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Statutory Interpretation: Theories, Tools, and Trends

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Summary

In the tripartite structure of the U.S. federal government, it is the job of courts to say what the law is, as Chief Justice John Marshall announced in 1803. When courts render decisions on the meaning of statutes, the prevailing view is that a judge's task is not to make the law, but rather to interpret the law made by Congress. The two main theories of statutory interpretation—purposivism and textualism—disagree about how judges can best adhere to this ideal of legislative supremacy. The problem is especially acute in instances where it is unlikely that Congress anticipated and legislated for the specific circumstances being disputed before the court. While purposivists argue that courts should prioritize interpretations that advance the statute's purpose, textualists maintain that a judge's focus should be confined primarily to the statute's text.

Regardless of their interpretive theory, judges use many of the same tools to gather evidence of statutory meaning. First, judges often begin by looking to the ordinary meaning of the statutory text. Second, courts interpret specific provisions by looking to the broader statutory context. Third, judges may turn to the canons of construction, which are presumptions about how courts ordinarily read statutes. Fourth, courts may look to the legislative history of a provision. Finally, a judge might consider how a statute has been—or will be—implemented. Although both purposivists and textualists may use any of these tools, a judge's theory of statutory interpretation may influence the order in which these tools are applied and how much weight is given to each tool.

This report begins by discussing the general goals of statutory interpretation, reviewing a variety of contemporary as well as historical approaches. The report then briefly describes the two primary theories of interpretation employed today, before examining the main types of tools that courts use to determine statutory meaning. The report concludes by exploring developing issues in statutory interpretation.

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Introduction

"No vehicles in the park."

For decades, lawyers have debated the proper scope of this hypothetical law.[1] The rule at first appears admirably straightforward, but thought experiments applying the law quickly reveal latent complications. Does this law forbid bicycles?[2] Baby strollers?[3] Golf carts?[4] Drones?[5] Does it encompass the service vehicles of the park's caretakers, or an ambulance responding to a parkgoer's injury?[6] Would it prevent the city from bringing in a World War II truck and mounting it on a pedestal as part of a war memorial?[7] While many would read the hypothetical law to prohibit an enthusiastic mother from driving a minivan full of young soccer players into the park, it may not be so simple to justify that seemingly reasonable interperetation. If the soccer mom challenged the decision of a hypothetical Department of Parks and Recreation to prohibit her from entering, how would the Department's lawyers justify this position? Should they refer primarily to the law's text, or to its purpose? What tools should they use to discover the meaning of the text or the lawmaker's purpose? How does their theory of interpretation influence their answers to the harder problems of application?

This deceptively simple hypothetical has endured because it usefully illustrates the challenges of statutory interpretation. Even a statutory provision that at first appears unambiguous can engender significant difficulties when applied in the real world. Supreme Court Justice Felix Frankfurter once aptly described the problem of determining statutory meaning as inherent in "the very nature of words."[8] The meaning of words depends on the context in which they are used and might change over time.[9] Words are "inexact symbols" of meaning, and even in everyday communications, it is difficult to achieve one definite meaning.[10]

These "intrinsic difficulties of language" are heightened in the creation of a statute, which is crafted by a complicated governmental process and will likely be applied to an unforeseeable variety of circumstances.[11] Statutes are usually written in general terms, which may compound the difficulty of applying a provision to specific situations.[12] However, this generality—and the ensuing ambiguity—is often intentional: statutes are frequently drafted to address "*categories* of conduct."[13] The enacting legislature may have sought to ensure that the statute would be general

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[1] *See, e.g.*, Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1111–12 (2008) (revisiting the hypothetical on "the fiftieth anniversary" of a famous debate between the legal scholars H.L.A. Hart and Lon Fuller that used this example as a focal point).

[2] H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

[3] *E.g.*, FCC v. NextWave Pers. Commc'ns Inc., 537 U.S. 293, 311 (2003) (Breyer, J., dissenting).

[4] *E.g.*, Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 545 (1988).

[5] *E.g.*, Brad A. Greenberg, *Rethinking Technology Neutrality*, 100 MINN. L. REV. 1495, 1530 (2016). Assume the drone is able to carry objects, or even people—and ask why that matters. *See id.*

[6] *E.g.*, Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1260 (2015).

[7] Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 663 (1958).

[8] Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947).

[9] *See, e.g.*, ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 111 (2d ed. 2002).

[10] *See* Frankfurter, *supra* note 8, at 528.

[11] *Id.* at 529.

[12] *See, e.g.*, MIKVA & LANE, *supra* note 9, at 111.

[13] *Id.*

enough to capture the situations it could not foresee,[14] or may have intended to delegate interpretive authority to the agency responsible for enforcing the statute.[15] Vague or ambiguous language might also be the result of compromise.[16] Or a statute might be silent with respect to a particular application because Congress simply did not anticipate the situation.[17]

When a statute becomes the subject of a dispute in court, judges usually must interpret the law, ambiguous or not.[18] As Chief Justice John Marshall stated in *Marbury v. Madison*: "It is emphatically the province and duty of the judicial department to say what the law is."[19] Judicial pronouncements about statutes are generally the final word on statutory meaning and will determine how the law is carried out—at least, unless Congress acts to amend the law. In the realm of statutory interpretation, many members of the judiciary view their role in "say[ing] what the law is" as subordinate to Congress's position as the law's drafter.[20] Indeed, the legitimacy of any particular exercise in statutory interpretation is often judged by how well it carries out Congress's will.[21]

Judges have taken a variety of approaches to resolving the meaning of a statute.[22] The two theories of statutory interpretation that predominate today are purposivism and textualism.[23] Proponents of both theories generally share the goal of adhering to Congress's intended meaning,

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[14] *See, e.g.*, Frankfurter, *supra* note 8, at 528.

[15] *See, e.g.*, MIKVA & LANE, *supra* note 9, at 111–12.

[16] *See, e.g.*, John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 445 (2005) (arguing that bills "are likely to look awkward" because they result from "a legislative process that has many twists and turns; that gives the most intensely interested or even outlying legislative actors many opportunities to stop, slow, or reshape initiatives that have apparent majority support; and that emphasizes the legislative majority's need to compromise as a way to secure a bill's passage"). *Cf, e.g.*, Sturgeon v. Frost, 139 S. Ct. 1066, 1083–84, 1087 (2019) (describing a federal law as a "settlement" that sought to balance two potentially conflicting goals, and rejecting a construction that would "undermine" the law's "grand bargain").

[17] *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1182 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994).

[18] *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."). *Cf.* Transcript of Oral Argument at 12, 41, Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund, No. 15-1439, 2018 U.S. LEXIS 1912 (U.S. 2017) (statements of Justice Samuel Alito) (describing statutory provision as "gibberish" and asking whether there is "a certain point at which we say this [provision] means nothing, we can't figure out what it means, and, therefore, it has no effect").

[19] 5 U.S. (1 Cranch) 137, 177 (1803). *See also* HART & SACKS, *supra* note 17, at 640 ("Adjudication in its normal operation is at once a process for settling disputes and a process for making, or declaring, or settling law.").

[20] *See, e.g.*, MIKVA & LANE, *supra* note 9, at 102 ("All approaches to statutory interpretation are framed by the constitutional truism that the judicial will must bend to the legislative command."). *See generally* Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 283 (1989) (defining and exploring the concept of legislative supremacy in the field of statutory interpretation).

[21] *See, e.g.*, 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, 1251–52 (2002) ("The legitimacy of judicial power over statutory interpretation has long been thought to flow from this assumption that judges would implement Congress's decisions. Recent scholarship on statutory interpretation has made this often-implicit assumption about judging into the focal point of an important historical debate." (citations omitted)).

[22] In a widely read article, Lon Fuller presented a hypothetical dispute from the year 4300 in which five Justices of the "Supreme Court of Newgarth" split irreconcilably on the proper resolution of a case. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 616 (1949). Each Justice issues an opinion that embodies a different school of interpretation, representing "a microcosm of this century's debates over the proper way to interpret statutes." William N. Eskridge, Jr., *The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a Nutshell*, 61 GEO. WASH. L. REV. 1731, 1732 (1993).

[23] *See, e.g.*, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 75 (2006).

but disagree about how best to achieve that goal.[24] Judges subscribing to these theories may employ different interpretive tools to discover Congress's meaning,[25] looking to the ordinary meaning of the disputed statutory text,[26] its statutory context,[27] any applicable interpretive canons,[28] the legislative history of the provision,[29] and evidence about how the statute has been or may be implemented.[30]

Understanding the theories that govern how judges read statutes can help Congress legislate more effectively. As a practical matter, judicial opinions interpreting statutes necessarily shape the way in which those statutes are implemented. If Congress knows how courts ascribe meaning to statutory text, it might be able to eliminate some ambiguity regarding its meaning by drafting according to the predominant legal theories.[31] If Congress follows courts' methodologies for statutory interpretation, it may better communicate its policy choices not only to courts, but also to the general public. Members of the public frequently interpret statutes in the same way as courts, whether because they look to courts as the final arbiters of statutes or because courts often intentionally mimic general understandings of how language is naturally interpreted.[32] Finally, as this report discusses in detail, judges and legal scholars are engaged in an ongoing and evolving debate over the best way to determine the meaning of statutes.[33] For Members of Congress and their staff to participate meaningfully in this discussion, they must be aware of the scope and intricacies of that debate.

To help provide Congress with a general understanding of how courts interpret statutory language, this report begins by discussing the general goals of statutory interpretation, reviewing a variety of contemporary and historical approaches. The report then describes the two primary theories of interpretation employed today, before examining the main types of tools that courts use to determine statutory meaning. The report concludes by exploring developing issues in statutory interpretation. A separate CRS report explores in more detail the rules and presumptions that govern the construction of common components of federal legislation, such as legislative findings or severability clauses.[34]

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[24] *See, e.g.*, *id.* at 91–92. *Cf.* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 30 (2012) (arguing against using the word "intent" even if it refers solely to the intent "to be derived solely from the words of the text" because it "inevitably causes readers to think of *subjective* intent"). For further discussion of the ways in which textualists are skeptical about legislative intent, see *infra* "Textualism."

[25] *See, e.g.*, Manning, *What Divides Textualists from Purposivists?*, *supra* note 23, at 84–85.

[26] *See* discussion *infra* "Ordinary Meaning."

[27] *See* discussion *infra* "Statutory Context."

[28] *See* discussion *infra* "Canons of Construction."

[29] *See* discussion *infra* "Legislative History."

[30] *See* discussion *infra* "Statutory Implementation."

[31] *See, e.g.*, John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1932–33 (2015) (noting that some versions of textualism emphasize the importance of creating "clear interpretive rules" as a background against which Congress may legislate (quoting Finley v. United States, 490 U.S. 545, 556 (1989))).

[32] *See, e.g.*, Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 847 (1992) (noting that his purposivist interpretive theory incorporates "widely shared substantive values, such as helping to achieve justice by interpreting the law in accordance with the 'reasonable expectations' of those to whom it applies" (citation omitted)); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 109 (2001) (noting that textualists ask how a "reasonable user of words would have understood the statutory text" (internal quotation mark omitted)).

[33] *E.g.*, William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1116 (2017).

[34] CRS Report R46484, *Understanding Federal Legislation: A Section-by-Section Guide to Key Legal Considerations*, by Victoria L. Killion.

Goals of Statutory Interpretation: A Historical Overview

Courts "say what the law is"[35] by resolving legal disputes in individual cases.[36] This is true whether a court is interpreting a positive law, such as a statute or regulation, or reasoning from a prior judicial precedent, drawing from a body of law known as the common law.[37] With regard to the historical common-law tradition of making law through judicial opinions, a court reasons by example, applying general "principles of equity, natural justice, and . . . public policy" to the specific circumstances before the court.[38] Case by case, a common-law court decides whether each set of circumstances should follow the rule of a previous decision.[39] But in resolving a statutory dispute, courts generally do not simply determine, based on equity or natural justice, what would have been a reasonable course of action under the circumstances.[40] Instead, the court must "figure out what the statute means" and apply the statutory law to resolve the dispute.[41]

The predominant view of a judge's proper role in statutory interpretation is one of "legislative supremacy."[42] This theory holds that when a court interprets a federal statute, it seeks "to give effect to the intent of Congress."[43] Under this view, judges attempt to act as "faithful agents" of Congress.[44] They "are not free to simply substitute their policy views for those of the legislature that enacted the statute."[45] This belief is rooted in the constitutional separation of powers: in the realm of legislation, the Constitution gives Congress, not courts, the power to make the law.[46] The

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[35] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[36] *See, e.g.*, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 24–25 (1928). *See also, e.g.*, Muskrat v. United States, 219 U.S. 346, 361 (1911) ("That judicial power . . . is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.").

[37] *E.g.*, HART & SACKS, *supra* note 17, at 640.

[38] Norway Plains Co. v. Boston & Me. R.R., 67 Mass. 263, 267–68 (1854). *See also* CARDOZO, *supra* note 36, at 28 ("[T]he problem which confronts the judge is in reality a twofold one: he must first extract from the precedents the underlying principle, the *ratio decidendi*; he must then determine the path or direction along which the principle is to move and develop, if it is not to wither and die.").

[39] *See* Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 501–02 (1948). *See also, e.g.*, Rogers v. Tennessee, 532 U.S. 451, 461 (2001) ("In the context of common law doctrines . . . , there often arises a need to clarify or even to reevaluate prior opinions as new circumstances and fact patterns present themselves. Such judicial acts, whether they be characterized as 'making' or 'finding' the law, are a necessary part of the judicial business . . . .").

[40] WILLIAM N. ESKRIDGE, JR., PHILLIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 5 (2d ed. 2006) (contrasting common law approach to statutory interpretation). *Cf. generally* Jeffrey A. Pojanowski, *Reading Statutes in the Common Law Tradition*, 101 VA. L. REV. 1357 (2015) (describing various arguments for and against applying common law principles of reasoning to statutory interpretation).

[41] ESKRIDGE ET AL., *supra* note 40, at 5.

[42] *See, e.g.*, John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2413, 2425 (2017).

[43] United States v. Am. Trucking Ass'ns, Inc., 310 U.S. 534, 542 (1940). *See also, e.g.*, Manning, *Textualism and Legislative Intent*, *supra* note 16, at 423 ("In any system predicated on legislative supremacy, a faithful agent will of course seek the legislature's intended meaning in some sense . . . ."). Manning goes on to explain, however, that textualists do not "practice intentionalism," because they seek an objective meaning rather than Congress's actual intent. *Id.* at 423–24. For further discussion of this point, see *infra* "Textualism."

[44] *See, e.g.*, Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 10 n.26 (2006) (citing a number of "works supporting the faithful agent theory"). *See also* ESKRIDGE ET AL., *supra* note 40, at 5–8 (exploring various conceptions of "faithful agent" role).

[45] MIKVA & LANE, *supra* note 9, at 103.

[46] *See, e.g.*, United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 216 (1979) (Burger, C.J., dissenting) ("The Court reaches a result I would be inclined to vote for were I a Member of Congress considering a proposed

judicial power vested in the courts entails only "the power to pronounce the law as Congress has enacted it."[47] Accordingly, courts must remain faithful to what the legislature enacted.[48]

It was not always the case that judges described their role in statutory interpretation as being so constrained. This section broadly reviews the evolution of statutory interpretation in U.S. courts, noting the various schools of legal thought that predominated at particular periods in the nation's history. However, while these other interpretive theories no longer represent a majority view, all continue to exist in some form today, and critically, they influenced the development of the theories that do dominate modern legal theory.

Early Years: Natural Law and Formalism

Legal thinking in this country's early years was influenced by the idea of natural law,[49] which is the belief that law consists of a set of objectively correct principles derived "from a universalized conception of human nature or divine justice."[50] The goal of judges in a natural law system[51] is to "conform man-made law to those natural law principles."[52] Accordingly, courts looked to "the equity of the statute,"[53] seeking to find "the reason or final cause of the law" in order to address "the mischief for which the common law did not provide," but the newly enacted statute did, "and to add life to the cure and remedy, according to the true intent of the makers of the act."[54]

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amendment of [the disputed act]. I cannot join the Court's judgment, however, because it is contrary to the explicit language of the statute and arrived at by means wholly incompatible with long-established principles of separation of powers."); Levi, *supra* note 39, at 520 ("[The words of a statute] are not to be taken lightly since they express the will of the legislature. The legislature is the law-making body."). *See also* Molot, *Reexamining* Marbury, *supra* note 21, at 1250–54 (examining Founders' conceptions of the judicial power).

[47] King v. Burwell, 576 U.S. 473, 515 (2015) (Scalia, J., dissenting).

[48] *See, e.g.*, HART & SACKS, *supra* note 17, at 1194–95.

[49] *See generally* Kirk A. Kennedy, *Reaffirming the Natural Law Jurisprudence of Justice Clarence Thomas*, 9 REGENT U. L. REV. 33, 41–50 (1997) (exploring the history and development of various strains of natural law). *See also, e.g.*, CARDOZO, *supra* note 36, at 124–25 ("The theory of the older writers was that judges did not legislate at all. A preexisting rule was there, imbedded, if concealed, in the body of the customary law. All that the judges did, was to throw off the wrappings, and expose the statute to our view.").

[50] BLACK'S LAW DICTIONARY (10th ed. 2014). *See also* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 5 (1990) (defining natural law as "the idea that there is a body of suprapolitical principles that underwrite 'positive law,' meaning law laid down by courts, legislatures, or other state organs").

[51] Natural law was not the only prominent view of statutory interpretation in the early history of American law. Notably, many subscribed to what was sometimes dubbed (mostly by its detractors) as "literalism." *See* United States v. Dotterweich, 320 U.S. 277, 284 (1943) ("Literalism and evisceration are equally to be avoided."); Learned Hand, *How Far Is a Judge Free in Rendering a Decision?*, *in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 107 (Irving Dilliard ed., 1952) ("[T]here are two extreme schools . . . . One school says that the judge must follow the letter of the law absolutely. I call this the dictionary school."). Literalism refused to consider any sense of purpose that was not strictly grounded in the text. *See* William S. Jordan, III, *Legislative History and Statutory Interpretation: The Relevance of English Practice*, 29 U.S.F. L. REV. 1, 4 (1994) ("[T]he literal rule [in English law] holds that the intent of Parliament is determined from the actual words of the statute. If Parliament's meaning is clear, that meaning is binding no matter how absurd the result may seem."). *See, e.g.*, Caminetti v. United States, 242 U.S. 470, 485 (1917) ("Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.").

[52] Manning, *Textualism and the Equity of the Statute*, *supra* note 32, at 29.

[53] *Id.* at 29–32.

[54] J. Clark Kelso & Charles D. Kelso, *Statutory Interpretation: Four Theories in Disarray*, 53 SMU L. REV. 81, 88 (2000).

A distinct, but not mutually exclusive,[55] view of the law that gained popularity in the 19th century,[56] formalism, posits that "the correct outcome of a case could be deduced" scientifically from fundamental "principles of common law" contained in prior cases.[57] These early formalists believed that they could use established forms of logic, based on these fundamental common-law principles, to determine the meaning of statutory text.[58]

Both natural law and formalism share the belief that the law provides one right answer to any question and lawmakers can discover that answer.[59] For those who subscribed to these schools of thought, the source of this answer is neither the legislature nor the courts, but the higher principles of law themselves.[60] When natural law and formalism dominated legal thinking, "it did not matter as much whether judges conceived of themselves as faithful agents of Congress or coequal partners in law elaboration."[61] This is because under these theories, both courts and legislators are engaged in the same process of finding the one correct answer.[62] And if courts discover the answer to the legal question presented, proponents of natural law and formalism contend that there is no need to defer to the legislature.[63] Accordingly, under these theories, courts might resort to equity or reason over a strict construction of the language of the statute because this gloss on the legislative text amounts to a "correction" of a defective statute, a correction that

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[55] Formalism represents a certain way of reasoning and could be adopted in tandem with natural law approaches. *See, e.g.*, POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 50, at 11. However, it is arguably more often associated with a more "literal" view of statutes—at least in its more modern formulations. *See, e.g.*, Daniel Farber, *The Ages of American Formalism*, 90 NW. U. L. REV. 89, 91 (1995) ("Formalists believe that certainty, stability, and logic are the primary values to be sought by judges . . . . To implement these values, they embrace formalist methods, such as textualism as a system for interpreting statutes . . . ."). *Cf.* Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 620 (1999) ("Rule-following in the sense of textual literalism was indeed an aspect of classical formalism—as it is likely to be of any body of American legal thought—but it was a marginal concern. Formalism was a project of rationalizing the central principles and methods of the common law . . . .").

[56] Molot, *The Rise and Fall of Textualism*, *supra* note 44, at 12.

[57] POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 50, at 15.

[58] Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 4–5 (1983). *See also* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 181 (1987) (defining formalism in contrast to other scholars as "the use of deductive logic to derive the outcome of a case from premises accepted as authoritative").

[59] *See* Lon L. Fuller, *A Rejoinder to Professor Nagel*, 3 NAT. L. F. 83, 84 (1958) ("It is an acceptance of the possibility of 'discovery' in the moral realm that seems to me to distinguish all the theories of natural law from opposing views."); Pildes, *supra* note 55, at 608–09 ("To the classical formalists, law . . . meant a scientific system of rules and institutions that were *complete* in that the system made right answers available in all cases; *formal* in that right answers could be derived from the autonomous, logical working out of the system; *conceptually ordered* in that ground-level rules could all be derived from a few fundamental principles; and socially *acceptable* in that the legal system generated normative allegiance.").

[60] *See generally* G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 2 (1978) (arguing that in the 19th century, "law was conceived of as a mystical body of permanent truths, and the judge was seen as one who declared what those truths were and made them intelligible—as an oracle who 'found' and interpreted the law").

[61] Molot, *The Rise and Fall of Textualism*, *supra* note 44, at 12.

[62] *Id.*

[63] *See, e.g.*, Frank E. Horack, Jr., *In the Name of Legislative Intention*, 38 W. VA. L.Q. 119, 119 (1932) ("Jeffersonian conceptions of individual freedom and equality have kept alive the doctrine that our government is one of laws and not of man. In this idea there is safety, for if law is justice and judicial opinions are produced, cellophane wrapped, by some monotonously automatic process which man cannot disturb, then man lives '*non sub homine sed sub deo et lege*' [not under man, but under God and law], and is free from mortal tyranny."). *Cf.* Molot, *The Rise and Fall of Textualism*, *supra* note 44, at 12 ("The rise of formalism and heightened confidence in the constraining force of natural law principles enabled the federal courts to be very aggressive in their search for legal meaning and yet to be relatively unconcerned about exceeding their constitutional role or interfering with legislative supremacy.").

would not have been necessary "if the original had been correctly stated."[64] As a result, a prevalent view in the 19th century was that the judge merely said "what the legislator himself would have said had he been present, and would have put into his law if he had known."[65]

20th Century: Rise of Legal Realism

Critically, then, the legitimacy of the theories that primarily governed early American jurisprudence hinged on the belief that a judge could divine the law by focusing on general principles of justice or logic.[66] As the school of legal realism gained traction in the early 20th century, however, legal scholars began to question these assumptions and called for judges to more self-consciously justify the legitimacy of their rulings.[67] The early legal realists sought to discover "how law 'really' operated,"[68] applying new insights from the fields of sociology and psychology to judicial decisionmaking.[69] Legal realism led to the widespread recognition that judges sometimes make law, rather than discover it.[70] As a result, judges more readily acknowledged that there were no "pre-established truths of universal and inflexible validity"—or at least, that they could not divine those truths and invariably derive from them the proper conclusion in any given case.[71] For legal realists, there is "no single right and accurate way of reading one case."[72] Accordingly, the need arose for judges to more openly justify the law that they announced in any given case.[73] Given the indeterminacy of the legal rules used in formalism, realists called for new rules they believed would better constrain judges and prevent arbitrary action.[74]

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[64] William H. Loyd, *The Equity of a Statute*, 58 U. PA. L. REV. 76, 77 n.8 (1909).

[65] Manning, *Textualism and the Equity of the Statute*, *supra* note 32, at 4 n.6 (quoting THE NICOMACHEAN ETHICS OF ARISTOTLE 133 (Sir David Ross trans., 1925)).

[66] *See, e.g.*, Levi, *supra* note 39, at 501 ("The pretense [of legal reasoning] is that the law is a system of known rules applied by a judge . . . .").

[67] *See generally* Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376 (1946); Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899); Horack, *supra* note 63; Levi, *supra* note 39; Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379 (1907); John Willis, *Statute Interpretation in a Nutshell*, 16 CAN. B. REV. 1 (1938). *See, e.g.*, CARDOZO, *supra* note 36, at 41 ("The logic of [one] principle prevailed over the logic of the others. . . . The thing which really interests us, however, is why and how the choice was made between one logic and another. In this instance, the reason is not obscure. One path was followed . . . because of the conviction in the judicial mind that the one selected led to justice.").

[68] Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909, 1912 (2004).

[69] *Id.* at 1911, 1923.

[70] *See, e.g.*, CARDOZO, *supra* note 36, at 128 ("Obscurity of statute . . . may leave the law unsettled, and cast a duty upon the courts to declare it retrospectively in the exercise of a power frankly legislative in function.").

[71] *Id.* at 22–23. *See, e.g.*, Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting) ("If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law . . . does not exist without some definite authority behind it.").

[72] 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, 395 (1950).

[73] *See, e.g.*, Fuller, *Reason and Fiat in Case Law*, *supra* note 67, at 378.

[74] *See, e.g.*, Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 467, 470–71 (1988) (reviewing LAURA KALMAN, LEGAL REALISM AT YALE: 1927-1960 (1986)).

Modern Jurisprudence: Responding to Legal Realism

In the field of statutory interpretation in particular, legal scholars and judges responded to legal realism in part by distinguishing the law-making role of the legislature from the law-interpreting role of the court.[75] In this realm especially, "law" was not some platonic ideal, but instead was the statute that Congress had passed.[76] Justice Oliver Wendell Holmes famously expressed this shift in prevailing legal theory when he stated, "[t]he common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi sovereign that can be identified."[77]

Judges noted that the Constitution itself restrained judicial discretion by designating Congress, not the courts, as the lawmaking branch.[78] Further, because Congress made the law, judges argued that they should restrain themselves to act "as merely the translator of another's command."[79] As Justice Frankfurter asserted: "In a democracy the legislative impulse and its expression should come from those popularly chosen to legislate, and equipped to devise policy, as courts are not."[80] Rather than seeking to discover foundational principles of the law, as determined by judges, many legal theorists argued that courts should instead attempt "to discover the rule which the law-maker intended to establish; to discover the intention with which the law-maker made the rule, or the sense which he attached to the words wherein the rule is expressed."[81] To do otherwise was to risk attempting to make policy, usurping the legislative function.[82] Today it is widely accepted that it is inappropriate for judges to prioritize their own policy views over the policy actually

[75] *See, e.g.*, Horack, *supra* note 63, at 121 ("The problem of interpretation when applied in the field of government arises because the legislature makes the law and the courts apply it. And since the departmentalization of government, the task of applying generalized standards of conduct to particularized consequences makes even an honest difference of opinion inevitable.").

[76] *See, e.g.*, Levi, *supra* note 39, at 501, 520.

[77] S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). As one scholar pointed out, the fact that statutes, in particular, were made through public, political processes meant that the law was "no longer the mysterious thing it was once." Pound, *supra* note 67, at 384–85.

