To: Patrick Traylor (traylor.patrick@epa.gov)[traylor.patrick@epa.gov]
From: Bodine, Susan
Sent: Tue 10/10/2017 9:55:01 PM
Subject: FW: Articles - Enforcement

This is the topic of the meeting with the Administrator on Friday. Ex. 5 - Deliberative Process
Ex. 5 - Deliberative Process

Also, we can piggy back on that meeting to give him an update on pending enforcement matters.

From: Ferguson, Lincoln
Sent: Tuesday, October 10, 2017 4:35 PM
To: Jackson, Ryan <jackson.ryan@epa.gov>; Bodine, Susan <bodine.susan@epa.gov>
Cc: Bowman, Liz <Bowman.Liz@epa.gov>; Ford, Hayley <ford.hayley@epa.gov>
Subject: Articles - Enforcement

Ex. 5 - Deliberative Process

Login – Ex. 6 - Personal Privacy

Password – Ex. 6 - Personal Privacy

Lincoln Ferguson

Senior Advisor to the Administrator

U.S. EPA

(202) 564-1935

To: Starfield, Lawrence[Starfield.Lawrence@epa.gov]
Cc: Patrick Traylor (traylor.patrick@epa.gov)[traylor.patrick@epa.gov]; Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]; Pollins, Mark[Pollins.Mark@epa.gov]; Bailey, Ethel[Bailey.Ethel@epa.gov]; Shiffman, Cari[Shiffman.Cari@epa.gov]; Miles, Erin[Miles.Erin@epa.gov]
From: Bodine, Susan
Sent: Tue 11/7/2017 2:00:28 PM
Subject: FW: Touching Base - Meeting Request - Kevin Shafer (MMSD) - Biosolids Regulation in EPA Region 5
10.31.17 EPA Meeting Request Letter.pdf
2017-10-17 MMSD White Paper (002).pdf

Larry,

I don't know if you have received the attached letter. Milwaukee Metropolitan Sewerage District is requesting a meeting with OECA and OW HQ. Looks like a biosolids issue.

I am happy to participate. I don't know anything about the issue, other than the attached docs.

They want to meet next week.

From: Jeff More [mailto:jmore@alpinegroup.com]
Sent: Monday, November 6, 2017 12:06 PM
To: Bodine, Susan <bodine.susan@epa.gov>
Subject: Touching Base - Meeting Request - Kevin Shafer (MMSD) - Biosolids Regulation in EPA Region 5
Importance: High

Susan,

I wanted to circle back regarding the attached meeting request and see if you had any availability Nov. 14, 15 or 16 to meet with Kevin Shafer (Executive Director of Milwaukee MSD) I to discuss Administrative Order being pursued by Region 5 in against MMSD. Thanks!

- Jeff

Jeffery T. More, Esq.

Alpine Group

500 North Capitol Street NW

Suite 210

Washington, D.C. 20001

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c. 202-841-1370

f. 202-547-4658

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From: Jeff More
Sent: Tuesday, October 31, 2017 4:55 PM
To: 'Forsgren, Lee' <Forsgren.Lee@epa.gov>; 'Bodine.susan@EPA.Gov' <Bodine.susan@EPA.Gov>
Subject: Meeting Request - Kevin Shafer (MMSD) - Biosolids Regulation in EPA Region 5
Importance: High

Lee and Susan,

Kevin Shafer, Executive Director of Milwaukee Metropolitan Sewerage District is requesting a meeting with OECA and the Office of Water to discuss the draft Administrative Order being advanced by EPA Region 5 that places new and previously unannounced interpretations of biosolids monitoring, reporting and temperature measurement requirements on MMSD. Please find attached a Meeting Request Letter and a Memo Summarizing the current challenges facing MMSD. Please let me know if

this correspondence and attached Meeting Request Letter will suffice to get the ball rolling on the scheduling of meeting with Kevin Shafer. A snail mail copy has also been sent. Thanks!

- Jeff

Jeffery T. More, Esq.

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PARTNERS FOR A CLEANER ENVIRONMENT

Kevin L. Shafer, P.E.
Executive Director

October 31, 2017

Lawrence Starfield, Principal Deputy Assistant Administrator
Office of Enforcement and Compliance Assurance, 2201A
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dennis Lee Forsgren, Deputy Assistant Administrator
Office of Water, 4101M
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Daft EPA Region 5 Administrative Order – MMSD Concerns and Meeting Request

Dear Mr. Starfield and Mr. Forsgren:

The Milwaukee Metropolitan Sewerage District (MMSD) has operated one of our nation's most successful water reclamation and resource recovery programs for the past 90 years – producing Milorganite® fertilizer since 1926. EPA Region 5 has introduced new and previously unannounced interpretations of monitoring, reporting and temperature measurement requirements and is seeking to enforce these new requirements through an Administrative Order (AO). MMSD believes that the best remedy for the concerns raised by EPA Region 5 is through incorporation of clarifying language in the pending discharge permit, which is slated for reissuance in early 2018. Please find attached a "Summary of MMSD's Position Regarding the Milorganite Matter."

I respectfully request a meeting with you to discuss the detrimental and unnecessary impacts of the AO currently being advanced by EPA Region 5. This is a time sensitive matter, and I would hope to meet with you in Washington, DC, on one of the following dates: Tuesday, November 14; Wednesday, November 15, or Thursday, November 16. (Thursday, November 16 is a preferred option for MMSD.) Your thoughtful consideration of this matter and meeting request are greatly appreciated.

Sincerely,

Kevin L. Shafer

Kevin L. Shafer, P.E.
Executive Director

UNITED STATES WATER PRIZE

milwaukee metropolitan sewerage district
260 W. Seeboth Street, Milwaukee, WI 53204-1446
414-225-2088 ● email: KShafer@mmsd.com ● www.mmsd.com

SUMMARY OF MMSD POSITION REGARDING MILORGANITE MATTER

October 17, 2017

BACKGROUND ON MILORGANITE® ISSUE

- **Longstanding History and Strong Reputation of MMSD/Milorganite®:** The Milwaukee Metropolitan Sewerage District (MMSD) has a long and proud history of water reclamation and resource recovery in the Greater Milwaukee area, particularly with its successful production of Milorganite® fertilizer since 1926 – one of the nation's oldest recycling efforts.
- **JIWR Facility Permit:** Milorganite® is produced from MMSD's Jones Island Water Reclamation (JIWR) Facility pursuant to a Wisconsin-issued National Pollutant Discharge Elimination System (NPDES) permit[1] and 40 C.F.R. Part 503, regulations governing disposal of sewage sludge from a publicly owned treatment works (POTW).
- **EPA R5 Inspection:** On March 14, in response to an external request by a Delaware state regulator R5 conducted a biosolids inspection of MMSD's Jones Island Facility with an interest in determining Part 503 compliance. R5 produced a report of its findings April 25, 2017, concluding that:
    - MMSD failed to meet its particle temperature documentation requirements under Wis. Admin. Code NR 204.06(9)(a) (MMSD asserts that its extensive temperature monitoring is compliant with Wisconsin law);
    - MMSD failed to conduct fecal coliform sampling in accordance with its permit and Wis. Admin. Code NR 204.07(6)(a)(1) (MMSD asserts that its fecal coliform sampling is compliant with Wisconsin law); and
    - MMSD failed to meet fecal coliform laboratory testing and transportation requirements under its permit and pursuant to Part 503.8(b)(2).
- **EPA R5 Enforcement and AO:** R5 met with MMSD and its counsel on June 19, 2017 to discuss the findings of the inspection, a draft Administrative Order on Consent (AO), and MMSD's belief that these issues are best addressed through more specific terms developed by the State in its ongoing permit renewal. Negotiations with R5 are ongoing as to the content of the draft AO and drafts have been exchanged between MMSD and R5. R5 may agree to meet on a second occasion to discuss additional edits and next steps, but has requested a written counterproposal from MMSD before it will commit to another meeting.

[1] JIWR Facility's NPDES permit, No. WI-0036820-03-1, was issued under Section 402 of the Clean Water Act, 33 U.S.C. 1342, effective on January 8, 2013.

MMSD CONCERNS ABOUT REGION 5 POSITIONS

POINT ONE: R5 ENFORCEMENT OF NEW, PREVIOUSLY UNANNOUNCED AND POTENTIALLY UNACHIEVABLE STANDARDS FOR 40 C.F.R. PART 503 COMPLIANCE.

- ***R5 Introduces a New and Previously Unannounced Interpretation of Monitoring and Reporting Temperature Measurement Requirements for Part 503 Compliance.***
  - R5 claims MMSD violated federal requirements for measuring, reporting, and documenting temperature of sewage sludge in completing pathogen removal based upon an expanded and previously unprecedented interpretation of Wisconsin law.
  - Wisconsin law requires only that MMSD "develop and retain" records of its compliance with class A pathogen requirements for a period of five years.
  - R5 interpreted that Code provision to preclude any demonstration of compliance with product temperature requirements that relies on "an evaluation of correlations or probability."
  - R5 problematically uses the Wisconsin Administrative Code as a foundation for interpreting both Wisconsin and federal requirements under Part 503, concluding – apparently for the first time – that "the regulations do not provide for an evaluation of correlations or probability"[2] to demonstrate compliance with particle temperature requirements by indirect measurement of temperature.
  - R5's interpretation is not found in federal law, Wisconsin law, or past agency guidance, and R5's actions would embellish upon the stated regulatory requirements without the benefit of legislative process, or formal guidance or – at a minimum - industry-wide notice.
- ***Though stated as mandatory in the initial draft AO, R5 and the Agency have previously allowed other municipalities and POTWs to use "evaluation of correlations or probability" as evidence of Part 503 temperature compliance.***
  - R5's insistence upon direct temperature measurement of sludge particles is inconsistent with past practice and prior acceptance of indirect evidence of temperature compliance.
  - Indirect evidence is sufficient to show compliance, specifically as it concerns the Part 503 heat drying temperature requirement.
  - Finally, MMSD's pilot program of testing from the dryer outlet at the JIWR Facility has shown that product temperatures are consistently in compliance at both the dryer outlet location and the previously used screw conveyor location.

[2] *See* October 3, 2017 Letter from J. Matthew Moore, Asst. Regional Counsel, Region 5, U.S. Environmental Protection Agency, to Richard Davis, Beveridge & Diamond, PC.

- ***There is little evidence that direct measurement of temperature as would be required under the R5 AO is technically feasible or used by any other POTW for heat drying pathogen reduction compliance.***

  - Though R5 demands that MMSD "measure and record product temperature at the outlet of each operating dryer at least twice per day," MMSD knows of no other POTW that has determined the technical means by which this measurement is possible.

  - R5 claims to have undertaken an investigation of techniques to directly measure product temperature but, despite several requests for the Region to share its findings, they decline to discuss the results – or lack of results – of their investigation until *after* MMSD has signed the AO obligating it to perform direct measurement.

<u>POINT TWO</u>: R5's RELIANCE UPON AND INTERPRETATION OF WISCONSIN LAW FOR ENFORCING FECAL COLIFORM SAMPLING LOCATION ENCROACHES ON THE POWERS PLAINLY DELEGATED TO THE STATE OF WISCONSIN.

- ***In the absence of specific direction in Part 503, R5 again generously interprets Wisconsin Administrative Code for authority to demand that MMSD perform additional testing of fecal coliform (at distribution and bagging) to comply with its permit, Wisconsin law and Rule 503.***

  - R5 injects into state law requirements that are not stated in Wisconsin law, and arguably, that the State never intended to include.

  - R5's interpretation of NR 204.07(6)(a)(1) goes beyond the language of the law and past interpretations by the governing state of Wisconsin, which has consistently granted NPDES permits to the JIWR facility which do not incorporate the now-asserted EPA requirements.

  - And R5 problematically goes further, stating that noncompliance with its expanded reading of NR 204.07(6)(a)(1) demonstrates that MMSD further failed to comply with Part 503, which lacks basis in any Part 503 language or EPA guidance.

<u>POINT THREE</u>: THE PROPOSED AO WOULD DICTATE THAT MMSD REQUEST SPECIFIC PERMIT TERMS CONSISTENT WITH R5's ATTEMPTED EXPANSION OF FEDERAL AND STATE REQUIREMENTS IN THE CURRENT RENEWAL OF THE DISTRICT's NPDES PERMIT. MMSD's PERMIT REISSUSANCE APPLICATION TO WDNR, NOW PENDING, ALREADY REQUESTS CLARIFICATION OF THE STATE AND FEDERAL REQUIREMENTS FOR BIOSOLIDS MONITORING AND THE PERMIT PROCESS WILL ENABLE THE STATE TO DETERMINE THE PROPER MONITORING OBLIGATIONS IN AN EXERCISE ITS PRIMACY AS THE DELEGATED PERMITTING AUTHORITY.

- ***R5's draft AO exhibits clear, but unnecessary, federal overreach in its attempt to use an administrative enforcement mechanism to force MMSD to include specific content in its NPDES permit application and in the eventual permit issued by WDNR. MMSD has already requested, in its permit re-issuance application, clarification of permit terms regarding temperature and fecal coliform monitoring.***

- Permitting for NPDES is a responsibility squarely within the sovereign right of WDNR, as R5 notes earlier in its proposed AO, and has been since 1974. EPA granted the State's request to expand its WPDES program to include administration and enforcement of sewage sludge management in 2000.

- ***This is a clear injection of federal preference into laws intended to be enforced and administered by the State of Wisconsin.***

CONCLUSION

- ***Milorganite® is a flagship of the industry – its integrity and longevity, including MMSD's ongoing and positive working relationship with the state, should speak volumes.***

- ***MMSD is not unwilling to work with R5 and has done so over the prior months, but we want to ensure that they are acting in a manner that is fair and based in applicable law. The best remedy here is the incorporation of clarifying language into the re-issued discharge permit, which is expected in early 2018.***

ED_001803A_00005383-00004

To: Dravis, Samantha[dravis.samantha@epa.gov]
Cc: Patrick Traylor (traylor.patrick@epa.gov)[traylor.patrick@epa.gov]
From: Bodine, Susan
Sent: Wed 10/4/2017 4:51:38 PM
Subject: Colorado Springs summary.docx
Colorado Springs summary.docx

As we discussed

To: Dickerson, Aaron[dickerson.aaron@epa.gov]; Jackson, Ryan[jackson.ryan@epa.gov]; Wehrum, William[wehrum.william@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]; Harlow, David[harlow.david@epa.gov]; Baptist, Erik[baptist.erik@epa.gov]; Dravis, Samantha[dravis.samantha@epa.gov]
Cc: Ford, Hayley[ford.hayley@epa.gov]
From: Bodine, Susan
Sent: Tue 11/14/2017 2:04:42 PM
Subject: RE:

Thanks

From: Dickerson, Aaron
Sent: Tuesday, November 14, 2017 9:04 AM
To: Jackson, Ryan <jackson.ryan@epa.gov>; Wehrum, William <wehrum.william@epa.gov>; Bodine, Susan <bodine.susan@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>; Harlow, David <harlow.david@epa.gov>; Baptist, Erik <baptist.erik@epa.gov>; Dravis, Samantha <dravis.samantha@epa.gov>
Cc: Ford, Hayley <ford.hayley@epa.gov>
Subject: RE:

Samantha's office has already reserved a van which will be in the courtyard at 9:00am. I will also have Phil Somerville waiting downstairs as well as I don't believe everyone will fit in the van.

From: Jackson, Ryan
Sent: Monday, November 13, 2017 5:25 PM
To: Wehrum, William <wehrum.william@epa.gov>; Bodine, Susan <bodine.susan@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>; Harlow, David <harlow.david@epa.gov>; Baptist, Erik <baptist.erik@epa.gov>; Dravis, Samantha <dravis.samantha@epa.gov>
Cc: Ford, Hayley <ford.hayley@epa.gov>; Dickerson, Aaron <dickerson.aaron@epa.gov>
Subject:

Hayley, can you put the following into WAVES to be able to attend the 9:30 tomorrow am?

Aaron, can you get transport for us to the WH for the meeting? I think we need to leave about 9:10.

Thanks.

Ryan Jackson

Chief of Staff

U.S. Environmental Protection Agency

Ex. 6 - Personal Privacy

To: Patrick Traylor (traylor.patrick@epa.gov)[traylor.patrick@epa.gov]
From: Bodine, Susan
Sent: Wed 10/4/2017 4:42:20 PM
Subject: CGP link

https://www.epa.gov/npdes/epas-2017-construction-general-permit-cgp-and-related-documents

To: Fotouhi, David[fotouhi.david@epa.gov]; Packard, Elise[Packard.Elise@epa.gov]
Cc: Mackey, Cyndy[Mackey.Cyndy@epa.gov]; DeLeon, Rafael[Deleon.Rafael@epa.gov]; Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Patrick Traylor (traylor.patrick@epa.gov)[traylor.patrick@epa.gov]
From: Bodine, Susan
Sent: Wed 11/1/2017 1:25:13 PM
Subject: notwithstanding case law
CRS statutory interpretation.pdf

On pp 39-40

Congressional Research Service
Informing the legislative debate since 1914

Statutory Interpretation: General Principles and Recent Trends

(name redacted)
Specialist in American Public Law

September 24, 2014

Congressional Research Service
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97-589

CRS REPORT
Prepared for Members and
Committees of Congress

ED_001803A_00005406-00001

Summary

The exercise of the judicial power of the United States often requires that courts construe statutes to apply them in particular cases and controversies. Judicial interpretation of the meaning of a statute is authoritative in the matter before the court. Beyond this, the methodologies and approaches taken by the courts in discerning meaning can help guide legislative drafters, legislators, implementing agencies, and private parties.

