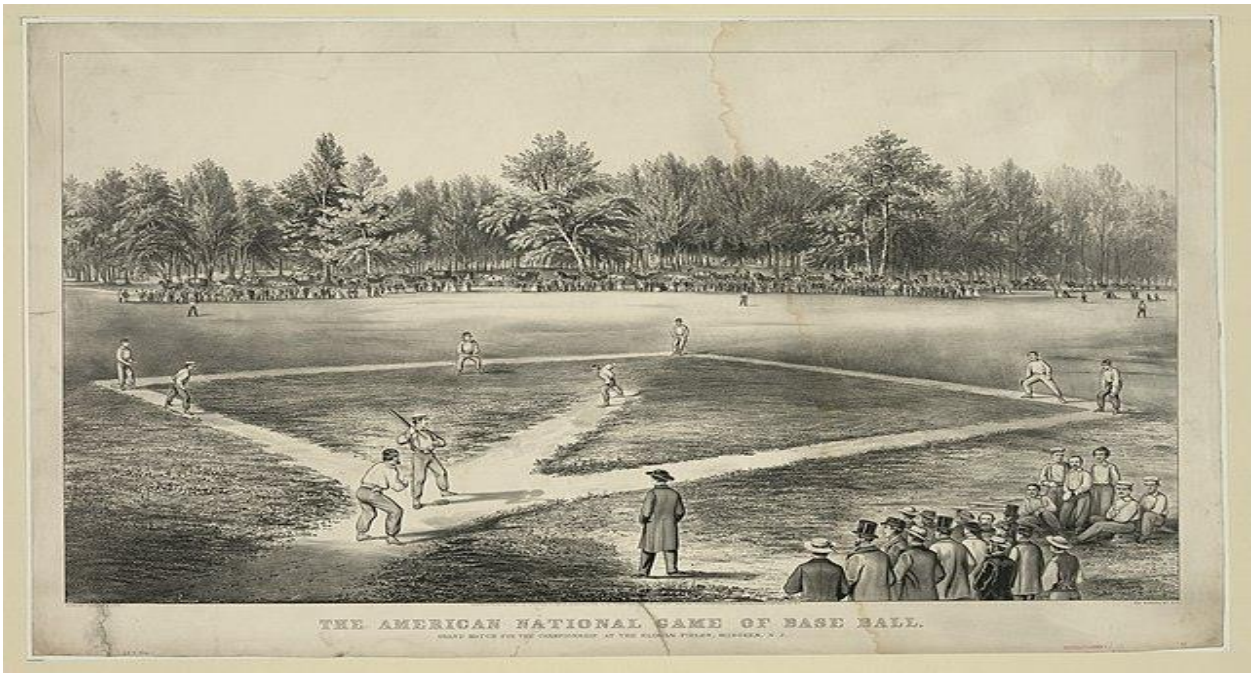
**5. Retroactivity:** Stare decisis is motivated, in part, by the reliance of society on courts' opinions. The majority in *Flood* and *Toolson* focused on that as part of the rationale for adhering to *Federal Baseball*. Both Courts also discussed the concerns about retroactivity. Justice Marshall dissented in *Flood* and called for a reversal of *Federal Baseball.* How would he address the concerns about retroactivity?

**6. Reasons for overturning precedent:** Although there is a "super-strong presumption" of stare decisis for statutory precedents, courts will overturn precedent when it is wrongly decided, unworkable, or outdated, as noted above. Most of the Justices in *Flood* felt that *Federal Baseball* was poorly reasoned or wrongly decided, but there was not a majority that voted to overrule the precedent. In dissent, Justice Douglas argued that *Federal Baseball* and *Toolson* were outdated because of changes in the law and changes in the nature of baseball. What changes did he think were significant enough to justify overruling the precedent? Note that other Justices in *Flood* and several of the cases decided between *Toolson* and *Flood* acknowledged those changes but did not overturn the precedent. In a footnote to his dissenting opinion, Justice Marshall raised another policy argument in favor of overruling the precedent. He suggested that the public could lose respect for the judicial system if it makes decisions that are clearly contrary to the prevailing sense of justice, and the court's own sense of how the case should be decided if it were to be decided anew, based solely on the existence of precedent. *See* 407 U.S. 258, 293, n.3 (Marshall, dissenting).

**7. Post-script:** A few years after *Flood*, an arbitrator appointed pursuant to the collective bargaining agreement between Major League Baseball and the Major League Baseball Players Union ruled that the "reserve clause" in baseball contracts only allowed a team to renew a player's contract unilaterally once, rather than perpetually. That led to

the creation of “free agency,” which allows players, at the expiration of their contracts, to negotiate freely with all teams for a contract. *See* Roger Abrams, *Arbitrator Seitz Sets the Players Free,* Fall 2009 Baseball Research Journal, (Soc. For American Baseball Research), *accessible at:* https://sabr.org/journal/article/arbitrator-seitz-sets-the-players-free/ (last visited Jan. 24, 2023).

In 1998, Congress addressed baseball’s antitrust exemption when it enacted legislation that explicitly provided that the antitrust laws would apply to business practices “directly relating to or affecting employment of major league baseball players,” but not to activities such as the relocation of teams, ticket prices, or the treatment of minor league baseball players. *See* Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat. 2824 (1998).




Elysian Fields in Hoboken, NJ – 1866 Currier & Ives Lithograph

**VIDEO LECTURE**

**Click here for a video lecture on *Flood v. Kuhn* by Professor Stephen Johnson.**

## Problem 5-3

This problem revisits the Aircraft Passenger Safety Law from Problem 4-3. Recall, from that problem, that in 1951, the Ames legislature enacted the Aircraft Passenger Safety Law. Section 2 of that statute provides "No person may operate a jet, biplane, turboprop, hot air balloon, blimp, helicopter, seaplane, or any other aircraft in a reckless or careless manner so as to endanger the life or property of any other person or the quiet enjoyment of any person's property."

In 1973, in *Ames v. Ehrmentraut,* the Ames Supreme Court held that a model airplane that was being used for recreational purposes was not an "aircraft" for purposes of Section 2 of the Ames Passenger Safety Act. In dicta, the Court suggested that the 1951 Ames legislature probably intended to limit "aircraft" to vehicles that transported passengers. The Court has not overruled that decision and the Ames legislature has not amended Section 2 after that decision.

In 2005, the Ames Department of Transportation, the agency that administers the Ames Aircraft Passenger Safety Law, issued a guidance document indicating that the agency considered drones to be aircraft for purposes of the Passenger Safety Law, even though they do not generally transport passengers.

In 2010, Senator Goodman introduced a bill in the Ames legislature that would have exempted all drones from the definition of "aircraft" under Section 2 of the Ames Passenger Safety Act. The bill died in the Senate Transportation Committee.

In 2015, the Ames legislature enacted the Safer Skies Law in response to several accidents involving drones that were being used for recreational purposes. Section 5 of the statute includes language similar to Section 2 of the Aircraft Passenger Safety Law, and states that "No person may operate a drone for recreational purposes in a reckless or careless manner so as to endanger the life or property of any other person or the quiet enjoyment of any person's property." The legislature limited the scope of the law to drones being used for recreational purposes due to vigorous lobbying by commercial drone operators.

In January of this year, Cindy Brady, a private investigator, was operating a drone to conduct surveillance. Unfortunately, while Brady was operating the remote controls for the drone, she was distracted by an incoming call on her cell phone and she crashed the drone into a grocery store window, injuring several shoppers and causing hundreds of dollars' worth of damage to the store. The Ames Department of Transportation filed a complaint in court alleging that Brady violated Section 2 of the Aircraft Passenger Safety Law of 1951. Assuming that Brady does not contest that she was operating the drone in a reckless or careless manner, how might Brady argue that she did not violate the statute and how would the State argue that she violated the statute? (You should not use any background information provided in Problem 4-3 that was not reproduced in this problem to analyze the meaning of the Aircraft Passenger Safety Law).

## CALI CHAPTER QUIZ

Now that you've finished Chapter 5, why not try a short quiz on the material at www.cali.org/lesson/19759. It should take about 20 minutes to complete.

# Chapter 6:

## Substantive Policy Canons

### I. Introduction

Recall that in Chapter 4, we learned that, regardless of their theory of interpretation, judges generally use three types of sources of interpretive tools: (1) intrinsic sources; (2) extrinsic sources; and (3) substantive policy-based sources. Chapters 4 and 5 focused on intrinsic sources and extrinsic sources. This chapter examines substantive policy canons courts use to interpret statutes.

***Sources of Interpretation***


While the canons discussed in Chapters 4 and 5 are policy neutral as to the ultimate interpretation of a statute, the substantive policy canons instruct courts to interpret statutes to advance certain substantive policies or values. For instance, the ***constitutional avoidance canon*** instructs courts to avoid an interpretation of a statute in ways that could render it unconstitutional. Many of the canons require courts to interpret statutes ***strictly*** to achieve a particular policy or ***liberally*** to achieve a particular policy. The ***remedial statutes canon***, for instance, instructs courts to interpret statutes ***liberally*** to carry out their remedial policies, while the ***rule of lenity***, on the other hand, instructs courts to interpret statutes ***strictly*** in favor of defendants.

Some substantive policy canons only apply to specific types of statutes, such as the canon that instructs courts to ***interpret revenue statutes*** strictly, while other canons, like the ***constitutional avoidance canon***, can be applied regardless of the subject matter of the statute, calling for an interpretation of the statute to achieve the substantive policy advanced by the canon.

The canons also vary in the strength of inference the court should draw from the canon. Conceptually, these policy-based canons take three approaches. First, some create a ***preference*** for an interpretation that advances a particular policy. The preference is applied as a ***tie-breaker*** after other sources of interpretation are exhausted. Second, other policy-based canons create a ***presumption*** in favor of, or against, a particular

interpretation to advance a policy. The amount of evidence of legislative intent, and the sources that can be examined to find that intent (*i.e.* text versus legislative history versus purposes) vary depending on the canon. Finally, some policy-based canons create presumptions that can only be rebutted by a ***clear statement*** of legislative intent, and often that statement must be found in the text of the statute.[482]

Critics of substantive policy canons frequently assert that the use of the canons inappropriately reflects judicial policies instead of those of the legislature. *See* Richard E. Levy & Robert L. Glicksman, STATUTORY ANALYSIS IN THE REGULATORY STATE, 147 (Foundation Press ed. 2014). In their study of Congressional drafters, Professors Gluck and Bressman concluded that the drafters were frequently unfamiliar with many "clear statement rules" and often did not draft legislation with substantive policy canons in mind. *See* Abbe R. Gluck and Lisa Schultz Bressman, *Statutory Interpretation from the Inside - An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 947-960 (2013).[483] Critics also contend that substantive policy canons are notoriously susceptible to judicial manipulation. *See* Levy & Glicksman, *supra* at 148, *citing* Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules of Canons About How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395 (1950). Now Justice Amy Coney Barrett has observed that reliance on substantive canons, other than as tie-breakers, appears to conflict with the central premise of textualism, but that textualists often apply these substantive canons. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 110 (2010).[484]

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[482] Some canons are referred to as "super strong clear statement" canons, as they require an even more explicit statement of legislative intent in the text of the statute than other "clear statement" canons.

[483] In response to that criticism, academics have argued that the use of the canons advance the "rule of law." *See* Manning & Stephenson, *supra* note 4, at 116, 119, *citing* Henry M. Hart, Jr. & Albert M. Sacks, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1376 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (the canons "constitute conditions on the effectual exercise of legislative power" that "promote objectives of the legal system which transcend the wishes of any particular session of the legislature"); Gluck & Bressman, supra note 152, at 961 (describing "rule of law" norms as embodying "the idea that interpretive rules should coordinate systemic behavior or impose coherence on the corpus juris);

[484] Coney Barrett notes that textualists argue that Congress legislates in reliance on the canons, so that judges are faithfully interpreting legislative intent when they in turn rely on those same canons. Barrett, *supra* note 152, at 159. Coney Barrett argues, however, that courts can rely on substantive canons, consistent with their "judicial power" only if the canon "does not justify a departure from a statute's plain language any more than does the invocation of a more general concern for equity." *Id.* at 163. In addition, she argues that "the Constitution affords federal courts the ability to depart from the best interpretation of a statute in favor of one that is less plausible yet still bearable, . . . a court may exercise it only in pursuit of constitutional values." *Id.* at 164. In contrast to textualists, Barrett argues that the adoption of substantive canons "poses no problem of authority for dynamic statutory interpreters, who conceive of courts as the cooperative partners in Congress and treat the protection of social values as part of the courts' task in statutory interpretation." *Id.* at 110.

## II. Common Law Canons v. Remedial Statutes

The common law canons and remedial statute canon were introduced briefly in the last chapter in the section addressing consideration of the historical context of statutes.[485] There are two traditional "common law" canons.[486] The first is the derogation canon, imported from British common law, which provides that statutes in ***derogation*** of the common law should be strictly construed.[487] As the Supreme Court counseled in *Shaw v. Railroad Co.*, 101 U.S. (11 Otto) 557, 565 (1879), "[n]o statute is to be construed as altering the common law, farther than its words import." Black's Law Dictionary defines derogation as "partial repeal or abolishing of a law, as by a subsequent act which limits its scope or impairs its utility and force."[488] Thus, if a statute addresses an issue that had been governed by common law, the canon counsels that a court should not interpret the statute to alter the common law unless the statute clearly indicates the legislature's intent to do so.[489] Even then, the changes should be interpreted narrowly.

Closely related to the ***derogation*** canon is the ***imputed common law meaning canon***. Under it, when a statute uses a term that had a meaning at common law and does not define it, courts should presume the legislature intended the term to have its common law meaning.[490] The presumption can be overcome if the context of the statute clearly indicates that the legislature intended a different meaning.[491] Courts applying the canon generally interpret statutes consistent with the common law at the time the statute had been enacted, but some courts have interpreted statutes to have meanings consistent with the common law as it evolved even after enactment.[492]

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485 *See supra* Chapter 5, Part III.

486 The "common law" canons are more likely to be applied when interpreting state statutes, in light of the relative scarcity of federal common law.

487 *See* Eskridge, Brudney, Chafetz, Frickey, & Garrett, *supra* note 17, at 714; Levy & Glicksman, supra note 340, at 150; Scalia & Garner, *supra* note 192, at 318.

488 *See Derogation*, The Law Dictionary: Your Free Online Legal Dictionary ● Featuring Black's Law Dictionary, 2nd Ed., *accessible at:* https://thelawdictionary.org/derogation/ (last visited Jan. 31, 2023).

489 *See* Scalia & Garner, *supra* note 192, at 318.

490 *Id.* at 320. *See also* Eskridge, Brudney, et. al, *supra* note 17, at 715, *citing* *Wallace v. Kato,* 549 U.S. 384, 388-89 (2007); *Community for Creative Non-Violence v. Reid,* 490 U.S. 730, 739 (1989). In addition, as noted in the next section, a court may interpret a statute against its common law roots when it is clear that the purpose of the statute was to change the common law rule. *See* *Isbrandtsen Co., Inc. v. Johnson*, 343 U.S. 779 (1952).

The canon is criticized because it assumes that the legislature had known of the common law enacting the statute, which is often a fiction, and it is criticized by textualists because it relies on sources of interpretation beyond the text.

491 *See* Scalia & Garner, *supra* note 192, at 320.

492 *See* Eskridge, Gluck, & Nourse, *supra* note 475, at 568, *citing* *Smith v. Wade,* 461 U.S. 30 (1983); Eskridge, Brudney, et. al, *supra* note 17, at 725, *citing* *Imbler v. Patchman,* 424 U.S. 409, 421-22 (1976); *Carey v. Piphus*, 435 U.S. 247, 257-58 (1978). In addition, Professor William Eskridge and his colleagues have noted that Judge Richard Posner has asserted that "some

The common law canons gained popularity at a time when most law existed in common law and statutes were the exception. The canons were animated by hostility[493] or suspicion[494] towards statutes and a sense of superiority of common law[495]. Today, however, the situation is reversed, as far more legal rights and responsibilities are established by statutes, rather than common law.[496]

In light of that, the ***remedial statute canon*** has gained popularity as a counter to the common law canons. That canon provides that remedial statutes should be read liberally to carry out their goals.[497] *See* *Tcherepnin v. Knight*, 389 U.S. 332 (1967). The canon gained popularity in the 1960s and 1970s as a means to enforce regulatory benefits statutes, and coincided with the rise in popularity of purposivism, which the canon closely resembles.[498]

Although the ***remedial statute canon*** has gained popularity, it has been criticized for several reasons. First, Justice Scalia and others complain that it is difficult to determine whether a statute is a ***remedial*** statute.[499] If a remedial statute includes any statute that changes the common law, then the remedial statute canon supersedes the derogation canon when applied to any statute that could be viewed as changing the common law.[500] Second, Justice Scalia and others note that it can be difficult to identify the "liberal

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statutes, such as … the Sherman Act, are essentially 'common law statutes'" that should be interpreted by courts to evolve over time. *Id.* at 725.

493 *See* Scalia & Garner, *supra* note 192, at 318.

494 *See See* Linda D. Jellum, THE LEGISLATIVE PROCESS, STATUTORY INTERPRETATION, AND ADMINISTRATIVE AGENCIES, *supra* note 165, at 542.

495 *See* Levy & Glicksman, *supra* note 340, at 150.

496 *See* Eskridge, Brudney, et. al, *supra* note 17, at 724; Jellum, *supra* note 165, at 543. Professor Anita Krishnakumar, however, argues that the Supreme Court still regularly, but inconsistently, relies on the common law canon. *See* Anita S.Krishnakumar, *The Common Law as Statutory Backdrop,* 136 Harv. L. Rev. 609 (2022) (recommending that the use of the canon be limited to situations where Congressional drafting practices or rule of law concerns justify the practice).

497 *See* Scalia & Garner, *supra* note 192, at 364, *citing* 3 Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* §60:2, at 268 (7th ed. 2007). *See also* *Chisom v. Roemer,* 501 U.S. 380 (1991).

498 *See* Levy & Glicksman, *supra* note 340, at 151-152.

499 *See* Scalia & Garner, *supra* note 192, at 364. As Justice Scalia notes, Blackstone's Commentaries defines remedial statutes as "those which are made to supply such defects, and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned judges, or from any other cause whatsoever." *Id.* at 365, *citing* 1 William Blackstone, *Commentaries on the Laws of England* 86 (4th ed. 1770). Scalia argues that the definition is not very helpful, as every statute could be remedial under the definition. *Id.* at 439.

500 As Professor William Eskridge and his colleagues ask, "What remedial statute is not in derogation of the common law?" *See* Eskridge, Brudney, et. al, *supra* note 17, at 648.

interpretation" of a statute, which is, Scalia argues, no more than an invitation to engage in purposivism.[501] Critics assert that the canon also invites judicial lawmaking.[502]

Since the ***remedial statute canon*** and ***derogation canon*** clearly conflict if the definition of ***remedial statute*** is broad, courts frequently must decide how to resolve the inherent conflict between these two canons. Some state legislatures have enacted statutory directives that abolish the derogation canon or indicate that the remedial statute canon takes precedence over the derogation canon.[503] In other states, the judiciary has made a similar choice through case law[504], but a few jurisdictions continue to give force to the derogation canon, limiting a statute's changes to the common law to those that are clearly expressed in a statute, even in remedial statutes.[505]

The following cases explore the common law canons and remedial canon further. The first case, *CSX Transportation, Inc. v. McBride*, 564 U.S. 685 (2011), interprets the Federal Employers' Liability Act, and the dissent illustrates the traditional application of the derogation canon. The second case, *Kelly v. Georgia Pacific, LLC*, 211 So. 3d 340 (2017), demonstrates the conflict between the common law canons and the remedial statute canon.

In the first case, *CSX Transportation, Inc. v. McBride*, the Supreme Court concluded that the Federal Employers' Liability Act, 45 U.S.C. § 51, et. seq. (FELA), which imposes liability on railroads for employees' injuries or deaths "***resulting in whole or in part from [carrier] negligence***" did not incorporate "proximate cause" principles from common law tort actions. 564 U.S. at 688. The Court noted that FELA was enacted at a time when the railroad business was exceptionally hazardous and was designed to impose the cost of doing business (in terms of human casualties) on employers. *Id.* at 691. The Court concluded that the broad language of FELA, coupled with the remedial goal of Congress, indicated Congressional intent to adopt a "relaxed standard of causation" under FELA, as opposed to the "proximate cause" standard that would apply to negligence actions at common law. *Id.* at 691-92.

The dissenting opinion is reproduced below.

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501 *See* Scalia & Garner, *supra* note 192, at 365. Scalia suggests that the canon might be reconciled if the canon merely provided that statutes should be read to have their plain meaning, regardless of the common law meaning. *Id.* Thus, the ***remedial statute canon*** would do nothing more than rebut the ***derogation canon.***

502 *Id.* at 364.

503 *See* Jellum, *supra* note 165, at 543.

504 The advantage of resolving the preference conflict through a statutory directive is clear, in that the directive, as a statute, is binding on courts in all cases, whereas a resolution of the conflict in a specific case, without a directive, would have no precedential value in future cases.

505 *See, e.g., Jung v. St. Paul Fire Dep't Relief Ass'n,* 223 Minn. 402 (Minn. 1947) (interpreting a pension statute narrowly to deny benefits to an illegitimate child).


CSX engine – Photo by Lexcie – CC BY-SA 3.0

## CSX TRANSPORTATION, INC. V. MCBRIDE

**564 U.S. 685 (2011)**

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument Audio (From Oyez)
Federal Employers' Liability Act
Case Background (From Quimbee)

**CHIEF JUSTICE ROBERTS**, with **whom JUSTICE SCALIA**, **JUSTICE KENNEDY**, and **JUSTICE ALITO** join, dissenting.

"It is a well established principle of [the common] law, that in all cases of loss we are to attribute it to the proximate cause, and not to any remote cause: causa proxima non remota spectatur." The Court today holds that this principle does not apply to actions under the Federal Employers' Liability Act (FELA), and that those suing under that statute may recover for injuries that were not proximately caused by the negligence of their employers. This even though we have held that FELA generally follows the common law, unless the Act expressly provides otherwise; even though FELA expressly abrogated common law rules in four other respects, but said nothing about proximate cause; and even though our own cases, for 50 years after the passage of FELA, repeatedly recognized that proximate cause was required for recovery under that statute. The Court is wrong to dispense with that familiar element of an action seeking recovery for negligence, an element "generally thought to be a necessary limitation on liability". The test the Court would substitute—whether negligence played any part, even the slightest, in producing the injury—is no limit at all. It is simply "but for"

causation. Nothing in FELA * * * supports such a boundless theory of liability. I respectfully dissent.

I

Unlike a typical workers' compensation scheme, which provides relief without regard to fault, ... FELA provides a statutory cause of action sounding in negligence. When Congress creates such a federal tort, "we start from the premise" that Congress "adopts the background of general tort law." With respect to FELA in particular, we have explained that "[a]bsent express language to the contrary, the elements of a FELA claim are determined by reference to the common law." Recovery for negligence has always required a showing of proximate cause. * * *

FELA expressly abrogated common law tort principles in four specific ways. As enacted in 1908, the Act abolished the common law contributory negligence rule, which barred plaintiffs whose negligence had contributed to their injuries from recovering for the negligence of another. FELA also abandoned the so-called fellow-servant rule, § 1, prohibited an assumption of risk defense in certain cases, § 4, and barred employees from contractually releasing their employers from liability, § 5.

But "[o]nly to the extent of these explicit statutory alterations is FELA an avowed departure from the rules of the common law." (internal quotation marks omitted). FELA did not abolish the familiar requirement of proximate cause. Because "Congress expressly dispensed with [certain] common-law doctrines" in FELA but "did not deal at all with [other] equally well-established doctrine[s]," I do not believe that "Congress intended to abrogate [the other] doctrine[s] sub silentio.

We have applied the standard requirement of proximate cause to actions under federal statutes where the text did not expressly provide for it. * * *

[The dissent then argued that the majority misinterpreted the language of Section 1 of FELA, 45 U.S.C. § 51, when it read the language as indicating an intent to depart from common law principles of "proximate cause."] [N]othing in Section 1 is similar to the "express language" Congress employed elsewhere in FELA when it wanted to abrogate a common law rule * * *

As the very first section of the statute, Section 1 simply outlines who could be sued by whom and for what types of injuries. It provides that "[e]very common carrier by railroad … shall be liable in damages to any person suffering injury while he is employed by such carrier … for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." §51. The Court's theory seems to be that the words "in whole or in part" signal a departure from the historic requirement of proximate cause. But those words served a very different purpose. They did indeed mark an important departure from a common law principle, but it was the principle of contributory negligence—not proximate cause.

As noted, FELA abolished the defense of contributory negligence; the “in whole or in part” language simply reflected the fact that the railroad would remain liable even if its negligence was not the sole cause of injury. The Congress that was so clear when it was abolishing common law limits on recovery elsewhere in FELA did not abrogate the fundamental principle of proximate cause in the oblique manner the Court suggests. “[I]f Congress had intended such a sea change” in negligence principles “it would have said so clearly.”

## Questions and Comments

**1. Did Congress speak clearly?** The *CSX* majority relied on the plain meaning of Section 1 of FELA and its remedial purpose to conclude that Congress had rejected the common law concept of “proximate cause” when it created a statutory claim in FELA for injured railroad workers. Does the dissent agree that the language in Section 1 clearly indicates Congressional intent to abrogate the common law rule? Does the dissent address the remedial nature of the statute or its purposes? Is the difference in the positions taken by the majority and dissent in part a reflection of different visions of how to apply the common law canon?

**2 Context:** How did the dissent rely on the context of FELA and its enactment history to support the argument that the statute did not eliminate the common law “proximate cause” requirement for negligence?

## KELLY V. GEORGIA PACIFIC, LLC

**211 So. 3d 340 (Fla. Dist. Ct. App. 2017)**

**LEVINE, J.**

The question presented for our review is whether the Florida Wrongful Death Act supersedes the common law requirement that a spouse must be married to the decedent before the date of the decedent's injury to recover damages for loss of consortium. Stated another way, did the legislative enactment, giving the estate's representatives and survivors a remedy not found in the common law, "explicitly," "clearly," and "unequivocally" abrogate the common law requirements to recover consortium damages when those damages are awarded under the Wrongful Death Act. Because there can be no change in the common law unless the statute is "explicit and clear in that regard" and the Wrongful Death Act does not "explicitly," "clearly," and "unequivocally" abrogate the common law rule, we hold that a spouse who was not married to a decedent at the time of the decedent's injury may not recover consortium damages as part of a wrongful death suit. Thus, we find that the trial court did not err in entering an order of dismissal, and subsequently entering a final judgment. We therefore affirm.

John Kelly and his wife, Janis Kelly, filed an action against appellees for negligence, strict liability, and for Janis Kelly's loss of consortium. During the course of the litigation, the

husband died, and the wife amended the complaint, dropping her loss of consortium claim and adding a wrongful death claim, which included a demand for loss of consortium damages.

The decedent worked in construction and was exposed to asbestos during the years of 1973 to 1974. The decedent and appellant did not marry until 1976. In 2014, the decedent was diagnosed with mesothelioma and alleged that his exposure to asbestos caused the disease. The decedent died from mesothelioma in 2015.

Appellees moved to dismiss the wife's wrongful death claim, arguing that a spouse must be married to the injured party at the time of the injury for the spouse to bring a claim for loss of consortium and that the wrongful death claim sought damages for loss of consortium. Appellees argued it was undisputed that appellant was not married to the decedent when the decedent was injured.

* * *

The tort of wrongful death did not exist at common law, and a personal injury claim did not survive the death of the injured party. As a result, the Florida Legislature created a cause of action, wrongful death, to allow for a claim that survived the death of the injured party. *See* § 768.16, Fla. Stat. (2015).

The purpose of the Florida Wrongful Death Act is to provide a "separate and independent" cause of action since the original cause of action for personal injury did "not survive" the death of the injured party. The passage of the Wrongful Death Act remedied this "anomaly." It is "thus clear that the paramount purpose of the Florida Wrongful Death Act is to prevent a tortfeasor from evading liability for his misconduct when such misconduct results in death." Thus, the statute explicitly, clearly, and unequivocally supersedes the common law by allowing the wrongful death cause of action to proceed even after the death of the injured party.

Under the Wrongful Death Act, the decedent's personal representative "shall recover for the benefit of the decedent's survivors and estate all damages, as specified in this act, caused by the injury resulting in death." § 768.20, Fla. Stat. (2015). Survivors are defined as "the decedent's spouse, children, parents, * * *"

As to damages, the Wrongful Death Act provides: (1) Each survivor may recover the value of lost support and services from the date of the decedent's injury to his or her death * * * (2) The surviving spouse may also recover tor loss of the decedent's companionship and protection * * * §768.21, Fla. Stat. (2015).

These damages "are inclusive of a spouse's loss of consortium damages" and allows for a spouse to recover damages for loss of consortium even after the decedent's death. * * *

Finally, the legislature announced that the public policy for the creation of the statute was to "shift the losses resulting when wrongful death occurs from the survivors of the

decedent to the wrongdoer." § 768.17, Fla. Stat. (2015). The statute is "remedial" and "shall be liberally construed." *Id.* Nevertheless, although the statute is "remedial," "we cannot construe the statutory provisions so `liberally' as to reach a result contrary to the clear intent of the legislature." * * *

[U]nder the common law of loss of consortium, the parties must have been married to one another at the time of the injury to recover damages for loss of consortium. * * * In the present case, the decedent's injury occurred when he was exposed to asbestos. * * * Thus, because the decedent was injured before appellant married him, for appellant to prevail in her claim, we must find that the Wrongful Death Act specifically supersedes the common law of loss of consortium.

We look to the language of the Wrongful Death Act. In interpreting a statute, "the plain meaning of the statutory language is the first consideration." There is, of course, the rule of statutory interpretation stating that statutes in derogation of the common law are to be strictly construed. But since the Wrongful Death Act is a remedial statute, "the general rule of strict construction does not, in Florida, apply to a remedial statute in derogation of the common law."

Whether the legislature intended for the Wrongful Death Act to supersede the common law of loss of consortium "depends upon the legislative intent as manifested in the language of the statute." "The presumption is that no change in the common law is intended unless the statute is explicit and clear in that regard." Thus, "[u]nless a statute unequivocally states that it changes the common law * * *, the statute will not be held to have changed the common law." *Id.* * * *

[T]he statutory language of the Wrongful Death Act does not, directly or indirectly, abrogate or supersede the common law requirement that the spouse must be married to the injured party at the time of the injury to recover for loss of consortium. Here, the plain language of the statute shows that the legislature clearly intended that the Wrongful Death Act allow for a surviving spouse to recover "consortium-type" damages. The legislature is presumed to know of the common law limitation for recovering loss of consortium damages. However, despite the clear intention that the Wrongful Death Act allow for the recovery of consortium damages after the decedent's death, nothing in the statute abrogates the common law marriage before injury rule. Therefore, because the legislature did not explicitly and clearly overrule the common law limitation on loss of consortium when enacting the Wrongful Death Act, the common law marriage before injury rule was incorporated into the Act. * * *

Additionally, we note that the plain language of the Wrongful Death Act indicates that the legislature did not intend for a surviving spouse to recover consortium damages if the surviving spouse was not married to the decedent prior to the date of the decedent's injury. The definition of "survivor" in the statute is limited to familial relationships only, and both subsections (1) and (2) of section 768.21 clearly provide that damages are recoverable from the date of "injury." §§ 768.18(1), 768.21(1)-(2), Fla. Stat. (2015). Thus,

the plain language of the statute indicates that the legislature anticipated that the surviving spouse would have been married to the decedent prior to the date of injury. * * *

Although there may be persuasive policy reasons for superseding this common law rule, especially in the present case where the injury is latent, such a change may come only from the legislature by statutory enactment.

**TAYLOR, J., dissenting.**

I respectfully dissent. I would reverse the trial court's order barring the plaintiff from recovering wrongful death damages after almost 40 years of marriage to the decedent. The trial court dismissed the plaintiff's wrongful death claim because she was not married to the decedent when he was exposed to asbestos-containing products in the early 1970's. It bears emphasizing, however, that the decedent was not diagnosed with any asbestos-related illness until 2014. In dismissing the plaintiff's claim, the trial court incorrectly applied a common law rule governing loss of consortium claims to a cause of action that arose under the Wrongful Death Act. This common law rule, which limits loss of consortium recovery to spouses who are married at the time of the injury, cannot coexist with the Wrongful Death Act as written.

Under the Wrongful Death Act, marriage at the time of injury is not a necessary element of the cause of action. A wrongful death cause of action did not exist at common law. It is purely statutory and supersedes the common law. As the Florida Supreme Court has noted on numerous occasions, the Legislature intended to create an entirely new and independent cause of action for survivors of injured persons who subsequently died from their injuries. * * *

As the majority correctly points out, “[u]nless a statute unequivocally states that it changes the common law * * *, the statute will not be held to have changed the common law. Here, however, * * * the Legislature unequivocally stated that the Wrongful Death Act is a "remedial" statute, and is designed "to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer"." § 768.17, Fla. Stat. (2015). This constitutes an unequivocal statement that the Wrongful Death Act is in derogation of the common law. By definition, a remedial statute is "designed to correct an existing law" or to give a party a "remedy for a wrong, where he had none, or a different one, before."

[The dissent also argued that the majority’s interpretation of the Wrongful Death Act was inconsistent with the plain meaning of the statute.] [T]he “marriage at the time of injury" element of a common law loss of consortium claim simply does not apply to a wrongful death action. Under the Wrongful Death Act, the decedent's personal representatives "shall recover for the benefit of the decedent's survivors and estate all damages, as specified in this act, caused by the injury resulting in death." § 768.20, Fla. Stat. (2015). "Survivors" are defined as: the decedents spouse, children, parents *** § 768.18(1), Fla. Stat. (2015).

As for damages, a wrongful death claim is "brought on behalf of the survivors, not to recover for injuries to the deceased, but to recover for statutorily identified losses the survivors have suffered directly as a result of the death." The statute provides that the surviving spouse may recover "for loss of the decedent's companionship and protection and for mental pain and suffering" and "the value of lost support and services" from the date of the decedent's injury to her or his death.

In interpreting a statute, we must first consider "[t]he plain meaning of the statutory language." No language in the Wrongful Death Act states or even suggests that a surviving spouse must be married to the decedent at the time of injury to recover the delineated damages. The statute gives a right of action not had under common law and it must be limited strictly to the meaning of the language employed and not extended beyond its plain and explicit terms.

The statute defines "survivors" as including "the decedent's spouse" without any other limitation. *See* § 768.18, Fla. Stat. (2015). Further, section 768.21, which governs recoverable damages, does not state that a spouse must be married to the decedent at the time of the decedent's injury. Under the clear terms of the Wrongful Death Act, a cause of action for the recovery of wrongful death damages vests in favor of the surviving spouse on the date of death of the decedent. Thus, the only relevant time for the determination of an individual's status as a survivor is the time of the decedent's death.

## Questions and Comments

**1. Statutory interpretation question:** What statutory interpretation question was the court trying to resolve? What was the common law rule in Florida limiting the recovery for loss of consortium claims?

**2. Derogation canon:** According to the majority, when should a court, applying the derogation canon, interpret a statute to find that the legislature had abrogated a common law rule? Does the dissent state the canon differently than the majority?

**3. Remedial statute canon:** According to the majority, how does the remedial statute canon operate and how should conflicts between the remedial statute canon and derogation canon be resolved? Does the dissent agree? When is a statute a remedial statute? Do the majority and dissent agree that the Wrongful Death Act was a remedial statute?

**4. Resolving the conflict of canons - majority:** The majority suggests that remedial statutes should be interpreted liberally (even though they might change the common law) but should not be interpreted to reach a result contrary to the clear intent of the legislature. It also suggests that the general rule of strict construction of statutes in derogation of the common law does not apply to remedial statutes. That would seem to suggest that the court should interpret the Wrongful Death Act liberally to achieve its goal of providing compensation for personal injury damages to spouses and other survivors of a decedent but not if a liberal interpretation would conflict with a clear intent in the Wrongful Death

statute to limit those damages. Is that how the majority applied the canons? To the extent that the majority found textual support for its reading of the statute, are you persuaded that the Florida legislature clearly addressed this issue in the Wrongful Death Act?

**5. Resolving the conflict of canons – dissent:** How does the dissent suggest that the tension between the derogation canon and remedial statute canon should be resolved in this case? Does the dissent find clear language in the statute indicating intent to abrogate the common law rule? Did the dissent identify language that directly addressed the common law rule regarding loss of consortium? It is interesting to note that two years later the same Florida court of appeals, in a per curiam opinion, wrote that "When a statute is both in derogation of the common law and remedial in nature, the rule of strict construction should not be applied so as to frustrate the legislative intent … The statute should be construed liberally in order to give effect to the legislation." *See* *WPB Residents for Integrity in Gov't, Inc. v. Materio*, 284 So. 3d 555 (Fla. Dist. Ct. App. 2019). Unlike the majority in the *Kelly* case, the *WPB Residents for Integrity in Gov't* court honored that statement and did *not* proceed to apply the rule of strict construction but interpreted the statute liberally to achieve its purposes.

## Problem 6-1

Marty Bryde was recently killed in a house fire which was allegedly caused by faulty electrical work performed by Snell Electricians. Wendy Byrde, Marty's wife, and Jonah, Marty's 16 year old son, are suing Snell Electricians for wrongful death under the Ames Wrongful Death Act of 2002. Jonah is seeking damages for mental pain and suffering beginning on the date of Marty's death and continuing throughout Jonah's lifetime. Snell Electricians argue that Jonah can only recover damages for mental pain and suffering under the Wrongful Death Act of 2002 from the date of Marty's death until the date of Jonah's 18th birthday, since Ames law provides that children are "minor" children until their 18th birthday.

After doing some research, you discover that the Ames Wrongful Death Act of 2002 includes the following relevant provisions:

**Section 100. Purposes**

It is the public policy of the state to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer.

## Problem 6-1 (continued)

**Section 700. Damages Available in Wrongful Death Action**

(a) Each survivor may recover the value of lost support from the date of the decedent's injury to her or his death, and future loss of support from the date of death … In computing the duration of future losses, the life expectancies of the survivor and the decedent and the period of minority, in the case of minor children, may be considered.

(b) The surviving spouse may also recover for loss of the decedent's companionship and for mental pain and suffering from the date of injury.

(c) Minor children of the decedent, and all children of the decedent if there is no surviving spouse, may also recover for lost parental companionship and for mental pain and suffering from the date of injury.

(d) Each parent of a deceased minor child may also recover for mental pain and suffering from the date of injury.

You also learn that prior to enactment of the Ames Wrongful Death Act, children of a decedent were not entitled to recover damages in common law tort actions for mental pain and suffering resulting from the death of a parent.

How would Snell Electricians argue that the statute cuts off Jonah's recovery of damages at age 18 or cuts off his recovery of damages completely? How would Jonah argue that he can recover damages for mental pain and suffering under the statute throughout his lifetime? How would the analysis of the statute change if Ames had enacted a statutory directive that indicated that statutes in derogation of the common law should be interpreted narrowly even if the statutes are enacted for a remedial purpose?

## III. The Rule of Lenity

Portrait of King Henry VIII – Public Domain

The ***rule of lenity*** is one of the oldest substantive policy canons, originating in British common law during the reign of King Henry VIII.[506] Under the rule, a statute that imposes a penal sanction should be interpreted strictly, so that any ambiguity is resolved in

[506] *See* Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L.Rev. 918, 924-925 (2020).

the defendant's favor.[507] *See, e.g., United States v. Bass*, 404 U.S. 336 (1971). The rule has been applied not only to statutes that impose criminal sanctions, but also to statutes that impose civil sanctions that are punitive.[508] When a statute imposes sanctions that are penal as well as sanctions that are not penal for the same offense, the Supreme Court has held that the canon should still apply. *See United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 (1992); *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004).

The canon is a tiebreaker canon[509], and only applies when a court concludes, ***after examining all other sources of interpretation***, that ***the statute is ambiguous***. *See, e.g., Muscarello v. United States*, 524 U.S. 125 (1998); *United States v. Wells*, 519 U.S. 482, 499 (1997); *Moskal v. United States*, 498 U.S. 103 (1990). While that may sound straightforward, courts disagree on (1) whether courts should consider legislative history and purpose among the sources of interpretation before applying the canon or should apply the canon if the statute is ambiguous but without consulting those sources (with textualists, not surprisingly, calling for application of the canon without consulting legislative history or purpose)[510]; and (2) the degree of ambiguity required in the statute before the court should apply the canon (i.e. "grievous ambiguity or uncertainty"[511] or the court "can make 'no more than a guess'"[512] or the court is "left with an ambiguous statute"[513]).[514]

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507 *See* Scalia & Garner, *supra* note 192, at 296, *citing* 1 William Blackstone, *Commentaries on the Laws of England* 88 (4th ed. 1770); Manning & Stephenson, *supra* note 4, at 460; Eskridge, Gluck & Nourse, *supra* note 475, at 494.

508 *See* Eskridge, Gluck & Nourse, *supra* note 475, at 494. The canon has been applied, at times, in the civil context, to statutes that impose, as penalties: (1) forfeiture; (2) "extra" damages, such as punitive damages, treble damages, attorneys fees; and (3) revocation of licenses or disbarment of lawyers. *See* Eskridge & Brudney, *supra* note 17, at 651, n.18.

509 *See* Manning & Stephenson, *supra* note 4, at 460. *See also Callanan v. United States*, 364 U.S. 587, 596 (1961) ("[t]he rule comes into operation at the end of the process …, not at the beginning as an overriding consideration of being lenient to wrongdoers.")

510 *See* David S. Romantz, *Reconstructing the Rule of Lenity*, 40 Cardozo L. Rev. 523, 561-565 (2018) (discussing textualist criticisms of courts' focus on legislative history and purpose in applying the rule of lenity). Many of the Supreme Court's rule of lenity cases have approved of the examination of legislative history and purpose as tools to exhaust before applying the rule. *See* Jellum, *supra* note 165, at 510-11.

511 *See Muscarello v. United States*, 524 U.S. 125, 139 (1998).

512 *See Reno v. Koray*, 515 U.S. 50, 65 (1995).

513 *See Smith v. United States*, 508 U.S. 223, 239 (1993).

514 *See* Scalia & Garner, *supra* note 192, at 298-299. Justice Scalia has argued that "[t]he main difficulty with the rule of lenity is the uncertainty of its application. Its operation would be relatively clear if the rule were automatically applied at the outset of textual inquiry, before any other rules of interpretation were invoked to resolve ambiguity. Treating it as a clear statement rule would comport with the original basis for the canon and would provide considerable certainty." *Id.* at 298. Scalia has argued that the rule of lenity "provides little more than atmospherics, since it leaves open the crucial question – almost invariably present – of how much ambiguousness constitutes an ambiguity." *Id.* at 299.

Courts have also stressed that the rule should only be used to justify a reading of the statute that is reasonable.[515] However, doing so should not be problematic if the canon is only applied when the court has determined that the statute is ambiguous after consulting all other sources of interpretation.[516]

Several rationales have been advanced for the canon. The primary justification for the canon is that it provides fair notice to persons who may be subject to penal sanctions.[517] Some, but not all, commentators suggest that the notice requirement is based on constitutional due process protections.[518] Separation of powers concerns are another reason for the canon.[519] Under that line of reasoning, legislatures have the power to define criminal conduct, so the canon prevents the judiciary from creating criminal laws when the legislature has not spoken clearly.[520] Some commentators even suggest that the long history of enforcement of the canon (one of the "hoariest" of canons) is a third justification for its continued application.[521]

As with most canons, the rule of lenity has been criticized for many reasons. First, since courts do not interpret a statute in favor of a defendant under the canon until they exhaust the full arsenal of statutory interpretation tools, including the Latin textual canons, statutory history, and legislative history, courts frequently adopt interpretations of statutes that an ordinary reader would not reach by reading the statute.[522] Thus, the canon does

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515 *See* Jellum, *supra* note 165, at 511; Scalia & Garner, *supra* note 192, at 296 (stating that the rule applies when two rational readings of a statute are possible). *See also* *McNally v. United States*, 483 U.S. 350, 359-60 (1987).

516 After all, if there is an interpretation of a statute that favors the defendant, but is unreasonable, and an alternative interpretation that does not favor the defendant, but is reasonable, there should not be a conflict between the two interpretations. If the canon were applied at the outset of interpretation, rather than as a tie-breaker, a limitation that the defendant favoring interpretation must be reasonable would make more sense.

517 *See* Eskridge, Gluck & Nourse, *supra* note 475, at 494, *citing* *McBoyle v. United States*, 283 U.S. 25 (1931); Eskridge, Brudney, et al, supra note 17, at 652, *citing McBoyle* and *United States v. Lanier,* 520 U.S. 259 (1997); Manning & Stephenson, *supra* note 4, at 460.

518 *See* Jellum, *supra* note 165, at 505 (canon based on procedural due process concerns); Scalia & Garner, *supra* note 192, at 297 (rule does not coincide with constitutional requirements of fair notice). Professor Eskridge and colleagues suggest that another justification for the canon related to notice could be the emphasis on mens rea as a prerequisite for criminal penalties in most cases. *See* Eskridge, Brudney, et. al, *supra* note 17, at 652-53 ("the inability of a reasonable defendant to know that his actions are criminal undermines the justice of inferring a criminal intent in some cases"). Keep an eye out for this in Justice Kavanaugh's concurring opinion in a case reproduced below.

519 *See* Manning & Stephenson, *supra* note 4, at 467, *citing* *United States v. Bass*, 404 U.S. 336 (1971); Eskridge, Gluck & Nourse, *supra* note 475, at 496, *citing* *United States v. Wiltberger*, 18 U.S. 76, 92 (1820); Scalia & Garner, *supra* note 192, at 296.

520 *See* Eskridge, Brudney, et. al, *supra* note 17, at 653; Jellum, *supra* note 165, at 506.

521 *See* Eskridge, Gluck & Nourse, *supra* note 475, at 496; Manning & Stephenson, *supra* note 4, at 469.