[78] *See, e.g.*, HART & SACKS, *supra* note 17, at 1374 (arguing courts should "[r]espect the position of the legislature as the chief policy-determining agency of the society"); Manning, *Textualism and the Equity of the Statute*, *supra* note 32, at 57 (arguing "that the U.S. Constitution rejected English structural assumptions in ways that make the equity of the statute an inappropriate foundation for the 'judicial Power of the United States'"). *Cf.* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 693 (1995) (discussing the problem of "the countermajoritarian difficulty" proposed by Alexander Bickel, which notes the tension inherent in "the exercise of power possessed by judges neither placed in office by the majority nor directly accountable to the majority to invalidate majoritarian policies" (internal quotation marks omitted)).

[79] Frankfurter, *supra* note 8, at 534.

[80] *Id.* at 545. *See, e.g.*, Int'l News Serv. v. Associated Press, 248 U.S. 215, 267 (1918) (Brandeis, J., dissenting) ("Courts are ill-equipped to make the investigations which should precede a determination of the limitations which should be set upon any property right in news or of the circumstances under which news gathered by a private agency should be deemed affected with a public interest.").

[81] Pound, *supra* note 67, at 381. As will be discussed in more detail, *infra* "Major Theories of Statutory Interpretation," both purposivists and textualists pursue an objective legislative intent, rather than Congress's *actual* intent.

[82] *See* Frankfurter, *supra* note 8, at 533 ("[Courts] are confined by the nature and scope of the judicial function in its particular exercise in the field of interpretation. . . . [T]he function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature."); Pound, *supra* note 67, at 382 ("[T]he object of spurious interpretation is to make, unmake, or remake, and not merely to discover. . . . It is essentially a legislative, not a judicial process . . . .").

codified by the legislature.[83] This general view undergirds both modern purposivism and modern textualism.[84]

Not all legal scholars and judges, however, reacted to legal realism by adopting a view of legislative supremacy in statutory interpretation. Some others argued instead that if judges make law, they should openly embrace this role and seek to make good law.[85] This school of thought, which continues today, points out that the Constitution has granted to judges the power of interpretation and argues that the constitutional duty of interpretation entails a meaningful duty to shape the law.[86] For example, one legal scholar has claimed that the Constitution purposefully "divorces statutory interpretation (given to the executive and the courts in articles II and III) from statutory enactment (by Congress under article I)," in order to ensure "that statutes will evolve because the perspective of the interpreter will be different from that of the legislator."[87]

[83] *See, e.g.*, Kimble v. Marvel Entm't, 576 U.S. 446, 464–65 (2015) (rejecting certain arguments regarding statutory meaning as "more appropriately addressed to Congress," citing "rule of law values" (quoting Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 27 (2014) (internal quotation marks omitted)); Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 667 (2014) ("[C]ourts are not at liberty to jettison Congress' judgment[.]"). *See generally, e.g.*, Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 593–94 (1995) (noting statutory interpretation necessarily entails judgment about a court's "institutional stance in relation to the legislature," and arguing the current "legal culture's understanding of the link between statutory interpretation and democratic theory verges on the canonical and is embodied in the principle of 'legislative supremacy'").

[84] *See, e.g.*, HART & SACKS, *supra* note 17, at 1194 (arguing the principle of institutional settlement "obviously, forbids a court to substitute its own ideas for what the legislature has duly enacted"); 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 22 (Amy Gutmann ed., 1997) ("It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is."). *See also, e.g.*, Manning, *Textualism and Legislative Intent*, *supra* note 16, at 430 n.34 ("Textualists implicitly build on the influential work of legal realist Max Radin.").

[85] *See, e.g.*, Fuller, *A Rejoinder to Professor Nagel*, *supra* note 59, at 84 (rejecting "the notion that there is a 'higher law' transcending the concerns of this life" but defending the "one central aim common to all the schools of natural law, that of discovering those principles of social order which will enable men to attain a satisfactory life in common" through a collaborative process to establish these shared purposes).

[86] *E.g.*, CARDOZO, *supra* note 36, at 66 ("The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence."); *id.* at 133 ("[T]he judge is under a duty, within the limits of his power of innovation, to maintain a relation between law and morals . . . ."); *id.* at 135 ("You may say that there is no assurance that judges will interpret the *mores* of their day more wisely and truly than other men. . . . [This] is quite beside the point. The point is rather that this power of interpretation must be lodged somewhere, and the custom of the constitution has lodged it in the judges.").

[87] WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 58 (1994). Eskridge argued that this conception of the Constitution is consistent with the framers' intentions, claiming that they believed "in the productivity of evolving interpretation to meet new circumstances." *Id.* at 117. *But see* Manning, *Textualism and the Equity of the Statute*, *supra* note 32, at 82 ("I believe that, properly understood, *The Federalist* in fact contradicts the assumptions underlying the equity of the statute."). In turn, Eskridge responded to Manning's article in *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 994 (2001).

At least one commentator has characterized this theory of "pragmatic dynamism"[88] as a revival of the natural law tradition of equitable interpretation.[89] Judge Guido Calabresi, while a professor at Yale Law School, argued that judges should take an active role in determining whether statutes are "out of phase with the whole legal framework,"[90] and should have "the authority to treat statutes as if they were no more and no less than part of the common law."[91] Former federal judge Richard Posner, another pragmatist,[92] has similarly argued that judges should take into account their "intuitions" or "preconceptions,"[93] and look to the practical consequences of their decisions in determining how to read a statute.[94]

Major Theories of Statutory Interpretation

The two predominant theories of statutory interpretation today are purposivism and textualism—although, as explored below,[95] some have argued that the two theories are converging.[96] As

[88] ESKRIDGE, *supra* note 87, at 50. Eskridge argued that a statute's meaning only becomes clear through application, and that this application "engenders dynamic interpretations": "When successive applications of the statute occur in contexts not anticipated by its authors, the statute's meaning evolves *beyond* original expectations. Indeed, sometimes subsequent applications reveal that factual or legal assumptions of the original statute have become (or were originally) erroneous; then the statute's meaning often evolves *against* its original expectations." *Id.* at 49.

In taking a dynamic approach to statutory meaning, pragmatists believe that the meaning of a statute evolves over time. *See, e.g.*, ESKRIDGE, *supra* note 87, at 50 (describing theory of "pragmatic dynamism"); Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 352 (7th Cir. 2017) (Posner, J., concurring) ("[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."). Other judges, however, including most purposivists and textualists, subscribe to a more static view of statutory meaning, looking instead to the text's original meaning at the time of enactment. *See, e.g.*, Carlos E. Gonzalez, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 626 (1996). Although this temporal distinction is an important part of some interpretive theories, this report does not discuss the issue further.

[89] *See* Manning, *Textualism and the Equity of the Statute*, *supra* note 32, at 81. *See also* United States v. Marshall, 908 F.2d 1312, 1335–36 (7th Cir. 1990) (Posner, J., dissenting) (arguing that an "irrational" statutory sentencing scheme highlights "the disagreement between the severely positivistic view that the content of law is exhausted in clear, explicit, and definite enactments by or under express delegation from legislatures, and the natural lawyer's or legal pragmatist's view that the practice of interpretation and the general terms of the Constitution (such as 'equal protection of the laws') authorize judges to enrich positive law with the moral values and practical concerns of civilized society").

[90] GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 164 (1982).

[91] *Id.* at 2. Judge Calabresi also pioneered the field of law and economics, later taken up by (among others) Judge Richard Posner. Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757, 759 (1975). Law and economics seeks to apply the fundamental insights of economics to analyze law. *E.g.*, POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 50, at 353 ("The basic assumption of economics that guides the . . . economic analysis of law . . . is that people are rational maximizers of their satisfactions . . . ."). Judge Calabresi has argued that unlike the legal realists, who used sociology and psychology to critique law, law and economics entails not merely the application of economic analysis to law but instead envisions a "bilateral relationship" between the disciplines. GUIDO CALABRESI, THE FUTURE OF LAW & ECONOMICS: ESSAYS IN REFORM AND RECOLLECTION 8–10 (2016).

[92] *See, e.g.*, RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 241 (1999) (defining "pragmatic adjudication" to include judges who "always try to do the best they can do for the present and the future, unchecked by any felt *duty* to secure consistency in principle with what other officials have done in the past" (quotation mark omitted)). *See also id.* (contrasting pragmatic judges with "legal positivist[s]" who believe "that the law is a system of rules laid down by legislatures and merely applied by judges").

[93] POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 50, at 124–25.

[94] *Id.* at 460 ("The essence of interpretive decision making is considering the consequences of alternative decisions."); *id.* at 462 (arguing that "legal advocates" should emphasize facts and policy and that "judges should at long last abandon . . . formalist adjudication").

[95] *Infra* "A Convergence of Theories?"

[96] There are a variety of ways to characterize various approaches to the law. *See, e.g.*, Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 STAN. L. REV. 2113 (2003)

previously discussed, both theories share the same general goal of faithfully interpreting statutes enacted by Congress.[97] This goal is grounded in the belief that the Constitution makes the legislature the supreme lawmaker and that statutory interpretation should respect this legislative supremacy.[98] Interpretive problems arise, however, when courts attempt to determine how Congress meant to resolve the particular situation before the court.[99] The *actual* intent of the legislature that passed a given statute is usually unknowable with respect to the precise situation presented to the court.[100] Accordingly, purposivists and textualists instead seek to construct an objective intent.[101]

Purposivists and textualists disagree about the best way to determine this objective intent and about the focus of the objective construct. Purposivists ask what a reasonable legislator would have been trying to achieve by enacting the disputed statute,[102] while textualists ask what a reasonable English speaker would convey with the disputed words.[103] This disagreement is based in large part on distinct views of the institutional competence of the courts.[104] The concept of "institutional competence" assumes that each branch of government "has a special competence or expertise, and the key to good government is not just figuring out what is the best policy, but figuring out which institutions should be making which decisions and how all the institutions should interrelate."[105] "[T]he rules of [statutory] interpretation allocate lawmaking power among the branches of government, and those rules should reflect and respect what, if anything, the Constitution has to say about that allocation."[106]

Consequently, because purposivists and textualists have different views of how judges can best act to advance the will of the legislature, they advocate different modes of interpretation[107] and turn to different tools for evidence of Congress's objective intent.[108] Although some jurists have

(categorizing schools of law on the basis of whether and how they incorporate nonlegal disciplines).

[97] *See supra* notes 42 to 48 and accompanying text.

[98] Manning, *Without the Pretense of Legislative Intent*, *supra* note 42, at 2413, 2425.

[99] *See supra* notes 8 to 17 and accompanying text.

[100] Manning, *Inside Congress's Mind*, *supra* note 31, at 1912–13. *See also, e.g.*, Hand, *supra* note 51, at 106 ("[Often, t]he men who used the language did not have any intent at all about the case that has come up; it had not occurred to their minds. Strictly speaking, it is impossible to know what they would have said about it, if it had."); Manning, *Without the Pretense of Legislative Intent*, *supra* note 42, at 2406 ("Since Congress is a 'they,' not an 'it,' . . . such intent does not exist as a fact in the world, simply waiting to be found." (quoting Kenneth A. Shepsle, *Congress Is a 'They,' Not an 'It': Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 239 (1992))).

[101] *See, e.g.*, Manning, *Inside Congress's Mind*, *supra* note 31, at 1913–14. *Cf.* Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 348 (2005) (arguing that both theories use evidence of "the subjective intent of the enacting legislature" to "construct their sense of objective meaning").

[102] *See* HART & SACKS, *supra* note 17, at 1148.

[103] *See* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988); Manning, *Textualism and the Equity of the Statute*, *supra* note 32, at 109; Scalia, *supra* note 84, at 17.

[104] *E.g.*, Manning, *What Divides Textualists from Purposivists?*, *supra* note 23, at 91.

[105] William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to* The Legal Process, *in* HART & SACKS, *supra* note 17, at lx.

[106] *See* Manning, *Without the Pretense of Legislative Intent*, *supra* note 42, at 2413 (describing the concept of institutional settlement pioneered by Hart & Sacks); *see also* HART & SACKS, *supra* note 17, at 4–5 (defining "the principle of institutional settlement" as expressing "the judgment that decisions which are the duly arrived at result of duly established procedures . . . ought to be accepted as binding" and arguing that "the effect to be given" to any particular settlement of a dispute, whether it was decided through a statute or a judicial decision, should be evaluated in light of the procedure that created that settlement).

[107] *See* Manning, *Without the Pretense of Legislative Intent*, *supra* note 42, at 2425–27.

[108] *See, e.g.*, Molot, *The Rise and Fall of Textualism*, *supra* note 44, at 26.

argued that textualism has "won" the statutory interpretation debate[109]—Justice Kagan declared in 2015 that "we're all textualists now"[110]—critical distinctions in judges' interpretive theories arguably remain, as discussed below.

Purposivism

Purposivists argue "that legislation is a purposive act, and judges should construe statutes to execute that legislative purpose."[111] Purposivists often focus on the legislative process, taking into account the problem that Congress was trying to solve by enacting the disputed law and asking how the statute accomplished that goal.[112] They argue that courts should interpret ambiguous text "in a way that is faithful to Congress's purposes."[113] Two preeminent purposivists from the mid-20th century, Henry Hart and Albert Sacks, advocated the "benevolent presumption . . . that the legislature is made up of reasonable men pursuing reasonable purposes reasonably."[114] But there was a caveat to this presumption: it should not hold if "the contrary is made unmistakably to appear" in the text of the statute.[115]

Purposivists believe that judges can best observe legislative supremacy by paying attention to the legislative process.[116] The Constitution "charges Congress, the people's branch of representatives, with enacting laws,"[117] and accordingly, purposivists contend that courts should look to "how Congress actually works."[118] As such, they argue that to preserve the "integrity of legislation," judges should pay attention to "how Congress makes its purposes known, through text and

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[109] *Cf., e.g.*, Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 119–20 (2009) (discussing this idea, but ultimately disagreeing that the two methods have converged).

[110] Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes* at 8:28 (Nov. 17, 2015), http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation (discussing Justice Scalia's influence on the Supreme Court); *cf., e.g.*, Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479, 480 (2013) ("The dust from the Thirty Years' statutory interpretation wars may have settled and, while textualism has not won an unconditional surrender in the Supreme Court, it appears to have gained substantial territory before its truce with purposivism.").

[111] ROBERT A. KATZMANN, JUDGING STATUTES 31 (2014). Academics sometimes distinguish between "purpose" and "intent," most frequently using "purpose" to mean the objective intent that is the goal of new purposivism, and "intent" to mean the legislature's *actual* intent, which was the goal of the old "intentionalism." *See, e.g.*, Siegel, *supra* note 109, at 123–24. However, courts generally use the two words interchangeably, and this report follows suit. *See* MIKVA & LANE, *supra* note 9, at 107; *see, e.g.*, Liparota v. United States, 471 U.S. 419, 424–25 (1985) (referring both to "congressional intent" and "congressional purpose").

[112] *E.g.* HART & SACKS, *supra* note 17, at 1148.

[113] KATZMANN, *supra* note 111, at 31.

[114] HART & SACKS, *supra* note 17, at 1148. *See also* Breyer, *supra* note 32, at 854 ("Given this statutory background, what would a reasonable human being intend this specific language to accomplish?" (internal quotation marks omitted)).

[115] HART & SACKS, *supra* note 17, at 1125.

[116] *See* Manning, *Without the Pretense of Legislative Intent*, *supra* note 42, at 2425, 2426 (describing purposivism as a belief that "the judiciary respect[s] legislative supremacy by implementing the apparent legislative plan of action," or by "supplying sensible means of carrying out legislative policies that Congress cannot possibly spell out completely in a world of great and ever-changing complexity"). *See also, e.g.*, Rebecca M. Kysar, *Interpreting by the Rules*, 99 TEX. L. REV. 1115, 1167 (2021) (exploring "ways in which taking [congressional] procedure seriously" can strengthen a judge's role "as a faithful agent of the legislature").

[117] KATZMANN, *supra* note 111, at 4.

[118] Breyer, *supra* note 32, at 858. As one textbook pithily asks, "Shouldn't it make a normative difference that a statute was enacted by legislators seeking to solve a social problem in the face of disagreement, and not by a drunken mob of legislators with no apparent purpose or who had agreed to adopt any bill chosen by a throw of the dice?" ESKRIDGE ET AL., *supra* note 40, at 243.

reliable accompanying materials constituting legislative history."[119] Courts should take into consideration any "institutional device that facilitates compromise and helps develop the consensus needed to pass important legislation."[120] As one purposivist judge said, "[w]hen courts construe statutes in ways that respect what legislators consider their work product, the judiciary not only is more likely to reach the correct result, but also promotes comity with the first branch of government."[121]

To discover what a reasonable legislator was trying to achieve,[122] purposivists rely on the statute's "policy context," looking for "evidence that goes to the way a reasonable person conversant with the circumstances underlying enactment would suppress the mischief and advance the remedy."[123] Purposivists are more willing than textualists to consider legislative history.[124] Arguably, the core of purposivism is "reasoning by example" and asking whether various specific applications of the statute further its general purpose.[125] As a result, purposivists maintain that courts should first ask what problem Congress was trying to solve,[126] and then ask whether the suggested interpretation fits into that purpose.[127] Hart and Sacks suggested that judges should seek "to achieve consistency of solution . . . to make the results in the particular cases respond to . . . some general objective or purpose to be attributed to the statute."[128] Judges should look for interpretations that promote "coherence and workability."[129]

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[119] KATZMANN, *supra* note 111, at 4.

[120] Breyer, *supra* note 32, at 860 (arguing that if legislators knew courts would not consider the legislative history that legislators considered critical to determining the meaning of a statute, the relevant policymakers "might not have agreed on the legislation").

[121] KATZMANN, *supra* note 111, at 36.

[122] *See* HART & SACKS, *supra* note 17, at 1148.

[123] Manning, *What Divides Textualists from Purposivists?*, *supra* note 23, at 91. *See also* Breyer, *supra* note 32, at 853–54 ("Sometimes [a court] can simply look to the surrounding language in the statute or to the entire statutory scheme and ask, 'Given this statutory background, what would a reasonable human being intend this specific language to accomplish?' Often this question has only one good answer, but sometimes the surrounding statutory language and the 'reasonable human purpose' test cannot answer the question. In such situations, legislative history may provide a clear and helpful resolution.").

[124] *See, e.g.*, Breyer, *supra* note 32, at 854; KATZMANN, *supra* note 111, at 35. *See also* discussion *infra* "Legislative History."

[125] *See* Levi, *supra* note 39, at 501, 504–05. *See also* HART & SACKS, supra note 17, at 1119–20, 1378–79; MIKVA & LANE, *supra* note 9, at 111. *Cf.* Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) ("I suggest that the task for the judge called upon to interpret a statute is best described as one of imaginative reconstruction. The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar."). Posner distinguishes his own suggestion from the approach of Hart and Sacks by arguing the judge should attempt to take into account the actual compromises struck. *Id.* at 819–20.

[126] *See, e.g.*, United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 201–08 (1979) (evaluating legislative history to determine "Congress' primary concern in enacting" the disputed statute and refusing to adopt an interpretation that would "bring about an end completely at variance with the purpose of the statute" (quoting United States v. Public Utils. Comm'n, 345 U.S. 295, 315 (1953)) (internal quotation marks omitted)). *See also* Breyer, *supra* note 32, at 864–65 (noting difficulties of ascribing an "intent" to Congress, but concluding that it is possible).

[127] *See, e.g.*, Freeman v. Quicken Loans, Inc., 566 U.S. 624, 632 (2012) (noting that a particular interpretation would undermine the purpose of a statute by imposing liability on "the very class for whose benefit [a particular statute] was enacted," "provid[ing] strong indication that something in [that] interpretation is amiss").

[128] HART & SACKS, *supra* note 17, at 1119.

[129] *See* Breyer, *supra* note 32, at 847. *See also, e.g.*, Cortez Byrd Chips v. Bill Harbert Constr. Co., 529 U.S. 193, 198–203 (2000) (concluding that "enlightenment" as to a statute's meaning would "not come merely from parsing the language," and looking to statutory history to avoid a reading that would be "at odds" with the law's policy and "would

Detractors argue that it is likely impossible to find one shared intention behind any given piece of legislation, and that it is inappropriate for judges to endeavor to find legislative purpose.[130] Such critics claim that judges are not well-equipped to understand how complex congressional processes bear on the law finally enacted by Congress—not least because the records of that process, in the form of legislative history, are often internally contradictory and otherwise unreliable.[131] Opponents of purposivism also sometimes argue that the theory is too easily manipulable, allowing the purposivist to ignore the text and "achieve what he believes to be the provision's purpose."[132]

Textualism

In contrast to purposivists, textualists focus on the words of a statute, emphasizing text over any unstated purpose.[133] Textualists argue courts should "read the words of that [statutory] text as any ordinary Member of Congress would have read them."[134] 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]."[135] Modern textualists therefore are more focused on how an ordinary (albeit well-educated) person would read the law, rather than on the legislators who wrote the law.[136] Textualists care about statutory purpose only to the extent that it is evident from the text.[137] Accordingly, 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."[138]

Textualists believe that "judges best respect[] legislative supremacy" when they follow rules that prioritize the statutory text.[139] For textualists, focusing on the text alone and adopting the "presumption that Congress 'means . . . what it says' enables Congress to draw its lines reliably—without risking that a court will treat an awkward, strange, behind-the-scenes compromise as a legislative error or oversight."[140] As Judge Frank Easterbrook stated, "[s]tatutes are not exercises in private language," but are "public documents, negotiated and approved by many parties."[141]

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create anomalous results").

[130] *See, e.g.*, Manning, *Textualism and Legislative Intent*, *supra* note 16, at 430.

[131] *See, e.g.*, SCALIA & GARNER, *supra* note 24, at 20–21, 376–78. *But see, e.g.*, Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2122 (2016) (reviewing KATZMANN, *supra* note 111) (agreeing with purposivist judge, as textualist, that it is important for judges to understand the legislative process).

[132] SCALIA & GARNER, *supra* note 24, at 18.

[133] *E.g.*, George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 327 (1995). *See also, e.g.*, King v. Burwell, 576 U.S. 473, 486 (2015) ("If the statutory language is plain, we must enforce it according to its terms."); Freeman v. Quicken Loans, Inc., 566 U.S. 624, 637 (2012) ("Vague notions of statutory purpose provide no warrant for expanding [the disputed statutory] prohibition beyond the field to which it is unambiguously limited . . . .").

[134] Chisom v. Roemer, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting).

[135] Scalia, *supra* note 84, at 17.

[136] *See, e.g.*, Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2194 (2017).

[137] *E.g.* SCALIA & GARNER, *supra* note 24, at 33.

[138] Easterbrook, *The Role of Original Intent in Statutory Construction*, *supra* note 103, at 65. *Cf.* Holmes, *supra* note 67, at 417–18 ("[W]e ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used, and it is to the end of answering this last question that we let in evidence as to what the circumstances were.").

[139] *See* Manning, *Without the Pretense of Legislative Intent*, *supra* note 42, at 2426–27.

[140] *Id.* at 2427 (emphasis omitted) (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992)). *See also* SCALIA & GARNER, *supra* note 24, at 39 (arguing legal instruments should not always be construed to make sense because "often," imperfect legal drafting "is the consequence of a compromise that it is not the function of the courts to upset").

[141] Easterbrook, *The Role of Original Intent in Statutory Construction*, *supra* note 103, at 60.

Textualism focuses on the words of a statute because it is that text that survived these political processes and was duly enacted by Congress, exercising its constitutional power to legislate.[142] Textualists have argued that focusing on "genuine but unexpressed legislative intent" invites the danger that judges "will in fact pursue their own objectives and desires"[143] and, accordingly, encroach into the legislative function by making, rather than interpreting, statutory law.[144]

To discover what a reasonable English-speaker would think a statute's text means, textualists look for evidence of the statute's "semantic context," seeking "evidence about the way a reasonable person conversant with relevant social and linguistic practices would have used the words."[145] Many textualists decline to use legislative history under most circumstances.[146] Instead, textualist judges generally seek to discover "the shared conventions" that are inherent in the statutory language,[147] asking what "assumptions [were] shared by the speakers and the intended audience."[148] As evidence of these shared assumptions, textualists might turn to rules of grammar, or to the so-called "canons of construction" that "reflect broader conventions of language use, common in society at large at the time the statute was enacted."[149]

Critics of textualism argue that the theory is an overly formalistic approach to determining the meaning of statutory text that ignores the fact that courts have been delegated interpretive authority under the Constitution.[150] Critics further claim that the theory of legislative supremacy requires courts to seek the meaning that Congress intended to convey.[151] Opponents of textualism sometimes claim that Congress legislates with this background understanding, expecting courts to

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[142] *See, e.g.*, Scalia, *supra* note 84, at 17 ("[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated."). *See also* Manning, *Textualism and Legislative Intent*, *supra* note 16, at 445 ("[F]or textualists, any attempt to overlay coherence on a statutory text that otherwise seems to have problems of fit unacceptably threatens to undermine the bargaining process that produced it.").

[143] Scalia, *supra* note 84, at 17–18. *See also* Molot, *The Rise and Fall of Textualism*, *supra* note 44, at 25–26 (examining parallels between textualism and legal realism).

[144] *See, e.g.*, Easterbrook, *supra* note 138, at 62 ("The use of original *intent* rather than an objective inquiry into the reasonable import of the language permits a series of moves. Each move greatly increases the discretion, and therefore the power, of the court."); *id.* at 66 ("To claim to find an answer by 'interpretation'—when the legislature neither gave the answer nor authorized judges to create a common law—is to play games with the meaning of words like 'interpretation.' The process is not interpretation but creation, and to justify the process judges must show that they have been authorized to proceed in the fashion of the common law.").

[145] Manning, *What Divides Textualists from Purposivists?*, *supra* note 23, at 91. *See also* SCALIA & GARNER, *supra* note 24, at 33 (endorsing the "fair reading" method of statutory interpretation, which gathers purpose "only from the text itself, consistently with the other aspects of its context," and defining this context to include "textual purpose" along with "(1) a word's historical associations acquired from recurrent patterns of past usage, and (2) a word's immediate syntactic setting—that is, the words that surround it in a specific utterance"). *Cf.* Frankfurter, *supra* note 8, at 533 ("And so the bottom problem is: What is below the surface of the words and yet fairly a part of them?").

[146] *E.g.*, Manning, *Textualism and Legislative Intent*, *supra* note 16, at 420. *But see, e.g.*, Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 444 (1990) ("No degree of skepticism concerning the value of legislative history allows us to escape its use. Especially not when we know that laws have no 'spirit,' that they are complex compromises with limits and often with conflicting provisions, the proponents of which have discordant understandings. Legislative history shows the extent of agreement."). For an explanation of when textualists might employ legislative history, see *infra* "Purposes for Using Legislative History."

[147] Manning, *Textualism and Legislative Intent*, *supra* note 16, at 433.

[148] Easterbrook, *What Does Legislative History Tell Us?*, *supra* note 146, at 443.

[149] Nelson, *supra* note 101, at 383.

[150] *See, e.g.*, *supra* note 87 and accompanying text.