The Supreme Court has expressed an interest "that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts." Though the feed-back loop of interpretive practices coming from the courts may not always speak well to actual congressional practice and desires, the judiciary has developed its own set of interpretive tools and methodologies, keeping in mind that there is no unified, systematic approach for unlocking meaning in all cases.

Though schools of statutory interpretation vary on what factors should be considered, all approaches start (if not necessarily end) with the language and structure of the statute itself. In this pursuit, the Court follows the principle that a statute be read as a harmonious whole whenever reasonable, with separate parts being interpreted within their broader statutory context.

Still, the meaning of statutory language is not always evident. To help clarify uncertainty, judges have developed various interpretive tools in the form of canons of construction. Canons broadly fall into two types. "Language," or "linguistic," canons are interpretive "rules of thumb" for drawing inferences based on customary usage, grammar, and the like. For example, in considering the meaning of particular words and phrases, language canons call for determining the sense in which terms are being used, that is, whether words or phrases are meant as terms of art with specialized meanings or are meant in the ordinary, "dictionary" sense. Other language canons direct that all words of a statute be given effect if possible, that a term used more than once in a statute ordinarily be given the same meaning throughout, and that specific statutory language ordinarily trumps conflicting general language. "Ordinarily" is a necessary caveat, since any of these "canons" may give way if context points toward a contrary meaning.

Not infrequently the Court stacks the deck, and subordinates the general, linguistic canons of statutory construction, as well as other interpretive principles, to overarching presumptions that favor particular substantive results. When one of these "substantive" canons applies, the Court frequently requires a "clear statement" of congressional intent to negate it. A commonly invoked "substantive" canon is that Congress does not intend to change judge-made law. Other substantive canons disfavor preemption of state law and abrogation of state immunity from suit in federal court. As another example, Congress must strongly signal an intent to the courts if it wishes to apply a statute retroactively or override existing law. The Court also tries to avoid an interpretation that would raise serious doubts about a statute's constitutionality.

Interpretive methods that emphasize the primacy of text and staying within the boundaries of statutes themselves to discern meaning are "textualist." Other approaches, including "intentionalism," are more open to taking extrinsic considerations into account. Most particularly, some Justices may be willing to look to legislative history to clarify ambiguous text. This report briefly reviews what constitutes "legislative history," including, possibly, presidential signing statements, and the factors that might lead the Court to consider it.

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Introduction

Article I, Section 1 of the Constitution vests all federal legislative power in Congress, while Article I, Section 7 sets forth the process for effectuating this power through passage of legislation by both houses and either presidential approval or veto override. The exercise of the judicial power of the United States often requires that courts construe statutes so enacted to apply them in concrete cases and controversies. Judicial interpretation of a statute is authoritative in the matter before the court, and may guide courts in future cases. Beyond this, the methodologies and approaches taken by the courts in interpreting meaning also can help guide legislative drafters, legislators, implementing agencies, and private parties.[1]

This report provides an overview of how the Supreme Court approaches statutory interpretation, with particular emphasis on rules and conventions that focus on the text itself.[2] That is, to inform Congress on how the Court might go about analyzing the meaning of particular legislative language, this report emphasizes "textualist"-based means of interpretation. "Textualism" considers the "law" to be embodied in the language of the statute, construed according to its "plain meaning," which can be discerned through the aid, as necessary, of various judicially developed rules of interpretation.[3] As put by Justice Oliver Wendell Holmes in an oft-quoted aphorism: "We do not inquire what the legislature meant; we ask only what the statute means."[4] "Textualism," as captured in Justice Holmes' quote, eschews explanatory legislative materials, and inferences drawn from them and other extrinsic sources, in applying statutory language to particular circumstances.

Despite its currency in recent decades, "textualism" is not the exclusive means of statutory analysis, and this report also briefly discusses "intentionalist"-based means of interpretation and the Court's approach toward relying on legislative history and other extrinsic considerations. This report is not intended as an examination of all schools of judicial decision making, or as an analysis of the merits or limits of the many methodologies used by courts in applying statutes in specific cases.[5] In this regard, even though textualism may be the primary approach toward

[1] Though different actors in the political and legal processes share an interest in "what a statute means," they can come to the issue in different contexts and with different concerns. Often, the question may not be one of what is the "best" interpretation of particular legislative language. For example, as legislation is deliberated and compromises are struck, legislators may be concerned with what substantive and regulatory "gaps" are being created, who likely will fill them (e.g., executive agencies or the courts) and in accordance with what standards, and what the prospects are that the legislature will revisit an issue because of how a statute is implemented or interpreted. Similarly, an implementing agency may see silence or ambiguity in a statute as an implicit delegation of broad regulatory powers. Private parties may be primarily concerned with assessing what options they have to act. The pertinent query in many instances might be whether a particular interpretation is "reasonable," not whether it is the "best." For one leading commentator's view on compromise as part of the legislative process and why courts should be cautious in "filling in the blanks" left open by a legislature, see Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540-42 (1983). For a discussion of interpretation in the administrative setting, see Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, 2009 MICH. ST. L. REV. 89 (2009).

[2] In places, the report also refers to opinions of United States courts of appeals and scholarly discussion of statutory interpretation generally.

[3] It is sometimes disputed whether the rules characterized as "substantive" canons of construction in this report, and also variously as "overarching presumptions" or "normative canons," properly fit within "textualism," which most often is associated with the linguistic, or "language," canons.

[4] Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899) cited, among other places, at ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 29 (2012).

[5] There is an extensive body of legal literature on statutory interpretation by the courts. A small sampling includes (continued...)

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interpreting statutes, individual Supreme Court opinions often employ multiple types of statutory analysis to support their conclusions and critique majority/dissenting opinions with which they do not agree.[6] Moreover, as general approaches for inferring meaning, neither textualism nor intentionalism is rigidly mechanistic or limited to the action of the enacting Congress, with "textualists," for example, sometimes looking to broader legal contexts and "intentionalists" at times venturing beyond the enacting Congress's particular intent to preserve a statute's purposes.[7]

When reading statutory text, the Supreme Court uses content-neutral canons developed by the judiciary that focus on word usage, grammar, syntax and the like. Sometimes, the Court also brings to bear various presumptions that reflect broader judicial concerns and can more directly favor particular substantive results. Other conventions assist the Court in determining whether to go beyond the corners of a statute and judicial-based rules of interpretation to also consider the congressional deliberations that led to a statute's passage. Although there is some overlap and inconsistency among these rules and conventions, and although the Court's pathway through the mix is often not clearly foreseeable, an understanding of interpretational possibilities may nonetheless aid Congress in choosing among various drafting options. To this end, the Court has expressed an interest "that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts."[8]

(...continued)

Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STANFORD L. REV. 901 (2013); Mark Tushnet, *Theory and Practice in Statutory Interpretation,* 43 TEX. TECH L. REV. 1185 (2011); James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231 (2009); Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769 (2008); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 (1992); Cass R. Sunstein, *Interpreting Statutes in the Regulatory* State, 103 HARV. L. REV. 405 (1989); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987). *See also* Symposium, *A Reevaluation of the Canons of Statutory Interpretation*, 45 VAND. L. REV. 529 (1992).

Methods of interpretation other than textualism and intentionalism, such as "pragmatism," "purposivism," and "practical reasoning," generally are more open to considering the functional effects of a particular decision, changed circumstances since a statute's enactment and how the current Congress might view an issue, and the broad aims of Congress in passing a specific law. As to purposes, Justice Breyer has written that a purpose-oriented approach to interpretation "helps further the Constitution's democratic goals, ... helps individual statutes work better for those whom Congress intended to help, ... [and] help[s] Congress better accomplish its own legislative work." `STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW, 94, 96 (2010).

[6] *See, e.g.,* Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971 (2007). Even when the Court is unified, and its opinion relatively brief, the Court commonly rests its interpretations on multiple, mutually reinforcing grounds. *E.g.*, Kucana v. Holder, 558 U.S. 233 (2010).

[7] *See* Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221 (2010-2011).

[8] Finley v. United States, 490 U.S. 545, 556 (1989). Even as the courts see themselves as providing a feedback loop to Congress to inform legislative drafting, they also routinely characterize themselves as "faithful agents" of Congress. However, acting as a "faithful agent" to effectuate congressional will presumes judicial familiarity with the ins and outs of bill drafting practices and congressional procedure. A 2011-2012 survey of 137 congressional counsels with bill drafting responsibilities revealed significant disparities between the principles and considerations that influence how legislation is crafted and the canons of construction and other factors that guide how legislative language is interpreted by the courts. The results of this survey are reported in a May 2013 Stanford Law Review article. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STANFORD L. REV. 901 (2013).

As is evident from this report, many of the interpretive challenges faced by the Court arise from lack of completeness and specificity. In this regard, Executive Order 12988, which in part provides guidance to agencies in drafting proposed legislation for possible congressional consideration, directs agencies to "make every reasonable effort to ensure" that (continued...)

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Of course, Congress can always amend a statute to supersede the reading given it by the Court. In interpreting statutes, the Court recognizes that legislative power resides in Congress, and that Congress can legislate away interpretations with which it disagrees.[9] Congress has revisited statutory issues fairly frequently to override or counter the Court's interpretations.[10] Corrective amendment can be a lengthy and uncertain process, however.[11]

Statutory Text

In General—Statutory Context and Purpose

The starting point in construing a statute is the language of the statute itself. The Supreme Court often recites the "plain meaning rule," that, if the language of the statute is plain and unambiguous, it must be applied according to its terms.[12] There is no single test to assay the

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proposed legislation, "as appropriate ... specifies in clear language"—(A) whether causes of action arising under the law are subject to statutes of limitations; (B) its preemptive effect; (C) the effect on existing Federal law; (D) a clear legal standard for affected conduct; (E) whether arbitration and other forms of dispute resolution are appropriate; (F) whether the provisions of the law are severable if one or more is held unconstitutional; (G) the retroactive effect, if any; (H) the applicable burdens of proof; (I) whether private parties are granted a right to sue, and, if so, what relief is available and whether attorney's fees are available; (J) whether state courts have jurisdiction; (K) whether administrative remedies must be pursued prior to initiating court actions; (L) standards governing personal jurisdiction; (M) definitions of key statutory terms; (N) applicability to the Federal Government; (O) applicability to states, territories, the District of Columbia, and the Commonwealths of Puerto Rico and the Northern Mariana Islands; and (P) what remedies are available, "such as money damages, civil penalties, injunctive relief, and attorney's fees." 61 *Federal Register* 4729 (February 5, 1996), *reprinted in* 28 U.S.C. §519. Many items in this list are addressed in this report because statutes have lacked clear guidance on them.

However, it would be a mistake to conclude that all "lapses" of completeness and specificity result from oversights. As observed by Judge Frank H. Easterbrook of the United States Court of Appeals for the Seventh Circuit, in an article written in 1983: "Almost all statutes are compromises, and the cornerstone of many a compromise is the decision, usually unexpressed, to leave certain issues unresolved.... What matters to the compromisers is reducing the chance that their work will be invoked subsequently to achieve more, or less, than they intended, thereby upsetting the balance of the package." Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540 (1983).

[9] It is because "Congress is free to change this Court's interpretation of its legislation," that the Court adheres more strictly to the doctrine of *stare decisis*, or adherence to judicial precedents, in the area of statutory construction than in the area of constitutional interpretation, where amendment is much more difficult. Neal v. United States, 516 U.S. 284, 295 (1996) (quoting Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977)); Shepard v. United States, 544 U.S. 13, 23 (2005). "*Stare decisis* is usually the wise policy [for statutes], because in most matters it is more important that the applicable rule of law be settled than that it be settled right." Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Justice Brandeis, dissenting). *See also, e.g.,* CSX Transportation, Inc. v. McBride, 564 U.S. ___, No. 10-235, slip op. at 5, 10 n.4, 12-13 (June 23, 2011) (Ginsburg, J., for the Court).

[10] One scholar identified 187 override statutes from 1967 to 1990. William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991). *See also* Deborah A. Widiss, *Shadow Precedents and the Separation of Powers*, 84 NOTRE DAME L. REV. 511 (2009). One prominent override addressed the Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* (550 U.S. 618 (2007)), which held that a plaintiff had failed to file a timely suit for past sex discrimination under Title VII of the Civil Rights Act. Congress superseded the decision in the Lilly Ledbetter Fair Pay Act of 2009, which amended Title VII to clarify the time limit to sue employers in a way that did not foreclose a suit of the type Ms. Ledbetter brought. Lilly Ledbetter Fair Pay Act of 2009, P.L. 111-2, 123 Stat. 5 (2009).

[11] The extent and intended effect of overrides vary, and courts may not always give an override the breadth of application Congress desired. Deborah A. Widiss, *Shadow Precedents and the Separation of Powers*, 84 NOTRE DAME L. REV. 511 (2008).

[12] *E.g.*, Sebelius v. Cloer, 569 U.S. ___, No. 12-236, slip op. (May 20, 2013).

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clarity of statutory language. The interpretive process frequently begins with a narrow focus on the meaning of particular words and phrases. This view is commonly supplemented by perspectives provided from elsewhere within the statute. How has Congress used or distinguished the same terms in other places in the statute? How does the section containing the language at issue fit within the statute's structure? What do the structure and language of a statute reveal about the statute's overall purposes?

The primacy of text in statutory analysis would appear to marginalize whatever insight legislative history or other extrinsic aids might provide. The strictures of a text-based "plain meaning rule" were once thought honored more in the breach than in the observance. However, this perception has changed: More often than before, statutory text is thought to be the ending point as well as the starting point for interpretation.[13]

Under text-based analysis, the cardinal rule of construction is that the whole statute should be drawn upon as necessary, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purposes.[14] Justice Scalia, who was in the vanguard of efforts to redirect statutory construction toward statutory text and away from legislative history, has characterized this general approach. "Statutory construction ... is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."[15] In 1850 Chief Justice Taney described the same process: "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."[16] Thus, the meaning of a specific statutory directive may be shaped, for example, by that statute's definitions of terms, by the statute's statement of findings and purposes, by the directive's relationship to other specific directives, by purposes inferred from those directives or from the statute as a whole, and by the statute's overall structure. Beyond this, courts also may look to the broader body of law into which the enactment fits.[17] Nevertheless, realities of the legislative process, including bundled deal making and consolidation of multiple proposals into omnibus bills, may militate against unstinting application of "whole act" or "whole code" methodologies.[18]

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[13] For an example of an empirical study finding decreased reliance on legislative history by the Supreme Court from 1969 to 2008, see James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231, 1258 (2009).

[14] Despite this principle, courts can find it difficult to read particular language as being in harmony with the tenor of other statutory provisions or the overall statutory purpose. Same-day opinions by the Fourth and D.C. Circuits on premium tax credits under the Affordable Care Act (ACA) illustrate different approaches courts may take. *Compare* King v. Burwell, No. 14-1158 (4th Cir. July 22, 2014) (various provisions of the ACA sufficiently indicate an expectation that tax credits will be available to participants in all health exchanges to cast doubt on whether provision specifically making credits available to participants in state exchanges implicitly denies credits to participants in federal exchanges) *with* Halbig v. Burwell, No. 14-5018 July 22, 2014) (plain language of the ACA provision making participants in a health exchange 'established by the State" potentially eligible for tax credit unambiguously disqualifies participants in federally established health exchanges).

[15] United Savings Ass'n v. Timbers of Inwood Forest Associates, 484 U.S. 365, 371 (1988) (citations omitted).

[16] United States v. Boisdoré's Heirs, 49 U.S. (8 How.) 113, 122 (1850). For a modern example of examining statutory language "in place," see Brotherhood of Locomotive Engineers v. Atchison, T. & S.F.R.R., 516 U.S. 152, 157 (1996) (purpose of Hours of Service Act, to promote safety by ensuring that fatigued employees do not operate trains, guides the determination of whether employees' time is "on duty").

[17] Green v. Bock Laundry Machine Co., 490 U.S. 504, 528 (1990).

[18] Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside – An Empirical Study of* (continued...)