522 *See* Manning & Stephenson, *supra* note 4, at 467.

not ensure that people have fair notice as to what conduct is prohibited before penal sanctions are imposed on them.[523] Critics argue that if the canon were truly designed to ensure that people know what conduct will subject them to penalties, then courts should be required to interpret statutes in favor of the defendant whenever the plain meaning of the statute is not clear. Second, as noted above, critics argue that the canon is difficult to apply because it is not clear how ambiguous a statute must be before it should be interpreted in favor of defendants. Third, as with many other canons, critics argue that application of the canon leaves too much discretion for courts to make law in the guise of deciding cases.[524]

Although it is one of the oldest canons, courts have relied on the rule of lenity far less frequently since the middle of the last century.[525] Twenty-eight states have either abolished or reversed the rule.[526] In addition, the Supreme Court has applied the rule of lenity in fewer than 30% of the statutory criminal cases it has decided between 1984 and 2017.[527]

The following two cases explore the rule of lenity further. The first, *United States v. Bass*, 404 U.S. 336 (1971), shows the Court applying the rule to interpret a statute that imposes criminal penalties. The second, *Wooden v. United States*, 142 S.Ct. 1063 (2022), also involves the interpretation of a criminal statute but the majority does *not* apply the rule of lenity. However, Justices Gorsuch and Kavanaugh, in separate concurring opinions, engage in a dialogue focusing on several of the problems involved with applying the canon.

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523 *Id.*

524 *See* Manning & Stephenson, *supra* note 4, at 471.

525 *See* Eskridge, Gluck & Nourse, *supra* note 475, at 497; Jellum, *supra* note 165, at 511.

526 *See* Eskridge, Gluck & Nourse, *supra* note 475, at 497; Jellum, *supra* note 165, at 513.

527 *See* Eskridge, Gluck & Nourse, *supra* note 475, at 520, *citing* William N. Eskridge Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statuttory Interpretations from Chevron to Hamdan,* 96 Geo. L. J. 1083, 1115-17 (2008) (empirical study finding that the Supreme Court heard 114 statutory criminal cases between 1984 and 2006, but only applied the rule of lenity in 34 of the cases (29.8%)); Intisar Raab, *The Appellate Rule of Lenity,* 131 Harv. L. Rev. Forum 179, 185 (2018) (empirical study finding that between 2005 and 2017, the Court applied the rule of lenity in only 13 of the 47 statutory criminal cases it heard (27.7%)). When applied, the rule of lenity still has force, though. The Eskridge and Baer study found that when the Court invoked the rule of lenity, the government prevailed only 37.8% of the time, compared to 74% when the Court did not apply the canon. *See* Eskridge & Baer, *supra* at 115-117.

Firearms – Photo by Silar – CC BY-SA 4.0

## UNITED STATES V. BASS

**404 U.S. 336 (1971)**

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument Audio (From Oyez)
Omnibus Crime … Act
Case Background (From Quimbee)
Video Summary (Prof. Stevenson – South Texas College of Law)

**MR. JUSTICE MARSHALL** delivered the opinion of the Court.

Respondent was convicted in the Southern District of New York of possessing firearms in violation of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. App. § 1202 (a). In pertinent part, that statute reads:

> Any person who (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . . and who receives, possesses, or transports in commerce or affecting commerce . . . any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

The evidence showed that respondent, who had previously been convicted of a felony in New York State, possessed on separate occasions a pistol and then a shotgun. There was no allegation in the indictment and no attempt by the prosecution to show that either firearm had been possessed "in commerce or affecting commerce." The Government proceeded on the assumption that § 1202 (a) (1) banned all possessions and receipts of

firearms by convicted felons, and that no connection with interstate commerce had to be demonstrated in individual cases.

After his conviction, respondent unsuccessfully moved for arrest of judgment [because] * * * the statute did not reach possession of a firearm not shown to have been "in commerce or affecting commerce" * * * We granted certiorari to resolve a conflict among lower courts over the proper reach of the statute. * * * We conclude that § 1202 is ambiguous in the critical respect. Because its sanctions are criminal * * *, we refuse to adopt the broad reading in the absence of a clearer direction from Congress.

**I**

Not wishing "to give point to the quip that only when legislative history is doubtful do you go to the statute," we begin by looking to the text itself. The critical textual question is whether the statutory phrase "in commerce or affecting commerce" applies to "possesses" and "receives" as well as to "transports." If it does, then the Government must prove as an essential element of the offense that a possession, receipt, or transportation was "in commerce or affecting commerce"—a burden not undertaken in this prosecution for possession.

While the statute does not read well under either view, "the natural construction of the language" suggests that the clause "in commerce or affecting commerce" qualifies all three antecedents in the list. Since "in commerce or affecting commerce" undeniably applies to at least one antecedent, and since it makes sense with all three, the more plausible construction here is that it in fact applies to all three. But although this is a beginning, the argument is certainly neither overwhelming nor decisive.

In a more significant respect, however, the language of the statute does provide support for respondent's reading. Undeniably, the phrase "in commerce or affecting commerce" is part of the "transports" offense. But if that phrase applies *only* to "transports," the statute would have a curious reach. While permitting transportation of a firearm unless it is transported "in commerce or affecting commerce," the statute would prohibit all possessions of firearms, and both interstate and intrastate receipts. Since virtually all transportations, whether interstate or intrastate, involve an accompanying possession or receipt, it is odd indeed to argue that on the one hand the statute reaches all possessions and receipts, and on the other hand outlaws only interstate transportations. Even assuming that a person can "transport" a firearm under the statute without possessing or receiving it, there is no reason consistent with any discernible purpose of the statute to apply an interstate commerce requirement to the "transports" offense alone. In short, the Government has no convincing explanation for the inclusion of the clause "in commerce or affecting commerce" if that phrase only applies to the word "transports." It is far more likely that the phrase was meant to apply to "possesses" and "receives" as well as "transports." As the court below noted, the inclusion of such a phrase "mirror[s] the approach to federal criminal jurisdiction reflected in many other federal statutes."

Nevertheless, the Government argues that its reading is to be preferred because the defendant's narrower interpretation would make Title VII redundant with Title IV of the same Act. Title IV, *inter alia,* makes it a crime for four categories of people—including those convicted of a crime punishable for a term exceeding one year—"to ship or transport any firearm or ammunition in interstate or foreign commerce . . . [or] to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U. S. C. §§ 922 (g) and (h). As Senator Long, the sponsor of Title VII, represented to Senator Dodd, the sponsor of Title IV, Title VII indeed does complement Title IV. Respondent's reading of Title VII is fully consistent with this view. First, although subsections of the two Titles do address their prohibitions to some of the same people, each statute also reaches substantial groups of people not reached by the other. Secondly, Title VII complements Title IV by punishing a broader class of behavior. Even under respondent's view, a Title VII offense is made out if the firearm was possessed or received "in commerce or affecting commerce"; however, Title IV apparently does not reach possessions or intrastate transactions at all, even those with an interstate commerce nexus, but is limited to the sending or receiving of firearms as part of an interstate transportation.

In addition, whatever reading is adopted, Title VII and Title IV are, in part, redundant. The interstate commerce requirement in Title VII minimally applies to transportation. Since Title IV also prohibits convicted criminals from transporting firearms in interstate commerce, the two Titles overlap under both readings. The Government's broader reading of Title VII does not eliminate the redundancy, but simply creates a larger area in which there is no overlap. While the Government would be on stronger ground if its reading were necessary to give Title VII some unique and independent thrust, this is not the case here. In any event, circumstances surrounding the passage of Title VII make plain that Title VII was not carefully molded to complement Title IV. Title VII was a last-minute Senate amendment to the Omnibus Crime Control and Safe Streets Act. The Amendment was hastily passed, with little discussion, no hearings, and no report. The notion that it was enacted to dovetail neatly with Title IV rests perhaps on a conception of the model legislative process; but we cannot pretend that all statutes are model statutes. While courts should interpret a statute with an eye to the surrounding statutory landscape and an ear for harmonizing potentially discordant provisions, these guiding principles are not substitutes for congressional lawmaking. In our view, no conclusion can be drawn from Title IV concerning the correct interpretation of Title VII.

Other aspects of the meager legislative history, however, do provide some significant support for the Government's interpretation. On the Senate floor, Senator Long, who introduced § 1202, described various evils that prompted his statute. These evils included assassinations of public figures and threats to the operation of businesses significant enough in the aggregate to affect commerce. Such evils, we note, would be most thoroughly mitigated by forbidding every possession of any firearm by specified classes of especially risky people, regardless of whether the gun was possessed, received, or transported "in commerce or affecting commerce." In addition, specific remarks of the

Senator can be read to state that the amendment reaches the mere possession of guns without any showing of an interstate commerce nexus. But Senator Long never specifically says that no connection with commerce need be shown in the individual case. And nothing in his statements explains why, if an interstate commerce nexus is irrelevant in individual cases, the phrase "in commerce or affecting commerce" is in the statute at all. But even if Senator Long's remarks were crystal clear to us, they were apparently not crystal clear to his congressional colleagues. Meager as the discussion of Title VII was, one of the few Congressmen who discussed the amendment summarized Title VII as "mak[ing] it a Federal crime to take, possess, or receive a firearm across State lines . . .”

In short, "the legislative history of [the] Act hardly speaks with that clarity of purpose which Congress supposedly furnishes courts in order to enable them to enforce its true will.” Here, as in other cases, the various remarks by legislators "are sufficiently ambiguous insofar as this narrow issue is concerned . . . to invite mutually destructive dialectic," and not much more. Taken together, the statutory materials are inconclusive on the central issue of whether or not the statutory phrase "in commerce or affecting commerce" applies to "possesses" and "receives" as well as "transports." While standing alone, the legislative history might tip in the Government's favor, the respondent explains far better the presence of critical language in the statute. The Government concedes that "the statute is not a model of logic or clarity.” After "seiz[ing] every thing from which aid can be derived," we are left with an ambiguous statute.

II

Given this ambiguity, we adopt the narrower reading: the phrase "in commerce or affecting commerce" is part of all three offenses, and the present conviction must be set aside because the Government has failed to show the requisite nexus with interstate commerce. This result is dictated by two wise principles this Court has long followed.

First, as we have recently reaffirmed, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.” In various ways over the years, we have stated that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."

This principle is founded on two policies that have long been part of our tradition. First, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.” Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant. Here, we conclude that

Congress has not "plainly and unmistakably," made it a federal crime for a convicted felon simply to possess a gun absent some demonstrated nexus with interstate commerce.

[The second "principle" that the Court cited as supporting its interpretation was the federalism canon, which will be explored later in this chapter.]

## Questions and Comments

**1. Statutory interpretation question:** What was the statutory interpretation question that the Court was trying to resolve?

**2. Sources:** What sources does the Court consult to interpret the statute before turning to the rule of lenity? Does the Court discuss the last antecedent rule? How would the statute be interpreted according to that rule? What support is there for the government's reading of the statute? What support is there for the respondent's reading of the statute? Note the Court's discussion of the manner in which the statute was enacted.

**3. The canon:** How does the Court suggest that the rule of lenity operates? How does the Court interpret the statute in light of the canon? Does the Court apply the canon as a presumption at the outset or as a tiebreaker?

**VIDEO LECTURE**

**Click here for a video lecture on *United States v. Bass* by Professor Stephen Johnson.**

The following case, *Wooden v. United States*, 142 S.Ct. 1063 (2022), demonstrates the difference in opinions regarding how the rule of lenity should be applied. The case involved interpreting 18 U.S.C. § 922(e)(1), which imposes a mandatory 15-year sentence for a person who has at least three prior convictions for specified felonies "committed on occasions different from one another." The defendant had ten prior burglary convictions from a single criminal episode during which he entered a single storage facility and stole items from ten different storage units. The Court was asked to determine whether the ten burglaries were committed on different "occasions" in terms of the sentencing enhancement statute.

The majority concluded that the ten burglary convictions were for offenses committed on a single occasion, relying on the ordinary meaning of the statute, its history, and its purpose. The majority did not discuss the rule of lenity. Justice Gorsuch concurred separately, indicating the Court should have used the rule. In response to Justice

Gorsuch's concurrence, Justice Kavanaugh wrote a separate concurrence to justify the majority's failure to use the rule of lenity. Both concurring opinions are reproduced below.


Storage Facility – Photo by Robbie Cameron – CC BY-SA 4.0

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument Audio (From Oyez)
18 U.S.C. § 924 (From LII)
Brief of Petitioner; Brief of U.S.

## WOODEN V. UNITED STATES

**142 S.Ct. 1063 (2022)**

**JUSTICE GORSUCH**, with whom **JUSTICE SOTOMAYOR** joins as to Parts II, III, and IV, concurring in the judgment.

II

The "rule of lenity" is a new name for an old idea—the notion that "penal laws should be construed strictly." The rule first appeared in English courts, justified in part on the assumption that when Parliament intended to inflict severe punishments it would do so clearly. In the hands of judges in this country, however, lenity came to serve distinctively American functions—a means for upholding the Constitution's commitments to due process and the separation of powers. Accordingly, lenity became a widely recognized rule of statutory construction in the Republic's early years.

Consider lenity's relationship to due process. Under the Fifth and Fourteenth Amendments, neither the federal government nor the States may deprive individuals of "life, liberty, or property, without due process of law." U. S. Const., Amdts. 5, 14. Generally, that guarantee requires governments seeking to take a person's freedom or possessions to adhere to "those settled usages and modes of proceeding" found in the common law. And among those "settled usages" is the ancient rule that the law must afford ordinary people fair notice of its demands. Lenity works to enforce the fair notice requirement by ensuring that an individual's liberty always prevails over ambiguous laws.

* * *

Of course, most ordinary people today don't spend their leisure time reading statutes * * * But lenity's emphasis on fair notice isn't about indulging a fantasy. It is about protecting an indispensable part of the rule of law—the promise that, whether or not individuals happen to read the law, they can suffer penalties only for violating standing rules

announced in advance. As the framers understood, "subjecting . . . men to punishment for things which, when they were done, were breaches of no law . . . ha[s] been, in all ages, the favorite and most formidable instrumen[t] of tyranny." The Federalist No. 84, pp. 511–512 (C. Rossiter ed. 1961) (A. Hamilton

Closely related to its fair notice function is lenity's role in vindicating the separation of powers. Under our Constitution, "[a]ll" of the federal government's "legislative Powers" are vested in Congress. Art. I, § 1. Perhaps the most important consequence of this assignment concerns the power to punish. Any new national laws restricting liberty require the assent of the people's representatives and thus input from the country's "many parts, interests and classes." Lenity helps safeguard this design by preventing judges from intentionally or inadvertently exploiting "doubtful" statutory "expressions" to enforce their own sensibilities. It "places the weight of inertia upon the party that can best induce Congress to speak more clearly," forcing the government to seek any clarifying changes to the law rather than impose the costs of ambiguity on presumptively free persons. In this way, the rule helps keep the power of punishment firmly "in the legislative, not in the judicial department."

Doubtless, lenity carries its costs. If judges cannot enlarge ambiguous penal laws to cover problems Congress failed to anticipate in clear terms, some cases will fall through the gaps and the legislature's cumbersome processes will have to be reengaged. But, as the framers appreciated, any other course risks rendering a self-governing people "slaves to their magistrates," with their liberties dependent on "the private opinions of the judge." From the start, lenity has played an important role in realizing a distinctly American version of the rule of law—one that seeks to ensure people are never punished for violating just-so rules concocted after the fact, or rules with no more claim to democratic provenance than a judge's surmise about legislative intentions.

III

It may be understandable why the Court declines to discuss lenity today. Certain controversies and misunderstandings about the rule have crept into our law in recent years. I would take this opportunity to answer them.

Begin with the most basic of these controversies—the degree of ambiguity required to trigger the rule of lenity. Some have suggested that courts should consult the rule of lenity only when, after employing every tool of interpretation, a court confronts a "grievous" statutory ambiguity. But ask yourself: If the sheriff cited a loosely written statute as authority to seize your home, would you be satisfied with a judicial explanation that, yes, the law was ambiguous, but the sheriff wins anyway because the ambiguity isn't "grievous"? If a judge sentenced you to decades in prison for conduct that no law clearly proscribed, would it matter to you that the judge considered the law "merely"—not "grievously"—ambiguous?

This "grievous" business does not derive from any well-considered theory about lenity or the mainstream of this Court's opinions. * * * Tellingly, this Court's early cases did not

require a "grievous" ambiguity before applying the rule of lenity. Instead, they followed other courts in holding that, "[i]n the construction of a penal statute, it is well settled . . . that *all reasonable doubts* concerning its meaning ought to operate in favor of [the defendant]." * * *

A second and related misunderstanding has crept into our law. Sometimes, Members of this Court have suggested that we possess the authority to punish individuals under ambiguous laws in light of our own perceptions about some piece of legislative history or the statute's purpose. Today's decision seemingly nods in the same direction. In a sentence in Part II–A, the Court says that statutory purpose is one factor a judge may "kee[p] an eye on" when deciding whether to enhance an individual's sentence under the Occasions Clause. The Court then proceeds to discuss the Clause's legislative history at length in Part II–B. It may be that the Court today intends to suggest only that judges may consult legislative history and purpose to limit, never expand, punishment under an ambiguous statute. But even if that's so, why take such a long way around to the place where lenity already stands waiting?

The right path is the more straightforward one. Where the traditional tools of statutory interpretation yield no clear answer, the judge's next step isn't to legislative history or the law's unexpressed purposes. The next step is to lenity. * * *

At least one more misconception has arisen in recent years. In debating the merits of the rule of lenity, some have treated the rule as an island unto itself—a curiosity unique to criminal cases. But in truth, lenity has long applied outside what we today might call the criminal law. And it is just one of a number of judicial doctrines that seek to protect fair notice and the separation of powers. * * *

**JUSTICE KAVANAUGH**, concurring.

I join the Court's opinion in full. In light of Justice Gorsuch's thoughtful concurrence in the judgment, I write separately to briefly explain why the rule of lenity has appropriately played only a very limited role in this Court's criminal case law. And I further explain how another principle—the presumption of *mens rea*—can address Justice Gorsuch's important concern, which I share, about fair notice in federal criminal law.

A common formulation of the rule of lenity is as follows: If a federal criminal statute is grievously ambiguous, then the statute should be interpreted in the criminal defendant's favor. Importantly, the rule of lenity does not apply when a law merely contains some ambiguity or is difficult to decipher. As this Court has often said, the rule of lenity applies only when " 'after seizing everything from which aid can be derived,' " the statute is still grievously ambiguous. The rule "comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." Our repeated use of the term "grievous ambiguity" underscores that point.

Properly applied, the rule of lenity therefore rarely if ever plays a role because, as in other contexts, "hard interpretive conundrums, even relating to complex rules, can often be solved." And if "a reviewing court employs all of the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation of the [law] at issue."

In short, because a court must exhaust all the tools of statutory interpretation before resorting to the rule of lenity, and because a court that does so often determines the best reading of the statute, the rule of lenity rarely if ever comes into play. In other words, "if lenity invariably comes in 'last,' it should essentially come in never." As I see it, that explains why this Court rarely relies on the rule of lenity, at least as a decisive factor.

I would not upset our rule of lenity case law by making the ambiguity trigger any easier to satisfy. For example, I would not say that any front-end ambiguity in the statute justifies resort to the rule of lenity even before exhausting the tools of statutory interpretation. One major problem with that kind of ambiguity trigger is that ambiguity is in the eye of the beholder and cannot be readily determined on an objective basis. Applying a looser front-end ambiguity trigger would just exacerbate that problem, leading to significant inconsistency, unpredictability, and unfairness in application. See B. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2136–2139 (2016).

For those reasons, I would not alter our rule of lenity case law. That said, I very much agree with Justice Gorsuch about the importance of fair notice in federal criminal law. But as I see it, that concern for fair notice is better addressed by other doctrines that protect criminal defendants against arbitrary or vague federal criminal statutes—in particular, the presumption of *mens rea*.

The deeply rooted presumption of *mens rea* generally requires the Government to prove the defendant's *mens rea* with respect to each element of a federal offense, unless Congress plainly provides otherwise. In addition, with respect to federal crimes requiring "willfulness," the Court generally requires the Government to prove that the defendant was aware that his conduct was unlawful.

To be sure, if a federal criminal statute does not contain a "willfulness" requirement and if a defendant is prosecuted for violating a legal prohibition or requirement that the defendant honestly was unaware of and reasonably may not have anticipated, unfairness can result because of a lack of fair notice. That scenario could arise with some *malum prohibitum* federal crimes, for example. But when that fair notice problem arises, one solution where appropriate could be to require proof that the defendant was aware that his conduct was unlawful. Alternatively, another solution could be to allow a mistake-of-law defense in certain circumstances—consistent with the longstanding legal principle that an act is not culpable unless the mind is guilty.

In sum, I would not invite the inconsistency, unpredictability, and unfairness that would result from expanding the rule of lenity beyond its very limited place in the Court's case law. I would, however, continue to vigorously apply (and where appropriate, extend) *mens*

*rea* requirements, which as Justice Robert Jackson remarked, are "as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."

## Questions and Comments

**1. Statutory interpretation question:** What was the statutory interpretation question that the Court was trying to resolve?

**2. Rationales for the rule of lenity – Justice Gorsuch:** Does Justice Gorsuch believe that the rule of lenity is necessary because people should be able to rely on their reading of criminal statutes to know what conduct is prohibited? How does Justice Gorsuch suggest the rule of lenity prevents a violation of separation of powers principles? Does Justice Gorsuch believe there are costs associated with applying the canon?

**3. The standard for applying the canon:** Does Justice Gorsuch agree that the rule of lenity should only be applied when there is a grievous ambiguity in a statute? What alternative would he suggest? Why does Justice Kavanaugh support the "grievous ambiguity" standard? Under Justice Kavanaugh's approach, how frequently are courts likely to apply the rule to read statutes in favor of defendants? What concerns does Justice Kavanaugh have about changing the test, so that the rule would more frequently be used to read statutes in favor of defendants? How does Justice Kavanaugh suggest courts could, in interpreting statutes, ensure fair notice to defendants if they do not rely on the rule of lenity?

**4. The sources of interpretation:** What sources does Justice Gorsuch suggest courts should examine before applying the presumption in the rule of lenity in reading the statute in favor of the defendant? How does he suggest that the canon should be applied differently?

### Problem 6-2

A few months ago, Rohan Singh, a commercial fisher, released several Claxton Mussels into Lake George in Springfield, Ames. The mussels had very little impact on the marine life in Lake George, but they caused considerable damage to boats and docks on the lake. The mussel attaches itself to wood structures and gradually breaks down the wood. In order to prevent harm to the boats and the docks, the Ames Department of the Environment filed a lawsuit in state court under the Ames Water Quality Law, seeking civil penalties and an injunction to prevent Walter from releasing any more mussels into the lake. Singh argues that she has not violated the Water Quality Law, so the court cannot impose penalties on her or order her to cease releasing mussels into the lake under the law.

## Problem 6-2 (continued)

The Ames Water Quality Law includes the following provisions:

**Section 101. Findings and Purposes**

(a) The unregulated pollution of waters in the State harms the State's economy and recreation, as well as its environment.

(b) In order to protect public health and the environment, it is necessary to limit the disposal of waste materials in the waters of the State.

**Section 301. Prohibition on waste disposal.**

No person may dispose of solid waste, garbage, refuse, sewage, radioactive materials, or any other pollutant into the waters of this State, except in accordance with a permit.

**Section 601. Enforcement**

(a) The Department of the Environment may institute an action in any State court against any person who violates any provision of this law.

(b) In any action that is instituted under this section, the court may order a person that violates any provision of this law to comply with the law, and the court may impose civil penalties, not to exceed $25,000 for each day that the person violates the law. The court may also award criminal penalties, not to exceed $100,000 for each day that the person knowingly violates the law.

Research into the legislative history of the Ames Water Quality Act discloses the following information. During the Senate consideration of the bill that became the Ames Water Quality Act, Senator Sabbath introduced an amendment that would include invasive species in the list in Section 301. However, when Senator Sabbath introduced the amendment, Senator Wright, the sponsor of the legislation, made the following statement on the Senate floor during debate on the amendment: "The proposed amendment is not necessary because Section 301 already prohibits the addition of pollutants into waters of the State and invasive species would clearly be included in the meaning of pollutants." The Senate did not approve the Sabbath amendment to the legislation.

There is other interesting information in the legislative history, including the following language in the Conference Committee report for the bill that became the Ames Water Quality Act: "Section 301 prohibits disposal of pollutants into waters of the State for many reasons, including protecting the economy of the State. Thus, the term 'pollutant' in Section 301 is broad enough to include anything that could harm the economy of the State if added to the waters of the State."

**Problem 6-2 (Continued)**

Dictionaries may also be useful in interpreting the law. The Webster's Dictionary that was published at the time the law was enacted defines "pollutant" as "something that pollutes" and defines "pollute" as "to make physically impure or unclean." The Oxford English Dictionary published at the same time defines "pollutant" as "anything that alters the natural environment by producing a condition that is harmful to living organisms."

On what basis could Ames argue that the statute prohibits Singh's release of mussels into Lake George? (It is not necessary to discuss any issues regarding deference to agency interpretations, but you may assume that Walter admits that she is a person, that Lake George is a water of the State, and that she did not have a permit under Section 301.) On what basis could Singh argue that the statute should not be read to prohibit his release of mussels? Who will likely prevail?

**CALI SECTION QUIZ**

Before moving on to the next section, why not try a short quiz on the material you just read at www.cali.org/lesson/19760. It should take about 30 minutes to complete.


The Preamble to the Constitution – Public Domain

# IV. Constitutional Avoidance Canon

## A. The Canon

The ***constitutional avoidance canon*** counsels courts to avoid interpreting a statute in a way that creates serious constitutional doubts or concerns, as long as there is another rational interpretation of the statute.[528] The canon has evolved over time. The "classic

[528] *See* Bressman, Rubin & Stack, *supra* note 63, at 242; Jellum, *supra* note 165, at 214; Eskridge, Gluck & Nourse, *supra* note 475, at 512 (courts should interpret ambiguous, but

avoidance" canon, set forth in *Murray v. the Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), instructed courts to determine that an interpretation of a statute ***would*** be unconstitutional before avoiding that interpretation.[529] Under the "modern avoidance" canon, courts do not have to resolve the constitutional question, as the canon requires avoidance when an interpretation raises serious constitutional doubts.[530]

Unlike the rule of lenity, the constitutional avoidance canon is not a tiebreaker. Instead, courts apply the canon at the outset, focusing first on whether a statutory interpretation raises serious constitutional concerns or doubts.[531] If an interpretation ***does*** raise such concerns or doubts, the court must then determine whether the statute demonstrates clear legislative intent to adopt the potentially unconstitutional interpretation or whether the statute is ambiguous.[532] Like the rule of lenity, the canon allows courts to examine a range of sources of interpretation, not just the text, to determine whether the statute is clear or ambiguous. If the legislature clearly intended the potentially unconstitutional interpretation, the canon requires courts to adopt that interpretation and address the constitutional question. If, on the other hand, the statute is ambiguous, the canon counsels courts to avoid the potentially unconstitutional interpretation, if an alternative reasonable interpretation exists.[533]

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potentially unconstitutional, statutes in a way that avoids the unconstitutional interpretation); Manning & Stephenson, *supra* note 4, at 385 (courts should construe statutes to avoid serious constitutional problems); Levy & Glicksman, *supra* note 340, at 156 (statutes should be construed to avoid constitutional issues or problems). Justice Scalia refers to the canon as the "constitutional doubt" canon. *See* Scalia & Garner, *supra* note 192, at 247. The National Conference of Commissioners on Uniform State Laws included the canon in their Uniform Statute and Rule Construction Act. *See* UNIF. STATUTE & RULE CONSTR. ACT, § 18(a3) (1995). Professor William Eskridge and his colleagues suggest that the rule of lenity is closely related to the constitutional avoidance canon, as it guides courts to avoid interpretations that could be unconstitutional in that they fail to provide defendants with notice required by due process. *See* Eskridge, Gluck & Nourse, *supra* note 475, at 513.

529 *See* Eskridge, Gluck & Nourse, *supra* note 475, at 517, *citing* John Copeland Nagle, *Delaware & Hudson Revisited*, 97 Notre Dame L. Rev. 1495 (1997). *See also* Manning & Stephenson, *supra* note 4, at 387.

530 *See* Eskridge, Gluck & Nourse, *supra* note 475, at 517 (criticizing the doctrine on the grounds that it counsels rewriting a statute that might be constitutional); Manning & Stephenson, *supra* note 4, at 387; Scalia & Garner, *supra* note 192, at 247-48 (comparing the classic and modern approaches to the canon).

531 *See* Jellum, *supra* note 165, at 214-15.

532 *Id.* at 214. *See also* Manning, *supra* note 4, at 395.

533 *See* Jellum, *supra* note 165, at 214-15 (alternative interpretation must be "fairly possible"); Manning & Stephenson, *supra* note 4, at 395; Levy & Glicksman, *supra* note 340, at 156-57 (noting that the statute must have a "susceptible" alternative reading, but noting that the canon is sometimes applied as a clear statement rule, in which case a court might interpret the statute against its plain meaning to avoid the potentially unconstitutional interpretation).

The canon is related to another statutory interpretation principle that urges courts to avoid deciding constitutional questions to decide a case when the case can be decided on narrower grounds, such as statutory interpretation.[534]

Several justifications have been suggested for the canon. One of the primary rationales supporting the canon is that it is based on a presumption that the legislature would not enact unconstitutional legislation.[535] A second, closely related, rationale is that the canon is based on separation of powers concerns.[536] As it is much more difficult for the legislature to undo a court's constitutional interpretation, courts should avoid striking down laws enacted through a democratic process by popularly elected representatives.[537] Judicial economy is also advanced as a rationale for the canon since it allows courts to avoid resolving difficult constitutional questions when it is not necessary.[538] Professor Eskridge and his colleagues identify two additional justifications for the canon. First, they suggest that the canon enables courts to invigorate some "underenforced" constitutional provisions, enforcing them indirectly by adopting narrow interpretations of statutes to avoid interpretations that might otherwise be unconstitutional under the underenforced provisions.[539] Second, they argue that the canon allows courts to preserve institutional capital, slowing down the political process without suffering the repercussions that they might otherwise incur if they struck down laws as unconstitutional.[540]

Not surprisingly, the canon has been criticized on several grounds. Like many of the other canons, critics argue that the canon facilitates "stealth judicial activism,"[541] as it enables courts to deviate from more natural readings of statutes based on a vague standard of "serious constitutional doubt" and not merely based on unconstitutionality of an interpretation.[542] In addition, the canon is difficult to apply as there is disagreement

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534 *See* Scalia & Garner, *supra* note 192, at 251. In a concurring opinion in *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 346 (1936), Justice Brandeis listed seven "rules under which [the Court] has avoided passing upon a large part of the constitutional questions pressed upon it for decision", including the constitutional avoidance doctrine and the rule counseling courts to decide cases on non-constitutional grounds when possible.

535 *See* Eskridge, Gluck & Nourse, *supra* note 475, at 512; Manning & Stephenson, *supra* note 4, at 398, *citing Clark v. Martinez,* 543 U.S. 371, 381 (2005); *Rust v. Sullivan,* 500 U.S. 173, 191 (1991).

536 *See* Eskridge, Gluck & Nourse, *supra* note 475, at 512, 518; Jellum, *supra* note 165, at 215; Manning & Stephenson, *supra* note 4, at 400-01.

537 *See* Manning & Stephenson, *supra* note 4, at 384-85, 400-01; Eskridge, Gluck & Nourse, *supra* note 475, at 512, 518.

538 *See* Jellum, *supra* note 165, at 215.

539 *See* Eskridge, Gluck & Nourse, *supra* note 475, at 518.

540 *Id.* at 519.

541 *See* Eskridge, Gluck & Nourse, *supra* note 475, at 519, *citing* Judge Henry Friendly, *Mr. Justice Frankfurter and the Reading of Statutes,* in *Benchmarks* 211-12 (1967).

542 *See* Manning & Stephenson, *supra* note 4, at 401-04); Levy & Glicksman, *supra* note 340, at 157.

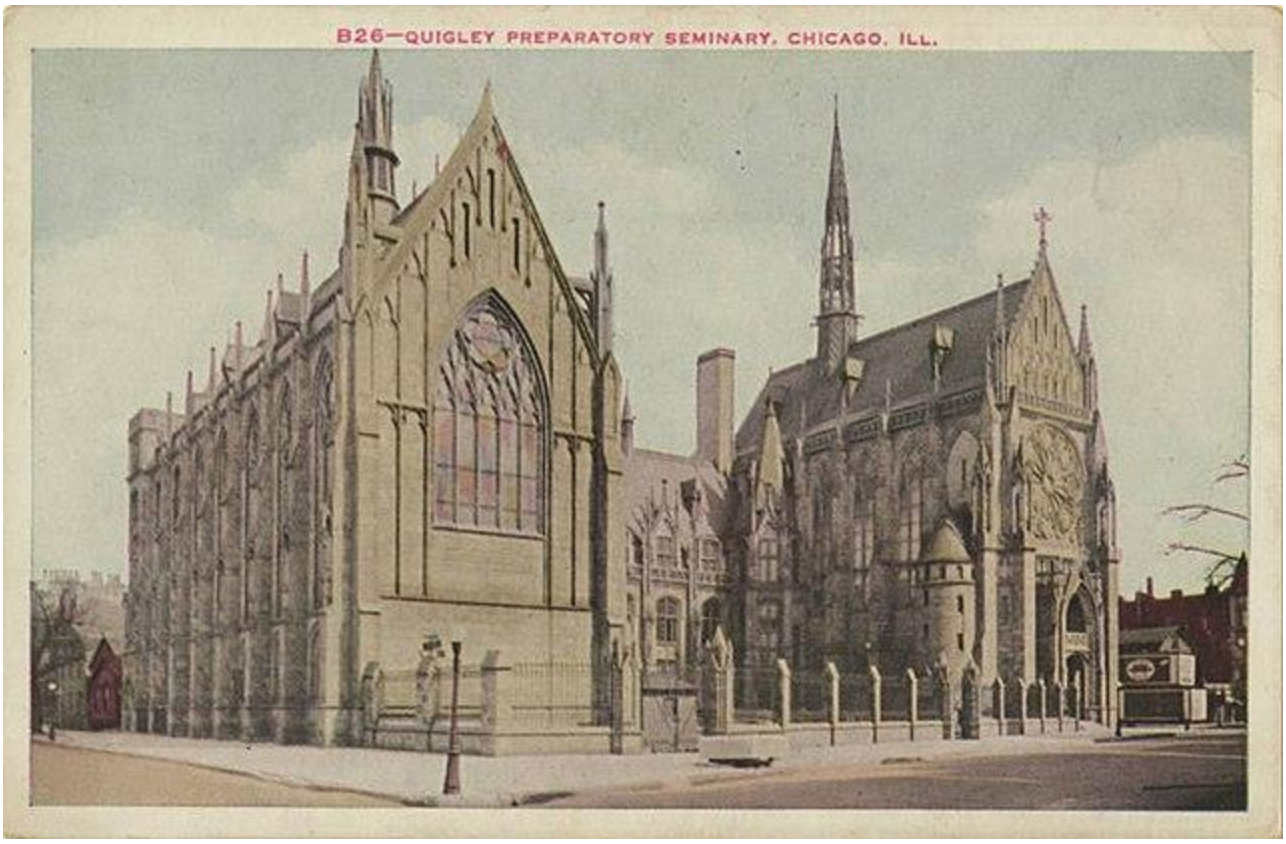
regarding the level of constitutional doubt that is necessary to trigger the canon.[543] Finally, critics point out that although empirical studies demonstrate that legislators draft statutes based on the assumptions of the canon,[544] there are occasions when legislatures enact statutes that they recognize are unconstitutional or raise serious constitutional questions.[545]

The following case, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), is a ***constitutional avoidance doctrine*** classic. As you read it, focus on the different ways that Justice Burger and Justice Brennan describe and apply the canon. The Court was asked to determine whether church-operated schools were "employers" under the National Labor Relations Act. Section 2(2) of the Act, 29 U.S.C. § 152(2), defines "employers" as "any person acting as an agent of an employer, directly or indirectly" and specifically lists eight types of entities that are excluded from the definition of employer. Section 2(2) did not explicitly list church-operated schools or non-profit institutions more generally in the exemptions.

543 *See* Manning & Stephenson, *supra* note 4, at 397(Does the canon apply whenever the question is non-frivolous or only when the unconstitutionality is likely? Does the application depend on the complexity or uncertainty of the constitutional question?); Levy & Glicksman, *supra* note 340, at 157 (suggesting seriousness may be "in the eye of the beholder"); Scalia & Garner, *supra* note 192, at 250 ("[h]ow doubtful is doubtful"?).

544 *See* Gluck & Bressman, *supra* note 152, at 947-48.

545 *See* Manning & Stephenson, *supra* note 4, at 399; Scalia & Garner, *supra* note 192, at 248-49 (noting that Congress frequently includes provisions in statutes that "all but acknowledge" their questionable constitutionality, including accelerated judicial review, standing for members of Congress, and fallback provisions in the event that statutory provisions are invalidated). Professors John Manning and Matthew Stephenson argue that, even though the presumption that Congress would not enact an unconstitutional law is a fiction, it is "a fiction designed to show judicial respect for Congress." *See* Manning & Stephenson, *supra* note 4, at 399.




Quigley Preparatory Seminary – Public Domain

## NLRB V. CATHOLIC BISHOP OF CHICAGO

**440 U.S. 490 (1979)**

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument Audio (From Oyez)
NLRA of 1935
29 U.S.C. § 152
Case Background (From Quimbee)
Video Summary (Prof. Stevenson – South Texas College of Law)

**MR. CHIEF JUSTICE BURGER** delivered the opinion of the Court.

This case arises out of the National Labor Relations Board's exercise of jurisdiction over lay faculty members at two groups of Catholic high schools. We granted certiorari to consider two questions: (a) whether teachers in schools operated by a church to teach both religious and secular subjects are within the jurisdiction granted by the National Labor Relations Act; and (b) if the Act authorizes such jurisdiction, does its exercise violate the guarantees of the Religion Clauses of the First Amendment?

**I**

One group of schools is operated by the Catholic Bishop of Chicago * * * ; the other group is operated by the Diocese of Fort Wayne-South Bend, Inc. The group operated by the Catholic Bishop of Chicago consists of two schools, Quigley North and Quigley South.

Those schools are termed "minor seminaries" because of their role in educating high school students who may become priests. * * * The schools * * * provide special religious instruction not offered in other Catholic secondary schools. * * * The Diocese of Fort Wayne-South Bend, Inc., has five high schools * * * [that] seek to provide a traditional secular education, but oriented to the tenets of the Roman Catholic faith; religious training is also mandatory. These schools are similarly certified by the State.

In 1974 and 1975, separate representation petitions were filed with the Board by interested union organizations for both the Quigley and the Fort Wayne-South Bend schools; representation was sought only for lay teachers. [The schools argued that the Religion Clauses of the First Amendment precluded the Board's jurisdiction over them, but the Board certified unions as the bargaining representatives for the teachers at those schools. The schools refused to bargain with the unions and the unions filed unfair labor complaints with the Board under §§ 8(a)(1) and (5) of the National Labor Relations Act (NLRA). The Board concluded that the schools violated the NLRA and ordered them to bargain with the unions. The schools challenged the Board's orders in the U.S. Court of Appeals for the 7th Circuit and that court denied enforcement of the Board's orders.]

**III**

The Board's assertion of jurisdiction over private schools is * * * a relatively recent development. Indeed, in 1951, the Board indicated that it would not exercise jurisdiction over nonprofit, educational institutions because to do so would not effectuate the purposes of the Act. In 1970, however, the Board pointed to what it saw as an increased involvement in commerce by educational institutions and concluded that this required a different position on jurisdiction. * * * The Board now asserts jurisdiction over all private, nonprofit, educational institutions with gross annual revenues that meet its jurisdictional requirements whether they are secular or religious. * * *

**IV**

That there are constitutional limitations on the Board's actions has been repeatedly recognized by this Court even while acknowledging the broad scope of the grant of jurisdiction. The First Amendment, of course, is a limitation on the power of Congress. Thus, if we were to conclude that the Act granted the challenged jurisdiction over these teachers we would be required to decide whether that was constitutionally permissible under the Religion Clauses of the First Amendment.

Although the respondents press their claims under the Religion Clauses, the question we consider first is whether Congress intended the Board to have jurisdiction over teachers in church-operated schools. In a number of cases, the Court has heeded the essence of Mr. Chief Justice Marshall's admonition in *Murray v. The Charming Betsy,* 2 Cranch 64, 6 U.S. 118 (1804), by holding that an Act of Congress ought not be construed to violate the

Constitution if any other possible construction remains available. Moreover, the Court has followed this policy in the interpretation of the Act now before us and related statutes. In *Machinists v. Street,* 367 U.S. 740 (1961), for example, the Court considered claims that serious First Amendment questions would arise if the Railway Labor Act were construed to allow compulsory union dues to be used to support political candidates or causes not approved by some members. The Court looked to the language of the Act and the legislative history and concluded that they did not permit union dues to be used for such political purposes, thus avoiding "serious doubt of [the Act's] constitutionality." * * *

The values enshrined in the First Amendment plainly rank high "in the scale of our national values." In keeping with the Court's prudential policy, it is incumbent on us to determine whether the Board's exercise of its jurisdiction here would give rise to serious constitutional questions. If so, we must first identify "the affirmative intention of the Congress clearly expressed" before concluding that the Act grants jurisdiction.

**V**

[In Part V of the opinion, the Court outlined several ways that reading the statute to authorize the Board to regulate church-operated schools could lead to excessive government entanglement in the affairs of the schools and wrote:]

The Board argues that it can avoid excessive entanglement * * * But at this stage of our consideration, we are not compelled to determine whether the entanglement is excessive as we would were we considering the constitutional issue. Rather, we make a narrow inquiry whether the exercise of the Board's jurisdiction presents a significant risk that the First Amendment will be infringed. * * * We see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow. We therefore turn to an examination of the National Labor Relations Act to decide whether it must be read to confer jurisdiction that would in turn require a decision on the constitutional claims raised by respondents.

**VI**

There is no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act. Admittedly, Congress defined the Board's jurisdiction in very broad terms; we must therefore examine the legislative history of the Act to determine whether Congress contemplated that the grant of jurisdiction would include teachers in such schools.

In enacting the National Labor Relations Act in 1935, Congress sought to protect the right of American workers to bargain collectively. The concern that was repeated throughout the debates was the need to assure workers the right to organize to counterbalance the

collective activities of employers which had been authorized by the National Industrial Recovery Act. But congressional attention focused on employment in private industry and on industrial recovery.

Our examination of the statute and its legislative history indicates that Congress simply gave no consideration to church-operated schools. It is not without significance, however, that the Senate Committee on Education and Labor chose a college professor's dispute with the college as an example of employer-employee relations not covered by the Act. S.Rep. No. 573, 74th Cong., 1st Sess., 7 (1935).

Congress' next major consideration of the jurisdiction of the Board came during the passage of the Labor Management Relations Act of 1947 -- the Taft-Hartley Act. In that Act, Congress amended the definition of "employer" in § 2 of the original Act to exclude nonprofit hospitals. There was some discussion of the scope of the Board's jurisdiction, but the consensus was that nonprofit institutions in general did not fall within the Board's jurisdiction, because they did not affect commerce.

The most recent significant amendment to the Act was passed in 1974, removing the exemption of nonprofit hospitals. The Board relies upon that amendment as showing that Congress approved the Board's exercise of jurisdiction over church-operated schools. A close examination of that legislative history, however, reveals nothing to indicate an affirmative intention that such schools be within the Board's jurisdiction. Since the Board did not assert jurisdiction over teachers in a church-operated school until after the 1974 amendment, nothing in the history of the amendment can be read as reflecting Congress' tacit approval of the Board's action. * * *

The absence of an "affirmative intention of the Congress clearly expressed" fortifies our conclusion that Congress did not contemplate that the Board would require church-operated schools to grant recognition to unions as bargaining agents for their teachers. * * *

Accordingly, in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could, in turn, call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.

*Affirmed.*

**MR. JUSTICE BRENNAN**, with whom **MR. JUSTICE WHITE**, **MR. JUSTICE MARSHALL**, and **MR. JUSTICE BLACKMUN** join, dissenting.

The Court today holds that coverage of the National Labor Relations Act does not extend to lay teachers employed by church-operated schools. That construction is plainly wrong

in light of the Act's language, its legislative history, and this Court's precedents. It is justified solely on the basis of a canon of statutory construction seemingly invented by the Court for the purpose of deciding this case. I dissent.

**I**

The general principle of construing statutes to avoid unnecessary constitutional decisions is a well settled and salutary one. The governing canon, however, is not that expressed by the Court today. The Court requires that there be a "clear expression of an affirmative intention of Congress" before it will bring within the coverage of a broadly worded regulatory statute certain persons whose coverage might raise constitutional questions. But those familiar with the legislative process know that explicit expressions of congressional intent in such broadly inclusive statutes are not commonplace. Thus, by strictly or loosely applying its requirement, the Court can virtually remake congressional enactments. This flouts Mr. Chief Justice Taft's admonition

> "that amendment may not be substituted for construction, and that a court may not exercise legislative functions to save [a] law from conflict with constitutional limitation."

The settled canon for construing statutes wherein constitutional questions may lurk was stated in *Machinists v. Street,* 367 U.S. 740 (1961):

> “When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is *fairly possible* by which the question may be avoided.' *Crowell v. Benson,* 285 U. S. 22, 285 U. S. 62."

This limitation to constructions that are "fairly possible," and "reasonable," acts as a brake against wholesale judicial dismemberment of congressional enactments. It confines the judiciary to its proper role in construing statutes, which is to interpret them so as to give effect to congressional intention. The Court's new "affirmative expression" rule releases that brake.

**II**

The interpretation of the National Labor Relations Act announced by the Court today is not "fairly possible." The Act's wording, its legislative history, and the Court's own precedents leave "the intention of the Congress . . . revealed too distinctly to permit us to ignore it because of mere misgivings as to power. Section 2(2) of the Act, 29 U.S.C. § 152(2), defines "employer" as

> ". . . any person acting as an agent of an employer, directly or indirectly, *but shall not include* the United States or any wholly owned Government corporation, or any

> Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

(Emphasis added.) Thus, the Act covers all employers not within the eight express exceptions. The Court today substitutes amendment for construction to insert one more exception -- for church-operated schools. This is a particularly transparent violation of the judicial role: the legislative history reveals that Congress itself considered and rejected a very similar amendment.