[151] *See, e.g.*, Mark Seidenfeld, *Textualism's Theoretical Bankruptcy and its Implication for Statutory Interpretation*, 100 B.U. L. REV. 1817, 1822 (2020).

pay attention to legislative processes and the law's purpose when applying it to specific circumstances.[152] As a result, textualism's detractors argue that considering evidence of a statute's purpose can be more constraining on a judge than merely considering the text, divorced from evidence of legislative intent.[153]

Purposivism vs. Textualism In Practice

A Clear Distinction

The distinctions between these two theories were illustrated in the Supreme Court case of *Arlington Central School District Board of Education v. Murphy*.[154] The case arose out of a suit in which a student's parents had successfully sued a school district under the Individuals with Disabilities Education Act.[155] As relevant to the case, that Act provided that "a court 'may award reasonable attorneys' fees as part of the costs' to parents who prevail in an action brought under the Act."[156] The parents sought to recover fees paid to an expert in education who had provided assistance throughout the proceedings.[157] The issue before the Court was whether the Act "authorized the compensation of *expert* fees."[158]

In a textualist opinion written by Justice Alito, the majority of the Court concluded that the Act did not authorize the compensation of expert fees.[159] Emphasizing that courts must "begin with the text" and "enforce [that text] according to its terms,"[160] the Court stated that the provision "provides for an award of 'reasonable attorneys' fees,'" without "even hint[ing]" that the award should also include expert fees.[161] The majority opinion rejected the parents' arguments that awarding expert fees would be consistent with the statute's goals and its legislative history, "in the face of the [Act's] unambiguous text."[162]

By contrast, Justice Breyer's dissenting opinion embodied a purposivist approach to interpreting the statute.[163] He concluded that the disputed term "costs" should be interpreted "to include the award of expert fees" for two reasons: "First, that is what Congress said it intended by the phrase. Second, that interpretation furthers the [Act's] statutorily defined purposes."[164] Justice Breyer relied on the bill's legislative history and the Act's "basic purpose"—to guarantee that children with disabilities receive quality public education—as primary evidence of the statute's

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[152] *See, e.g.*, KATZMANN, *supra* note 111, at 47–48.

[153] *See, e.g.*, *id.* at 48; Seidenfeld, *supra* note 151, at 1841–43.

[154] 548 U.S. 291 (2006).

[155] *Id.* at 294.

[156] *Id.* at 293 (quoting 20 U.S.C. § 1415(i)(3)(B)).

[157] *Id.* at 294.

[158] *Id.* at 295 (emphasis added).

[159] *See id.* at 298.

[160] *Id.* at 296 (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000) (internal quotation mark omitted).

[161] *Id.* at 297 (quoting 20 U.S.C. § 1415(i)(3)(B)).

[162] *Id.* at 303–04.

[163] *See id.* at 309 (Breyer, J., dissenting).

[164] *Id.*

meaning.[165] He did not agree that the statute's text was unambiguous.[166] Although he expressed that a literal reading of the provision would not authorize the costs sought by the parents, he concluded that this reading was "not inevitable."[167] Instead, he believed that his reading, "while linguistically the less natural, is legislatively the more likely."[168]

A Convergence of Theories?

Many judges, however, do not necessarily identify as pure purposivists or textualists; or even if they do, in practice, they will often employ some elements from each theory.[169] Some scholars have argued that even the theoretical gap between these two theories is narrowing.[170] Most modern purposivists consider the statutory text to be both a starting point[171] and an ultimate constraint.[172] Given the broad consensus that a statute's text is primary, some have asserted that textualism has prevailed over purposivism.[173] Nonetheless, most textualists will look past the plain text, standing alone, to discover the relevant context and determine what problem Congress was trying to address.[174] Courts accordingly continue to disagree about what types of context are fairly deemed inherent in that text[175] and about which interpretive tools may help discover the context that is necessary to understand the statute's meaning.[176]

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[165] *Id.* at 312–13.

[166] *Id.* at 318.

[167] *Id.* at 319.

[168] *Id.*

[169] *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) (describing predominant approach among federal appellate judges as "intentional eclecticism"). *See also* William N. Eskridge, Jr., & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 321–22 (1990) ("Many commentators argue that judicial interpretation is, or at least ought to be, inspired by grand theory. We think these commentators are wrong, both descriptively and normatively: Judges' approaches to statutory interpretation are generally eclectic, not inspired by any grand theory, and this is a good methodology.").

[170] *See* Molot, *The Rise and Fall of Textualism*, *supra* note 44, at 3 ("Given that nonadherents and adherents of textualism alike place great weight on statutory text and look beyond text to context, it is hard to tell what remains of the textualism-purposivism debate."); Nelson, *supra* note 101, at 348 ("[J]udges whom we think of as textualists construct their sense of objective meaning from what the evidence that they are willing to consider tells them about the subjective intent of the enacting legislature. Many textualists do impose more restrictions than the typical intentionalist on the evidence of intent that they are willing to consider, but those restrictions need not reflect any fundamental disagreement about the goals of interpretation."); Lawrence M. Solan, *The New Textualists' New Text*, 38 LOY. L.A. L. REV. 2027, 2028 (2005) ("Gone largely unnoticed in the battles between these camps during the past quarter century is the fact that both sides in the debate agree upon almost everything when it comes to statutory interpretation.").

[171] *See, e.g.*, KATZMANN, supra note 111, at 4.

[172] *See, e.g.*, HART & SACKS, supra note 17, at 1374 (arguing judges should not give the words of a statute either "a meaning they will not bear, or . . . a meaning which would violate any established policy of clear statement"); *id.* at 1375 (noting words "limit[] the particular meanings that can properly be attributed" to the statute).

[173] *See, e.g.*, Jimmy Hoover, *Justice Breyer's Statutory Interpretation Swan Song?*, LAW360 (Apr. 4, 2022), https://www.law360.com/publicpolicy/articles/1480811/justice-breyer-s-statutory-interpretation-swan-song-?nl_pk=77a8fbcd-0ce9-4d0f-a0ac-3a4c7fd100a8.

[174] *See, e.g.*, Manning, *What Divides Textualists from Purposivists?*, *supra* note 23, at 84 ("Because speakers use language purposively, textualists recognize that the relevant context for a statutory text includes the mischiefs the authors were addressing."). *See also, e.g.*, McGirt v. Oklahoma, 140 S. Ct. 2452, 2464 (2020) (Gorsuch, J.,) (referring to "Congress's expressed policy" apparently obvious from the text of the statute).

[175] *See, e.g.*, Manning, *What Divides Textualists from Purposivists?*, *supra* note 23, at 91. *Cf.* Frankfurter, *supra* note 8, at 533 ("And so the bottom problem is: What is below the surface of the words and yet fairly a part of them?").

[176] *See, e.g.*, John F. Manning, *Legal Realism & the Canons' Revival*, 5 GREEN BAG 2d 283, 285 (2002).

One Supreme Court case issued in 2017 demonstrates the increasing similarities between the two factions, as well as the remaining distinctions. In *NLRB v. SW General, Inc.*, the Supreme Court considered whether the service of the Acting General Counsel of the National Labor Relations Board violated a statute that limits the ability of federal employees to serve as "acting officers."[177] The majority and dissenting opinions both began their analysis of the statute with its text before proceeding to consider many of the same sources to determine the meaning of the disputed statute.[178]

The majority opinion in *SW General*, authored by Chief Justice John Roberts, principally represents a textualist point of view, although it also includes some elements of purposivism.[179] In describing the facts of the case, the Chief Justice began with an explanation of the problem that Congress faced when it first enacted the disputed statute, and, in so doing, considered the original version of that statute and subsequent amendments intended to address continuing disputes over the ability of federal employees to serve as acting officers.[180] The Court's analysis started with the statutory text, considering its meaning by looking to the ordinary meaning of the words, rules of grammar, and statutory context.[181] The Court emphasized two "key words" in the disputed provision.[182] The majority then noted that it did not need to consider the "extra-textual evidence" of "legislative history, purpose, and post-enactment practice" because the text was clear.[183] Nonetheless, the Court went on to evaluate and reject this evidence as "not compelling."[184] Ultimately, the majority held that the acting officer's service violated the relevant statute.[185]

In dissent in *SW General,* Justice Sonia Sotomayor concluded that the "text, purpose, and history" of the statute suggested the opposite conclusion.[186] Like the majority opinion, the dissent began by considering the meaning of the text, and acknowledged that "taken in isolation," certain words could support the majority's reading.[187] However, Justice Sotomayor concluded that two textual canons of construction implied that the statute should be read differently in light of the full statutory context.[188] Additionally, while the dissenting opinion similarly considered "the events leading up to" the enactment of the relevant statute, Justice Sotomayor also placed some weight on the historical practice of the executive department *after* the passage of the statute.[189] The dissent used the provision's legislative history to inform its understanding of the historical practice under the statute, in its earlier and current forms, and reached a different conclusion from

[177] NLRB v. SW Gen., Inc., 137 S. Ct. 929, 935 (2017). For more discussion of the substance of this case, see CRS Legal Sidebar WSLG1840, *Help Wanted: Supreme Court Holds Vacancies Act Prohibits Nominees from Serving as Acting Officers*, by Valerie C. Brannon.

[178] *See SW Gen., Inc.*, 137 S. Ct. at 938; *id.* at 950 (Sotomayor, J., dissenting).

[179] *See The Supreme Court 2016 Term: Leading Case:* NLRB v. SW General, Inc., 131 HARV. L. REV. 353, 353 (2017) ("[T]he Court relied on the ordinary meaning of the provision's text over and against arguments from purpose, post-enactment practice, and even a semantic canon.").

[180] *SW Gen., Inc.*, 137 S. Ct. at 935–36 (majority opinion).

[181] *Id.* at 938–39.

[182] *Id.* at 938.

[183] *Id.* at 941–42.

[184] *Id.* at 942.

[185] *Id.* at 944.

[186] *Id.* at 950 (Sotomayor, J., dissenting).

[187] *See id.* at 950.

[188] *Id.* at 950–52.

[189] *Id.* at 953–54.

the majority opinion.[190] As a result, the dissent represents a more purposivist view of the case, but one that still concentrated on the statutory text.[191]

As *SW General* illustrates, the particular tools a judge uses to discover evidence about the meaning of the statute, and the weight that the judge gives to that evidence, can influence the outcome of a case.[192] In contrast to the opinions of Justices Alito and Breyer in *Arlington Central School District*,[193] the two opinions in *SW General* considered many of the same interpretive tools, and the text of the statute was central to both opinions.[194] However, like the textualist majority opinion in *Arlington Central School District*,[195] the textualist majority opinion in *SW General* explained that legislative history is disfavored where the text is clear,[196] giving less weight to this tool than the dissenting opinion.[197] These cases demonstrate that if a judge's theory of statutory interpretation counsels that some tools should be preferred over others,[198] that theory can change the way the judge resolves a particular dispute. A number of scholars have nonetheless argued that the divide between purposivism and textualism may not be so stark, in that the choice to use legislative history or the canons of construction may not always neatly track judges' legal philosophies.[199]

Empiricism and Refinement of the Theories

In theory, both purposivism and textualism seek the most objectively reasonable meaning of a statute, looking to the construct of an objective intent rather than attempting to discern Congress's actual intent with respect to the question before the court.[200] As two scholars argued in a 2017 article, the legal system often purposefully seeks "to replace real answers with fake ones."[201] In this view, persistent disagreements about "real" answers such as actual legislative intent require the legal system to "helpfully" substitute "fake" answers "on which society (mostly) agrees."[202] Objective intent qualifies as one of these "fake" answers, although as previously discussed, purposivists and textualists continue to disagree on the focus of objective intent. Accordingly, judges subscribing to these theories have justified their rulings by reference to specific, accepted

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[190] *See id.*

[191] *See id.* at 950.

[192] *Compare id.* at 938, 942 (majority opinion) (focusing primarily on two "key words" and rejecting "extra-textual evidence"); *with id.* at 954 (Sotomayor, J., dissenting) (arguing the majority's position "disregards the *full* text of the [relevant act] and finds no support in its *purpose* or *history*") (emphasis added).

[193] Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006); *see supra* "A Clear Distinction."

[194] *See SW Gen., Inc.*, 137 S. Ct. at 938 (majority opinion); *id.* at 950 (Sotomayor, J., dissenting).

[195] 548 U.S. at 304 ("Under these circumstances, where everything other than the legislative history overwhelmingly suggests that expert fees may not be recovered, the legislative history is simply not enough.").

[196] *SW Gen., Inc.*, 137 S. Ct. at 942 ("The text is clear, so we need not consider this extra-textual evidence.").

[197] *See id.* at 953 (Sotomayor, J., dissenting).

[198] *See, e.g.*, Molot, *The Rise and Fall of Textualism*, *supra* note 44, at 3–4 (noting differences in types of "context" considered by textualists and purposivists).

[199] *See, e.g.*, Gluck & Posner, *supra* note 169, at 1310–11; Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 891 (2017); John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 146–47 (2011); Nina Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 100 (2018).

[200] *See, e.g.*, Manning, *What Divides Textualists from Purposivists?*, *supra* note 23, at 91. *See also discussion supra* "Major Theories of Statutory Interpretation."

[201] Baude & Sachs, *supra* note 33, at 1096.

[202] *Id.*

tools of statutory interpretation that they claim helped constrain judges to appropriately defined legislative intent.[203]

Because the objective intent sought by both purposivists and textualists is a construct, it is open to attack on the basis that it does not reflect actual meaning. Some of the most discussed legal scholarship on statutory interpretation in recent years has conducted empirical research to examine additional means of identifying intent and legal meaning.[204] Scholars assessing tools of statutory interpretation have attempted to discern, for example, whether judges' conceptions of ordinary meaning in fact align with how people usually use language and whether judges' use of legislative history reflects a proper understanding of how a bill is passed.

Thus, for example, purposivists seek to ascribe legal meaning to texts, in part, by drawing on the legislative context in which statutes were enacted. To discover this context, they may look to legislative history such as committee reports but may also rely on other traditional tools of interpretation. As discussed in more detail below, some scholars have looked to evidence about how Congress actually operates in order to criticize—or support—existing uses of legislative history and the canons of construction.[205] This scholarship, once termed "process-based theories" by Justice Amy Coney Barrett, seems to draw from purposivism while also challenging some judges' use of particular tools.[206]

In comparison, textualists seek to determine the most objectively reasonable meaning of the words of a statute by asking how a reasonable English speaker would understand what is being conveyed. Some scholars have used empirical research to evaluate textualism's assumptions about how people ordinarily use language, suggesting refinements in the tools used to assess ordinary meaning as well as the canons of construction.[207]

It remains to be seen how useful judges who focus on *objective* intent will consider tools that arguably go to *actual* meaning.[208] Nonetheless, as discussed below, a number of judges have cited empirical studies studies to refine their statutory analyses, either to replace or supplement their traditional methods of discerning legislative intent. Further, at least one scholar has stated that some sources described as empirical in nature are still filtered through statutory context and legal interpretation, preventing those sources "from transforming legal interpretation into an empirical science."[209]

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[203] *Supra* "20th Century: Rise of Legal Realism" and "Modern Jurisprudence: Responding to Legal Realism."

[204] *See, e.g.*, Abbe R. Gluck & 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, 907 (2013); Stephen C. Mouritsen, *Hard Cases and Hard Data: Assessing Corpus Linguistics as an Empirical Path to Plain Meaning*, 13 COLUM. SCI. & TECH. L. REV. 156, 164 (2011).

[205] *See, e.g.*, Jesse M. Cross, *Legislative History in the Modern Congress*, 57 HARV. J. ON LEGIS. 91, 95 (2020); Gluck & Bressman, *supra* note 204, at 905.

[206] Barrett, *supra* note 136, at 2194.

[207] *See, e.g.*, Mouritsen, *Hard Cases and Hard Data*, *supra* note 204, at 164; Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Statutory Interpretation from the Outside*, 122 COLUM. L. REV. 213, 221–23 (2022).

[208] *See, e.g.*, Carissa Byrne Hessick, *Corpus Linguistics and the Criminal Law*, 2017 B.Y.U. L. REV. 1503, 1511 (2017) (arguing relying on a judge's intuition about a word's ordinary meaning is more appropriate than the frequency analysis involved in consulting corpus linguistics); Manning, *Inside Congress's Mind*, *supra* note 31, at 1916 (arguing that studies about legislative drafting practices do not undermine "the intent skepticism that has framed so much of the discussion about how to read statutes").

[209] Brian G. Slocum, *Big Data and Accuracy in Statutory Interpretation*, 86 BROOKLYN L. REV. 357, 361 (2021).

Tools of Statutory Interpretation

Judges use a variety of tools to help them interpret statutes, most frequently relying on five types of interpretive tools: ordinary meaning, statutory context, canons of construction, legislative history, and evidence of the way a statute is implemented.[210]

These tools often overlap. For example, a judge might use evidence of an agency's implementation of a statute to support her own understanding of a word's ordinary meaning.[211] Further, basic principles about understanding statutory context are sometimes described as canons of construction.[212]

Some theories of statutory interpretation counsel that certain tools are generally disfavored; for example, textualism teaches that judges should only rarely look to legislative history.[213] Consequently, a judge's interpretive theory might influence which tools she uses. Different judges, then, might unearth different evidence about the meaning of a particular statute,[214] and even if they find the same evidence, they might consider it in different ways.[215] However, in practice, judges will often draw on whatever tools provide useful evidence of the meaning of the statute before them.

[210] In addition to the tools discussed below, courts also rely on judicial precedent; that is, if another case has previously interpreted a particular statutory provision, a judge may afford that prior interpretation some significance. *See, e.g.*, Krishnakumar, *Reconsidering Substantive Canons*, *supra* note 199, at 887 ("Supreme Court precedent and practical consequences . . . stand out as the two most frequently referenced alternate interpretive resources [in Supreme Court opinions decided between 2006 and 2012, other than text or plain meaning]."). However, this process of reasoning is more or less similar to the way courts normally resolve cases. This report focuses on judicial tools specifically used to interpret statutes, and accordingly, does not discuss this use of judicial precedent. Nonetheless, it is important to note that judges sometimes adopt a "super-strong presumption of correctness for statutory precedents," meaning that they will be even more likely to adhere to a prior decision about statutory meaning than they would in any other decisional context. ESKRIDGE, *supra* note 87, at 253. *See, e.g.*, Ill. Brick Co. v. Illinois, 431 U.S. 720, 737 (1977) ("[C]onsiderations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation.").

[211] *See, e.g.*, S.D. Warren Co. v. Me. Bd. Of Envtl. Prot., 547 U.S. 370, 378 (2006).

[212] *See, e.g.*, SCALIA & GARNER, *supra* note 24, at 167 (describing the "whole-text canon").

[213] *See, e.g.*, Solan, *supra* note 170, at 2029.

[214] *See generally, e.g.*, Manning, *What Divides Textualists from Purposivists?*, *supra* note 23, at 91 (describing distinctions between contextual evidence used by textualists and purposivists).

[215] *See* Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 930–31 (2016) (discussing instances in which majority and dissenting opinions in Supreme Court cases used "dueling canons" or invoked the same interpretive tools to support competing statutory constructions).

Ordinary Meaning

Courts often begin by looking for the "ordinary" or "plain" meaning of the statutory text.[216] Where a term is not expressly defined in the statute,[217] courts generally assume "that Congress uses common words in their popular meaning, as used in the common speech of men."[218] Thus, for example, in the context of a case that raised the question of what it meant to "use" a gun, Justice Scalia stated the following in a dissenting opinion:

> To use an instrumentality ordinarily means to use it for its intended purpose. When someone asks, "Do you use a cane?," he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane. Similarly, to speak of "using a firearm" is to speak of using it for its distinctive purpose, *i.e.*, as a weapon.[219]

The Supreme Court has also referred to this exercise as seeking a word's "natural meaning"[220] or its "normal and customary meaning."[221] However, this "ordinary meaning" presumption can be overcome if there is evidence that the statutory term has a specialized meaning in law[222] or in another relevant field.[223] In addition, a word's ordinary meaning may change over time. In that situation, the Court will either effectuate the meaning of the term at the time of the statute's enactment[224] or, depending on the statutory context and relevant history, conclude that new applications are covered by the plain text.[225]

Judges may use a wide variety of materials to gather evidence of a text's ordinary meaning. In many cases, "simple introspection" suffices, as judges are English speakers who presumably engage in everyday conversation like the rest of the general public.[226] Judges also turn to

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[216] *See, e.g.*, Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 251 (2010) (noting that between January 31, 2006, and June 29, 2009, the majority of Supreme Court Justices "referenced text/plain meaning and Supreme Court precedent more frequently than any of the other interpretive tools"). Scholars sometimes use "plain meaning" to refer to the "literalist" school of statutory interpretation, *supra* note 51, and use "ordinary meaning" to refer to the concept invoked by modern textualists. *See, e.g.*, 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, 687 (2014). This report does not make this distinction, focusing primarily on modern invocations of the concept by courts, which do not generally distinguish the terms in this way. *See* Mouritsen, *Hard Cases and Hard Data*, *supra* note 204, at 164.

[217] Stenberg v. Carhart, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning.").

[218] Frankfurter, *supra* note 8, at 536. *See also, e.g.*, Wooden v. United States, 142 S. Ct. 1063, 1069 (2022) (interpreting a statutory term in a criminal law by "consider[ing] first first how an ordinary person (a reporter; a police officer; yes, even a lawyer) might describe" the defendant's crimes).

[219] Smith v. United States, 508 U.S. 223, 242 (1993) (Scalia, J., dissenting).

[220] *Id.* at 228 (majority opinion).

[221] Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 388 (1951).

[222] *E.g.*, FAA v. Cooper, 566 U.S. 284, 291–92 (2012) (concluding that "'actual damages' is a legal term of art").

[223] *E.g.*, Van Buren v. United States, 141 S. Ct. 1648, 1657 (2021) (concluding that the statutory term "access" has a long-standing technical meaning "[i]n the computing context").

[224] *E.g.*, MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 228 (1994). *Cf., e.g.*, Intel Corp. Inv. Policy Comm. v. Sulyma, 140 S. Ct. 768, 776 (2020) (looking to dictionaries from the time of a statute's enactment and modern dictionaries to determine that statutory terms had the same meaning in both time periods).

[225] *E.g.*, Bostock v. Clayton Cty., 140 S. Ct. 1731, 1750 (2020).

[226] *See* Solan, *supra* note 170, at 2054 ("During most of American judicial history, the predominant methodology for discovering ordinary meaning has been introspection. Without fanfare, judges simply rely upon their own sense of how common words are typically used."). *See, e.g.*, FCC v. AT&T Inc., 562 U.S. 397, 403 (2011) ("'Personal' ordinarily refers to individuals [and not to artificial entities]. . . . Certainly, if the chief executive officer of a corporation

dictionaries to help inform their understanding of a word's normal usage.[227] Judges may then have to choose between multiple definitions provided by the same dictionary[228] or by different dictionaries.[229] Courts have also turned to books to discover a word's ordinary meaning, drawing from works such as *Moby Dick* or the *Bible*[230] as well as *Aesop's Fables*[231] and the work of Dr. Seuss.[232] Judges may also look for evidence of normal usage elsewhere in the law, such as in judicial decisions[233] or in other governmental materials.[234] More recently, some scholars and judges have turned to corpus linguistics as a source of concrete empirical data for determining the most common meanings of statutory phrases.[235] "Corpus linguistics" uses large "collections of naturally occurring language called corpora," for example, such as a database of newspapers, to study "language function and use."[236]

The idea that courts should generally give the words of a statute their "usual" meaning is an old one.[237] This principle straddles judicial philosophies: for example, all current members of the Supreme Court have invoked this rule of ordinary meaning.[238] If Congress does in fact generally

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approached the chief financial officer and said, 'I have something personal to tell you,' we would not assume the CEO was about to discuss company business.").

[227] *See* Solan, *supra* note 170, at 2055; *e.g.*, Republic of Sudan v. Harrison, 139 S. Ct. 1048, 1056 (2019). *Cf.* HART & SACKS, *supra* note 17, at 1190 ("A dictionary, it is vital to observe, never says what meaning a word *must* bear in a particular context. . . . An unabridged dictionary is simply an historical record, not necessarily all-inclusive, of the meanings which words in fact *have* borne, in the judgment of the editors, in the writings of reputable authors.").

[228] *See, e.g.*, Muscarello v. United States, 524 U.S. 125, 128 (1998) (emphasizing first dictionary definition as supplying "the word's primary meaning"). *But 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, 514 (2013) (noting many dictionaries use different principles other than frequency of use to order definitions).

[229] *See, e.g.*, MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 227 (1994) (rejecting definition that was not only contained in only one of the dictionaries consulted but also "*contradict[ed]* one of the meanings contained in virtually all other dictionaries"). *See generally* Antonin Scalia & Bryan A. Garner, *A Note on the Use of Dictionaries*, 16 GREEN BAG 2d 419 (2013).

[230] *Muscarello*, 524 U.S. at 129.

[231] Freeman v. Quicken Loans, Inc., 566 U.S. 624, 634 (2012).

[232] Yates v. United States, 574 U.S. 528, 553 (2015) (Kagan, J., dissenting).

[233] *E.g.*, Wooden v. United States, 142 S. Ct. 1063, 1070 (2022); S.D. Warren Co. v. Me. Bd. Of Envtl. Prot., 547 U.S. 370, 376 (2006).

[234] *E.g.*, Smith v. United States, 508 U.S. 223, 243 (1993) (Scalia, J., dissenting) ("The normal usage is reflected, for example, in the United States Sentencing Guidelines . . . .").

[235] *See, e.g. Muscarello*, 524 U.S. at 129 (looking to a database of newspapers for evidence that a particular statutory phrase had been used to convey a certain meaning); Caesars Entm't Corp. v. Int'l Union of Operating Eng'rs Local 68 Pension Fund, 932 F.3d 91, 95 (3d Cir. 2019) (looking to the Corpus of Historical American English to help determine a statutory term's most common usage); United States v. Woodson, 960 F.3d 852, 855 (6th Cir. 2020) (looking to the Corpus of Contemporary American English for evidence of how a word "is used in ordinary speech"); *see generally, e.g.*, Stefan Gries & Brian G. Slocum, *Ordinary Meaning and Corpus Linguistics*, 2017 B.Y.U. L. REV. 1417 (2017); Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788 (2018).

[236] Mouritsen, *Hard Cases and Hard Data*, *supra* note 204, at 159.

[237] 1 WILLIAM BLACKSTONE, COMMENTARIES *59 ("Words are generally to be understood in their usual and most known signification, not so much regarding the propriety of grammar as their general and popular use.").

[238] *E.g.*, FCC v. AT&T Inc., 562 U.S. 397, 403 (2011) (Roberts, C.J.) ("When a statute does not define a term, we typically give the phrase its ordinary meaning." (internal quotation marks omitted)); FDIC v. Meyer, 510 U.S. 471, 476 (1994) (Thomas, J.) ("In the absence of such a [statutory] definition, we construe a statutory term in accordance with its ordinary or natural meaning."); Flores-Figueroa v. United States, 556 U.S. 646, 657 (2009) (Breyer, J.) ("[W]e cannot find indications in statements of [the statute's] purpose or in the practical problems of enforcement sufficient to overcome the ordinary meaning, in English or through ordinary interpretive practice, of the words that [Congress] wrote."); BP Am. Prod. Co. v. Burton, 549 U.S. 84, 91 (2006) (Alito, J.) ("Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning."); Sebelius v. Cloer, 569 U.S. 369, 376 (2013)

use words as they would be normally understood, this interpretive tool helps judges act as faithful agents of Congress by ensuring that judges and Congress—along with the ordinary people governed by statutes—are looking to the same interpretive context: "normal conversation."[239]

Although there is wide judicial consensus on the general validity of this rule, disputes arise in its application. To say that a statutory word should be given the same meaning that it would have in "everyday language"[240] serves only as a starting point for debate in many cases.[241] The ordinary meaning of a term may often be "clear," or uncontroversial in its application to some core set of circumstances.[242] Some have argued that invoking a word's plain meaning in these cases is tautological, equivalent to saying that "[w]ords should be read as saying what they say."[243] Moreover, at the margins, when a court is no longer considering a prototypical example of the disputed statutory term, the judge is called upon to explain how the statute applies to the facts before the court.[244] Therefore, in some cases, merely adverting to the ordinary meaning tool may not help illuminate a statutory term.[245]

(Sotomayor, J.) ("As in any statutory construction case, we start, of course, with the statutory text, and proceed from the understanding that unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." (internal quotation marks, alterations, and citations omitted)); Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743, 753 (2017) (Kagan, J.) (beginning statutory analysis by looking to text's "ordinary meaning"); Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718, 1723 (2017) (Gorsuch, J.) (referring to a word's meaning "as a matter of ordinary English"); Quarles v. United States, 139 S. Ct. 1872, 1877 (2019) (Kavanaugh, J.) (referring to a statutory term's "ordinary usage"); Babcock v. Kijakazi, 142 S. Ct. 641, 645 (2022) (Barrett, J.) (attempting to discover staute's "plain meaning"). Judge Ketanji Brown Jackson is set to join the Court in its October 2022 term and has also referred to ordinary meaning. *E.g.*, Equal Rights Ctr. v. Uber Techs., Inc., 525 F. Supp. 3d 62, 83 (D.D.C. 2021).