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The Supreme Court often cites general rules, or canons, of construction in resolving statutory meaning. The Court, moreover, presumes "that Congress legislates with knowledge of our basic rules of statutory construction."[19] It is well to keep in mind, however, that the overriding objective of statutory construction has been to effectuate statutory purpose as expressed in a law's text. As Justice Jackson put it 68 years ago, "[h]owever well these rules may serve at times to decipher legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy."[20]

"Language" Canons of Construction

In General

The "language" canons of construction are neutral, analytical guides for discerning the meaning of particular text that might otherwise appear unclear.[21] That is to say, these canons are based on general linguistic principles, many of them of the common-sense variety, for drawing inferences about the meaning of language. The meaning of a word or phrase can be shaped by its ordinary or specialized meaning, its context in the statute, the usage of similar terms in the statute, the statute's structure, and other factors. The language canons are "axioms of experience," but none "preclude[s] consideration of persuasive [contrary] evidence if it exists."[22] Each canon provides its own perspective, and different takes from different views can give different insights into the meaning of what is being observed. Considering and weighing the value of various views would appear to be a sound process for ensuring well-reasoned interpretations. However, the language canons are intrinsic aids only, not "rules of law." Discerning what Congress probably meant by particular language for the purpose of applying it to a particular set of facts can be a difficult judicial exercise that is not amenable to formulaic resolution.

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Congressional Drafting, Delegation, and the Canons: Part I, 65 STANFORD L. REV. 901, 936 (2013).

[19] McNary v. Haitian Refugee Center, 498 U.S. 479, 496 (1991) (referring to presumption favoring judicial review of administrative action). *See also* United States v. Fausto, 484 U.S. 439, 463 n.9 (1988) (Stevens, J., dissenting) (Court presumes that "Congress is aware of this longstanding presumption [disfavoring repeals by implication] and that Congress relies on it in drafting legislation.").

[20] SEC v. Joiner, 320 U.S. 344, 350-51 (1943). Justice Jackson explained that some of the canons derived "from sources that were hostile toward the legislative process itself," and that viewed legislation as "'interference'" with the common law process of "'intelligent judicial administration.'" 320 U.S. at 350 & n.7 (quoting the first edition of SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION). A more recent instance of congressional purpose and statutory context trumping a "canon" occurred in *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 594-599 (2004), the Court there determining that the word "age" is used in different senses in different parts of the Age Discrimination in Employment Act, and consequently the presumption of uniform usage throughout a statute should not be followed.

[21] This report separately addresses "substantive" canons of construction, which often are referred to as "normative" canons or "overarching presumptions." Unlike the linguistic rules that are the "language" canons, the substantive canons derive from broader judicial notions of constitutionalism, federalism, effective judicial administration, and other policy concerns of the courts. Unless they are rebutted, these presumptions can favor particular outcomes.

[22] Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928) (Holmes, J., for Court).

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The sheer number and variety of canons have been cited to emphasize their limited utility as a stand-alone method of statutory construction. Still influential, for example, is a 1950 article by Professor Karl Llewellyn that lists many canons (both language canons and substantive canons) juxtaposed to equally "correct" but opposing canons.[23] Professor Llewellyn's main point was to argue that judges should take current circumstances into account in applying a statute in a case—he was critical of the impression that "formalism" gave of there being "only one single correct answer possible" in reading text. Nevertheless, many have broadened his message into a charge that canons are mere pretext because judges may pick and choose among them to achieve whatever result they desire.

However, accepting that there may be more than one "correct" answer in resolving the meaning of a statutory provision—a premise that seems unremarkable in many cases at the Supreme Court level[24]—does not necessarily mean that a Court majority begins with a preferred policy outcome and then marshals only those canons that support it. Given an array of established templates to guide interpretation, one may be a particularly apt fit in a given case, and the case's outcome will in large measure be driven by the rationale of the canon applied. This might particularly be so when a substantive canon of interpretation (e.g., avoidance of constitutional issues) is in play. (These canons are discussed below.)

In any event, one possible suggestion of the indeterminacy of canons is that statutory construction should be a narrow pursuit, not a broader one:

> [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, cardinal canon before all others.... [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."[25]

Ordinary and Specialized Meaning

Determining how a statute is to be applied often comes down to considering what a particular word or phrase means *as used in the statute*. In this exercise, a threshold inquiry is whether language is being used in the "ordinary," "general dictionary" sense or in a narrower, specialized sense or as a term of art.[26] Also, the appropriate reference is what a term meant to Members when Congress passed the statute, not its meaning at the time the statute is being adjudicated.[27]

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[23] Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950).

[24] "As is true with most of the statutory interpretation questions that come before this Court, the question in this case is not like a jigsaw puzzle. There is simply no perfect solution to the problem before us." Corley v. United States, 556 U.S. 303, 326 (2009) (Alito, J., dissenting).

[25] Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (citations omitted). A canon of construction should not be followed "when application would be tantamount to a formalistic disregard of congressional intent." Rice v. Rehner, 463 U.S. 713, 732 (1983).

[26] On occasion, disagreement within a sharply divided Court plays out over whether a term is being used in a specialized sense or in accordance with ordinary meaning. *See, e.g.,* Sullivan v. Stroop, 496 U.S. 478 (1990) (five-Justice majority holding that "child support" in the AFDC statute is restricted to that term's specialized use in the Child Support program under the Social Security Act, while four-Justice minority argues that "child support" in the AFDC statute has a broader, common use meaning). *See also* Bruesewitz v. Wyeth LLC 562 U.S. ___, No. 09-152, slip op. at 9-10 (February 22, 2011) and *Bruesewitz*, slip op. at 7-9 (Sotomayor, J., dissenting). At other times, a unanimous Court (continued...)

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Terms of Art

If the word or phrase is defined in the statute (federal statutes frequently collect definitions in a "definitions" section), or elsewhere in the *United States Code*,[28] then that definition governs if applicable in the context used.[29] Even if the word or phrase is not defined by statute, it may have an accepted meaning in the area of law addressed by the statute,[30] it may have been borrowed from another statute under which it had an accepted meaning,[31] or it may have had an accepted and specialized meaning at common law.[32] In each of these situations the accepted meaning

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has interpreted what might appear to be a term of art by its ordinary meaning. *See* Wall v. Kholi, 562 U.S. ___, No. 09-868 (March 7, 2011) (meaning of "collateral review" in habeas corpus statute analyzed by separate examination of the ordinary dictionary meanings of "collateral" and "review"). In other cases, the Court may view a term's ordinary meaning, technical meaning, and statutory context as all pointing to a single interpretation. *E.g.*, Taniguchi v. Kan Pacific Saipan, Ltd., 566 U.S. ___, No. 10-1472, slip op. (May 21, 2012).

[27] Saint Francis College v. Khazraji, 481 U.S. 604 (1987). The Court there held that a citizen of Arab ancestry could bring an action under 42 U.S.C. §1981, which gives to all persons certain rights to the extent they are enjoyed by "white citizens": "Plainly, all those who might be deemed Caucasian today were not thought to be of the same race at the time §1981 became law [in the 19th century]." Id. at 610. *See also, e.g.,* Cuomo v. Clearing House Assn., L.L.C., 557 U.S. 519 (2009), where the ability of a state to take certain enforcement actions against national banks depended on the meaning of "visitorial powers" when the National Bank Act was enacted in 1864.

[28] The Dictionary Act, ch. 388, 61 Stat. 633 (1947), as amended, 1 U.S.C. §§1-6, has definitions of a few common terms used in federal statutes (*e.g.*, "person," "vessel," and "vehicle"). These definitions govern in all federal statutes "unless the context indicates otherwise." *See also* Stewart v. Dutra Constr. Co., 543 U.S. 481, 489 (2005) (relying on Dictionary Act's definition of "vessel").

That a word is defined in statute does not necessarily mean, however, that other forms of the word are bound by the definition. Thus, a statutory definition of "person" to include corporations did not govern whether "personal" privacy under the statute covered corporations, and not individuals only: "[I]n ordinary usage, a noun and its adjective form may have meanings as disparate as any two unrelated words." F.C.C. v. AT&T, 562 U.S. ___, No. 09-1279, slip op. at 5 (March 1, 2011) (using "crab" and "crabbed" as an example).

[29] Colautti v. Franklin, 439 U.S. 379, 392 (1979). If the context indicates otherwise, *i.e.*, if a mechanical application of a statutory definition throughout a statute would create an "obvious incongruity" or frustrate an evident statutory purpose for a particular provision, then it is permissible to depart from the definition. Lawson v. Suwannee S.S. Co., 336 U.S. 198, 201 (1949); Rowland v. California Men's Colony, 506 U.S. 194 (1993) (context indicates otherwise; the term "person" as used in 28 U.S.C. §1915(a) refers only to individuals and does not carry its Dictionary Act definition, which includes associations and artificial entities). But, as noted below, a term appearing in several places in a statute is ordinarily interpreted as having the same meaning each time it appears.

[30] *See, e.g.*, Sullivan v. Stroop, 496 U.S. 478, 483 (1990) (five-Justice majority holding that "child support" in the AFDC statute is restricted to that term's specialized use in the Child Support program under the Social Security Act). Note also that "where a phrase in a statute appears to have become a term of art ..., any attempt to break down the term into its constituent words is not apt to illuminate its meaning." *Id. But see* Wall v. Kholi, 562 U.S. ___, No. 09-868 (March 7, 2011) (meaning of "collateral review" in habeas corpus statute analyzed by separate examination of the ordinary dictionary meanings of "collateral" and "review").

[31] In appropriate circumstances, courts will assume that "adoption of the wording of a statute from another legislative jurisdiction carries with it the previous judicial interpretations of the wording." Carolene Products Co. v. United States, 323 U.S. 18, 26 (1944) (finding, however, that circumstances were inappropriate for reliance on the principle). For the presumption to operate, the previous judicial interpretations must have been "known and settled." Capital Traction Co. v. Hof, 174 U.S. 1, 36 (1899). *See also* Yates v. United States, 354 U.S. 298, 310 (1957) (in the absence of legislative history indicating that decisions of lower state courts were called to Congress's attention, Court "should not assume that Congress was aware of them"). Variations in statutory wording may also refute the suggestion that Congress borrowed an interpretation. Shannon v. United States, 512 U.S. 573, 581 (1994) (Congress did not borrow the terms of the Insanity Defense Reform Act of 1984 from the District of Columbia Code.).

[32] *See, e.g.*, Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739-40 (1989) (relying on traditional common law agency principles for meaning of term "employee"). *See also* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (following the same course after finding ERISA's "circular" definition of "employee" to be wanting); Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 444 (2003) (same construction of (continued...)

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governs[33] and the word or phrase is considered a technical term or "term of art." Justice Jackson explained why this reliance is appropriate:

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such a case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as departure from them.[34]

Ordinary Meaning and Dictionary Definitions

Words that are not terms of art and that are not statutorily defined are customarily given their ordinary meanings, frequently derived from the dictionary.[35] Thus, the Court has relied on regular dictionary definitions to interpret the word "marketing" as used in the Plant Variety Protection Act,[36] and the word "principal" as used to modify a taxpayer's place of business for purposes of an income tax deduction,[37] and relied on Black's Law Dictionary for the meaning of the word "cognizable" as used in the Federal Tort Claims Act to identify certain causes of action.[38] At times, the ordinary meaning of a term in an everyday dictionary has prevailed over an interpretation given to a term in circuit court precedents.[39]

Of course application of dictionary definitions is not always a clear course;[40] many words have several meanings, and context must guide choice among them, where possible.[41] However,

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similarly "circular" definition of "employee" in ADA).

[33] "[W]here a common law principle is well established, ... the courts may take it as a given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991) (quoting Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952)).

[34] Morissette v. United States, 342 U.S. 246, 263 (1952).

[35] In the absence of a statutory definition, "we construe a statutory term in accordance with its ordinary or natural meaning." FDIC v. Meyer, 510 U.S. 471, 476 (1994). *See also, e.g.*, Mohamad v. Palestinian Authority, 566 ___, No. 11-88, slip op. (April 18, 2012) ("individual," as used in the Torture Victim Protection Act, does not include an organization).

[36] Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995).

[37] Commissioner v. Soliman, 506 U.S. 168, 174 (1993).

[38] FDIC v. Meyer, 510 U.S. 471, 476 (1994).

[39] *E.g.*, Octane Fitness, LLC v. Icon Health & Fitness, Inc., 572 U.S. ___, No. 12-1184, slip op. (April 29, 2014).

[40] *See* Janus Capital Group, Inc. v. First Derivative Traders, 564 U.S. ___, No. 09-525, slip op. (June 13, 2011), where a five-Justice majority cites the ordinary dictionary meaning of "make" to narrowly interpret "mak[ing] a statement" under SEC Rule 10b-5, and the four-Justice dissent, without dictionary citation and using "everyday" examples, characterizes the majority's interpretation as too restrictive.

[41] *See, e.g.*, MCI Tel. Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 226-28 (1994) (FCC's authority to "modify" requirements does not include the authority to make tariff filing optional; aberrant dictionary meaning "to make a basic or important change" is antithetical to the principal meaning of incremental change and more than the statute can bear); and Nixon v. Missouri Municipal League, 541 U.S. 125 (2004) (preemption of state laws that prohibit "any entity" from providing telecommunications service means, in context, "any private entity," and does not preempt a state law prohibiting local governments from providing such services). If the court views the issue as one of deference to an administrative interpretation, then the agency's choice of one dictionary definition over another may indicate sufficient "reasonableness." Smiley v. Citibank (South Dakota), 517 U.S. 735, 744-47 (1996). *See also* Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. ___, No. 09-834, slip op. (March 22, 2011) (holding that "filing" a complaint (continued...)

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"[a]mbiguity is a creature not of definitional possibilities but of statutory context."[42] Consider two cases in which context did not clearly point to whether a term was to be given its broadest dictionary meaning or was to be construed narrowly according to "common understanding." In one case, the Supreme Court concluded that "use of a firearm" in the commission of a drug offense or crime of violence included trading a gun for drugs; that is, "use of a firearm" was not confined to its use as a weapon.[43] This conclusion may be compared to a finding that purchasing drugs over a cell phone did not constitute the felony of "facilitating" drug trafficking through a communication device: "[S]tatutes are not read as a collection of isolated phrases ... 'A word in a statute may or may not extend to the outer limits of its definitional possibilities.' We think the word here does not."[44] In close cases such as these, the Court may go beyond the words of a statute for guidance and look to the statute's broader purpose or its fit with other laws.[45] As Judge Learned Hand observed, "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."[46]

And/Or

Ordinarily, as in everyday English, use of the conjunctive "and" in a list means that all of the listed requirements must be satisfied,[47] while use of the disjunctive "or" means that only one of the listed requirements need be satisfied.[48] Courts do not apply these meanings "inexorably,"

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included complaints made orally).

[42] Brown v. Gardner, 513 U.S. 115, 118 (1994).

[43] Smith v. United States, 508 U.S. 223 (1993). Dissenting, Justice Scalia argued for a narrower reading: "[To] use an instrumentality normally 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." *Id.* at 242. The Court had less difficulty with the provision in 1995, overruling a lower court's holding that proximity and accessibility of a firearm are alone sufficient to establish "use." Bailey v. United States, 516 U.S. 137 (1995) (driving car with gun located in bag in car's trunk does not constitute "use" of gun; person who sold drugs after retrieving them from room in which gun was found in a locked trunk in a closet did not "use" that gun in sale). The *Bailey* Court, however, defined "use" in such a way ("active employment") as to leave the *Smith* holding intact. *See also* Muscarello v. United States, 524 U.S. 125 (1998) (holding that the companion phrase "carries a firearm," found in the same statutory provision, is a broader category that includes transporting drugs with a handgun locked in the glove compartment of a vehicle).

[44] Abuelhawa v. United States, 556 U.S. 816, 819-20 (2009) (quoting Dolan v. Postal Service, 546 U.S. 481, 486 (2006)) (citations omitted).

[45] The majority in *Smith*, which construed "use of a firearm" broadly, stated there was a general understanding that drugs and firearms are a dangerous combination and saw no reason why Congress would want to distinguish use of a firearm as a weapon in a drug crime from use of a firearm in barter in a drug crime; according to the majority, both circumstances involved a grave possibility of violence and death. 508 U.S. at 240. The unanimous Court in *Abuelhawa*, which construed "facilitate" narrowly, stated that a broad reading (which would have led to higher criminal penalties) could be inconsistent with the gradation of similar and more serious offenses. 556 U.S. at 821-23.

[46] Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945). Justice Stevens expressed a preference for established interpretation over dictionary definitions. "In a contest between the dictionary and the doctrine of *stare decisis,* the latter clearly wins." Hibbs v. Winn, 542 U.S. 88, 113 (2004) (Stevens, J., concurring).

[47] *See, e.g.*, Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284, 1292 (D. N. Mex. 1996).