The pertinent legislative history of the NLRA begins with the Wagner Act of 1935. Section 2(2) of that Act, identical in all relevant respects to the current section, excluded from its coverage neither church-operated schools nor any other private nonprofit organization. Accordingly, in applying that Act, the National Labor Relations Board did not recognize an exception for nonprofit employers, even when religiously associated. An argument for an implied nonprofit exemption was rejected because the design of the Act was as clear then as it is now:

> "[N]either charitable institutions nor their employees are exempted from operation of the Act by its terms, although certain other employers and employees are exempted."

The Hartley bill, which passed the House of Representatives in 1947, would have provided the exception the Court today writes into the statute:

> "The term 'employer' . . . shall not include . . . any corporation, community chest, fund, or foundation organized and operated exclusively for *religious,* charitable, scientific, literary, or *educational* purposes, . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual. . . ."

But the proposed exception was not enacted. The bill reported by the Senate Committee on Labor and Public Welfare did not contain the Hartley exception. Instead, the Senate proposed an exception limited to nonprofit hospitals, and passed the bill in that form. The Senate version was accepted by the House in conference, thus limiting the exception for nonprofit employers to nonprofit hospitals. Ch. 120, 61 Stat. 136.

Even that limited exemption was ultimately repealed in 1974.. In doing so, Congress confirmed the view of the Act expressed here: that it was intended to cover all employers -- including nonprofit employers -- unless expressly excluded, and that the 1947 amendment excluded only nonprofit hospitals. *See* H.R.Rep. No. 93-1051, p. 4 (1974) Moreover, it is significant that, in considering the 1974 amendments, the Senate expressly rejected an amendment proposed by Senator Ervin that was analogous to the one the

Court today creates -- an amendment to exempt nonprofit hospitals operated by religious groups. Senator Cranston, floor manager of the Senate Committee bill and primary opponent of the proposed religious exception, explained:

> "[S]uch an exception for religiously affiliated hospitals would seriously erode *the existing national policy which holds religiously affiliated institutions generally such as* proprietary nursing homes, residential communities, and *educational facilities to the same standards as their nonsectarian counterparts.*"

120 Cong.Rec. 12957 (1974), 1974 Leg.Hist. 137 (emphasis added).

In construing the Board's jurisdiction to exclude church-operated schools, therefore, the Court today is faithful to neither the statute's language nor its history. Moreover, it is also untrue to its own precedents.

> "This Court has consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause. *See, e.g., Guss v. Utah Labor Board,* 353 U.S. 1, 3 (1957)

* * * As long as an employer is within the reach of Congress' power under the Commerce Clause -- and no one doubts that respondents are -- the Court has held him to be covered by the Act regardless of the nature of his activity. Indeed, *Associated Press v. NLRB,* 301 U.S. 103 (1937), construed the Act to cover editorial employees of a nonprofit news-gathering organization despite a claim -- precisely parallel to that made here -- that their inclusion rendered the Act in violation of the First Amendment. Today's opinion is simply unable to explain the grounds that distinguish that case from this one.

Thus, the available authority indicates that Congress intended to include -- not exclude -- lay teachers of church-operated schools. The Court does not counter this with evidence that Congress *did* intend an exception it never stated. Instead, despite the legislative history to the contrary, it construes the Act as excluding lay teachers only because Congress did not state explicitly that they were covered. In Mr. Justice Cardozo's words, this presses "avoidance of a difficulty . . . to the point of disingenuous evasion."

**III**

Under my view that the NLRA includes within its coverage lay teachers employed by church-operated schools, the constitutional questions presented would have to be reached. I do not now do so only because the Court does not. I repeat for emphasis, however, that, while the resolution of the constitutional question is not without difficulty, it is irresponsible to avoid it by a cavalier exercise in statutory interpretation which succeeds

only in defying congressional intent. A statute is not "a nose of wax to be changed from that which the plain language imports. . .."

## Questions and Comments

**1. Classic v. modern avoidance doctrine:** At the beginning of Part IV of his opinion for the majority, Justice Burger cited *The Charming Betsy* decision, which counseled courts to determine that a statutory interpretation would be unconstitutional before applying the constitutional avoidance canon. Did the majority determine that interpreting the NLRA to define employers to include church operated schools would be unconstitutional before applying the avoidance canon?

**2. Burger's articulation of the canon:** How did Justice Burger define the manner in which the constitutional avoidance canon operates? What is the first question that the Court must resolve? What is the second question?

**3. Second step in the Burger analysis:** After the majority concluded that including church-operated schools within the definition of "employer" in the NLRA would raise serious constitutional questions, did the majority analyze the statute to determine whether interpreting it to exclude church-operated schools from the definition of "employee" was reasonable? What question ***did*** the majority explore after deciding that the inclusion of church-operated schools in the definition of "employee" would raise serious constitutional questions?

**4. Sources of interpretation:** When the majority looked for a "clear statement" of Congress' intent to include church-operated schools in the definition of "employer," did it limit its search to the text of the statute? What sources did the Court consult? Why did the majority conclude that there was not a clear expression of Congressional intent to include church-operated schools in the definition of "employer" and what impact did that have on the majority's interpretation of the statute? Did the majority ***ever*** explain why it would be reasonable to interpret the statute to exclude church-operated schools from the definition of "employer"?

**5. Brennan's articulation of the canon:** How does Justice Brennan's dissent argue the constitutional avoidance canon operates? How is that different from the majority's approach? What concerns does Justice Brennan have about the canon as articulated by Justice Burger for the majority? Does that help you understand why courts, in applying the canon, generally use the approach outlined by Justice Brennan, rather than the "clear statement" approach advocated by Justice Burger?

**6. Second step in the dissent's analysis:** Under the dissent's test, after determining that an interpretation of a statute raises serious constitutional questions, the court should determine whether other interpretations that don't raise those questions are fairly possible or reasonable. In this case, the interpretation that raised serious constitutional questions was the interpretation that "employers" includes church-operated schools, so the dissent must focus on whether an alternative interpretation is reasonable. What sources does the dissent examine to determine whether it is reasonable to interpret "employers" to ***exclude*** church-operated schools and does the dissent conclude that there is a reasonable alternative interpretation? What textual canon that supports the dissent's reading does the dissent ***not*** cite by name? What does the dissent say a court should do if it can't identify a reasonable alternative interpretation? If the dissent determined that there was not a reasonable alternative reading, why didn't it decide whether interpreting "employers" to include church-operated schools violated the Religion clauses?

**VIDEO LECTURE**

**Click here for a video lecture on *NLRB v. Catholic Bishop of Chicago* by Professor Stephen Johnson.**

## B. Severability

Closely related to the constitutional avoidance canon is the issue of ***severability***. If a court holds that a provision in a statute is unconstitutional or otherwise invalid, it must determine whether the invalid provision can be ***severed*** from the rest of the statute or whether the entire statute must be invalidated.

The Supreme Court's approach to severability has evolved over time. At first, the Court seemed to assume that an unconstitutional provision of a statutes could be severed from the remainder of the statute.[546] For a time, the Court shifted gears and created a presumption of inseverability.[547] After the New Deal, the Court reverted to its earlier approach, adopting a presumption in favor of severability.[548]

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546 *See* Michael D. Shumsky, *Severability, Inseverability and the Rule of Law*, 41 Harv. J. on Legis. 227, 232-33 (2004).

547 *Id.*, *citing* *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). *See also* Eskridge, Gluck & Nourse, *supra* note 475, at 529.

548 *See* Eskridge, Gluck & Nourse, *supra* note 475, at 529; Jellum, *supra* note 165, at 344-45.

The test the Court now uses to determine whether an invalid provision can be severed was established in *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987). According to the *Alaska Airlines* Court, an invalid provision in a statute can be severed from the rest of the statute if two conditions are met: (1) the remaining portions of the statute can function independently of the invalid provision; ***and*** (2) the legislature ***would*** have enacted the remaining portions of the statute without the invalid provision. *Id.* at 684.

Legislation is frequently the product of compromise, with legislators agreeing to the inclusion of an otherwise objectionable provision in a statute in exchange for the inclusion of a provision they support. When a court strikes down a portion of a statute, but allows other portions to remain in force, it could undercut the bargains that were the foundation for its enactment. In light of that, the presumption in favor of severability has been criticized on several grounds, including that it ***violates separation of powers*** because it leaves in place a statute that the legislature did not enact, and the executive did not sign.[549] In addition, even though the Supreme Court's test requires courts to find that the legislature would have enacted the remaining portions of a statute without the invalid provision before severing the invalid provision, critics argue that the presumption ***promotes judicial activism*** by giving judges the discretion to make that determination.[550]


Alaska Airline Jet – Photo by Mertbiol – CC0 1.0

549 *See* Eskridge, Gluck & Nourse, *supra* note 475, at 531.

550 *Id.*

## ALASKA AIRLINES, INC. V. BROCK

**480 U.S. 678 (1987)**

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument Audio (From Oyez)
Airline Deregulation Act of 1978

**JUSTICE BLACKMUN** delivered the opinion of the Court.

In *INS v. Chadha,* this Court held unconstitutional the congressional veto provision in * * * the Immigration and Nationality Act and found it severable from the remainder of that Act. Petitioners, 14 commercial airlines, * * * contend that provisions protecting employees in the Airline Deregulation Act of 1978 are ineffective because § 43(f)(3) of the Act similarly subjects to a legislative veto implementing regulations issued by the Department of Labor (DOL). * * *

[The Airline Deregulation Act of 1978 eliminated many of the government controls on commercial airlines, but created an Employee Protection Program (EPP) to provide benefits, in the event of work force reductions, to “protected employees” (employees who had been employed by a carrier for at least four years when the Act became effective.)]

The first part of the EPP establishes a monthly compensation program. * * * The Secretary of Labor is directed to promulgate guidelines to be used in determining the amount of the monthly assistance payments. § 43(b)(1). * * * The second portion of the EPP imposes on airlines * * * a "duty to hire" protected employees. If a protected employee is "furloughed or otherwise terminated," other than for cause, within 10 years of the enactment date of the statute, that employee has a "first right of hire, regardless of age, in his occupational specialty" with any carrier, covered by the section, who is "hiring additional employees.” * * *

The Secretary "may issue, amend, and repeal such rules and regulations as may be necessary for the administration of [the EPP]." § 43(f)(1). [Section 43(f) also included a “legislative veto”.]

II

Petitioners are certified carriers subject to the duty-to-hire provisions of the Act and to the regulations promulgated by the Secretary. They challenged the EPP * * * contending that the legislative veto provision is unconstitutional * * * and that the entire program must be invalidated because the veto provision is nonseverable from the rest of the EPP. * * * The District Court granted summary judgment for the petitioners, striking down the entire EPP * * * The United States Court of Appeals for the District of Columbia Circuit reversed, holding that the legislative veto clause is severable from the remainder of the EPP program. We agree and affirm the judgment of the Court of Appeals.

III

"[A] court should refrain from invalidating more of the statute than is necessary. . .." "[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain

the act in so far as it is valid." The standard for determining the severability of an unconstitutional provision is well established:

> "'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'"

*Buckley v. Valeo,* 424 U.S. 1, 108 (1976) (per curiam).

Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently. * * *

The more relevant inquiry in evaluating severability is whether the statute will function in a manner consistent with the intent of Congress. * * * The * * * test * * * is the traditional one: the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.

The inquiry is eased when Congress has explicitly provided for severance by including a severability clause in the statute. This Court has held that the inclusion of such a clause creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision. In such a case, unless there is strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute. In the absence of a severability clause, however, Congress' silence is just that -- silence -- and does not raise a presumption against severability.

In this case, the parties disagree as to whether there is a severability clause applicable to the EPP. We need not resolve this question, for there is no need to resort to a presumption in order to find the legislative veto provision severable in this case. There is abundant indication of a clear congressional intent of severability both in the language and structure of the Act and in its legislative history.

IV

Congress' intent that the EPP's first-hire provisions should survive in the absence of the legislative veto provision is suggested strongly by the affirmative duty the statute places directly on air carriers. The first-hire portion of the EPP establishes in detail an obligation to hire protected employees that scarcely needs the adoption of regulations by the Secretary, and thus leaves little of substance to be subject to a veto. Section 43(d) designates the recipients of this "first right of hire," * * * [and] specifies the class of carriers that are obligated, and the extent of the obligation. * * * The language of these provisions is sufficiently unambiguous to notify carriers of their responsibilities and sufficiently detailed to require little further action on the part of the Secretary. * * *

Moreover, Congress did not link specifically the operation of the first-hire provisions to the issuance of regulations. While the Secretary is explicitly directed to promulgate, by rule,

guidelines for the assistance payments authorized by the EPP, § 43(b)(1), there is no similar command with regard to the duty-to-hire provisions. The Act simply provides that the Secretary "may" issue such regulations as are necessary to the administration of the program. § 43(f)(1). A duty to hire that is not dependent upon the issuance of regulations is unlikely to be dependent upon an opportunity for Congress to veto those regulations. * * *

Not only do the first-hire provisions stand on their own, independent of any need for extensive regulations, but, should Congress object to the regulations issued, it retains a mechanism for the expression of its disapproval that reduces any disruption of congressional oversight caused by severance of the veto provision. The EPP's "report and wait" provision in the statute requires the Secretary to forward regulations to the Transportation Committees of both Chambers of Congress and to wait 30 days before issuing them as final regulations. § 43(f)(3). This interval gives Congress an opportunity to review the regulations and either to attempt to influence the agency's decision or to enact legislation preventing the regulations from taking effect. * * *

The legislative history of the EPP supports the conclusion that Congress would have enacted the duty-to-hire provisions even without a legislative veto provision by revealing that Congress regarded labor protection as an important feature of the Act, while it paid scant attention to the legislative veto provision. [The Court then cited provisions that were included in the bill, statements of legislators, and language in reports to demonstrate that Congress was deeply concerned with employee protection in the Act.]

In contrast to this extensive discussion of employee protection, the Committee paid scant attention to legislative oversight. When it did show concern with retaining control over the form the program would take, it was in the context of the compensation program, not the duty to hire: * * *

V

The language and structure of the EPP and its legislative history provide an uncontradicted view of congressional intent with regard to severance of the legislative veto provisions from the duty-to-hire program. This evidence leads to the conclusion that any concerns about the operation of the EPP related principally to the financial assistance program * * * with scant attention paid to any need for congressional oversight. In the almost total absence of any contrary refrain, we cannot conclude that Congress would have failed to enact the Airline Deregulation Act, including the EPP's first-hire program, if the legislative veto had not been included. Accordingly, we affirm the judgment of the Court of Appeals.

## Questions and Comments

**1. Statutory interpretation question:** The Court proceeded from the conclusion that the legislative veto provision in the Airline Deregulation Act of 1978 was unconstitutional. The focus in the case, then, was on whether the legislative veto provision that Congress

included to oversee the regulations adopted by the Secretary of Labor, was severable from the EPP duty to hire. Unlike many of the other cases in the book, the Court is not trying to interpret a specific statutory provision in this case.

**2. Step One of the two-step process:** Note that the Court begins its severability discussion by noting the presumption in favor of severability. The Court then moves on to the modern two-part test noted above. The first question that the Court had to resolve was whether the remainder of the Airline Deregulation Act (or at least the EPP right to hire, which was the provision that the petitioners were most concerned about) could function independently of the legislative veto provision. Although it is edited out above, the Court found that a legislative veto is, by its very nature, separate from the operation of the substantive provisions of a statute, so the remainder of the statute could easily function without the legislative veto provision. In other cases, the operation of the provisions may be more intertwined.

**3. Step Two of the two-step process:** In step two of the Court's analysis, it must determine whether Congress would have enacted the remainder of the Airline Deregulation Act (or at least the EPP right to hire, which was the provision that the petitioners were most concerned about) without the legislative veto. As you'll recall from Chapter 1, a legislative veto is a tool Congress used to maintain control over regulations and other discretionary decisions made by agencies. What sources did the Court consult and why did it conclude that Congress would have enacted the remainder of the statute without the legislative veto?

**4. Presumption:** The Court concluded that there was ***clear*** evidence of Congress' intent to enact the EPP right to hire provisions even without a legislative veto. Was it necessary to find a ***clear*** expression of Congressional intent to enact the remaining provisions? How does the presumption in the canon work?

**5. Severable from what?** In deciding questions of severability, a court might be trying to determine whether an invalid provision is severable from an entire statute or severable from a portion of the statute. The analysis in both cases is, however, the same.

**6. Severability clauses:** In some cases, legislatures include ***severability clauses*** that explicitly state that specific provisions of the statute are severable from other provisions or from the entire statute, or that all the provisions of the statute are severable.[551] The *Alaska Airlines* Court noted that the parties disagreed about whether the Airline Deregulation Act of 1978 included a severability clause that applied to the case, but the Court concluded that it was not necessary to determine whether a provision applied. What effect did the Court suggest a severability clause would have on

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[551] Critics often argue that severability clauses are routinely included in legislation as boilerplate. *See* Shumsky, *supra* note 65, at 246; Jellum, *supra* note 165, at 344. In some cases, jurisdictions have adopted statutes that codify the presumption of severability across all statutes. *See* Jellum, *supra* note 165, at 350, *citing* Va. Code Ann. § 1-17.1.

determining whether an invalid provision was severable? Are courts ignoring the will of the legislature if they fail to enforce a severability clause?[552]

**7. Inseverability clauses:** Just as legislatures may include severability clauses in statutes, they may include ***inseverability clauses*** that provide that specific provisions of the statute are not severable from other provisions or from the entire statute, or that none of the provisions of the statute are severable from others. Legislatures include such provisions far less frequently than severability clauses.[553] While the Supreme Court has not addressed the effect of inseverability clauses, courts generally treat them as creating a presumption of inseverability, just as severability clauses create a presumption of severability.[554]

## Problem 6-3

In 1995, the legislature of the State of Ames enacted the Ames Zoning Code to create a uniform system of regulating zoning and planning in the State. The law included the following provision that addressed coastal development:

**Section 100. Oceanfront Development**

(a) Except as provided in subsection (b), no person may construct a house, store, factory, building, or any other structure within 100 feet of the ocean.

(b) Boardwalks, docks, and lifeguard towers may be constructed within 100 feet of the ocean.

Saint Stephen's church is located on oceanfront property in Sea Isle, Ames and the building is 110 feet from the ocean. Saint Stephen's Church would like to build an altar and cross adjacent to their church to hold services on the beach. The altar resembles a table and is 5 feet wide by 7 feet wide. The cross is 8 feet tall and 2 feet wide. The church leaders have selected a site for the altar and cross that is 75 feet from the ocean. Several neighbors, however, have objected to the altar and cross, alleging that the Ames Zoning Code prohibits the church from building the altar and cross on the proposed location.

There is nothing in the legislative history of the Ames Zoning Code that indicates whether the Ames legislature intended to require churches or houses of worship to comply with the Code, and the Code does not explicitly exempt churches or houses of worship from zoning or planning requirements.

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552 *See* Shumsky, *supra* note 65, at 245-266 (arguing that severability clauses are laws enacted through the Article I, §7 process and rejecting arguments that such clauses usurp judicial power and violate non-delegation principles).

553 *Id.* at 243-44. *See also* Jellum, *supra* note 165, at 350.

554 *See* Shumsky, *supra* note 65, at 243-44.

## Problem 6-3 (continued)

However, in the same year that Ames enacted the Zoning Code, the legislature enacted the Ames Anti-Gambling Law. That law prohibits all forms of gambling in the State of Ames, except for the State lottery and "games of chance" that are operated by religious organizations. The legislative history of the Anti-Gambling Law suggests that the legislature was concerned that a prohibition on "games of chance" operated by religious organizations might be held unconstitutional as a violation of the Free Exercise Clause of the United State Constitution. That clause provides that "Congress shall make no law … prohibiting the free exercise [of religion]."

After the Anti-Gambling Law was enacted, opponents argued that the special treatment afforded to religious organizations under the statute violated the Establishment Clause of the Constitution. That clause provides that "Congress shall make no law respecting an establishment of religion." That law has not, however, been challenged in court.

There is also some case law that has interpreted Section 100 of the Ames Zoning Code. In Ames v. Abrams, Sean Abrams, a home repair contractor who lived on beachfront property argued that he should be allowed to build a 10-foot by 10-foot storage shed on his property just 50 feet from the ocean under the Code, because his shed was not a "structure." Abrams planned to use the shed to store several thousand dollars' worth of tools, but he did not plan to live in the shed. The trial court held that the storage shed was a "structure" under the Code, and that Abrams could not build his shed on that location. The decision was affirmed by a State appellate court and the State Supreme Court (in 1998) without comment. The Ames legislature has not amended Section 100 of the Code subsequent to the Supreme Court's decision.

Finally, the most recent edition of the Webster's Dictionary defines the word "structure" as (1) a building; (2) anything that has been built or constructed, regardless of size.

On what basis could the neighbors argue that the statute prohibits the construction of the altar and cross on the location preferred by St. Stephen's Church? On what basis could Saint Stephen's argue that the statute does not prohibit the construction?

# V. Federalism Canon

The ***federalism canon*** provides that courts will not interpret federal statutes to interfere with core aspects of state government (also referred to as traditional state functions) unless Congress clearly expresses its intent to do so in the text of the statute.[555] *See* *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).[556] However, as with most other substantive policy canons, courts should not rely on the canon to justify an unreasonable interpretation of a statute.

The federalism canon was created to advance principles of federalism and protect state sovereignty.[557] In some ways, it is similar to the constitutional avoidance canon[558], as it addresses the relationship of federal and state sovereignty, an issue that is addressed by the 10th Amendment to the Constitution.[559] However, it applies more broadly than the constitutional avoidance doctrine, since the 10th Amendment does not limit Congress' ability to impose requirements on state governments as long as Congress has authority to enact legislation including those limits under the Commerce Clause or another constitutional provision.[560] Thus, the canon counsels courts to avoid an interpretation that would not necessarily raise significant constitutional concerns.[561] Also unlike the constitutional avoidance canon, courts do not consult sources other than the text of the statute to find evidence that Congress intended the interpretation that interferes with traditional state functions.

In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the Supreme Court set forth the federalism canon. In the case, the Court focuses on the application of the federal Age Discrimination

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555 *See* Bressman, Rubin & Stack, *supra* note 63, at 254 (contrasting clear statement canons, presumptions, and tie-breakers); Eskridge, Brudney, et. al, *supra* note 17, at 690 (questioning the Court's faithfulness to rely solely on the text); Levy & Glicksman, *supra* note 340, at 166.

556 In *BFP v. Resolution Trust Corp.*, the Court wrote that federal statutes that impinge on state interests "cannot … be construed without regard to the implications of our dual system of government … [W]hen the Federal Government takes over … local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating (must be) reasonably explicit." 511 U.S. 531, 544 (1994), *quoting* Felix Frankfurter, *Some Reflections on Reading Statutes,* 47 Colum. L. Rev. 527, 539-540 (1947).

557 *See* Jellum, *supra* note 165, at 522; Manning & Stephenson, *supra* note 4, at 413.

558 *See* Bressman, Rubin & Stack, *supra* note 63, at 264.

559 U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.")

560 In cases where a federal statute interferes with traditional state functions in a manner that raises serious constitutional concerns, both canons could apply. *See, e.g.,* *Solid Waste Agency of Northern Cook County v. Corps v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (reading the Clean Water Act narrowly to avoid a serious Commerce Clause question and because the Clean Water Act regulated land and water management, areas of traditional state responsibility).

561 *See* Manning & Stephenson, *supra* note 4, at 413.

in Employment Act to state court judges. Some background on two cases that preceded *Gregory* will help you understand *Gregory*. First, in 1976, in *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court held that the Fair Labor Standards Act could not be applied to various state employees because the 10th Amendment prohibited the regulation of "traditional" or "integral" state functions. Just six years later, the Court overruled that decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). In *Garcia*, the Court held that tests focusing on whether state functions were "traditional," "integral," or "necessary" were unworkable, and that the 10th Amendment did not prohibit federal regulation of such functions. *Id.* at 531, 547-555. According to the Court, the only protection states had from such regulation was through the political process. *Id.* at 552-555.

Governor John Ashcroft – Public Domain

## GREGORY V. ASHCROFT

**501 U.S. 452 (1991)**

**JUSTICE O'CONNOR** delivered the opinion of the Court.

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument Audio (From Oyez)
ADEA
Case Background (From Quimbee)
Video Summary (Prof. Stevenson – South Texas College of Law)

Article V, § 26, of the Missouri Constitution provides that "[a]ll judges other than municipal judges shall retire at the age of seventy years. We consider whether this mandatory retirement provision violates the federal Age Discrimination in Employment Act of 1967 (ADEA) * * * The ADEA makes it unlawful for an "employer" to discharge any individual" who is at least 40 years old "because of such individual's age." 29 U.S.C. §§ 623(a), 631(a). The term "employer" is defined to include "a State or political subdivision of a State. [The petitioners are State court judges (and, thus, State employees) who were initially appointed to office by the Governor of Missouri and who have been retained in office pursuant to a retention election in which the judges ran unopposed, subject to a "yes" or "no vote. The petitioners sued in district court, seeking to obtain a declaration that the mandatory retirement age in the Missouri Constitution violates the ADEA. The district court dismissed the action, concluding that the judges were "appointees on the policymaking level," a category of state officials excluded from the definition of "employees" covered by the Act. The Court of Appeals affirmed.]

II

* * *

A.

As every schoolchild learns, Our Constitution establishes a system of dual sovereignty between the States and the Federal Government. This Court also has recognized this fundamental principle. * * * [U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. * * *

The Constitution created a Federal Government of limited powers. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amdt. 10. The States thus retain substantial sovereign authority under our constitutional system. * * *

Perhaps the principal benefit of the federalist system is a check on abuses of government power. "The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. * * * These twin powers will act as mutual restraints only if both are credible. * * *

The Federal Government holds a decided advantage in this delicate balance: the Supremacy Clause. U.S. Const., Art. VI, cl. 2. As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly.

The present case concerns a state constitutional provision through which the people of Missouri establish a qualification for those who sit as their judges. This provision goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign. * * *

Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers. For this reason, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" this balance. We explained recently:

> "If Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' * * * Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States * * *

This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere. * * *

[Recent] cases stand in recognition of the authority of the people of the States to determine the qualifications of their most important government officials. It is an authority that lies at "'the heart of representative government.'" It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States "guarantee[s] to every State in this Union a Republican Form of Government." U.S. Const., Art. IV, § 4.

The authority of the people of the States to determine the qualifications of their government officials is, of course, not without limit. Other constitutional provisions, most notably the *Fourteenth Amendment*, proscribe certain qualifications; our review of citizenship requirements under the political function exception is less exacting, but it is not absent. Here, we must decide what Congress did in extending the ADEA to the States, pursuant to its powers under the *Commerce Clause*. As against Congress' powers "to regulate Commerce . . . among the several States," U.S. Const., Art. I, § 8, cl. 3, the authority of the people of the States to determine the qualifications of their government officials may be inviolate.

We are constrained in our ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause. See *Garcia v. San Antonio Metropolitan Transit Authority,* (declining to review limitations placed on Congress' *Commerce Clause* powers by our federal system). But there is no need to do so if we hold that the ADEA does not apply to state judges. Application of the plain statement rule thus may avoid a potential constitutional problem. Indeed, inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "To give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."

B.

In 1974, Congress extended the substantive provisions of the ADEA to include the States as employers. 29 U. S. C. § 630(b)(2). At the same time, Congress amended the definition of "employee" to exclude all elected and most high-ranking government officials. Under the Act, as amended:

> "The term 'employee' means an individual employed by any employer except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office." 29 U. S. C. § 630(f).

Governor Ashcroft contends that the § 630(f) exclusion of certain public officials also excludes judges, like petitioners, who are appointed to office by the Governor and are then subject to retention election. The Governor points to two passages in *§ 630(f)*. First, he argues, these judges are selected by an elected official and, because they make policy, are "appointee[s] on the policymaking level."

Petitioners counter that judges merely resolve factual disputes and decide questions of law; they do not make policy. Moreover, petitioners point out that the policymaking-level exception is part of a trilogy, tied closely to the elected-official exception. Thus, the Act excepts elected officials and: (1) "any person chosen by such officer to be on such officer's personal staff"; (2) "an appointee on the policymaking level"; and (3) "an immediate advisor with respect to the exercise of the constitutional or legal powers of the office." Applying the maxim of statutory construction *noscitur a sociis* -- that a word is known by the company it keeps -- petitioners argue that since (1) and (3) refer only to those in close working relationships with elected officials, so too must (2). Even if it can be said that judges may make policy, petitioners contend, they do not do so at the behest of an elected official.

Governor Ashcroft relies on the plain language of the statute: It exempts persons appointed "at the policymaking level." The Governor argues that state judges, in fashioning and applying the common law, make policy. * * * Governor Ashcroft contends that Missouri judges make policy in other ways as well. The Missouri Supreme Court and Courts of Appeals have supervisory authority over inferior courts. The Missouri Supreme Court has the constitutional duty to establish rules of practice and procedure for the Missouri court system, and inferior courts exercise policy judgment in establishing local rules of practice. The state courts have supervisory powers over the state bar, with the Missouri Supreme Court given the authority to develop disciplinary rules.

The Governor stresses judges' policymaking responsibilities, but it is far from plain that the statutory exception requires that judges actually make policy. The statute refers to appointees "on the policymaking level," not to appointees "who make policy." It may be sufficient that the appointee is in a position requiring the exercise of discretion concerning issues of public importance. This certainly describes the bench, regardless of whether judges might be considered policymakers in the same sense as the executive or legislature.

Nonetheless, "appointee at the policymaking level," particularly in the context of the other exceptions that surround it, is an odd way for Congress to exclude judges; a plain statement that judges are not "employees" would seem the most efficient phrasing. But in this case we are not looking for a plain statement that judges are excluded. We will not read the ADEA to cover state judges unless Congress has made it clear that judges are *included*. This does not mean that the Act must mention judges explicitly, though it does not. Rather, it must be plain to anyone reading the Act that it covers judges. In the context of a statute that plainly excludes most important state public officials, "appointee on the

policymaking level" is sufficiently broad that we cannot conclude that the statute plainly covers appointed state judges. Therefore, it does not.

The ADEA plainly covers all state employees except those excluded by one of the exceptions. Where it is unambiguous that an employee does not fall within one of the exceptions, the Act states plainly and unequivocally that the employee is included. It is at least ambiguous whether a state judge is an "appointee on the policymaking level." * * *

In the face of such ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions regardless of whether Congress acted pursuant to its Commerce Clause powers or § 5 of the Fourteenth Amendment.

**JUSTICE WHITE**, with whom **JUSTICE STEVENS** joins, concurring in part, dissenting in part, and concurring in the judgment.

I.

While acknowledging [the] principle of federal legislative supremacy, the majority nevertheless imposes upon Congress a "plain statement" requirement. The majority claims to derive this requirement from the plain statement approach developed in our Eleventh Amendment cases, see, *e. g., Atascadero*, and applied two Terms ago in *Will.* The issue in those cases, however, was whether Congress intended a particular statute to extend to the States *at all*. In *Atascadero*, for example, the issue was whether States could be sued under § 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794. Similarly, the issue in *Will* was whether States could be sued under 42 U. S. C. § 1983. In the present case, by contrast, Congress has expressly extended the coverage of the ADEA to the States and their employees. Its intention to regulate age discrimination by States is thus "unmistakably clear in the language of the statute." *Atascadero*. The only dispute is over the precise details of the statute's application. We have never extended the plain statement approach that far, and the majority offers no compelling reason for doing so.

* * *

The majority's plain statement rule is not only unprecedented, it directly contravenes our decisions in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985), and *South Carolina v. Baker,* 485 U.S. 505 (1988). In those cases we made it clear "that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity." We also rejected as "unsound in principle and unworkable in practice" any test for state immunity that requires a judicial determination of which state activities are "'traditional,'" "'integral,'" or "'necessary.'" The majority disregards those decisions in its attempt to carve out areas of state activity that will receive special protection from federal legislation.

The majority's approach is also unsound because it will serve only to confuse the law. First, the majority fails to explain the scope of its rule. Is the rule limited to federal regulation of the qualifications of state officials? Or does it apply more broadly to the regulation of any "state governmental functions"? Second, the majority does not explain

its requirement that Congress' intent to regulate a particular state activity be "plain to anyone reading [the federal statute].” Does that mean that it is now improper to look to the purpose or history of a federal statute in determining the scope of the statute's limitations on state activities? If so, the majority's rule is completely inconsistent with our pre-emption jurisprudence. The vagueness of the majority's rule undoubtedly will lead States to assert that various federal statutes no longer apply to a wide variety of state activities if Congress has not expressly referred to those activities in the statute. Congress, in turn, will be forced to draft long and detailed lists of which particular state functions it meant to regulate. * * *

The majority asserts that its plain statement rule is helpful in avoiding a "potential constitutional problem.” It is far from clear, however, why there would be a constitutional problem if the ADEA applied to state judges, in light of our decisions in *Garcia* and *Baker*, discussed above. As long as “the national political *process* did not operate in a defective manner, the Tenth Amendment is not implicated.” There is no claim in this case that the political process by which the ADEA was extended to state employees was inadequate to protect the States from being "unduly burdened" by the Federal Government. In any event, as discussed below, a straightforward analysis of the ADEA's definition of "employee" reveals that the ADEA does not apply here. Thus, even if there were potential constitutional problems in extending the ADEA to state judges, the majority's proposed plain statement rule would not be necessary to avoid them in this case. Indeed, because this case can be decided purely on the basis of statutory interpretation, the majority's announcement of its plain statement rule, which purportedly is derived from constitutional principles, *violates* our general practice of avoiding the unnecessary resolution of constitutional issues. * * * *

The majority’s departures from established precedent are even more disturbing when it is realized, as discussed below, that this case can be affirmed based on simple statutory construction.

II.

The statute at issue in this case is the ADEA's definition of "employee," which provides:

> "The term 'employee' means an individual employed by any employer except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision." 29 U. S. C. § 630(f).

A parsing of that definition reveals that it excludes from the definition of "employee" (and thus the coverage of the ADEA) four types of (noncivil service) state and local employees:

(1) persons elected to public office; (2) the personal staff of elected officials; (3) persons appointed by elected officials to be on the policymaking level; and (4) the immediate advisers of elected officials with respect to the constitutional or legal powers of the officials' offices.

The question before us is whether petitioners fall within the third exception. * * * * [I] conclude that petitioners are "on the policymaking level."

"Policy" is defined as "a definite course or method of action selected (as by a government, institution, group, or individual) from among alternatives and in the light of given conditions to guide and usu[ally] determine present and future decisions." Webster's Third New International Dictionary 1754 (1976). Applying that definition, it is clear that the decisionmaking engaged in by common-law judges, such as petitioners, places them "on the policymaking level." In resolving disputes, although judges do not operate with unconstrained discretion, they do choose "from among alternatives" and elaborate their choices in order "to guide and . . . determine present and future decisions." * * *

Moreover, it should be remembered that the statutory exception refers to appointees "on the policymaking level," not "policymaking employees." Thus, whether or not judges actually *make* policy, they certainly are on the same *level* as policymaking officials in other branches of government and therefore are covered by the exception. * * *

Petitioners argue that the "appointee[s] on the policymaking level" exception should be construed to apply "only to persons who advise or work closely with the elected official that chose the appointee." Brief for Petitioners 18. In support of that claim, petitioners point out that the exception is “sandwiched" between the "personal staff" and "immediate adviser" exceptions in § 630(f), and thus should be read as covering only similar employees.

Petitioners' premise, however, does not prove their conclusion. It is true that the placement of the "appointee" exception between the "personal staff" and "immediate adviser" exceptions suggests a similarity among the three. But the most obvious similarity is simply that each of the three sets of employees are connected in some way with elected officials: The first and third sets have a certain working relationship with elected officials, while the second is *appointed* by elected officials. There is no textual support for concluding that the second set must *also* have a close working relationship with elected officials. Indeed, such a reading would tend to make the "appointee" exception superfluous since the "personal staff" and "immediate adviser" exceptions would seem to cover most appointees who are in a close working relationship with elected officials.

Petitioners seek to rely on legislative history, but it does not help their position. There is little legislative history discussing the definition of "employee" in the ADEA, so petitioners point to the legislative history of the identical definition in Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e(f). If anything, that history tends to confirm that the "appointee[s] on the policymaking level" exception was designed to exclude from the

coverage of the ADEA all high level appointments throughout state government structures, including judicial appointments. * * *

[The dissenting opinion of **JUSTICE BLACKMUN**, joined by **JUSTICE MARSHALL**, is omitted.]

## Questions and Comments

**1. Statutory interpretation question:** What was the statutory interpretation question that the Court was trying to decide? How does the statute define "employee"? The judges who were arguing that the FLSA applied to them were initially appointed by the Governor but were subject to a retention "election" to be reappointed for additional terms. If the Court had concluded that they were "elected," how might that have impacted the Court's analysis of the challenge?

**2. Justice O'Connor's federalism tome:** Part I of Justice O'Connor's opinion for the majority has been heavily edited above, as she was a leading advocate for states' rights and federalism during her tenure on the Court and several pages in Part I outlined the need for a federalism canon to protect states' rights.

**3. Scope of the canon:** Justice O'Connor stated that the canon applies "if Congress intends to alter the usual constitutional balance between the federal and state government." Is that a workable test? What types of laws "alter the usual constitutional balance between the federal and state government"? Why did the majority conclude that the ADEA altered that balance? What concerns does Justice White's separate opinion raise regarding the Court's application of the canon to "fundamental" or "traditional" state functions? Note that the canon has been applied in other cases to federal statutes that interfere with state control over land use and water management, redistricting, term limits and qualifications for elected officials, operation of prisons, and the definition of state crimes. *See, e.g.,* *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (water and land use); *Bond v. United States*, 572 U.S. 844 (2014) (definition of crimes); *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206 (1998) (operation of prisons).

**4. A clear statement?** Does the majority find a clear statement of Congress' intent to interfere with traditional state functions in the text of the statute by including the judges in the case in the definition of "employee"? Why or why not? Is the majority looking for a clear statement that the judges are excluded from the definition? What should the result be if the language of the statute is ambiguous? Does the majority consult sources outside of the text to determine whether the statute clearly defines these judges as employees?

**5. The separate opinion of Justices White and Stevens:** Did Justices White and Stevens agree with the majority that these judges were not "employees"? Did they apply the federalism canon and look for a clear statement that the judges were included in the definition? What sources did they consult and why did they conclude that the judges were not protected by the ADEA?

**6. Legislative drafters and the fiction on legislative intent:** In their survey of legislative drafters, Professors Gluck and Bressman found that drafters were generally unaware of the federalism canon and did not rely on it when drafting statutes. *See* Abbe R. Gluck and Lisa Schultz Bressman, *Statutory Interpretation from the Inside - An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 942-945 (2013). Should that impact courts' application of the canon?

**7. Criticism of the canon:** Professor Eskridge and colleagues suggest that the federalism canon could encourage judicial activism because it is easier for courts to use the canon to reach an interpretation that they prefer than to reach the same result by striking down a statute on constitutional grounds. *See* William N. Eskridge Jr., Abbe R. Gluck, & Victoria F. Nourse, STATUTES, REGULATION AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES, 548-49 (West Acad. Pub. 2014).

## VIDEO LECTURE

**Click on the following links for a two part series of videos on *Gregory v. Ashcroft* by Professor Stephen Johnson – Part 1; Part 2.**

## Problem 6-4

The United States is a signatory to an international treaty to prohibit the development, production, stockpiling, and use of chemical weapons. The stated goals for the treaty include "general and complete disarmament under strict and effective international control, including the prohibition and elimination of all types of weapons of mass destruction."

In 1998, the United States Congress enacted the Chemical Weapons Convention Implementation Act to implement the international treaty. That statute includes the following provisions:

18 U.S.C. § 229(a)(1) prohibits any person from "producing, acquiring, possessing or using any chemical weapon".

18 U.S.C. § 229F(1)(A) defines "chemical weapon" as "a toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter."

## Problem 6-4 (continued)

18 U.S.C. § 229F(8)(A) defines "toxic chemical" as "any chemical which through its chemical action on life processes can cause death, temporary incapacitation, or permanent harm to humans or animals."

18 U.S.C. § 229F(7) defines "purposes not prohibited by this chapter" to be "any peaceful purpose related to an industrial, agricultural, research or medical, or pharmaceutical activity or other activity."

A person who violates Section 229 can be imprisoned and could be subject to the death penalty if the violation of Section 229 causes a person's death.

In 2006, Carol Brady, a microbiologist in Pennsylvania, discovered that her husband was having an affair with her closest friend, Anne Davis. Brady stole a vial of potassium dichromate from her employer and spread the chemical on Davis' car door, mailbox, and doorknob. The chemical is toxic to humans and is lethal to humans in high doses. Davis received severe burns from the chemicals but was not otherwise injured. However, federal prosecutors charged Brady with violating 18 U.S.C. § 229(a)(1) by possessing and using a chemical weapon. The American Heritage Dictionary defines "weapon" as "an instrument of attack or defense in combat."

On what basis can Brady argue that she cannot be prosecuted under 18 U.S.C. § 229(a)(1)? On what basis can the United States argue that she can be prosecuted under that provision? You can assume, for purposes of this question, that potassium dichromate is a toxic chemical and that Bond's use of the chemical was not for "a peaceful purpose related to an industrial, agricultural, research or medical, or pharmaceutical activity or other activity." Incidentally, the definition of "toxic chemical" in the statute is broad enough to include detergent and stain removers because they could cause temporary incapacitation or permanent harm to humans or animals in sufficient concentrations.

It should also be helpful to know that the United States Supreme Court has held that States have broad authority to enact legislation for the public good under their "police power," see *United States v. Lopez*, 514 U.S. 549, 567 (1995), and that the Court has long held that States have broad and primary authority to define and prosecute criminal activities in the State that do not extend beyond state lines. At the same time, though, Congress has the power to create federal crimes in executing its powers under the Commerce Clause or other constitutional authorities, including the Treaty Power.

**CALI SECTION QUIZ**

Before moving on to the next section, why not try a short quiz on the material you just read at www.cali.org/lesson/19761. It should take about 30 minutes to complete.

## VI. Presumption Against Preemption

The ***presumption against preemption*** canon is closely related to the federalism canon and motivated by similar concerns for state sovereignty.[562] In order to understand the canon, though, some background information about preemption is necessary.

The Supremacy Clause of the Constitution provides that the Constitution and federal laws are "the supreme Law of the Land,"[563] so a federal law preempts a state law when there is a conflict between them.[564] In the statutory interpretation context, Congress can preempt state laws ***expressly*** or ***implicitly***. In cases of ***express preemption***, a statute may explicitly state that it preempts state law in a particular manner.[565] ***Implied preemption***, on the other hand, arises in a variety of ways. One type of implied preemption is ***field preemption***, where Congressional legislation in a particular field is so comprehensive and pervasive that courts conclude that Congress implicitly "occupied the field," preempting state law.[566] A second type of implied preemption is ***impossibility preemption***. If it is impossible to simultaneously comply with state law and a federal statute, the federal law preempts the state law.[567] The third type of implied preemption is ***obstacle preemption***. In some cases, it is ***possible*** to simultaneously comply with both state law and federal law, but compliance with state law will ***frustrate the purposes or objectives*** of the federal law. If so, the federal law preempts state law.[568]

While preemption can apply in all those contexts, the ***presumption against preemption*** provides that courts should presume that federal laws do ***not*** preempt state law unless that was the clear and manifest purpose of Congress. *See* *Wyeth v. Levine*, 555 U.S. 555

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562 *See* Eskridge, Gluck & Nourse, *supra* note 475, at 532 (referring to the presumption as one of the oldest of the federalism canons, created in 1957 in *Rice v. Santa Fe Elevator*, 331 U.S. 218 (1947)).

563 U.S. CONST., Art. IV, Cl. 2.

564 *See* Jellum, *supra* note 165, at 531.

565 *See* Bressman, Rubin & Stack, *supra* note 63, at 265; Jellum, *supra* note 165, at 531.

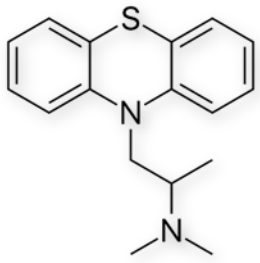
566 *See* Manning & Stephenson, *supra* note 4, at 436, *citing* *California v. ARC America Corp*,. 490 U.S. 93, 100 (1989); Jellum, *supra* note 165, at 387 (identifying the Labor Management Relations Act; the Employee Retirement Income Security Act; and the National Bank Act as three statutes where the Supreme Court found field preemption); Levy and Glicksman, *supra* note 340, at 166-67.

567 *See* Jellum, *supra* note 165, at 387; Manning & Stephenson, *supra* note 4, at 436, *citing* *Southland Corp. v. Keating*, 465 U.S. 1 (1984); Bressman, Rubin & Stack, *supra* note 63, at 266.

568 *See* Jellum, *supra* note 165, at 387; Manning & Stephenson, *supra* note 4, at 436; Bressman, Rubin & Stack, *supra* note 63, at 266.

(2009); *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947). Although the canon is a clear statement canon, the presumption in the canon is weaker than the presumption in the federalism canon and can be rebutted by evidence beyond the text of the statute.[569] The presumption applies even in cases where Congress includes an express preemption provision in a statute.[570] In those cases, the canon urges courts to interpret the scope of the preemption provision narrowly.[571]

In the following case, *Wyeth v. Levine*, 555 U.S. 555 (2009), the Supreme Court applies the presumption and concludes that the challenger can recover damages from Wyeth Labs in a state common law tort action for mis-labeling a drug, even though Wyeth complied with federal law when labeling the drug.




Chemical Diagram of Phenergan – Public Domain

## WYETH V. LEVINE

**555 U.S. 555 (2009)**

**JUSTICE STEVENS** delivered the opinion of the Court.

Directly injecting the drug Phenergan into a patient's vein creates a significant risk of catastrophic consequences. A Vermont jury found that petitioner Wyeth, the manufacturer of the drug, had failed to provide an adequate warning of that risk and awarded damages to respondent Diana Levine to compensate her for the amputation of her arm. The warnings on Phenergan's label had been deemed sufficient by the federal Food and Drug Administration (FDA) when it approved Wyeth's new drug application in 1955 and when it later approved changes in the drug's labeling. The question we must decide is whether the FDA's approvals provide Wyeth with a complete defense to Levine's tort claims. We conclude that they do not.