[239] Green v. Bock Laundry Mach. Co., 490 U.S. 504, 529 (1989) (Scalia, J., concurring). *Cf.* Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 232 (1990) (arguing plain language serves "as a second-best coordinating device for multiple decisionmakers attempting to reach some methodological consensus in the face of substantive disagreements among them").

[240] Yates v. United States, 574 U.S. 528, 553 (2015) (Kagan, J., dissenting).

[241] *Compare, e.g.*, Bostock v. Clayton Cty., 140 S. Ct. 1731, 1741 (2020) (giving effect to the "the ordinary public meaning of the statute's language at the time of the law's adoption"), *with, e.g.*, *id.* at 1824, 1833 (Kavanaugh, J., dissenting) (accusing the majority of giving effect to the law's "literal meaning rather than ordinary meaning"). *See also, e.g.*, Taylor, *supra* note 133, at 360 ("[S]tructural textualism does not derive meaning simply in a formal manner; it also does not find meaning to be 'plain' in the sense of being immediately obvious. The inquiry demands argument, and meaning requires construction.").

[242] *Cf.* LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 98 (1993) ("When we speak of clarity in construing the concepts expressed by statutes, we are not really making statements about the clarity of the concepts themselves. Rather, we are expressing judgments about the goodness of fit between the statutory concept and the thing or event in the world that is the subject of dispute. . . . [For example,] we mean that a truck is such a typical token of the category *vehicle* that there should be no controversy about the applicability of the statute to the situation at hand.").

[243] Chapman v. Higbee Co., 319 F.3d 825, 835 (6th Cir. 2003) (Suhrheinrich, J., dissenting) (quoting Reed Dickerson, THE INTERPRETATION AND APPLICATION OF STATUTES 229 (1975)) (internal quotation marks omitted).

[244] *Cf.* SOLAN, *supra* note 242, at 13, 26 (arguing most plain meaning is determined by "what linguists call a generative grammar, the set of internalized rules and principles that permit us, unselfconsciously, to speak and understand language with ease and with great rapidity," and claiming that in determining whether a statute is ambiguous, "the question is whether the meaning of the disputed language is determined fully by our generative grammars, or whether disputed aspects of the meaning are left open as part of the residue of meaning that our internal grammars do not fully determine").

[245] *Compare, e.g.*, United States v. Marshall, 908 F.2d 1312, 1317 (7th Cir. 1990) ("LSD is applied to paper in a solvent; after the solvent evaporates, a tiny quantity of LSD remains. Because the fibers absorb the alcohol, the LSD solidifies inside the paper rather than on it. You cannot pick a grain of LSD off the surface of the paper. Ordinary parlance calls the paper containing tiny crystals of LSD a mixture."); *with id.* at 1332 (Posner, J., dissenting) ("[A]pparently some gelatin is part of a 'mixture or substance' and some is not. . . . Would the gelatin be a part of the mixture or substance in an LSD case if a defendant sprayed an LSD-alcohol solution into a capsule, but not if a grain of LSD were placed into the capsule with a tweezers? It is not enough to say that 'ordinary usage' precludes including the

There are also a number of theoretical criticisms of the "ordinary meaning" standard. Some have argued that judges might invoke "ordinary meaning" merely to mask their own policy preferences.[246] Judge Easterbrook claimed that frequently, "[t]he invocation of 'plain meaning' just sweeps under the rug the process by which meaning is divined."[247] Because "ordinary meaning" invites judges to refer to their own experiences as English speakers, it is arguably susceptible to the importation of personal policy preferences.[248] Dictionaries or corpus linguistics may supply a more objective source of evidence of meaning than the judge's intuitions can, but those sources may not be focused on a term's usage in a particular statutory context.[249]

Statutory Context

Often, a statutory dispute will turn on the meaning of only a few words.[250] Courts will interpret those words, though, in light of the full statutory context.[251] To gather evidence of statutory meaning, a judge may turn to the rest of the provision,[252] to the act as a whole,[253] or to similar provisions elsewhere in the law.[254] As the Supreme Court said in one opinion, "Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme. . . ."[255]

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weight of a heavy glass bottle . . . . The words 'mixture or substance' are ambiguous . . . .").

[246] *See* Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 VAND. L. REV. 715, 738 (1992) ("It is true that judges have historically tended to mask contested social and political choices of interpretation of indeterminate texts in the language of linguistic inexorability."); SOLAN, *supra* note 242, at 27 ("[T]he appeal of neutral linguistic principles as justification for a decision will loom especially large when the judge's 'real reasons' for the decision are not ones that are properly articulated in a judicial opinion."); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 304 (1990) ("The second alternative source of meaning is for the courts to supply their *own* suppositions and assumptions regarding the will of Congress . . . .").

[247] Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 536 (1983).

[248] *See* Ward Farnsworth et al., *Ambiguity about Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. OF LEGAL ANALYSIS 257, 259 (2010); Solan, *supra* note 170, at 2048 ("[C]ourts find ordinary meaning anywhere they look and judges are not restrained in deciding where they are willing to look.").

[249] *See, e.g.*, Wright v. Spaulding, 939 F.3d 695, 700 n.1 (6th Cir. 2019) (saying that in the case before the court, "corpus linguistics turned out not to be the most helpful tool in the toolkit"); *see also, e.g.*, Lawrence M. Solan & Tammy Gales, *Corpus Linguistics as a Tool in Legal Interpretation*, 2018 B.Y.U. L. REV. 1311, 1315 (2017) (noting limitations inherent in certain databases, including, for example, geographic bias).

[250] *See, e.g.*, Yates v. United States, 574 U.S. 528, 536 (2015) (plurality opinion) (considering whether a fish is a "tangible object" within the meaning of 18 U.S.C. § 1519).

[251] *See, e.g.*, *id.* at 532 ("A fish is no doubt an object that is tangible . . . . But it would cut [18 U.S.C.] § 1519 loose from its financial-fraud mooring to hold that it encompasses any and all objects . . . .").

[252] *E.g.*, NLRB v. SW Gen., Inc., 137 S. Ct. 929, 938–39 (2017) (considering disputed terms from statutory subsection individually and then considering them as a whole).

[253] *E.g.*, FCC v. AT&T Inc., 562 U.S. 397, 407–08 (2011) (considering meaning of "personal privacy" in light of its use in a distinct but similar exemption within the same statute); Holder v. Hall, 512 U.S. 874, 883 (1994) (comparing the functioning of two sections within the Voting Rights Act of 1965 that "differ in structure, purpose, and application").

[254] *E.g.*, Unicolors, Inc. v. H&M Hennes & Mauritz, L.P., 142 S. Ct. 941, 947 (2022) (looking to how "nearby statutory provisions" use a specific word); Peter v. NantKwest, Inc., 140 S. Ct. 365, 373 (2019) (looking to how two statutory phrases were used "across various statutes" dealing with similar subjects). In their book cataloguing the canons of construction, Justice Scalia and Bryan Garner describe this concept as part of the "whole text canon." SCALIA & GARNER, *supra* note 24, at 167; *cf.* Anita S. Krishnakumar, *Cracking the Whole Code Rule*, 96 N.Y.U.L. REV. 76 (2021) (reviewing the practice and identifying five types of whole code comparisons: (1) modeled, borrowed, and incorporated statutes; (2) consistent usage; (3) meaningful variation; (4) superfluity; and (5) harmonization).

[255] United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988).

For instance, a court might look to see whether the disputed language is used in another statutory provision.[256] Courts will generally try to give identical terms the same meaning throughout a statute,[257] and another provision may offer context that illuminates the meaning of the relevant term.[258] However, this rule calling for words to be defined consistently is defeasible, again depending on the context: "A given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies."[259] For example, in *Azar v. Allina Health Services*, the Court concluded that a statutory phrase should be interpreted consistently throughout the Medicare Act but held that the Medicare Act did not need to be interpreted consistently with the Administrative Procedure Act.[260] The Court's view was based on the specific language, context, and functioning of both statutory schemes.[261] At least one scholar has argued that when seeking to compare terms used in different statutes, courts might reasonably look to whether the statutes deal with similar subjects or were enacted contemporaneously.[262] The scholar further found, however, that only the second factor was considered consistently by the Supreme Court.[263]

A judge might also look to the rest of the statute to find whether Congress used *different* language in other provisions. If Congress elsewhere used language that more clearly captured an interpretation urged by one of the parties, it might suggest that the disputed term should not be given that construction.[264] Courts will generally read as meaningful "the exclusion of language from one statutory provision that is included in other provisions of the same statute."[265] Some have questioned, however, whether this "meaningful variation form of cross-statute comparison" is consistent with congressional practice.[266]

Thus, statutory context can supply evidence of semantic, or text-focused, context. In *Smith v. United States*, for example, a defendant challenged his sentence following conviction for a drug trafficking offense during which he offered to trade a gun for cocaine.[267] The Supreme Court had to decide whether the defendant should be subject to a sentence enhancement that applied to any "'use' of a firearm 'during and in relation to . . . [a] drug trafficking crime.'"[268] The defendant

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[256] *See United Sav. Ass'n of Tex.*, 484 U.S. at 371. *See also, e.g.*, Brown v. Gardner, 513 U.S. 115, 118 (1994) (looking to how a term is used in "analogous statutes").

[257] *E.g.*, Cochise Consultancy, Inc. v. United States *ex rel.* Hunt, 139 S. Ct. 1507, 1512 (2019).

[258] *See, e.g.*, Smith v. United States, 508 U.S. 223, 234 (1993) (concluding that because a distinct statutory subsection contemplated that a firearm might be "used" "as an item of barter or commerce," defendant had "used" a firearm within the meaning of the disputed statutory subsection by trading the gun for drugs).

[259] Envtl. Def. v. Duke Energy Corp., 549 U.S. 561, 574 (2007).

[260] Azar v. Allina Health Servs., 139 S. Ct. 1804, 1811–13 (2019) (interpreting a Medicare Act provision that required notice and comment procedures for rules or other policy statements that established a "substantive legal standard").

[261] *See id.*

[262] *See* Krishnakumar, *Cracking the Whole Code Rule*, *supra* note 254, at 103.

[263] *Id.* at 104, 108 (reviewing "data from the Roberts Court's first twelve-and-a-half Terms").

[264] *E.g.* City of Chicago v. Envtl. Def. Fund, 511 U.S. 328, 337–38 (1994) ("Our interpretation is confirmed by comparing [the disputed statute] with another statutory exemption in [the same act]. . . . [T]his [other] provision shows that Congress knew how to draft a waste stream exemption . . . when it wanted to." (internal quotation marks omitted)).

[265] Hamdan v. Runsfeld, 548 U.S. 557, 578 (2006).

[266] Krishnakumar, *Cracking the Whole Code Rule*, *supra* note 254, at 150–51. *See also, e.g.*, Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S, 566 U.S. 399, 416 (2012) ("[T]he mere possibility of clearer phrasing cannot defeat the most natural reading of a statute; if it could (with all due respect to Congress), we would interpret a great many statutes differently than we do.").

[267] Smith v. United States, 508 U.S. 223, 226–27 (1993).

[268] *Id.* at 225 (alteration in original) (quoting 18 U.S.C. § 924(c)(1)).

argued that this enhancement should apply only when a firearm was "used as a weapon," not when it was used to barter for drugs.[269] The Supreme Court disagreed.[270]

During the course of its analysis, the Court investigated how Congress had employed the term "use" in other provisions of the statute.[271] The Court found it compelling that a different subsection of the statute called for forfeiture of a firearm that was "used" in an interstate transfer of a firearm or in a federal offense involving the exportation of a firearm.[272] In the eyes of the Court, this other provision clearly contemplated that firearms could be "used" "as items of commerce rather than as weapons,"[273] suggesting the same interpretation of "used" should apply to the disputed sentence enhancement.[274] The Court also explained that Congress had used the phrase "involved in" instead of the word "use" elsewhere in the statute.[275] Specifically, a different provision allowed the seizure of a firearm that was "'involved in' . . . the making of a false statement material to the lawfulness of a gun's transfer."[276] The Court reasoned that this distinction demonstrated that Congress found it was necessary in the other provision to use more expansive language because "making a material misstatement in order to acquire or sell a gun is not 'use' of the gun."[277] By contrast, Congress "did not so expand the language for offenses in which firearms were 'intended to be *used*,' even though the firearms in many of those offenses function as items of commerce rather than as weapons."[278] Therefore, according to the majority opinion, "Congress apparently was of the view that one could use a gun by trading it."[279]

Statutory context can also help a court determine how the disputed terms fit into the rest of the law, illuminating the purpose of a provision.[280] Courts may consider statutory declarations of purpose as well as the broad functioning of the statutory scheme.[281] Judges sometimes weigh the practical consequences of the various proposed interpretations.[282] It could be that "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."[283] This use of statutory context often implicates the broader debate between purposivism and

[269] *Id.* at 227.

[270] *Id.* at 225.

[271] *Id.* at 233.

[272] *Id.* at 234.

[273] *Id.* at 235.

[274] *Id.* at 235–36.

[275] *Id.* at 235.

[276] *Id.* (quoting 18 U.S.C. § 924(d)(1)).

[277] *Id.*

[278] *Id.* (quoting 18 U.S.C. § 924(d)(3)) (emphasis added).

[279] *Id. See also, e.g.*, Babcock v. Kijakazi, 142 S. Ct. 641, 645–46 (2022) (concluding statutory context confirmed statute's plain meaning treating military technicians as civilians, because other statutory provisions "consistently distinguished technician employment from National Guard service").

[280] *E.g.*, Freeman v. Quicken Loans, Inc., 566 U.S. 624, 632 (2012) (rejecting an interpretation that would undermine the purpose of a statute by imposing liability on "the very class for whose benefit [the statute] was enacted").

[281] *E.g.* United States v. Turkette, 452 U.S. 576, 589 (1981) (considering statutory declaration of purpose and evaluating "various Titles of the Act" as "the tools through which this goal is to be accomplished").

[282] *E.g.*, Krishnakumar, *Reconsidering Substantive Canons*, *supra* note 199, at 887 (noting empirical evidence that the Supreme Court frequently uses practical consequences to interpret statutes). *See, e.g.*, King v. Burwell, 576 U.S. 473, 490–91 (2015) (considering meaning of statutory phrase in light of the functioning of the entire Patient Protection and Affordable Care Act); *id.* at 2494 ("It is implausible that Congress meant the Act to operate in this manner.").

[283] United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988).

textualism,[284] as well as arguments over when judges should use practical consequences to determine statutory meaning.[285]

Canons of Construction

Over time, courts have created the "canons of construction" to serve as guiding principles for interpreting statutes.[286] The canons supply default assumptions about the way Congress generally expresses meaning,[287] but are not "rules" in the sense that they must invariably be applied.[288] A judge may decline to interpret a statute in accordance with any given canon if the canon's application is not justified in that case.[289] In some cases, two canons may appear to apply but support different interpretations.[290] Some judges, especially purposivists and some pragmatists, may even doubt the general validity of the canons as interpretive rules.[291] Nonetheless, the canons are widely used and defended, as discussed in more detail below.[292]

Judges may also disagree on what qualifies as a valid canon, either as a matter of theory or historical fact.[293] These disagreements will sometimes stem from a judge's individual theory of statutory interpretation and their justifications for using the canons more generally.[294] This report's **Appendix** combines two preeminent anthologies of the canons of construction, providing a list of widely accepted canons of construction.[295] However, even the authors of these prominent lists disagree about whether certain canons are valid.[296] This report does not attempt to set out a

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[284] *Compare, e.g.*, *Freeman*, 566 U.S. at 637 ("Vague notions of statutory purpose provide no warrant for expanding [a statute's] prohibition beyond the field to which it is unambiguously limited . . . ."), *with King*, 576 U.S. at 497 ("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.").

[285] *See infra* "Practical Consequences."

[286] *E.g.* MIKVA & LANE, *supra* note 9, at 114 ("Canons of construction are judicially crafted maxims or aphorisms for determining the meaning of statutes. Canons are expressly intended to limit judicial discretion by rooting interpretive decisions in a system of aged and shared principles . . . .").

[287] *See, e.g.*, Nelson, *supra* note 101, at 383.

[288] HART & SACKS, *supra* note 17, at 1191; SCALIA & GARNER, *supra* note 24, at 51.

[289] *See, e.g.*, Michael Sinclair, *"Only a Sith Thinks Like That": Llewellyn's "Dueling Canons," One to Seven*, 50 N.Y.L. SCH. L. REV. 919, 923 (2005) ("The application of a canon depends on its justification. When the conditions presupposed by a canon do not obtain, then it should not be used. . . . A canon . . . looks more like a formulaic summary of the end result of a process of reasoning, but a process sufficiently commonplace to justify a canonical formula.").

[290] *See, e.g.*, Lockhart v. United States, 577 U.S. 347 (2016). *Lockhart* is discussed *infra* "Semantic Canons."

[291] *See, e.g.*, Breyer, *supra* note 32, at 869–71; Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, *supra* note 125, at 806–07.

[292] *Infra* "Justifications: Disrepute, Rehabilitation, and Empirical Studies." *See also, e.g.*, Mendelson, *supra* note 199, at 75.

[293] *See, e.g.*, Nelson, *supra* note 101, at 386 (asking "What Makes Canons Canonical?").

[294] *See, e.g.*, Manning, *Legal Realism & the Canons' Revival*, *supra* note 176, at 288 (describing why some theorists disfavor the canons).

[295] SCALIA & GARNER, *supra* note 24; WILLIAM N. ESKRIDGE, JR., PHILLIP P. FRICKEY, ELIZABETH GARRETT, & JAMES J. BRUDNEY, CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY (5th ed. 2014). The list in the latter casebook builds upon the list given in William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law As Equilibrium*, 108 HARV. L. REV. 26, 97–108 (1994).

[296] *Compare, e.g.*, SCALIA & GARNER, *supra* note 24, at 359 (describing as a "false notion" the idea that statutory exemptions should be strictly construed), *with* Eskridge & Frickey, *Law As Equilibrium*, *supra* note 295, at 105 (describing the "narrow interpretation of statutory exemptions" as a canon). *See generally, e.g.*, Evan C. Zoldan, *Canon Spotting*, 59 HOUS. L. REV. 621, 629 (2022) (suggesting three criteria for identifying a canon: "it reflects use by legal interpreters; it affects an interpretive outcome when applied; and it is supported by a claim of theoretical justification").

definitive compilation of the canons of construction, but merely describes the canons generally, giving examples where appropriate. Furthermore, new canons may emerge over time. For example, this report does not contain a significant discussion of the "major questions" doctrine,[297] a relatively new interpretive rule—still with an uncertain scope—that requires Congress to speak clearly if it gives an agency authority over an issue of "vast 'economic and political significance.'"[298]

Generally, legal scholars and judges divide the canons into two groups: semantic and substantive canons.[299]

Semantic Canons

The semantic, or textual, canons represent "rules of thumb for decoding legal language."[300] Because these canons focus on statutory text, they are often favored by textualists.[301] The semantic canons frequently reflect the rules of grammar that govern ordinary language usage.[302] Consequently, these rules may overlap with indicators of a provision's ordinary meaning[303]—and indeed, some authors label the principle that words should be given their ordinary meaning as a semantic canon.[304] But there are a greater number of semantic canons beyond the ordinary meaning rule, several of which are discussed below.

For example, the "grammatical 'rule of the last antecedent'" states that "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately

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[297] For more discussion of this issue, see CRS In Focus IF12077, *The Major Questions Doctrine*, by Daniel J. Sheffner. *See also, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting) (describing the "major questions doctrine" as "nominally a canon of statutory construction").

[298] Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)). The major questions doctrine is related to the "elephants in mouseholes" principle, which is mentioned elsewhere in the report. *Infra* note 484; notes 598 to 599 and accompanying text. *See also, e.g.*, Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 373 (2016) (arguing this principle has "its roots in the major questions doctrine").

[299] *E.g.*, JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 202 (2d ed. 2013).

[300] *Id.* at 204.

[301] Manning, *Legal Realism & the Canons' Revival*, *supra* note 176, at 290 ("Because textualists believe in a strong version of legislative supremacy, their skepticism about actual [legislative] intent or purpose has . . . inspired renewed emphasis on the canons of interpretation, particularly the linguistic or syntactic canons of interpretation."); *id.* at 292 ("[T]extualists deem it essential to foster clear and predictable linguistic and syntactic rules to permit legislators and interpreters to decode enacted texts.").

[302] *E.g.*, Kavanaugh, *supra* note 131, at 2159–60. *But see* Adam Schlusselberg & Michael Sinclair, *'Only a Sith Thinks Like That': Llewellyn's 'Dueling Canons', Twenty-Five to Twenty-Eight* 36 (Sept. 24, 2010) (N.Y. Law Sch. Research Paper Series 10/11 #3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1682164 (questioning whether it is "productive to call the rules of grammar 'canons of construction.'").

[303] *E.g.*, MANNING & STEPHENSON, *supra* note 299, at 204–05.

[304] *E.g.*, SCALIA & GARNER, *supra* note 24, at 69. *Cf.* MIKVA & LANE, *supra* note 9, at 114 ("The authors do not, as some do, define the plain meaning rule as a canon of construction. This is based on our view that the plain meaning rule is the constitutionally compelled starting place for any statutory construction and that tools of interpretation are only applicable when, for whatever reason, the plain meaning rule fails to provide the answer."). Judges also disagree about whether the plain meaning rule is a special and superior canon. *Compare, e.g.*, State v. Peters, 665 N.W.2d 171, 177–78 (Wis. 2003) (Abrahamson, C.J., concurring) (arguing plain meaning rule, as well as rules saying courts may use dictionaries and that statutory definitions must control, are all canons, and arguing that all canons representing "'[i]ntrinsic aids' to construction . . . are essential to any application of the plain meaning rule"), *with* Metro One Telecomms., Inc. v. Comm'r, 704 F.3d 1057, 1063 (9th Cir. 2012) ("[W]here the plain meaning rule has provided a clear answer, we do not need to look to other canons of statutory construction.").

follows."[305] In *Barnhart v. Thomas*, the Supreme Court illustrated this canon with the following hypothetical:

> Consider, for example, the case of parents who, before leaving their teenage son alone in the house for the weekend, warn him, "You will be punished if you throw a party or engage in any other activity that damages the house." If the son nevertheless throws a party and is caught, he should hardly be able to avoid punishment by arguing that the house was not damaged. The parents proscribed (1) a party, and (2) any other activity that damages the house.[306]

The last-antecedent canon tells the reader of the parents' edict that the descriptive clause "that damages the house" refers to the "nearest reasonable antecedent": here, "any other activity."[307] Accordingly, that clause modifies only the phrase "any other activity," and not "party," a more remote antecedent.[308]

In *Lockhart v. United States*, the Supreme Court applied the last-antecedent canon to interpret a federal criminal statute that imposed a 10-year mandatory minimum sentence on any person possessing child pornography[309] if that person had "a prior conviction . . . under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward."[310] The question before the Court was "whether the limiting phrase that appears at the end of that list—'involving a minor or ward'—applies to all three predicate crimes preceding it in the list or only the final predicate crime."[311] Invoking the rule of the last antecedent, the Court concluded that the limiting phrase "modifies only the phrase that it immediately follows: 'abusive sexual conduct.'"[312]

The dissenting opinion in *Lockhart* argued that a different semantic canon, the "series-qualifier canon," applied instead of the last-antecedent canon.[313] The "series-qualifier" canon provides that under certain circumstances, a modifier should be applied to all terms in a list.[314] Because the modifying clause "involving a minor or ward" followed "a list of multiple, parallel terms," the dissent claimed that it should apply to the entire series.[315] In the dissenters' view, "the reference to a minor or ward applies as well to sexual abuse and aggravated sexual abuse as to abusive sexual

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[305] Barnhart v. Thomas, 540 U.S. 20, 26 (2003). *See also* Lockhart v. United States, 577 U.S. 347, 351 (2016) ("The rule reflects the basic intuition that when a modifier appears at the end of a list, it is easier to apply that modifier only to the item directly before it. That is particularly true where it takes more than a little mental energy to process the individual entries in the list, making it a heavy lift to carry the modifier across them all.").

[306] *Barnhart*, 540 U.S. at 27.

[307] *See* SCALIA & GARNER, *supra* note 24, at 144–45 (discussing *Barnhart* and the Court's hypothetical).

[308] *See id.* at 145.

[309] 18 U.S.C. § 2252(a)(4).

[310] *Lockhart*, 577 U.S. at 349 (quoting 18 U.S.C. § 2252(b)(2)).

[311] *Id.* (quoting 18 U.S.C. § 2252(b)(2)).

[312] *Id.* at 352 (quoting 18 U.S.C. § 2252(b)(2)).

[313] *Id.* at 364 (Kagan, J., dissenting) (quoting BLACK'S LAW DICTIONARY 1574 (10th ed. 2014)) (internal quotation marks omitted).

[314] *Id.* (citing SCALIA & GARNER, *supra* note 24, at 147).

[315] *Id.* at 363–64. *Cf. id.* at 364–65 ("When the nouns in a list are so disparate that the modifying clause does not make sense when applied to them all, then the last-antecedent rule takes over. Suppose your friend told you not that she wants to meet 'an actor, director, or producer involved with Star Wars,' [in which case the modifier would apply to the entire list] but instead that she hopes someday to meet 'a President, Supreme Court Justice, or actor involved with Star Wars.' Presumably, you would know that she wants to meet a President or Justice even if that person has no connection to the famed film franchise.").

conduct."[316] By contrast, the majority of the Court believed the series-qualifier canon was inapplicable, concluding that the disputed provision "does not contain items that readers are used to seeing listed together or a concluding modifier that readers are accustomed to applying to each of them."[317] Further, the majority argued, "the varied syntax of each item in the list makes it hard for the reader to carry the final modifying clause across all three."[318] *Lockhart* therefore demonstrates the complexities of applying the canons of construction, particularly when different canons suggest different interpretations.

Another semantic canon, the rule against surplusage, relies less on the niceties of grammar and more on the general principles underlying how courts assume Congress conveys meaning.[319] The surplusage canon requires courts to give each word and clause of a statute operative effect, if possible.[320] Stated another way, courts should not interpret any statutory provision in a way that would render it or another part of the statute inoperative or redundant.[321] Accordingly, for example, when a court is faced with a statutory list of terms, it generally will read each term to convey some distinct meaning.[322] In *Bailey v. United States*, the Supreme Court considered a statute that imposed a five-year mandatory minimum sentence on a person who "uses or carries a firearm" during a crime of violence or drug trafficking crime.[323] The Court refused to give the term "use" such a broad reading that "no role remains for 'carry.'"[324] Instead, the Court assumed "that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning," and gave "use" a more limited connotation that "preserve[d] a meaningful role for 'carries' as an alternative basis for a charge."[325]

Elsewhere, however, judges have questioned whether the assumption underlying the surplusage canon is true or whether instead it is more likely that Congress sometimes does use redundant language.[326] In one case, the Supreme Court noted that "redundancies are common in statutory drafting—sometimes in a congressional effort to be doubly sure, sometimes because of congressional inadvertence or lack of foresight, or sometimes simply because of the shortcomings

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[316] *Id.* at 366.