[48] *See, e.g.*, Zorich v. Long Beach Fire and Ambulance Serv., 118 F.3d 682, 684 (9th Cir. 1997); United States v. O'Driscoll, 761 F.2d 589, 597-98 (10th Cir. 1985). A corollary is that use of the disjunctive "or" creates "mutually exclusive" conditions that can rule out mixing and matching. United States v. Williams, 326 F.3d 535, 541 (4th Cir.
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however; if a "strict grammatical construction" will frustrate evident legislative intent, a court may read "and" as "or," or "or" as "and."[49] Moreover, statutory context can render the distinction secondary.[50]

Definite/Indefinite Article

As in common usage, a drafter's choice between the definite and indefinite article can affect meaning. "The definite article 'the' particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an.'"[51]

Shall/May

Use of "shall" and "may" in statutes also mirrors common usage; ordinarily "shall" is mandatory and "may" is permissive.[52] These words must be read in their broader statutory context, however, the issue often being whether the statutory directive itself is mandatory or permissive.[53] Use of both words in the same provision can underscore their different meanings,[54] and often the context

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2003) ("A crime may qualify as a serious drug offense by meeting all the requirements of (i) or all the requirements of (ii), but not some of the requirements of (i) and some of (ii).").

[49] *See, e.g.*, United States v. Moore, 613 F.2d 1029 (D.C. Cir. 1979); De Sylva v. Ballentine, 351 U.S. 570, 573 (1956) ("[T]he word 'or' is often used as a careless substitute for the word 'and.'"). Both "and" and "or" are context-dependent, and each word "is itself semantically ambiguous, and can be used in two quite different senses." LAWRENCE E. FILSON, THE LEGISLATIVE DRAFTER'S DESK REFERENCE, §21.10 (1992).

[50] *See, e.g.*, United States v. 141st St. Corp., 911 F.2d 870 (2d Cir. 1990) (holding that an affirmative defense to forfeiture of real property used in a drug offense, applicable if the offense was committed "without the knowledge or consent" of the property owner, applies if the property owner had knowledge of the crime, did not consent, and took all reasonable steps to prevent illicit use of his property).

[51] American Bus Ass'n v. Slater, 231 F.3d 1, 4-5 (D.C. Cir. 2000). *See also* Reid v. Angelone, 369 F.3d 363, 367 (4th Cir. 2004) ("Because Congress used the definite article 'the,' we conclude that ... there is only one order subject to the requirements."); Warner-Lambert Corp. v. Apotex Corp., 316 F.3d 1348, 1356 (Fed. Cir. 2003) (reference to "the" use of a drug is a reference to an FDA-approved use, not to "a" use or "any" use); Freytag v. Commissioner, 501 U.S. 868, 902 (1991) (Scalia, J., concurring) (contending that use of the definite article in the Constitution's conferral of appointment authority on "*the* Courts of Law" "obviously narrows the class of eligible 'Courts of Law' to those courts of law envisioned by the Constitution"). *But cf.* Sprietsma v. Mercury Marine, 537 U.S. 51, 63 (2002) (reference in a preemption clause to "a law or regulation" "implies a discreteness—which is embodied in statutes and regulations—that is not present in the common law").

[52] "The mandatory 'shall' ... normally creates an obligation impervious to judicial discretion." Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998). *See also, e.g.,* EPA v. EME Homer City Generation, 572 U.S. ___, Nos. 12-1182 and 12-1183, slip op. (April 29, 2014). "The use of a permissive verb—'may review' instead of 'shall review'—suggests a discretionary rather than mandatory review process." Rastelli v. Warden, Metro. Correctional Center, 782 F.2d 17, 23 (2d Cir. 1986). "Should" sometimes is substituted for "may" as a permissive word. Union Elec. Co. v. Consolidation Coal Co., 188 F.3d 998, 1001 (8th Cir. 1999). "Will" and "must" can be additional mandatory words. Bankers Ins. Co. v. Florida Res. Prop. & Cas. Jt. Underwriting Ass'n, 137 F.3d 1293, 1298 (11th Cir. 1998).

[53] See IA SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §25:4 (Norman J. Singer ed., 6th ed. 2002 rev.).

[54] *See, e.g.*, Lopez v. Davis, 531 U.S. 230, 241 (2001) ("Congress' use of the permissive 'may' ... contrasts with the legislators' use of a mandatory 'shall' in the very same section."); and United States ex rel. Siegel v. Thoman, 156 U.S. 353, 359-60 (1895) ("In the law to be construed here it is evident that the word 'may' is used in special contradistinction to the word 'shall.'").

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will confirm that the ordinary meaning of one or the other was intended.[55] Occasionally, however, context will trump ordinary meaning.[56]

Singular/Plural

An elementary rule of statutory construction is that the singular includes the plural, and vice-versa.[57] Thus, a statutory directive that the Secretary of Transportation require automakers to install a warning system in new cars to alert drivers "when *a* tire is significantly under-inflated" is only satisfied by a system capable of a separate warning for each tire, so that a driver knows when two tires on the same side, or all four tires, are significantly under-inflated.[58]

General, Specific, and Associated Words

Ordinarily, specific terms in a statute prevail over general terms.[59] "However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment."[60] In one case citing this canon, the Court examined whether time granted to a defendant to prepare pretrial motions extended the Speedy Trial Act's deadline for the government to begin a trial. The act directed that the clock stop for "[a]ny period of delay resulting from other proceedings concerning the defendant, including but not limited to ... (D) delay resulting from any pretrial motion, from the filing of the motion through conclusion...." The Court held that this directive could not include time expended preparing motions: despite "delays from other proceedings" not being limited to those contained in a list of illustrative subparagraphs, the specific language in subparagraph (D) on delays due to pretrial motions, *beginning with their being filed*, left no room for delays related to preparing motions prior to their being filed.[61] As with other canons, context is critical.[62]

Another interpretational guide used from time to time is the principle *noscitur a sociis*, that "words grouped in a list should be given related meaning."[63] Thus, a tax provision that

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[55] *See, e.g.*, Escoe v. Zerbst, 295 U.S. 490, 493 (1935) ("Doubt ... is dispelled when we pass from the words alone to a view of [the statute's] ends and aims.").

[56] *See, e.g.*, Moore v. Illinois Cent R.R., 312 U.S. 630, 635 (1941) (substitution of "may" for "shall" "was not, we think, an indication of a change in policy, but was instead a clarification of the [Railway Labor Act's] original purpose [of establishing] a system for peaceful adjustment and mediation voluntary in its nature"). *See also* Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 432 n.9 (1995) ("shall" sometimes means "may").

[57] The Dictionary Act provides that "unless the context indicates otherwise," "words importing the singular include and apply to several persons, parties, or things; words importing the plural include the singular." 1 U.S.C. §1.

[58] Public Citizen, Inc. v. Mineta, 340 F.3d 39, 54 (2d Cir. 2003).

[59] *E.g.*, Radlax Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. ___, No. 11-166, slip op. (May 29, 2012).

[60] Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 228 (1957) (citations omitted). The same principle is used to resolve conflict between two statutes. *See, e.g.*, United States v. Estate of Romani, 523 U.S. 517, 532 (1998) (later, more specific statute governs). *See also* Morton v. Mancari, 417 U.S. 535, 550-51 (1974) (a general statute will not be held to have repealed by implication a more specific one unless there is "clear intention otherwise").

[61] Bloate v. U.S., 559 U.S. 196 (2010).

[62] *See, e.g.*, Adams v. Woods, 6 U.S. (2 Cranch) 336, 341 (1805).

[63] Dole v. United Steelworkers of America, 494 U.S. 26, 36 (1990); Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995) (reading a statutory definition as limited by the first of several grouped words); Freeman v. Quicken Loans, 566 U.S. ___, No. 1042, slip op. (May 24, 2012) (terms in phrase prohibiting giving or accepting of any "portion, split, or percentage" of a real estate settlement charge unless a service was actually rendered reinforce one another and the conclusion that the prohibition does not cover a loan provider assessing an unearned fee for itself alone).

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advantaged "income resulting from exploration, discovery, or prospecting" was held not to apply to income derived from patented cameras and pharmaceuticals that the taxpayers had "discovered." "Discovery," as used in conjunction with "exploration" and "prospecting," limited the scope of "discovery" to activities associated with oil and mineral extraction.[64] Similarly, the Court inferred that "defalcation" in a bankruptcy code provision required an element of intentional wrongdoing based on its placement in the phrase "fraud [,] defalcation ..., embezzlement or larceny."[65] Because "fraud," "embezzlement," and "larceny" require intentional wrongdoing, "defalcation" presumably is similarly intended.[66]

On the other hand, the term "administrative" in the phrase "a congressional, administrative, or Government Accounting Office [sic] report, hearing, audit or investigation" was held to extend beyond federal administrative entities to include the work of state bodies as well.[67] Similarly, the term "report" in the same phrase was broadly construed to cover raw copies of contractor documents obtained through the Freedom of Information Act: the placement of "report" within a list including "hearings, audits, and investigations" did not, as the Second Circuit had concluded, limit "reports" to materials that also analyzed, synthesized, or explained the information presented.[68] As with other language canons, *noscitur a sociis* can be a factor in interpretation, but "is by no means a hard and fast rule...."[69]

A corollary, *ejusdem generis*, instructs that, "where general words follow an enumeration of specific items, the general words are read as applying only to other items akin to those specifically enumerated."[70] Thus, an exemption from arbitration for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in ... commerce" did not apply to the case of a salesperson at a consumer electronics store: only contracts for the employment of individuals who transported goods and materials were to be exempted.[71] At times, however,

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[64] Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961). "The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to Acts of Congress." *Id.*

[65] 11 U.S.C. §523(a)(4).

[66] Bullock v. BankChampaign, 569 U.S. ___, No. 11-1518, slip op. (May 13, 2013).

[67] Graham County Soil and Water Conservation District v. U.S., 559 U.S. 280 (2010). "The substantive connection, or fit, between the terms 'congressional,' 'administrative,' 'and 'GAO' is not so tight or so self-evident as to demand that we 'rob' any one of them 'of its independent and ordinary significance.'" *Id.* at 288 (citations omitted). The language at issue in *Graham County* barred *qui tam* actions under the False Claims Act that were based on certain publicly available government documents, and a broad interpretation of the language effectively limited the circumstances in which private parties could sue to recover funds fraudulently obtained from the government by others.

[68] Schindler Elevator Corp. v. United States, 563 U.S. ___, No. 10-188, slip op. (May 16, 2011).

[69] Beecham v. United States, 511 U.S. 368, 371 (1994). The Court often explains that this and similar canons are only vehicles for ascertaining the correct meaning of otherwise uncertain terms. *See* Norfolk & Western Ry. v. Train Dispatchers, 499 U.S. 117, 129 (1991) ("The canon does not control ... when the whole context dictates a different conclusion."); United States v. Turkette, 452 U.S. 576, 580-82 (1981) (appeals court erred in finding that a second category was merely a more general description of the first; context and language instead reveal two contrasting categories).

[70] Harrison v. PPG Industries, Inc., 446 U.S. 578, 588 (1980); Washington Dep't of Social Servs. v. Keffeler, 537 U.S. 371, 384 (2003) (relying on both *noscitur a sociis* and *ejusdem generis*). The principle cannot be applied if the enumerated categories are too "disparate." Arcadia v. Ohio Power Co., 498 U.S. 73, 78 (1990). And, of course, context may reveal that application is inappropriate. Norfolk & Western Ry. v. Train Dispatchers, 499 U.S. 117, 129 (1991) (exemption of carriers from "the antitrust laws and all other law, including State and municipal law," is "clear, broad and unqualified," and obviously applies beyond antitrust and similar laws).

[71] Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114-15 (2001). "Canons of construction need not be conclusive and are often countered, of course, by some maxim pointing in a different direction. The application of the rule of *ejusdem* (continued...)

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discerning commonalities among particulars to guide interpretation of the general is not so straightforward.[72]

Grammatical Rules, Punctuation

The old rule, borrowed from English law, was that "[p]unctuation is no part of the statute," and that "[c]ourts will ... disregard the punctuation, or repunctuate, if need be, to render the true meaning of the statute."[73] Nevertheless, the modern Court now recognizes that punctuation may clarify meaning, even though it remains reluctant to place primary importance on it. "A statute's plain meaning must be enforced ..., and the meaning of a statute will typically heed the commands of its punctuation."[74] So said the Court—not, however, in applying a plain meaning consistent with punctuation, but instead while justifying a departure from that meaning. "Overwhelming evidence from the structure, language, and subject matter" of the law led the Court to conclude that in this unusual case the punctuation at issue resulted from "a simple scrivener's error."[75]

The Court assumes that a legislative drafter writes precisely and in accordance with the rules of grammar.[76] Verb tense and the like count.[77] But, as with other interpretive challenges, more than one grammatical principle potentially might apply, and these principles might point to different interpretations. The interpreter is left with a choice of which principle applies most aptly. As an

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generis in this case, however, is in full accord with other sound considerations bearing upon proper interpretation of the clause." *Id.* at 115. *Compare* CSX Transportation, Inc. v. Alabama Dept. of Revenue, 562 U.S. ___, No. 09-520, slip op. at 16-17 (February 22, 2011) (a prohibition against "impos[ing] another tax that discriminates" against railroads that followed a list of prohibited property taxes on railroad property held not limited to other property taxes; the prohibition was distinct and independent from the listed property tax prohibitions and not a catch-all that rendered the more specific prohibitions meaningless).

[72] During a five-year period, the Court addressed the scope of the term "violent felony" in the Armed Career Criminal Act in four separate cases. In the ACCA, "violent felony" includes, *inter alia*, a crime that "is burglary, arson, or extortion, involves the use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*" (emphasis added). In *James v. United States*, a five-Justice majority found that attempted burglary fit within the residual clause because it entails a significant risk of bodily injury, which, according to the majority, is the most relevant common attribute of the listed crimes, and not that they are all completed crimes, as the petitioner had argued. 550 U.S. 192 (2007). In *Begay v. United States*, the majority found DUI to fall outside the residual clause because it is too dissimilar to the listed crimes, being a crime that need not be deliberate, among other things. 553 U.S. 137 (2008). With somewhat less emphasis on *ejusdem generis* reasoning, a unanimous Court found failure to report to prison beyond the residual clause in *Chambers v. United States*, finding the crime to be passive and not aggressive conduct as the listed crimes are. 555 U.S. 122 (2009). Two years later, a majority of the Court in *Sykes v. United States* found the crime of vehicle flight to carry a level of risk, and a *mens rea* requirement, comparable to the listed crimes and, therefore, within the residual clause. 564 U.S. ___, No. 09-11311, slip op. (June 9, 2011). Dissenting in *Sykes*, Justice Scalia reviewed the several tests the Court had derived from its various characterizations of the listed crimes in the ACCA cases and declared the residual clause to be unconstitutionally vague.

[73] Hammock v. Loan and Trust Co., 105 U.S. (15 Otto) 77, 84-85 (1881) (disregarding a comma). *See also* United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 82-83 (1932) (also disregarding a comma).

[74] United States Nat'l Bank of Oregon v. Independent Ins. Agents, 508 U.S. 439, 454 (1993).

[75] *Id.* at 462.

[76] *See, e.g.*, Arcadia v. Ohio Power Co., 498 U.S. 73, 79 (1990) ("In casual conversation, perhaps, such absent-minded duplication and omission are possible, but Congress is not presumed to draft its laws that way.").

[77] Ingalls Shipbuilding v. Director, OWCP, 519 U.S. 248, 255 (1997) (present tense of verb is an element of plain meaning); Dole Food Co. v. Patrickson, 538 U.S. 468, 478 (2003) (interpretation required by "plain text" derived from present tense).

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example, first consider the "rule of the last antecedent." That rule holds that a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows. One application of this rule looked at language that denies SSI disability to an individual who is able to "do his previous work ... or engage in any other kind of substantial gainful work which exists in the national economy." The claimant's job as an elevator operator had been eliminated, and her subsequent SSI application rested in part on the assertion that elevator operator work no longer existed in significant numbers in the national economy. A unanimous Court upheld the government's position that the claimant was ineligible for SSI if she was physically capable of doing elevator operator work at all: the phrase "which exists in the national economy" applied only to "other kind of substantial gainful work."[78]

Distinct from the rule of the last antecedent is a principle enunciated in *Port Rico Railway, Light & Power Co. v. Mor*: "When several words are followed by a clause which is applicable as much to the first and other words as the last, the natural construction of the language demands that the clause be read as applicable to all."[79] A provision of the federal criminal code mandates restitution for the full amount of the victim's losses, which are defined to include five specific types of loss (*e.g.*, medical costs, lost income) and "any other losses suffered by the victim as a proximate result of the offense."[80] The Court held that the phrase "as a proximate result of the offense" modified each of the five separately listed types of losses.[81]

Though refusal always to be bound by the rules of grammar[82] and punctuation gives the Court flexibility in construing statutes, this is not to say that grammatical rules should be disregarded in statutory drafting. These rules remain strong guides. There are many cases decided on the basis of what constitutes the most "natural reading" of a statute according to common rules of grammar, without extended reference to particular canons or other interpretational aids.[83]

Statutory Language Not to be Construed as "Mere Surplusage"

A basic principle of statutory interpretation is that courts should "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."[84] The modern variant is

[78] Barnhart v. Thomas, 540 U.S. 20 (2003). An example of the "rule of the last antecedent" not being strictly followed is *Nobelman v. American Savings Bank*, 508 U.S. 324, 330-31 (1993). Under a section of the Bankruptcy Code, a bankruptcy plan can modify the "rights of holders of secured claims, other than a claim secured only by [the debtor's residence]." The term "secured claim" is defined elsewhere in the Bankruptcy Code as being limited to the fair market value of the underlying collateral. In this instance, the rule of the last antecedent would link the modifying clause to "claims" and imply that a home mortgage does not cover an amount greater than a home's fair market value. For policy and practical reasons, however, the Court read the modifying clause as saying "other than *the rights of holders of* a claim secured only by the debtor's residence." *See also* Lamie v. United States Trustee, 540 U.S. 526, 534 (2004) ("The statute is awkward, and even ungrammatical; but that does not make it ambiguous.").