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument Audio (From Oyez)
Food, Drug and Cosmetic Act
Case Background (From Quimbee)
Phenergan Information (WebMD)
Pfizer (Current Parent of Wyeth)

I

Phenergan is Wyeth's brand name for promethazine hydrochloride, an antihistamine used to treat nausea. The injectable form of Phenergan can be administered intramuscularly or intravenously, and it can be administered intravenously through either the "IV-push"

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569 *See* Bressman, Rubin & Stack, *supra* note 63, at 265; Jellum, *supra* note 165, at 531-32. The willingness of courts to look beyond statutory text to rebut the presumption prompts Justice Thomas' separate opinion in the *Wyeth* case that follows this introduction to the canon.

570 *See* Bressman, Rubin & Stack, *supra* note 63, at 265.

571 *See* Bressman, Rubin & Stack, *supra* note 63, at 265-66, *citing Riegel v. Medtronic, Inc.,* 552 U.S. 312, 334-35 (2008) (Ginsburg, J., dissenting); Manning & Stephenson, *supra* note 4, at 435. The Court interpreted an express preemption provision narrowly in *Cipollone v. Liggett Group, Inc*., 505 U.S. 504 (1992).

method, whereby the drug is injected directly into a patient's vein, or the "IV-drip" method, whereby the drug is introduced into a saline solution in a hanging intravenous bag and slowly descends through a catheter inserted in a patient's vein. * * * Levine's injury resulted from an IV-push injection of Phenergan. * * *

Levine brought an action for damages against Wyeth, relying on common-law negligence and strict-liability theories. Although Phenergan's labeling warned of the danger of gangrene and amputation following inadvertent intra-arterial injection, Levine alleged that the labeling was defective because it failed to instruct clinicians to use the IV-drip method of intravenous administration instead of the higher risk IV-push method. * * * Wyeth filed a motion for summary judgment, arguing that Levine's failure-to-warn claims were pre-empted by federal law. [Levine was awarded $7.4 million in damages by the trial court, which subsequently reduced the award. The Vermont Supreme Court affirmed the trial court's decision.] * * *

II

Wyeth makes two separate pre-emption arguments: first, that it would have been impossible for it to comply with the state-law duty to modify Phenergan's labeling without violating federal law, and second, that recognition of Levine's state tort action creates an unacceptable "obstacle to the accomplishment and execution of the full purposes and objectives of Congress", because it substitutes a lay jury's decision about drug labeling for the expert judgment of the FDA. * * *

The * * * question presented is whether federal law pre-empts Levine's claim that Phenergan's label did not contain an adequate warning about using the IV-push method of administration.

Our answer to that question must be guided by two cornerstones of our pre-emption jurisprudence. First, "the purpose of Congress is the ultimate touchstone in every pre-emption case." Second, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated … in a field which the States have traditionally occupied,' … we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996) (*quoting Rice* v. *Santa Fe Elevator Corp*., 331 U. S. 218, 230 (1947)).

[The Court then discussed the history of federal legislation on drugs and drug labeling to identify Congressional concerns about unsafe drugs and fraudulent marketing as major purposes for the laws.] * * * As it enlarged the FDA's powers to "protect the public health" and "assure the safety, effectiveness, and reliability of drugs," Congress took care to preserve state law. The 1962 amendments added a saving clause, indicating that a provision of state law would only be invalidated upon a "direct and positive conflict" with the FDCA. Consistent with that provision, state common-law suits "continued unabated despite … FDA regulation." And when Congress enacted an express pre-emption

provision for medical devices in 1976, it declined to enact such a provision for prescription drugs. * * *

III

Wyeth first argues that Levine's state-law claims are pre-empted because it is impossible for it to comply with both the state-law duties underlying those claims and its federal labeling duties. The FDA's premarket approval of a new drug application includes the approval of the exact text in the proposed label. See 21 U. S. C. §355; 21 CFR §314.105(b) (2008). Generally speaking, a manufacturer may only change a drug label after the FDA approves a supplemental application. There is, however, an FDA regulation that permits a manufacturer to make certain changes to its label before receiving the agency's approval. Among other things, this "changes being effected" (CBE) regulation provides that if a manufacturer is changing a label to "add or strengthen a contraindication, warning, precaution, or adverse reaction" or to "add or strengthen an instruction about dosage and administration that is intended to increase the safe use of the drug product," it may make the labeling change upon filing its supplemental application with the FDA; it need not wait for FDA approval. §§314.70(c)(6)(iii)(A), (C).

Wyeth argues that the CBE regulation is not implicated in this case because a 2008 amendment provides that a manufacturer may only change its label "to reflect newly acquired information." Resting on this language * * * , Wyeth contends that it could have changed Phenergan's label only in response to new information that the FDA had not considered. * * * Thus, Wyeth insists, it was impossible for it to discharge its state-law obligation to provide a stronger warning about IV-push administration without violating federal law. Wyeth's argument misapprehends both the federal drug regulatory scheme and its burden in establishing a pre-emption defense.

We need not decide whether the 2008 CBE regulation is consistent with the FDCA and the previous version of the regulation, as Wyeth and the United States urge, because Wyeth could have revised Phenergan's label even in accordance with the amended regulation. As the FDA explained in its notice of the final rule, " 'newly acquired information' " is not limited to new data, but also encompasses "new analyses of previously submitted data." * * * [A]s amputations continued to occur, Wyeth could have analyzed the accumulating data and added a stronger warning about IV-push administration of the drug.

Wyeth argues that if it had unilaterally added such a warning, it would have violated federal law governing unauthorized distribution and misbranding. Its argument that a change in Phenergan's labeling would have subjected it to liability for unauthorized distribution rests on the assumption that this labeling change would have rendered Phenergan a new drug lacking an effective application. But strengthening the warning about IV-push administration would not have made Phenergan a new drug. See 21 U.S.C. §321(p)(1) (defining "new drug"); 21 CFR §310.3(h). Nor would this warning have rendered Phenergan misbranded. The FDCA does not provide that a drug is misbranded

simply because the manufacturer has altered an FDA-approved label; instead, the misbranding provision focuses on the substance of the label and, among other things, proscribes labels that fail to include "adequate warnings." 21 U.S.C. §352(f). * * * And the very idea that the FDA would bring an enforcement action against a manufacturer for strengthening a warning pursuant to the CBE regulation is difficult to accept—neither Wyeth nor the United States has identified a case in which the FDA has done so. * * *

Impossibility pre-emption is a demanding defense. On the record before us, Wyeth has failed to demonstrate that it was impossible for it to comply with both federal and state requirements. The CBE regulation permitted Wyeth to unilaterally strengthen its warning, and the mere fact that the FDA approved Phenergan's label does not establish that it would have prohibited such a change.

IV

Wyeth also argues that requiring it to comply with a state-law duty to provide a stronger warning about IV-push administration would obstruct the purposes and objectives of federal drug labeling regulation. Levine's tort claims, it maintains, are pre-empted because they interfere with "Congress's purpose to entrust an expert agency to make drug labeling decisions that strike a balance between competing objectives." We find no merit in this argument, which relies on an untenable interpretation of congressional intent and an overbroad view of an agency's power to pre-empt state law.

Wyeth contends that the FDCA establishes both a floor and a ceiling for drug regulation: Once the FDA has approved a drug's label, a state-law verdict may not deem the label inadequate, regardless of whether there is any evidence that the FDA has considered the stronger warning at issue. The most glaring problem with this argument is that all evidence of Congress' purposes is to the contrary. Building on its 1906 Act, Congress enacted the FDCA to bolster consumer protection against harmful products. Congress did not provide a federal remedy for consumers harmed by unsafe or ineffective drugs in the 1938 statute or in any subsequent amendment. Evidently, it determined that widely available state rights of action provided appropriate relief for injured consumers. It may also have recognized that state-law remedies further consumer protection by motivating manufacturers to produce safe and effective drugs and to give adequate warnings.

If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point during the FDCA's 70-year history. But despite its 1976 enactment of an express pre-emption provision for medical devices, see §521, , Congress has not enacted such a provision for prescription drugs. Its silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness. * * *

Despite this evidence that Congress did not regard state tort litigation as an obstacle to achieving its purposes, Wyeth nonetheless maintains that, because the FDCA requires the FDA to determine that a drug is safe and effective under the conditions set forth in its

labeling, the agency must be presumed to have performed a precise balancing of risks and benefits and to have established a specific labeling standard that leaves no room for different state-law judgments. In advancing this argument, Wyeth relies not on any statement by Congress, but instead on the preamble to a 2006 FDA regulation governing the content and format of prescription drug labels. In that preamble, the FDA declared that the FDCA establishes "both a 'floor' and a 'ceiling,' " so that "FDA approval of labeling … preempts conflicting or contrary State law." It further stated that certain state-law actions, such as those involving failure-to-warn claims, "threaten FDA's statutorily prescribed role as the expert Federal agency responsible for evaluating and regulating drugs."

This Court has recognized that an agency regulation with the force of law can pre-empt conflicting state requirements. * * * We are faced with no such regulation in this case, but rather with an agency's mere assertion that state law is an obstacle to achieving its statutory objectives. Because Congress has not authorized the FDA to pre-empt state law directly, cf. 21 U. S. C. §360k (authorizing the FDA to determine the scope of the Medical Devices Amendments' pre-emption clause), the question is what weight we should accord the FDA's opinion. [The Court then concluded that the agency's statement was not entitled to deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944), especially since the statement was in the preamble to a regulation. It also noted that the statement in the preamble conflicted with evidence of the statute's purposes and constituted a unexplained reversal of the agency's prior longstanding position.] * * *

In keeping with Congress' decision not to pre-empt common-law tort suits, it appears that the FDA traditionally regarded state law as a complementary form of drug regulation. The FDA has limited resources to monitor the 11,000 drugs on the market, and manufacturers have superior access to information about their drugs, especially in the postmarketing phase as new risks emerge. State tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly. They also serve a distinct compensatory function that may motivate injured persons to come forward with information. Failure-to-warn actions, in particular, lend force to the FDCA's premise that manufacturers, not the FDA, bear primary responsibility for their drug labeling at all times. Thus, the FDA long maintained that state law offers an additional, and important, layer of consumer protection that complements FDA regulation. The agency's 2006 preamble represents a dramatic change in position. * * *

In short, Wyeth has not persuaded us that failure-to-warn claims like Levine's obstruct the federal regulation of drug labeling. Congress has repeatedly declined to pre-empt state law, and the FDA's recently adopted position that state tort suits interfere with its statutory mandate is entitled to no weight. Although we recognize that some state-law claims might well frustrate the achievement of congressional objectives, this is not such a case.

V

We conclude that it is not impossible for Wyeth to comply with its state and federal law obligations and that Levine's common-law claims do not stand as an obstacle to the accomplishment of Congress' purposes in the FDCA. Accordingly, the judgment of the Vermont Supreme Court is affirmed.

It is so ordered.

**JUSTICE THOMAS**, concurring in the judgment.

I agree with the Court that the fact that the Food and Drug Administration (FDA) approved the label for petitioner Wyeth's drug Phenergan does not pre-empt the state-law judgment before the Court. That judgment was based on a jury finding that the label did not adequately warn of the risk involved in administering Phenergan through the IV-push injection method. Under federal law, without prior approval from the FDA, Wyeth could have "add[ed] or strengthen[ed]" information on its label about "a contraindication, warning, precaution, or adverse reaction," 21 CFR §314.70(c)(6)(iii)(A) (2008), or "about dosage and administration that is intended to increase the safe use of the drug product," §314.70(c)(6)(iii)(C), in order to "reflect newly acquired information," including "new analyses of previously submitted data," about the dangers of IV-push administration of Phenergan. It thus was possible for Wyeth to label and market Phenergan in compliance with federal law while also providing additional warning information on its label beyond that previously approved by the FDA. In addition, federal law does not give drug manufacturers an unconditional right to market their federally approved drug at all times with the precise label initially approved by the FDA. The Vermont court's judgment in this case, therefore, did not directly conflict with federal law and is not pre-empted.

I write separately, however, because I cannot join the majority's implicit endorsement of far-reaching implied pre-emption doctrines. In particular, I have become increasingly skeptical of this Court's "purposes and objectives" pre-emption jurisprudence. Under this approach, the Court routinely invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law. Because implied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution, I concur only in the judgment.

## Questions and Comments

**1. Statutory interpretation question:** What was the statutory interpretation question that the Court was trying to decide? Did the Food, Drug, and Cosmetic Act include an express preemption provision? Is a saving clause an express preemption provision? Did the case involve field preemption?

**2. The presumption as a starting point:** How did Justice Stevens frame the presumption against preemption in his majority opinion? When does the Court apply the presumption? Is it a tiebreaker to be applied in the event that the statute is ambiguous?

**3. Impossibility preemption:** Why does Wyeth argue that it would be impossible to comply with the FDCA and the state common law requirement to provide a clearer warning about the side effects of the IV-push administration of the drug? Is the majority persuaded? Why or why not?

**4. Obstacle preemption:** Why does Wyeth argue that including the warning required by state common law would frustrate the purposes of the FDCA? What does it suggest are the law's purposes and where does it find authority for the purposes? Shouldn't an agency's identification of the purposes of a statute it administers be entitled to some deference by the Court? Does the majority agree that including the warning would frustrate the purposes of the FDCA? Why or why not? Does the majority limit its search for evidence of intent to preempt the State law to the text of the FDCA?

**5. Justice Thomas' concurring opinion:** Why doesn't Justice Thomas join the majority's opinion? What philosophical objections does he have to the Court's implied preemption jurisprudence?

**6. *Riegel v. Medtronic*:** One year before the Court decided *Wyeth*, they held that the FDCA preempts state common law negligence and strict liability claims related to injuries caused by medical devices regulated under the Act. *See* Riegel v. Medtronic, *Inc.,* 552 U.S. 312 (2008). However, that case did not involve a claim of implied preemption. As noted in *Wyeth,* the FDCA includes an express preemption provision that addresses medical devices, and the statute prohibits manufacturers from modifying devices from the design approved by the FDA. In addition, while the *Wyeth* Court argued that state tort law claims could help protect consumers from the hazards associated with drug labeling, in *Medtronic,* the Court suggested that state tort law claims could hurt consumers and public health by driving medical devices off the market after the FDA has concluded that they were safe. Thus, it would conflict with the goals of the FDCA, rather than advance those goals.

**7. Legislative drafters and the fiction on legislative intent:** In their survey of legislative drafters, Professors Abbe Gluck and Lisa Schultz Bressman found that drafters were generally familiar with the presumption against preemption. *See* Abbe R. Gluck and Lisa Schultz Bressman, *Statutory Interpretation from the Inside - An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901 (2013).

## VII. Presumption Against Retroactivity

Unlike judicial decisions, which generally operate retroactively, legislation generally operates prospectively.[572] There are times, however, when statutes will apply retroactively. A statute operates retroactively if it "attaches legal consequences to events completed before its enactment."[573] A legislature may include a provision that expressly

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572 *See* Scalia & Garner, *supra* note 192, at 261; Jellum, *supra* note 165, at 512.

573 *See* Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).

provides that the statute applies retroactively or, less commonly, courts may imply that a statute applies retroactively.[574]

Legislatures may enact retroactive statutes for various reasons, including "to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the time immediately preceding its passage, and to give comprehensive effect to a new law."[575]

However, retroactive application of a statute can raise concerns. For example, the Constitution's Ex Post Facto clause[576] prohibits retroactive application of any statute that imposes punitive sanctions.[577] Retroactive application of a statute might also violate the takings clause, the prohibition on bills of attainder, the prohibition on laws impairing the obligation of contracts, and due process.[578] Even when retroactive application of a statute does not raise constitutional concerns, it may be unfair to apply it to persons who had believed that they were engaged in conduct that was lawful at the time they engaged in it.

In light of those concerns and others, under the ***presumption against retroactivity***, courts should presume that statutes do not have retroactive effect unless there is clear legislative intent to apply the statute retroactively.[579] *See* *Landgraf v. USI Film Products*, 511 U.S. 244, 265-67 (1994). Courts generally require a significant degree of clarity to rebut the presumption.[580] Although the presumption is in part motivated by constitutional concerns, it applies in a much broader setting to laws that may not raise any constitutional concerns.[581]

The following case, *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), demonstrates the Court's application of the canon to a revision of Title VII of the Civil Rights Act.

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574 *See* Scalia & Garner, *supra* note 192, at 262.

575 *See* *Landgraf*, *supra,* at 268.

576 U.S. CONST., Art. I, §9, Cl. 3.

577 *See* Scalia & Garner, *supra* note 192, at 262; Jellum, *supra* note 165, at 513.

578 *See* *Landgraf*, *supra,* at 266.

579 *See* Jellum, *supra* note 165, at 513; Manning & Stephenson, *supra* note 4, at 471, *citing* *Johnson v. United States*, 529 U.S. 694, 701 (2000).

580 *See* Jellum, *supra* note 165, at 513; Bressman, Rubin & Stack, *supra* note 63, at 267, *citing* *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997) (statutory language must be "so clear that it could sustain only one interpretation.")

581 *See* Scalia & Garner, *supra* note 192, at 261 (noting that the canon would apply to retroactive application of a statute that reduces criminal penalties, even though the Constitution would not prohibit retroactive application of such a statute).

Thermal Laminator – Photo by Sachinkothari123 – CC BY-SA 4.0

## LANDGRAF V. USI FILM PRODUCTS

**511 U.S. 244 (1994)**

**JUSTICE STEVENS** delivered the opinion of the Court.

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument Audio (From Oyez)
Title VII of the Civil Rights Act
Case Background (From Quimbee)

The Civil Rights Act of 1991 (1991 Act or Act) creates a right to recover compensatory and punitive damages for certain violations of Title VII of the Civil Rights Act of 1964. *See* 42 U.S.C. § 1981a(a) The Act further provides that any party may demand a trial by jury if such damages are sought. *See* 42 U.S.C. 1981a(c). We granted certiorari to decide whether these provisions apply to a Title VII case that was pending on appeal when the statute was enacted. We hold that they do not.

I

From September 4, 1984, through January 17, 1986, petitioner Barbara Landgraf was employed in the USI Film Products (USI) plant in Tyler, Texas. * * * A fellow employee named John Williams repeatedly harassed her with inappropriate remarks and physical contact. Petitioner's complaints to her immediate supervisor brought her no relief, but when she reported the incidents to the personnel manager, he conducted an investigation, reprimanded Williams, and transferred him to another department. Four days later petitioner quit her job.

Petitioner filed a timely charge with the Equal Employment Opportunity Commission (EEOC or Commission). The Commission * * * issued a notice of right to sue. On July 21, 1989, petitioner commenced this action against USI, its corporate owner, and that company's successor in interest. After a bench trial, the District Court found that Williams had sexually harassed petitioner causing her to suffer mental anguish. However, the court concluded that she had not been constructively discharged. * * * Because the court found that petitioner's employment was not terminated in violation of Title VII, she was not entitled to equitable relief, and because Title VII did not then authorize any other form of relief, the court dismissed her complaint. * * *

On November 21, 1991, while petitioner's appeal was pending, the President signed into law the Civil Rights Act of 1991. The Court of Appeals rejected petitioner's argument that her case should be remanded for a jury trial on damages pursuant to the 1991 Act. * * * Finding no clear error in the District Court's factual findings, the Court of Appeals affirmed the judgment for respondents. * * *

We * * * assume * * * that if the same conduct were to occur today, petitioner would be entitled to a jury trial and that the jury might find that she was constructively discharged, or that her mental anguish or other injuries would support an award of damages against her former employer. Thus, the controlling question is whether the Court of Appeals

should have applied the law in effect at the time the discriminatory conduct occurred, or at the time of its decision in July 1992. * * *

[In Parts II and III of the opinion, the Court reviewed the text of the 1991 Act to determine whether it provided that the law should be applied to cases pending on enactment. Petitioner argued that Section 402(a) of the Act indicated that the law should be applied to pending cases. However, Section 402(s) provided, “"Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.” The Court held that the language of that provision did not “even arguably suggest that it [had] any application to conduct that occurred at an earlier date.” The Court also rejected the petitioner’s argument that Section 402(a) demonstrated Congress’ intent to apply the law to pending cases when Section 402(a) was read in conjunction with Sections 402(b) and 109(c) of the Act. In addition to the text cited by the petitioner, the Court examined the legislative history of the Act, but found no evidence of Congressional intent to apply the law to pending cases.]

IV

It is not uncommon to find "apparent tension" between different canons of statutory construction. As Professor Llewellyn famously illustrated, many of the traditional canons have equal opposites. In order to resolve the question left open by the 1991 Act, federal courts have labored to reconcile two seemingly contradictory statements found in our decisions concerning the effect of intervening changes in the law. * * * The first is the rule that "a court is to apply the law in effect at the time it renders its decision." The second is the axiom that "[r]etroactivity is not favored in the law," and its interpretive corollary that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.”

We have previously noted the "apparent tension" between those expressions. We found it unnecessary in [past cases] to resolve that seeming conflict "because under either view, where the congressional intent is clear, it governs," [and congressional intent was clear in the past cases]. In the case before us today, however, we have concluded that the 1991 Act does not evince any clear expression of intent on § 102's application to cases arising before the Act's enactment. We must, therefore, focus on the apparent tension between the rules we have espoused for handling similar problems in the absence of an instruction from Congress. * * *

A

As JUSTICE SCALIA has demonstrated, the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.” * * *

It is therefore not surprising that the antiretroactivity principle finds expression in several provisions of our Constitution. The Ex Post Facto Clause flatly prohibits retroactive application of penallegislation.19 Article I, § 10, cl. 1, prohibits States from passing another type of retroactive legislation, laws "impairing the Obligation of Contracts." The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a "public use" and upon payment of "just compensation." The prohibitions on "Bills of Attainder" in Art. I, §§ 9-10, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct. The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation * * *

These provisions demonstrate that retroactive statutes raise particular concerns. The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals. * * * The Constitution's restrictions, of course, are of limited scope. Absent a violation of one of those specific provisions, the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope. Retroactivity provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary. However, a requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness.

While statutory retroactivity has long been disfavored, deciding when a statute operates "retroactively" is not always a simple or mechanical task. * * * A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. * * * Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent. * * *

[W]hile the constitutional impediments to retroactive civil legislation are now modest, prospectivity remains the appropriate default rule. Because it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations. Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits. Such a requirement allocates to Congress responsibility for fundamental policy

judgments concerning the proper temporal reach of statutes and has the additional virtue of giving legislators a predictable background rule against which to legislate.

B

[In Part B, the Court discussed several cases where it had previously applied laws enacted after the events that gave rise to the lawsuits (which might suggest that the principle that courts should apply the law in effect at the time of decision should trump the presumption against retroactivity). It distinguished them, though, from the case at bar, by noting either that the application of the law to the facts in those cases was not retroactive or that they did not implicate the presumption against retroactivity. The Court wrote, “Although [language in a precedent case] suggests a categorical presumption in favor of application of all new rules of law, we now make it clear that [the precedent] did not alter the well-settled presumption against application of the class of new statutes that would have genuinely "retroactive" effect.] * * *

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

[Since the Court concluded that the presumption against retroactivity applies despite the canon in favor of applying the law in effect at the time of decision, the Court held that Congress did not clearly express an intent to apply the changes in the 1991 Act to cases pending at the time the law went into effect, so the Court upheld the Court of Appeals’ decision, denying the petitioner a new trial.]

**JUSTICE SCALIA**, with whom **JUSTICE KENNEDY** and **JUSTICE THOMAS** join, concurring in the judgments.

I

I of course agree with the Court that there exists a judicial presumption, of great antiquity, that a legislative enactment affecting substantive rights does not apply retroactively absent clear statement to the contrary. The Court, however, is willing to let that clear statement be supplied, not by the text of the law in question, but by individual legislators who participated in the enactment of the law, and even legislators in an earlier Congress which tried and failed to enact a similar law. For the Court not only combs the debate and committee reports of the statute at issue, the Civil Rights Act of 1991, but also reviews the procedural history of an earlier, unsuccessful, attempt by a different Congress to enact similar legislation, the Civil Rights Act of 1990.

This effectively converts the "clear statement" rule into a "discernible legislative intent" rule - and even that understates the difference. The Court's rejection of the floor statements of certain Senators because they are "frankly partisan" and "cannot plausibly be read as reflecting any general agreement", reads like any other exercise in the soft science of legislative historicizing, undisciplined by any distinctive "clear statement" requirement. If it is a "clear statement" we are seeking, surely it is not enough to insist that the statement can "plausibly be read as reflecting general agreement"; the statement must clearly reflect general agreement. No legislative history can do that, of course, but only the text of the statute itself. That has been the meaning of the "clear statement" retroactivity rule from the earliest times. I do not deem that clear rule to be changed by the Court's dicta regarding legislative history in the present case.

## Questions and Comments

**1. Statutory interpretation question:** What was the statutory interpretation question that the Court was trying to decide?

**2. The presumption:** How did Justice Stevens' majority opinion frame the presumption against preemption? When does the Court apply the presumption? Does the Court clearly define when a statute operates "retroactively"?

**3. Rationale supporting the presumption:** Why does Justice Stevens suggest a presumption against retroactivity is necessary in cases that do not implicate constitutional concerns? What other concerns are created by retroactive legislation?

**4. Conflicting canons:** What canon did Justice Stevens suggest conflicted with the presumption against retroactivity? How did the majority resolve the conflict?

**5. Clear statement:** The presumption against retroactivity is another clear statement canon. Did Justice Stevens limit his search for a clear statement on intent to the text of the 1991 Civil Rights Act amendments? What sources does Justice Scalia suggest courts should examine in that search for a clear statement?

**6. "Exceptions" to the presumption:** In a portion of the Court's opinion not included above, Justice Stevens identified several situations where it is appropriate to apply a new law to cases pending or events that occurred prior to the time the statute had been enacted, even though there may not be a clear statement of Congressional intent to apply the law to those situations. First, he noted that "[w]hen the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." Second, he indicated that, "We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." In addition, he pointed out that "[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity."

## VIII. Presumption Against Waiver of Sovereign Immunity

Illustration of King Arthur – Public domain

Another clear statement rule applies to statutory waivers of sovereign immunity, an issue that arises with respect to both federal and state governments. Sovereign immunity, said to derive from the mantra that "the King can do no wrong" in British common law[582], generally provides that a government may not be sued without its consent.[583]

The clear statement rule that applies to sovereign immunity provides a presumption against the waiver of sovereign immunity unless there is a clear statement that the legislature intended to waive sovereign immunity.[584] *See* *Price v. United States*, 174 U.S. 373, 375-76 (1899). The Supreme Court has held that waivers of federal sovereign immunity must be explicit and cannot be implied. *See* *Financial Oversight and Management Board for Puerto Rico v. Centro De Periodismo Investigativo, Inc.*, 143 S.Ct. 1176 (2023).[585] In addition, courts generally interpret waivers of statutory interpretation narrowly.[586] Thus, if a statute authorizes persons to sue the government for declaratory relief, but is silent regarding money damages, courts will presume that a plaintiff can only recover declaratory relief.

Although sovereign immunity protects governments from suit, the Supreme Court has long held that it does not foreclose a suit against a government official for declaratory or injunctive relief. *See* *Ex Parte Young*, 209 U.S. 123 (1908).

In addition, explicit statutory waivers of sovereign immunity are common. Congress has enacted many federal statutes that waive sovereign immunity to some extent and authorize suits against the United States for contract claims[587], tort claims[588], takings claims[589], and other claims.[590] The statutes often impose limits on the available remedies

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582 *See* *Nixon v. Fitzgerald*, 457 U.S. 731, 766 (1982).

583 *See* *United States v. Mitchell*, 463 U.S. 206, 212 (1983).

584 *See* Scalia & Garner, supra note 192, at 281; Jellum, *supra* note 165, at 533.

585 Congress must make its intent "unmistakably clear in the language of the statute." *Id.* That has only happened "when a statute says in so many words that it is stripping immunity from a sovereign entity" or "when a statute creates a cause of action and authorizes suit against the government on that claim." *Id. But see* Scalia & Garner, *supra* note 192, at 282 (arguing that there could be cases where waivers could be implied, rather than express).

586 *See* Scalia & Garner, supra note 192, at 281; Jellum, *supra* note 165, at 533.

587 *See* Court of Claims Act, 10 Stat. 612 (1855).

588 *See* Federal Tort Claims Act, 60 Stat. 842 (1946).

589 *See* Tucker Act, 24 Stat. 505 (1887).

590 *See, e.g.,* The Administrative Procedure Act, 5 U.S.C. § 702 (waiving sovereign immunity of the United States for claims for declaratory or injunctive relief brought pursuant to the statute).

and/or pre-suit notice requirements, and sometimes require challenges be brought in a specific court. As noted above, those limits and conditions are strictly construed.[591]

States are also generally protected by sovereign immunity, which in part derives from the 11th Amendment.[592] As with the federal government, a state normally cannot be sued without its consent. However, state statutes can waive sovereign immunity but any waivers will generally be interpreted narrowly.[593]

In addition, Congress has the limited power to eliminate the sovereign immunity of states and authorize suits against them. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Supreme Court held that Congress can waive the sovereign immunity of states, but its intent must be "unmistakably clear" in the language of the statute ***and*** the statute must be enacted pursuant to Congress' powers under the 14th Amendment. *Id.* at 56-73.[594] Suits against state officials for declaratory or injunctive relief are not generally barred, but a court may conclude that language or the structure of a statute precludes such actions.

# IX. Implied Causes of Action and Implied Remedies

Statutes often include judicial review provisions, citizen suit provisions, and enforcement provisions that dictate who can sue to enforce the statute, as well as how, when, and where they can sue. In some cases, though, questions arise regarding whether courts can imply that a statute creates a cause of action even though it does not expressly include a provision that creates the cause of action.

In British common law, private causes of action were routinely implied to enforce common law and statutory rights.[595] Early decisions in the United States adopted a similar approach[596], but American courts curtailed the practice somewhat after the New Deal, when Congress delegated authority to enforce many statutory rights and duties to administrative agencies.[597]

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591 *See* Scalia & Garner, supra note 192, at 285, *citing* *Soriano v. United States*, 352 U.S. 270, 276 (1957).

592 U.S. CONST., 11th Amend.

593 Some state courts have also judicially eliminated sovereign immunity, at least for tort claims. *See* Scalia & Garner, *supra* note 192, at 283.

594 In an earlier case, *Pennsylvania v. Union Gas Company*, 491 U.S. 1, 19-20 (1989), a plurality of the Court concluded that Congress could abrogate state sovereign immunity by enacting a law pursuant to its Commerce Clause powers. However, the *Seminole Tribe* Court explicitly overruled *Union Gas*. 517 U.S. at 66.

595 *See* Jellum, *supra* note 165, at 549; Scalia & Garner, *supra* note 192, at 313 (citing the maxim "ubi jus, ibi remedium" (where there is a right, there is a remedy) which British common law courts applied in equity, and courts later applied to enforce statutory rights).

596 *See* Jellum, *supra* note 165, at 549; Scalia & Garner, *supra* note 192, at 313.

597 *See* Jellum, *supra* note 165, at 549.

The approach that the Supreme Court has taken on the question of implied private causes of action has evolved significantly over time (and remains a bit unsettled).

In *J.I. Case v. Borak*, 377 U.S. 426, 433 (1964), the Supreme Court adopted a liberal approach toward finding implied private rights of action to enforce statutes, writing that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."

Not long after that, though, in *Cort v. Ash*, 422 U.S. 66, 78 (1975), the Court sharply departed from that approach and suggested that the Court would consider four factors to determine whether a federal statute created an implied private right of action, including: (1) whether the legislative history evidenced an intent to create a private right of action; (2) whether the plaintiff is one of the class for whose benefit the statute was enacted; (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy; and (4) whether the cause of action is one traditionally relegated to state law. The *Cort* Court did not find an implied private right of action to enforce Section 10(b) of the Securities Exchange Act and courts generally did not find implied rights of action using the *Cort* analysis, although the Supreme Court, in *Cannon v. University of Chicago*, 441 U.S. 677 (1979) ***did*** find an implied private right of action to enforce Section 601 of Title IX of the Education Amendments using the *Cort* analysis.

Shortly after the Court decided *Cannon*, however, it decided *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979). In finding that there was no implied private right of action to enforce Section 17(a) of the Securities and Exchange Act, the *Touche Ross* Court indicated that the four factors in *Cort* did not carry equal weight. According to the Court, "The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action." The Court suggested that the first three *Cort* factors—the language and focus of the statute, its purpose, and its legislative history—were factors that were traditionally relied on in determining legislative intent. It is not clear how much that changed the analysis set forth in *Cort* and the Court's approach in *Alexander v. Sandoval*, 532 U.S. 275 (2001), reproduced below, creates additional confusion, since the majority did not apply the *Cort* factors.

Nevertheless, to the extent that the Court's decisions establish a presumption in any direction, it is a presumption ***against*** finding an implied private right of action.[598] Although the ascendance of the presumption corresponds to the rise in textualism, *Cort,* which has not been overruled, counsels courts to examine legislative history and purpose as additional tools for finding legislative intent to create an implied private right of action.

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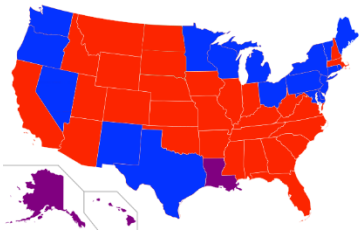
[598] Justice Scalia has argued that private rights must be express or clearly implied from the text of a statute, *see* Scalia & Garner, supra note 192, at 313, but the Supreme Court's precedent appears to be less stringent. Professor Linda Jellum describes the "current trend … to deny the existence of new implied actions." *See* Jellum, *supra* note 165, at 549.



Map of States with English as the official langue (red) – Diagram by Deturtlemon1 – CC BY-SA 4.0

## ALEXANDER V. SANDOVAL

**532 U.S. 275 (2001)**

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument Audio (From Oyez)
Title VI of the Civil Rights Act

**JUSTICE SCALIA** delivered the opinion of the Court.

This case presents the question whether private individuals may sue to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964.

I

The Alabama Department of Public Safety (Department), of which petitioner James Alexander is the Director, accepted grants of financial assistance from the United States Department of Justice (DOJ) and Department of Transportation (DOT) and so subjected itself to the restrictions of Title VI of the Civil Rights Act of 1964. Section 601 of that Title provides that no person shall, "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" covered by Title VI. 42 U.S.C. § 2000d. Section 602 authorizes federal agencies "to effectuate the provisions of [§601] … by issuing rules, regulations, or orders of general applicability," 42 U.S.C. § 2000d-1, and the DOJ in an exercise of this authority promulgated a regulation forbidding funding recipients to "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin … ." 28 CFR § 42.104(b)(2) (1999). See also 49 CFR § 21.5(b)(2) (2000) (similar DOT regulation).

The State of Alabama amended its Constitution in 1990 to declare English "the official language of the state of Alabama." Pursuant to this provision and, petitioners have argued, to advance public safety, the Department decided to administer state driver's license examinations only in English. Respondent Sandoval, as representative of a class, brought suit in the United States District Court for the Middle District of Alabama to enjoin the English-only policy, arguing that it violated the DOJ regulation because it had the effect of subjecting non-English speakers to discrimination based on their national origin.

The District Court agreed. It enjoined the policy and ordered the Department to accommodate non-English speakers. Petitioners appealed to the Court of Appeals for the Eleventh Circuit, which affirmed. Both courts rejected petitioners' argument that Title VI did not provide respondents a cause of action to enforce the regulation. * * * The petition for writ of certiorari raised, and we agreed to review, only the question posed in the first paragraph of this opinion: whether there is a private cause of action to enforce the regulation.

II

* * *

[Our Title VI precedent has held that] private individuals may sue to enforce §601 of Title VI and obtain both injunctive relief and damages. * * * [I]t is similarly beyond dispute–and no party disagrees–that §601 prohibits only intentional discrimination. * * * [W]e must assume for purposes of deciding this case that regulations promulgated under §602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under §601. * * * We therefore assume for the purposes of deciding this case that the DOJ and DOT regulations proscribing activities that have a disparate impact on the basis of race are valid.

[The Court then rejected the respondents argument that the Supreme Court had already upheld a private right of action to enforce Title VI regulations in prior Supreme Court decisions. The Court noted that regulations applying §601's ban on intentional discrimination would be covered by the cause of action to enforce that section, ***but*** the Court stressed that the disparate impact regulations adopted under §602 were not adopted to enforce §601, so that the private right of action to enforce §601 did not include a private right to enforce the §602 regulations. Thus, the Court noted that the right to enforce the §602 regulations "must come, if at all, from the independent force of §602."]

[W]e assume for purposes of this decision that §602 confers the authority to promulgate disparate-impact regulations; the question remains whether it confers a private right of action to enforce them. * * *

[P]rivate rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. "Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals."

Respondents would have us revert in this case to the understanding of private causes of action that held sway 40 years ago when Title VI was enacted. That understanding is captured by the Court's statement in *J. I. Case Co.* v. *Borak,* 377 U.S. 426, 433 (1964), that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose" expressed by a statute. We abandoned that understanding in *Cort* v. *Ash,* 422 U.S. 66, 78 (1975) - which itself interpreted a statute enacted under the *ancien regime*–and have not returned to it since. * * * Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink.

Nor do we agree with the Government that our cases interpreting statutes enacted prior to *Cort* v. *Ash* have given "dispositive weight" to the "expectations" that the enacting Congress had formed "in light of the 'contemporary legal context.' " * * * We have never accorded dispositive weight to context shorn of text. In determining whether statutes

create private rights of action, as in interpreting statutes generally, legal context matters only to the extent it clarifies text.

We therefore begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI. Section 602 authorizes federal agencies "to effectuate the provisions of [§601] … by issuing rules, regulations, or orders of general applicability." 42 U.S.C. § 2000d—1. It is immediately clear that the "rights-creating" language * * * in * * * §601 is completely absent from §602. Whereas §601 decrees that "[n]o person … shall … be subjected to discrimination," the text of §602 provides that "[e]ach Federal department and agency … is authorized and directed to effectuate the provisions of [§601]. Far from displaying congressional intent to create new rights, §602 limits agencies to "effectuat[ing]" rights already created by §601. And the focus of §602 is twice removed from the individuals who will ultimately benefit from Title VI's protection. Statutes that focus on the person regulated rather than the individuals protected create "no implication of an intent to confer rights on a particular class of persons." Section 602 is yet a step further removed: it focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating. * * * [It] is "phrased as a directive to federal agencies engaged in the distribution of public funds." When this is true, "[t]here [is] far less reason to infer a private remedy in favor of individual persons. So far as we can tell, this authorizing portion of §602 reveals no congressional intent to create a private right of action.

Nor do the methods that §602 goes on to provide for enforcing its authorized regulations manifest an intent to create a private remedy; if anything, they suggest the opposite. [The Court then described a series of limits on agency enforcement of Section 602.] * * * Whatever these elaborate restrictions on agency enforcement may imply for the private enforcement of rights created *outside* of §602, they tend to contradict a congressional intent to create privately enforceable rights through §602 itself. The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others. * * *

Both the Government and respondents argue that the *regulations* contain rights-creating language and so must be privately enforceable, but that argument skips an analytical step. Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not. * * *

The last string to respondents' and the Government's bow is their argument that two amendments to Title VI "ratified" this Court's decisions finding an implied private right of action to enforce the disparate-impact regulations. See Rehabilitation Act Amendments of 1986, §1003, 42 U.S.C. § 2000d—7; Civil Rights Restoration Act of 1987, §6, 102 Stat. 31, 42 U.S.C. § 2000d—4a. One problem with this argument is that, as explained above, none of our decisions establishes (or even assumes) the private right of action at issue here * * *. Another problem is that the incorporation claim itself is flawed. Section 1003 of the Rehabilitation Act Amendments of 1986, on which only respondents rely, by its terms

applies only to suits "for a violation of a *statute.* It therefore does not speak to suits for violations of regulations that go beyond the statutory proscription of §601. * * *

Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under §602. We therefore hold that no such right of action exists. * * *

The judgment of the Court of Appeals is reversed.

It is so ordered.

**JUSTICE STEVENS**, with whom **JUSTICE SOUTER**, **JUSTICE GINSBURG**, and **JUSTICE BREYER** join, dissenting.

In 1964, as part of a groundbreaking and comprehensive civil rights Act, Congress prohibited recipients of federal funds from discriminating on the basis of race, ethnicity, or national origin. Pursuant to powers expressly delegated by that Act, the federal agencies and departments responsible for awarding and administering federal contracts immediately adopted regulations prohibiting federal contractees from adopting policies that have the "effect" of discriminating on those bases. At the time of the promulgation of these regulations, prevailing principles of statutory construction assumed that Congress intended a private right of action whenever such a cause of action was necessary to protect individual rights granted by valid federal law. Relying both on this presumption and on independent analysis of Title VI, this Court has repeatedly and consistently affirmed the right of private individuals to bring civil suits to enforce rights guaranteed by Title VI. A fair reading of those cases, and coherent implementation of the statutory scheme, requires the same result under Title VI's implementing regulations. * * *

The majority's statutory analysis does violence to both the text and the structure of Title VI. Section 601 does not stand in isolation, but rather as part of an integrated remedial scheme. Section 602 exists for the sole purpose of forwarding the antidiscrimination ideals laid out in §601. The majority's persistent belief that the two sections somehow forward different agendas finds no support in the statute. * * * For three decades, we have treated §602 as granting the responsible agencies the power to issue broad prophylactic rules aimed at realizing the vision laid out in §601, even if the conduct captured by these rules is at times broader than that which would otherwise be prohibited. * * *

This understanding is firmly rooted in the text of Title VI. As §602 explicitly states, the agencies are authorized to adopt regulations to "effectuate" §601's antidiscrimination mandate. 42 U.S.C. § 2000d—1. The plain meaning of the text reveals Congress' intent to provide the relevant agencies with sufficient authority to transform the statute's broad aspiration into social reality. So too does a lengthy, consistent, and impassioned legislative history. * * *

The majority couples its flawed analysis of the structure of Title VI with an uncharitable understanding of the substance of the divide between those on this Court who are reluctant to interpret statutes to allow for private rights of action and those who are willing

to do so if the claim of right survives a rigorous application of the criteria set forth in *Cort* v. *Ash*. As the majority narrates our implied right of action jurisprudence, *ante*, at 10—11, the Court's shift to a more skeptical approach represents the rejection of a common-law judicial activism in favor of a principled recognition of the limited role of a contemporary "federal tribunal." According to its analysis, the recognition of an implied right of action when the text and structure of the statute do not absolutely compel such a conclusion is an act of judicial self-indulgence. * * *

Overwrought imagery aside, it is the majority's approach that blinds itself to congressional intent. While it remains true that, if Congress intends a private right of action to support statutory rights, "the far better course is for it to specify as much when it creates those rights," its failure to do so does not absolve us of the responsibility to endeavor to discern its intent. In a series of cases since *Cort* v. *Ash*, we have laid out rules and developed strategies for this task.

The very existence of these rules and strategies assumes that we will sometimes find manifestations of an implicit intent to create such a right. Our decision in *Cannon* represents one such occasion. As the *Cannon* opinion iterated and reiterated, the question whether the plaintiff had a right of action that could be asserted in federal court was a "question of statutory construction, not a question of policy for the Court to decide. Applying the *Cort* v. *Ash* factors, we examined the nature of the rights at issue, the text and structure of the statute, and the relevant legislative history. Our conclusion was that Congress unmistakably intended a private right of action to enforce both Title IX and Title VI. Our reasoning and * * * our holding * * * was equally applicable to intentional discrimination and disparate impact claims.

Underlying today's opinion is the conviction that *Cannon* must be cabined because it exemplifies an "expansive rights-creating approach." But, as I have taken pains to explain, it was Congress, not the Court, that created the cause of action, and it was the Congress that later ratified the *Cannon* holding in 1986 and again in 1988.

In order to impose its own preferences as to the availability of judicial remedies, the Court today adopts a methodology that blinds itself to important evidence of congressional intent. * * *

if the majority is genuinely committed to deciphering congressional intent, its unwillingness to even consider evidence as to the context in which Congress legislated is perplexing. Congress does not legislate in a vacuum. As the respondent and the Government suggest, and as we have held several times, the objective manifestations of congressional intent to create a private right of action must be measured in light of the enacting Congress' expectations as to how the judiciary might evaluate the question.

At the time Congress was considering Title VI, it was normal practice for the courts to infer that Congress intended a private right of action whenever it passed a statute designed to protect a particular class that did not contain enforcement mechanisms which would be thwarted by a private remedy. Indeed, the very year Congress adopted Title VI,

this Court specifically stated that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *J. I. Case Co.* v. *Borak.* Assuming, as we must, that Congress was fully informed as to the state of the law, the contemporary context presents important evidence as to Congress' intent–evidence the majority declines to consider. * * *

## Questions and Comments

**1. Statutory interpretation question:** What was the statutory interpretation question that the Court was trying to decide?

**2. Theory of interpretation:** What theory of interpretation does the majority use to interpret Title VI? What theory does the dissent use?

**3. Implied private rights of action:** When does the majority suggest a court should find an implied private right of action in a statute? Does the majority discuss any presumptions or clear statement rules? Does the majority apply the analysis utilized by the Court in the precedent case, *Cort v. Ash*?

**4. Sources of interpretation:** Does the majority conclude that Title VI includes an implied private right of action to enforce the regulations adopted under Section 602? Why does the majority reach that conclusion and what sources does it suggest should be consulted? What sources does it reject and why? If the agencies' regulations had clearly indicated that private parties could sue to enforce the regulations, would the majority have reached a different conclusion regarding the existence of an implied private right of action?

**5. Dissent:** Instead of relying on the language or structure of Title VI to independently identify Congressional intent to create a private right of action to enforce regulations adopted under Section 602, the dissent argues that when the Supreme Court previously held that Title VI includes a private right of action to enforce Section 601 and regulations adopted to enforce that section, it was, at the same time, upholding a broader private right of action to enforce Section 602 regulations. What textual support does the dissent provide for that argument? What sources, other than the text of Title VI, does the dissent rely on to find an implied private right of action to enforce Section 602 regulations, and how does the dissent say those sources support that right?

**6. Philosophical differences:** How does the dissent characterize the different approaches taken by the majority and dissent toward the search for implied private rights of action? Does the dissent apply the *Cort v. Ash* precedent?