[317] *Id.* at 352 (majority opinion).

[318] *Id.*

[319] *See* SCALIA & GARNER, *supra* note 24, at 174. This canon is also sometimes referred to as the "canon against superfluity." *See, e.g.*, Microsoft Corp. v. i4i Ltd. P'ship, 564 U.S. 91, 106 (2011).

[320] *See* Duncan v. Walker, 533 U.S. 167, 174 (2001).

[321] *See, e.g.*, Fourth Estate Pub. Ben. Corp. v. Wall-Street.com, LLC, 139 S. Ct. 881, 889 (2019); Colautti v. Franklin, 439 U.S. 379, 392 (1979). *But see, e.g.*, Rimini St., Inc. v. Oracle USA, Inc., 139 S. Ct. 873, 881 (2019) (stating that this rule "is not a silver bullet" and acknowledging that "[s]ometimes the better overall reading of the statute contains some redundancy").

[322] *See, e.g.*, McDonnell v. United States, 579 U.S. 550, 569 (2016).

[323] Bailey v. United States, 516 U.S. 137, 138–39 (1995) (quoting 18 U.S.C. § 924(c)(1)) (internal quotation mark omitted).

[324] *Id.* at 145.

[325] *Id.* at 146.

[326] *See, e.g.*, Microsoft Corp. v. i4i Ltd. P'ship, 564 U.S. 91, 106 (2011) (noting that "no interpretation" of the relevant statute "avoids excess language"); *id.* at 107 ("'There are times when Congress enacts provisions that are superfluous,' and the kind of excess language [at issue] . . . is hardly unusual in comparison to other [similar] statutes . . . ." (quoting Corley v. United States, 556 U.S. 303, 325 (2009) (Alito, J., dissenting))); Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 344 (7th Cir. 2017) ("Congress may certainly choose to use both a belt and suspenders to achieve its objectives . . . .").

of human communication."[327] This discussion demonstrates the idea that the canons are presumptions, rather than rules, and cannot replace a broader contextual inquiry.[328]

Substantive Canons

In contrast to the semantic canons, the substantive canons express "judicial presumption[s] . . . in favor of or against a particular substantive outcome."[329] Some of these canons, particularly those that protect constitutional values, are described as "clear statement rules" because courts will favor certain outcomes unless the statute makes a "clear statement" that unambiguously dislodges the presumption.[330] The substantive canons "look to the legal consequences of interpretation rather than to linguistic issues alone."[331] If a statute is susceptible to more than one meaning, they may tip the scale toward a particular result.[332]

Accordingly, invocation of the substantive canons frequently invites judicial disagreement.[333] The canon of constitutional avoidance provides a good example of how even a well-established[334] substantive canon can provoke debate.[335] The canon of constitutional avoidance provides that if one plausible reading of a statute would raise "serious doubt" about the statute's constitutionality, a court should look for another, "fairly possible" reading that would avoid the constitutional issue.[336] Thus, for instance, the constitutional-avoidance canon might lead a court to adopt a limiting construction of a statutory provision, if a broader interpretation would allow the government to exercise a constitutionally problematic amount of power.[337]

The constitutional-avoidance canon may allow a court to adopt a "reasonable alternative interpretation"[338] even if it is not otherwise "the most natural interpretation" of the disputed statute.[339] For example, in *Bond v. United States*, the Supreme Court interpreted a statute making

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[327] Barton v. Barr, 140 S. Ct. 1442, 1453 (2020).

[328] *See also infra* "Justifications: Disrepute, Rehabilitation, and Empirical Studies."

[329] MANNING & STEPHENSON, *supra* note 299, at 202.

[330] *See, e.g.*, HART & SACKS, *supra* note 17, at 1376; Manning, *Textualism and the Equity of the Statute*, *supra* note 32, at 121–22.

[331] SOLAN, *supra* note 242, at 65.

[332] *See id.* (stating substantive canons "stack the deck in favor of one party and against another"); Scalia, *supra* note 84, at 27 (referring to "rules of construction that load the dice for or against a particular result").

[333] *See, e.g.*, ESKRIDGE ET AL., *supra* note 40, at 342.

[334] *See* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (saying the canon "has for so long been applied by this Court that it is beyond debate").

[335] *See, e.g.*, ESKRIDGE ET AL., *supra* note 40, at 362–67 (discussing arguments for and against using the canon).

[336] Crowell v. Benson, 285 U.S. 22, 62 (1932). This canon is distinct from other variations on the principle of constitutional avoidance, including the "rule of judicial procedure" stating that "'if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction . . . , the Court will decide only the latter.'" *See* SCALIA & GARNER, *supra* note 24, at 251 (quoting Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). The procedural rule tells a court *when* to decide a statutory question (i.e., before the constitutional question); the canon tells a judge *how* to interpret the statute. MANNING & STEPHENSON, *supra* note 299, at 250. This report uses the term to refer to the canon, although there is room for disagreement regarding how to classify various aspects of the constitutional avoidance doctrine. For more information on the doctrine, see CRS Report R43706, *The Doctrine of Constitutional Avoidance: A Legal Overview*, by Andrew Nolan.

[337] *See, e.g.*, Gomez v. United States, 490 U.S. 858, 863–64 (1989) (noting that "read literally," disputed statute would allow federal magistrate to take on "any assignment that is not explicitly prohibited," and instead adopting an alternative interpretation—that the additional duties must be related to statutorily specified duties of the office).

[338] *Id.* at 864.

[339] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 563 (2012).

it a crime for a person to use "any chemical weapon."[340] The Court noted that the "expansive language" of the statute could be read to encompass the conduct of the defendant, who had placed toxic chemicals on the car door, mailbox, and door knob of a friend after discovering that the friend had become pregnant by the defendant's husband.[341] However, the Court decided that it would not interpret the statute "to reach purely local crimes"[342] because such an interpretation would intrude on powers traditionally reserved for the states, implicating constitutional concerns about the balance of power between the federal government and the states.[343] Instead, the Court read the statute more narrowly, to exclude the defendant's conduct.[344]

Of course, judges may disagree on whether an alternative reading that avoids a constitutional problem is "fairly possible."[345] As the Supreme Court emphasized in one case, the constitutional-avoidance canon "does not give a court the authority to rewrite a statute as it pleases."[346] Accordingly, the Court has rejected application of the canon if the text "unambiguously forecloses" the proferred construction.[347]

Many of the substantive canons entail difficult judgments in determining whether triggering threshold conditions have been met.[348] In the case of the canon of constitutional avoidance, a court need not conclude that a suggested reading of the statute in fact would render the statute unconstitutional; the canon requires only that there is a "serious doubt" about the constitutionality of the proferred interpretation.[349] Judges disagree, however, on how much constitutional "doubt" must be present before a court may use the constitutional-avoidance canon to support a certain interpretation of a statute.[350] As one treatise puts it: "How doubtful is doubtful?"[351] Some judges have argued that the constitutional-avoidance canon should be used sparingly, if at all.[352]

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[340] 572 U.S. 844, 851 (2014) (quoting 18 U.S.C. 229(a)(1) (quotation mark omitted)).

[341] *Id.* at 860–61.

[342] *Id.* at 860.

[343] *Id.* at 862–63.

[344] *Id.* at 866.

[345] Crowell v. Benson, 285 U.S. 22, 62 (1932). *See also* Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1285 (2016) (distinguishing "tiebreaking avoidance," in which the canon may be used to choose one of two similarly plausible interpretations, from "rewriting avoidance," in which the canon may be used "to select a less-accurate interpretation").

[346] Jennings v. Rodriguez, 138 S. Ct. 830, 843 (2018).

[347] United States v. Palomar-Santiago, 141 S. Ct. 1615, 1622 (2021). *See also, e.g.*, Holder v. Humanitarian Law Project, 561 U.S. 1, 17 (2010) (rejecting invocation of canon where construction would "revise" the law rather than interpret it, and "pervert[] the purpose of" the disputed law).

[348] *Compare, e.g.*, Muscarello v. United States, 524 U.S. 125, 138–39 (1998) (concluding statute is not sufficiently ambiguous to make the rule of lenity applicable), *with id.* at 148–49 (Ginsburg, J., dissenting) (arguing rule of lenity should apply to resolve statutory ambiguity).

[349] *Crowell*, 285 U.S. at 62. *Cf.* Brown v. Plata, 563 U.S. 493, 526 (2011) (concluding reading is "permissible" because the alternative interpretation "would raise serious constitutional concerns"); Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 545 (2001) ("It is well understood that when there are two reasonable constructions for a statute, yet one raises a constitutional question, the Court should prefer the interpretation which avoids the constitutional issue.").

[350] Anthony Vitarelli, Comment, *Constitutional Avoidance Step Zero*, 119 YALE L.J. 837, 841–42 (2010).

[351] SCALIA & GARNER, *supra* note 24, at 250. *Compare, e.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994) (determining constitutional-avoidance canon supports reading *mens rea* requirement into statute because statute would otherwise "raise serious constitutional doubts"), *with id.* at 83 (Scalia, J., dissenting) (arguing statute does not raise serious constitutional doubts).

[352] *See, e.g.*, United States v. Marshall, 908 F.2d 1312, 1335–36 (7th Cir. 1990) (Posner, J., dissenting) ("Courts often do interpretive handsprings to avoid having even to *decide* a constitutional question. In doing so they expand, very questionably in my view, the effective scope of the Constitution, creating a constitutional penumbra in which statutes

At a more general level, judges frequently disagree about whether substantive canons are appropriately used to interpret statutes, both in theory and in practical application.[353] This disagreement sometimes stems from different beliefs about the general justifications for using the canons.[354] To the extent that the substantive canons suggest that a judge should read a statute in a way that is not immediately evident from the statute's text or purpose, both textualists and purposivists may be wary of employing these canons.[355] Consequently, most courts will not apply the substantive canons unless they conclude that after consulting other interpretive tools, the statute remains ambiguous.[356] Again, however, such a conclusion often presents a debatable question about whether a statute is sufficiently ambiguous to call for the application of a substantive canon.[357]

Justifications: Disrepute, Rehabilitation, and Empirical Studies

Judges may choose not to apply a canon to resolve a statutory ambiguity if they disagree with the justifications generally proffered to justify that canon, or if they simply believe that those general justifications do not warrant its extension to the case before them.[358] The canons of construction were a disfavored tool of statutory interpretation for a significant portion of the 20th century.[359] This view was reflected in an influential article written by legal scholar Karl Llewellyn in 1950, in which he argued that the canons were not useful interpretive tools because of their indeterminacy.[360] He compiled a table of "thrusts" and "parries" that purported to demonstrate that for every canon, there was an opposing canon on the same point.[361] For example, one thrust

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wither, shrink, are deformed. A better case for flexible interpretation is presented when the alternative is to nullify Congress's action: when in other words there is not merely a constitutional question about, but a constitutional barrier to, the statute when interpreted literally." (citation omitted)).

[353] *See, e.g.*, ESKRIDGE ET AL., *supra* note 40, at 342 ("The *substantive* canons of interpretation . . . are even more controversial, because they are rooted in broader policy or value judgments.").

[354] *See, e.g.*, MANNING & STEPHENSON, *supra* note 299, at 248 (discussing possible justifications for the canons of construction).

[355] *See, e.g.*, Manning, *Textualism and the Equity of the Statute*, *supra* note 32, at 125; Nelson, *supra* note 101, at 393–94.

[356] *Compare, e.g.*, Beecham v. United States, 511 U.S. 368, 374 (1994) ("Because the statutory language is unambiguous, the rule of lenity, which petitioners urge us to employ here, is inapplicable."), *with* Liparota v. United States, 471 U.S. 419, 427–28 (1985) ("Although the rule of lenity is not to be applied where to do so would conflict with the implied or expressed intent of Congress, it provides a time-honored interpretive guideline when the congressional purpose is unclear. In the instant case, the rule directly supports petitioner's contention that the Government must prove knowledge of illegality to convict him . . . ."). *See also, e.g.*, United States v. Monsanto, 491 U.S. 600, 611 (1989) (noting the canons "are quite often useful in close cases, or when statutory language is ambiguous," but declining to use them where "the language is clear and the statute comprehensive").

[357] *See supra* note 348.

[358] *E.g.*, *supra* notes 289 and 291.

[359] *E.g.* MIKVA & LANE, *supra* note 9, at 115 ("The use of canons of construction for the interpretation of statutes has been held in scholarly ill repute for over a century."). *Cf.* Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, *supra* note 125, at 805 ("[I]t has been many years since any legal scholar had a good word to say about any but one or two of the canons, but scholarly opinion . . . has had little impact on the writing of judicial opinions, where the canons seem to be flourishing as vigorously as ever.").

[360] Llewellyn, *supra* note 72, at 401. *Cf.* Frankfurter, *supra* note 8, at 544 ("[C]anons of construction . . . give an air of abstract intellectual compulsion to what is in fact a delicate judgment . . . ."); *id.* at 544–45 (arguing canons are valid only insofar as they are flexible "axioms of experience" that judges may revisit and adapt through application).

[361] Llewellyn, *supra* note 72, at 401. *See also* SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344, 353 (1943) ("Some authority is cited and a great array could be assembled to support the general proposition that penal statutes must be strictly construed. An almost equally impressive collection can be made of decisions holding that remedial statutes should be liberally construed. What, then, shall we say of the construction of a [statute] like this which may be the basis

declares that "[w]ords and phrases which have received judicial construction before enactment are to be understood according to that construction," while the parry counters, "[n]ot if the statute clearly requires them to have a different meaning."[362] Some modern judges have agreed with this criticism, arguing that judges effectively "need a canon for choosing between competing canons."[363]

Others, however, have challenged Llewellyn's list, questioning the validity of the rules that he claimed were canons.[364] Scholars and judges have also cast doubt on whether his thrusts and parries are truly contradictory, arguing that many of his pairs instead represent two halves of one rule, the thrust giving the general rule, and the parry, the exception or condition.[365] By and large, the canons of construction have been rehabilitated among jurists and legal scholars, primarily by textualists, who have argued on a number of bases that the canons represent "sound interpretive conventions."[366]

The foregoing criticisms, however, have forced many judges to more diligently justify their use of the canons. One scholar, Caleb Nelson, has placed the canons into two categories based on the justifications given for their canonization.[367] For Nelson, the first group of canons is descriptive; such canons "simply reflect broader conventions of language use, common in society at large at the time the statute was enacted."[368] Judges invoke these canons because, according to this scholar, they are accurate descriptions of the way that all people use words.[369] As a result, courts expect that these principles will also apply to legislative drafting.[370] Nelson describes the second group of canons as normative.[371] These normative canons are "used primarily by lawyers" rather

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of either civil proceedings of a preventive or remedial nature or of punitive proceedings, or perhaps both?").

[362] Llewellyn, *supra* note 72, at 403.

[363] Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, *supra* note 125, at 806.

[364] *See, e.g.*, Scalia, *supra* note 84, at 26–27 (identifying two examples of "faux canons"). *Cf.* Michael Sinclair, *"Only a Sith Thinks Like That": Llewellyn's "Dueling Canons," Pairs Thirteen to Sixteen*, 53 N.Y.L. SCH. L. REV. 953, 985 (2008/09) (questioning the provenance of Llewellyn's formulation of the canons).

[365] *See* Scalia, *supra* note 84, at 27; Schlusselberg & Sinclair, *supra* note 302, at 38. *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 264, 280 (1994) (noting "apparent tension" between two canons and resolving the conflict). *Cf.* SOLAN, *supra* note 242, at 31 (suggesting some canons embody two "types of devices," reflecting the way English speakers generally understand language: "[1] interpretive strategies that function to ease the rapid processing of language as it is heard or read, but which can be overridden if their application leads to nonsensical or ungrammatical interpretations of sentences, and [2] rules of grammar, which make certain interpretations impossible," and questioning whether judges apply the canons consistently with linguistic theory).

[366] *E.g.*, SCALIA & GARNER, *supra* note 24, at xxvii ("Nothing but conventions and contexts cause a symbol or sound to convey a particular idea."); *id.* at xxviii ("We seek to restore sound interpretive conventions."). *See also* Nelson, *supra* note 101, at 377, 383 (arguing textualists prefer the canons to legislative history because of their more rule-like nature); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 663 (1990) ("The new textualists . . . seek a revival of canons that rest upon precepts of grammar and logic, proceduralism, and federalism. The Court's opinions in the last two Terms reflect this revival urged by the new textualists.").

[367] Nelson, *supra* note 101, at 383. Nelson prefers these categories to the traditional distinction between semantic and substantive canons. *See id.* at 394 n.140. *Cf.* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 454 (1989) (noting canons "have served different functions" and distinguishing widely shared and uncontroversial "invisible norms" from "background norms" that "more visibly serve substantive or institutional goals," but recognizing that "the distinction . . . is imprecise").

[368] Nelson, *supra* note 101, at 383.

[369] *Id.*

[370] *Id.* at 383–84.

[371] *Id.* at 384.

than society at large and "relate specifically to the interpretation of statutes."[372] Courts may think that these canons, as well, accurately capture insights about congressional behavior.[373] But judges might also apply these canons as a matter of historical practice,[374] or because they believe the canons reflect good policy,[375] or because they believe the canons provide principles that limit judicial deference[376] and promote predictability in judicial decisionmaking.[377]

Defenders of the canons have argued that they help judges act as faithful agents of the legislature, either because they reflect legislative drafting practices or because they provide coordinating background rules that can guide Congress when drafting legislation.[378] For example, the constitutional-avoidance canon is frequently said to respect legislative supremacy[379]—although judges do not always agree on the reasons why.[380] The Court has, at times, said that the constitutional-avoidance canon reflects what Congress meant because Congress would not have wanted to enact an unconstitutional statute.[381] Choosing a reasonable alternative interpretation "recognizes that Congress, like [the courts], is bound by and swears an oath to uphold the

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[372] *Id.*

[373] *See id.* at 390 ("Many of the canons used by textualists reflect observations about Congress's own habits.").

[374] *See* Scalia, *supra* note 84, at 29 ("The rule of lenity is almost as old as the common law itself, so I suppose that is validated by sheer antiquity."). *See also, e.g.*, United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself.").

[375] *See, e.g.*, Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 563 (1992) ("[N]ormative canons are principles . . . that . . . direct courts to construe any ambiguity in a particular way in order to further some policy objective."). *See also* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1018 (1989) (arguing interpreters should explicitly incorporate "rational background understandings," or "underlying public values" into application of the canons of construction); Sunstein, *supra* note 367, at 413 (arguing some substantive canons can and should "be supported through an understanding of the ways in which they incorporate constitutional principles, promote deliberation in government, and respond to New Deal reforms of the legal system").

[376] *See, e.g.*, Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, *supra* note 125, at 807 ("A . . . line of defense is that even if the canons do not make very good sense, it is better that the judges should feel constrained by some interpretive rules than free to roam at large in a forest of difficult interpretive questions . . . .").

[377] *See, e.g.*, Nelson, *supra* note 101, at 391 ("[C]anons and presumptions can . . . take advantage of . . . relative predictability. . . . [S]ome specialized canons help courts discern Congress's likely intent . . . simply because members of Congress know that the courts use them. That knowledge . . . enables members of Congress to convey their intended meaning in a way that the courts will understand."). *See also* Eskridge & Frickey, *Law As Equilibrium*, *supra* note 295, at 67 ("[T]he canons may be understood as conventions, similar to driving a car on the right-hand side of the road; often it is not as important to choose the best convention as it is to choose one convention, and stick to it.").

[378] Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1021 (2015); HART & SACKS, *supra* note 17, at 1376; *see also, e.g.*, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 261 (2010) (noting that consistent application of presumption against extraterritoriality creates "a stable background against which Congress can legislate with predictable effects"). *But see* Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177, 179 (2017) (arguing that the system-coordinating justification for a formalist approach employing the canons is untenable).

[379] *See, e.g.*, William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 843 (2001). *But see, e.g.*, Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1405 (2002) (arguing the canon of constitutional avoidance is "wholly illegitimate" because it "acts as a roving commission to rewrite statutes to taste").

[380] *See, e.g.*, MANNING & STEPHENSON, *supra* note 299, at 260–61. Others argue that even if the constitutional-avoidance canon does not advance legislative supremacy, it may be useful to protect constitutional values, by allowing courts to impose narrowing constructions on constitutionally dubious statutes. *See* ESKRIDGE ET AL., *supra* note 40, at 365.

[381] *See, e.g.*, Yates v. United States, 354 U.S. 298, 319 (1957) ("[W]e should not assume that Congress chose to disregard a constitutional danger zone so clearly marked.").

Constitution."[382] Others have argued that even if the canon does not reflect actual congressional practice, it properly represents a judicial policy judgment "that courts should minimize the occasions on which they confront and perhaps contradict the legislative branch."[383]

Some judges, however—primarily purposivists—have argued for greater caution in deploying the canons of construction, warning that insofar as they do not reflect the reality of legislative drafting, they may not respect legislative supremacy.[384] Supporting this concern, some empirical studies have raised questions as to whether some of these canons do in fact reflect how ordinary English speakers or legislatures use words.[385] One influential article, published in 2013, surveyed 137 congressional staffers to assess whether legislative staffers were aware of various judicial doctrines of statutory interpretation and whether the drafters actually complied with those doctrines.[386] Their findings demonstrated a wide range of awareness and use of various semantic and substantive canons, and suggested that some canons, such as the surplusage canon, are not widely used by Congress.[387] However, some have pointed out that this study may not provide a complete view of the federal lawmaking process[388]—and indeed, the authors themselves recognized many of the limitations in their study.[389]

Responding to this study, then-professor Barrett explained that textualists would likely reject this legislative "process-based" approach to evaluating the canons because textualists do not use canons "in an effort to track the linguistic patterns of the governors; they use them because they reflect the linguistic patterns of the governed."[390] In response to this criticism, another group of scholars surveyed "4,500 demographically representative people recruited from the United States, as well as a sample of over one-hundred first-year U.S. law students" to test their knowledge of the canons.[391] The study found that while non-governmental speakers do frequently read laws in accordance with many of the canons tested, some of them are less frequently applied.[392] A number of judges have cited the initial study on congressional drafting practices in explaining their choices about whether to apply certain canons;[393] it remains to be seen whether this second survey will be as influential.

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[382] Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

[383] SCALIA & GARNER, *supra* note 24, at 249.

[384] *See, e.g.*, KATZMANN, supra note 111, at 52 ("[W]iping out legislative history, in the face of empirical evidence that Congress views it as essential in understanding its meaning, leaves us largely with a canon-based interpretive regime that may not only fail to reflect the reality of the legislative process, but may also undermine the constitutional understanding that Congress's statutemaking should be respected as a democratic principle."). *See also* Breyer, *supra* note 32, at 870 (arguing legislative history is more accessible than the canons to give notice of statutory meaning).

[385] *See, e.g.*, Tobia et al., *supra* note 207, at 249–62, 271; Gluck & Bressman, *supra* note 204, at 907.

[386] Gluck & Bressman, *supra* note 204, at 920.

[387] *Id.* at 949.

[388] *See, e.g.*, Kysar, *supra* note 116, at 1118–19; Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 810–11, 837, 863–65 (2014).

[389] *See* Gluck & Bressman, *supra* note 204, at 922–23 (noting limitations in survey sample); 1020–21 (noting possibility that collective or outside knowledge may impact drafting process).

[390] Barrett, *supra* note 136, at 2194.

[391] Tobia et al., *supra* note 207, at 225.

[392] *Id.* at 249–62.

[393] *See, e.g.*, Yates v. United States, 574 U.S. 528, 562 (2015) (Kagan, J., dissenting); United States v. Koutsostamatis, 956 F.3d 301, 307 n.1 (5th Cir. 2020); Zarda v. Altitude Express, Inc., 883 F.3d 100, 130 (2d Cir. 2018); Loving v. IRS, 742 F.3d 1013, 1019 (D.C. Cir. 2014).

Even if a judge agrees that a particular canon is generally valid, the court may still doubt that it should control the interpretation of a particular statute. Modern theory acknowledges that the application of a particular canon in any case is highly context-dependent.[394] The canons merely supply "one indication" of meaning,[395] suggesting only that "a particular meaning is linguistically permissible, if the context warrants it."[396] Judges sometimes describe the canons as akin to rebuttable presumptions.[397] Judges will weigh application of the canon against the evidence of statutory meaning discovered through other interpretive tools and may disagree about whether a canon is so contrary to other indicators of meaning that it should not be applied.[398] The use of the canons "rest[s] on reasoning," and their application should be justified in any given case.[399]

A judge's willingness to deploy a particular canon, generally or in a specific case, may also depend on that judge's particular theory of interpretation. Many judges will turn to the canons only if more favored tools fail to resolve any ambiguity.[400] For example, Justice Clarence Thomas, who is generally described as a textualist,[401] stated the following in one Supreme Court opinion:

> [C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one,

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[394] *See, e.g.*, HART & SACKS, *supra* note 17, at 1191 ("Of course there are pairs of maxims susceptible of being invoked for opposing conclusions. Once it is understood that meaning depends on context, and that contexts vary, how could it be otherwise?").

[395] Scalia, *supra* note 84, at 27 ("Every canon is simply *one indication* of meaning; and if there are more contrary indications (perhaps supported by other canons), it must yield."). *See, e.g.*, Rice v. Rehner, 463 U.S. 713, 732 (1983) ("[W]e have consistently refused to apply . . . a canon of construction when application would be tantamount to a formalistic disregard of congressional intent. . . . In the present case, congressional intent is clear from the face of the statute and its legislative history.").

[396] HART & SACKS, *supra* note 17, at 1191. *See also, e.g.*, Yellen v. Confederated Tribes of the Chehalis Reservation, 141 S. Ct. 2434, 2448 (2021) (noting that canons must give way if they yield a "contextually implausible outcome," because "[t]he most grammatical reading of a sentence in a vacuum does not always produce the best reading in context" (quoting Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1171 (2021)) (internal quotation marks omitted)).

[397] *See, e.g.*, District of Columbia v. Thompson, 593 A.2d 621, 631 (D.C. 1991) ("[T]he venerable canon that would have us strictly construe a statute against altering the common law creates 'a rebuttable presumption.'" (quoting Monroe v. Foreman, 540 A.2d 736, 739 (D.C. 1988))). *See also, e.g.*, Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV. 81, 83 (2017) (noting that "*every* canon implicitly begins or ends with the statement 'unless the context indicates otherwise'").

[398] *See, e.g.*, Lockhart v. United States, 577 U.S. 347, 352 (2016) (arguing rule of last antecedent applies and "is not overcome by other indicia of meaning"); *id.* at 363 (Kagan, J., dissenting) (arguing statutory context shows rule of last antecedent does not apply to the disputed provision).

[399] Sinclair, *supra* note 289, at 992. *See also* Varity Corp. v. Howe, 516 U.S. 489, 511 (1996) ("To apply a canon properly one must understand its rationale.").

[400] *See, e.g.*, FAA v. Cooper, 566 U.S. 284, 305 (2012) (Sotomayor, J., dissenting) (declining to rely on certain canon where "traditional tools of statutory construction—the statute's text, structure, drafting history, and purpose—provide a clear answer"); Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 589–90 (2008) ("[W]e have never held that [a particular canon] displaces the other traditional tools of statutory construction. . . . In this case, traditional tools of statutory construction and considerations of *stare decisis* compel [a certain] conclusion . . . . There is no need for us to resort to the . . . canon because there is no ambiguity left for us to construe."); Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting) ("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.").