[79] 253 U.S. 345, 348 (1920).

[80] 18 U.S.C. §2259(b).

[81] Paroline v. United States, 572 U.S. ___, No. 12-8561, slip op. at 9 (April 23, 2014).

[82] So too, in another case the Court shied away from "the most natural grammatical reading" of a statute to avoid an interpretation that would have raised a serious issue of constitutionality. United States v. X-Citement Video, Inc., 513 U.S. 64, 68 (1994). Justice Scalia, dissenting, insisted that the language was perfectly clear, and that the rejected interpretation was "the only grammatical reading." *Id.* at 81.

[83] *E.g.,* Flores-Figueroa v. United States, 556 U.S.646 (2009).

[84] Montclair v. Ramsdell, 107 U.S. 147, 152 (1883).

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that statutes should be construed "so as to avoid rendering superfluous" any statutory language: "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant...."[85] A related principle applies to statutory amendments: there is a "general presumption" that, "when Congress alters the words of a statute, it must intend to change the statute's meaning."[86] Resistance to treating statutory words as mere surplusage "should be heightened when the words describe an element of a criminal offense."[87]

There can be differences of opinion, of course, as to when it is "possible" to give effect to all statutory language – that is, to search for distinctions between similar terms or apparently redundant language without distorting the significance of those distinctions -- and when the general rule should give way to a more "common sense" interpretation.[88]

The presumption against surplusage also can guide interpretation of "redundancies across statutes," but the canon "is strongest when an interpretation would render superfluous another part of the same statutory scheme."[89] Two overlapping statutes may be given effect so long as there is no "positive repugnance" between them.[90]

A converse of the rule that courts should not read statutory language as surplusage is that, as discussed below, courts should not add language that Congress has not included.

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[85] Hibbs v. Winn, 542 U.S. 88, 101 (2004) (quoted in Corley v. United States, 556 U.S. 303, 314 (2009)); Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991); Sprietsma v. Mercury Marine, 537 U.S. 51, 63 (2003) (interpreting word "law" broadly could render word "regulation" superfluous in preemption clause applicable to a state "law or regulation"). *See also* Bailey v. United States, 516 U.S. 137, 146 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.") (rejecting interpretation that would have made "uses" and "carries" redundant in statute penalizing using or carrying a firearm in commission of offense). In a case analyzing the significance of the adjective "applicable" in a provision of the Bankruptcy Code, the majority opinion relied on the presumption again superfluity to hold that "applicable" had a limiting effect, whereas Justice Scalia, in dissent, observed that "[t]he canon against superfluity is not a canon against verbosity. When a thought could have been expressed more concisely, one does not always have to cast about for some additional meaning to the word or phrase that could have been dispensed with." *Compare* Ransom v. FIA Card Services, 562 U.S. ___, No. 09-907, slip op. at 7-8 (January 11, 2011) *with* Ransom v. FIA Card Services, 562 U.S. ___, No. 09-907, slip op. at 2 (January 11, 2011) (Scalia, J., dissenting).

[86] United States v. Wilson, 503 U.S. 333, 336 (1992) (nonetheless attributing no significance to deletion of a reference to the Attorney General; the reference "was simply lost in the shuffle" of a comprehensive statutory revision that had various unrelated purposes); Stone v. INS, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."). There is an exception for minor, unexplained changes in phraseology made during recodification—changes that courts generally assume are "not intended to alter the statute's scope." Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 318 (1985).

[87] Ratzlaf v. United States, 510 U.S. 135, 140-41 (1994).

[88] *See, e.g.*, Moskal v. United States, 498 U.S. 103 (1990). Defendant in Pennsylvania sent altered documentation about certain automobiles to Virginia and obtained valid Virginia auto titles incorporating false facts contained in the altered documents. The new titles were then sent back to defendant in Pennsylvania. The federal forgery statute prohibited receipt of "falsely made, forged, altered, or counterfeited securities." Five Justices held that the Virginia titles were "falsely made" even though Virginia authorities were unaware of the misrepresentations contained in them. Dissenting Justice Scalia objected to the Court's straining to avoid holding that "falsely made" is redundant: "The principle [against mere surplusage] is sound, but its limitation ('if possible') should be observed. It should not be used to distort ordinary meaning. Nor should it be applied to obvious instances of iteration to which lawyers, alas, are particularly addicted." *Id.* at 120.

[89] Marx v. General Revenue Corp., 568 U.S. ___, No. 11-1175, slip op. at 14 (February 26, 2013).

[90] POM Wonderful LLC v. Coca-Cola Co., 573 U.S. ___, No. 12-761, slip op. (June 12, 2014). *See also* Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992) (finding that, despite considerable overlap between two provisions, each addressed matters that the other did not).

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Same Phrasing in Same or Related Statutes

"A term appearing in several places in a statutory text is generally read the same way each time it appears."[91] This presumption is "at its most vigorous when a term is repeated within a given sentence."[92] It also has been applied to the appearance of a term in inter-related programs.[93] Additionally, the Court in at least one instance referred to a broader "established canon" that similar language contained within the same section of a statute be accorded a consistent meaning.[94]

The general presumption is not rigid, however, and "readily yields when there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent."[95] Context and statutory history can override the presumption.

Different Phrasings in Same Statute

The other side of the coin is that "where Congress includes particular language in one section of a statute but omits it in another ..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[96] The Court cited this maxim when Congress had restricted direct access by Guantanamo detainees to the courts but did not expressly restrict access in pending cases through petitions for writs of habeas corpus: "A familiar principle of statutory construction ... is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute."[97] In an

[91] Ratzlaf v. United States, 510 U.S. 135, 143 (1994). *See also* Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995); and Wisconsin Dep't of Revenue v. William Wrigley, Jr. Co., 505 U.S. 214, 225 (1992).

[92] Brown v. Gardner, 513 U.S. 115, 118 (1994); Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 329-30 (2000). *Cf.* Robers v. United States, 572 U.S. ___, No. 12-9012, slip op. (May 5, 2014).

[93] Sullivan v. Stroop, 496 U.S. 478, 484 (1990) ("child support" as used in the Child Support program under the Social Security Act points toward the same use of "child support" in the closely related AFDC program, and thus "child support" as used in the AFDC program does not include OASDI payments under title II of the Social Security Act).

[94] National Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 501(1998).

[95] Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1933). *See also* Robinson v. Shell Oil Co., 519 U.S. 337, 342-43 (1997) (term "employees" means current employees only in some sections of Title VII of Civil Rights Act, but in other sections includes former employees); United States v. Cleveland Indians Baseball Co., 532 U.S. 200 (2001) (different statutory contexts of worker eligibility for Social Security benefits and "administrability" of tax rules justify different interpretations); General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581, 594-595 (2004) (word "age" means "old age" when included in the term "age discrimination" in the Age Discrimination in Employment Act even though it is used in its primary sense elsewhere in the act). For disagreement about the appropriateness of applying this limitation, contrast the Court's opinion in *Gustafson v. Alloyd Co.*, 513 U.S. at 573, with the dissenting opinion of Justice Thomas in the same case, *id.* at 590 (interpreting a definition that, by its terms, was applicable "unless the context otherwise requires").

[96] Keene Corp. v. United States, 508 U.S. 200, 208 (1993) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)). *See also* Bailey v. United States. 516 U.S. 137, 146 (1995) (distinction in one provision between "used" and "intended to be used" creates implication that related provision's reliance on "use" alone refers to actual and not intended use); Merck v. Reynolds, 559 U.S. ___, No. 08-905 (April 27, 2010) (Scalia, J., concurring) (use of "discovery" alone in one securities fraud statute of limitations provision and the use of "discovery, or after such discovery should have been made" in another securities fraud statute of limitations provision implies that "discovery" in the first provision means only "actual discovery" and does not include "constructive discovery"); and Bates v. United States, 522 U.S. 23, 29 (1997) (inclusion of "intent to defraud" language in one provision and exclusion in a parallel provision).

[97] Hamdan v. Rumsfeld, 548 U.S. 557, 578 (2006).

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earlier case on the availability of habeas review by a convicted murderer, the Court referred to the history of the provision that treated habeas relief and other access to the courts differently: "[N]egative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted."[98] This maxim has been applied by the Court—or at least cited as a justification—in distinguishing among different categories of veterans benefits[99] and among different categories of drug offenses.[100] A court can only go so far with the maxim, of course; establishing that language does *not* mean one thing does not necessarily establish what the language *does* mean.[101]

"Congress Knows How to Say ..."

Occasionally the Court contrasts a party's interpretation of certain language with language that expresses the same concept more clearly and directly. There are some instances—for example, a failure to employ particular terms of art—in which this argument can be fairly persuasive. For example, the Court reasoned that, although "Congress knew how to impose aiding and abetting liability when it chose to do so," it did not use the words "aid" and "abet" in the statute at issue, and hence did not impose aiding and abetting liability.[102] To say that Congress did not use the most precise language, however, does not necessarily aid the court in determining what the less precise language means in its statutory context.[103] Some statutes may not be well drafted,[104] but

[98] Lindh v. Murphy, 521 U.S. 320, 330 (1997) (statute was explicit in making one section applicable to habeas cases pending on date of enactment, but was silent as to parallel provision).

[99] King v. St. Vincent's Hospital, 502 U.S. 215, 220-21 (1991) ("Given the examples of affirmative limitations on reemployment benefits conferred by neighboring provisions, we infer that the simplicity of subsection (d) was deliberate, consistent with a plain meaning to provide its benefit without conditions on length of service.").

[100] Chapman v. United States, 500 U.S. 453, 459 (1991) (fact that, with respect to some drugs, Congress distinguished between a "mixture or substance" containing the drug and a "pure" drug refutes the argument that Congress's failure to so distinguish with respect to LSD was inadvertent).

[101] *See* Field v. Mans, 516 U.S. 59, 67 (1995) ("without more, the ['negative pregnant'] inference might be a helpful one," but other interpretive guides prove more useful).

[102] Central Bank of Denver v. First Interstate Bank, 511 U.S. 164, 176-77 (1994). *See also* Franklin Nat'l Bank v. New York, 347 U.S. 373, 378 (1954) (finding "no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances"); Meghrig v. KFC Western, Inc., 516 U.S. 479, 485 (1996) ("Congress ... demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs, and ... the language used to define the remedies under RCRA does not provide that remedy."); FCC v. NextWave Personal Communications, Inc., 537 U.S. 293, 302 (2003) (when Congress has intended to create exceptions to bankruptcy law requirements, "it has done so clearly and expressly"); Dole Food Co. v. Patrickson, 538 U.S. 468, 476 (2003) (Congress knows how to refer to an indirect owner of a corporation, as distinct from a direct owner of shares in the "formal sense," and did not do so in the Foreign Sovereign Immunities Act's definition of foreign state "instrumentality"); Whitfield v. United States, 543 U.S. 209, 216 (2005) ("Congress has included an express overt-act requirement in at least 22 other current conspiracy statutes, clearly demonstrating that it knows how to impose such a requirement when it wishes to do so."). *Also* Mississippi *ex rel.* Hood v. AU Optronics Corp., 571 U.S. ___, No. 12-1036, slip op. (January 14, 2014) (when Class Action Fairness Act authorizes removal of a state case to federal court as a "mass action" if the case was brought by 100 or more persons, only named plaintiffs may be counted; in the same statute, Congress explicitly had included counting "unnamed parties in interest" toward meeting class action thresholds and could have done so under the mass action provision if it so chose.).

[103] *See, e.g.*, Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) (Title IX's prohibition on sex discrimination encompasses retaliation despite absence of an explicit prohibition on retaliation such as those contained in Title VII, the ADA, and the Age Discrimination in Employment Act).

[104] *See, e.g.*, the provisions of the Plant Variety Protection Act at issue in Asgrow Seed Co. v. Winterboer, 513 U.S. 179 (1995). Justice Scalia in his opinion for the Court in *Asgrow* called 7 U.S.C. §2543 a "verbal maze," and conceded that (continued...)

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others represent conscious choices, born of political compromise, that may or may not signal that a different result is intended or that Congress is leaving final interpretation to agencies, courts, or future legislatures.[105] It may be inappropriate question begging to assume, therefore, that "[i]f Congress had intended such an irrational result, surely it would have expressed it in straightforward English."[106]

Statutory Silence

Nothing compels Congress to act comprehensively when it legislates on a subject. It is not safe to assume that Congress intends to address all ancillary issues directly whenever it acts.

> As one court has aptly put it, "[n]ot every silence is pregnant." In some cases, Congress intends silence to rule out a particular statutory application, while in others Congress' silence signifies merely an expectation that nothing more need be said in order to effectuate the relevant legislative objective. In still other instances, silence may reflect the fact that Congress has not considered an issue at all. An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent.[107]

Occasionally, the Court does regard silence as a significant indicator of meaning, especially when Congress has consistently used particular language in similar laws.[108] Nevertheless, the Court generally assumes Congress will speak to major issues directly: "Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not ... hide elephants in mouseholes."[109] Thus, when the Court held that the FDA's authority did not include authority to regulate tobacco products as drugs, it stated: "Congress could not have

(...continued)

"it is quite impossible to make complete sense of the provision." *Id.* at 185-86. In another case, the Court found statutory language "incoherent" due to use of three different and conflicting standards identifying an evidentiary burden. Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602, 627 (1993). The Court resolved the issue by treating the "incoherence" as ambiguity, and by applying the one possible construction that did not raise constitutional issues. *Id.* at 628-30.

[105] *See, e.g.*, Landgraf v. USI Film Products, 511 U.S. 244, 263 (1994) ("The history of the 1991 [Civil Rights] Act conveys the impression that the legislators agreed to disagree about whether and to what extent the Act would apply to preenactment conduct.").

[106] FMC Corp. v. Holliday, 498 U.S. 52, 66 (1990) (Justice Stevens, dissenting, objecting to Court's interpretation of convoluted preemption language in ERISA).

[107] Burns v. United States, 501 U.S. 129, 136 (1991) (quoting Illinois Dep't of Public Aid v. Schweiker, 707 F.2d 273, 277 (7th Cir. 1983)).

[108] Director, OWCP v. Newport News Shipbuilding Co., 514 U.S. 122 (1995) (agency in its governmental capacity is not a "person adversely affected or aggrieved" for purposes of judicial review). *See also* United States v. Bestfoods, 524 U.S. 51, 62 (1998) ("Against this venerable common-law backdrop, the congressional silence is audible."); Elkins v. Moreno, 435 U.S. 647, 666 (1978) (absence of reference to an immigrant's intent to remain citizen of foreign country is "pregnant" when contrasted with other provisions of "comprehensive and complete" immigration code); Meyer v. Holley, 537 U.S. 280 (2003) (ordinary rules of vicarious liability apply to tort actions under the Fair Housing Act; statutory silence as to vicarious liability contrasts with explicit departures in other laws).

[109] Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001). *See also* MCI Telecommunications Corp. v. AT&T, 512 U.S. 218, 231 (1994) (conferral of authority to "modify" rates was not a cryptic conferral of authority to make filing of rates voluntary); Director of Revenue of Mo. v. CoBank, ACB, 531 U.S. 316, 323 (2001) ("[I]t would be surprising, indeed," if Congress had effected a "radical" change in the law "*sub silentio*" via "technical and conforming amendments.").

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intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[110]

A variation on the statutory silence theme is the negative inference: *expressio unius est exclusio alterius* (the inclusion of one is the exclusion of others). Thus, where Congress subjected specific categories of ticket sales to taxation but failed to cover another category, either by specific or by general language, the Court refused to extend the coverage. To do so, given the "particularization and detail" with which Congress had set out the categories, would amount to "enlargement" of the statute rather than "construction" of it.[111] Relatedly, "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent."[112] The Court applied the principle, albeit without express recognition, in holding that a statute requiring payment of an attendance fee to "a witness" applies to an incarcerated state prisoner who testifies at a federal trial. Because Congress had expressly excepted another category (detained aliens) from eligibility for these fees, and had expressly excepted any "incarcerated" witness from eligibility for a different category of fees, "the conclusion is virtually inescapable ... that the general language 'witness in attendance' ... includes prisoners ...."[113]

But here again, context may render the principle inapplicable. A statutory listing may be "exemplary, not exclusive," the Court once concluded.[114] In one case, a provision of the Fair Debt Collection Act (FDCA) authorized the award of attorney's fees and costs to defendants who were sued in bad faith for the purpose of harassment.[115] Did this provision negatively imply that costs could not be awarded to prevailing defendants in cases not involving bad faith and harassment? A majority of the Court found that costs could indeed be awarded in these cases. According to the Court, the *expressio unius* cannon only applies when it is fair to assume that Congress considered broader coverage but rejected it. Here, the general rules on awarding costs, the prevalence of redundancies in costs provisions, and certain aspects of the statutory structure all indicated that the FDCA was not meant to categorically bar the award of costs to any class of defendants prevailing in FDCA actions.