**7. Implied remedies for implied causes of action:** While the analysis that the Supreme Court is using to decide whether a statute includes an implied cause of action is confusing, the Court has spoken much more clearly regarding the remedies that are available for implied causes of action. In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66 (1992), when the Court had to determine whether the plaintiff could recover injunctive relief or money damages in a lawsuit brought based on an implied private right

of action in Title IX of the Civil Rights Act, the Court held that it would "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise."

## X. Other Substantive Policy Canons

While this book does not catalogue all of the "presumptions" that courts have applied to advance substantive policies, this section briefly identifies a few more canons that have been somewhat consistently applied by the Supreme Court.

The Court has adopted several presumptions to protect the interests of Native Americans, including (1) a presumption that tribes are immune from state regulation, *see* Bryan v. Itasca County, 426 U.S. 373 (1976); (2) a presumption that statutes do not violate treaty obligations, *see* Hamdan v. Rumsfeld, 548 U.S. 557 (2006); and (3) a clear statement rule for statutes that could diminish reservation boundaries, *see* Hagen v. Utah, 510 U.S. 399, 411 (1993) (courts presume that Congress would not diminish reservation boundaries unless it clearly and explicitly expressed that intent); Solem v. Bartlett, 465 U.S. 463 (1984).

The Court has also applied substantive policy canons to issues involving international law. Specifically, the Court has adopted (1) a presumption that Congress does not intend to enact laws that violate international laws or treaties, *see* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984); Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); and (2) a presumption that Congress does not intend laws to apply extraterritorially, *see* Abitron Austria GmbH et al v. Hetronic Intl., Inc., 600 U.S. __ (2023); E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 248 (1991); Foley Bros. v. Filardo, 336 U.S. 281 (1949).

In addition, a few of the Court's policy canons address judicial review. For instance, the Court has adopted (1) a presumption that Congress will not withdraw courts' traditional equitable discretion, *see* Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982); Hecht Co. v. Bowles, 321 U.S. 321, 330 (1944); (2) a presumption that Congress will not withdraw all remedies or opportunities for judicial review when it recognizes a statutory right, *see* South Carolina v. Regan, 465 U.S. 367 (1984); and (3) a presumption that statutes do not preclude review of constitutional claims unless there is a clear statement of intent to preclude review. *See* Johnson v. Robison, 415 U.S. 361 (1974).

On a constitutional note, the Court has also adopted a super strong presumption that Congress will not interfere with the President's inherent powers unless there is a clear statement of its intent to interfere. *See, e.g.,* Morrison v. Olson, 487 U.S. 654, 682-83 (1988); Department of Navy v. Egan, 484 U.S. 518, 527 (1988).

Finally, the Court has adopted several canons that create presumptions limited to statutes addressing specific subjects. For instance, the Court has adopted a rule that statutes that provide public grants should be interpreted strictly in favor of the government, *see* 3 Sutherland § 63.4. In the tax arena, the Court has adopted somewhat conflicting

presumptions. On the one hand, the Court historically required strict construction of tax statutes in favor of the taxpayer, *see* *Gould v. Gould*, 245 U.S. 151 (1917), but more recently has adopted an approach that counsels courts to interpret exemptions to the tax code narrowly (i.e. against the taxpayer). *See* *United States v. Wells Fargo Bank*, 485 U.S. 351, 357 (1988).

**CALI SECTION QUIZ**

Before moving on to the next section, why not try a short quiz on the material you just read at https://www.cali.org/lesson/19762. It should take about 30 minutes to complete.

# Chapter 7:
# Agencies and Statutory Interpretation

## I. Introduction

Although courts are generally the final arbiter of the meaning of statutes, administrative agencies play a key role interpreting statutes as they implement and enforce them pursuant to the powers delegated by the legislature before courts are asked to interpret the statutes. How does the fact that an agency has interpreted a statute in a particular way affect the manner in which a court reviews the meaning of the statute? Does the court give any deference to the agency's interpretation, or does the court ignore it and simply apply the normal rules of interpretation that were covered in Chapters 2 through 6? On the one hand, it is "emphatically the province and duty" of the judiciary to "say what the law is." See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Similarly, the federal Administrative Procedure Act provides that when courts review agency actions, courts "shall decide all relevant questions of law, [and] interpret . . . statutory provisions." *See* 5 U.S.C. § 706. However, when Congress has delegated authority to an expert (and politically accountable) agency to interpret a statute, perhaps the court should consider the agency's interpretation carefully, especially when the interpretation of the statute is closely tied to resolving questions of fact and policy. Those are the questions that will be addressed in this chapter.[599]

The way courts review statutes that have been previously interpreted by agencies varies based on (1) the authority granted to the agency by the legislature to interpret the statute; and (2) the procedures used by the agency when interpreting the statute. Accordingly, it is important to spend a little time exploring the procedures used by agencies when interpreting statutes. Those procedures are set forth in the Administrative Procedure Act (APA) and in the statutes that agencies administer. The APA also sets forth standards for judicial review of agency decisions.

[599] Several of the cases excerpted in earlier sections of this book involved courts interpreting statutes that were previously interpreted by agencies, but we did not focus on the portions of the opinions that addressed the agencies' interpretations in those cases.

## II. Procedural Requirements for Agency Action[600]

Although agencies engage in a variety of different activities, most agency actions can be categorized as either ***rulemaking*** or ***adjudication***. As discussed in Chapter 1 of this book, adjudication involves the application of law to a specific set of facts, while rulemaking involves establishing a general standard or obligation that applies broadly and prospectively. The Administrative Procedures Act (APA), the federal statute that establishes the procedures that all agencies must follow and that outlines the manner in which agency actions can be challenged in court, defines a "***rule***" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency ..." 5 U.S.C. § 551(4). The Act defines "***adjudication***" as "agency process for formulation of an order," 5 U.S.C. § 551(7), and defines "***order***" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6). Although rulemaking and adjudication are distinct categories of agency actions, an agency can generally interpret and clarify ambiguous provisions of a statute ***either*** through rulemaking or in an adjudication if Congress has given the agency both powers and has not required the agency to use a specific procedure to interpret the statute. *See* *Securities and Exchange Commission v. Chenery*, 332 U.S. 194 (1947).

Within the broad category of ***rulemaking***, an agency's rules can be divided into ***legislative rules*** (sometimes called *"substantive rules*") and ***non-legislative rules***. When Congress, in a statute, authorizes an agency to makes rules that have the force of law and the agency adopts rules pursuant to that statutory authority, following the required administrative procedures (generally known as "notice and comment" rulemaking), the rules are ***legislative rules***. For example, the Clean Water Act authorizes EPA to issue any regulations that are necessary to carry out the agency's functions under the Act, *see* 33 U.S.C. § 1361(a). Thus, when EPA adopts rules to clarify the meaning of the statutory term "waters of the United States," which is not defined in the Clean Water Act, EPA's rules are ***legislative rules***.

While agencies with legislative rulemaking authority can adopt legislative rules, there are times when an agency does not have legislative rulemaking authority or when an agency has that authority but prefers not to exercise it. In those situations, agencies can still interpret a statute through a ***non-legislative rule***. ***Non-legislative rules*** are issued in a variety of forms, *including interpretative rules, policy statements, guidance documents*, and *enforcement manuals*, among others.

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[600] Part II of this chapter is excerpted from my *Wetlands Course Source*. *See* Stephen M. Johnson, *Wetlands Law: A Course Source* (4th ed., eLangdell Press 2021), *accessible at:* https://www.cali.org/books/wetlands-law-course-source.

Agencies may choose to interpret statutes through non-legislative rules for a variety of reasons. First, as will be discussed below, agencies must follow certain procedures when adopting legislative rules, but are subject to very few procedural requirements when adopting non-legislative rules. Because the legislative rulemaking procedures may be time consuming, an agency may decide to issue a non-legislative rule in order to announce its interpretation of the law more quickly. An agency might also decide to use a non-legislative rule because the agency is still uncertain about its interpretation of the statute and would like to retain the flexibility to change that interpretation without going through a legislative rulemaking process, which it would be required to do if it wanted to change a legislative rule. In addition, because a non-legislative rule is often not a "final agency action," an agency can also generally avoid legal challenges to the rule in court.

Federal administrative agencies, across the board, have increasingly interpreted statutes through guidance documents and other non-legislative rules because of the advantages outlined above.

While an agency can save time, avoid litigation, and retain flexibility by interpreting a statute through a non-legislative rule, legislative rules have ***two distinct advantages*** over non-legislative rules. First, legislative rules have the ***force of law*** and agencies do not have to independently justify the basis for the rule when applying it to a specific factual setting. Non-legislative rules, on the other hand, are not binding on the agency or the regulated community. An agency must justify the basis for the legal or policy interpretation adopted in the non-legislative rule when applying it to a specific factual setting. The second important advantage that legislative rules have is that courts will accord an agency more ***deference*** when reviewing the statutory interpretation adopted by the agency in a legislative rule than in a non-legislative rule.

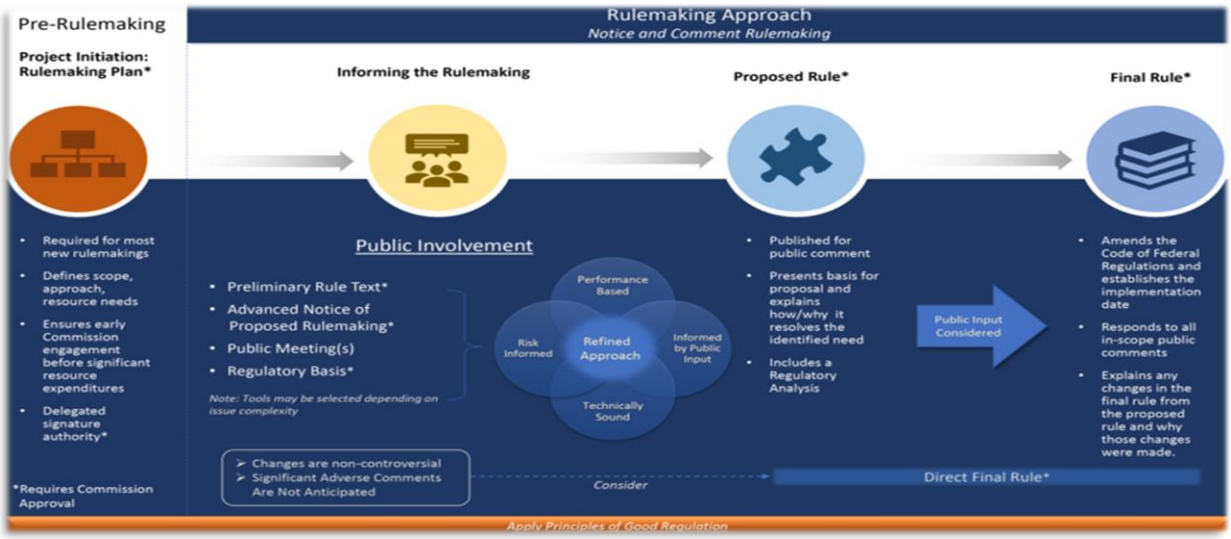
| **Advantages of Legislative v. Non-Legislative Rules** | |
|---|---|
| **Legislative Rules** | **Non-Legislative Rules** |
| Force of Law | Fewer Procedures (Quicker) |
| Greater Judicial Deference | Easier to Change (More Flexible) |
| | Harder to Challenge in Court |

## A. Rulemaking Procedures

**Resources**

OIRA - Rulemaking Primer
OMB's Reginfo website (Track regulations)
Regulations.gov (Online rulemaking)
Regulation Room (Cornell e-rulemaking project)
Congressional Research Service Report on Rulemaking and Judicial Review (2011)
Congressional Research Service Report re: number of rules issued by agencies (2013)

The procedures that agencies must follow when adopting rules or making decisions through adjudication are set by the APA, which applies to all federal agencies, but can be modified by the statutes that give the agencies authority to adopt rules or make decisions through adjudication. The APA requires agencies to follow either ***formal rulemaking procedures*** or ***informal*** *("notice and comment")* ***rulemaking procedures*** when adopting legislative rules, *see* 5 U.S.C. § 553, but it exempts ***non-legislative rules*** from those procedural requirements. *Id.* § 553(b)(3)(A). ***Formal rulemaking*** involves a trial-type hearing before an administrative law judge, who makes a decision based on a record presented at the hearing. *See* 5 U.S.C. §§ 556-557. An agency must adopt rules through formal rulemaking only when the statute that authorizes the agency to make rules requires the agency to make the rules "on the record after opportunity for an agency hearing." *See* 5 U.S.C. § 553(c). Courts rarely interpret statutes to require formal rulemaking.




Rulemaking Flowchart – from the Nuclear Regulatory Commission – CC BY-SA 2.0

If an agency is not required to follow formal rulemaking procedures when adopting legislative rules, the agency must follow the APA's ***informal rulemaking procedures***. For informal rulemaking, the APA requires agencies to begin the process by publishing a ***notice of proposed rulemaking*** in the Federal Register, including the terms or substance of the proposed rule, a reference to the legal authority for the rule, and a statement of the time, place, and nature of public rulemaking proceedings. *See* 5 U.S.C. § 553(b). The agency is not required to hold public hearings, although it can, but the

agency *is* required to provide interested persons an ***opportunity to comment*** on the proposed rule. *Id.* § 553(c). Unlike formal rulemaking, therefore, there is no formal record for the agency's decision and the agency can rely solely on written submissions in formulating its rule. At the end of the comment period, the agency reviews the public input and decides whether to make any changes to the proposed rule based on the comments that the agency received. When the agency has finalized the rule in light of the public input, the APA requires the agency to provide a "***concise general statement of [the] .. basis and purpose***" of the rules, which the agency publishes with the final rule in the Federal Register. *Id.* Agencies do not have to change rules based on the public input, but they must consider the comments, respond to the major comments, and identify the "major issues of policy" that they considered in formulating the rule. *See* *United States of America v. Nova Scotia Food Products Corp.,* 568 F.2d 240 (2d Cir. 1977).

Today, significant portions of the notice-and-comment process take place online, and interested persons can view comments submitted by other persons during the comment period, as well as significant amounts of information that the agency relied on in preparing a proposed rule that would not have been as readily accessible before agencies began to carry out the notice and comment process online. *See* Regulations.gov.

While the APA establishes procedures for ***legislative*** (or substantive) ***rules***, it does not require agencies to follow any specific procedures when adopting ***non-legislative rules***. Agencies generally develop such guidance with very little input from the public or notice to the public. Although the APA does not require agencies to follow procedures in ***developing*** non-legislative rules, the Freedom of Information Act (FOIA) requires federal agencies to ***publish***, in the Federal Register, "statements of general policy or interpretations of general applicability formulated and adopted by the agency." *See* 5 U.S.C. § 552(a)(1)(D). In addition, FOIA requires agencies to ***make available to the public*** other statements of policy or interpretations that haven't been published in the Federal Register, as well as "administrative staff manuals and instructions to staff that affect a member of the public." *Id.* § 552(a)(2).

Congress can impose additional procedural requirements on the development of legislative or non-legislative rules by agencies and, when it does, the rulemaking process is referred to as ***hybrid rulemaking***.

| APA Procedural Requirements for Rulemaking | | |
|---|---|---|
| Legislative Rules: Formal Rulemaking<br><br>5 U.S.C. § 556, 557 | Legislative Rules: Informal Rulemaking<br><br>5 U.S.C. § 553 | Non-Legislative Rules<br><br>5 U.S.C. § 552 |
| Trial-type hearing usually w/ ALJ; Decision "on the record" | Notice;<br>Opportunity for comment;<br>Publication of final rule with a concise general statement of the basis and purpose | Publish or make available |

## Problem 7-1: Research and Drafting Exercise

Most federal agencies post proposed and final rules, as well as guidance documents and other important public information on their websites. In addition, many federal agencies post proposed rulemakings and documents that support the proposed rulemakings online and allow interested persons to comment online through Regulations.gov. Those agencies also make the final rules, supporting documents and comments available on Regulations.gov. Guidance documents and other agency materials are also posted on Regulations.gov.

1. In 2014, EPA and the Corps of Engineers issued a notice of proposed rulemaking to re-define "waters of the United States" under the Clean Water Act. The proposal was posted on Regulations.gov on April 21, 2014. Search Regulations.gov to find the EPA docket for the proposed rule. When you find it, click on the "Open Docket Folder" link. This lists all of the documents that were posted that are associated with the rulemaking. Who were the agency contacts for the rule?

2. Review the proposed rule and identify: (a) the legal authority for the rule adopted by EPA; (b) the length of the comment period; (c) the proposed definition of "waters of the United States" that would be included in 33 C.F.R. § 328.3(a); (d) whether EPA or the Corps prepared an environmental impact statement or an environmental assessment for the proposed rulemaking.

**Problem 7-1: Research and Drafting Exercise (continued)**

3. In the supporting documents for the proposed rule, review the economic analysis prepared for the rule and identify the total low and high estimated incremental annual indirect costs and benefits of the proposed rule (per Exhibit 16). Does EPA estimate that benefits of the rule will be greater than the costs?

4. To get a flavor for the nature of public comments submitted in notice and comment rulemaking, search for the docket for the Federal Motor Carrier Safety Administration's (FMCSA) rule restricting the use of cellular phones by drivers of commercial vehicles. (FMCSA-2010-0096). When you find that docket, click on the "Open Docket Folder" link and browse through some of the comments submitted to FMCSA for the rule. Compare, for instance, the comments submitted by Robert Paul Smith or Wildon Clyde Renn III, and those submitted by Edison Electric Institute or the Alliance of Automobile Manufacturers. Review the "Tips for Submitting Effective Comments" on the Regulations.gov page. After reviewing those tips, do you think that the comments of Mr. Smith or the Edison Electric Institute are likely to be more effective?

5. Draft a comment on a proposed rulemaking that you find on Regulations.gov and identify the rulemaking for which the comment is being submitted. DO NOT SUBMIT THE COMMENT ONLINE!! Think about the "Tips for Submitting Effective Comments" as you draft your comment.

## B. Adjudication Procedures

Just as the APA establishes minimum procedural requirements for federal agency rulemaking, it also establishes minimum procedural requirements for ***adjudication***. As with rulemaking, the APA creates distinct procedural requirements for ***formal adjudication*** and for ***informal adjudication***. *See* 5 U.S.C. § 554. The APA requirements for ***formal adjudication*** are similar to the requirements for formal rulemaking and include a trial-type hearing before an administrative law judge, who makes a decision based on a record presented at the hearing. *See* 5 U.S.C. §§ 554, 556-557.

In contrast to the requirements for ***formal adjudication***, the APA includes minimal requirements for ***informal adjudication***. If an agency is denying a written application, petition, or request of a person, the statute requires the agency to give the person "prompt notice" and "a brief statement of the grounds for denial." 5 U.S.C. § 555(e). The APA does not include any other procedural requirements for informal adjudication, but FOIA requires agencies to "make available for public inspection and copying" any "final opinions ... as well as orders, made in the adjudication of cases." *Id.* § 552(a)(2)(A). As with rulemaking, though, the statute that authorizes the agency to make decisions through informal

adjudication can impose additional procedural requirements on the agency when it makes those decisions.

Agencies must follow the APA's ***formal adjudication*** procedures whenever a statute requires the agency to make a decision in adjudication "on the record after opportunity for an agency hearing." *See* 5 U.S.C. § 554(a).

## C. Judicial Review Standards

Although Congress can vary the standards for review of agency actions, the APA establishes standards that generally apply to ***judicial review*** of agency actions under that statute. Specifically, the APA provides that a reviewing court shall: "(2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." *See* 5 U.S.C. § 706. Agency fact-findings are usually reviewed under the "arbitrary and capricious" standard unless they are made in the context of formal rulemaking or formal adjudication, in which case the "substantial evidence" standard applies. Judicial review of agencies' statutory interpretation is addressed in the remaining sections of this chapter.

### Problem 7-2

1. 33 U.S.C. § 1361 provides that "The [EPA] Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under [the Clean Water Act.]" If EPA planned to issue rules, under the Clean Water Act, to define the undefined statutory term "waters of the United States," would the agency be required to follow the trial-type procedures in 5 U.S.C. §§ 556 and 557 when issuing those rules?

2. 33 U.S.C. § 1317(b)(1) provides that "The [EPA] Administrator shall, within one hundred and eighty days after October 18, 1972, and from time to time thereafter, publish proposed regulations establishing pretreatment standards for ... [sewage treatment plants]. Not later than ninety days after such publication, and after opportunity for public hearing, the Administrator shall promulgate such pretreatment standards. ..." Does the statute require EPA to use formal rulemaking procedures or notice and comment rulemaking when promulgating pretreatment standards?

**Problem 7-2 (continued)**

3. 33 U.S.C. § 1344(a) provides that "The Secretary [of the Army] may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites." Does the statute require the Secretary to follow the trial-type procedures in 5 U.S.C. §§ 556 and 557 when issuing permits?

4. 33 U.S.C. 1344(i), which focuses on federal oversight of states that have taken over administration of the Clean Water Act Section 404 permitting program, provides that "Whenever the Administrator determines after public hearing that a State is not administering a program approved under ... this section, in accordance with this section, the Administrator shall so notify the State, and if appropriate corrective action is not taken within a reasonable time, ... the Administrator shall ... withdraw approval of such program until the Administrator determines such corrective action has been taken..." Does the statute require EPA to use formal adjudication procedures when determining that a State is not administering a permitting program in accordance with Section 404 of the Clean Water Act? Does the statute require EPA to use formal adjudication procedures when determining that the State has taken corrective action and may take over administration of the permitting program again?

**CALI SECTION QUIZ**

Before moving on to the next section, why not try a short quiz on the material you just read at www.cali.org/lesson/19763. It should take about 15 minutes to complete.

## III. The World Before *Chevron*

For forty years, the most significant Supreme Court decision that addressed the manner in which courts interpret statutes in light of agency interpretations was *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). After four decades, in June 2024, the Supreme Court overruled *Chevron* in *Loper Bright Enterprises, et al. v. Gina Raimondo*, 2024 U.S. LEXIS 2882 (2024). To some extent, the Court's decision in *Loper Bright* suggests that the approach that courts should take when interpreting statutes that an agency has interpreted is an approach that courts used before *Chevron*. However, the path forward is not clear and is likely to be influenced, to some degree, by the decades of precedent in the Supreme Court and lower federal courts based on *Chevron.* Accordingly, this part of the chapter will focus on the manner in which courts reviewed

statutes in light of agency interpretations in the years before *Chevron.* Part IV of the chapter will describe the approach that the Supreme Court and lower federal courts took under *Chevron* and will briefly discuss the numerous Supreme Court decisions that clarified, extended, and then narrowed *Chevron.* Part V of the chapter will turn to *Loper Bright*, and begin to consider the extent to which that decision re-framed the manner in which courts interpret statutes in light of agency interpretation.

Prior to *Chevron*, in a series of decisions in the 1940s, the Court seemed to accord different levels of deference to agency interpretations of statutes depending on (1) the type of question that the agency was deciding and (2) the authority delegated to the agency to resolve that type of question.

When agencies interpret statutes, they may resolve three different types of questions: (1) ***questions of law***; (2) ***questions of fact or policy***; and (3) ***mixed questions of fact and law***.

In the statutory interpretation context, "questions of law" are questions about the meaning of statutory terms that can be resolved without focusing on the facts of the case in which the statute is being applied. In *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), for instance, when the Court was asked to determine whether the newsboys employed by Hearst Publications in Los Angeles were "employees" under the National Labor Relations Act (NLRA), 29 U.S.C. § 152, the Court separated that question into two questions to be decided serially: (1) whether the term "employee" in the NLRA incorporated the common law definition of employee, *see* 322 U.S. at 120-129; and (2) whether the newsboys suing in the case were "employees" based on the Court's resolution of the first question. *See* 322 U.S. at 130-132. The first question is an example of a traditional "question of law."

The second type of questions that agencies may resolve while interpreting statutes are questions of fact or policy. When agencies resolve fact or policy questions in ***informal*** rulemaking or adjudication proceedings, courts review the agency's decisions under the ***arbitrary and capricious*** standard. *See* 5 U.S.C. § 706(2)(A). When agencies resolve fact questions in ***formal*** rulemaking or adjudication procedures, courts review the agency's decisions and uphold them if they are supported by "***substantial evidence***" in the ***record*** of the agency's decision. *See* 5 U.S.C. § 706(2)(E).

The third type of questions that agencies may resolve while interpreting statutes are "mixed questions of fact and law." Those are questions that require the agency to decide whether a statute applies to a specific set of facts. The second question that the *Hearst* Court addressed above—whether the "newsboys" suing in the case were "employees"—is an example of a mixed question of fact and law.

The distinction between "questions of law" and "mixed questions of fact and law" was significant to the *Hearst* Court, as the Court accorded different degrees of deference to agency statutory interpretations depending on whether the agency was resolving a "question of law" or a "mixed question of law." The *Hearst* Court decided the "question of law" (whether "employee" incorporated the common law definition of employee) using

traditional tools of statutory interpretation, without considering the NLRB's views on that question. *See* 322 U.S. at 120-129.

However, the Court took a markedly different approach to reviewing the "mixed question of fact and law." On that issue, the Court concluded that Congress had assigned responsibility to the NLRA to determine whether the newsboys were "employees." *Id.* at 130. The Court stressed that "[e]veryday experience in the administration of the statute gives [the NLRA] familiarity with … employment relationships in various industries, [and] with the abilities and needs of the workers for self-organization and collective action… The experience thus acquired must be brought frequently to bear on the question of who is any employee under the Act." *Id.* at 130. The Court further wrote, "[w]here the question is one of specific application of a broad statutory term in a proceeding in which the agency must determine it initially, the reviewing court's function is limited. … [T]he Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *Id.* at 131.

*Hearst*, therefore, seemed to require courts to decide "questions of law" on their own, without according deference to agencies, but to accord significant deference to agencies when deciding "mixed questions of fact and law," upholding those decisions when there is "warrant in the record." The precedent was difficult to apply because it is not always easy to distinguish "questions of law" and "mixed questions of fact and law."[601] In addition, in some cases, courts were able to divide "mixed questions of fact and law" into factual and legal components and review each separately, but that also was frequently not possible.

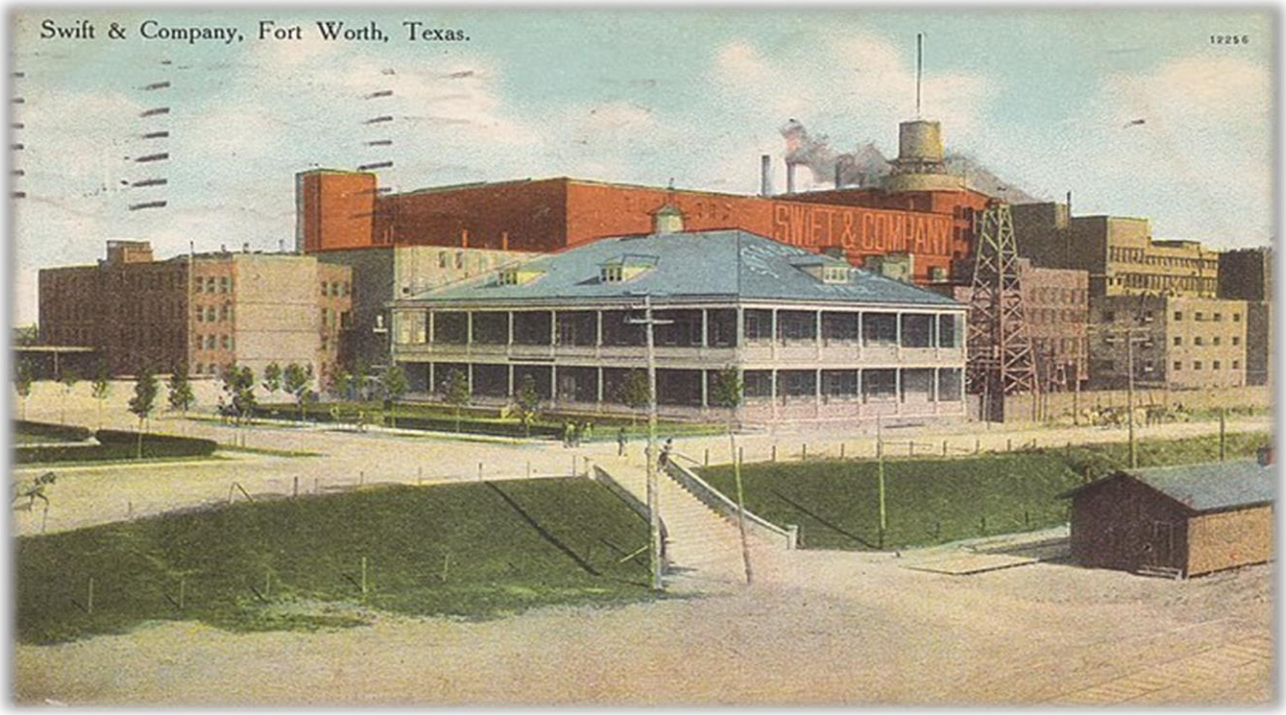
There was an additional wrinkle to the Court's agency deference regime prior to *Chevron.* While the *Hearst* Court accorded the NLRB significant deference on the mixed question of fact and law in that case, the Court made it clear, in another case, *Skidmore v. Swift*, 323 U.S. 134 (1944), that it accorded the agency that degree of deference because the Court concluded that Congress delegated to the agency the authority to decide the mixed question of fact and law. In *Skidmore,* the Court concluded that the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq*., did not give the Department of Labor the "responsibility to determine in the first instance whether particular cases fall within or without the Act," *see* 323 U.S. at 137, so the agency's interpretations of the Act in the context of "mixed questions of fact and law" were not entitled to the deference the Court accorded the NLRB in *Hearst.* Instead, the Court accorded the agency's interpretation a lesser degree of deference, focusing on a series of factors identified by the Court. *Id.* at 140.

In the forty years between the Court's decisions in *Hearst* and *Chevron*, the Court gradually moved away from the bright line distinctions adopted in *Hearst* and *Skidmore* towards a multi-factor approach to determining whether agency interpretations were

601 *See* Manning & Stephenson, *supra* note 4, at 1090-91. For different approaches to distinguishing factual and legal conclusions, *compare* Louis L. Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 548 (1965) (describing an "analytical approach") *with* 4 Kenneth Culp Davis, ADMINISTRATIVE LAW TREATISE § 30.01 (1958) (describing a "practical approach").

entitled deference. The Court's precedent was confusing at times, but the Court spoke clearly in 1984, when it decided *Chevron* and established the modern test for determining the amount of deference courts accord to agencies' interpretations of statutes.

However, when the Court decided *Chevron*, it did not jettison *Skidmore*. In a series of cases decided after *Chevron*, the Court outlined situations where *Chevron* applies and where it does not. When the Court has held that *Chevron* did not apply, it usually held that courts should, nevertheless, accord agency interpretations deference in those cases based on the factors set forth in *Skidmore,* which is reproduced below. The case involved interpretation of the Fair Labor Standards Act, which set limits on the maximum number of hours employees could be asked to work each week.




Swift and Company Packing Plant – Public Domain

## SKIDMORE V. SWIFT

**323 U.S. 134 (1944)**

**MR. JUSTICE JACKSON** delivered the opinion of the Court.

Seven employees of the Swift and Company packing plant at Fort Worth, Texas, brought an action under the Fair Labor Standards Act to recover overtime,

**Resources for the Case**

Unedited Opinion (From Justia)
Fair Labor Standards Act
Swift & Co. (Company History)
Video Summary (Prof. Stevenson – South Texas College of Law)

liquidated damages, and attorneys' fees totaling approximately $77,000. * * *

It is not denied that the daytime employment of these persons was working time within the Act. Two were engaged in general fire-hall duties and maintenance of fire-fighting equipment of the Swift plant. The others operated elevators or acted as relief men in fire duties. They worked from 7:00 a.m. to 3:30 p.m., with a half-hour lunch period, five days a week. * * * Under their oral agreement of employment, however, petitioners undertook to stay in the fire hall on the Company premises, or within hailing distance, three and a half to four nights a week. This involved no task except to answer alarms, either because of fire or because the sprinkler was set off for some other reason. No fires occurred during the period in issue, the alarms were rare, and the time required for their answer rarely exceeded an hour. For each alarm answered, the employees were paid, in addition to their fixed compensation, an agreed amount, fifty cents at first, and later sixty-four cents. The Company provided a brick fire hall equipped with steam heat and air-conditioned rooms. It provided sleeping quarters, a pool table, a domino table, and a radio. The men used their time in sleep or amusement as they saw fit, except that they were required to stay in or close by the fire hall and be ready to respond to alarms. It is stipulated that

> "they agreed to remain in the fire hall and stay in it or within hailing distance, subject to call, in event of fire or other casualty, but were not required to perform any specific tasks during these periods of time, except in answering alarms."

The trial court found the evidentiary facts as stipulated * * * It said, however, as a "conclusion of law" that

> "the time plaintiffs spent in the fire hall subject to call to answer fire alarms does not constitute hours worked for which overtime compensation is due them under the Fair Labor Standards Act, as interpreted by the Administrator and the Courts,"

and in its opinion observed, "of course, we know pursuing such pleasurable occupations or performing such personal chores does not constitute work." The Circuit Court of Appeals affirmed. * * *

[W]e hold that no principle of law found either in the statute or in Court decisions precludes waiting time from also being working time. We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether, in a concrete case, such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court. This involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances. Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged. His compensation may cover both waiting and task, or only performance of the task itself. Living quarters may in some situations be furnished as a facility of the task and in another as a part of its

compensation. The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was. * * *

Congress did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act. Instead, it put this responsibility on the courts. But it did create the office of Administrator, impose upon him a variety of duties, endow him with powers to inform himself of conditions in industries and employments subject to the Act, and put on him the duties of bringing injunction actions to restrain violations. Pursuit of his duties has accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs prevailing in reference to their solution. From these he is obliged to reach conclusions as to conduct without the law, so that he should seek injunctions to stop it, and that within the law, so that he has no call to interfere. He has set forth his views of the application of the Act under different circumstances in an interpretative bulletin and in informal rulings. They provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it.

The Administrator thinks the problems presented by inactive duty require a flexible solution, rather than the all-in or all-out rules respectively urged by the parties in this case, and his Bulletin endeavors to suggest standards and examples to guide in particular situations. * * * In general, the answer depends "upon the degree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active work." * * *

The facts of this case do not fall within any of the specific examples given, but the conclusion of the Administrator, as expressed in the brief *amicus curiae,* is that the general tests which he has suggested point to the exclusion of sleeping and eating time of these employees from the work-week and the inclusion of all other on-call time: * * *

There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions. And while we have given them notice, we have had no occasion to try to prescribe their influence. The rulings of this Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact. They are not, of course, conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy. They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do. But the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. They do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for

determining private rights shall be at variance only where justified by very good reasons. The fact that the Administrator's policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect. This Court has long given considerable, and in some cases decisive, weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of adversary origin.

We consider that the rulings, interpretations, and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.* * *

[I]n this case, although the District Court referred to the Administrator's Bulletin, its evaluation and inquiry were apparently restricted by its notion that waiting time may not be work, an understanding of the law which we hold to be erroneous. Accordingly, the judgment is reversed and the cause remanded for further proceedings consistent herewith.

## Questions and Comments

**1. Statutory interpretation question:** What was the statutory interpretation question that the Court was trying to decide?

**2. Method used by agency to interpret the statute:** Was the Administrator of the Wage and Hour Division of the Department of Labor (Administrator) a party to this lawsuit? Who were the plaintiffs and defendant? How was the Administrator involved and what procedure did the Administrator use to interpret the statute in this case? (I.e. rulemaking, adjudication, other?)

**3. Agency's interpretation:** Did the Administrator interpret the FLSA as applied to the facts of this case? What was the actual interpretation of the Administrator that the Court was considering?

**4. Agency authority:** Did the FLSA authorize the Administrator to make the initial determination, in most cases, whether an employer was violating the FLSA? Based on the *Hearst* precedent that existed at the time, would the case have come out differently if the statute clearly gave the agency the authority to make such decisions involving "mixed questions of fact and law"?

**5. Degree of deference:** What factors did the Court suggest a court should consider in order to determine whether to defer to an agency's interpretation of a statute?

**6. Reasons for deference:** Why did the Court suggest that courts should defer to agencies' interpretations of statutes in appropriate cases?

**7. Deference?** Did the Court ultimately defer to the agency's interpretation of the statute? How did that affect the outcome of the litigation?

**8. Scope of *Skidmore*:** Although *Skidmore* was decided before *Chevron* and arose in the context of reviewing a "mixed question of fact and law," the Court continues to apply *Skidmore* today, and its scope is not limited to review of "mixed questions of fact and law." The scope of *Skidmore* will be discussed more in Part IV of this chapter.

**VIDEO LECTURE**

**Click here for a video lecture on *Skidmore v. Swift* by Professor Stephen Johnson.**

## IV. *Chevron v. NRDC*

For forty years, one of the most significant Supreme Court decisions addressing statutory interpretation or administrative law was the Court's decision in *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). It is the most frequently cited Supreme Court administrative law decision and perhaps the most frequently cited statutory interpretation decision in academic journals.[602] As noted at the beginning of this chapter,

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602 A 2014 study found that the case was cited in 11,538 secondary sources. *See* Chris Walker, *Most Cited Supreme Court Administrative Law Decisions* (Notice & Comment, Oct 9, 2014), archived at http://perma.cc/J26H-QVBW . A more recent review identified 15,000 judicial decisions and 18,000 law review articles and secondary sources citing the case on Westlaw. *See* Aaron L. Nielson, *Visualizing Change in Administrative Law*, 49 Ga. L. Rev. 757, 786 (2015); Cass R. Sunstein, Chevron *Step Zero*, 92 Va L Rev 187 (2006); William S. Jordan III, *Judicial Review of Informal Statutory Interpretations: The Answer Is* Chevron *Step Two, Not Christensen or Mead*, 54 Admin L Rev 719 (2002); Thomas W. Merrill and Kristin E. Hickman, Chevron's *Domain*, 89 Georgetown L J 833 (2001); criticism of the decision and reform proposals, *see, e.g.,* Steve R. Johnson, *The Rise And Fall of* Chevron *in Tax: From the Early Days to King and Beyond*, 2015 Pepp. L. Rev. 19 (2015); Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779, 829 (2010); Linda Jellum, *Chevron's Demise: A Survey of* Chevron *from Infancy to Senescence*, 59 Admin. L. Rev. 725 (2007); praise for the decision, *see, e.g.,* John C. Cruden & Matthew R. Oakes, *The Enduring Nature of the* Chevron *Doctrine*, 40 Harv. Envtl. L. Rev. 189 (2016); and empirical studies of *Chevron's* deference, *see, e.g.* Kent Barnett and Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1 (2017); Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the* Chevron *Doctrine in Environmental Law*, 79 U. Colo. L. Rev. 767 (2008); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 Geo. L.J. 1083 (2008); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. Chi. L. Rev. 823 (2006); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of*

courts have long struggled to determine whether and when to defer to agency interpretations of statutes, in light of the inherent judicial power, per *Marbury v. Madison*, to say what the law is, and the APA's command that courts decide questions of law. Prior to *Chevron*, courts determined the amount of deference to give to agency statutory interpretations based on a multitude of factors, including whether Congress delegated lawmaking authority to the agency, whether the agency adopted the interpretation contemporaneous with the statute and applied it consistently over a long period of time, and the degree of reliance on the agency interpretation.[603] The Supreme Court replaced that multi-factor analysis with a seemingly straightforward two step analysis in *Chevron*.[604] That test proved to be less than straightforward in application and support for the doctrine eroded over time. *Chevron* and its evolution are traced in the following sections.

## A. The *Chevron* Two-Step

*Chevron* involved interpretation of the term "stationary source" in the federal Clean Air Act. Under the statute, if a company constructed or modified certain "stationary sources" in parts of the country that were not meeting EPA's national pollution standards ("non-attainment areas"), the company would need to obtain a permit from EPA before making those changes and would have to comply with stringent technology-based limits on pollution from the source. *See* 42 U.S.C. § 7502(c) (Section 172(c) of the Clean Air Act). The Clean Air Act does not explicitly define the term "stationary source" and EPA had interpreted the term "stationary source" in various conflicting ways before it adopted the interpretation at issue in the landmark Supreme Court case. The Natural Resources Defense Council (NRDC) challenged the agency's interpretation of the term when the agency interpreted the statute, by regulation, to allow an entire plant to be treated as a "stationary source," as opposed to treating each individual smokestack or other source of pollution within the plant as a "stationary source." The agency adopted that interpretation as part of the deregulatory push of the Reagan Administration. A broad definition of the

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*Appeals: A Preliminary Investigation,* 90 Va. L. Rev. 301, 322 (2004); Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 Yale J. On Reg. 1 (1998); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 Va. L. Rev. 1717 (1997); Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L.J. 984.

603 *See* Colin Diver, *Statutory Interpretation in the Administrative State*, 133 U.Pa. L. Rev. 549, 562 (1985).

604 The Court did not explicitly overrule the prior precedent or acknowledge any tensions between the two step and the prior precedent. See Thomas W. Merrill, *The Story of* Chevron*: The Making of An Accidental Landmark*, 66 ADMIN. L. REV. 253, 255-56 (2014). Apparently, the Court did not even recognize that the decision would have the broad impact that it ultimately did. *See* Thomas W. Merrill, *The Story of* Chevron U.S.A. v. Natural Resources Defense Council, Inc.: *Sometimes Great Cases Are Made Not Born, in* STATUTORY INTERPRETATION STORIES 165 (Eskridge, Frickey & Garrett eds., 2011). It is also interesting to note that, although *Chevron* was decided unanimously, only 6 Justices participated in the Court's decision. Justices Marshall and Rehnquist did not participate due to illnesses and Justice O'Connor recused herself due to a conflict of interest. *Id.* at 180-184.

term allowed companies to make changes to plants without needing to obtain a permit for the changes and without needing to comply with the more stringent technology-based standards that would otherwise apply to the construction or modification of the plant.

Before EPA adopted the regulatory definition of "stationary source" challenged by NRDC, the agency had taken the position that the Clean Air Act authorized it to treat an entire plant as a "stationary source" in regions of the country that were meeting EPA's national pollutant standards, but could ***not*** take that approach in "non-attainment" regions of the country. Thus, prior to EPA's adoption of the regulations challenged by EPA, the agency defined "stationary source" differently depending on whether the source was located in an areas of the country that met the agency's national pollution standards.

## CHEVRON V. NATURAL RESOURCES DEFENSE COUNCIL

**467 U.S. 837 (1984)**

**JUSTICE STEVENS** delivered the opinion of the Court.

In the Clean Air Act Amendments of 1977, * * * Congress enacted certain requirements applicable to States that had not achieved the national air quality standards established by the Environmental Protection Agency (EPA) pursuant to earlier legislation. The amended Clean Air Act required these "nonattainment" States to establish a permit program regulating "new or modified major stationary sources" of air pollution. Generally, a permit may not be issued for a new or modified major stationary source unless several stringent conditions are met. * * * The EPA regulation promulgated to implement this permit requirement allows a State to adopt a plantwide definition of the term "stationary source."[2] Under this definition, an existing plant

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument (From the Oyez Project)
The Story of Chevron – Prof. Thomas Merrill
Video Summary (Prof. Stevenson – South Texas College of Law)

Oil Refinery photo by http://www.flickr.com/photos/keepitsurreal/ - CC BY-SA 2.0

[2] "(i) 'Stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act."
"(ii) 'Building, structure, facility, or installation' means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel." 40 CFR §§ 51.18(j)(1)(i) and (ii) (1983).

that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant. The question presented by these cases is whether EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble" is based on a reasonable construction of the statutory term "stationary source."

I

The EPA regulations containing the plantwide definition of the term stationary source were promulgated on October 14, 1981. * * * Respondents[3] filed a timely petition for review in the United States Court of Appeals for the District of Columbia Circuit pursuant to 42 U.S.C. § 7607(b)(1).[4] The Court of Appeals set aside the regulations. * * * The court observed that the relevant part of the amended Clean Air Act "does not explicitly define what Congress envisioned as a stationary source, to which the permit program . . . should apply," and further stated that the precise issue was not "squarely addressed in the legislative history." * * * In light of its conclusion that the legislative history bearing on the question was "at best contradictory," it reasoned that "the purposes of the nonattainment program should guide our decision here." * * * Based on two of its precedents concerning the applicability of the bubble concept to certain Clean Air Act programs, * * * the court stated that the bubble concept was "mandatory" in programs designed merely to maintain existing air quality, but held that it was "inappropriate" in programs enacted to improve air quality. * * * Since the purpose of the permit program its "raison d'etre," in the court's view -- was to improve air quality, the court held that the bubble concept was inapplicable in these cases under its prior precedents. * * * It therefore set aside the regulations embodying the bubble concept as contrary to law. We granted certiorari to review that judgment, * * * and we now reverse.

The basic legal error of the Court of Appeals was to adopt a static judicial definition of the term "stationary source" when it had decided that Congress itself had not commanded that definition. Respondents do not defend the legal reasoning of the Court of Appeals.[7] Nevertheless, since this Court reviews judgments, not opinions, * * * we must determine whether the Court of Appeals' legal error resulted in an erroneous judgment on the validity

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[3] National Resources Defense Council, Inc., Citizens for a Better Environment, Inc., and North Western Ohio Lung Association, Inc.

[4] Petitioners, Chevron U.S.A. Inc., American Iron and Steel Institute, American Petroleum Institute, Chemical Manufacturers Association, Inc., General Motors Corp., and Rubber Manufacturers Association were granted leave to intervene and argue in support of the regulation.

[7] Respondents argued below that EPA's plantwide definition of "stationary source" is contrary to the terms, legislative history, and purposes of the amended Clear Air Act. The court below rejected respondents' arguments based on the language and legislative history of the Act. It did agree with respondents contention that the regulations were inconsistent with the purposes of the Act, but did not adopt the construction of the statute advanced by respondents here. Respondents rely on the arguments rejected by the Court of Appeals in support of the judgment and may rely on any ground that finds support in the record. * * *

of the regulations.

II

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[9] If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, * * * as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[11]

> "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. * * * Sometimes the legislative delegation to an agency on a particular question is implicit, rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. * * *

We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, * * * and the principle of deference to administrative interpretations

> "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that

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[9] The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. * * * If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law, and must be given effect.