[401] *See, e.g.*, Fallon, *Three Symmetries*, *supra* note 216 at 691 (describing Justice Thomas as "a recognized textualist").

> cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.[402]

Acccordingly, in that opinion, Justice Thomas concluded that because the statutory text was clear, the canon against surplusage was inapplicable.[403]

In a similar vein, Justice William Brennan argued that it was unnecessary to invoke the canon of constitutional avoidance in his dissenting opinion in *NLRB v. Catholic Bishop of Chicago*.[404] In particular, he contended that the alternative reading adopted by the majority was not a "fairly possible" interpretation of the statute, relying heavily on the statute's legislative history to demonstrate that Congress intended to foreclose the majority opinion's construction.[405] Thus, although a particular canon might facially operate to resolve a particular statutory ambiguity, judges may disagree about whether a canon's application is appropriate, if another interpretive tool suggests the statute should bear another meaning and if a particular jurisprudential methodology counsels for reliance on that particular tool.[406]

Legislative History

Where the text of the statute alone does not answer the relevant question, judges have at times turned to a statute's legislative history,[407] defined as the record of Congress's deliberations when enacting a law.[408] One of the Supreme Court's most famous—and perhaps infamous—invocations of legislative history came in *United Steelworkers v. Weber*.[409] In that case, the Court considered whether Title VII of the Civil Rights Act of 1964, which "make[s] it unlawful to 'discriminate . . . because of . . . race' in hiring" and training employees, prohibited a private employer from adopting an affirmative action plan intended to increase the number of black employees in one of its training programs.[410] The Court noted that "a literal interpretation" of the relevant statutory provisions arguably would forbid such plans, since they "discriminate[d]

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[402] Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992).

[403] *Id.* Two concurring opinions in that case argued that the Court should have also considered the statute's legislative history, *id.* at 255 (Stevens, J., concurring), and should have acknowledged that this interpretation did violate the canon against surplusage and explained why the canon did not control, *id.* at 256 (O'Connor, J., concurring).

[404] NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 511 (1979) (Brennan, J., dissenting).

[405] *Id.* at 511–15.

[406] *See, e.g.*, Grand Trunk W. R.R. Co. v. U.S. Dep't of Labor, 875 F.3d 821, 825 (2017) (concluding statutory context overcomes presumption of "so-called *Russello* structural canon"—that "'[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'" (alteration in original) (quoting Russello v. United States, 464 U.S. 16, 23 (1983))).

[407] *See, e.g.*, Mitchell v. Cohen, 333 U.S. 411, 418 (1948).

[408] ESKRIDGE ET AL., *supra* note 40, at 303. This report addresses only pre-enactment legislative history, and does not discuss the even more contentious category of post-enactment legislative history. *See, e.g.*, ESKRIDGE ET AL., *supra* note 40, at 316 (discussing "subsequent legislative history," or congressional statements and actions related to a law after its enactment, such as when Congress rejects amendments to a law). The report addresses separately other post-enactment interpretive tools *infra* "Statutory Implementation." *See also* HART & SACKS, *supra* note 17, at 1255–70 (reviewing "post-enactment aids to interpretation," including popular construction, administrative construction, judicial construction, and legislative silence or acquiescence).

[409] United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 201 (1979). *Cf., e.g.*, SCALIA & GARNER, *supra* note 24, at 12 (arguing this case's reading of the statute "def[ies] the text"); Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, *supra* note 169, at 336 (arguing this case was decided "by romanticizing the legislative process and subordinating other purposes of Title VII").

[410] *United Steelworkers*, 443 U.S. at 201 (quoting 42 U.S.C. § 2000-e(2)(a), (d)).

against white employees solely because they [were] white."[411] Nonetheless, the Court concluded that in this case, such a "literal construction" was "misplaced."[412] Instead, writing for the majority, Justice Brennan used the legislative history of Title VII to uncover evidence of the statute's purpose, examining a number of statements from individual Senators as well as the committee report.[413] He concluded that the law sought to "address centuries of racial injustice," and Congress could not have "intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve."[414] In Justice Brennan's view, the private employer's plan mirrored the purposes of the statute[415] by seeking "to abolish traditional patterns of racial segregation and hierarchy,"[416] and the legislative history demonstrated that Congress intended to leave an "area of discretion" for just such a plan.[417]

Purposes for Using Legislative History

The use of legislative history has generated significant debate over the past century.[418] In its most controversial applications, legislative history has been deployed in opinions that cite a statute's purpose to override arguably clear text, as demonstrated by *Weber*.[419] Most frequently, however, when modern judges use legislative history, it is not to contradict a clear text but to discover evidence of an ambiguous statute's underlying purpose or confirm a reading suggested by other tools.[420] As with the substantive canons, courts have suggested that legislative history should not be examined unless the statutory text is ambiguous.[421] Of course, judges may disagree whether the text is sufficiently ambiguous to warrant recourse to a statute's legislative history.[422] Judges have also used legislative history to support a textual interpretation.[423] An increasingly common

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[411] *Id.*

[412] *Id.*

[413] *Id.* at 202–07.

[414] *Id.* at 204. *See also id.* at 207 ("Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action.").

[415] *Id.* at 208.

[416] *Id.* at 204.

[417] *Id.* at 209.

[418] *E.g.*, MANNING & STEPHENSON, *supra* note 299, at 127. *See also id.* at 127–28 (outlining historical trends in use of legislative history in U.S. courts, beginning with a rule of general exclusion, swinging towards general inclusion around 1940, and describing the new backlash against its use beginning in the 1980s).

[419] *See Weber*, 443 U.S. at 201–02. *See also, e.g.*, Church of the Holy Trinity v. United States, 143 U.S. 457, 464–65 (1892). *Cf., e.g.*, Kavanaugh, *supra* note 131, at 2127 (distinguishing use of legislative history to resolve textual ambiguities from use of legislative history "to override the clear text when following the text would contradict Congress's apparent intent").

[420] *See, e.g.*, Milner v. Dep't of the Navy, 562 U.S. 562, 572 (2011) ("Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text. We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language."). *See also, e.g.*, HART & SACKS, *supra* note 17, at 1379 ("Effect should not be given to evidence from the internal legislative history if the result would be to contradict a purpose otherwise indicated . . . .").

[421] *See, e.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 508–09 (1989) ("We begin by considering the extent to which the text of [the disputed provision] answers the question before us. Concluding that the text is ambiguous with respect to [that question], we then seek guidance from legislative history . . . .").

[422] *Compare, e.g.*, Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 304 (2006) (disregarding legislative history where statutory text was unambiguous), *with id.* at 323 (Breyer, J., dissenting) (arguing statutory text was ambiguous and turning to legislative history). Then-Judge Brett Kavanaugh argued that "the indeterminacy of the trigger"—that is, determining when the text is ambiguous— "greatly exacerbates the problems with the use of legislative history." Kavanaugh, *supra* note 131, at 2149.

[423] *See, e.g.*, Milavetz, Gallop & Milavetz, P. A. v. United States, 559 U.S. 229, 236 n.3 (2010) ("Although reliance on

phrasing in Supreme Court majority opinions discusses legislative history as additional support for "those who consider" it.[424]

Judges do not always use legislative history to determine a statute's *purpose*.[425] Even textualist judges may use legislative history to determine whether a statutory term has a specialized meaning[426] or to determine whether a seemingly incongruous result nonetheless aligns with congressional intent.[427] Some judges may also use legislative history to determine the scope of a statute and ascertain whether Congress sought to address the particular problem before the court at all.[428] Thus, for example, in *FDA v. Brown & Williamson Tobacco Corp.*, the Court reviewed the history of various "tobacco-specific legislation that Congress ha[d] enacted over the past 35 years," along with the history of the disputed provision located in the agency's organic statute, the Federal Food, Drug, and Cosmetic Act (FDC&A).[429] In the Court's view, the fact that the other legislative acts specifically concerned the issue of tobacco bore directly on the meaning of the FDC&A, which did not expressly address tobacco.[430] The Court concluded that Congress did not intend to give the FDA jurisdiction to broadly regulate tobacco products in the FDC&A.[431]

The Debate over Using Legislative History

To the extent that legislative history is used to determine statutory purpose, purposivists and textualists may disagree about whether legislative history is a permissible tool of statutory interpretation.[432] Many purposivists defend the use of legislative history on the grounds that these

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legislative history is unnecessary in light of the statute's unambiguous language, we note the support that record provides for the Government's reading."). *But see, e.g.*, Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 783–84 (2018) (Thomas, J., concurring) (arguing majority opinion should not have relied on committee report "to discuss the supposed 'purpose' of the statute").

[424] *E.g.*, Unicolors, Inc. v. H&M Hennes & Mauritz, L.P., 142 S. Ct. 941, 946–48 (2022) (discussing the text and statutory context before turning to legislative history as additional "persuasive" support for "those who consider" it); Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062, 1072 (2020) (similar); Sturgeon v. Frost, 139 S. Ct. 1066, 1085 (2019) (similar).

[425] *See, e.g.*, Breyer, *supra* note 32, at 848.

[426] *See, e.g.*, Pierce v. Underwood, 487 U.S. 552, 563–64 (1988) (relying on "a Committee Report prepared at the time of the original enactment of" the disputed statute to define the phrase "substantially justified," as used in the disputed statute to describe a party's litigating position). *See also, e.g.*, SCALIA & GARNER, *supra* note 24, at 388 ("[F]or the purpose of establishing linguistic usage—showing that a particular word or phrase is capable of bearing a particular meaning—it is no more forbidden (though no more persuasive) to quote a statement from the floor debate on the statute in question than it is to quote the *Wall Street Journal* or the *Oxford English Dictionary*.").

[427] *See, e.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (arguing that it is "entirely appropriate to consult all public materials, including the background of [the disputed provision] and the legislative history of its adoption, to verify that what seems to us an unthinkable disposition . . . was indeed unthought of, and thus to justify a departure from the ordinary meaning [of the disputed term]"). *See also, e.g.*, SCALIA & GARNER, *supra* note 24, at 388 ("[L]egislative history can be consulted to refute attempted application of the absurdity doctrine—to establish that it is indeed thinkable that a particular word or phrase should mean precisely what it says."). Similarly, courts may—in rare cases—use legislative history to determine that Congress made a mistake. *See, e.g.*, U.S. Nat'l Bank v. Indep. Ins. Agents of Am., 508 U.S. 439, 462 (1993) ("In these unusual cases, we are convinced that the placement of the quotation marks in the 1916 Act was a simple scrivener's error, a mistake made by someone unfamiliar with the law's object and design.").

[428] *See* Easterbrook, *What Does Legislative History Tell Us?*, *supra* note 146, at 443.

[429] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143–56 (2000).

[430] *Id.* at 143.

[431] *Id.* at 142.

[432] *See, e.g.*, Manning, *What Divides Textualists from Purposivists?*, *supra* note 23, at 84, 90.

deliberative materials can illuminate the context and purpose of a statutory provision.[433] Purposivists emphasize legislative process,[434] and legislative history provides a record of that process.[435] Defenders of legislative history generally argue that in statutory interpretation, judges should respect the processes Congress has established and should pay attention to those materials that Congress itself has used to memorialize the lawmaking process.[436] This is particularly true, argue some, because Congress generally does place significance on at least certain types of legislative history.[437] Thus, the central argument in favor of the use of legislative history is grounded in the purposivist view of legislative supremacy.[438]

By contrast, many textualists argue that legislative history should be used sparingly.[439] The first and perhaps most persistent objection is theoretical: as Justice Scalia argued, the use of legislative history improperly "assumes that what [judges] are looking for is the intent of the legislature rather than the meaning of the statutory text."[440] Accordingly, to the extent legislative history enables a judge to elevate a judgment about "background purposes" above "the clear import of an enacted text," textualists disagree with the use of this tool.[441] Textualists frequently claim that using legislative history in this way is inappropriate because "as a formal matter," it is this text, and not the "committee reports and floor statements," that are "the law enacted by Congress."[442] Textualists' primary objections to legislative history are therefore rooted in their own distinct view of how courts best observe legislative supremacy.[443]

Many textualists also harbor more practical concerns about the reliability of legislative history.[444] Justice Scalia frequently argued that "[e]ven if legislative intent did exist, there would be little

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[433] Breyer, *supra* note 32, at 848.

[434] *E.g.*, KATZMANN, supra note 111, at 31 ("[L]egislation is the product of a deliberative and informed process. Statutes in this conception have purposes or objectives that are discernible. The task of the judge is to make sense of legislation in a way that is faithful to Congress's purposes.").

[435] *E.g.*, *id.* at 29.

[436] *E.g.*, Breyer, *supra* note 32, at 858–60.

[437] *E.g.*, Gluck & Bressman, *supra* note 204, at 967; Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1549 (2020).

[438] *E.g.*, KATZMANN, supra note 111, at 4 ("Our constitutional system charges Congress, the people's branch of representatives, with enacting laws. So, how Congress makes its purposes known, through text and reliable accompanying materials constituting legislative history, should be respected, lest the integrity of legislation be undermined."). *See generally* Manning, *Legal Realism & the Canons' Revival*, *supra* note 176, at 288–89 ("Legislative history [in the view of purposivists] . . . might serve the same function as the canons (eliminating ambiguity), but with the distinct advantage of having a more democratic pedigree."). This justification for using legislative history appeals beyond purposivists to at least some pragmatists. *See, e.g.*, ESKRIDGE ET AL., *supra* note 40, at 239.

[439] *See, e.g.*, Nelson, *supra* note 101, at 361.

[440] SCALIA & GARNER, *supra* note 24, at 375. *See also* Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators."). This concern rests on the "intent skepticism" shared by both textualists and purposivists. Manning, *Inside Congress's Mind*, *supra* note 31, at 1912–13.

[441] Manning, *What Divides Textualists from Purposivists?*, *supra* note 23, at 73.

[442] Kavanaugh, *supra* note 131, at 2149. *See also*, *e.g.*, NLRB v. SW Gen., Inc., 137 S. Ct. 929, 942 (2017) ("What Congress ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators."); City of Chicago v. Envtl. Def. Fund, 511 U.S. 328, 337 (1994) ("[I]t is the statute, and not the Committee Report, which is the authoritative expression of the law . . . ."); Lawson v. FMR LLC, 571 U.S. 429, 459–60 (2014) (Scalia, J., concurring) (arguing against using legislative history to discover congressional intent because "we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended").

[443] *See, e.g.*, MANNING & STEPHENSON, *supra* note 299, at 151–53.

[444] *See, e.g.*, *id.* at 158.

reason to think it might be found in the sources that the courts consult."[445] In his view, even committee reports do not necessarily represent the understanding of the full Congress, given that they are created by a minority of Members, making it dangerous to draw assumptions about the whole body's understanding of the statute from such documents, in the view of textualists.[446] Justice Scalia also warned that legislative history is subject to intentional manipulation and gamesmanship, making it even less likely that these documents reflect legislative intent.[447] Finally, judges have pointed out that due to the multiplicity of actors, "legislative history is often conflicting," making it difficult to determine which parts of the record should be heeded.[448] Judge Harold Leventhal once observed that using legislative history can be like "looking over a crowd and picking out your friends."[449] These concerns about the reliability of legislative history may apply whether the tool is used to discover a statute's purpose or for another reason.

In light of these criticisms, judges who see value in examining legislative history to discern the legislature's intent have begun using such materials in more nuanced ways.[450] Courts review legislative history in light of the text ultimately enacted,[451] and in conjunction with other interpretive tools.[452] Many judges also view some types of legislative history as more reliable than others, drawing from their understanding of congressional procedure.[453] Justice Sotomayor, for example, has written that committee reports "are a particularly reliable source" of legislative history because they are circulated with a bill to Members and their staff, and are viewed by those people as reliable indicators of the bill's meaning.[454] By contrast, the Court has noted that floor

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[445] *E.g.*, SCALIA & GARNER, *supra* note 24, at 376.

[446] Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 620–21 (1991) (Scalia, J., concurring).

[447] *See, e.g.*, SCALIA & GARNER, *supra* note 24, at 376–77. *See also, e.g.*, Circuit City Stores v. Adams, 532 U.S. 105, 120 (2001) ("We ought not attribute to Congress an official purpose based on the motives of a particular group that lobbied for or against a certain proposal . . . .").

[448] Kavanaugh, *supra* note 131, at 2149. *See also, e.g.*, Conroy v. Aniskoff, 507 U.S. 511, 519–20 (1993) (Scalia, J., concurring) (arguing legislative history is indeterminate).

[449] Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983).

[450] *See, e.g.*, Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005); *see also, e.g.*, Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 78 (2012) (arguing courts must view legislative history with a better understanding of congressional procedures). *Cf.* KATZMANN, supra note 111, at 46 (noting that in response to textualist critiques of legislative history, judges "tend to give it more of a supporting rather than a leading role in statutory interpretation"); Gluck & Posner, *supra* note 169, at 1326 (noting that none of the judges in their survey use legislative history "indiscriminately").

[451] *See, e.g.*, NLRB v. SW Gen., Inc., 137 S. Ct. 929, 942–43 (2017).

[452] *See, e.g.*, Wyeth v. Levine, 555 U.S. 555, 566–68 (2009) (looking to legislative history to determine whether Congress intended to overcome presumption embodied in substantive canon); Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co., 547 U.S. 651, 658–59 (2006) (looking to legislative history, including drafting history and committee reports, to determine the purpose of the disputed provision, and reviewing this purpose in light of the statutory context).

[453] *See, e.g.*, Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395–96 (1951) (Jackson, J., concurring) ("Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared. . . . [T]o select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions.").

[454] Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 782 (2018) (Sotomayor, J., concurring). *See also* George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39, 43 (1990) (noting committee reports are "ordinarily . . . considered the most reliable and persuasive element of legislative history" by the Supreme Court).

debates are a weaker form of legislative history because they "reflect at best the understanding of individual Congressmen."[455]

One group of legal scholars created a hierarchy of legislative history derived from federal case law, shown in **Figure 1**.[456] One 2020 article provided some empirical insight into legislative history hierarchy by conducting interviews with 30 congressional staffers.[457] That study suggested courts should view legislative history, "in order of decreasing reliability, as follows: (1) [c]ommittee reports; (2) [a]ll statements by a Chair or Ranking Member of a committee or subcommittee on a topic within committee or subcommittee jurisdiction; (3) [o]ther markup and hearing statements; (4) [o]ther floor statements."[458]

Figure 1. Hierarchy of Legislative History

Source: ESKRIDGE ET AL., *supra* note 40, at 317.

The preceding discussion does not account for a special form of legislative history—a history of amendment. Courts will generally accord significant weight to Congress's *changes* to a prior statute in a subsequent statute.[459] Like the other forms of legislative history discussed in this report, legislative action amending a statute provides a record of congressional deliberation prior to the enactment of the disputed statute.[460] However, unlike the other forms of legislative history, a prior version of a statute is itself formally enacted, and to many, therefore provides stronger evidence of a statute's evolution. The Supreme Court has said, "When Congress acts to amend a statute, we presume it intends its amendment to

[455] Zuber v. Allen, 396 U.S. 168, 186 (1969) ("A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation. Floor debates reflect at best the understanding of individual Congressmen. It would take extensive and thoughtful debate to detract from the plain thrust of a committee report in this instance."). *See also, e.g.*, Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2364 (2019) (describing witness statements from congressional hearings on a different bill as particularly unhelpful, especially given that the statements contradicted official committee reports).

[456] ESKRIDGE ET AL., *supra* note 40, at 317. *See also* KATZMANN, supra note 111, at 54 (arguing "conference committee reports and committee reports" should be considered most authoritative, "followed by statements of the bill's managers in the Congressional Record, with stray statements of legislators on the floor—who had heretofore not been involved in consideration of the bill—at the bottom").

[457] Cross, *supra* note 205, at 95.

[458] *Id.* at 97.

[459] *See, e.g.*, Lomax v. Ortiz-Marquez, 140 S. Ct. 1721, 1726–27 (2020) (concluding that the purpose of a law was to go beyond existing provisions regulating the same topic, and rejecting an interpretation that would have made the new law coextensive with prior coverage); United States v. Brown, 333 U.S. 18, 25 (1948) (concluding amendment of disputed provision "was intended . . . to broaden the Act's coverage or to assure its broad coverage").

[460] *See supra* note 408 and accompanying text.

have real and substantial effect."[461] As a result, a statute's amendment history can even overcome other evidence of statutory meaning.[462]

Statutory Implementation

Finally, courts frequently investigate how a statute actually works, asking what problem Congress sought to address by enacting the disputed provision, and how Congress went about doing that.[463] As a result, courts have assessed whether the consequences of an asserted interpretation align with the statutory scheme.[464] A focus on practical consequences is, at least academically, sometimes aligned with the so-called dynamic theories of interpretation and, when viewed as such, is generally disfavored.[465] Nonetheless, scholars have maintained that "practical considerations play an important role in the [Supreme] Court's statutory cases,"[466] as discussed in more detail below. Further, judges may look to the consequences of a particular meaning as part of a broader inquiry that primarily focuses on the text.[467] Courts sometimes look for evidence of practical consequences in materials from the agencies that are charged with implementing the disputed statute, but they also rely on their own understandings of how the statute works.

Agency Interpretations

Administrative agencies are frequently the first official interpreters of statutes: in the course of implementing a statutory scheme, interpretive questions arise and must be resolved in order for the agency to do its work. When courts interpret a statute, they sometimes consider these agency interpretations, whether the agency's views are asserted through administrative rulings or a

[461] Stone v. INS, 514 U.S. 386, 397 (1995). *See also, e.g.*, Ross v. Blake, 578 U.S. 632, 640–41 (2016) (concluding mandatory nature of disputed provision was affirmed by its history, where it replaced a weaker precursor). In comparison, one Supreme Court opinion described as "noteworthy" a Senate vote approving a joint resolution that, if enacted into law, would have disapproved a particular agency interpretation of the disputed statute. Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 666 (2022).

[462] *See, e.g.*, Pierce Cty. v. Guillen, 537 U.S. 129, 145 (2003) (concluding substantive canon should not apply because the reading effectuating that canon "would render the 1995 amendment to [the disputed provision] . . . an exercise in futility").

[463] *See, e.g.*, Nixon v. Mo. Mun. League, 541 U.S. 125, 132–33 (2004) ("[C]oncentration on the writing on the page does not produce a persuasive answer here. . . . [I]n this litigation it helps if we ask how Congress could have envisioned the preemption clause actually working if the FCC applied it at the municipal respondents' urging.").

[464] *See, e.g.*, Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 389 (1951) (rejecting interpretation under which "the exception swallows the proviso and destroys its practical effectiveness").

[465] *See supra* notes 89 to 94 and accompanying text (discussing dynamic theories of interpretation). *See also, e.g.*, BP p.l.c. v. Mayor of Baltimore, 141 S. Ct. 1532, 1542 (2021) ("[T]his Court's task is to discern and apply the law's plain meaning as faithfully as we can, not 'to assess the consequences of each approach and adopt the one that produces the least mischief.'" (quoting Lewis v. Chicago, 560 U.S. 205, 217 (2010))).

[466] Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1107 (1992). This finding was confirmed in more recent empirical studies of Supreme Court cases. *See* Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era*, *supra* note 216, at 225–26 (suggesting there are two camps of Justices that use practical consequences in distinct ways); Krishnakumar, *Reconsidering Substantive Canons*, *supra* note 199, at 887 (noting empirical evidence that the Supreme Court frequently uses practical consequences to interpret statutes).

[467] *See, e.g.*, RJR Nabisco, Inc. v. European Cmty., 579 U.S. 325, 344 (2016) ("The practical problems we have identified with [the defendant's reading of the statute] are not, by themselves, cause to reject it. Our point in reciting these troubling consequences of [the defendant's] theory is simply to reinforce our conclusion, based on [the disputed statute's] text and context . . . .").

pattern of action.[468] A judge might cite an agency's unofficial but public interpretation of a statutory term to support other evidence justifying a particular interpretation.[469] Or a judge might use evidence of the way an administrative agency has implemented a statute to gain a sense of the problem that Congress sought to address and how the statutory scheme generally works to address that problem.[470]

This use of an agency's interpretation of a statute is distinct from the special weight, called *Chevron* deference, that a court will sometimes give to an agency interpretation.[471] *Chevron* deference generally applies when a court is reviewing an agency's official interpretation of a statute that the agency is charged with administering.[472] In such a situation, if a statute is silent or ambiguous with respect to the specific issue being litigated, then *Chevron* instructs a court to give the agency's construction controlling weight, so long as it is reasonable.[473] Even outside the context of *Chevron* deference, though, when a court is determining for itself the best reading of the statute, it will still consider an agency's interpretation.[474] Courts may view the agency's interpretation as evidence that the statute can bear a particular meaning, similar to a dictionary definition.[475]

Two legal scholars suggested that "popular" constructions of a statute, especially those embodied in the actions of those entities implementing that law, should be entitled to some special weight.[476] According to them, evidence of how a law has been implemented does not show merely "peoples' understanding of the [disputed] term . . . in the abstract," as a dictionary would, but gives "evidence of the understanding upon which people had *acted*," and sometimes the ways in which people have acted against their own interests.[477] In this sense, they contend that interpreters should give special weight to "action by the primary addressees who were required by the very nature of the arrangement to make the initial decisions under it."[478] This view accords with one of the central justifications given for deferring to agency interpretations under *Chevron*: courts should give special weight to agency constructions of statutes that they administer because

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[468] *See, e.g.*, FCC v. Am. Broad. Co., 347 U.S. 284, 294–95 (1954).

[469] *See, e.g., id.*; S.D. Warren Co. v. Me. Bd. of Envtl Prot., 547 U.S. 370, 377 (2006) (citing the EPA's Water Quality Standards Handbook). *Cf.* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 65–66 (2006) (considering potentially contradictory statements of EEOC).

[470] *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 144–46 (2000). *Cf., e.g.*, Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 90–91 (2007) (noting Congress adopted language originally drafted by the Secretary of Education without amendment or comment, and viewing this as evidence Congress did not intend to disturb the agency's interpretation of the relevant language).

[471] *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842–43 (1984). For more on *Chevron* deference, see CRS Report R44954, *Chevron Deference: A Primer*, by Valerie C. Brannon and Jared P. Cole.

[472] *See Chevron*, 467 U.S. at 842–43.

[473] *See id.* at 844.

[474] *See, e.g., S.D. Warren Co.*, 547 U.S. at 377–78 (considering agency's interpretation as evidence of statutory term's meaning even though the particular "expressions of agency understanding do not command deference").

[475] *E.g., id.* at 378 ("[T]he administrative usage of 'discharge' in this way confirms our understanding of the everyday sense of the term."); HART & SACKS, *supra* note 17, at 1270 ("Such action, manifestly, is especially cogent evidence that the words of the statute would bear the meaning which the action necessarily attributed to them.").

[476] *See* HART & SACKS, *supra* note 17, at 1270.

[477] *See id.* at 1269.