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[110] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000). Ordinarily the Court does not require reference to specific applications of general authority, but in this instance ("hardly an ordinary case") the Court majority attached importance to the FDA's longstanding disavowal of regulatory authority over tobacco, and to subsequently enacted tobacco-specific legislation that stopped short of conferring authority to ban sale of the product.

[111] Iselin v. United States, 270 U.S. 245, 250 (1926). *See also* Lamie v. United States Trustee, 540 U.S. 526, 537 (2004) (courts should not add an "absent word" to a statute; "there is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted"). Obviously, the line between the permissible filling in of statutory gaps and the impermissible adding of statutory content may be indistinct in some instances, and statutory context, congressional purpose, and overriding presumptions may tip the scales. For example, the Court made no mention of the "absent word" rule in holding that a reference to "any entity" actually meant "any *private* entity" in the context of preemption. Nixon v. Missouri Municipal League, 541 U.S. 125 (2004) (preemption of state laws that prohibit "any entity" from providing telecommunications service does not preempt a state law prohibiting local governments from providing such service).

[112] Andrus v. Glover Const. Co., 446 U.S. 608, 616-17 (1980) (citing Continental Casualty Co. v. United States, 314 U.S. 527, 533 (1942)).

[113] Demarest v. Manspeaker, 498 U.S. 184, 188 (1991). Congress quickly acted to override this result and prohibit payment of witness fees to prisoners, P.L. 102-417, 106 Stat. 2138 (1992), the House Judiciary Committee expressing the belief that "Congress never intended" that prisoners be paid witness fees. H.Rept. 102-194, 102d Cong., 1st Sess. 2 (1991).

[114] NationsBank v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257 (1995) (endorsing Comptroller of the Currency's interpretation).

[115] Marx v. General Revenue Corp., 568 U.S. ___, No. 11-1175, slip op. (February 26, 2013).

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De Minimis Principle

"The venerable maxim *de minimis non curat lex* ('the law cares not for trifles') is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept.... Whether a particular activity is a *de minimis* deviation from a prescribed standard must ... be determined with reference to the purpose of the standard."[116]

"Substantive" Canons of Construction

In some circumstances, the Court subordinates the general, linguistic canons of statutory construction, as well as other interpretive principles, to overarching presumptions that, unless rebutted, favor particular substantive results. Some of the "weighty and constant values" protected by these "substantive" canons of construction are derived from the Constitution, others from notions of federalism, and yet others from interests in judicial administration and ordered governance.[117] Application of a substantive canon often, but not always,[118] results in some form of "clear statement" rule, requiring that Congress, if it wishes to achieve a particular result inconsistent with the Court's view of legal traditions, must state such an intent with unmistakable clarity.[119]

Departure from Common Law or Established Interpretation

Congress is presumed to legislate with knowledge of existing common law. When it adopts a statute, related judge-made law (common law) is presumed to remain in force and work in conjunction with the new statute absent a clear indication otherwise. Thus, when Congress established civil actions for harms "by reason of" violations of antitrust laws and the Racketeer Influenced and Corrupt Organizations Act (RICO), the courts incorporated common law principles of "proximate cause" to determine liability. Establishing that a harm would not have occurred "but for" the violation is insufficient; as is the case under common law actions, a more

[116] *See* Abbott Laboratories v. Portland Retail Druggists, 425 U.S. 1, 18 (1976) (occasional emergency dispensation of drugs to walk-in patients is *de minimis* deviation from Robinson-Patman Act's exemption for hospitals' purchase of supplies "for their own use"); Industrial Ass'n v. United States, 268 U.S. 64, 68 (1925) (3 or 4 "sporadic and doubtful instances" of interference with interstate commerce in what was in essence an intrastate matter were insufficient to establish a violation of the Sherman Act).

[117] For an extensive listing of substantive canons, by type, used in Supreme Court decisions from 1986-2006, along with accompanying case citations, see WILLIAM N. ESKRIDGE, JR., PHILLIP P. FRICKEY & ELIZABETH GARRETT, CASES & MATERIALS ON LEGISLATION: STATUTES & THE CREATION OF PUBLIC Policy at Appendix B 29-41 (4th ed. 2007).

[118] For example, in *Astoria Federal Savings & Loan Assn. v. Solimino* (501 U.S. 104 (1991)), the Court addressed whether a federal cause of action under the Age Act was bound by unreviewed findings of a state administrative board, as might be the case if the common law doctrine of collateral estoppel applied. In this instance, Justice Souter characterized the maxim that judge-made law implicitly continues to apply as an analytical starting point only, one that would give way as statutory context or purpose indicates. The opinion eschewed any formulaic application that would make the maxim dispositive absent a "clear statement" in the statute to the contrary. 501 U.S. at 108-10.

[119] Judge Wald described one such presumption as requiring that Congress "signal[ ] its intention in neon lights." Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term,* 68 IOWA L. REV. 195, 208 (1983). *See generally* pp. 206-14 of the article. *See also* William N. Eskridge, Jr. and Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992).

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direct and immediate connection between violation and harm must be shown.[120] Similarly, when Congress adopted the common law on abandonment of property as part of the Bankruptcy Code, it was deemed to have adopted all the judge-made corollaries and exceptions that attended the abandonment law: "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."[121] In another bankruptcy case the Court declared that "[w]e will not read the Bankruptcy Code to erode past ... practice absent a clear indication that Congress intended such a departure."[122] Further, the Court held that Congress, in adopting language stating that a patent is presumed valid, concomitantly adopted the common law rule that the presumed validity of a patent may be overcome only by clear and convincing evidence.[123]

Questions about whether common-law rights and causes of action continue come up in a variety of contexts.[124] In some instances, the presumption of continuation has been overcome by general reference to a statute's purpose, even absent a "clear statement."[125] In other instances, the Justices have disagreed on whether particular language sufficiently evidences an intent to overcome the presumption: Does language in the Federal Employers' Liability Act making railroads liable for employee injuries "resulting in whole or in part from [carrier] negligence" supersede (and relax) common law rules limiting liability to injuries arising from a "proximate cause"? In one case, five Justices held that it does, while four Justices held that it does not.[126]

Preempting State Law, Deferring to State Powers

Under the Supremacy Clause of the Constitution (Article VI, cl. 2), federal law supersedes inconsistent state law.[127] Whether a particular statute does so is a matter of congressional intent. One substantive canon proceeds from "the assumption that the historic police powers of the States were not to be superseded by [a federal law] unless that was the clear and manifest purpose of

[120] *See* Holmes v. Securities Investor Protection Corporation, 503 U.S. 258 (1992).

[121] Midlantic Nat'l Bank v. New Jersey Dep't of Envt'l Protection, 474 U.S. 494, 501 (1986) (quoting Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266-67 (1979)).

[122] Pennsylvania Pub. Welfare Dep't v. Davenport, 495 U.S. 552, 563 (1990) (nonetheless finding that the statutory language plainly evidenced an intent to depart from past practice).

[123] Microsoft Corp. v. i4i Ltd. Partnership, 564 U.S. ___, No. 10-290, slip op. (June 9, 2011).

[124] *E.g.,* Atlantic Sounding Co., Inc. v. Townsend, 557 U.S. 404 (2009) (availability of punitive damages in maritime cases under common law not superseded by Jones Act); Norfolk Southern Railway v. Sorrell, 549 U.S. 158 (2007) (common-law negligence principles continued to apply in action under the Federal Employers' Liability Act); United States v. Dixon, 548 U.S. 1 (2006) (common-law burden on defendant to prove affirmative defense of duress applied in prosecution for firearms-related offenses); Bates v. Dow Agrosciences LLC, 544 U.S. 431 (2005) (continued availability of certain state common law tort remedies after Federal Insecticide, Fungicide, and Rodenticide Act).

[125] *See* Astoria Federal Savings & Loan Assn. v. Solimino, 501 U.S. 104 (1991).

[126] *Compare* CSX Transportation Inc. v. McBride, 564 U.S. ___, No. 10-235, slip op. (June 23, 2011) (Ginsburg, J., for the Court) (also citing previous judicial interpretations and the purpose of the statute), *with* CSX Transportation Inc. v. McBride, 564 U.S. ___, No. 10-235, slip op. (June 23, 2011) (Roberts, C.J., dissenting) (finding lack of requisite congressional intent in the statutory language and opining that if the phrase "in whole or in part" was intended to affect any common law rule, it was to allow actions in cases of contributory negligence, not to relax proximate cause restrictions).

[127] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

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Congress."[128] Also, solicitude toward state police powers can lead the Court to look for a clear indication of intent from Congress when a statute implicates traditional state authorities, even if there is no conflict with state law.[129]

Many federal regulatory statutes contain an express statement preempting state law or disclaiming intent to do so. Nevertheless, both preemption and savings statements have presented the Court difficult interpretive questions of precisely what has been foreclosed or preserved.[130] When a statute is silent on preemption, the Court has asked three questions in determining whether state law has been preempted implicitly: Is there a direct conflict between federal and state law—can they be implemented simultaneously? Would implementation of state law "frustrate congressional purpose"? Has federal law "occupied the field" of regulation? Answering these questions has very much been a case-by-case exercise.

In deference to the states, the Court will not lightly infer that Congress has enacted legislation that restricts how states may constitute their own governments. In ruling that state judges are not "employees" for purposes of the Age Discrimination in Employment Act, the Court cited the lack of a plain statement to limit state authority to determine the qualifications of important

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[128] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 605 (1991). *See also* Medtronic Inc. v. Lohr, 518 U.S. 470, 485 (1996) ("[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action."). Nevertheless, any presumption disfavoring preemption of state law may go only so far. In *PLIVA, Inc. v. Mensing*, for example, four Justices characterized the Supremacy Clause phrase asserting federal pre-eminence "any [state law] to the Contrary notwithstanding" as a *non obstante* provision that "suggests that federal law should be understood to impliedly repeal conflicting state law" and indicates limits on the extent to which courts should seek to reconcile federal and state law in preemption cases. 564 U.S. ___, No. 09-993, slip op. at 15-17 (June 23, 2011) (Thomas, J., plurality opinion).

In contrast to the congressional intent required to support preemption of a state-based cause of action, Congress displaces a potential cause of action under federal common law (*i.e.,* a suit based on judicially declared law) simply by addressing the question at issue in a statute. American Electric Power Co. v. Connecticut, 564 U.S. ___, No. 10-174, slip op. (June 20, 2011) (federal common law suit to abate greenhouse gas emissions as a public nuisance held to have been displaced by the Clean Air Act).

[129] Bond v. United States, 572 U.S. ___, No. 12-158, slip op. (June 2, 2014) (no clear statement from Congress that statute implementing Chemical Weapons Convention was meant to support federal prosecution of a purely local assault crime committed with harmful, but not illegal, chemical compounds).

[130] *E.g.,* Bates v. Dow Agrosciences LLC, 544 U.S. 431 (2005) (continued availability of certain state common law tort remedies after Federal Insecticide, Fungicide, and Rodenticide Act); Rush Prudential HMO v. Moran, 536 U.S. 355 (2002) (5-4 decision finding that Illinois regulation fell within ERISA's preservation of state insurance laws); Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) (preemptive reach of Federal Cigarette Labeling and Advertising Act). *Compare* Geier v. American Honda Motor Co. 529 U.S. 861 (2000) (despite the inclusion of savings clause preserving liability under common law, the National Traffic and Motor Vehicle Safety Act nevertheless found to have preempted a state common law tort action based on the failure of a car manufacturer to install front seat airbags: giving car manufacturers some leeway in developing and introducing passive safety restraint devices held to be a key congressional objective under the act, one that would be frustrated should a tort action be allowed to proceed) *with* Williamson v. Mazda Motor of America, Inc., 562 U.S. ___, No. 08-1314, slip op. (2011) (applying same statute as *Geier,* no conflict preemption found of common law suit based on rear seat belt type, because giving manufacturers a choice on the type of rear seat belt to install was not a "significant objective" of the statute).

A statement asserting preemption or disclaiming intent to preempt must be clear not only as to preemptive intent, but also as to scope. In *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), for example, the Court ruled that the Clean Water Act foreclosed the application of state law to an out-of-state source of pollution despite a savings clause in the Act preserving an injured party's right to seek relief under any statute or common law. "Because we do not believe Congress intended to undermine this carefully drawn statute [leaving a source state responsible for control of point-source discharges within its boundaries] through a general savings clause, we conclude that the CWA precludes a court from applying the law of an affected state against an out-of-state source." *Id.* at 484.

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government officials—an authority protected by the Tenth Amendment and by the Guarantee Clause.[131] "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."[132]

Abrogation of States' Eleventh Amendment Immunity

Also protective of state sovereignty is the rule that, in order to abrogate the states' Eleventh Amendment immunity from suit,[133] "Congress must make its intention 'unmistakably clear in the language of the statute.'"[134] Even then, Congress has limited authority to abrogate states' Eleventh Amendment immunity. The Court held in *Seminole Tribe of Florida v. Florida*, that Congress's general legislative powers under Article I may not be used to "circumvent the constitutional limitations placed upon federal jurisdiction [by the Eleventh Amendment]."[135] This leaves Section 5 of the Fourteenth Amendment (specific power to enforce the provisions of the Amendment) as the principal source of power to abrogate state immunity. Despite these restrictions, Congress has been found to have authorized suits against states in appropriate circumstances.[136]

Nationwide Application of Federal Law

Congress, if it chooses, can incorporate state law into federal law.[137] Federal law usually applies uniformly nationwide,[138] however, and there is a presumption that, "when Congress enacts a statute ... it does not intend to make its application dependent on state law."[139]

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[131] Gregory v. Ashcroft, 501 U.S. 452 (1991).

[132] *Id.* at 461. *See also* Nixon v. Missouri Municipal League, 541 U.S. 125 (2004) (indicating that the plain statement rule is also appropriate for laws "interposing federal authority between a State and its municipal subdivisions").

[133] The Eleventh Amendment states that federal courts do not have jurisdiction over suits against a state by citizens of another state or foreign country. By the late nineteenth century, the amendment was understood to mean that a state generally could not be sued without its consent. The primary exception is that Congress may subject a state to suit through an exercise of its legislative authority under section 5 of the Fourteenth Amendment. Section 5 empowers Congress to pass laws effectuating civil rights promoted by the Amendment.

[134] Hoffman v. Connecticut Income Maint. Dep't, 492 U.S. 96, 101 (1989) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

[135] 517 U.S. 44, 73 (1996).

[136] Nevada Dept. of Human Resources v. Hibbs 538 U.S. 721 (2003) (allowing private right of action and money damages against a state for violating the family leave provisions of the Family and Medical Leave Act (FMLA); family leave provisions held to be permissible exercises of Section 5 because they targeted gender discrimination). *Compare* Coleman v. Court of Appeals of Maryland, 566 U.S. ___, No. 10-1016, slip op. (March 20, 2012) (disallowing a damages suit against a state for violating the personal sick leave provisions of the FMLA; personal sick leave provisions held to be beyond Section 5 authority, because the personal sick leave provisions are not sufficiently tied to curbing discrimination).

[137] *See, e.g.*, the Assimilative Crimes Statute, 18 U.S.C. §13, governing crimes within the special maritime and territorial jurisdiction of the United States.

[138] Jerome v. United States, 318 U.S. 101, 104 (1943). Arguably, the *Jerome* Court actually overstated the case, citing United States v. Pelzer, 312 U.S. 399, 402 (1941), for the proposition that "the application of federal legislation is nationwide." *Pelzer* was far less sweeping, holding only that "in light of their general purpose to establish a nationwide scheme of taxation uniform in its application," provisions of the *revenue laws* "should not be taken as subject to state control or limitation unless the language or necessary implication of the section involved makes its application dependent on state law." 312 U.S. at 402-03.