[11] The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. * * *

the accommodation is not one that Congress would have sanctioned." * * *

In light of these well-settled principles, it is clear that the Court of Appeals misconceived the nature of its role in reviewing the regulations at issue. Once it determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether, in its view, the concept is "inappropriate" in the general context of a program designed to improve air quality, but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one. Based on the examination of the legislation and its history which follows, we agree with the Court of Appeals that Congress did not have a specific intention on the applicability of the bubble concept in these cases, and conclude that the EPA's use of that concept here is a reasonable policy choice for the agency to make. * * *

VII

* * * We are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress. * * *

*Legislative History*

In addition, respondents argue that the legislative history and policies of the Act foreclose the plantwide definition, and that the EPA's interpretation is not entitled to deference, because it represents a sharp break with prior interpretations of the Act.

Based on our examination of the legislative history, we agree with the Court of Appeals that it is unilluminating. * * * We find that the legislative history as a whole is silent on the precise issue before us. It is, however, consistent with the view that the EPA should have broad discretion in implementing the policies of the 1977 Amendments.

More importantly, that history plainly identifies the policy concerns that motivated the enactment; the plantwide definition is fully consistent with one of those concerns -- the allowance of reasonable economic growth -- and, whether or not we believe it most effectively implements the other, we must recognize that the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives as well. * * * Indeed, its reasoning is supported by the public record developed in the rulemaking process, * * * as well as by certain private studies. * * *

Our review of the EPA's varying interpretations of the word "source" -- both before and after the 1977 Amendments -- convinces us that the agency primarily responsible for administering this important legislation has consistently interpreted it flexibly -- not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena. The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of

its policy on a continuing basis. Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute. * * *

*Policy*

The arguments over policy that are advanced in the parties' briefs create the impression that respondents are now waging in a judicial forum a specific policy battle which they ultimately lost in the agency and in the 32 jurisdictions opting for the "bubble concept," but one which was never waged in the Congress. Such policy arguments are more properly addressed to legislators or administrators, not to judges.[38]

In these cases, the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests, and is entitled to deference: the regulatory scheme is technical and complex, * * * the agency considered the matter in a detailed and reasoned fashion, * * * and the decision involves reconciling conflicting policies. * * * Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices -- resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

When a challenge to an agency construction of a statutory provision, fairly

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[38] Respondents point out if a brand new factory that will emit over 100 tons of pollutants is constructed in a nonattainment area, that plant must obtain a permit pursuant to § 172(b)(6), and, in order to do so, it must satisfy the § 173 conditions, including the LAER requirement. Respondents argue if an old plant containing several large emitting units is to be modernized by the replacement of one or more units emitting over 100 tons of pollutant with a new unit emitting less -- but still more than 100 tons -- the result should be no different simply because "it happens to be built not at a new site, but within a preexisting plant." …

conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges -- who have no constituency -- have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

We hold that the EPA's definition of the term "source" is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth.

"The Regulations which the Administrator has adopted provide what the agency could allowably view as . . . [an] effective reconciliation of these twofold ends. . . ."

The judgment of the Court of Appeals is reversed.

It is so ordered.

## Questions and Comments

**1. The bubble:** Under the Clean Air Act, at the time of the decision, construction of a new major "stationary source" or "modification" of a major "stationary source" in an area of a state that was not meeting air quality standards ("nonattainment") required a permit and compliance with stringent technology-based air pollution limits. Not every change in a "stationary source," however, constituted a "modification." A change only constituted a "modification" if it resulted in the emission of a new pollutant or an increase in emissions of existing pollutants. Therefore, as noted in footnote 38 above, therefore, by defining "stationary source" to include an entire plant, an industrial facility could avoid the permitting and new technology requirements of the statute by replacing existing parts of a factory that are emitting pollution with new parts, as long as the new parts emitted the same or less pollution as the existing parts, since the facility would not be "modifying" a source. If, however, each part of the facility that emitted pollution were defined as a separate "source," the construction of a new part would be construction of a "stationary source" which could (if it were a major stationary source) trigger the permitting and new technology requirements, regardless of whether any other portions of the facility were being retired. Why do you think that NRDC opposed the bubble concept, and why did Chevron favor it?

**2. The agency's process:** What process did the agency use to interpret the statute in this case? If the agency's decision in the case was a "rule," was it a "legislative rule" or "non-legislative rule"? The answer to that question became important as courts tried to determine when to apply *Chevron* to review agency interpretations of statutes.

**3. The two step:** The Court created a two-step test that was frequently used to review agencies' legal interpretations of statutory terms. At Step One, Justice Stevens suggests that courts must ask "whether Congress has directly spoken to the precise question at

issue." Is the Court applying a clear statement test at Step One? If so, is the Court's review limited to the language of the statute, or can it consider the legislative history or purpose of the statute as well? Note that Justice Scalia, in a ***concurring opinion*** in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 454 (1987), criticized the Supreme Court's reliance, in that case, on traditional tools of statutory interpretation at Step One, and wrote that "courts must give effect to a reasonable agency interpretation of a statute unless that interpretation is inconsistent with a clearly expressed congressional intent." Is his position a faithful interpretation of *Chevron*? Although it is edited out above, the *Chevron* Court examined the text and structure of the Clean Air Act, and the legislative history of the statute and concluded, at Step One, that the statute was ambiguous regarding whether "stationary source" could include an entire plant, as EPA defined the term.

**4. Step Two:** If a court determines, at *Chevron* Step One, that the statute is silent or ambiguous on the statutory interpretation question, when should a court uphold the agency's interpretation of the statute? Can the court reject the agency's interpretation because the court disagrees with the policy interpretation adopted by the agency? Why did the *Chevron* Court uphold EPA's interpretation of the Clean Air Act at Step Two of its analysis? Note that one of the reasons identified by EPA for the broader definition of "stationary source" challenged in the case was EPA's desire to reduce confusion in the regulated community by adopting a consistent definition of "stationary source" that applied nationwide.

**5. Agency change in position:** The Court noted that EPA did not always interpret the term "stationary source" to encompass the "bubble concept" and that the agency had previously interpreted the term to apply to separate units within a plant. Does the agency's change in position make its decision unreasonable at Step Two? Would the result have been the same if the agency had changed its interpretation several times prior to adopting the regulations that were challenged in this case? Would the result have been the same if the agency did not explain why it had changed its interpretation of the term "stationary source"?

**6. Step two v. arbitrary and capricious:** Since *Chevron* Step Two focuses on the "reasonableness" of an agency's interpretation, some courts and academics treated Step Two as an application of the "arbitrary and capricious" standard of review under the APA. *See, e.g.* Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the* Chevron *Doctrine in Environmental Law*, 79 U. Colo. L. Rev. 767 (2008); Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 Yale L.J. 952, 959 (2007); Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 Chi.-Kent L. Rev. 1253, 1264-67 (1997); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009); *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 84 (2007). Other courts and academics argued that the two analyses are distinct (and, thus, not redundant). *See* Linda D. Jellum, THE LEGISLATIVE PROCESS, STATUTORY INTERPRETATION, AND ADMINISTRATIVE AGENCIES 648 (ed. Carolina Academic Press, 2016); *Catskill Mountains Chapter of Trout Unlimited, Inc v. EPA*, 846 F.3d 492, 521 (2d Cir. 2017). When courts treated the two standards as discrete, they often utilized traditional tools of statutory interpretation at *Chevron* Step Two (as well as Step One) to

identify a range of interpretations that may be reasonable under the statute and upheld the agency's interpretation as long as it fits within than range. *See* John F. Manning & Matthew Stephenson, LEGISLATION AND REGULATION: CASES AND MATERIALS, 4TH ED., 1111 (Found. Press 2021); Jellum, *supra*, at 647.

**7. Ratification of agency decisions under *Chevron* – Step One v. Step Two:** Empirical studies found that courts upheld agency interpretations of statutes under *Chevron* at a rate of 70% or higher. *See, e.g.,* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 28–29 (2017) (finding that agencies prevailed on 71.4% of interpretations in statutory interpretation cases); David Zaring, *Reasonable Agencies*, 96 Va. L. Rev. 135, 170 (2010) (finding an "overall agency validation rate" of 69%) Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 Yale J. On Reg. 1 (1998) (finding that agencies prevailed in 73% of the cases decided in federal courts between 1995 and 1996 involving *Chevron* review). There is, however, a significant difference between the rate at which courts upheld agency interpretations at Step One of *Chevron* and at Step Two. At Step One, studies found that courts upheld agency interpretations at a rate of 40% or lower. *See* Kent Barnett and Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 6 (2017) (finding federal appellate courts upheld agencies 39% of the time); Christopher H. Schroeder & Robert L. Glicksman, Chevron, State Farm*, and EPA in the Courts of Appeals During the 1990s*, 31 ELR 10371 10377 (2001) (finding federal courts upheld EPA determinations 40.9% of the time during the 1990s). At Step Two, on the other hand, courts upheld agency interpretations at a rate of 93% or higher. *See* Barnett & Walker, supra at 33 (finding federal appellate courts uphold agency interpretations 93.8% of the time); Schroeder & Glicksman, *supra* at 10377 (finding federal courts upheld EPA determinations 92.6% of the time). Thus, realistically, if a court was going to ignore an agency's interpretation of a statute, the only way to do that was to find that the statute was clear and that the agency's interpretation conflicted with the clear statute. If, on the other hand, a court approved of an agency's interpretation, it could uphold it either by finding that the statute was clear and the agency's interpretation was consistent with Congress' intent ***or*** it could find that the statute was ambiguous and the agency's reading of the statute was a reasonable interpretation. Critics of *Chevron* argued that judges had substantial discretion to reach the result that they desired through the use of traditional tools of statutory interpretation at Step One. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L. J. 511, 521 (1989) (Justice Scalia was a long-time supporter of *Chevron*, rather than a critic, but parted ways with the majority of the Court regarding the proper application of the doctrine).

**8. Fluidity in the structure:** Although the *Chevron* Court crafted a two-step analysis, courts were not always diligent in applying the test in that rigid structure. Occasionally, courts began their discussion of a statute at Step Two or conflated the two-step analysis into a single step. *See* Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals,* 15 Yale J. on Reg. 1, 30-31 (1998). For further examination of the structure of the *Chevron* analysis, *see* Cary Coglianese, Chevron's *Interstitial Steps*, 85 Geo. Wash. L. Rev. 1339, 1374-86 (2017); Richard M. Re, *Should* Chevron *Have Two Steps?*, 89 Ind. L.J. 605 (2014).

**9. Rationales for deference:** In crafting a decision for a unanimous Court, Justice Stevens identified several different reasons why deference to an agency's interpretation is warranted, including: (a) Congress intended that the agency should resolve the issue; (b) agencies have specialized expertise to resolve the issue; and (c) agencies are politically accountable through the democratic process. In addition to the rationales identified in the opinion, scholars argue that according deference to agencies' statutory interpretations provides uniformity that would not exist if courts across the country independently interpreted statutory language de novo. See Peter L. Strauss, *One Hundred and Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Colum. L. Rev. 1093, 1124 (1987). Professors Robert Glicksman and Christopher Schroeder note that the Court set forth the new test at a time when there was a shift in the attitude towards agencies from distrust based on agency capture to confidence in the expertise and accountability of agencies. *See* Robert Glicksman & Christopher Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 L. & Contemp. Probs. 249, 256-57 (1991). Justice Blackmun's papers suggest that the Court's deferential approach in *Chevron* was motivated, in part, by the Justices' difficulty in understanding the complexities of the Clean Air Act. *See* Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Blackmun Papers*, 35 ELR 10637, 10663 (2005). In determining how far *Chevron* applies outside of the context in which the case arose, courts have struggled to determine whether one rationale carries more weight than others.

**10. Ambiguity as a rationale for deference:** Is ambiguity in a statute a reasonable basis for deferring to an agency's interpretation? Does it indicate legislative intent to delegate questions to agencies? Many academics and Justices have expressed skepticism that Congress intends to delegate authority to agencies by leaving ambiguity in statutes. *See, e.g.,* David J. Barron & Elena Kagan, Chevron's *Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201,203 (2001); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986). Justice Brett Kavanaugh and Professor Lawrence Solan argue that it is frequently unclear whether a statute is ambiguous, so courts should not rely on ambiguity as a trigger for *Chevron* or other "clarity doctrines" in statutory interpretation. See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2144 (2016) (book review); Lawrence M. Solan, *Pernicious Ambiguity in Contracts and Statutes*, 79 Chi.- Kent L. Rev. 859, 859 (2004).

On the other hand, the empirical study of legislative drafters conducted by Professors Abbe Gluck and Lisa Schultz Bressman found that drafters were more familiar with the *Chevron* doctrine than most other canons and drafted statutes with the knowledge that courts would apply that canon. *See* Abbe R. Gluck and Lisa Schultz Bressman, *Statutory Interpretation from the Inside - An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 993-94 (2013). Bressman and Gluck also reported, though, that legislative drafters indicated that they frequently leave ambiguity in statutes for many reasons other than as indication of intent to delegate authority to agencies. *Id.* at 994-97. The drafters suggested that legislative history often provides stronger evidence of intent to delegate authority to agencies and that many types of

issues, including major policy issues, are inappropriate for agency resolution even when a statute is ambiguous. *Id. See also* Lisa Schultz Bressman and Abbe R. Gluck, *Statutory Interpretation from the Inside - An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 Stan. L. Rev. 725, 771-73 (2014). Professor Jarod Shobe argues for a more nuanced reliance on ambiguity as a sign of intent to delegate. According to Shobe, Congress delegates less often to agencies during periods of divided government, so ambiguity in statutes enacted during periods of divided government should not be viewed as a signal of intent to delegate authority to agencies. *See* Jarrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 Geo. Wash. L. Rev. 451, 457 (2017). Should the fact that agencies are involved in drafting a particular statute be relevant in deciding whether Congress delegates authority to them to decide ambiguous questions?

**11. *Chevron* and judicial ideology:** In light of the flexibility provided at Step One of *Chevron*, several academics have explored whether there was any correlation between the ideology of judges and their application of the *Chevron* analysis. In the context of environmental law, several academics concluded that judicial ideology correlated with decisions to uphold or invalidate agency action when judges apply *Chevron*. *See* Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the* Chevron *Doctrine in Environmental Law*, 79 U. Colo. L. Rev. 767 (2008); Cass R. Sunstein, David Schkade, Lisa M. Ellman & Andres Sawicki, ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 34 (2006).

**12. Judges' views on *Chevron*:** An empirical study of all of the federal appeals court decisions applying *Chevron* between 2003 and 2013 found that there was considerable variation in the manner in which judges applied *Chevron* among the circuits, prompting the authors of the study to suggest that the Supreme Court should provide more guidance regarding the application of the doctrine. *See* Kent Barnett and Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 9, 71-72 (2017). A separate survey of forty-two federal appeals court judges disclosed that most of the judges, other than judges on the D.C. Circuit, were not fans of *Chevron,* but felt themselves bound to apply it. *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 Harv. L. Rev. 1298, 1302 (2018)

**13. Was *Chevron* a canon and did that matter?** In recent years, courts and academics began to examine whether agencies "waive" *Chevron* deference if they do not assert it in defense of their decisions. In response, Professors Kristin Hickman and David Hahn have explored whether *Chevron* is a rule of decision, standard of review, or a canon of construction. *See* Kristin E. Hickman & R. David Hahn, *Categorizing* Chevron, 81 Ohio State L. J. 611 (2020). They argued that if *Chevron* is a canon, courts could readily ignore it and agencies could waive it because courts do not accord precedential value to canons of construction. *Id.* at 635-36, 649-50, 653. The Supreme Court addressed that issue, to an extent, in *Loper Bright* when it discussed the implications of overruling *Chevron*.

**14. Adoption of *Chevron* in the states:** *Chevron* involved judicial review of the

decision of a federal agency and set forth a deference standard that applied to federal agencies. States were not bound to follow the Court's approach in *Chevron*. For many years, most states retained de novo or broad review of agency statutory interpretation. *See* William N. Eskridge Jr., James J. Brudney, Josh Chafetz, Philip F. Frickey, & Elizabeth Garrett, CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY, 6TH ED. 1071 (West Acad. Pub. 2020). Over the last two decades, though, many states adopted *Chevron* or an approach similar to *Chevron* to review agency statutory interpretation. *Id.* at 1071-72 (identifying states that have adopted or rejected *Chevron* and describing alternative deference regimes adopted in various states). However, Ohio, Arkansas, Delaware, Kansas, Michigan, Mississippi, and Wisconsin explicitly rejected the *Chevron* approach. *See* Alex Ebert, *Ohio Eliminates Agency Deference, Splitting With High Court,* Bloomberg Law News, Dec. 29, 2002.

## Problem 7-3

In the last decade, 384 workers died from heat exposure in the United States. Most of the heat-related deaths occur in the agriculture, landscaping, construction, and trash collection industries.

In response to lobbying from several labor organizations that represent workers in the agriculture, landscaping, and construction industries, Senator Mark Sabbath introduced a bill, S.178, to require the Occupational Safety and Health Administration (OSHA) to set workplace safety standards for heat exposure in outdoor employment. While the bill was being considered, Senator Carrie Snowdon proposed an amendment that would require the agency to set workplace safety standards for heat exposure in employment, regardless of whether workers were working indoors or outdoors. Senator Sabbath responded, "Although many indoor jobs create a risk of heat illness, we need to move incrementally to address this problem. Most deaths today arise from heat exposure in outdoor jobs, so this bill only addresses those jobs." Senator Snowdon's amendment was defeated on the Senate floor. The issue raised by Senator Snowdon was also addressed in the Conference Committee report for the bill, which indicated, "'Outdoor places of employment', in this bill, include jobs that involve some indoor work as long as a substantial amount of the work occurs outdoors or the outdoor component of the work creates significant risk of heat illness."

S.178 was ultimately enacted as "The Heat Illness Prevention in Outdoor Places of Employment Act of 2021." Several provisions of the statute are reproduced below.

## Problem 7-3 (continued)

**Section 1. Findings**

a. Health-related deaths in agriculture, construction, landscaping, oil and gas extraction and trash collection have risen dramatically over the last decade.

b. The likelihood of heat-related illness is influenced by many workplace conditions, including air temperature, heat from the sun and other sources, and workload severity and duration. Those conditions can contribute to heat-related illness regardless of whether employees are working outdoors or indoors.

**Section 2. Purposes**

a. It is the goal of this Act to protect employees from heat illness, including heat cramps, heat exhaustion, and heat stroke, in the workplace.

**Section 3. Standards for heat in outdoor places of employment**

a. The Administrator of OSHA shall, "after notice and opportunity for a public hearing", adopt occupational safety and health standards for heat in outdoor places of employment.

b. An "occupational safety and health standard" is "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment."

**Section 4. Enforcement Authority**

a. Any person who violates an "occupational safety and health standard" established under this Act may be fined up to $5,000 for each violation. In addition, the Administrator of OSHA may order any person who is violating an "occupational safety and health standard" to comply with the standard.

Shortly after the statute was enacted by the U.S. Congress, OSHA issued a notice of proposed rulemaking to establish "occupational safety and health standards" for heat in outdoor places of employment. The proposed rule applied to outdoor activities in the agriculture, construction, landscaping, oil and gas, and trash collection industries. During the comment period on the proposed rule, the Transportation Workers Union submitted a comment, arguing that the rules should apply to transportation workers, including delivery drivers, as well as the industries identified in the proposed rule.

## Problem 7-3 (continued)

When OSHA published the final rule in the Federal Register, it retained all of the requirements from the proposed rulemaking, but it expanded the scope of the rule to apply to workers engaged in transportation or delivery of agricultural products, construction materials, and other heavy materials. In the preamble to the final rule, the agency explained, "Data provided during the comment period regarding incidences of heat illness in the transportation and delivery of agricultural products, construction materials, and other heavy materials suggest that even though most of the work involved in those delivery activities occurs indoors, there are significant risks associated with packing and unpacking the trucks. Those activities occur outdoors, so it is appropriate to regulate transportation and delivery drivers in those industries."

Mammoth Home Improvement, a corporation that owns and operates hundreds of home improvement stores, would like to challenge the agency's decision to apply the final rule to workers engaged in the transportation and delivery of construction materials. After all, Mammoth argues, the delivery drivers spend most of their day in air-conditioned trucks. What standard would the court use to review the agency's legal determination that the statute authorizes regulation of workers engaged in the transportation and delivery of construction materials (an activity that occurs primarily indoors) and is the court likely to uphold the agency's determination under that standard? In addition to the information outlined above, it may also be helpful to know that Webster's dictionary defines "outdoors" as "done, situated or used outside" and the American Heritage Dictionary defines "outdoors" as "located in, done in or situated in the open air."

### B. Scope of *Chevron* – Step Zero

*Chevron* involved judicial review of an agency's interpretation of a statutory term when the agency was given authority to make rules to implement the statute and the agency defined the term in a rule adopted pursuant to notice and comment rulemaking. Since the Court identified so many varied bases for deference in *Chevron*, and since the *Chevron* Court did not overturn other precedent outlining different deference rules for agency decisions, it was unclear, at the time, how broadly *Chevron* applied. The Court provided some clarity in a series of decisions decided a decade and a half after *Chevron*.

In *Christensen v. Harris County*, 529 U.S. 576 (2000), the Supreme Court was asked to decide whether a policy implemented by the Sheriff's Department in Harris County that required employees to use accrued compensatory time violated the Fair Labor Standards Act (FLSA). The Fair Labor Standards Administration, the agency that administered the

FLSA, had issued an opinion letter setting forth its interpretation of the law, but the Supreme Court refused to apply *Chevron* and determined that the County's actions did not violate the FLSA. *Id.* at 585-86.

The Court explained its decision to refrain from applying *Chevron* in the case as follows:

> Here, * * * we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters -- like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law -- do not warrant Chevron-style deference. * * * Instead, interpretations contained in formats such as opinion letters are "entitled to respect" under our decision in *Skidmore v. Swift & Co*., but only to the extent that those interpretations have the "power to persuade."

*Id.* at 587. The Court concluded that the agency's letter was unpersuasive under *Skidmore.*

*Christensen* seemed to establish a bright line rule that ***non-legislative rules***, such as policy statements and guidance documents, were not entitled to *Chevron* deference, but were entitled to *Skidmore* deference. Beyond non-legislative rules, however, the scope of the exception to *Chevron* was not clear. After all, the *Christensen* Court cited several reasons for its decision to reject *Chevron*, including the ***informality of the procedures*** used by the agency to make its decision and the fact that the decision was not issued with the ***force of law***.

The Court addressed the scope of the *Chevron* exception again in the following year in *United States v. Mead Corp.*, 533 U.S. 218 (2001). The Court's decisions in *Christensen* and *Mead* motivated academics to suggest that *Chevron* includes a third step that precedes the *Chevron* two-step. *See* Cass R. Sunstein, Chevron *Step Zero,* 92 Va. L. Rev. 187, 207-09 (2006). At ***Chevron Step Zero***, courts decide whether an agency's decision should even be analyzed under the *Chevron* two-step framework.

In *Mead,* the Court focused on whether a tariff classification ruling by the United States Customs Service should be reviewed under the *Chevron* framework. The agency had interpreted language in the Harmonized Tariff Schedule to require Mead to pay a tariff on the day planners that it sold. The Customs Service made the decision that was challenged in the case through a "letter ruling," which was an informal adjudication that was issued by regional offices of the agency, was not generally binding on third parties, and could be revoked or suspended without notice to anyone other than the recipient of the letter. The Court determined that *Chevron* did not apply, explaining,

> …administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.

> Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent. The Customs ruling at issue here fails to qualify.

533 U.S. 218 at 227. While the Court held that *Chevron* did not apply, it concluded that the agency's interpretation was entitled deference under *Skidmore*. *Id.*

Although the Supreme Court, in *Mead,* eschewed creation of any bright-line test for application of *Chevron* based on the procedures used by agencies, in general, when agencies made decisions through formal rulemaking, formal adjudication, or notice and comment rulemaking, *Chevron* usually applied. When they made decisions through informal adjudication or non-legislative rules, *Skidmore* ***usually*** applied. Nevertheless, the lower federal courts were inconsistent in their application of *Chevron* in light of *Mead*. Professors Kent Barnett and Christopher Walker reviewed all of the published federal appellate court decisions between 2003 and 2013 that refer to the *Chevron* doctrine and they concluded that there was considerable variation among the circuits regarding the rate at which courts applied *Chevron* to review agency decisions. *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 7 (2017) (ranging from 60.7% in the Sixth Circuit to 88.6% in the D.C. Circuit). The variation in the application of *Chevron* by the courts was one of the justifications advanced by the *Loper Bright* Court when it determined that *stare decisis* should not prevent the Court from overturning *Chevron*.

When *Skidmore* deference and *Chevron* deference co-existed, *Skidmore* deference was generally understood to be a weaker form of deference than *Chevron*. In Barnett and Walker's review of federal appellate court decisions noted above, courts upheld agency interpretations under the *Chevron* analysis in 77.4% of the cases, whereas they upheld agency interpretations under *Skidmore* in only 56% of the cases.[605] Other academics found less significant gaps between the rates of judicial approval of agency action under the different deference regimes.[606]

As applied, there were some practical differences between the two deference regimes. First, courts were less likely to defer to agency statutory interpretations under *Skidmore* than *Chevron* when an agency had changed its interpretation of the statute over time. Similarly, if an agency's interpretation of a statute was of recent vintage, as opposed to a long-standing interpretation, that weakened the "consistency" factor in the *Skidmore* analysis, whereas it usually had little impact under *Chevron*. With respect to the other

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[605] *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 6 (2017).

[606] *See* Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?,* 63 Admin. L. Rev. 77, 83-84 (2011) (reviewing several studies and finding an affirmance rate between 55.1% and 70.9% for *Skidmore* in the studies v. 64% to 81.3% for *Chevron*).

*Skidmore* factors, the "thoroughness" evident in an agency's consideration focuses, to some extent, on the identity of the decisionmaker and the finality of the agency's decision. Decisions made by lower level agency officials that are tentative will carry little weight in a *Skidmore* court's weighing of the multiple factors of the test. *See, e.g.,* *DeLaMota v. United States Department of Education*, 412 F.3d 71 (2d. Cir. 2005). The *Skidmore* factor that focuses on the "validity" of the agency's reasoning appears to incorporate both a *Chevron* Step One style interpretation of the statute and a Step Two review of the reasonableness of the agency's interpretation. *Id.* In addition to the factors explicitly identified by the *Skidmore* Court, including the amorphous "power to persuade" factor, courts applying *Skidmore* frequently focus on the type of question an agency is resolving, evidence of Congress' intent to have the agency decide that question, and the degree of expertise the agency has in that area as factors to consider.

## Problem 7-4

This Problem is based on "The Heat Illness Prevention in Outdoor Places of Employment Act of 2021" in Problem 7-3 (above), so the background facts regarding the statute are incorporated into this problem.

However, for purposes of this problem, instead of adopting the regulation described in Problem 7-1, assume that OSHA adopted a regulation that requires employers to limit the number of consecutive hours that employees can work in "outdoor activities." (The "maximum hours" rule.) OSHA did not, however, define "outdoor activities" in the regulation and did not identify, in the regulation, the industries that are covered by the statute.

When the Heat Illness Prevention statute was first enacted in 2021, OSHA posted a guidance document on its website ("the 2021 guidance document") that indicated that OSHA interpreted the statute to apply to outdoor activities in the agriculture, construction, landscaping, oil and gas, and trash collection industries. The guidance document explicitly provided, however, that the agency did not interpret the statute to apply to employees engaged in the transportation and delivery of products in those industries.

When OSHA adopted the regulation that required employers to limit the number of hours that employees can work in "outdoor activities," the agency removed the 2021 guidance document from its website. When the agency removed the guidance document from its website, Mammoth Home Improvement, a corporation that owns and operates hundreds of home improvement stores, was concerned that the agency would apply the "maximum hours" rule to its employees who were engaged in the transportation and delivery of construction materials. Mammoth contacted the regional office of OSHA to inquire about whether the agency planned to require employers like Mammoth to comply with the "maximum hours" rule.

## Problem 7-4 (continued)

In response, a "public information" employee in the regional office of the agency sent a letter to Mammoth that indicated, "Based on the information that we have learned through oversight of workplace safety conditions over 50 years, we have determined that even though most of the work involved in the transportation and delivery of construction materials occurs indoors, there are significant heat-related risks associated with packing and unpacking the materials. Those activities often occur outdoors, so it is appropriate to regulate transportation and delivery drivers in those industries and we will apply the statutory safeguards to those workers." The agency employee did not acknowledge, in the letter, that the position taken in the letter was the opposite of the position taken in the 2021 guidance document. Not surprisingly, therefore, the employee did not explain why the agency no longer adhered to the prior guidance. Incidentally, a "public information" employee is a staff-level employee in OSHA regional offices, and the employee is not required to have letters that they send approved by any higher-level agency official. The letters are merely advisory and are not viewed by the agency as binding. Indeed, the statute does not even address the agency's authority to issue such letters.

Mammoth would like to challenge the agency's decision, in the letter, to apply the requirements of the statute in Section 3 to workers engaged in the transportation and delivery of construction materials. Assuming that a court would review the agency's legal determination that the statute authorizes regulation of workers engaged in the transportation and delivery of construction materials (an activity that occurs primarily indoors) under *Skidmore,* is the court likely to uphold the agency's determination under that standard?

## CALI SECTION QUIZ

Before moving on to the next section, why not try a short quiz on the material you just read at www.cali.org/lesson/19764. It should take about 30 minutes to complete.

### C. Expansion and Decline of *Chevron*

As the Supreme Court attempted to provide some clarity regarding the types of agency decisions that were entitled to *Chevron* deference, it faced another question regarding the scope of *Chevron.* Should a court defer to an agency's interpretation of a statute under

*Chevron* when the agency adopts an interpretation of a statute that conflicts with an interpretation of the statute endorsed by the court in a previous lawsuit? Or is the court bound by *stare decisis* to adopt the interpretation of the statute that it announced in the precedent case? In short, can the agency interpretation of the statute trump the court's interpretation?

In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), the Supreme Court resolved that question, holding:

> A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.

*Id.* at 982. In other words, if a court interpreted a statute in a particular way ***because the court found the statute to be clear***, an agency's later interpretation of the statute that conflicted with the court's interpretation would not be entitled to *Chevron* deference. However, if a court interpreted a statute in a particular way ***despite finding that it was ambiguous***, an agency could later interpret the statute in a way that conflicted with the court's interpretation and the court would need to review the agency's interpretation under *Chevron* rather than upholding its prior interpretation based on *stare decisis*. As some critics of the decision charged, the agency could, in essence, overrule the court's interpretation of the statute. The *Brand X* Court wrote that its decision was compelled by the underlying reasoning of *Chevron* that Congress implicitly delegates authority to agencies, rather than courts, to interpret a statute when there is an ambiguity in the statute. *Id.* at 982-983.

The Court's decision in *Brand X* marked a high-water mark for *Chevron*, but also led to increased criticism of the doctrine. In that way, *Brand X* helped to hasten *Chevron's* demise.

In addition to the *Chevron* Step Zero exceptions discussed in the prior section of this chapter, courts fashioned several other exceptions to *Chevron* before the Supreme Court overruled it in *Loper Bright.* For instance, it was generally understood that *Chevron* only applied to agency interpretations of statutes that an agency was authorized to enforce and administer. *See Epic Systems Corp. v. Lewis*, 584 U.S. 497, 519-520 (2018). Some courts also held that *Chevron* did not apply when an agency disavowed the doctrine. *See Glob. Tel. Link v. FCC*, 866 F.3d 397, 407-08 (D.C. Cir. 2017). Furthermore, *Chevron* did not apply when a court reviewed an agency's interpretation of its regulations, rather than interpretation of a statute. The standard of review that applies in those cases is discussed later in this chapter.

As courts fashioned more exceptions to *Chevron*, several Supreme Court Justices criticized the doctrine in concurring or dissenting opinions, *see, e.g., Burlington Northern Santa Fe Ry. v. Loos*, 139 S. Ct. 893 (2019) (dissenting opinion of Justices Gorsuch and Thomas criticizing Chevron); *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) (concurring

opinion of Justice Kennedy and dissenting opinion of Justice Alito criticizing Chevron); *Michigan v. EPA*, 576 U.S. 743 (2015) (concurring opinion of Justice Thomas criticizing Chevron)*; City of Arlington v. Federal Communications Commission*, 569 U.S. 290, 312 (2013) (Roberts, dissenting) (Chief Justice Roberts expressing skepticism toward *Chevron*). In addition, prior to joining the Court, Justice Brett Kavanaugh criticized *Chevron* as having "no basis in the Administrative Procedure Act," orchestrating a "shift of power from Congress to the Executive Branch," being difficult to apply, and encouraging the Executive Branch to be aggressive when interpreting statutes. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150-51 (2016). In the article in which he raised those criticisms, though, he suggested that *Chevron* can still play a role in statutory interpretation and that courts should defer to agencies when interpreting broad and open-ended terms in statutes, but not when interpreting specific statutory terms or phrases. *Id.* at 2153-54.

As criticism to *Chevron* mounted, Congress also considered, but did not pass, legislation that would replace *Chevron* deference with *Skidmore* or de novo review. *See, e.g.,* Regulatory Accountability Act of 2017, S. 951, 115th Cong., § 4 (2017), *available at:* https://www.congress.gov/bill/115th-congress/house-bill/76/text (last visited July 9, 2024); Separation of Powers Restoration Act of 2017, S. 1577, 115th Cong. § 2 (2017), *available at*: https://www.congress.gov/bill/115th-congress/senate-bill/1577 (last visited July 9, 2024).

Before the Supreme Court overruled *Chevron,* federal courts were increasingly ignoring *Chevron* in cases where the doctrine should have applied without mentioning *Chevron* or justifying departure from *Chevron* based on an exception. *See* Michael Kagan*, Loud and Soft Anti-*Chevron *Decisions*, 53 Wake Forest L. Rev. 37 (2018); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 970, 982 (1992) ("the *Chevron* framework is used in only about half the cases that the Court perceives as presenting a deference question.").[607]

The last time that the U.S. Supreme Court upheld an agency interpretation of a statute based on *Chevron* was in 2016. *See Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261 (2016) (unanimous decision, including Justices Alito and Thomas).

# V. The World After *Chevron*

On the penultimate day of the 2023-24 term, the Supreme Court overruled the *Chevron* doctrine in *Loper Bright Enterprises et al. v. Raimondo*, which is reproduced below.

[607] *But see* Kent Barnett and Christopher J. Walker, *Chevron in the Circuit Courts*, 116 Mich. L. Rev. 1, 9 (2017) (finding that lower federal courts were continuing to apply the doctrine with vigor).

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument (From the Oyez Project)
Amicus Briefs (From ScotusBlog)
Impacts of Loper Bright (Prof. Richard Lazarus – Harvard Law School)
Atlantic Herring Fisheries Management Plan (from New England Fishery Mgmt. Council)

# LOPER BRIGHT ENTERPRISES, ET AL. V. RAIMONDO

**2024 U.S. LEXIS 2882 (2024)**

**CHIEF JUSTICE ROBERTS** delivered the opinion of the Court.

Since our decision in *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), we have sometimes required courts to defer to "permissible" agency interpretations of the statutes those agencies administer— even when a reviewing court reads the statute differently. In these cases we consider whether that doctrine should be overruled.

I.

[In Part I of the opinion, the Court summarized the background of the consolidated cases and the procedural history of the cases. Both cases involved interpretation of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), codified at 16 U.S.C. §1801, et. seq. A provision of the law indicated that fishery management plans developed under the law could require that "one or more observers be carried on board" vessels "for the purpose of collecting data necessary for the conservation and management of the fishery." *Id.* §1853(b)(8). Pursuant to the law, the New England Fishery Management Council adopted a fishery management plan for the Atlantic herring fishery that required observers to be carried on board vessels in some circumstances. The MSA specifically identifies three groups of vessels that must pay for the costs associated with observers required under the law, but it does not include any provisions that address whether Atlantic herring fishermen may be required to pay for the costs associated with any observers that might be required under a fishery management plan developed under the law for the Atlantic herring fishery. For many years, the National Marine Fisheries Service (NMFS), an agency within the U.S. Department of Commerce, paid the costs for the observers but, in 2020, the NMFS promulgated a regulation that required the vessel operators to pay for the cost of observers that may be required under the plans.

Loper Bright Enterprises operates fishing vessels in the Atlantic herring fishery and, along with other businesses operating in the fishery, it brought a lawsuit in the U.S. District Court for the District of Columbia, challenging the regulations adopted by NMFS requiring operators to pay for the cost of observers. The district court upheld the regulation, finding that either the MSA authorized the regulation or the MSA was ambiguous, but the government's reading of the statute was reasonable under *Chevron* and should be upheld. The D.C. Circuit affirmed the decision, finding that there was some question

regarding Congress' intent, but that the agency's reading of the statute was reasonable under *Chevron.*

The companion case was brought in the U.S. District Court for the District of Rhode Island by Relentless, Inc. and other companies that operated in the Atlantic herring fishery. Like Loper Bright, they argued that the NMFS rule was not authorized by the MSA. The district court granted summary judgment to the government, deferring, under *Chevron*, to the government's reading of the statute. The First Circuit affirmed, finding that the NMFS rule was authorized by the statute. The court indicated that it was applying *Chevron's* two step framework, but it didn't explain which aspects of its analysis were relevant to which step of *Chevron* and it did not indicate whether it was ruling for the government at *Chevron* step one or step two.

The Supreme Court granted certiorari in both cases, limited to the question of whether *Chevron* should be overruled or clarified. Since Justice Jackson heard argument on the Loper Bright case while she served as a judge on the D.C. Circuit, she did not participate in that case on appeal, but participated in the appeal of the case brought by Relentless. The Court issued this single opinion for both cases.]

II.

A.

Article III of the Constitution assigns to the Federal Judiciary the responsibility and power to adjudicate "Cases" and "Controversies"—concrete disputes with consequences for the parties involved. The Framers appreciated that the laws judges would necessarily apply in resolving those disputes would not always be clear. * * * The Framers also envisioned that the final "interpretation of the laws" would be "the proper and peculiar province of the courts." The Federalist No. 78, at 525 (A. Hamilton). * * *

This Court embraced the Framers' understanding of the judicial function early on. In the foundational decision of *Marbury v. Madison*, Chief Justice Marshall famously declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is." 1 Cranch 137, 177 (1803). * * *

The Court also recognized from the outset, though, that exercising independent judgment often included according due respect to Executive Branch interpretations of federal statutes. For example, in *Edwards' Lessee v. Darby*, 12 Wheat. 206 (1827), 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. *See United States v. Dickson*, 15 Pet. 141, 161 (1841) (Story, J., for

the Court); *United States v. Alabama Great Southern R. Co.*, 142 U. S. 615, 621 (1892); *National Lead Co. v. United States*, 252 U. S. 140, 145–146 (1920). 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.'" *NLRB v. Noel Canning*, 573 U. S. 513, 525 (2014) * * * 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." *United States v. Moore*, 95 U.S. 760, 763 (1878). * * *

"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." *Decatur*, 14 Pet., at 515; see also Burnet v. Chicago Portrait Co., 285 U. S. 1, 16 (1932). Otherwise, judicial judgment would not be independent at all. As Justice Story put it, "in cases where [a court's] own judgment . . . differ[ed] from that of other high functionaries," the court was "not at liberty to surrender, or to waive it." *Dickson*, 15 Pet., at 162.

B.

The New Deal ushered in a "rapid expansion of the administrative process." *United States v. Morton Salt Co.*, 338 U. S. 632, 644 (1950). But as new agencies with new powers proliferated, the Court continued to adhere to the traditional understanding that questions of law were for courts to decide, exercising independent judgment. During this period, the Court often treated agency determinations of fact as binding on the courts, provided that there was "evidence to support the findings." *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 51 (1936). * * *

But the Court did not extend similar deference to agency resolutions of questions of law. It instead made clear, repeatedly, that "[t]he interpretation of the meaning of statutes, as applied to justiciable controversies," was "exclusively a judicial function." * * * It also continued to note, as it long had, that the informed judgment of the Executive Branch—especially in the form of an interpretation issued contemporaneously with the enactment of the statute—could be entitled to "great weight." *American Trucking Assns*., 310 U. S. 534, 549 (1940).

Perhaps most notably along those lines, in *Skidmore v. Swift & Co.*, 323 U. S. 134 (1944), the Court explained that the "interpretations and opinions" of the relevant agency, "made in pursuance of official duty" and "based upon . . . specialized experience," "constitute[d] a body of experience and informed judgment to which courts and litigants [could] properly resort for guidance," even on legal questions. "The weight of such a judgment in a particular case," the Court observed, would "depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later

pronouncements, and all those factors which give it power to persuade, if lacking power to control."

On occasion, to be sure, the Court applied deferential review upon concluding that a particular statute empowered an agency to decide how a broad statutory term applied to specific facts found by the agency. For example, in *Gray v. Powell*, 314 U. S. 402 (1941), the Court deferred to an administrative conclusion that a coal-burning railroad that had arrangements with several coal mines was not a coal "producer" under the Bituminous Coal Act of 1937. Congress had "specifically" granted the agency the authority to make that determination. The Court thus reasoned that "[w]here, as here, a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched" so long as the agency's decision constituted "a sensible exercise of judgment." Similarly, in *NLRB v. Hearst Publications, Inc.*, 322 U. S. 111 (1944), the Court deferred to the determination of the National Labor Relations Board that newsboys were "employee[s]" within the meaning of the National Labor Relations Act. The Act had, in the Court's judgment, "assigned primarily" to the Board the task of marking a "definitive limitation around the term 'employee.'" The Court accordingly viewed its own role as "limited" to assessing whether the Board's determination had a "'warrant in the record' and a reasonable basis in law."

Such deferential review, though, was cabined to factbound determinations like those at issue in *Gray* and *Hearst*. Neither *Gray* nor *Hearst* purported to refashion the longstanding judicial approach to questions of law. In *Gray*, after deferring to the agency's determination that a particular entity was not a "producer" of coal, the Court went on to discern, based on its own reading of the text, whether another statutory term—"other disposal" of coal— encompassed a transaction lacking a transfer of title. The Court evidently perceived no basis for deference to the agency with respect to that pure legal question. And in *Hearst*, the Court proclaimed that "[u]ndoubtedly questions of statutory interpretation . . . are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute." At least with respect to questions it regarded as involving "statutory interpretation," the Court thus did not disturb the traditional rule. It merely thought that a different approach should apply where application of a statutory term was sufficiently intertwined with the agency's factfinding.

In any event, the Court was far from consistent in reviewing deferentially even such factbound statutory determinations. Often the Court simply interpreted and applied the statute before it. * * * Nothing in the New Deal era or before it thus resembled the deference rule the Court would begin applying decades later to all varieties of agency interpretations of statutes. Instead, just five years after *Gray* and two after *Hearst*, Congress codified the opposite rule: the traditional understanding that courts must "decide all relevant questions of law." 5 U.S.C. §706.

C.

Congress in 1946 enacted the APA "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." * * * In addition to prescribing procedures for agency action, the APA delineates the basic contours of judicial review of such action. As relevant here, Section 706 directs that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U. S. C. §706. It further requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law." §706(2)(A).

The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment. It specifies that courts, not agencies, will decide "all relevant questions of law" arising on review of agency action, §706 (emphasis added)— even those involving ambiguous laws—and set aside any such action inconsistent with the law as they interpret it. And it prescribes no deferential standard for courts to employ in answering those legal questions. That omission is telling, because Section 706 does mandate that judicial review of agency policymaking and factfinding be deferential. See §706(2)(A) (agency action to be set aside if "arbitrary, capricious, [or] an abuse of discretion"); §706(2)(E) (agency factfinding in formal proceedings to be set aside if "unsupported by substantial evidence").

In a statute designed to "serve as the fundamental charter of the administrative state," * * * Congress surely would have articulated a similarly deferential standard applicable to questions of law had it intended to depart from the settled pre-APA understanding that deciding such questions was "exclusively a judicial function," *American Trucking Assns*., 310 U. S., at 544. But nothing in the APA hints at such a dramatic departure. * * *

The text of the APA means what it says. And a look at its history if anything only underscores that plain meaning. [The majority then cited provisions in the House and Senate Reports on the legislation and statements of legislators to support its reading of the statute according to the plain meaning.] Even the Department of Justice—an agency with every incentive to endorse a view of the APA favorable to the Executive Branch—opined after its enactment that Section 706 merely "restate[d] the present law as to the scope of judicial review." Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 108 (1947) * * * That "present law," as we have described, adhered to the traditional conception of the judicial function.

Various respected commentators contemporaneously maintained that the APA required reviewing courts to exercise independent judgment on questions of law. * * *

The APA, in short, 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—as they have from the start—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" consistent with the APA. *Skidmore*, 323 U. S., at 140. 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. *See ibid.; American Trucking Assns*., 310 U. S., at 549.

In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes "expressly delegate[]" to an agency the authority to give meaning to a particular statutory term.[5] Others empower an agency to prescribe rules to "fill up the details" of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that "leaves agencies with flexibility," *Michigan v. EPA*, 576 U. S. 743, 752 (2015), such as "appropriate" or "reasonable."[6]

When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, "fix[ing] the boundaries of [the] delegated authority," and ensuring the agency has engaged in "'reasoned decisionmaking' " within those boundaries, *Michigan*, 576 U. S., at 750 (quoting Allentown Mack Sales & Service, Inc. v. NLRB, 522 U. S. 359, 374 (1998)); *see also Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29 (1983). By doing so, a court upholds the traditional conception of the judicial function that the APA adopts.

III.

The deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA.

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5 *See, e.g.,* 29 U.S.C. §213(a)(15) (exempting from provisions of the Fair Labor Standards Act "any employee employed on a casual basis in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (*as such terms are defined and delimited by regulations of the Secretary*)" (emphasis added); 42 U.S.C. §5846(a)(2) (requiring notification to Nuclear Regulatory Commission when a facility or activity licensed or regulated pursuant to the Atomic Energy Act "contains a defect which could create a substantial safety hazard, *as defined by regulations which the Commission shall promulgate"* (emphasis added).

6 *See, e.g.,* 33 U.S.C. § 1312(a); 42 U.S.C. §7412(n)(1)(A).

A.