[478] *See id.* at 1270. *See also, e.g.*, NLRB v. SW Gen., Inc., 137 S. Ct. 929, 953–54 (2017) (Sotomayor, J., dissenting) (considering as evidence the practices of executive branch prior to and following the enactment of the disputed statutory text). *Cf.* Bd. of Trs. of the Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc., 563 U.S. 776, 793 (2011) (noting the "common practice" of "parties operating under the act").

they have special expertise in that subject area, and because Congress itself, by charging the agency with implementation authority, has said that the agency has a special role in interpreting the statute.[479] Notwithstanding these considerations, however, judges regularly reject agency interpretations if they are contrary to the text of the statute or other strong evidence of the statute's meaning.[480]

Practical Consequences

Judges may also rely on their own understandings of how a statute should be implemented to interpret the statute's meaning. Even textualists, who generally protest the use of consequentialist reasoning, do regularly invoke policy consequences to evaluate the validity of a proffered interpretation.[481] If a court believes that the practical consequences of a particular interpretation would undermine the purposes of the statute, the court may reject that reading even if it is the one that seems most consistent with the statutory text.[482] Similarly, judges will refer to concerns of administrability when interpreting statutes.[483] Judges may also rely on policy considerations to limit the reach of a statute, if one possible construction would seem to expand the government's authority beyond what the judge believes to be reasonable.[484]

In one prominent example, the Supreme Court concluded in *King v. Burwell* that "the context and structure of the [Patient Protection and Affordable Care] Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase."[485] The disputed statute provided that the availability of certain tax credits rested in part on whether a taxpayer had "enrolled in an insurance plan through 'an Exchange *established by the State*.'"[486] At issue was whether these tax credits were "available in States that have a Federal Exchange rather than a State Exchange."[487] The Court acknowledged that based solely on this statutory text, "it might

[479] *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843–44, 865 (1984).

[480] *See, e.g.*, *SW Gen., Inc.*, 137 S. Ct at 943 (majority opinion) (rejecting as insubstantial evidence of executive branch's "post-enactment practice" under statute); Freeman v. Quicken Loans, Inc., 566 U.S. 624, 629–30 (2012) (noting that an agency had authority to interpret statute but rejecting its interpretation as "manifestly inconsistent with the statute [that the agency] purported to construe").

[481] *See, e.g.*, Krishnakumar, *Reconsidering Substantive Canons*, supra note 199, at 886–87 (noting that Justices Scalia and Thomas referenced practical consequences in a number of their opinions). *See also, e.g.*, Van Buren v. United States, 141 S. Ct. 1648, 1659–60 (2021) (Barrett, J.) (looking to the "design" of a statute and concluding a particular reading was "ill fitted" to its operation); Artis v. District of Columbia, 138 S. Ct. 594, 612 (2018) (Gorsuch, J., dissenting) (pointing out "some examples of the absurdities that follow" from the majority's reading).

[482] *See, e.g.*, King v. Burwell, 576 U.S. 473, 488 (2015). Courts sometimes describe this as seeking to avoid absurd results. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 429 (1998) ("Acceptance of the Government's new-found reading of [the disputed statute] 'would produce an absurd and unjust result which Congress could not have intended.'") (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 574 (1982)); *see generally* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003) ("Despite the absurdity doctrine's deep roots, recent intellectual and judicial developments have undermined the doctrine's strong intentionalist foundations.").

[483] *See, e.g.*, Robers v. United States, 572 U.S. 639, 644 (2014).

[484] *See, e.g.*, *Van Buren*, 141 S. Ct. at 1661 (concluding that the "fallout" from reading a criminal law to encompass "a breathtaking amount of commonplace . . . activity" supported a narrower textual interpretation); Rapanos v. United States, 547 U.S. 715, 721–22 (2006) (plurality opinion) (discussing the consequences stemming from the agency's reading of the law). *Cf.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

[485] *King*, 576 U.S. at 497.

[486] *Id.* at 483 (quoting 26 U.S.C. § 36B(b)-(c)).

[487] *Id.*

seem that a Federal Exchange cannot fulfill [the] requirement" of being "established by the State."[488] Based on the statutory context and the "broader structure of the Act," however, the Court concluded that a strict textualist approach to interpreting the statute was not the best reading of the statute.[489] The Court reviewed the reforms that the Act aimed to achieve and considered how the exchanges would actually operate under this plain-text reading.[490] The Court expressed that a reading that would deny tax credits to most individuals "could well push a State's individual insurance market into a death spiral."[491] Ultimately, the Court decided that it was "implausible that Congress meant the Act to operate in this manner."[492]

Justice Scalia authored the dissent in *King*, arguing that it was "quite absurd" to read "Exchange established by the State" to mean "Exchange established by the State or the Federal Government."[493] Arguing that "[w]ords no longer have meaning if an Exchange that is *not* established by a State is 'established by the State,'"[494] the dissent described the majority opinion as "rewriting the law under the pretense of interpreting it."[495] The majority opinion itself recognized that "[r]eliance 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.'"[496] In the dispute before it, on the other hand, the Court argued such reliance was warranted "to avoid the type of calamitous result that Congress plainly meant to avoid."[497] The Court concluded by asserting that it was required to "respect the role of the Legislature, and take care not to undo what it has done."[498]

While *King*'s discussion of an interpretation's practical consequences was quite obvious,[499] courts may also consider the policy consequences of a particular interpretation in more subtle ways. Courts frequently will discuss pragmatic concerns in the context of a discussion of another interpretive tool.[500] Many of the substantive canons, for instance, explicitly favor certain policy outcomes, inviting judges to choose the reading that comports with that outcome.[501]

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[488] *Id.* at 487.

[489] *Id.* at 492.

[490] *Id.* at 492–93.

[491] *Id.* at 492.

[492] *Id.* at 494.

[493] *Id.* at 498 (Scalia, J., dissenting) (internal quotation marks omitted).

[494] *Id.* at 500.

[495] *Id.* at 516.

[496] *Id.* at 497–98 (majority opinion) (quoting Palmer v. Massachusetts, 308 U.S. 79, 83 (1939)).

[497] *Id.* at 498. *See also id.* ("Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter.").

[498] *Id.*

[499] *See id.*

[500] *See, e.g.*, Zeppos, *supra* note 466, at 1108 (arguing empirical studies likely "undercount the role such consequentialist concerns play in the Court's decisionmaking process" because "practical considerations are masked by the invocation of more formal sources of authority").

[501] *See supra* notes 329 to 331 and accompanying text.

Conclusion

When Congress understands how courts interpret statutes, it can draft according to the prevailing interpretive conventions.[502] Because courts act as the arbiters of statutory meaning and necessarily shape the way a statute is implemented, Congress may be able to eliminate at least some misunderstandings by legislating with judges in mind.[503] Understanding the theories and tools that govern judicial statutory interpretation may be especially beneficial as some scholars turn their attention to actual legislative processes and legislative drafting practices. A continued dialogue between the courts and Congress can help ensure that, in Justice Thomas's phrase, Congress successfully "says in a statute what it means and means in a statute what it says."[504]

[502] *See, e.g.*, Manning, *Inside Congress's Mind*, *supra* note 31, at 1932–33 (2015) (noting importance to textualists of creating stable background rules against which Congress may legislate). *See also, e.g.*, *Project on Statutory Construction Promotes Inter-Branch Communications*, U.S. COURTS (Sept. 10, 2015), http://www.uscourts.gov/news/2015/09/10/project-statutory-construction-promotes-inter-branch-communications (discussing project through which federal appellate courts send Congress "opinions that note possible technical problems in statutes," using them as "teaching tools" for legislative drafters).

[503] *See, e.g.*, KATZMANN, *supra* note 111, at 92–93.

[504] Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992). This phrase has been repeated in a number of Supreme Court opinions by a variety of Justices. *See, e.g.*, Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718, 1725 (2017) (Gorsuch, J.); Simmons v. Himmelreich, 578 U.S. 621, 627 (2016) (Sotomayor, J.).

Appendix. Canons of Construction

This appendix draws from two different works to present an exemplary list of the canons of construction.[505] The two works take different approaches to compiling the canons, and sometimes disagree on what counts as a legitimate canon of construction.[506] In their book *Reading Law: The Interpretation of Legal Texts*, Justice Antonin Scalia and Bryan Garner[507] took an "unapologetically normative" approach to this task, collecting only those canons that they deemed valid under their approach to textualism.[508] By contrast, a casebook authored by law professor William Eskridge and others took a more descriptive approach, compiling the canons "invoked by" the Supreme Court from 1986 to 2014.[509] This appendix does not intend to favor a position in any ongoing debates about the validity of the canons, and where feasible, notes disagreement among the authors.

Some editorial choices were made in the process of combining and reproducing the authors' lists. These edits include some generalization and consolidation of canons.[510] The list also omits a number of canons that are too specific[511] or otherwise outside the scope[512] of this report, which aims to provide a general overview of how courts interpret statutes. The appendix likewise excludes canons that seem to represent substantive legal principles rather than assumptions about how to read statutes.[513]

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[505] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012); WILLIAM N. ESKRIDGE, JR., PHILLIP P. FRICKEY, ELIZABETH GARRETT, & JAMES J. BRUDNEY, CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY (5th ed. 2014). While a more recent edition of this latter source has been published since the report's author first compiled this list, the appendix containing these canons was unchanged. This report therefore continues to cite to the fifth edition.

[506] *Compare, e.g.*, SCALIA & GARNER, *supra* note 505, at 359 (describing as a "false notion" the idea that statutory exemptions should be strictly construed), *with* William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law As Equilibrium*, 108 HARV. L. REV. 26, 105 (1994) (describing as statute-based canon the "narrow interpretation of statutory exemptions").

[507] Bryan Garner's biography describes him as "noted speaker, writer, and consultant regarding legal writing and drafting;" he is the current editor-in-chief of *Black's Law Dictionary*. *Bryan Garner*, SMU Dedman School of Law, https://www.smu.edu/Law/Faculty/Profiles/Garner-Bryan-A (last visited May 18, 2022).

[508] SCALIA & GARNER, *supra* note 505, at 9.

[509] ESKRIDGE ET AL., *supra* note 505, at 1195. This list is built upon a preliminary compilation created by Eskridge and Frickey in 1994. *See* Eskridge & Frickey *supra* note 506, at 97. Professor Eskridge has acknowledged that this list does not include "all possible canons." William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 536 n.31 (2013) (reviewing SCALIA & GARNER, *supra* note 505).

[510] For example, the Eskridge & Frickey list contained a number of different canons relating to federal preemption of state law, which this list provides for with the general presumption against such preemption. *See* ESKRIDGE ET AL., *supra* note 505, at 1205–07; *infra* note 586 and accompanying text.

[511] *See, e.g.*, ESKRIDGE ET AL., *supra* note 505, at 1212–15 (discussing canons applicable to statutes governing a wide variety of specific issue areas). For example, this appendix excludes a canon of patent law that creates a presumption that "abstract ideas and laws of nature are not patentable." *Id.* at 1214.

[512] *See, e.g.*, *id.* at 1199–1200 (discussing "canons" that apply when courts review agency interpretations of statutes). *See also* SCALIA & GARNER, *supra* note 505, at 53 (outlining the "interpretation principle" that "[e]very application of a text to particular circumstances entails interpretation").

[513] For example, the Eskridge casebook describes a "[s]uper-strong rule against congressional interference with President's inherent powers, his executive authority." ESKRIDGE ET AL., *supra* note 505, at 1204. Arguably, the cases cited in support of this rule do establish such a principle, but do not describe this rule as a presumption about how to generally read statutes. *See, e.g.*, Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988). *Cf.* Morrison v. Olson, 487 U.S. 654, 682 (1988) (invoking canon of constitutional avoidance to narrowly construe statute to avoid infringing President's removal powers).

This appendix names and briefly describes each canon, citing either or both of the two lists and applicable cases as appropriate. In many cases, the canon includes both the general rule and any relevant exceptions, in accord with the modern understanding that the application of a canon is highly context-dependent.[514] The list distinguishes semantic canons from substantive canons, but does not further group the canons.[515] The canons are listed in alphabetical order.

Semantic Canons

1. "**Artificial-Person Canon**":[516] "The word person includes corporations and other entities, but not the sovereign."[517]
2. ***Casus Omissus***: A matter not covered by a statute should be treated as intentionally omitted (*casus omissus pro omisso habendus est*).[518]
3. "**Conjunctive/Disjunctive Canon**":[519] "And" usually "joins a conjunctive list," combining items, while "or" usually joins "a disjunctive list," denoting alternatives.[520]
4. ***Ejusdem Generis***: A general term that follows an enumerated list of more specific terms should be interpreted to cover only "matters similar to those specified."[521]
5. ***Expresio Unius***: "The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)."[522] This canon is strongest "when the items expressed are members of an 'associated group or series,' justifying the

[514] *See* discussion *supra*, "Justifications: Disrepute, Rehabilitation, and Empirical Studies." *See also* SCALIA & GARNER, *supra* note 505, at 59 (outlining the "principle of interrelating canons," stating that "[n]o canon of interpretation is absolute").

[515] Both lists from which this appendix is drawn do draw further distinctions, but such groupings require more discussion and justification than would arguably be helpful here.

[516] SCALIA & GARNER, *supra* note 505, at 273 (emphasis added).

[517] *Id. See also* ESKRIDGE ET AL., *supra* note 505, at 1196 (noting Dictionary Act, 1 U.S.C. § 1, supplies default statutory definitions). *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 707–08 (2014) (adopting Dictionary Act's definition of "person" to conclude corporations were covered by disputed statute); Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 780 (2000) (applying the "longstanding interpretive presumption that 'person' does not include the sovereign").

[518] SCALIA & GARNER, *supra* note 505, at 93; State v. I.C.S., 145 So. 3d 350, 355 (La. 2014) ("We recognize the canon *casus omissus pro omisso habendus est*, which means that a case omitted is to be held as intentionally omitted."). *See also, e.g.*, Ebert v. Poston, 266 U.S. 548, 554 (1925) ("A *casus omissus* does not justify judicial legislation. This Act is so carefully drawn as to leave little room for conjecture." (citation omitted)). *Cf.* ESKRIDGE ET AL., *supra* note 505, at 1198 ("Avoid the implication of broad congressional delegation of agency authority when statute carefully limits agency authority in particular matters.").

[519] SCALIA & GARNER, *supra* note 505, at 116 (emphasis added).

[520] *Id. See also* ESKRIDGE ET AL., *supra* note 505, at 1197. *See, e.g.*, City of Rome v. United States, 446 U.S. 156, 172 (1980) ("By describing the elements of discriminatory purpose and effect in the conjunctive [by using "and"], Congress plainly intended that a voting practice not be precleared unless *both* discriminatory purpose and effect are absent."); United States v. Woods, 571 U.S. 31, 45 (2013) ("[T]he operative terms are connected by the conjunction 'or.' . . . [That term's] ordinary use is almost always disjunctive, that is, the words it connects are to 'be given separate meanings.'" (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979))). *But cf.* SCALIA & GARNER, *supra* note 505, at 116–25 (discussing nuances introduced by the use of "negatives, plurals, and various specific wordings").

[521] Gooch v. United States, 297 U.S. 124, 128 (1936). *Accord* Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 586 (2008) ("Under that rule [of *ejusdem generis*], when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows."). *See also* SCALIA & GARNER, *supra* note 505, at 199; ESKRIDGE ET AL., *supra* note 505, at 1195.

[522] SCALIA & GARNER, *supra* note 505, at 107. *See also* ESKRIDGE ET AL., *supra* note 505, at 1195. *See, e.g.*, Lindh v. Murphy, 521 U.S. 320, 330 (1997) (describing "negative implications raised by disparate provisions").

inference that items not mentioned were excluded by deliberate choice, not inadvertence."[523]

6. "**Gender/Number Canon**":[524] Usually, "the masculine includes the feminine (and vice versa) and the singular includes the plural (and vice versa)."[525]
7. "**General/Specific Canon**":[526] Where two laws conflict, "the specific governs the general (*generalia specialibus non derogant*)."[527] That is, "a precisely drawn, detailed statute pre-empts more general remedies,"[528] and conversely, "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum."[529]
8. "**General-Terms Canon**":[530] "General terms are to be given their general meaning (*generalia verba sunt generaliter intelligenda*)."[531]
9. **Grammar Canon**: Statutes "follow accepted standards of grammar."[532]
10. "**Harmonious-Reading Canon**":[533] "The provisions of a text should be interpreted in a way that renders them compatible, not contradictory."[534]

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[523] Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003) (quoting United States v. Vonn, 535 U.S. 55, 65 (2002)).

[524] SCALIA & GARNER, *supra* note 505, at 129 (emphasis added).

[525] *Id. See also* ESKRIDGE ET AL., *supra* note 505, at 1196 (noting Dictionary Act, 1 U.S.C. § 1, supplies default statutory definitions). *See, e.g.*, United States v. Hayes, 555 U.S. 415, 432 (2009) (Roberts, C.J., dissenting) (arguing singular statutory term should be read to encompass the plural, by reference to the Dictionary Act and semantic context); *but see, e.g.*, Niz-Chavez v. Garland, 141 S. Ct. 1474, 1480 (2021) (emphasizing the use of "the singular article 'a'" to conclude that the statute referred to a singular term).

[526] SCALIA & GARNER, *supra* note 505, at 183 (emphasis added).

[527] Nitro-Lift Techs., L.L.C. v. Howard, 568 U.S. 17, 21 (2012). *See also* ESKRIDGE ET AL., *supra* note 505, at 1199 ("Specific provisions targeting a particular issue apply instead of provisions more generally covering the issue."); SCALIA & GARNER, *supra* note 505, at 183 ("If there is a conflict between a general provision and a specific provision, the specific provision prevails (*generalia specialibus non derogant*).").

[528] Brown v. Gen. Servs. Admin., 425 U.S. 820, 834 (1976). *See also* ESKRIDGE ET AL., *supra* note 505, at 1210.

[529] Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976). But as the authors point out in *Reading Law*, it can be "difficult to determine whether a provision is a general or a specific one." SCALIA & GARNER, *supra* note 505, at 187–88 (discussing *Radzanower*).

[530] SCALIA & GARNER, *supra* note 505, at 101 (emphasis added).

[531] *Id. See, e.g.*, Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 131 (2002) (giving unqualified statutory term broad meaning). *See also* Arizona v. Tohono O'odham Nation, 818 F.3d 549, 557 (9th Cir. 2016) ("[A] word or phrase is not ambiguous just because it has a broad general meaning under the *generalia verba sunt generaliter intelligenda* canon of statutory construction.").

[532] ESKRIDGE ET AL., *supra* note 505, at 1197. *See also* SCALIA & GARNER, *supra* note 505, at 140. *See, e.g.*, Niz-Chavez v. Garland, 141 S. Ct. 1474, 1481 (2021) (discussing the use of definite versus indefinite articles); Carr v. United States, 560 U.S. 438, 448 (2010) ("Consistent with normal usage, we have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach."). *Cf.* Nielsen v. Preap, 139 S. Ct. 954, 964–65 (2019) (noting that "an adverb cannot modify a noun," but saying this rule of grammar is not dispositive and "merely complements" a reading based on statutory context).

[533] SCALIA & GARNER, *supra* note 505, at 180 (emphasis added).

[534] *Id. See also* ESKRIDGE ET AL., *supra* note 505, at 1198 ("Avoid interpreting a provision in a way that is inconsistent with the overall structure of the statute or with another provision or with a subsequent amendment to the statute or with another statute enacted by a Congress relying on a particular interpretation." (citations omitted)). *See, e.g.*, Lindh v. Murphy, 521 U.S. 320, 336 (1997) (favoring reading that "accords more coherence" to the disputed statutory provisions).

11. "**Irreconcilability Canon**":[535] "If a text contains truly irreconcilable provisions at the same level of generality, and they have been simultaneously adopted, neither provision should be given effect."[536]
12. **Legislative History Canons**:[537] "[C]lear evidence of congressional intent" gathered from legislative history "may illuminate ambiguous text."[538] The most "authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill."[539] Floor statements, especially those made by a bill's sponsors prior to its passage, may be relevant,[540] but should be used cautiously.[541] "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."[542]
13. "**Mandatory/Permissive Canon**":[543] "Shall" is usually mandatory and imposes a duty; "may" usually grants discretion.[544]
14. "**Nearest-Reasonable-Referent Canon**":[545] "When the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent."[546]
15. ***Noscitur a Sociis***: "Associated words bear on one another's meaning . . . ."[547]

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[535] SCALIA & GARNER, *supra* note 505, at 189 (emphasis added).

[536] *Id.*

[537] The authors of *Reading Law* disagree with the use of legislative history to discover statutory purpose and describe the idea "that committee reports and floor speeches are worthwhile aids in statutory construction" as a "false notion." SCALIA & GARNER, *supra* note 505, at 367.

[538] Milner v. Dep't of the Navy, 562 U.S. 562, 572 (2011). *See also* ESKRIDGE ET AL., *supra* note 505, at 1202 ("Consider legislative history (the internal evolution of a statute before enactment) if the statute is ambiguous.").

[539] Garcia v. United States, 469 U.S. 70, 76 (1984). *See also* ESKRIDGE ET AL., *supra* note 505, at 1202 ("Committee reports (especially conference committee reports reflecting the understanding of both House and Senate) are the most authoritative legislative history, but cannot trump a textual plain meaning, and should not be relied on if they are themselves ambiguous or imprecise." (citations omitted)); *id.* at 1203 ("Committee report language that cannot be tied to a specific statutory provision cannot be credited. House and Senate reports inconsistent with one another should be discounted." (citations omitted)).

[540] *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 580 n.10 (2006). *See also* ESKRIDGE ET AL., *supra* note 505, at 1203.

[541] *See, e.g.*, *Garcia*, 469 U.S. at 76 ("We have eschewed reliance on the passing comments of one Member, and casual statements from the floor debates." (citation omitted)). *See also* ESKRIDGE ET AL., *supra* note 505, at 1203. *Cf.* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 599 (2004) ("Even from a sponsor, a single outlying statement cannot stand against a tide of context and history, not to mention 30 years of judicial interpretation producing no apparent legislative qualms.").

[542] Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 117 (1980) (quoting United States v. Price, 361 U.S. 304, 313 (1960)). *See also* ESKRIDGE ET AL., *supra* note 505, at 1203.

[543] SCALIA & GARNER, *supra* note 505, at 112 (emphasis added).

[544] *Id.*; ESKRIDGE ET AL., *supra* note 505, at 1197. *See, e.g.*, Kingdomware Techs., Inc. v. United States, 579 U.S. 162, 171 (2016) ("Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement."). *But see, e.g.*, SCALIA & GARNER, *supra* note 505, at 113–14 (noting controversy over whether "shall" is mandatory). Scalia and Garner describe the first half of this canon as "mandatory words impose a duty," without specifically naming "shall" in the rule itself. SCALIA & GARNER, *supra* note 505, at 112.

[545] SCALIA & GARNER, *supra* note 505, at 152 (emphasis added).

[546] *Id. See, e.g.*, Ray v. McCullough Payne & Haan, L.L.C., 838 F.3d 1107, 1111 (11th Cir. 2016).

[547] SCALIA & GARNER, *supra* note 505, at 195. *See also* ESKRIDGE ET AL., *supra* note 505, at 1195. *See, e.g.*, United States v. Williams, 553 U.S. 285, 294 (2008) ("[T]he commonsense canon of *noscitur a sociis* . . . counsels that a word is given more precise content by the neighboring words with which it is associated."); Beecham v. United States, 511 U.S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well."). *Cf.* S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 547 U.S. 370, 379–80 (2006)

16. **Ordinary Meaning Canon**: Words should be given "their ordinary, everyday meanings,"[548] unless "Congress has provided a specific definition"[549] or "the context indicates that they bear a technical sense."[550]
17. **Plain Meaning Rule and Absurdity Doctrine**: "Follow the plain meaning of the statutory text, except when a textual plain meaning requires an absurd result or suggests a scrivener's error."[551]
18. "**Predicate-Act Canon**":[552] "The law has long recognized that the '[a]uthorization of an act also authorizes a necessary predicate act.'"[553]
19. "**Prefatory-Materials**"[554] **and** "**Titles-and-Headings**"[555] **Canons**: Preambles, purpose clauses, recitals, titles, and headings are all "permissible indicators of meaning,"[556] though they generally will not be dispositive.[557]

("[*N*]*oscitur a sociis* is no help absent some sort of gathering with a common feature to extrapolate.").

[548] SCALIA & GARNER, *supra* note 505, at 69. *See also* ESKRIDGE ET AL., *supra* note 505, at 1196. *See, e.g.*, Perrin. v. United States, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."). *See also* SCALIA & GARNER, *supra* note 505, at 78 ("Words must be given the meaning they had when the text was adopted"); *Perrin*, 444 U.S. at 42 ("[W]e look to the ordinary meaning of the term . . . at the time Congress enacted the statute . . . .").

[549] ESKRIDGE ET AL., *supra* note 505, at 1196. *See also* SCALIA & GARNER, *supra* note 505, at 225. *See, e.g.*, Nat'l Steel Car, Ltd. v. Canadian Pac. Ry., Ltd., 357 F.3d 1319, 1328 (Fed. Cir. 2004) (noting that although "in some instances there may be ambiguity" regarding whether the statute covered a single rail container, there was no ambiguity in that case, given that "Congress has defined 'vehicle' with sufficient breadth to include an individual rail car").

[550] SCALIA & GARNER, *supra* note 505, at 69. *See also* ESKRIDGE ET AL., *supra* note 505, at 1196. *See, e.g.*, Gustafson v. Alloyd Co., 513 U.S. 561, 576 (1995) (holding statutory word "is a term of art"); *cf., e.g.*, Rimini St., Inc. v. Oracle USA, Inc., 139 S. Ct. 873, 879–80 (2019) (rejecting argument that statutory phrase is term of art).

[551] ESKRIDGE ET AL., *supra* note 505, at 1195 (citations omitted). *See also* SCALIA & GARNER, *supra* note 505, at 56 ("supremacy-of-text principle"); *id.* at 234 (absurdity doctrine). *See, e.g.*, Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."); Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 454 (1989) ("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." (quoting Green v. Bock Laundry Machine Co., 490 U.S. 504, 509 (1989))); U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 462 (1993) ("[W]e are convinced that the placement of the quotation marks in the 1916 Act was a simple scrivener's error, a mistake made by someone unfamiliar with the law's object and design. . . . The true meaning of the 1916 Act is clear beyond question, and so we repunctuate."); *cf., e.g.*, Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 565 (2005) (noting that a result may be "odd" but not "absurd").

[552] SCALIA & GARNER, *supra* note 505, at 192 (emphasis added).

[553] Luis v. United States, 578 U.S. 5, 26 (2016) (Thomas, J., concurring) (alteration in original) (quoting SCALIA & GARNER, *supra* note 505, at 192). *See also, e.g.*, State *ex rel.* Brown v. Klein, 22 S.W. 693, 695 (Mo. 1893) ("[W]henever a power is given by a statute, everything necessary to the making of it effectual or requisite to attain the end is implied. *Quando lex aliquid concedit concedere videtur et id, per quod devenitur ad illud*.").

[554] SCALIA & GARNER, *supra* note 505, at 217 (emphasis added).

[555] *Id.* at 221 (emphasis added).

[556] *Id.* at 217, 221. *See also* ESKRIDGE ET AL., *supra* note 505, at 1197. *See, e.g.*, S.D. Warren Co. v. Me. Bd. Of Envtl. Prot., 547 U.S. 370, 385 (2006) (relying on congressional declarations of policy); Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998) ("'[T]he title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute." (quoting Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co., 331 U.S. 519, 529 (1947))).

[557] *See, e.g.*, Yates v. United States, 574 U.S. 528, 552 (2015) (Alito, J., concurring) ("Titles, of course, are . . . not dispositive."); *Bhd. of R.R. Trainmen*, 331 U.S. at 528 ("[H]eadings and titles are not meant to take the place of the detailed provisions of the text.").