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Sovereign Immunity

"[T]he Government's consent to be sued 'must be construed strictly in favor of the sovereign.'"[140] A waiver of sovereign immunity must be effected by unequivocal expression in statutory text; legislative history "has no bearing" on the issue.[141] As a consequence, "statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect."[142]

Separate from whether Congress has clearly and unequivocally waived immunity is the availability of money damages when immunity has been waived. When the amenability of the federal government to damages is at issue, the Court at times has read a statute under a "fair interpretation" standard that is "demonstrably" less exacting than the "clear and unequivocal" test to determine whether immunity has been waived in the first place.[143] At other times, the Court has been more demanding,[144] saying, for example, when waiver of state immunity under the Eleventh Amendment is at stake, liability for monetary damages must be stated unambiguously.[145]

Though most commonly the issue in immunity cases is whether a sovereign's right to immunity has been waived, the issue in some cases is whether a sovereign state has extended immunity to substate or private entities. The question arises under, among other areas, anti-trust law when a political subdivision or private entity claims that the state has cloaked it with state anti-trust immunity to engage in certain anti-competitive practices. To successfully claim immunity in this circumstance, it must be established that the extension of immunity was a foreseeable result of clearly articulated, affirmatively expressed statutory language.[146]

(...continued)

[139] Dickerson v. New Banner Inst., 460 U.S. 103, 119 (1983) (quoting NLRB v. Randolph Elec. Membership Corp., 343 F.2d 60, 62-63 (4th Cir. 1965)).

[140] United States v. Nordic Village, Inc., 503 U.S. 30, 34 (1992); Ardestani v. INS, 502 U.S. 129, 137 (1991) (partial waiver).

[141] *Nordic Village*, 503 U.S. at 37. For criticism of the rule, see John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WISC. L. REV. 771, 836.

[142] UMW v. United States, 330 U.S. 258, 272 (1947) (United States is not an "employer" for purposes of the Norris-LaGuardia Act); Vermont Agency of Nat. Resources v. United States ex rel. Stevens, 529 U.S. 765, 780-81 (2000) (state is not a "person" for purposes of *qui tam* liability under the False Claims Act).

[143] United States v. White Mt. Apache Tribe, 537 U.S. 465, 472-73 (2003).

[144] Lane v. Pena, 518 U.S. 187, 192 (1996) ("To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims."); *see also* FAA v. Cooper, 566 U.S. ___, No.10-1024, slip op. at 5 (March 28, 2012) ("For the same reason that we refuse to enforce a waiver that is not unambiguously expressed in the statute, we also construe any ambiguities in the scope of the waiver in favor of the sovereign.").

[145] Sossamon v. Texas, 563 U.S. ___, No. 98-1438 (April 20, 2011).

[146] Federal Trade Commission v. Phoebe Putney Health System, Inc., 568 U.S. ___, No. 11-1160 (February 19, 2013) (local government hospital authority not entitled to immunity in consolidating hospital ownership in the area; authorizing statute insufficiently clear).

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Non-retroactivity/Effective Date

"[A]bsent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment."[147] There is a general rule, based on the unfairness of attaching new legal consequences to past events, disfavoring retroactive application of civil statutes. Statutory provisions do not apply to events antedating enactment unless there is clear congressional intent that they so apply. "Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits."[148] The prohibition on *ex post facto* laws, of course, imposes a constitutional bar to retroactive application of penal laws.[149]

Avoidance of Constitutional Issues

The doctrine of "constitutional doubt" requires courts to construe statutes, "if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."[150] "[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 .... 'The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.' This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution."[151] As with other issues, of course, it is the view of the majority that prevails: "Grave doubt" as to constitutionality does not arise simply because a Court minority—even a minority of four Justices—believes a statute may be constitutionally suspect.[152]

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[147] Gozlon-Peretz v. United States, 498 U.S. 395, 404 (1991). Ordinarily, and in the absence of special circumstances, the law does not recognize fractions of the day, so a law becomes effective "from the first moment" of the effective date. Lapeyre v. United States, 17 Wall. 191, 198 (1872). However, "whenever it becomes important to the ends of justice ... the law will look into fractions of a day." Louisville v. Savings Bank, 104 U.S. 469, 474 (1881). *See* Burgess v. Salmon, 97 U.S. 381 (1878) (a law signed in the afternoon could not be applied to fine a person for actions he had completed on the morning of the same day); United States v. Will, 449 U.S. 200, 225 n.29 (1980) (a judicial salary increase had taken effect at the beginning of the day, and was already in effect when the President later in the day signed legislation reducing cost-of-living increases).

[148] Landgraf v. USI Film Products, 511 U.S. 244, 272-73 (1994) (finding no such clearly expressed congressional intent with respect to the civil rights law's new compensatory and punitive damages remedies and the associated right to a jury trial). *See also* Fernandez-Vargas v. Gonzales, 548 U.S. 30 (2006).

[149] Art. I, §9, cl. 3 prohibits Congress from enacting *ex post facto* laws; Art. I, §10 applies the prohibition to the states. *See* Lynce v. Mathis, 519 U.S. 433, 439 (1997); and Johnson v. United States, 529 U.S. 694, 701 (2000), for general discussion.

[150] United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916); Almendarez-Torres v. United States, 523 U.S. 224, 237-38 (1998); Jones v. United States, 529 U.S. 848, 857 (2000). *See also* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (J. Brandeis, concurring) ("The Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. [...] Thus, if a case can be decided upon two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.").

[151] DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575 (1988) (quoting Hooper v. California, 155 U.S. 648, 657 (1895)). *Accord*, Burns v. United States, 501 U.S. 129, 138 (1991); Gollust v. Mendell, 501 U.S. 115, 126 (1991).

[152] Almendarez-Torres v. United States, 523 U.S. 224, 239 (1998) (citing Rust v. Sullivan, 500 U.S. 173, 191 (1991), in which the Court concluded, over the dissent of four Justices, that abortion counseling regulations "do not raise the sort of 'grave and doubtful constitutional questions,' ... that would lead us to assume Congress did not intend to authorize (continued...)

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Extraterritorial Application Disfavored

"It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' This 'canon of construction' ... serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."[153]

A 2010 securities fraud case reasserted the preclusive extent of the presumption against extraterritorial application.[154] Circuit court jurisprudence had been moving toward a fact-specific reasonableness test for allowing fraud-based actions related to securities transactions abroad.[155] The Court eschewed this approach, however. Rather, it held that no fraud-related cause of action was available under U.S. securities law for foreign transactions in foreign securities because Congress had not affirmatively indicated it intended to cover those transactions. Absent a clear indication that extraterritorial effects (*e.g.*, declines in share prices on a foreign exchange) were to be remediable, it did not matter, for example, that it was fraudulent conduct in the U.S. by a U.S. subsidiary that led to the parent company's inflated stock price on a foreign exchange.[156]

A majority of the Court also interposed the presumption against extraterritoriality as an obstacle to finding jurisdiction under the Alien Tort Statute over a foreign tort against a foreign national.[157] That statute provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[158] According to the majority, nothing in this language, nor its historical context, overcomes the underlying presumption against recognizing a cause of action against a foreign national occurring abroad.[159] By comparison, four concurring Justices approached the jurisdictional issue from more neutral ground. Rather than initially proceeding from a position presuming an absence of jurisdiction, they would assess the ties each case has to the U.S., taking into consideration whether the alleged tort occurred in the U.S., was committed by an American, or substantially and adversely affected important American interests.[160]

(...continued)

their issuance").

[153] EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) (quoting Foley Bros, Inc. v. Filardo, 336 U.S. 281, 285 (1949)) (Title VII of the Civil Rights Act inapplicable to alleged discrimination against employee serving in Saudi Arabia even though employee was a U.S. citizen hired in the U.S. to work for a U.S. subsidiary). *See also* Microsoft Corp. v. AT&T, 550 U.S. 437, 454-55 (2007) ("The presumption that United States law governs domestically but does not rule the world applies with particular force in patent law."); Smith v. United States, 507 U.S. 197, 203-04 (1993) (interpretation of Federal Tort Claims Act as inapplicable in Antarctica is reinforced by presumption against extraterritorial application). *But see* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) (Sherman Act applies to foreign conduct producing, and intended to produce, substantial effects in United States).

[154] Morrison v. National Australia Bank Ltd., 561 U.S. ___, No. 08-1191, slip op. (June 24, 2010).

[155] To determine whether a cause of action existed, the courts examined, on a case-by-case basis, the extent to which the alleged conduct affected American markets or investors, the extent to which the alleged conduct took place in the U.S., and related factors.

[156] *Morrison v. National Australian Bank Ltd.*, slip op. at 16.

[157] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. ___, No.10-1491, slip op. (April 17, 2013) (no jurisdiction to hear case brought by Nigerian residents of the U.S. against foreign oil company for allegedly aiding and abetting Nigerian Government in committing atrocities against its people).

[158] 28 U.S.C. §1350.

[159] *Kiobel,* slip op. at 7-9.

[160] *Kiobel*, slip op. at 6-7 (Breyer, J., concurring).

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Judicial Review of Administrative Action

There is a strong presumption that Congress intends judicial review of administrative action: "[A] survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."[161] The Court requires that a statute contain "clear and convincing evidence" of an intent to preclude judicial review of decisions made under it.[162] Also, the Court tends to construe preclusions narrowly. Thus, even where a statute has barred judicial review of the merits of individual cases, the Court nevertheless has found that the regulations and practices for determining cases may be reviewed.[163]

While the presumption of reviewability predated the enactment of the Administrative Procedure Act in 1946, the APA embodied the presumption in statute. Under the APA, final agency actions for which there is no other adequate remedy in a court are subject to judicial review,[164] "except to the extent that ... statutes preclude judicial review; or ... agency action is committed to agency discretion by law."[165] As to the first exception, the presumption of reviewability may be overcome by specific statutory language, but it also "may be overcome by inferences of intent drawn from the statutory scheme as a whole."[166] The second exception applies "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'"[167]

An aspect of the second exception is that "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."[168] Thus, the Court in *Webster v. Doe* looked at the structure of the National Security

[161] Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967).

[162] *E.g.,* Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 671 (1986) ("This ['clear and convincing evidence'] standard has been invoked time and again...."); Kucana v. Holder, 558 U.S.233, 251-52 (2010).

[163] Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986) (finding that the method for determining the amount of benefits that is payable under Medicare Part B is reviewable even though the individual determinations themselves are not). *See also* McNary v. Haitian Refugee Center, 498 U.S. 479, 496 (1991) ("It is most unlikely that Congress intended to foreclose all forms of meaningful judicial review," given the presumption "that Congress legislates with knowledge of our basic rules of statutory construction."); Kucana v. Holder, 558 U.S. 233, 252-53 (2010) (stressing that it is for Congress, and not an executive agency, to determine whether a discretionary agency decision is subject to review, and thus a statutory bar on review of discretionary agency decisions was limited to certain decisions made discretionary by Congress and did not include procedural decisions made discretionary through agency regulation).

See also Lindahl v. OPM, 470 U.S. 768, 778 (1985) (provision in Civil Service Retirement Act stating that OPM's "decisions ... concerning these matters are final and conclusive and are not subject to review" interpreted as precluding review only of OPM's factual determinations, but as not precluding review of legal interpretations). The *Lindahl* Court contrasted other statutory language said to be "far more unambiguous and comprehensive" in precluding review. *Id.* at 779-80 & n.13 (citing 5 U.S.C. §8128(b)) ("Action of the Secretary ... is final and conclusive for all purposes and with respect to all questions of law and fact."); and 38 U.S.C. §211(a) ("Decisions of the Administrator on any question of law or fact ... shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision.").

[164] 5 U.S.C. §704.

[165] 5 U.S.C. §701(a).

[166] Block v. Community Nutrition Inst., 467 U.S. 340, 349 (1984) (judicial review of milk marketing orders not available to consumers). *Accord*, United States v. Fausto, 484 U.S. 439, 452 (1988) (congressional intent to preclude judicial review clear from the purposes of the Civil Service Reform Act, from the entirety of its text, and from the structure of the statutory scheme).

[167] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (citing S.Rep. 79-752 (1945)).

[168] Heckler v. Chaney, 470 U.S. 821, 830 (1985).

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Act and language allowing the Director of Central Intelligence to terminate an employee as the Director deemed necessary or advisable, and concluded that a court could not, as a general matter, review the necessity or advisability of terminating an employee based on sexual orientation.[169] But, as in many other judicial review cases, the *Webster* Court was very precise as to what review a statute foreclosed. Though the Court found decisions on whether a dismissal was necessary or advisable resided with the Director alone, this discretion did not go so far as to preclude court consideration of colorable constitutional claims arising from the actions of the Director. In the Court's view, a clearer statement from Congress is necessary before courts should refrain from reviewing constitutional claims of administrative error.[170]

Deference to Administrative Interpretation

Interpreting statutes is not solely a matter for the courts. Executive agencies charged with implementing regulatory statutes adopt policies and processes to put statutes into action.[171] Agency decisions might set operational rules of general application or might arise during agency adjudications; they might be the result of more or less formal processes; they might purport to be more or less binding. But they all involve interpreting the law to some degree, and courts considering challenges to agency decision making face the issue of how much to defer to an agency reading of the law or to proceed to interpret the law on their own.

Under current precedent, when a court reviews an agency's formal interpretation of a statute that the agency administers, and when the statute has not removed agency discretion by compelling a particular disposition of the matter at issue, courts defer to any reasonable agency interpretation.[172] This is the *Chevron* rule announced in 1984.[173] In two decisions, one in 2000[174] and one in 2001,[175] the Court clarified and narrowed *Chevron's* application, ruling that *Chevron* deference applies only if an agency's interpretation is the product of a formal agency process, such as adjudication or notice and comment rulemaking, through which Congress has authorized the agency "to speak with the force of law."[176] Other agency interpretations that are made without a formal and public process often are reviewed under pre-*Chevron* principles set forth in

[169] 486 U.S. 592 (1988).

[170] 486 U.S. at 601-605. *See also* Johnson v. Robison, 415 U.S. 361 (1974).

[171] Clearly, the courts and administrative agencies have different interests and different types of expertise, and their respective processes differ in their openness to policy considerations, both in initially interpreting a statute and amending an interpretation over time.

[172] *United States v. Home Concrete and Supply LLC*, 566 U.S. ___, No. 11-139, slip op. (April 25, 2012), dealt with the unusual circumstance in which an agency and an earlier, pre-modern deference doctrine Supreme Court case disagreed in their interpretation of the same statutory language. A plurality of the *Home Concrete* Court upheld the earlier judicial interpretation, primarily on its reading that the earlier opinion found Congress had left no interpretive gaps in the statutory language. Concurring in the result, Justice Scalia maintained that the earlier judicial interpretation bound the agency regardless of the earlier opinion's legal reasoning.

[173] Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984). *Chevron* extends to interpretations by an agency on the extent of its own jurisdiction. City of Arlington v. FCC, 569 U.S. ___, No. 11-1545, slip op. (May 20, 2013). Absent a textual directive to the contrary, a compact commission overseeing an interstate compact is not reviewed under this deferential model of judicial review. Alabama v. North Carolina, 560 U.S. ___, No. 132, Orig. (June 1, 2010).

[174] Christensen v. Harris County, 529 U.S. 576 (2000).

[175] United States v. Mead Corp., 533 U.S. 218 (2001).

[176] *Mead Corp.*, 533 U.S. at 229.

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Skidmore v. Swift & Co.[177] Additional variations of deference analysis also may come into play in individual cases, depending on subject matter and other factors.[178]

As in other matters of interpretation, it is congressional intent that counts. Under *Chevron*, the first question is "whether Congress has directly spoken to the precise question at issue."[179] If the court, "employing the traditional tools of statutory construction," determines that Congress has addressed the precise issue, then that is the end of the matter, because the "law must be given effect."[180] However, if the statute does not directly address the issue, "the court does not simply impose its own construction of the statute," but rather determines "whether the agency's answer is based on a permissible construction of the statute."[181]

On its face, the *Chevron* rule is quite deferential, and was perceived as a significant break from the multi-factored approach that preceded it.[182] One would expect that a court's conclusion as to whether Congress has "directly spoken" to the issue would be decisive in most cases, that most of the myriad of issues that can arise in the administrative setting would not be directly addressed by statute, and that, consequently, courts would most often defer to what are found to be "reasonable" agency interpretations.[183] However, *Chevron* did not usher in a sea change of increased deference by the Supreme Court.[184] The Court has frequently determined that in fact Congress *has* settled the matter, and that consequently there is no need to proceed to the second, more deferential step of the inquiry.[185] The Court has also found that, even though Congress has left the matter for agency resolution, the agency's interpretation is unreasonable.[186]

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[177] 323 U.S. 134 (1944).

[178] William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008). One variation of deference analysis comes into play whenever the Court invites an agency to submit an *amicus* brief interpreting an ambiguous agency regulation. Unless there is reason to believe that the brief is a '*post hoc* rationalization" taken as a litigation position, or there is another reason to believe that the brief is anything other than the agency's fair and considered judgment, the Court will defer to the interpretation in the brief if it is not plainly erroneous or inconsistent with the regulation. Chase Bank USA v. McCoy, 562 U.S. ___, No. 09-329, slip op. at 12-14 (January 24, 2011).

[179] *Chevron*, 467 U.S. at 842.