In the decades between the enactment of the APA and this Court's decision in *Chevron,* courts generally continued to review agency interpretations of the statutes they administer by independently examining each statute to determine its meaning. * * *

*Chevron*, decided in 1984 by a bare quorum of six Justices, triggered a marked departure from the traditional approach. [The majority then outlined the two step test articulated by the Court in *Chevron.* After discussing the first step, the majority turned to the second step.] * * *

Without mentioning the APA, or acknowledging any doctrinal shift, the Court articulated a second step applicable when "Congress ha[d] not directly addressed the precise question at issue." In such a case—that is, a case in which "the statute [was] silent or ambiguous with respect to the specific issue" at hand—a reviewing court could not "simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." A court instead had to set aside the traditional interpretive tools and defer to the agency if it had offered "a permissible construction of the statute," even if not "the reading the court would have reached if the question initially had arisen in a judicial proceeding." That directive was justified, according to the Court, by the understanding that administering statutes "requires the formulation of policy" to fill statutory "gap[s]"; by the long judicial tradition of according "considerable weight" to Executive Branch interpretations; and by a host of other considerations, including the complexity of the regulatory scheme, EPA's "detailed and reasoned" consideration, the policy-laden nature of the judgment supposedly required, and the agency's indirect accountability to the people through the President. * * *

Initially, *Chevron* "seemed destined to obscurity." The Court did not at first treat it as the watershed decision it was fated to become; it was hardly cited in cases involving statutory questions of agency authority. But within a few years, both this Court and the courts of appeals were routinely invoking its two-step framework as the governing standard in such cases. As the Court did so, it revisited the doctrine's justifications. Eventually, the Court decided that *Chevron* rested on "a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." * * *

B.

Neither *Chevron* nor any subsequent decision of this Court attempted to reconcile its framework with the APA.

1

*Chevron* defies the command of the APA that "the reviewing court"—not the agency whose action it reviews—is to "decide all relevant questions of law" and "interpret . . . statutory provisions." §706 (emphasis added). It requires a court to ignore, not follow, "the

reading the court would have reached" had it exercised its independent judgment as required by the APA. And although exercising independent judgment is consistent with the "respect" historically given to Executive Branch interpretations, *Chevron* insists on much more. It demands that courts mechanically afford binding deference to agency interpretations, including those that have been inconsistent over time. Still worse, it forces courts to do so even when a pre-existing judicial precedent holds that the statute means something else—unless the prior court happened to also say that the statute is "unambiguous." *Brand X,* 545 U. S., at 982. That regime is the antithesis of the time honored approach the APA prescribes. * * *

*Chevron* cannot be reconciled with the APA, as the Government and the dissent contend, by presuming that statutory ambiguities are implicit delegations to agencies. * * * Presumptions have their place in statutory interpretation, but only to the extent that they approximate reality. *Chevron's* presumption does not, because "[a]n ambiguity is simply not a delegation of lawinterpreting power. *Chevron* confuses the two." As *Chevron* itself noted, ambiguities may result from an inability on the part of Congress to squarely answer the question at hand, or from a failure to even "consider the question" with the requisite precision. In neither case does an ambiguity necessarily reflect a congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question. And many or perhaps most statutory ambiguities may be unintentional. * * *

Courts, after all, routinely confront statutory ambiguities in cases having nothing to do with *Chevron*—cases that do not involve agency interpretations or delegations of authority. Of course, when faced with a statutory ambiguity in such a case, the ambiguity is not a delegation to anybody, and a court is not somehow relieved of its obligation to independently interpret the statute. Courts in that situation do not throw up their hands because "Congress's instructions have" supposedly "run out," leaving a statutory "gap." Courts instead understand that such statutes, no matter how impenetrable, do— in fact, must—have a single, best meaning. That is the whole point of having written statutes; "every statute's meaning is fixed at the time of enactment." * * * So instead of declaring a particular party's reading "permissible" in such a case, courts use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity.

In an agency case as in any other, though, even if some judges might (or might not) consider the statute ambiguous, there is a best reading all the same—"the reading the court would have reached" if no agency were involved. It therefore makes no sense to speak of a "permissible" interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible.

Perhaps most fundamentally, *Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do. The Framers, as noted, anticipated that courts would often confront statutory ambiguities and expected that courts would resolve them by exercising independent legal judgment. * * * [E]ven *Chevron* itself reaffirmed that "[t]he judiciary is the final authority on issues of statutory

construction" and recognized that "in the absence of an administrative interpretation," it is "necessary" for a court to "impose its own construction on the statute." *Chevron* gravely erred, though, in concluding that the inquiry is fundamentally different just because an administrative interpretation is in play. The very point of the traditional tools of statutory construction—the tools courts use every day— is to resolve statutory ambiguities. That is no less true when the ambiguity is about the scope of an agency's own power—perhaps the occasion on which abdication in favor of the agency is least appropriate.

2

The Government responds that Congress must generally intend for agencies to resolve statutory ambiguities because agencies have subject matter expertise regarding the statutes they administer; because deferring to agencies purportedly promotes the uniform construction of federal law; and because resolving statutory ambiguities can involve policymaking best left to political actors, rather than courts. * * * But none of these considerations justifies *Chevron*'s sweeping presumption of congressional intent.

Beginning with expertise, we recently noted that interpretive issues arising in connection with a regulatory scheme often "may fall more naturally into a judge's bailiwick" than an agency's. *Kisor*, 588 U. S., at 578. We thus observed that "[w]hen the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority." *Chevron's* broad rule of deference, though, demands that courts presume just the opposite. Under that rule, ambiguities of all stripes trigger deference. * * *

But even when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency. Congress expects courts to handle technical statutory questions. "[M]any statutory cases" call upon "courts [to] interpret the mass of technical detail that is the ordinary diet of the law," and courts did so without issue in agency cases before *Chevron*. Courts, after all, do not decide such questions blindly. The parties and amici in such cases are steeped in the subject matter, and reviewing courts have the benefit of their perspectives. In an agency case in particular, the court will go about its task with the agency's "body of experience and informed judgment," among other information, at its disposal. *Skidmore*, 323 U. S., at 140. And although an agency's interpretation of a statute "cannot bind a court," it may be especially informative "to the extent it rests on factual premises within [the agency's] expertise." Such expertise has always been one of the factors which may give an Executive Branch interpretation particular "power to persuade, if lacking power to control." *Skidmore*, 323 U. S., at 140. * * *

For those reasons, delegating ultimate interpretive authority to agencies is simply not necessary to ensure that the resolution of statutory ambiguities is well informed by subject matter expertise. The better presumption is therefore that Congress expects courts to do their ordinary job of interpreting statutes, with due respect for the views of the Executive

Branch. And to the extent that Congress and the Executive Branch may disagree with how the courts have performed that job in a particular case, they are of course always free to act by revising the statute.

Nor does a desire for the uniform construction of federal law justify *Chevron*. Given inconsistencies in how judges apply *Chevron*, *see infra*, it is unclear how much the doctrine as a whole (as opposed to its highly deferential second step) actually promotes such uniformity. In any event, there is little value in imposing a uniform interpretation of a statute if that interpretation is wrong. We see no reason to presume that Congress prefers uniformity for uniformity's sake over the correct interpretation of the laws it enacts.

The view that interpretation of ambiguous statutory provisions amounts to policymaking suited for political actors rather than courts is especially mistaken, for it rests on a profound misconception of the judicial role. It is reasonable to assume that Congress intends to leave policymaking to political actors. But resolution of statutory ambiguities involves legal interpretation. That task does not suddenly become policymaking just because a court has an "agency to fall back on." Courts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences. Indeed, the Framers crafted the Constitution to ensure that federal judges could exercise judgment free from the influence of the political branches. *See The Federalist*, No. 78, at 522–525. * * *

That is not to say that Congress cannot or does not confer discretionary authority on agencies. Congress may do so, subject to constitutional limits, and it often has. But to stay out of discretionary policymaking left to the political branches, judges need only fulfill their obligations under the APA to independently identify and respect such delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA. By forcing courts to instead pretend that ambiguities are necessarily delegations, *Chevron* does not prevent judges from making policy. It prevents them from judging.

3

In truth, *Chevron*'s justifying presumption is, as Members of this Court have often recognized, a fiction. * * * So we have spent the better part of four decades imposing one limitation on *Chevron* after another, pruning its presumption on the understanding that "where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is 'inapplicable.'" *United States v. Mead Corp*., 533 U. S. 218, 230 (2001). [The majority then outlined the various exceptions to the application of *Chevron* developed by the Court over four decades.] Confronted with this byzantine set of preconditions and exceptions, some courts have simply bypassed *Chevron*, saying it makes no difference for one reason or another. And even when they do invoke *Chevron*, courts do not always heed the various steps and nuances of that evolving doctrine. In one of the cases before us today, for example, the First Circuit both skipped "step zero," and

refused to “classify [its] conclusion as a product of *Chevron* step one or step two”—though it ultimately appears to have deferred under step two.

This Court, for its part, has not deferred to an agency interpretation under *Chevron* since 2016. *See Cuozzo Speed Technologies, LLC v. Lee,* 579 U. S. 261, 280 (2016). But *Chevron* remains on the books. So litigants must continue to wrestle with it, and lower courts—bound by even our crumbling precedents — understandably continue to apply it. The experience of the last 40 years has thus done little to rehabilitate *Chevron*. It has only made clear that *Chevron's* fictional presumption of congressional intent was always unmoored from the APA's demand that courts exercise independent judgment in construing statutes administered by agencies. At best, our intricate *Chevron* doctrine has been nothing more than a distraction from the question that matters: Does the statute authorize the challenged agency action? And at worst, it has required courts to violate the APA by yielding to an agency the express responsibility, vested in “the reviewing court,” to “decide all relevant questions of law” and “interpret . . . statutory provisions.” §706 (emphasis added).

[In Part IV of its opinion, the majority concluded that *stare decisis* was not a barrier to overruling *Chevron* because *stare decisis* “is not an ‘inexorable command’ and the stare decisis considerations most relevant *** - the quality of [the precedent's] reasoning, the workability of the rule it established, and reliance on the decision,” * * * all weigh in favor of letting *Chevron* go.” The majority argued that the Court need not wait for Congress to legislate to eliminate *Chevron* because the Court created the doctrine and should correct its own mistakes. In light of the fact that so many cases were decided by the Supreme Court and lower courts in reliance on *Chevron,* the majority directly addressed the impact of its decision on those cases. The majority wrote, “By [overruling *Chevron*], however, we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful - including the Clean Air Act holding of *Chevron* itself - are still subject to statutory *stare decisis* despite our change in interpretive methodology.”]

*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.

Because the D. C. and First Circuits relied on *Chevron* in deciding whether to uphold the Rule, their judgments are vacated, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

## Questions and Comments

**1. The statutory interpretation question:** *Loper Bright* was a classic *Chevron* scenario in that it involved a challenge to a legislative rule adopted by an agency to interpret an ambiguous provision in a statute. While the Magnuson-Stevens Fishery Conservation and Management Act (MSA) explicitly identified certain groups of vessels that had to pay for observers required by the Act, it was silent regarding whether other operators of vessels could be required to pay for observers. The National Marine Fisheries Service (NMFS) interpreted the statute, by regulation, to allow the agency to require the operators of vessels in the Atlantic herring fishery to pay for the observers. Both the D.C. Circuit and the 1st Circuit applied *Chevron* in the companion cases challenging the agency's regulation.

**2. Article III:** Chief Justice Roberts begins his opinion with a discussion of Article III and the powers assigned to courts under the Constitution. Does he believe that application of the *Chevron* doctrine is consistent with Article III?

**3. The world before *Chevron*:** What weight did the majority argue courts accorded to agency interpretations of statutes prior to *Chevron?* Was there deference on any matters? How does the majority characterize judicial review under *Skidmore, Gray v. Powell*, and *NLRB v. Hearst*? Justice Kagan, in her dissent, argued that courts were deferring to agencies' legal interpretations in cases like *Gray v. Powell* and *NLRB v. Hearst* when they deferred to agencies' conclusions on "mixed questions of fact and law," so that those cases were natural precursors to *Chevron* deference.

**4. The APA:** Why does the majority conclude that the plain meaning of the text of Section 706 precludes *Chevron* deference? What significance does the majority give to the language used to set the standard for judicial review of agency actions in Sections 706(2)(A) and 706(2)(E)? Justice Kagan points out, in dissent, that Section 706(2)(F) provides for courts to review agency decisions de novo in certain situations. How might that be used to determine whether courts can defer to agencies' interpretations of legal questions under Section 706?

**5. The APA as codifying existing caselaw:** The majority and Justice Kagan, in dissent, agreed that the APA was intended to codify existing caselaw regarding the manner in which courts interpreted statutes in light of agency interpretations of statutes. However, they disagreed regarding the state of the caselaw as it existed at the time of the enactment of the APA. As noted above, the majority felt that courts did not accord agencies any deference on questions of law before the enactment of the APA, while Justice Kagan argued that courts were according *Chevron*-style deference in those cases decades before *Chevron* was decided.

**6. Relevance of agency interpretations after *Loper*:** While the majority holds that *Chevron* deference is inconsistent with the APA and Article III, it identifies two ways that agency interpretations may be useful in interpreting a statute. What were the two ways and how is a court's analysis different under each? Note that the format of the agency's

decision (legislative rulemaking, non-legislative rulemaking, informal adjudication, adjudication) no longer has much influence on the weight accorded to an agency interpretation, except to the extent that the format might be relevant in the *Skidmore* analysis.

**7. Explicit delegation:** Why does the majority reject the *Chevron* presumption that Congress intended to delegate interpretive power to agencies when it left ambiguities in statutes? Note the contrast between the majority's discussion of implicit delegation and explicit delegation. How does the court's role, as described by the majority, in reviewing statutes when Congress expressly delegates authority to the agency to interpret the statute differ from *Chevron* Step Two? Does the majority provide a clear test for determining when Congress expressly delegates authority to an agency to interpret a statute?

**8. Agency expertise, political accountability, and uniformity:** In her dissent, Justice Kagan defended *Chevron* deference on many of the traditional grounds asserted by the *Chevron* Court and subsequent courts and academics. Specifically, she argued that when Congress leaves an ambiguity in a statute, that ambiguity can be resolved either by courts or by agencies. Deferring to agencies, she argued, is preferable because (1) agencies have expertise in the subject matter of the statute and expertise developed from administering the statute that courts lack; (2) agencies are politically accountable, whereas courts are not; and (3) agencies can establish uniform interpretations of statutes. How does the majority address those arguments in defense of deference to agencies? Do you agree that judges do not make policy when interpreting ambiguities in statutes?

**9. The slow decline of *Chevron*:** The majority's disdain for *Chevron* is especially evident in Part III of the opinion. In Part III.B., the Court expresses frustration at being required to "mechanically afford binding deference to agency interpretations * * * that have been inconsistent over time [and] * * * to do so even when a pre-existing judicial precedent holds that the statute means something else." Later, the majority notes that it "spent the better part of four decades imposing one limitation on *Chevron* after another," that courts often bypassed *Chevron* because they couldn't figure out how or when it applied, and that courts often didn't understand the various steps of *Chevron*, as exhibited by the 1st Circuit's decision below. As noted earlier, the majority also pointed out that the Supreme Court hadn't relied on the doctrine to uphold an agency's interpretation of a statute since 2016.

**10. *Stare decisis*:** As noted earlier in this book, judicial interpretations of statutes, as opposed to interpretations of the Constitution, are usually accorded "super-strong" *stare decisis* effect because Congress can more readily overturn a court's interpretation of a statute than it can overturn an interpretation of the Constitution. Why does the majority determine that it is appropriate to overturn the forty-year-old *Chevron* precedent? In her dissent, Justice Kagan described the precedent as "a cornerstone of administrative law," "part of the warp and woof of modern government," and the basis for thousands of judicial decisions. What effect will the Court's decision have on the thousands of cases that relied

on *Chevron* to interpret statutes? Is it relevant that *Chevron* created a method of statutory interpretation? Does *stare decisis* usually apply to statutory interpretation methodologies?

**11. Congressional inaction:** Note that Justice Roberts defends judicial, rather than agency, resolution of statutory ambiguities by arguing that Congress can always amend a statute if it disagrees with the court's interpretation of the statute. That seems to indicate a faith in Congress' ability to overturn judicial decisions with which it disagrees. However, when analyzing whether it is appropriate to overturn *Chevron* despite the fact that Congress has not enacted legislation to overturn the precedent, the majority does not exhibit that same faith, and holds that the Court does not have to wait for Congress to overturn *Chevron* because the doctrine was created by the Court itself. In the wake of the Court's decision in *Loper Bright*, Congress could allow agencies to exert broad authority to interpret ambiguous language in statutes by including explicit delegations of such authority to the agencies in amendments to the statutes. Do you think that is likely?

**12. Additional opinions:** Justice Thomas wrote a solo concurring opinion in *Loper Bright*, arguing that *Chevron* raised separation of powers concerns as a violation of Article II as well as Article III. Justice Gorsuch wrote a solo concurring opinion to set forth his views on *stare decisis* and the application of *stare decisis* to *Chevron*.

**13. Anti-agency trend in the Roberts Court:** *Loper Bright* is just one decision that is part of a broader trend in the Roberts Court, led by Justices Gorsuch, Thomas, and Alito, to reduce the power of administrative agencies. In the same week that the Court issued its decision in *Loper Bright*, it issued a decision calling into question the power of agencies to enforce statutes administratively as opposed to judicially, *see* *SEC v. Jarkesy*, 2024 U.S. LEXIS 2847 (2024), and a decision effectively extending the statute of limitations for challenges to agency actions under the Administrative Procedure Act. *See* *Corner Post Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 2024 U.S. LEXIS 2885 (2024). In addition, as noted earlier in this book, the Roberts Court has imposed new limits on the composition of agencies based on the Appointments Clause[608] and is reinvigorating the non-delegation doctrine.[609] In the same vein, the Court has expanded the use of the "major questions doctrine," discussed in the next part of this chapter, to limit the ability of agencies to carry out broad delegations of statutory authority.

## VI. The Major Questions Doctrine

Originally established in a 1994 decision, *MCI Telecommunications v. AT&T*, 512 U.S. 218 (1994), the ***major questions doctrine*** creates a presumption that Congress will not address issues of vast economic or political significance unless it speaks clearly in a

608 *See* Chapter 1, Part IV.A.

609 *Id.*, Part II.A.

statute.[610] Congress will not "***hide elephants in mouseholes***."[611] The canon evolved gradually from *MCI* to its current state.

In *MCI,* the Court was reviewing a decision of the FCC to eliminate tariff requirements for all long-distance phone companies other than AT&T under the agency's statutory authority to "modify … any requirement" of the section of the statute requiring tariffs. *Id.* at 220. Although the agency's decision was within the plain meaning of the language of the statute, the Court rejected the agency's reading of the statute, writing, "It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements." *Id.* at 431.

The Court clarified the doctrine six years later in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). In that case, the Court was reviewing the FDA's decision to regulate advertising of cigarettes and tobacco under the Food, Drug, and Cosmetic Act. The Court rejected the agency's reading of the statute, writing, "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* at 160. In *MCI* and *Brown & Williamson*, the agencies' decisions would normally have been entitled to *Chevron* deference, but, in each case, the Court refused to uphold the decisions because the statutes under which the agencies acted did not explicitly address the issue being resolved by the agency. While the Court applied *Chevron* in those cases, it resolved the statutory interpretation question at Step One in each case.

As the canon is still relatively new, there is some disagreement regarding whether the canon prohibits agencies from making decisions of vast economic or political significance at all, because delegation of such decision-making authority to agencies would violate the non-delegation doctrine, or whether the canon prohibits agencies from making such decisions unless Congress has clearly authorized them to make the decisions.[612]

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610 A law review article by then Judge Stephen Breyer is also credited as an early inspiration for the major questions doctrine. *See* Stephn G. Breyer, *Judicial Review of Questions of Law and Policy,* 38 Admin. L. Rev. 363, 370 (1986). Commentators have also suggested that the origins for the doctrine lay in an earlier Supreme Court decision, *Industrial Union Department v. American Petroleum Institute,* 448 U.S. 607 (1980). *See* Cass R. Sunstein, *There are Two "Major Questions" Doctrines,* 73 Admin. L. Rev. 475, 484-485 (2021).

611 *See Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001).

612 *See* Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise,* 2007 Sup. Ct. Rev. 51, 76 (2007); Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes,* 62 Admin. L. Rev. 19, 52-53, 60-63 (2010). Professor Cass Sunstein suggests that it is not yet clear what a court should do under the doctrine if it finds that there is no clear delegation of authority to an agency to address the major question. *See* Sunstein, *supra* note 605. He suggests that under a "weak" version of the doctrine, courts would interpret the statute independently, without deference to an agency's interpretation of the statute, because the doctrine is simply another *Chevron* Step Zero exception. *Id.* at 477. By contrast, he argues that under a "strong" version of the doctrine, courts would resolve the statutory interpretation question

Professor Lisa Heinzerling refers to the doctrine as a "power canon," because it is "a politically inspired shift in power from the executive branch to the courts," which is inspired by a "distrust of an active administrative state."[613]

From 1994 until 2021, the Court used the doctrine only five times.[614] The canon was used sparingly and was limited to situations where there was "a significant expansion of the agency's asserted authority and an important departure from prior agency practices."[615] In several cases, the Court was concerned that the agency interpreting the statute was not the primary agency empowered to administer the statute and was seeking to regulate in areas outside of its expertise.[616]

However, during the 2021 Term, the Supreme Court used the major questions doctrine in three cases to reject agencies' interpretations of statutes, signaling an expansion of the doctrine.[617]

In *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S.Ct. 2485 (2021), the Court invalidated a moratorium that the Centers for Disease Control (CDC) imposed on eviction of tenants during the COVID-19 pandemic. Although the Public Health Service Act authorized the agency to "make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases …," s*ee* 42 U.S.C. § 264(a), the Court held that the CDC's moratorium was an exercise of powers of "vast economic and political significance" because it affected at least 80% of the country and intruded into the landlord-tenant relationship, an area that is the particular domain of state law, so the agency's action could only be valid if Congress ***clearly*** authorized the agency to impose an eviction moratorium.[618] When the Court focused on the rest of the language of the statute identifying some of the measures that the CDC could address through rules (fumigation, disinfection, sanitation, pest extermination), the Court concluded that Congress did not

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in the manner disfavored by the agency, since the agency's interpretation would be pursuant to an unconstitutional delegation of authority. *Id.*

613 *See See* Lisa Heinzerling, *The Power Canons*, 58 Wm. & Mary L. Rev. 1933, 1937 (2017).

614 In addition to *MCI* and *Brown & Williamson*, the Court utilized the canon in *King v. Burwell,* 576 U.S. 473 (2015); *Gonzales v. Oregon,* 546 U.S. 243 (2006); and *Util. Air Reg. Grp. v. EPA,* 573 U.S. 302 (2014). The *Burwell* case was the first case where the Court relied on the doctrine as a reason to avoid applying *Chevron* to review the agency's interpretation (although the Court ultimately upheld the agency's interpretation of the statute) . In the *UARG* case, the Court applied *Chevron* but struck down the agency's decision at Step One, as in *MCI* and *Brown & Williamson.* In *Gonzales,* the Court did not apply *Chevron* because the Court concluded that the agency did not have authority under the statute to make decisions having the force of law.

615 *See* Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine,* 74 Admin. L. Rev. 317, 324 (2022).

616 *See, e.g. King v. Burwell,* 576 U.S. at 475*; Gonzales v. Oregon,* 546 U.S. at 262.

617 *See West Virginia v. EPA,*142 S.Ct. 2587 (2022); *National Federation of Independent Business v. Department of Labor, OSHA,* 142 S.Ct. 661 (2022); *Alabama Association of Realtors v. Department of Health and Human Services,* 141 S.Ct. 2485 (2021).

618 *See* 141 S.Ct. at 2488.

clearly authorize the CDC to impose an eviction moratorium, which the Court concluded was markedly different from the other measures authorized in the statute.[619] The Court also found that it was significant that the statutory provision authorizing the CDC's action was enacted in 1944, had been rarely invoked, and had never been invoked to justify an eviction moratorium.[620]

In some ways, the decision was consistent with earlier applications of the ***major question doctrine*** because it involved an agency asserting significantly expanded authority that it had not asserted before and asserting it in an area that seemed outside of its expertise. In other ways, though, the decision was an expansion of the canon, in that the Court relied, in part, on the agency's interference with traditional state powers, to conclude that the action was one of vast "economic and political significance."

The Court applied the doctrine in another case involving the COVID-19 pandemic just a few months after it decided the *Alabama Association of Realtors* case. The Court's decision in *National Federation of Independent Business v. Department of Labor, OSHA*, 142 S.Ct. 661 (2022) is reproduced below.

Masking during the COVID-19 Pandemic – Photo by Frankie Fouganthin – CC BY-SA 4.0

619 *Id.*

620 *Id.*

## NATIONAL FEDERATION OF INDEPENDENT BUSINESS V. DEPARTMENT OF LABOR, OSHA

**142 S.CT. 661 (2022)**

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument (From the Oyez Project)
Briefs in the Case – Scotus Blog

**PER CURIAM.**

The Secretary of Labor, acting through the Occupational Safety and Health Administration (OSHA), recently enacted a vaccine mandate for much of the Nation's work force. The mandate, which employers must enforce, applies to roughly 84 million workers, covering virtually all employers with at least 100 employees. It requires that covered workers receive a COVID-19 vaccine, and it pre-empts contrary state laws. The only exception is for workers who obtain a medical test each week at their own expense and on their own time, and also wear a mask each workday. OSHA has never before imposed such a mandate. Nor has Congress. Indeed, although Congress has enacted significant legislation addressing the COVID-19 pandemic, it has declined to enact any measure similar to what OSHA has promulgated here. Many States, businesses, and nonprofit organizations challenged OSHA's rule in Courts of Appeals across the country. * * * Applicants now seek emergency relief from this Court, arguing that OSHA's mandate exceeds its statutory authority and is otherwise unlawful. Agreeing that applicants are likely to prevail, we grant their applications and stay the rule.

I

A

Congress enacted the Occupational Safety and Health Act in 1970. * * * The Act created the Occupational Safety and Health Administration (OSHA), which is part of the Department of Labor and under the supervision of its Secretary. As its name suggests, OSHA is tasked with ensuring occupational safety - that is, "safe and healthful working conditions." 29 U.S.C. §651(b). It does so by enforcing occupational safety and health standards promulgated by the Secretary. §655(b). Such standards must be "reasonably necessary or appropriate to provide safe or healthful employment." §652(8). They must also be developed using a rigorous process that includes notice, comment, and an opportunity for a public hearing. §655(b). The Act contains an exception to those ordinary notice and-comment procedures for "emergency temporary standards." §655(c)(1). Such standards may "take immediate effect upon publication in the Federal Register." They are permissible, however, only in the narrowest of circumstances: the Secretary must show (1) "that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards," and (2) that the "emergency standard is necessary to protect employees from such danger." Prior to the emergence of COVID–19, the Secretary had used this power just nine times before (and never to issue a rule as broad as this one). Of those nine emergency rules, six were challenged in court, and only one of those was upheld in full. * * *

II

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Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided. The Secretary has ordered 84 million Americans to either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense. This is no "everyday exercise of federal power." * * * It is instead a significant encroachment into the lives and health of a vast number of employees. "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." * * * There can be little doubt that OSHA's mandate qualifies as an exercise of such authority. The question, then, is whether the Act plainly authorizes the Secretary's mandate. It does not. The Act empowers the Secretary to set ***workplace*** safety standards, not broad public health measures. See 29 U. S. C. §655(b) (directing the Secretary to set "***occupational*** safety and health standards" (emphasis added)); §655(c)(1) (authorizing the Secretary to impose emergency temporary standards necessary to protect "employees" from grave danger in the workplace). Confirming the point, the Act's provisions typically speak to hazards that employees face at work. See, e.g., §§651,653, 657. And no provision of the Act addresses public health more generally, which falls outside of OSHA's sphere of expertise. * * *

The Solicitor General does not dispute that OSHA is limited to regulating "work-related dangers." * * * She instead argues that the risk of contracting COVID-19 qualifies as such a danger. We cannot agree. Although COVID-19 is a risk that occurs in many workplaces, it is not an occupational hazard in most. COVID-19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases. Permitting OSHA to regulate the hazards of daily life -simply because most Americans have jobs and face those same risks while on the clock - would significantly expand OSHA's regulatory authority without clear congressional authorization.

The dissent contends that OSHA's mandate is comparable to a fire or sanitation regulation imposed by the agency. But a vaccine mandate is strikingly unlike the workplace regulations that OSHA has typically imposed. A vaccination, after all, "cannot be undone at the end of the workday." * * * Contrary to the dissent's contention, imposing a vaccine mandate on 84 million Americans in response to a worldwide pandemic is simply not "part of what the agency was built for." * * *

It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind - addressing a threat that is untethered, in any causal sense, from the workplace. This "lack of historical precedent," coupled with the breadth of authority that the Secretary now claims, is a "telling indication" that the mandate extends beyond the agency's legitimate reach.

**JUSTICE GORSUCH**, with whom **JUSTICE THOMAS** and **JUSTICE ALITO** join, concurring.

The central question we face today is: Who decides? No one doubts that the COVID-19 pandemic has posed challenges for every American. Or that our state, local, and national governments all have roles to play in combating the disease. The only question is whether an administrative agency in Washington, one charged with overseeing workplace safety, may mandate the vaccination or regular testing of 84 million people. Or whether, as 27 States before us submit, that work belongs to state and local governments across the country and the people's elected representatives in Congress. This Court is not a public health authority. But it is charged with resolving disputes about which authorities possess the power to make the laws that govern us under the Constitution and the laws of the land. * * * There is no question that state and local authorities possess considerable power to regulate public health. They enjoy the "general power of governing," including all sovereign powers envisioned by the Constitution and not specifically vested in the federal government. And in fact, States have pursued a variety of measures in response to the current pandemic.

The federal government's powers, however, are not general but limited and divided. Not only must the federal government properly invoke a constitutionally enumerated source of authority to regulate in this area or any other. It must also act consistently with the Constitution's separation of powers. And when it comes to that obligation, this Court has established at least one firm rule: "We expect Congress to speak clearly" if it wishes to assign to an executive agency decisions "of vast economic and political significance."

OSHA's mandate fails that doctrine's test. The agency claims the power to force 84 million Americans to receive a vaccine or undergo regular testing. By any measure, that is a claim of power to resolve a question of vast national significance. Yet Congress has nowhere clearly assigned so much power to OSHA. Approximately two years have passed since this pandemic began; vaccines have been available for more than a year. Over that span, Congress has adopted several major pieces of legislation aimed at combating COVID-19. But Congress has chosen not to afford OSHA - or any federal agency—the authority to issue a vaccine mandate. * * *

What is OSHA's reply? It directs us to 29 U.S.C. § 655(c)(1) [which authorizes the agency to issue emergency standards]. * * * The Court rightly applies the major questions doctrine and concludes that this lone statutory subsection does not clearly authorize OSHA's mandate. Section 655(c)(1) was not adopted in response to the pandemic, but some 50 years ago at the time of OSHA's creation. Since then, OSHA has relied on it to issue only comparatively modest rules addressing dangers uniquely prevalent inside the workplace, like asbestos and rare chemicals. [The concurring Justices then argued that the language of the emergency standard section did not clearly authorize OSHA to issue the vaccine or mask mandate.] * * *

Why does the major questions doctrine matter? It ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs - with the people's elected representatives. If administrative agencies seek to regulate the daily lives and liberties of millions of Americans, the doctrine says, they must at least be able to trace that power to a clear grant of authority from Congress.

In this respect, the major questions doctrine is closely related to what is sometimes called the nondelegation doctrine. Indeed, for decades courts have cited the nondelegation doctrine as a reason to apply the major questions doctrine. Both are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands.

The nondelegation doctrine ensures democratic account ability by preventing Congress from intentionally delegating its legislative powers to unelected officials. * * * The major questions doctrine serves a similar function by guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power. Sometimes, Congress passes broadly worded statutes seeking to resolve important policy questions in a field while leaving an agency to work out the details of implementation. Later, the agency may seek to exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment. The major questions doctrine guards against this possibility by recognizing that Congress does not usually "hide elephants in mouseholes." In this way, the doctrine is "a vital check on expansive and aggressive assertions of executive authority." * * *

The question before us is not how to respond to the pandemic, but who holds the power to do so. The answer is clear: Under the law as it stands today, that power rests with the States and Congress, not OSHA.

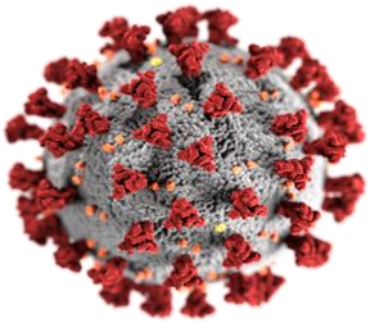

Illustration of COVID-19 Virus – Public Domain

**JUSTICE BREYER**, **JUSTICE SOTOMAYOR**, and **JUSTICE KAGAN**, dissenting.

Every day, COVID-19 poses grave dangers to the citizens of this country—and particularly, to its workers. The disease has by now killed almost 1 million Americans and hospitalized almost 4 million. It spreads by person-to-person contact in confined indoor spaces, so causes harm in nearly all workplace environments. And in those

environments, more than any others, individuals have little control, and therefore little capacity to mitigate risk. COVID-19, in short, is a menace in work settings. The proof is all around us: Since the disease's onset, most Americans have seen their workplaces transformed.

So the administrative agency charged with ensuring health and safety in workplaces did what Congress commanded it to: It took action to address COVID-19's continuing threat in those spaces. * * *

III

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A

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OSHA's rule perfectly fits the language of the applicable statutory provision. Once again, that provision commands - not just enables, but commands - OSHA to issue an emergency temporary standard whenever it determines "(A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger." 29 U. S. C. §655(c)(1). Each and every part of that provision demands that, in the circumstances here, OSHA act to prevent workplace harm.

The virus that causes COVID-19 is a "new hazard" as well as a "physically harmful" "agent." Merriam-Webster's Collegiate Dictionary 572 (11th ed. 2005) (defining "hazard" as a "source of danger"); id., at 24 (defining "agent" as a "chemically, physically, or biologically active principle"); id., at 1397 (defining "virus" as "the causative agent of an infectious disease").

The virus also poses a "grave danger" to millions of employees. As of the time OSHA promulgated its rule, more than 725,000 Americans had died of COVID-19 and millions more had been hospitalized. * * * Since then, the disease has continued to work its tragic toll. In the last week alone, it has caused, or helped to cause, more than 11,000 new deaths. * * * And because the disease spreads in shared indoor spaces, it presents heightened dangers in most workplaces.

Finally, the Standard is "necessary" to address the danger of COVID-19. OSHA based its rule, requiring either testing and masking or vaccination, on a host of studies and government reports showing why those measures were of unparalleled use in limiting the threat of COVID–19 in most workplaces. The agency showed, in meticulous detail, that close contact between infected and uninfected individuals spreads the disease; that "[t]he science of transmission does not vary by industry or by type of workplace"; that testing, mask wearing, and vaccination are highly effective—indeed, essential—tools for reducing the risk of transmission, hospitalization, and death; and that unvaccinated employees of

all ages face a substantially increased risk from COVID-19 as compared to their vaccinated peers. In short, OSHA showed that no lesser policy would prevent as much death and injury from COVID-19 as the Standard would. * * *

B

The Court does not dispute that the statutory terms just discussed, read in the ordinary way, authorize this Standard. * * * Instead, the majority claims that the Act does not "plainly authorize[]" the Standard because it gives OSHA the power to "set workplace safety standards" and COVID-19 exists both inside and outside the workplace. Ante, at 6. In other words, the Court argues that OSHA cannot keep workplaces safe from COVID-19 because the agency (as it readily acknowledges) has no power to address the disease outside the work setting. * * *

Consistent with Congress's directives, OSHA has long regulated risks that arise both inside and outside of the workplace. For example, OSHA has issued, and applied to nearly all workplaces, rules combating risks of fire, faulty electrical installations, and inadequate emergency exits - even though the dangers prevented by those rules arise not only in workplaces but in many physical facilities (e.g., stadiums, schools, hotels, even homes). Similarly, OSHA has regulated to reduce risks from excessive noise and unsafe drinking water - again, risks hardly confined to the work place. A biological hazard - here, the virus causing COVID-19 is no different. * * *

The result of [the majority's ruling] is squarely at odds with the statutory scheme. As shown earlier, the Act's explicit terms authorize the Standard. * * * The enacting Congress of course did not tell the agency to issue this Standard in response to this COVID-19 pandemic because that Congress could not predict the future. But that Congress did indeed want OSHA to have the tools needed to confront emerging dangers (including contagious diseases) in the workplace. We know that, first and foremost, from the breadth of the authority Congress granted to OSHA. And we know that because of how OSHA has used that authority from the statute's beginnings—in ways not dissimilar to the action here. OSHA has often issued rules applying to all or nearly all workplaces in the nation, affecting at once many tens of millions of employees. It has previously regulated infectious disease, including by facilitating vaccinations. And it has in other contexts required medical examinations and face coverings for employees. * * * If OSHA's Standard is far-reaching - applying to many millions of American workers - it no more than reflects the scope of the crisis. * * * It is perverse, given these circumstances, to read the Act's grant of emergency powers in the way the majority does - as constraining OSHA from addressing one of the gravest workplace hazards in the agency's history The Standard protects untold numbers of employees from a danger especially prevalent in workplace conditions. It lies at the core of OSHA's authority. It is part of what the agency was built for. * * *

IV

* * *

Underlying everything else in this dispute is a single, simple question: Who decides how much protection, and of what kind, American workers need from COVID-19? An agency with expertise in workplace health and safety, acting as Congress and the President authorized? Or a court, lacking any knowledge of how to safeguard workplaces, and insulated from responsibility for any damage it causes?

Here, an agency charged by Congress with safeguarding employees from workplace dangers has decided that action is needed. The agency has thoroughly evaluated the risks that the disease poses to workers across all sectors of the economy. It has considered the extent to which various policies will mitigate those risks, and the costs those policies will entail. It has landed on an approach that encourages vaccination, but allows employers to use masking and testing instead. It has meticulously explained why it has reached its conclusions. And in doing all this, it has acted within the four corners of its statutory authorization - or actually here, its statutory mandate. OSHA, that is, has responded in the way necessary to alleviate the "grave danger" that workplace exposure to the "new hazard[]" of COVID-19 poses to employees across the Nation. 29 U. S. C. §655(c)(1). The agency's Standard is informed by a half century of experience and expertise in handling workplace health and safety issues. The Standard also has the virtue of political accountability, for OSHA is responsible to the President, and the President is responsible to - and can be held to account by - the American public.

And then, there is this Court. Its Members are elected by, and accountable to, no one. And we "lack[] the back ground, competence, and expertise to assess" workplace health and safety issues. When we are wise, we know enough to defer on matters like this one. When we are wise, we know not to displace the judgments of experts, acting within the sphere Congress marked out and under Presidential control, to deal with emergency conditions. Today, we are not wise. In the face of a still-raging pandemic, this Court tells the agency charged with protecting worker safety that it may not do so in all the workplaces needed. As disease and death continue to mount, this Court tells the agency that it cannot respond in the most effective way possible. Without legal basis, the Court usurps a decision that rightfully belongs to others. It undercuts the capacity of the responsible federal officials, acting well within the scope of their authority, to protect American workers from grave danger.

## Questions and Comments

**1. The statutory interpretation question:** The Occupational Safety and Health Act authorizes OSHA to create occupational safety and health standards, which are designed to be "reasonably necessary or appropriate to provide safe or healthful employment." 29 U.S.C § 652(8). The agency can set "emergency temporary standards" through a streamlined process, if it determines that (1) "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards" and (2) that the emergency standard is "necessary to protect employees from such danger." OSHA concluded that COVID-19 was a toxic or physically harmful agent to which employees were exposed in the workplace and that it was

necessary to require workers to be vaccinated or wear masks and get tested each week in order to protect them from COVID-19 infection. The Court was reviewing the agency's rule to determine whether the rule was within the agency's statutory authority.

**2. Process and effect of agency decision:** Procedurally, how did the agency establish the vaccine or mask and test requirement? Did the agency's decision have the force of law? Would the agency's decision normally be subject to the *Chevron* analysis, if not for the major questions doctrine?

**3. The major questions doctrine:** When and how does the majority say the major questions doctrine applies? Why did the Court conclude that it should apply in this case?

**4. Clear statement:** Why did the Court conclude that Congress did not clearly authorize OSHA to establish the emergency standard in this case? Isn't COVID-19 a toxic or physically harmful agent to which employees were being exposed at work and wasn't that causing grave danger for the employees? Is the Court saying that OSHA can only regulate risks that are unique to the workplace and do not arise outside of the workplace? Note that the Court can reach the same result in this case, and most cases, if we identify the major question doctrine as an exception to *Chevron* or if we apply it as a traditional tool of interpretation at *Chevron* Step One.

**5. Historical interpretation of the statute:** When was the statute that OSHA was interpreting enacted? Does the majority believe that OSHA ever previously interpreted the statute in a manner similar to the manner they were interpreting it in this case? Does the dissent agree? To the extent that the Court frames the agency's action as a significant expansion of authority in a way that the agency has not exercised that authority in the past and on an issue which the Court suggests is "outside of OSHA's sphere of expertise," perhaps the decision is not a significant expansion of the major questions doctrine.

**6. Congressional inaction:** How is Congressional action or inaction relevant to the majority and Justice Gorsuch, in the concurring opinion, in interpreting the Occupational Safety and Health Act?

**7. Justice Gorsuch's concurring opinion:** Justice Gorsuch wrote a separate concurring opinion to express his views about (1) the nature of the major questions doctrine, and (2) the limits on federal interference with state sovereignty. Why does he argue that interpreting the statute to authorize OSHA's mandate would interfere with state sovereignty? Turning to the major questions doctrine, what constitutional limits does Justice Gorsuch suggest the doctrine enforces? Is he arguing that the doctrine is based on the non-delegation doctrine? Note that only Justices Thomas and Alito joined Justice Gorsuch in the concurring opinion.

**8. Justice Breyer's dissent:** Justice Breyer, in dissent, provides a very solid textualist analysis of the statute, explaining why OSHA's interpretation fits easily within the ***plain meaning*** of the statute. Remember, though, the difference between "***plain meaning***" and a "***clear statement***." When courts require a "clear statement" in canons,

it is not enough that an agency's interpretation fits neatly within the plain meaning of a broad or general statutory term or phrase. The court wants to see an explicit or specific reference in the statute to the issue being addressed by the agency before it finds that the statute includes a "clear statement" supporting the agency's decision. The majority wanted to see language in the Occupational Safety and Health Act that explicitly provided that OSHA could regulate any risks that arise at work, even though they also arise outside of the workplace.

Why does Justice Breyer suggest that Congress did not provide more explicit authority to OSHA to require vaccines or masks and testing in the event of the COVID-19 pandemic in the Occupational Safety and Health Act when it passed the legislation fifty years earlier? How does Congress normally draft statutes to address future problems that could arise when it cannot predict what those problems may be?

**9. Justice Breyer's dissent – who should decide?** At the end of the dissent, Justice Breyer makes the point, articulated above by Professor Heinzerling, that the major questions doctrine is a judicial power grab, transferring policy-making authority from the Executive Branch to the courts. Why does he say that is inappropriate?

**10. Legislative drafters:** The empirical study of legislative drafters conducted by Professors Abbe Gluck and Lisa Schultz Bressman provides some support for the presumption behind the major questions doctrine, as a majority of the drafters surveyed in the study indicated that they did not delegate major policy questions to agencies. *See* Abbe R. Gluck and Lisa Schultz Bressman, *Statutory Interpretation from the Inside - An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 993-94 (2013).

The Court applied the major questions doctrine most recently in *West Virginia v. EPA*,142 S.Ct. 2587 (2022), when it determined that EPA did not have authority under the Clean Air Act to set air pollution standards for coal fired power plants that were designed to encourage utilities to shift energy generation away from coal to renewable energy sources and natural gas. In a 6-3 ruling, the Court said the major questions doctrine applied because EPA's action would substantially restructure the U.S. energy market, EPA did not have expertise in restructuring the energy market, and the approach that EPA was taking was significantly different than the approach EPA traditionally took under the section of the Clean Air Act pursuant to which the agency acted.[621] As in the vaccine or mask mandate case, the majority also argued that it was significant that Congress had not enacted legislation to explicitly authorize EPA to make the rules it did over the last few decades.[622] The majority did not provide any further direction regarding what constitutes an issue of "vast economic or political significance" to trigger application of the canon, but it characterized its decision to apply the canon as consistent with prior

621 142 S.Ct. at 2610.

622 *Id.*

decisions and ultimately concluded that the Clean Air Act did not clearly authorize EPA to adopt the standards that it adopted.

Justice Kagan and the dissenting Justices in *West Virginia* argued that the Court ***expanded*** the major questions doctrine because the Court, in prior cases, only used the doctrine when (1) the agency whose action was being challenged was regulating in an area outside of its expertise and (2) the agency action being challenged would conflict with the statutory scheme.[623] In the *West Virginia* case, the dissenters argued, EPA was regulating in an area that was clearly within its expertise and in a way that was perfectly consistent with the structure of the Clean Air Act.[624]

The dissenting Justices raised significant concerns regarding the impact of the Court's decision on administrative agencies. Justice Kagan wrote:

> Some years ago, I remarked that "[w]e're all textualists now." It seems I was wrong. The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the "major questions doctrine" magically appear as get-out-of-text-free cards. Today, one of those broader goals makes itself clear: Prevent agencies from doing important work, even though that is what Congress directed. That anti-administrative-state stance shows up in the majority opinion, and it suffuses the concurrence.
>
> The kind of agency delegations at issue here go all the way back to this Nation's founding. * * * It is not surprising that Congress has always delegated, and continues to do so—including on important policy issues. * * * In all times, but ever more in "our increasingly complex society," the Legislature "simply cannot do its job absent an ability to delegate power under broad general directives.[625]

In describing why Congress delegates broad authority to agencies to implement statutes, Justice Kagan wrote,

> Congress makes broad delegations * * * so an agency can respond, appropriately and commensurately, to new and big problems. Congress knows what it doesn't and can't know when it drafts a statute; and Congress therefore gives an expert agency the power to address issues - even significant ones - as and when they arise.[626]

By utilizing the major questions doctrine, Justice Kagan argued, the Court arrogated to itself the authority to make important policy decisions on questions that Congress assigned to agencies and on which the courts have no expertise.[627] As she noted,

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623 *Id.* at 2633.
624 *Id.*
625 *Id.* at 2641-42.
626 *Id.* at 2628.
627 *Id.* at 2643-44.