20. **Presumption of Consistent Usage**: "Generally, identical words used in different parts of the same statute are . . . presumed to have the same meaning."[558] Conversely, "a material variation in terms suggests a variation in meaning."[559]
21. "**Presumption of Nonexclusive 'Include'**":[560] "[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle."[561]
22. "**Presumption of Validity**":[562] "An interpretation that validates outweighs one that invalidates (*ut res magis valeat quam pereat*)."[563] Stated another way, courts should construe statutes to have effect.[564]
23. "**Proviso Canon**":[565] "A proviso," or "a clause that introduces a condition," traditionally by using the word "provided," "conditions the principal matter that it qualifies—almost always the matter immediately preceding."[566]
24. **Punctuation Canon**: Statutes "follow accepted punctuation standards,"[567] and "[p]unctuation is a permissible indicator of meaning."[568]
25. **Purposive Construction**: "[I]nterpret ambiguous statutes so as best to carry out their statutory purposes."[569]

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[558] Robers v. United States, 572 U.S. 639, 643 (2014) (quoting Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 86 (2006)) (internal quotation marks omitted); *see also, e.g.*, Cochise Consultancy, Inc. v. United States *ex rel.* Hunt, 139 S. Ct. 1507, 1512 (2019) ("In all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning."). *See also* ESKRIDGE ET AL., *supra* note 505, at 1198 ("presumption of statutory consistency"); SCALIA & GARNER, *supra* note 505, at 170 ("presumption of consistent usage").

[559] SCALIA & GARNER, *supra* note 505, at 170. *See also* ESKRIDGE ET AL., *supra* note 505, at 1198 ("presumption of meaningful variation"). *See, e.g.*, Russello v. United States, 464 U.S. 16, 23 (1983) ("[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)) (internal quotation marks omitted)).

[560] SCALIA & GARNER, *supra* note 505, at 132 (emphasis added).

[561] Fed. Land Bank v. Bismarck Lumber Co., 314 U.S. 95, 100 (1941). *See also* SCALIA & GARNER, *supra* note 505, at 132 ("The verb *to include* introduces examples, not an exclusive list.").

[562] SCALIA & GARNER, *supra* note 505, at 66 (emphasis added).

[563] *Id.* at 66. *See, e.g.*, Ft. Leavenworth R. Co. v. Lowe, 114 U.S. 525, 534 (1885) (discussing approvingly United States v. Cornell, 25 F. Cas. 646, 649 (D.R.I. 1819) (No. 14,867)). This principle overlaps with the canon of constitutional avoidance. *See infra* note 583 and accompanying text; *see, e.g.*, Virginia v. Black, 538 U.S. 343, 378 (2003) (Scalia, J., dissenting) ("[A]pplying the maxim '*ut res magis valeat quam pereat*' we would do precisely the opposite of what the plurality does here—that is, we would adopt the alternative reading that renders the statute constitutional rather than unconstitutional.") (emphasis omitted).

[564] *See* Clark v. Barnard, 108 U.S. 436, 461 (1883) ("It is admitted, that if it does not mean this, it does not mean anything, and we have already said that we are not at liberty to adopt that alternative. We must construe it, ut res magis valeat quam pereat . . . ."). *See also, e.g.*, Election Cases, 65 Pa. 20, 31 (1870) (concluding that the legislature could not have intended to require something impossible, and therefore construing it not to require that).

[565] SCALIA & GARNER, *supra* note 505, at 154 (emphasis added).

[566] *Id. See, e.g.*, Pennington v. United States, 48 Ct. Cl. 408, 411, 413 (1913) (rejecting argument that proviso was "a separate and independent statute" and holding instead that, according to the general rule, it modified only "the enacting clause to which [it was] attached").

[567] ESKRIDGE ET AL., *supra* note 505, at 1196. *See, e.g.*, U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., 508 U.S. 439, 454 (1993) ("[T]he meaning of a statute will typically heed the commands of its punctuation.").

[568] SCALIA & GARNER, *supra* note 505, at 161. *See, e.g.*, Jama v. ICE, 543 U.S. 335, 344 (2005) ("Each clause is distinct and ends with a period, strongly suggesting that each may be understood completely . . . .").

[569] ESKRIDGE ET AL., *supra* note 505, at 1210. The casebook also describes a number of subject-area-specific descriptions of purpose as canons; those are excluded from this appendix. *See, e.g.*, *id.* at 1212 ("Sherman Act should

26. ***Reddendo Singula Singulis***: "[W]ords and provisions are referred to their appropriate objects . . . ."[570]
27. **Rule Against Surplusage**: Courts should "give effect, if possible, to every clause and word of a statute"[571] so that "no clause is rendered 'superfluous, void, or insignificant.'"[572]
28. **Rule of the Last Antecedent**: "[A] limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows . . . ."[573]
29. "**Scope-of-Subparts Canon**":[574] "Material within an indented subpart relates only to that subpart; material contained in unindented text relates to all the following or preceding indented subparts."[575]
30. **Series-Qualifier Canon**: "'When 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.'"[576]
31. "**Subordinating/Superordinating Canon**":[577] "Subordinating language (signaled by *subject to*) or superordinating language (signaled by *notwithstanding* or *despite*) merely shows which provision prevails in the event of a clash—but does not necessarily denote a clash of provisions."[578]

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be applied in light of its overall purpose of benefitting consumers."). *Cf.* SCALIA & GARNER, *supra* note 505, at 63 ("A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored."); *see, e.g.*, Philadelphia v. Ridge Ave. Passenger R.R. Co., 102 Pa. 190, 196 (1883) ("[T]his purpose and object of the statute, [under the proposed construction,] would be defeated; the absurdity of such a construction is therefore apparent.").

[570] Sandberg v. McDonald, 248 U.S. 185, 204 (1918). *See also* SCALIA & GARNER, *supra* note 505, at 214 ("Distributive phrasing applies each expression to its appropriate referent . . . .").

[571] Duncan v. Walker, 533 U.S. 167, 174 (2001) (quoting United States v. Menasche, 348 U.S. 528, 538–39 (1955)) (internal quotation marks omitted).

[572] Young v. UPS, 575 U.S. 206, 226 (2015) (quoting TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001)) (internal quotation mark omitted). *See also* ESKRIDGE ET AL., *supra* note 505, at 1197 ("Presumption against redundancy: avoid interpreting a provision in a way that would render other provisions of the statute superfluous or unnecessary."); SCALIA & GARNER, *supra* note 505, 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."). *But see, e.g.*, Rimini St., Inc. v. Oracle USA, Inc., 139 S. Ct. 873, 881 (2019) ("Sometimes the better overall reading of the statute contains some redundancy.").

[573] Barnhart v. Thomas, 540 U.S. 20, 26 (2003). *See also* ESKRIDGE ET AL., *supra* note 505, at 1197; SCALIA & GARNER, *supra* note 505, at 144 (defining rule as applicable to "a pronoun, relative pronoun, or demonstrative adjective" because "strictly speaking, only pronouns have antecedents").

[574] SCALIA & GARNER, *supra* note 505, at 156 (emphasis added).

[575] *Id. See, e.g.*, Jama v. ICE, 543 U.S. 335, 344 (2005) ("Each clause is distinct and ends with a period, strongly suggesting that each may be understood completely without reading any further.").

[576] Lockhart v. United States, 577 U.S. 347, 364 (2016) (Kagan, J., dissenting) (quoting SCALIA & GARNER, *supra* note 505, at 147) (internal quotation marks omitted). Scalia and Garner describe this canon as applicable to either prepositive or postpositive modifiers. SCALIA & GARNER, *supra* note 505, at 147. *See also, e.g.*, Porto Rico Ry., Light & Power Co. v. Mor, 253 U.S. 345, 348 (1920) ("When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all."); *but see, e.g.*, Yellen v. Confederated Tribes of the Chehalis Reservation, 141 S. Ct. 2434, 2448 (2021) (concluding the series-qualifier canon did not apply based on the statutory context).

[577] SCALIA & GARNER, *supra* note 505, at 126 (emphasis added).

[578] *Id.* (quoted in part in NLRB v. SW Gen., Inc., 137 S. Ct. 929, 939 (2017)). *See, e.g.*, Cisneros v. Alpine Ridge Grp., 508 U.S. 10, 18 (1993) ("[T]he use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section."); *see also* Merit

32. "**Unintelligibility Canon**":[579] "[A] statute must be capable of construction and interpretation; otherwise it will be inoperative and void."[580]
33. "**Whole-Text Canon**":[581] Courts "do not . . . construe statutory phrases in isolation; [they] read statutes as a whole."[582]

Substantive Canons

1. **Canon of Constitutional Avoidance**: "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[583]
2. "**Dog that Didn't Bark**"[584] **Presumption**: A "prior legal rule should be retained if no one in legislative deliberations even mentioned the rule or discussed any changes in the rule."[585]
3. **Federalism Canons**: Courts will generally require a clear statement before finding that a federal statute "alter[s] the federal-state balance."[586] Thus, for example,

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Mgmt. Grp., LP v. FTI Consulting, Inc., 200 L. Ed. 2d 183, 194 (2018) (stating that a notwithstanding clause indicates that a certain provision "operates as an exception" to other provisions). Courts have recognized that the breadth of a "notwithstanding" clause may be influenced by context. *See, e.g.*, *SW Gen.*, 137 S. Ct. at 940; Or. Nat. Res. Council v. Thomas, 92 F.3d 792, 796–97 (9th Cir. 1996).

[579] SCALIA & GARNER, *supra* note 505, at 134 (emphasis added).

[580] State v. Partlow, 91 N.C. 550, 553 (1884). *See also* SCALIA & GARNER, *supra* note 505, at 134 ("An unintelligible text is inoperative.").

[581] SCALIA & GARNER, *supra* note 505, at 167 (emphasis added).

[582] United States v. Morton, 467 U.S. 822, 828 (1984). *See also* ESKRIDGE ET AL., *supra* note 505, at 1197; SCALIA & GARNER, *supra* note 505, at 167. *See, e.g.*, K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."); Pennington v. Coxe, 6 U.S. (2 Cranch) 33, 52–53 (1804) ("That a law is the best expositor of itself, that every part of an act is to be taken into view, for the purpose of discovering the mind of the legislature; and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act, are among those plain rules laid down by common sense for the exposition of statutes which have been uniformly acknowledged.").

[583] Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); *cf.*, *e.g.*, Holder v. Humanitarian Law Project, 561 U.S. 1, 17 (2010) (declining to apply the canon). *See also* ESKRIDGE ET AL., *supra* note 505, at 1203–04; SCALIA & GARNER, *supra* note 505, at 247.

[584] Church of Scientology v. IRS, 484 U.S. 9, 17–18 (1987) ("All in all, we think this is a case where common sense suggests, by analogy to Sir Arthur Conan Doyle's 'dog that didn't bark,' that an amendment having the effect petitioner ascribes to it would have been differently described by its sponsor, and not nearly as readily accepted by the floor manager of the bill."). *See also* Anita S. Krishnakumar, *The Sherlock Holmes Canon*, 84 GEO. WASH. L. REV. 1, 4 (2016) (examining these "'failure to comment' arguments" as "the Sherlock Holmes canon").

[585] ESKRIDGE ET AL., *supra* note 505, at 1203. *See, e.g.*, Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 91 (2007) ("No one at the time—no Member of Congress, no Department of Education official, no school district or State—expressed the view that this statutory language . . . was intended to require, or did require, the Secretary to change the Department's system of calculation, a system that the Department and school districts across the Nation had followed for nearly 20 years . . . ."). The authors of *Reading Law* reject this canon. SCALIA & GARNER, *supra* note 505, at 387. *See also* Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 73–74 (2004) (Scalia, J., dissenting) ("I have often criticized the Court's use of legislative history because it lends itself to a kind of ventriloquism. . . . The Canon of Canine Silence that the Court invokes today introduces a reverse—and at least equally dangerous—phenomenon, under which courts may refuse to believe Congress's *own* words unless they can see the lips of others moving in unison.").

[586] ESKRIDGE ET AL., *supra* note 505, at 1205. *See also id.* at 1205–06; SCALIA & GARNER, *supra* note 505, at 290. *See, e.g.*, Bond v. United States, 572 U.S. 844, 860 (2014).

courts require Congress to speak with "unmistakeable clarity" in order to "abrogate state sovereign immunity."[587]

4. ***In Pari Materia***: "[S]tatutes addressing the same subject matter generally should be read 'as if they were one law.'"[588]
5. "***Mens Rea* Canon**":[589] Courts should "presume that a criminal statute derived from the common law carries with it the requirement of a culpable mental state—even if no such limitation appears in the text—unless it is clear that the Legislature intended to impose strict liability."[590] In the context of civil liability, "willfulness . . . cover[s] not only knowing violations of a standard, but reckless ones as well."[591]
6. **Nondelegation Doctrine**: Courts should presume that "Congress does not delegate authority without sufficient guidelines."[592]
7. "**Penalty/Illegality Canon**":[593] "[A] statute that penalizes an act makes it unlawful . . . ."[594]
8. "**Pending-Action Canon**":[595] "When statutory law is altered during the pendency of a lawsuit, the courts at every level must apply the new law unless doing so would violate the presumption against retroactivity."[596]

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[587] Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 785 (1991). *See also* ESKRIDGE ET AL., *supra* note 505, at 1209; SCALIA & GARNER, *supra* note 505, at 281.

[588] Wachovia Bank, Nat'l Ass'n v. Schmidt, 546 U.S. 303, 316 (2006) (quoting Erlenbaugh v. United States, 409 U.S. 239, 243 (1972)). *See also* ESKRIDGE ET AL., *supra* note 505, at 1201 ("*In pari materia* rule: when similar statutory provisions are found in comparable statutory schemes, interpreters should presumptively apply them the same way."); *id.* at 1210 ("*In pari materia*: similar statutes should be interpreted similarly, unless legislative history or purpose suggests material differences."); SCALIA & GARNER, *supra* note 505, at 252 ("Statutes *in pari materia* are to be interpreted together, as though they were one law."). *Cf.* Smith v. City of Jackson, 544 U.S. 228, 233 (2005) ("[W]hen 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."); ESKRIDGE ET AL., *supra* note 505, at 1201 ("Presumption that Congress uses same term consistently in different statutes."); *id.* ("Borrowed statute rule: when Congress borrows a statute, it adopts by implication interpretations placed on that statute, absent indication to the contrary.").

[589] SCALIA & GARNER, *supra* note 505, at 303 (emphasis added).

[590] *Bond*, 572 U.S. at 857. *See also* ESKRIDGE ET AL., *supra* note 505, at 1207; SCALIA & GARNER, *supra* note 505, at 303. *See also, e.g.*, United States v. U.S. Gypsum Co., 438 U.S. 422, 437–38 (1978).

[591] Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 57 (2007). *See also* ESKRIDGE ET AL., *supra* note 505, at 1207.

[592] ESKRIDGE ET AL., *supra* note 505, at 1204. *See* Mistretta v United States, 488 U.S. 361, 373 n.7 (1989) ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.").

[593] SCALIA & GARNER, *supra* note 505, at 295 (emphasis added).

[594] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 664 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). *See also* SCALIA & GARNER, *supra* note 505, at 295.

[595] SCALIA & GARNER, *supra* note 505, at 266 (emphasis added).

[596] *Id. Cf.* Bradley v. Richmond Sch. Bd., 416 U.S. 696, 711 (1974) ("[A] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."); *but see* Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 837 (1990) (noting "apparent tension" between the rule of *Bradley*, 416 U.S. at 711, and the presumption against retroactivity but declining to resolve that tension); *id.* at 841 (Scalia, J., concurring) (arguing these principles are not merely in tension but are "in irreconcilable contradiction").

9. **Presumption Against Extraterritoriality**: Courts should presume, "absent a clear statement from Congress, that federal statutes do not apply outside the United States."[597]
10. "**Presumption Against Hiding Elephants in Mouseholes**":[598] "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[599]
11. **Presumption Against Implied Repeals**: "[R]epeals by implication are not favored."[600]
12. **Presumption Against Implied Right of Action**: Courts should not imply a private remedy "unless . . . congressional intent [to create a private remedy] can be inferred from the language of the statute, the statutory structure, or some other source."[601] Without such intent, "a cause of action does not exist."[602]
13. **Presumption Against Retroactive Legislation**: "[C]ourts read laws as prospective in application unless Congress has unambiguously instructed retroactivity."[603]

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[597] Bond v. United States, 572 U.S. 844, 857 (2014) (citing Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010)). *See also* ESKRIDGE ET AL., *supra* note 505, at 1208 ("Rule against extraterritorial application of U.S. law. Presumption that Congress legislates with domestic concerns in mind." (citations omitted)); SCALIA & GARNER, *supra* note 505, at 268 ("A statute presumptively has no extraterritorial application (*statuta suo clauduntur territorio, nec ultra territorium disponunt*)."). *Cf.* ESKRIDGE ET AL., *supra* note 505, at 1201 ('Presumption that statutes be interpreted consistent with international law and treaties."); *id.* at 1204 ("Presumption that U.S. law conforms to U.S. international obligations. Presumption that Congress takes account of the legitimate sovereign interests of other nations when it writes American laws." (citations omitted)); *id.* at 1208 ("American laws apply to foreign-flag ships in U.S. territory and affecting Americans, but will not apply to the 'internal affairs' of a foreign-flag ship unless there is a clear statutory statement to that effect.").

[598] ESKRIDGE ET AL., *supra* note 505, at 1201 (emphasis added).

[599] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001). *See also* ESKRIDGE ET AL., *supra* note 505, at 1201. *Cf., e.g.*, Bostock v. Clayton Cty., 140 S. Ct. 1731, 1753 (2020) (declining to apply the canon where the statute was "written in starkly broad terms" and could not be considered a "mousehole").

[600] Morton v. Mancari, 417 U.S. 535, 549 (1974) (quoting Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936)) (internal quotation mark omitted). *See also* ESKRIDGE ET AL., *supra* note 505, at 1201, 1210 ("Presumption against repeals by implication. But where there is a clear repugnancy between a more recent statutory scheme and an earlier one, partial repeal will be inferred." (citations omitted)); SCALIA & GARNER, *supra* note 505, at 327 ("Repeals by implication are disfavored . . . . But a provision that flatly contradicts an earlier-enacted provision repeals it."); *id.* at 336 ("A statute is not repealed by nonuse or desuetude."). *Cf. Posadas*, 296 U.S. at 503 ("There are 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.").

[601] Nw. Airlines v. Transp. Workers Union, 451 U.S. 77, 94 (1981). *See also* ESKRIDGE ET AL., *supra* note 505, at 1204 ("Presumption against 'implying' causes of action into federal statutes."); *id.* at 1210 ("Presumption *against* private right of action unless statute expressly provides one . . . ."); SCALIA & GARNER, *supra* note 505, at 313 ("A statute's mere prohibition of a certain act does not imply creation of a private right of action for its violation. The creation of such a right must be either express or clearly implied from the text of the statute."). *Cf.* ESKRIDGE ET AL., *supra* note 505, at 1210 ("When Congress enacts a specific remedy when no remedy was clearly recognized previously, the new remedy is regarded as exclusive."). *See also, e.g.*, Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1102 (1991) ("[A]ny private right of action for violating a federal statute must ultimately rest on congressional intent to provide a private remedy. From this the corollary follows that the breadth of the right once recognized should not, as a general matter, grow beyond the scope congressionally intended." (citation omitted)).

[602] Alexander v. Sandoval, 532 U.S. 275, 286 (2001).

[603] Vartelas v. Holder, 566 U.S. 257, 266 (2012). *See also* ESKRIDGE ET AL., *supra* note 505, at 1207; SCALIA & GARNER, *supra* note 505, at 261. *Cf.* ESKRIDGE ET AL., *supra* note 505, at 1209 ("[L]aw takes effect on date of

14. **Presumption Against Waiver of Sovereign Immunity**: A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed."[604]
15. **Presumption for Retaining the Common Law**: "'[W]hen a statute covers an issue previously governed by the common law,' [courts] must presume that 'Congress intended to retain the substance of the common law.'"[605]
16. **Presumptions in Favor of Judicial Process**: Courts sometimes require clear statements from Congress in order to bar judicial review of certain claims.[606]
17. "**Presumption of Continuity**":[607] "Congress does not create discontinuities in legal rights and obligations without some clear statement."[608]
18. **Presumption of Legislative Acquiescence**: "[A] long adhered to administrative interpretation dating from the legislative enactment, with no subsequent change having been made in the statute involved, raises a presumption of legislative acquiescence . . . ."[609] This also applies to judicial interpretations of the statute.[610] More broadly, "when a statute refers to a general subject, the statute adopts the

enactment." (citing Gozlon-Peretz v. United States, 498 U.S. 395, 404 (1991))).

[604] United States v. King, 395 U.S. 1, 4 (1969). *See also* ESKRIDGE ET AL., *supra* note 505, at 1209; SCALIA & GARNER, *supra* note 505, at 281. *See also, e.g.*, FAA v. Cooper, 566 U.S. 284, 290 (2012). The same is true for a statute to waive state sovereign immunity. *See infra* note 587. *Cf.* ESKRIDGE ET AL., *supra* note 505, at 1209 ("Presumption that federal agencies launched into commercial world with power to 'sue and be sued' are not entitled to sovereign immunity.").

[605] Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 538 (2013) (first alteration in original) (quoting Samantar v. Yousuf, 560 U.S. 305, 320 n.13 (2010)). *See also* ESKRIDGE ET AL., *supra* note 505, at 1208 ("Presumption in favor of following common law usage and rules where Congress has employed words or concepts with well-settled common law traditions."); SCALIA & GARNER, *supra* note 505, at 318 ("A statute will be construed to alter the common law only when that disposition is clear."); *id.* at 320 ("A statute that uses a common-law term, without defining it, adopts its common-law meaning."). *See also, e.g.*, Evans v. United States, 504 U.S. 255, 259 (1992) ("[A] statutory term is generally presumed to have its common-law meaning." (quoting Taylor v. United States, 495 U.S. 575, 592 (1990)) (internal quotation mark omitted)).

[606] ESKRIDGE ET AL., *supra* note 505, at 1207 ("Presumption in favor of judicial review."); *id.* ("Rule against interpreting statutes to deny a right to jury trial."); *id.* ("Super-strong rule against implied congressional abrogation or repeal of habeas corpus."); *id.* at 1208 ("Presumption against exhaustion of remedies requirement for lawsuit to enforce constitutional rights."); *id.* ("Presumption that judgments will not be binding upon persons not party to adjudication."); *id.* ("Presumption against foreclosure of private enforcement of important federal rights."). *See, e.g.*, Demore v. Hyung Joon Kim, 538 U.S. 510, 517 (2003). *But see* SCALIA & GARNER, *supra* note 505, at 367 (describing as a "false notion" the idea "that a statute cannot oust courts of jurisdiction unless it does so expressly").

[607] ESKRIDGE ET AL., *supra* note 505, at 1201 (emphasis added).

[608] *Id. See* Finley v. United States, 490 U.S. 545, 554 (1989) ("Under established canons of statutory construction, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'" (quoting Anderson v. Pac. Coast S.S. Co., 225 U.S. 187, 199 (1912))); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 521 (1989) ("A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change.").

[609] Baker v. Compton, 211 N.E.2d 162, 164 (Ind. 1965) (citing Costanzo v. Tillinghast, 287 U.S. 341, 345 (1932)). *See also* ESKRIDGE ET AL., *supra* note 505, at 1202 ("acquiescence rules"); *id.* at 1199 ("Even informal and unsettled agency interpretations (such as those embodied in handbooks or litigation briefs) may be useful confirmations for the interpreter's interpretation of statutory language.").

[610] *E.g.*, Shapiro v. United States, 335 U.S. 1, 16 (1948) ("In adopting the language used in the earlier act, Congress 'must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment.'" (quoting Hecht v. Malley, 265 U.S. 144, 153 (1924))). *See also* SCALIA & GARNER, *supra* note 505, at 322 ("If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, or even uniform construction by inferior courts or a responsible administrative agency, they are to be understood according to that construction.").

law on that subject as it exists whenever a question under the statute arises."[611] If Congress reenacts a statute without any change, it incorporates any settled judicial constructions of the statute "so broad and unquestioned that [a court] must presume Congress knew of and endorsed it."[612] However, "[o]rdinarily, . . . courts are slow to attribute significance to the failure of Congress to act on particular legislation."[613]

19. **Presumption of Narrow Construction of Exceptions**: "An exception to a 'general statement of policy' is 'usually read . . . narrowly in order to preserve the primary operation of the provision.'"[614]
20. "**Presumption of Purposive Amendment**":[615] Courts should assume that Congress intends any statutory "amendment to have real and substantial effect."[616]
21. "**Repeal-of-Repealer Canon**":[617] "The repeal or expiration of a repealing statute does not reinstate the original statute."[618]
22. "**Repealability Canon**":[619] "[O]ne legislature is competent to repeal any act which a former legislature was competent to pass; and . . . one legislature cannot abridge the powers of a succeeding legislature."[620]
23. **Rule of Lenity**: "Ambiguity in a statute defining a crime or imposing a penalty

[611] Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 769 (2019) (describing this as the "'reference' canon").

[612] Jama v. ICE, 543 U.S. 335, 349 (2005) (holding there was no such "congressional ratification"). ESKRIDGE ET AL., *supra* note 505, at 1202 ("re-enactment rule"); *see also, e.g.*, United States v. Davis, 139 S. Ct. 2319, 2331 (2019) (referring to but rejecting application of the "reenactment canon").

[613] Bob Jones Univ. v. United States, 461 U.S. 574, 600 (1983).

[614] Maracich v. Spears, 570 U.S. 48, 60 (2013) (quoting Commissioner v. Clark, 489 U.S. 726, 739 (1989) (alteration in original)). *See also* ESKRIDGE ET AL., *supra* note 505, at 1199, 1211. *See also, e.g.*, A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945) ("Any exemption from . . . remedial legislation must . . . be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress."). *But see* SCALIA & GARNER, *supra* note 505, at 359 (describing as "false notion" the idea "that tax exemptions—or any other exemptions for this matter—should be strictly construed"); BP p.l.c. v. Mayor & City Council of Baltimore, 141 S. Ct. 1532, 1538–39 (2021) (rejecting narrow construction of exception and saying the Court has "no right to place our thumbs on one side of the scale or the other"). *Cf., e.g.*, Bostock v. Clayton Cty., 140 S. Ct. 1731, 1747 (2020) ("Nor is there any such thing as a 'canon of donut holes,' in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule."); Andrus v. Glover Constr. Co., 446 U.S. 609, 616–17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied . . . .").

[615] ESKRIDGE ET AL., *supra* note 505, at 1198 (emphasis added).

[616] Stone v. INS, 514 U.S. 386, 397 (1995). *See also* ESKRIDGE ET AL., *supra* note 505, at 1198 ("[S]tatutory amendments are meant to have real and substantial effect."); *id.* at 1202 ("Statutory history (the formal evolution of a statute, as Congress amends it over the years) is always potentially relevant."); SCALIA & GARNER, *supra* note 505, at 256 ("If the legislature amends or reenacts a provision other than by way of a consolidating statute or restyling project, a significant change in language is presumed to entail a change in meaning."). *See also, e.g.*, Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 57–58 (2006) ("We refuse to interpret the Solomon Amendment in a way that negates its recent revision, and indeed would render it a largely meaningless exercise.").

[617] SCALIA & GARNER, *supra* note 505, at 334 (emphasis added).

[618] *Id.*

[619] *Id.* at 278 (emphasis added).

[620] Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810). *See also* SCALIA & GARNER, *supra* note 505, at 278 ("The legislature cannot derogate from its own authority or the authority of its successors.").

should be resolved in the defendant's favor."[621]

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[621] SCALIA & GARNER, *supra* note 505, at 296. *See also* ESKRIDGE ET AL., *supra* note 505, at 1207, 1213. *E.g.*, Liparota v. United States, 471 U.S. 419, 427 (1985). *Cf.* ESKRIDGE ET AL., *supra* note 505, at 1207 ("Rule of lenity may apply to civil sanction that is punitive or when underlying liability is criminal."); *see also* SCALIA & GARNER, *supra* note 505, at 297–98 (discussing this "interpretive problem").