"Whatever else this Court may know about, it does not have a clue about how to address climate change."[628]

The Court's trio of major question doctrine cases during the 2021 term demonstrate that the Court is expanding its use of the doctrine, but it is not clear how broadly the Court plans to apply it. In the recent cases, the Court has endeavored to characterize its use of the doctrine as being consistent over several decades. However, while the Court applied it only five times between 1994 and 2021, it applied it three times between 2021 and 2022. Significantly, the trigger for the doctrine—issues of "vast economic or political significance" —is frustratingly amorphous. By not clarifying the scope of the standard, the Court retains substantial power to apply the major questions doctrine in cases where the Court disagrees with the policies adopted by an agency in interpreting broad statutory authority.[629]

Supporters of the major questions doctrine argue that Congress should update statutes or pass new laws to address new problems, rather than delegating broad authority to agencies.[630] However, Congress has, for decades, been incapable of achieving consensus to enact legislation on almost any issues, so the expansion of the major questions doctrine is truly an expansion of judicial policymaking.

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628 *Id.* at 2644.

629 *See, e.g.,* Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine,* 74 Admin. L. Rev. 217 (2022) (criticizing factors advanced by the Trump Administration for determining when the doctrine applies). Professor Daniel Walters argues that the canon, as now applied, is unprecedented in that it has "a theoretically boundless potential scope of applicability coupled with a weak relationship to authoritative law." *See* Daniel Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law,* Texas A&M University School of Law Legal Studies Research Paper , (Feb. 4, 2023), at 6, *accessible at*: https://ssrn.com/abstract=4348024 (last visited June 13, 2023). He argues that there is no constitutional support for the canon as applied, in that it "allows systemic departure from plausible readings of statutes on the basis of judicial values and preferences that are at best weakly tethered to higher sources of law." *Id.* at 7.

630 *See* Richard Lazarus*, The Supreme Court Just Upended Environmental Law at the Worst Possible Moment,* Wash. Post, June 30, 2022*, available at:* https://www.washingtonpost.com/opinions/2022/06/30/supreme-court-just-upended-environmental-law-worst-possible-moment/ (last visited June 30, 2022)

## Problem 7-5

This problem is loosely based on the 2003 HEROES Act. If you are familiar with the law or the dispute that arose under the law, do not consider facts that are not included below in analyzing this problem.

Congress has established several federal student loan programs under Title IV of the Education Act, including the William D. Ford Federal Direct Loan Program (Direct Loans), under which the federal government lends money directly to student borrowers, and the Federal Family Education Loan Program (Family Education Loans) and Federal Perkins Loan Program (Perkins Loans), under which non-federal lenders issue loans to student borrowers on terms set by the federal government. Title IV includes several provisions governing student-loan repayment obligations, cancellation, and discharge. One provision, 20 U.S. Code § 1091b, explicitly authorizes the Department of Education to waive or cancel student debt in specific circumstances.

In 2003, Congress passed the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act). The law provides that, "[n]otwithstanding any other provision of law," the Secretary of Education may (i) respond to a "national emergency" by (ii) providing relief to student-loan recipients (iii) to the extent "the Secretary deems necessary" to "ensure" that those individuals are not "placed in a worse position financially" in relation to their loans because of the emergency. 20 U.S.C. § 1098bb(a)(1) and (2). The Act further specifies (iv) that the relief may consist of "waiv[ing] or modify[ing] any statutory or regulatory provision" governing the federal student loan programs. 20 U.S.C. §1098bb(a)(1).

The law was originally enacted a few years after the terrorist bombings of September 11, 2001.

Since the law was enacted in 2003, the Secretary invoked the law to waive the requirement that borrowers return overpayments of certain grant funds, to extend the maximum period of forbearance for Perkins loans, to extend the period of eligibility for deferment of Family Education Loans, and to require the Department of Education to pay the interest that accrues during extended deferments. Over that period of several decades, however, the Department never relied on the statute to cancel student debt under any Title IV loan programs.

Assume for purposes of this problem that, in 2015, the United States Court of Appeals for the Sixth Circuit determined, in *Ohio v. Department of Education*, that the Secretary of Education was not authorized to cancel student loan debt based on the authority in 20 U.S.C. § 1098bb(a)(1).

## Problem 7-5 (continued)

The Court wrote, "while the plain meaning of the statute would seem to grant the Secretary the authority to cancel student loan debt, the language is too broad to indicate clear Congressional support for the agency's asserted authority. Since the statute is not clear, we must consider whether the Secretary's decision to cancel student debt in this case is reasonable." After discussing the purposes of the statute, legislative history, and other provisions of the statute, the court concluded that the Secretary's interpretation of the statute was not reasonable.

In March 2020, after the President declared that the COVID-19 pandemic was a "national emergency," the Secretary of Education relied on the HEROES Act to pause student loan repayment obligations and suspend interest accrual on loans. In response to her action, Congress passed the COVID-19 Pandemic Education Relief Act of 2020 and directed the Secretary to extend those policies through September 2020. The Department of Education extended those policies through 2022.

In August 2022, however, a new Secretary of Education determined that the across-the-board pause on student loan repayments should end. However, he concluded that because of the COVID-19 pandemic, the resumption of repayment obligations would put many lower-income borrowers "at heightened risk of loan delinquency and default" due to the pandemic. To ensure that "borrowers are not in a worse position financially due to the pandemic with regard to their ability to repay their loans" when payment obligations resumed, the Secretary directed the Department of Education to issue up to $10,000 in student-loan relief to eligible borrowers with a federal adjusted gross income below $125,000. The Secretary relied on authority under 20 U.S.C. § 1098bb(a)(1) to justify canceling the student loan debt and did not rely on any other authority in Title IV of the Education Act to cancel the debt. It was estimated that the Department could cancel almost a half-trillion dollars in student debt based on the Secretary's decision.

Several States challenged the Secretary's decision to cancel the student loan debt. Assume, for purposes of this problem, that the Secretary of Education made the decision to cancel the student loan debt in accordance with authority granted to the Secretary to make decisions having the force of law, so that the decision would be entitled to *Chevron* deference.

If the challenge were raised in the United States Court of Appeals for the Sixth Circuit, what arguments would the States make that the statute should not be interpreted to authorize the Secretary to cancel the student loan debt? What arguments would the Secretary make that the statute authorizes the cancellation of the student loan debt? How is the court likely to rule?

**Problem 7-5 (continued)**

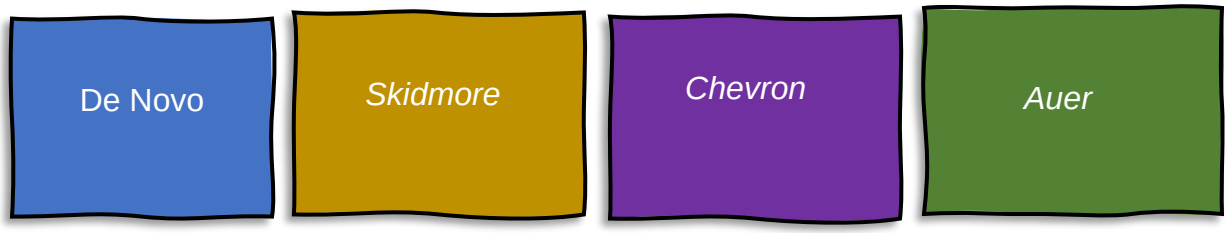
Before answering those questions, a couple more facts and assumptions are necessary. First, assume that all parties agree that the Secretary was responding to a national emergency covered by the statute, and that the Secretary has determined that the cancellation of student loan debt is necessary to ensure that the students will not be placed in a worse position financially in relation to their loans because of the emergency.

Assume also that (1) during the floor debates in the House of Representatives on the bill that became the HEROES Act, several legislators made statements suggesting that the statute was doing little more than "relieving active-duty military from 'making student loan payments for a period of time while they are away.'"; (2) Black's Law Dictionary (2019 edition) defines "waive" as "to abandon, renounce, or surrender (a claim, privilege, right, etc.)" or "to give up (a right or claim) voluntarily," and defines "modify" as "[t]o make somewhat different" or "to reduce in degree or extent"; (3) Webster's Dictionary defines "modify" as "to change moderately or in a minor fashion"; (4) the Oxford English Dictionary defines "any" as "used to express a lack of restriction in selecting one of a specified class"; and (5) in 2022, after the Secretary announced the plan to cancel student debt, the Stop Reckless Student Loan Actions Act of 2022 was introduced in Congress, providing that the Secretary "may not cancel the outstanding balances, or a portion of the balances, on covered loans due to the COVID-19 national emergency." That bill was not enacted into law.

## VII. Deference to Agency Interpretations of Regulations

While agencies interpret ***statutes*** through rulemaking, there are times when the regulations that agencies adopt are unclear and agencies must interpret the ***regulations***, either in an adjudication or through a guidance document or other non-legislative rule. When an agency interprets a ***regulation***, as opposed to a ***statute***, a court will not apply *Chevron* to review the agency's interpretation. Instead, the court will review the agency's interpretation under the *Auer* standard, which is even more deferential than *Chevron.* As with *Chevron*, though, courts will only accord an agency deference if it is interpreting ***its own*** regulations. Supporters of the heightened deference argue that it is appropriate because (1) the agency, as drafter, is in the best position to know what its intent was when drafting the regulation; (2) the agency has expertise in administering and enforcing the statute which is superior to courts; (3) deference advances uniformity of interpretation of the regulation.

## *Deference Standards*




***Least deference*** → ***Most deference***

*Auer v. Robbins* is reproduced below. The case involved a question of whether certain police officers were entitled to overtime pay under the Fair Labor Standards Act (FLSA). The employer, Saint Louis Board of Police Commissioners, argued that the police officers were exempt from coverage of the FLSA because they were "bona fide executive, administrative or professional employees," while the officers argued that the exemption did not apply to them. The opinion below focuses primarily on the interpretation of a regulation that the Secretary of Labor adopted to define the scope of the "bona fide executive, administrative or professional employees" exemption.

### AUER V. ROBBINS

**519 U.S. 452 (1997)**

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument (From the Oyez Project)
Case Background (From Quimbee)
Video Summary (Prof. Stevenson – South Texas College of Law)

**JUSTICE SCALIA** delivered the opinion of the Court.

The Fair Labor Standards Act of 1938 (FLSA) exempts "bona fide executive, administrative, or professional" employees from overtime pay requirements. This case presents the question whether the Secretary of Labor's "salary-basis" test for determining an employee's exempt status reflects a permissible reading of the statute as it applies to public sector employees. We also consider whether the Secretary has reasonably interpreted the salary-basis test to deny an employee salaried status (and thus grant him overtime pay) when his compensation may "as a practical matter" be adjusted in ways inconsistent with the test.

I

Petitioners are sergeants and a lieutenant employed by the St. Louis Police Department. They brought suit in 1988 against respondents, members of the St. Louis Board of Police Commissioners, seeking payment of overtime pay that they claimed was owed under § 7(a)(1) of the FLSA, 29 U. S. C. § 207(a)(1). Respondents argued that petitioners were not entitled to such pay because they came within the exemption provided by § 213(a)(1) for "bona fide executive, administrative, or professional" employees.

Under regulations promulgated by the Secretary, one requirement for exempt status under § 213(a)(1) is that the employee earn a specified minimum amount on a "salary basis." According to the regulations, "[a]n employee will be considered to be paid 'on a salary basis' ... if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." * * *

[In Part II of the opinion, the Court concluded that the "salary basis" test that the Secretary of Labor adopted in a regulation as a means of determining whether an employee was exempt from the coverage of the FLSA was a reasonable interpretation of the statute under *Chevron*. In Part III of the opinion, the Court focused on the Secretary's interpretation of that regulation.]

III

A primary issue in the litigation * * * has been whether, under [the salary basis test regulation], an employee's pay is "subject to" disciplinary or other deductions whenever there exists a theoretical possibility of such deductions, or rather only when there is something more to suggest that the employee is actually vulnerable to having his pay reduced. Petitioners in effect argue for something close to the former view; they contend that because the police manual nominally subjects all department employees to a range of disciplinary sanctions that includes disciplinary deductions in pay, and because a single sergeant was actually subjected to a disciplinary deduction, they are "subject to" such deductions and hence nonexempt under the FLSA. * * *

The Secretary of Labor, in an *amicus* brief filed at the request of the Court, interprets the salary-basis test to deny exempt status when employees are covered by a policy that permits disciplinary or other deductions in pay "as a practical matter." That standard is met, the Secretary says, if there is either an actual practice of making such deductions or an employment policy that creates a "significant likelihood" of such deductions. The Secretary's approach rejects a wooden requirement of actual deductions, but in their absence it requires a clear and particularized policy-one which "effectively communicates" that deductions will be made in specified circumstances. This avoids the imposition of massive and unanticipated overtime liability in situations in which a vague or broadly worded policy is nominally applicable to a whole range of personnel but is not "significantly likely" to be invoked against salaried employees.

Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless "'plainly erroneous or inconsistent with the regulation.'" *Bowles* v. *Seminole Rock & Sand Co.,* 325 U. S. 410, 414 (1945). That deferential standard is easily met here. The critical phrase "subject to" comfortably bears the meaning the Secretary assigns. See American Heritage Dictionary 1788 (3d ed. 1992) (def. 2: defining "subject to" to mean "prone; disposed"; giving as an example "a child who is subject to colds"); Webster's New International Dictionary 2509

(2d ed. 1950) (def. 3: defining "subject to" to mean "[e]xposed; liable; prone; disposed"; giving as an example "a country subject to extreme heat"). * * *

Petitioners complain that the Secretary's interpretation comes to us in the form of a legal brief; but that does not, in the circumstances of this case, make it unworthy of deference. The Secretary's position is in no sense a *"post hoc* rationalizatio[n]" advanced by an agency seeking to defend past agency action against attack. There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question. Petitioners also suggest that the Secretary's approach contravenes the rule that FLSA exemptions are to be "narrowly construed against ... employers" and are to be withheld except as to persons "plainly and unmistakably within their terms and spirit." But that is a rule governing judicial interpretation of statutes and regulations, not a limitation on the Secretary's power to resolve ambiguities in his own regulations. A rule requiring the Secretary to construe his own regulations narrowly would make little sense, since he is free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute.

## Questions and Comments

**1. The statutory interpretation question:** As noted above, the *Auer* Court was asked to decide (1) whether the Secretary of Labor's regulation defining the scope of the exemption for "bona fide executive, administrative or professional" employees was a valid reading of the FLSA; and (2) whether the police officers were covered by the exemption in the regulation adopted by the Secretary of Labor. The Court upheld the agency's regulation interpreting the statute under *Chevron*. The Court then had to decide whether the police officers were covered by the exemption in the agency's regulation. At that point, the focus of the case turned to an interpretation of the scope of the agency's regulation.

**2. Role of the Secretary of Labor:** The Secretary of Labor is authorized to administer and enforce the FLSA. How was the Secretary involved in this lawsuit? Was there a complaint filed with the agency? Was the agency bringing an enforcement action? Who sued who? Prior to the lawsuit, had the Secretary announced its interpretation of the regulation in an adjudication, guidance document, or other non-legislative rule? Note that in other cases, courts have accorded *Auer* deference to agency interpretations announced in policy statements issued *after* lawsuits have been brought addressing the regulation being interpreted in the policy statement.

**3. Standard for review:** In what circumstances does the Court say a court should uphold an agency's interpretation of its regulation? Why does the Court uphold the agency's interpretation in this case?

**4. Post hoc rationalizations:** In administrative law, generally, an agency's decision can be upheld only on the basis articulated by the agency at the time of its decision. Courts will not allow agencies to advance other justifications for their decisions after their decisions are challenged to justify the decisions because courts are concerned that such "post hoc rationalizations" may not represent the actual reasons for the agency's

decisions. Why is the *Auer* Court not concerned about post-hoc rationalizations in this case?

**5. Concerns with the *Auer* standard:** As with *Chevron,* support for *Auer* has waned over the last few decades, as academics and judges raised concerns about the standard. Some critics complained that by according greater deference to agencies' interpretations of regulations under *Auer* than is accorded to agencies' interpretations of statutes under *Chevron*, courts encourage agencies to adopt broad and general regulations to implement a statute, which they can subsequently interpret in adjudication or through a non-legislative rule. By adopting the ultimate interpretation as an interpretation of a regulation, as opposed to an interpretation of a statute, the agency can take advantage of *Auer* deference, as opposed to *Chevron* deference.

Critics also argued that granting agencies the broad deference of *Auer* violates separation of powers principles. *See* *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597, 619-621 (2013) (Scalia, J., concurring).

**6. Exceptions to *Auer* grow:** In the decades after *Auer* was decided, courts created several exceptions to the doctrine. In *Gonzales v. Oregon*, 546 U.S. 243 (2006), the U.S. Supreme Court held that when an agency adopts a regulation that simply ***parrots the language of a statute***, the agency's interpretations of that regulation are not entitled to *Auer* deference.

In addition, when courts review agency interpretations of regulations announced in ***proceedings seeking criminal or punitive sanctions***, courts are less likely to accord the agency interpretation *Auer* deference. *See, e.g., Carter v. Welles-Bowen*, 736 F.3d 722 (6th Cir. 2013). A major concern in those cases is that persons subject to those sanctions should have adequate notice of the legal requirements that apply to them.

The Supreme Court has also indicated that it will not accord an agency interpretation *Auer* deference in certain cases where the agency announces the interpretation in a manner that does not provide the regulated community notice of the agency's interpretation before the regulated entities are sanctioned under the agency's interpretation of the regulation. In *Christopher v. Smithkline Beecham Corp.*, 567 U.S. 142 (2012), pharmaceutical industry employers argued that drug representatives that they hired were "outside salesman" and, therefore, exempt from the protections of the FLSA (including the requirement that employees receive overtime pay). The Department of Labor filed a brief in the case in support of the drug representatives, announcing, for the first time, its interpretation of the statute as protecting the drug representatives as employees. The Court refused to accord *Auer* deference to the Department's interpretation, which would, it argued, "impose potentially massive liability on respondent for conduct that occurred well before that interpretation was announced. To defer to the agency's interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.' … It is one thing to expect regulated parties to conform their conduct to an agency's

interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference." *Id.* at 155-159.

The *Smithkline* Court also identified several other exceptions to *Auer* deference, suggesting that such deference is unwarranted "when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question,'" such as (1) "when the agency's interpretation conflicts with a prior interpretation"; and (2) "when it appears that the interpretation is nothing more than a 'convenient litigating position,' or a " '*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack." *Id.* at 155.

**7. The standard if *Auer* doesn't apply:** If a court determines that it is not appropriate to accord *Auer* deference to an agency's interpretation, the court does not review the agency's interpretation de novo. Instead, it usually applies the *Skidmore* standard of review.

**8. Justices criticizing *Auer***: As the Court crafted exceptions to *Auer*, Justices Scalia, Thomas, Roberts, and Alito expressed concerns about the doctrine in various concurring opinions. *See, e.g.,* Perez v. Mortgage Bankers Association, 575 U.S. 92, 108 (2015) (Scalia, J., concurring) (arguing that the Court should overrule *Auer); Id.* at 112 (Thomas, J., concurring) (arguing that the Court should overrule *Auer*); Decker v. Northwest Environmental Defense Center, 568 U.S. 597, 615 (2013) (Roberts, C.J., concurring) (joined by Justice Alito and suggesting that it may be appropriate to reconsider *Auer* deference in another case).

Fractured Plate – Photo by Auckland Museum – CC BY-SA 4.0

In light of the growing criticism of the precedent and the expanding exceptions to deference under the standard, it was widely believed that the Court might overrule *Auer* in 2019 in a case involving a challenge to the Veterans Administration's interpretation of its regulations, Kisor v. Wilkie, 139 S.Ct. 2400 (2019). Instead of overruling *Auer,* the Court retained *Auer* in a fractured series of opinions.

Justice Kagan wrote an opinion which (1) provided the background of the case (Part I); (2) identified the rationale for *Auer* and defended it (Part II.A.); (3) catalogued the exceptions to *Auer* crafted by the Court (Part II.B.); (4) defended *Auer* against charges that it violates the APA (Part III.A.); (5) defended *Auer* based on *stare decisis* (Part III.B.); and (6) concluded that the lower court misapplied *Auer* and remanded the case for further proceedings (Part IV). Justices Ginsburg, Breyer, and Sotomayor joined Justice Kagan on the entire opinion.

Justice Roberts joined Parts I, II.B., III.B., and IV of Justice Kagan's opinion. In essence, he provided a fifth vote to outline the various exceptions to Auer (Part II.B.) and voted to uphold *Auer* deference in light of *stare decisis* (Part III.B.), but he did not join the other

four Justices in their overall defense of the doctrine (Part II.A.) or their defense of the doctrine against APA challenges (Part III.A.)

Justices Kavanaugh (joined by Justice Alito) and Gorsuch (joined by Thomas and joined in parts by Kavanaugh and Alito) wrote separate opinions but concurred in the judgment.

With that background in hand, portions of the various opinions are reproduced below.

## KISOR V. WILKIE, SECRETARY OF VETERANS AFFAIRS

**139 S.CT. 2400 (2019)**

**Resources for the Case**

Unedited Opinion (From Justia)
Oral Argument (From the Oyez Project)
Case Background (From Quimbee)
Video Summary (Prof. Stevenson – South Texas College of Law)
Briefs in the Case – Scotus Blog

**JUSTICE KAGAN** announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–B, III–B, and IV, and an opinion with respect to Parts II–A and III–A, in which **JUSTICE GINSBURG, JUSTICE BREYER,** and **JUSTICE SOTOMAYOR** join.

This Court has often deferred to agencies' reasonable readings of genuinely ambiguous regulations. We call that practice *Auer* deference, or sometimes *Seminole Rock* deference, after two cases in which we employed it. The only question presented here is whether we should overrule those decisions, discarding the deference they give to agencies. We answer that question no. *Auer* deference retains an important role in construing agency regulations. But even as we uphold it, we reinforce its limits. *Auer* deference is sometimes appropriate and sometimes not. Whether to apply it depends on a range of considerations that we have noted now and again, but compile and further develop today. The deference doctrine we describe is potent in its place, but cabined in its scope. On remand, the Court of Appeals should decide whether it applies to the agency interpretation at issue.

[In Part I, the Court outlined the facts of the case, the regulation under review, the interpretation of the regulation advanced by the Veterans Administration and the procedural history of the case.]

II

* * *

A

Begin with a familiar problem in administrative law: For various reasons, regulations may be genuinely ambiguous. They may not directly or clearly address every issue; when applied to some fact patterns, they may prove susceptible to more than one reasonable reading. Sometimes, this sort of ambiguity aries from careless drafting * * * But often,

ambiguity reflects the well-known limits of expression or knowledge. The subject matter of a rule "may be so specialized and varying in nature as to be impossible"—or at any rate, impracticable—to capture in its every detail. Or a "problem[ ] may arise" that the agency, when drafting the rule, "could not [have] reasonably foresee[n]." Whichever the case, the result is to create real uncertainties about a regulation's meaning. * * *

In each case, interpreting the regulation involves a choice between (or among) more than one reasonable reading. To apply the rule to some unanticipated or unresolved situation, the court must make a judgment call. How should it do so? In answering that question, we have often thought that a court should defer to the agency's construction of its own regulation. * * * Deference to administrative agencies traces back to the late nineteenth century, and perhaps beyond. * * *

We have explained *Auer* deference (as we now call it) as rooted in a presumption about congressional intent—a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities. Congress, we have pointed out, routinely delegates to agencies the power to implement statutes by issuing rules. In doing so, Congress knows (how could it not?) that regulations will sometimes contain ambiguities. But Congress almost never explicitly assigns responsibility to deal with that problem, either to agencies or to courts. Hence the need to presume, one way or the other, what Congress would want. And as between those two choices, agencies have gotten the nod. We have adopted the presumption—though it is always rebuttable—that "the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." Or otherwise said, we have thought that when granting rulemaking power to agencies, Congress usually intends to give them, too, considerable latitude to interpret the ambiguous rules they issue.

In part, that is because the agency that promulgated a rule is in the "better position [to] reconstruct" its original meaning. Consider that if you don't know what some text (say, a memo or an e-mail) means, you would probably want to ask the person who wrote it. And for the same reasons, we have thought, Congress would too (though the person is here a collective actor). The agency that "wrote the regulation" will often have direct insight into what that rule was intended to mean. * * *

In still greater measure, the presumption that Congress intended *Auer* deference stems from the awareness that resolving genuine regulatory ambiguities often "entail[s] the exercise of judgment grounded in policy concerns." * * *

Agencies (unlike courts) have "unique expertise," often of a scientific or technical nature, relevant to applying a regulation "to complex or changing circumstances." Agencies (unlike courts) can conduct factual investigations, can consult with affected parties, can consider how their experts have handled similar issues over the long course of administering a regulatory program. And agencies (again unlike courts) have political accountability, because they are subject to the supervision of the President, who in turn answers to the public. It is because of those features that Congress, when first enacting a statute, assigns rulemaking power to an agency and thus authorizes it to fill out the statutory scheme. And so too, when new issues demanding new policy calls come up within that scheme, Congress presumably wants the same agency, rather than any court, to take the laboring oar. * * *

Finally, the presumption we use reflects the well-known benefits of uniformity in interpreting genuinely ambiguous rules. * * *

B

But all that said, *Auer* deference is not the answer to every question of interpreting an agency's rules. Far from it. * * * We have thus cautioned that *Auer* deference is just a "general rule"; it "does not apply in all cases." * * *

First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous. * * * And before concluding that a rule is genuinely ambiguous, a court must exhaust all the "traditional tools" of construction. * * * To make that effort, a court must "carefully consider[ ]" the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on. Doing so will resolve many seeming ambiguities out of the box, without resort to *Auer* deference.

If genuine ambiguity remains, moreover, the agency's reading must still be "reasonable." In other words, it must come within the zone of ambiguity the court has identified after employing all its interpretive tools. (Note that serious application of those tools therefore has use even when a regulation turns out to be truly ambiguous. The text, structure, history, and so forth at least establish the outer bounds of permissible interpretation.) Some courts have thought (perhaps because of *Seminole Rock*'s "plainly erroneous" formulation) that at this stage of the analysis, agency constructions of rules receive greater deference than agency constructions of statutes. But that is not so. Under *Auer*, as under *Chevron*, the agency's reading must fall "within the bounds of reasonable interpretation." And let there be no mistake: That is a requirement an agency can fail.

Still, we are not done—for not every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference. * * * [W]e have laid out some especially important markers for identifying when *Auer* deference is and is not appropriate.

To begin with, the regulatory interpretation must be one actually made by the agency. In other words, it must be the agency's "authoritative" or "official position," rather than any more ad hoc statement not reflecting the agency's views. * *

Next, the agency's interpretation must in some way implicate its substantive expertise. * * * [T]he basis for deference ebbs when "[t]he subject matter of the [dispute is] distan[t] from the agency's ordinary" duties or "fall[s] within the scope of another agency's authority." * * * Some interpretive issues may fall more naturally into a judge's bailiwick. Take one requiring the elucidation of a simple common-law property term, or one concerning the award of an attorney's fee. When the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority.

Finally, an agency's reading of a rule must reflect "fair and considered judgment" to receive *Auer* deference. That means, we have stated, that a court should decline to defer to a merely "convenient litigating position" or "*post hoc* rationalizatio[n] advanced" to "defend past agency action against attack." And a court may not defer to a new interpretation, whether or not introduced in litigation, that creates "unfair surprise" to regulated parties. That disruption of expectations may occur when an agency substitutes

one view of a rule for another. We have therefore only rarely given *Auer* deference to an agency construction "conflict[ing] with a prior" one. Or the upending of reliance may happen without such an explicit interpretive change. This Court, for example, recently refused to defer to an interpretation that would have imposed retroactive liability on parties for longstanding conduct that the agency had never before addressed. Here too the lack of "fair warning" outweighed the reasons to apply *Auer.* * * *

When it applies, *Auer* deference gives an agency significant leeway to say what its own rules mean. * * * But that phrase "when it applies" is important—because it often doesn't. As described above, this Court has cabined *Auer*'s scope in varied and critical ways—and in exactly that measure, has maintained a strong judicial role in interpreting rules. What emerges is a deference doctrine not quite so tame as some might hope, but not nearly so menacing as they might fear.

III

[In Part III.A., Justice Kagan defended the *Auer* standard against charges that is inconsistent with the APA, to the extent that the APA provides that reviewing courts "determine the meaning and applicability of agency action." 5 U.S.C. §706. Kagan argued that the APA does not require de novo review by courts and that a "reasonableness" review is consistent with the APA. Justice Kagan also explained why application of the *Auer* standard of review does not violate the rulemaking requirements of the APA, since the APA allows agencies to adopt interpretive rules without following the "notice and comment" procedures of 5 U.S.C. §553.] * * *

B

* * *

If all that were not enough, *stare decisis* cuts strongly against Kisor's position. "Overruling precedent is never a small matter. Adherence to precedent is "a foundation stone of the rule of law." * * * [A]ny departure from the doctrine demands "special justification"—something more than "an argument that the precedent was wrongly decided." * * * And that is even more than usually so in the circumstances here [where] Kisor asks us to overrule not a single case, but a "long line of precedents"—each one reaffirming the rest and going back 75 years or more. This Court alone has applied *Auer* or *Seminole Rock* in dozens of cases, and lower courts have done so thousands of times. Deference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law. * * * [A]bandoning *Auer* deference would cast doubt on many settled constructions of rules. As Kisor acknowledged at oral argument, a decision in his favor would allow relitigation of any decision based on *Auer*, forcing courts to "wrestle [with] whether or not *Auer*" had actually made a difference. It is the rare overruling that introduces so much instability into so many areas of law, all in one blow.

**CHIEF JUSTICE ROBERTS**, concurring in part.

I join Parts I, II–B, III–B, and IV of the Court's opinion. We took this case to consider whether to overrule *Auer* v. *Robbins* and *Bowles* v. *Seminole Rock & Sand Co.* For the reasons the Court discusses in Part III–B, I agree that overruling those precedents is not warranted. I also agree with the Court's treatment in Part II–B of the bounds

of *Auer* deference.

I write separately to suggest that the distance between the majority and Justice Gorsuch is not as great as it may initially appear. * * *

One further point: Issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.* I do not regard the Court's decision today to touch upon the latter question.

**JUSTICE GORSUCH**, with whom **JUSTICE THOMAS** joins, with whom **JUSTICE KAVANAUGH** joins as to Parts I, II, III, IV, and V, and with whom **JUSTICE ALITO** joins as to Parts I, II, and III, concurring in the judgment.

It should have been easy for the Court to say goodbye to *Auer* v. *Robbins*. * * This rule creates a "systematic judicial bias in favor of the federal government, the most powerful of parties, and against everyone else." Nor is *Auer*'s biased rule the product of some congressional mandate we are powerless to correct: This Court invented it, almost by accident and without any meaningful effort to reconcile it with the Administrative Procedure Act or the Constitution. A legion of academics, lower court judges, and Members of this Court—even *Auer*'s author—has called on us to abandon *Auer*. Yet today a bare majority flinches, and *Auer* lives on.

Still, today's decision is more a stay of execution than a pardon. The Court cannot muster even five votes to say that *Auer* is lawful or wise. Instead, a majority retains *Auer* only because of *stare decisis*. And yet, far from standing by that precedent, the majority proceeds to impose so many new and nebulous qualifications and limitations on *Auer* that The Chief Justice claims to see little practical difference between keeping it on life support in this way and overruling it entirely. So the doctrine emerges maimed and enfeebled—in truth, zombified. * * *

[Part I of Justice Gorsuch's opinion traced the historical evolution of the *Auer* standard and Part II outlined Gorsuch's argument that the standard conflicts with requirements of the Administrative Procedure Act.]

III

Not only is *Auer* incompatible with the APA; it also sits uneasily with the Constitution. Article III, §1 provides that the "judicial Power of the United States" is vested exclusively in this Court and the lower federal courts. A core component of that judicial power is " 'the duty of interpreting [the laws] and applying them in cases properly brought before the courts.' " As Chief Justice Marshall put it, "[i]t is emphatically the province and duty of the judicial department to say what the law is." * * *

A

Our Nation's founders were painfully aware of the dangers of executive and legislative intrusion on judicial decision-making. One of the abuses of royal power that led to the American Revolution was King George's attempt to gain influence over colonial judges. Colonial legislatures, too, had interfered with the courts' independence "at the behest of

private interests and factions." These experiences had taught the founders that " 'there is no liberty if the power of judgment be not separated from the legislative and executive powers.' " They knew that when political actors are left free not only to adopt and enforce written laws, but also to control the interpretation of those laws, the legal rights of "litigants with unpopular or minority causes or . . . who belong to despised or suspect classes" count for little. * * *

Experiencing all this in their own time, the founders sought to ensure that those who came after them would not. Believing that "[n]o maxim was better established" than "that the power of making ought to be kept distinct from that of expounding, the laws," they designed a judiciary that would be able to interpret the laws "free from potential domination by other branches of government." To that end, they resisted proposals that would have subjected judicial decisions to review by political actors. * * *

*Auer* represents no trivial threat to these foundational principles. Under the APA, substantive rules issued by federal agencies through notice-and-comment procedures bear "the 'force and effect of law'" and are part of the body of federal law, binding on private individuals, that the Constitution charges federal judges with interpreting. Yet *Auer* tells the judge that he must interpret these binding laws to mean not what he thinks they mean, but what an executive agency says they mean. Unlike Article III judges, executive officials are not, nor are they supposed to be, "wholly impartial." They have their own interests, their own constituencies, and their own policy goals—and when interpreting a regulation, they may choose to "press the case for the side [they] represen[t]" instead of adopting the fairest and best reading. *Auer* thus means that, far from being "kept distinct," the powers of making, enforcing, and interpreting laws are united in the same hands—and in the process a cornerstone of the rule of law is compromised.

[In Part IV of his opinion, Justice Gorsuch rejects the policy arguments advanced by Justice Kagan in support of the *Auer* standard and in Part V, he argues that the Court should have overruled *Auer* despite principles of stare decisis. Justice Alito did not join with Justice Gorsuch on Parts IV and V of his opinion. Justice Kavanaugh joined with Justice Gorsuch on the entire opinion, including Parts IV and V, with the exception of the introduction to the opinion. Finally, Justice Thomas joined with Gorsuch on the entire opinion.]

## Questions and Comments

**1. What's missing?** The opinion reproduced above does not identify the facts of the dispute, the statutory interpretation question that the agency addressed in a regulation, the agency's interpretation of the regulation, or the procedure used by the agency to interpret the regulation. While all of those components of the case are essential to the resolution of the case, the opinion is being included in the casebook to outline the Court's restructuring of the *Auer* standard and to explore more fully the justifications for the standard and the statutory and constitutional challenges to the standard.

**2. Justification for the standard:** A plurality of the Court outlined several justifications for the deference accorded under *Auer* to agencies' interpretations of their own regulations. What were the justifications? How do those justifications compare to the

justifications for deference to agencies' interpretations of statutes outlined by Justice Stevens in *Chevron*? Note the difference in tone towards *Auer* in Parts II.A. (the plurality) and II.B. (in which Justice Roberts joined). Why does the plurality suggest agencies draft ambiguous regulations in the first place?

**3. Exceptions to *Auer*:** Five Justices signed on to Part II.B. of Justice Kagan's opinion, which outlined numerous *Auer* exceptions and summarized the limits of the standard. Note the resemblance to *Chevron* as the *Auer* standard has been re-cast in *Kisor.* The Justices indicate that (1) the court should first determine, using traditional tools of statutory interpretation, whether the agency's regulation is clear or ambiguous; and (2) if the agency's regulation is ambiguous, the court should defer to the agency's interpretation, but only if it is reasonable. Does the *Kisor* version of *Auer* described in Part III.A. sound like a standard that will be significantly more deferential than *Chevron*? What other exceptions or limitations did the Court identify to application of *Auer*? Does the identity of the decision-maker or the manner in which the interpretation is announced matter? How about the type of question that the agency is interpreting?

**4. Life or death for *Auer*:** In light of the fractured nature of the opinions in *Kisor*, it may be difficult, on first reading, to figure out precisely what precedent has been set by the Court. Did a majority of the Court vote to retain or overrule *Kisor*? If so, why? Did a majority of the Court apply *Auer* and decide whether to uphold the Veterans Administration's interpretation of its regulations?

**5. Justice Gorsuch's concurring opinion:** How does Justice Gorsuch argue the *Auer* standard is unconstitutional? What response does the plurality have to Justice Gorsuch's claim?

**6. What about *Chevron*?** Note that Justice Roberts wrote separately for two reasons: (1) to stress that he was only voting to retain the *Auer* standard because he didn't think that it was appropriate to overrule it, due to stare decisis; and (2) to stress that the Court's decision did not implicate *Chevron.* Justice Kavanaugh, joined by Justice Alito, also wrote separately indicating that the Court's decision to not overrule *Auer* did not touch on issues surrounding *Chevron* deference.

## Problem 7-6

Recall the background of *Chevron v. NRDC*. The Clean Air Act requires persons who construct or modify major "stationary sources" in areas that are not meeting national air quality standards to obtain permits from EPA to authorize those activities and to comply with stringent technology-based standards for those activities. *See* 42 U.S.C. § 7502(b)(6).

EPA has authority to bring administrative enforcement actions against persons who construct or modify major stationary sources without complying with those requirements and can recover administrative penalties and order persons to comply with statutory requirements in those enforcement actions. *See* 42 U.S.C. § 7413. EPA can also refer those cases to the Department of Justice, which can seek civil and criminal penalties in court for those statutory violations. *Id*.

The Clean Air Act does not include a definition for "stationary source," but, in 1983, EPA adopted a regulation that defines "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act" and defines "building, structure, facility or installation" as "all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control)." *See* 40 CFR §§ 51.18(j)(1)(i) and (ii).

Assume that after EPA adopted the regulation, there was some confusion about whether smokestacks or other structures that were located on property that did not share a border with the property on which the rest of the facility was located could be included within a "stationary source" if they were part of the same industrial process. Assume that, for forty years, EPA interpreted the regulation to allow companies to include "off-site" structures as part of the "stationary source" as long as (1) they were part of an industrial process at the source; and (2) they were located no further than 1 mile from the rest of the source.

In January 2023, EPA brought an administrative penalty proceeding against the Dutton Energy oil refinery when Dutton made changes to a structure that was located "off-site" from its refinery, because the agency re-interpreted its "stationary source" regulation to require that "off-site" structures must be located on property that shares a border with the property where the rest of a stationary source is located in order to be treated as part of the same "stationary source."

## Problem 7-6 (continued)

Since the structure to which Dutton made changes was not located on property that shared a border with the property on which the refinery was located, EPA determined that the structure was a separate stationary source, and that Dutton needed to obtain a permit to modify that stationary source. Since EPA only imposed a penalty of $4,000 on Dutton, the agency was not required to hold a formal hearing when imposing the penalty.

If Dutton appealed EPA's decision in court, would the reviewing court apply the *Chevron* analysis to EPA's interpretation of "stationary source" or would the court apply some other analysis? Would the court likely defer to EPA's interpretation of "stationary source"? It may be helpful to know that the Merriam Webster dictionary defines "adjacent" as follows: (1) lying near, close, or contiguous; (2) having a border or point in common.

## CALI SECTION QUIZ

Now that you've finished Chapter 7, why not try a short quiz on the material you just read at www.cali.org/lesson/19765. It should take about 30 minutes to complete.

# Appendix A:
# A Guide to Interpreting Statutes

**I.** **Identify the language in the statute to be interpreted.** Is there more than one way to interpret the language? What are the different interpretations that are possible?

**II.** **Plain Meaning:** Begin by focusing on the plain meaning of the text to be interpreted. Most theories of interpretation begin with an examination of the text of the statute. There are many tools that are used to determine the plain meaning of the statute's language. They include:

**A.** **Ordinary Meaning:** Identify the ordinary meaning that reasonable persons would ascribe to the language being interpreted. This may be narrower than dictionary definitions. This is frequently the first place to look for the plain meaning of language.

**B.** **Dictionary Definitions:** Identify any dictionary definitions for the language being interpreted. There may be competing dictionary definitions for the language.

**C.** **Grammar, Punctuation, and Context**: Don't forget to consider grammar and punctuation rules as you consider the ordinary meaning and dictionary definitions of language (rules re: commas; and v. or; singular v. plural; masculine v. feminine; shall v. may; series qualifier v. doctrine of the last antecedent). In addition, consider the context in which the language is used as you consider its plain meaning.

**D**. **Technical Meaning:** Identify any technical meaning for the language and determine whether the legislature intended the language to be interpreted according to its technical meaning.

**III**. **Intrinsic Sources and Ambiguity:** Depending on the theory applied and the judge applying the theory, courts will examine intrinsic sources of interpretation to determine the meaning of statutory language IF they determine that the plain meaning of the language is ambiguous OR to determine WHETHER the plain meaning of the language is ambiguous. In looking at intrinsic sources, courts consider:

**A**. **Linguistic Canons Applied to the Language at Issue:** Consider whether any linguistic canons may apply to the interpretation of the precise language at issue—Noscitur a sociis; ejusdem generis, expression unius.

**B.** **The Whole Act Rule and Linguistic Canons:** The language being interpreted should be interpreted in the context of the entire statute. Thus, consider

whether any linguistic canons may apply to the interpretation of the language at issue as it relates to other sections of the statute—In Pari Materia; Consistent Usage and Meaningful Deviation; Rule Against Surplusage; Expressio Unius.

**C. Statutory Components:** Examine other components of the statute for evidence of the meaning of the language being interpreted—Titles; Definitions; Preambles, Findings and Purposes; Provisos and Exceptions. Purposivists will focus particular attention on the Findings and Purposes provisions, as well as the overall structure of the statute, to help identify the purpose(s) of the statute.

**D. Absurdity and Scrivener's Errors:** In rare cases, if a court finds that the plain meaning of statutory language is absurd or the result of a scrivener's error, the court may adopt an alternative interpretation of the statute.

**IV. Extrinsic Sources:** Depending on the theory applied and the judge applying the theory, courts will examine extrinsic sources to determine the meaning of the language being interpreted. Purposivists and intentionalists are more likely, in general, than textualists, to rely on an examination of extrinsic sources to find the meaning of statutory language. In looking at extrinsic sources, courts consider:

**A. Whole Code and Harmonizing Similar Statutes:** Statutes will often be interpreted in light of other similar statutes in the same jurisdiction. Linguistic canons may be used to interpret the language of a statute consistently with other similar statutes—Consistent Usage and Meaningful Deviation; Rule Against Surplusage; Expressio unius.

**B. Conflicts With Other Statutes:** If statutes in the same jurisdiction conflict, courts should begin by trying to read the statutes in a manner that avoids the conflict. If that is not possible, specific statutes control over general statutes and later enacted statutes control over earlier statutes, but repeal by implication is disfavored.

**C. Modeled Statutes, Borrowed Statutes, and Uniform Acts:** Consider whether the statute being interpreted is modeled on another statute, borrowed from another jurisdiction, or is based on a model or uniform statute.

**D. Legislative History:** Depending on the theory applied and the judge applying the theory, courts will consider legislative history to aid in determining the meaning of the language being interpreted. Purposivists and intentionalists are more likely than textualists to examine legislative history. Purposivists use it to determine the broad purpose(s) of a statute, while intentionalists use it to determine the specific intent of the legislature regarding the language being interpreted. There are various types of legislative history that courts will consider, with some being more authoritative than others. The primary types of legislative history that courts will consider include Committee Reports (especially Conference Committee Reports), Bill Drafts and Amendments (or Rejected Amendments), and

Statements Made in Hearings or During Floor Debate. The identity of the speaker may also be important. Evidence from the legislative history will frequently provide support for conflicting interpretations of the statute.

**E. Context of Enactment:** Depending on the theory applied and the judge applying the theory, courts will consider the context in which legislation was enacted to aid in determining the meaning of the language being interpreted. This will include the law that was in existence at the time the statute was enacted, the problems that motivated the legislature to enact the statute, the prevailing social views at the time the statute was enacted, and the role that interest groups played in enactment of the statute. Purposivists use this as evidence of the broad purpose(s) of a statute, while intentionalists use it to determine the specific intent of the legislature regarding the language being interpreted.

**F. Precedent and Stare Decisis:** Have courts previously interpreted the language at issue? If so, consider the implications of stare decisis.

**G. Subsequent Legislative Action or Inaction:** Consider whether the legislature has made any changes to the law or enacted any other laws subsequent to the enactment of the law or subsequent to the interpretation of the law by a court or administrative agency. Has the legislature acquiesced in interpretations or ratified interpretations? Consider legislative action AND inaction.

**IV. Substantive Policy Canons:** Where they apply, courts may also consider substantive policy canons when determining the meaning of statutory language. These include:

**A. Constitution Avoidance Canon and Severability Rules**

**B. Rule of Lenity**

**C. Federalism Canon**

**D. Common Law Canons v. Remedial Legislation Canon**

**E. Presumption Against Waiver of Sovereign Immunity**

**F. Presumption Against Preemption**

**G. Presumption Against Retroactivity**

**H. Canon re: Implied Causes of Action**

**I. Other Clear Statement Canons and Presumptions**

**V. Agency Interpretations of Statutes:** If a court is reviewing an interpretation of a statute advanced by an administrative agency, the court may accord some deference to the agency's interpretation, depending on the authority delegated to the agency by the legislature and the procedure that the agency used to interpret the statute.

**A.** ***Chevron*****:** Consider whether the agency's interpretation is entitled to *Chevron* deference. If so, use all of the traditional tools of statutory interpretation outlined above to decide whether Congress clearly answered the precise statutory interpretation question. If so, Congress' intent controls. If the statute is silent or ambiguous on the interpretation question, defer to the agency's interpretation of the statute if it is reasonable. BUT see the discussion of the major questions doctrine below.

**B.** ***Skidmore***: If *Chevron* doesn't apply, courts may still accord the agency's interpretation of the statute some deference under the *Skidmore* standard. Consider the *Skidmore* factors in conjunction with the other traditional tools of interpretation outlined above. BUT see the discussion of the major questions doctrine below.

**C**. **Major Questions Doctrine:** In any case in which a court is reviewing an agency's interpretation of a statute, consider whether the agency's interpretation involves an exercise of "vast economic and political significance." If so, the normal rules of statutory interpretation above will be modified so that there must be a clear statement in the text of the statute to support the agency's interpretation of the statute. If there is not, the court will adopt an alternative reasonable interpretation of the statute.

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