[180] 467 U.S. at 843 n.9.

[181] *Id.* at 843. Many scholars and courts opine that the "permissible construction," or "reasonable" interpretation, inquiry under this second step of *Chevron* analysis is essentially the same as determining whether an agency action is "arbitrary, capricious, and an abuse of discretion" for purposes of judicial review under the Administrative Procedure Act, though some question whether the *Chevron* and APA standards are, or should be, wholly congruent in all cases. *See, e.g.,* Kenneth A. Bamberger & Peter L. Strauss, Chevron's *Two Steps*, 95 VA. L. REV. 611 (2009) and authorities cited therein.

[182] *See, e.g.,* Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283 (1986).

[183] *See, e.g.*, Sullivan v. Everhart, 494 U.S. 83 (1990) (regulations are a reasonable interpretation of Social Security Act); Smiley v. Citibank (South Dakota), 517 U.S. 735 (1996) (upholding Comptroller of the Currency's interpretation of 1864 Bank Act); and Lopez v. Davis, 531 U.S. 230, 240 (2001) (Bureau of Prisons regulation denying early release is reasonable interpretation of discretionary authority).

[184] An extensive study of more than 1,000 Supreme Court cases decided between the issuance of *Chevron* in 1984 and the end of the Court's 2005 Term concluded that *Chevron* analysis is but one of a broad array of deference regimes that continue to be applied by Court. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008).

[185] *See, e.g.*, Sullivan v. Zebley, 493 U.S. 521 (1990) (regulations "are simply inconsistent with the statutory standard"); and Dole v. Steelworkers, 494 U.S. 26 (1990) (deference to OMB interpretation of Paperwork Reduction Act is foreclosed by Court's finding of clear congressional intent to contrary).

[186] Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457 (2001).

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In determining whether Congress has "directly spoken," there is much territory between an express delegation to an agency to address a particular issue and express legislative language resolving the issue statutorily. Imprecision on an issue may reflect an oversight by Congress, a failure to anticipate what might arise, a political compromise, an implicit assumption that the gap would be filled in by the agency with technical expertise, or other considerations. With this in mind, the Court has recognized circumstances in which it is less likely that Congress intended to leave resolution of statutory uncertainty to the administering agency, especially when it appears that the agency may be citing vague terms to justify jurisdiction over controversial matters with major policy implications traditionally resolved by Congress or another agency.[187] Thus, in holding that the Food and Drug Administration lacked authority to regulate tobacco products as "drugs" and "devices" under the Federal Food, Drug, and Cosmetic Act, the Court concluded that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[188] The Court ruled that Congress had "directly spoken" to the regulatory issue—not through the FDCA itself, but rather through subsequently enacted tobacco-specific legislation and through rejection of legislative proposals to confer jurisdiction on the FDA.[189] In another case, the Court found deference to be inappropriate where the agency interpretation "invokes the outer limits of Congress' power," and there is no "clear indication" that Congress intended that result.[190]

A logical consequence of applying *Chevron* is to render irrelevant whether an agency interpretation was "contemporaneous" with a statute's enactment, or whether an agency's position

[187] *See, e.g.*, MCI Telecommunications Corp. v. AT&T Co., 512 U.S. 218, 231 (1994) ("It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion.") (holding that FCC authority to "modify" statutory filing requirements for communications carriers did not support agency order that filing was optional for all long-distance carriers other than the then-dominant carrier – AT&T). Unlike agency actions taken under vague or imprecise delegations of authority, actions taken under general delegations of authority to make rules and regulations to carry out a statute are due *Chevron* deference. *See* Mayo Foundation for Medical Education and Research v. U.S., 562 U.S. ___, No. 09-837 (January 11, 2011).

As to an agency assertion of jurisdiction delegated elsewhere, the Court stated the following in overturning a rule by the Attorney General declaring that use of a controlled substance for physician-assisted suicide is not a legitimate medical practice for purposes of the Controlled Substances Act: "*Chevron* deference ... is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official." Gonzales v. Oregon, 546 U.S. 243, 258 (2006).

[188] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000).

[189] The subsequent legislation created "a distinct regulatory scheme for tobacco products." 529 U.S. at 159. As Justice Breyer's dissent pointed out, tobacco products clearly fell within the generally worded jurisdictional definitions of the Federal Food, Drug, and Cosmetic Act, and it was also clear that Congress had not spoken directly to the issue anywhere else in that act. 529 U.S. at 162. The Court's different resolution of a similar issue concerning patent protection for plant breeding illustrates that a subsequently enacted "distinct regulatory scheme" does not always trump general authority. The Court ruled in 1980 and again in 2001 that neither the Plant Patent Act of 1930 nor the Plant Variety Protection Act—both premised on the understanding that the Patent and Trademark Office lacked authority to issue plant patents under its general utility patent authority—deprived the Office of authority to issue plant patents pursuant to that general authority. Diamond v. Chakrabarty, 447 U.S. 318 (1980); J.E.M. Ag Supply, Inc. v. Farm Advantage, Inc., 534 U.S. 124 (2001).

[190] Solid Waste Agency v. Army Corps of Engineers, 531 U.S. 159, 172 (2001). In *Rapanos v. United States*, the plurality opinion took issue with the breadth of the Corps of Engineers' claim to jurisdiction through its interpretation of the term "the waters of the United States": "The extensive federal jurisdiction urged by the Government would authorize the Corps to function as a *de facto* regulator of immense stretches of intrastate land ... We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority.... Likewise ... the Corps' interpretation stretches the outer limits of Congress' commerce power.... Even if the term 'the waters of the United States' were ambiguous as applied to channels that sometimes host ephemeral flows of water ... we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity." 547 U.S. 715, 738 (2006).

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has been consistent over the years. "Neither antiquity nor contemporaneity with the statute is a condition of validity."[191] The fact that an agency has changed its position over the years "is not fatal," because "the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency."[192]

Agency interpretations that take place in the many less formal contexts where *Chevron* deference is inapplicable (e.g., opinion letters, policy statements, agency manuals, and enforcement guidelines, "all of which lack the force of law"[193]) can still be "entitled to respect,"[194] "but only to the extent that [they] have the power to persuade."[195] As the Court put it in *Skidmore v. Swift & Co.*, agency interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort.... The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[196] These factors may include whether an interpretation applied technical expertise on a complex matter within agency jurisdiction,[197] whether an agency's decision was well-reasoned,[198] and whether the agency's interpretation was longstanding or consistent.[199] It should be emphasized that, far from being superseded by *Chevron*, the Court continues to consider agency interpretations under *Skidmore*-like analyses with some frequency.[200]

Repeals by Implication

If Congress intends one statute to repeal an earlier statute or section of a statute *in toto*, it usually says so directly in the repealing act.[201] There are other occasions when Congress intends one statute to supersede an earlier statute to the extent of conflict, but intends the earlier statute to remain in effect for other purposes. This too is often spelled out, usually in a section captioned "effect on existing law," "construction with other laws," or the like: "[It] can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change."[202]

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[191] Smiley v. Citibank (South Dakota), 517 U.S. 735, 740 (1996) (upholding regulation issued more than 100 years after statute's enactment).

[192] *Id.* at 742. In other words, the Court presumes "that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency...." *Id.* at 740-41. Under case law prior to *Chevron*, the Court was more apt to take into account a regulation's longevity, contemporaneity, and other factors in assessing the degree of deference due. *See, e.g.*, National Muffler Dealers Ass'n v. U.S., 440 U.S. 479 (1979).

[193] Christensen v. Harris County, 529 U.S. 576, 587 (2000).

[194] Skidmore v. Swift & Co., 323 U.S. 134 (1944).

[195] Christensen v. Harris County, 529 U.S. at 587.

[196] *Skidmore v. Swift & Co.*, 323 U.S. at 140.

[197] *See, e.g.*, Aluminum Co. v. Central Lincoln Util. Dist., 467 U.S. 380, 390 (1984).

[198] *See, e.g.*, Investment Co. Inst. v. Camp, 401 U.S. 617, 626-27 (1971).

[199] *See, e.g.,* General Electric Co. v. Gilbert, 429 U.S. 125, 142-43 (1976).

[200] WILLIAM N. ESKRIDGE, JR., PHILLIP P. FRICKEY & ELIZABETH GARRETT, CASES & MATERIALS ON LEGISLATION: STATUTES & THE CREATION OF PUBLIC Policy at 1225 (4th ed. 2007).

[201] When a repealing act itself is repealed, prior law is not thereby revived unless done so expressly. 1 U.S.C. §108.

[202] United States v. Fausto, 484 U.S. 439, 453 (1988).

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Not infrequently, however, conflicts arise between the operation of two federal statutes that are silent as to their relationship. In such a case, courts will try to harmonize the two so that both can be given effect. A court "must read [two allegedly conflicting] statutes to give effect to each if [it] can do so while preserving their sense and purpose."[203] Only if provisions of two different federal statutes are "irreconcilably conflicting,"[204] or "if the later act covers the whole subject of the earlier one and is clearly intended as a substitute,"[205] will courts apply the rule that the later of the two prevails. "[R]epeals by implication are not favored, ... and will not be found unless an intent to repeal is clear and manifest."[206] And, in fact, the Court rarely finds repeal by implication.[207] As Judge Richard Posner has pointed out, this canon is "a mixed bag. It protects some old statutes from ... inadvertent destruction, but it threatens to impale new statutes on the concealed stakes planted by old ones."[208]

Laws of the Same Session

The presumption against implied repeals "is all the stronger" if both laws were passed by the same session of Congress.[209] In the case of an irreconcilable conflict between two laws of the same session, the later enactment will be deemed to have repealed the earlier one to the extent of the conflict.[210] Because the focus here is on legislative intent (or presumed legislative intent),

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[203] Watt v. Alaska, 451 U.S. 259, 267 (1981). *See also* Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438 (2001) (reconciling "tension" between the saving to suitors clause and the Limitation of Liability Act); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1017-18 (1984) (rejecting a contention that the Federal Insecticide, Fungicide, and Rodenticide Act repealed by implication a Tucker Act remedy for governmental taking of property without just compensation, and reconciling the two statutes by implying a requirement that remedies under FIFRA must be exhausted before relief under the Tucker Act could be obtained). *But see* Stewart v. Smith, 673 F.2d 485, 492 (D.C. Cir. 1982) (interpreting a statute authorizing agency heads to set maximum age limits for law enforcement officers as an exception to the Age Discrimination in Employment Act). Even though the laws might have been harmonized through a "strained reading," the court concluded that doing so would thwart the maximum age law's sense and purpose. The *Stewart* court relied on legislative history to find a "clear" congressional intent "to employ maximum entry ages as a means towards securing a 'young and vigorous' work force of law enforcement officers," and concluded that furtherance of this policy required "consideration of factors not ordinarily accounted for" under ADEA procedures.

[204] *Watt v. Alaska*, at 266. For an example of securities law being held to preclude enforcement of antitrust law, see Credit Suisse Securities (USA) LLC v. Billing, 551 U.S. 264 (2007).

[205] Posadas v. National City Bank, 296 U.S. 497, 503 (1936).

[206] Rodriguez v. United States, 480 U.S. 522, 524 (1987) (citations omitted). *See also* Morton v. Mancari, 417 U.S. 535, 550-51 (1974).

[207] For an instance in which the Court arguably found repeal by implication, see Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 438 (1989) (concluding that Congress had intended to "deal comprehensively with the subject of foreign sovereign immunity in the [Foreign Sovereign Immunities Act of 1976]," and that consequently suit against the Argentine Republic could not be brought under the Alien Tort Statute). *But see* Branch v. Smith, 538 U.S. 254, 293 (2003), in which Justice O'Connor asserted that the Court last found a repeal by implication in 1975, in *Gordon v. New York Stock Exchange*, 422 U.S. 659 (antitrust laws impliedly repealed (in part) by Securities Exchange Act). Other cases refusing to find a repeal by implication include *Hamdan v. Rumsfeld* (548 U.S. 557, 593-94 (2006)) and *Granholm v. Heald* (544 U.S. 460, 483 (2005)).

[208] Friedrich v. City of Chicago, 888 F.2d 511, 516 (7th Cir. 1989). Judge Posner describes the assumption on which the canon rests—that Congress surveys and envisions the whole body of law before legislating—as "unrealistic": how could Congress do so, he has questioned, "given the vast expanse of legislation that has never been repealed and the even vaster expanse of judicial and administrative rulings glossing that legislation." In re Doctors' Hospital of Hyde Park, 337 F.3d 951, 960 (7th Cir. 2003). On the plus side, the rule serves the "superior values of harmonizing different statutes and constraining judicial discretion in the interpretation of the laws." Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 109 (1991).

[209] Pullen v. Morgenthau, 73 F.2d 281 (2d Cir. 1934).

[210] SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §23:18 (Norman J. Singer ed., 6th ed. 2002 rev.).

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time of legislative consideration, rather than effective dates of the statutes, is the key to determining which enactment was the "later" one.[211]

Appropriations Laws

The doctrine disfavoring repeals by implication also "applies with even greater force when the claimed repeal rests solely on an Appropriations Act," since it is presumed that appropriations laws do not normally change substantive law.[212] Nevertheless, Congress can repeal substantive law through appropriations measures if intent to do so is clearly expressed.[213]

Rule of Lenity

The "rule of lenity" requires that "before a man can be punished as a criminal ... his case must be plainly and unmistakably within the provisions of some statute."[214] Lenity principles "demand resolution of ambiguities in criminal statutes in favor of the defendant."[215] The reasons for the rule are that "'fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed'" and that "'legislatures and not courts should define criminal activity.'"[216] Consequently, the rule "places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead."[217] If statutory language is unambiguous,[218] the rule of lenity is inapplicable.[219]

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[211] *Id.*

[212] TVA v. Hill, 437 U.S. 153, 190 (1978).

[213] United States v. Will, 449 U.S. 200, 222 (1980).

[214] United States v. Gradwell, 243 U.S. 476, 485 (1917).

[215] Hughey v. United States, 495 U.S. 411, 422 (1990). *See also* United States v. Granderson, 511 U.S. 39, 54 (1994) ("In these circumstances—where text, structure, and [legislative] history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor"); Cleveland v. United States, 531 U.S. 12, 25 (2000) (before choosing a "harsher alternative" interpretation of the mail fraud statute, "it is appropriate ... to require that Congress should have spoken in language that is clear and definite"). *Accord* Skilling v. U.S., 561 U.S. ___, No. 08-1394 (June 24, 2010).

[216] Ratzlaf v. United States, 510 U.S. 135, 148-49 (1994) (quoting Boyle v. United States, 283 U.S. 25, 27 (1931) (Holmes, J., for Court)).

[217] United States v. Santos, 553 U.S. 507, 514 (2008) (Scalia, J., plurality opinion).

[218] The judicial quest to discern whether a penal statute is sufficiently clear can at times appear abstruse in itself. *Compare, e.g.,* the four-Justice plurality opinion and the four-Justice dissent in *United States v. Santos*. 553 U.S. 507 (2008).

[219] Beecham v. United States, 511 U.S. 368, 374 (1994) (quoting Chapman v. United States, 500 U.S. 453, 463-64 (1991)). *Accord*, National Org. for Women v. Scheidler, 510 U.S. 249, 262 (1994). *See also* United States v. Hayes, 555 U.S. 415, 429 (2009).

In *Muscarello v. United States*, a five-Justice majority eschewed application of the rule of lenity and found that a mandatory sentence for carrying a weapon during a drug crime included having a firearm in a locked glove box or in the trunk of a car while transporting drugs for sale: "The simple existence of some statutory ambiguity ... is not sufficient to warrant application of [the rule of lenity], for most statutes are ambiguous to some degree.... To invoke the rule, we must conclude that there is a 'grievous ambiguity or uncertainty'.... [T]his Court has never held that the rule of lenity automatically permits a defendant to win." 524 U.S. 125, 138-39 (1998). Consider as well the four-Justice dissent in *United States v. Santos*: "[T]he rule of lenity does not require us to put aside the usual tools of statutory interpretation or to adopt the narrowest possible dictionary definition of the terms in a criminal statute." 553 U.S. at 548 (2008) (Alito, J., dissenting).

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Scienter

Intent is generally a required element of a criminal offense, and consequently there is a presumption in favor of a scienter or *mens rea* requirement in a criminal statute. The presumption applies "to each of the statutory elements which criminalize otherwise innocent conduct."[220] The Court may read an express scienter requirement more broadly than syntax would require or normally permit,[221] and may read into a criminal prohibition a scienter requirement that is not expressed.[222] The Court recognizes some "strict liability" exceptions, especially for "public welfare" statutes regulating conduct that is inherently harmful or injurious and therefore unlikely to be perceived as lawful and innocent.[223] Determining whether such an exception applies can be difficult.[224] However, if the statute does not preclude a holding that scienter is required, and if the public welfare exception is deemed inapplicable, "far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement."[225] On the other hand, while "it is fair to begin with a general presumption that the specified *mens rea* applies to all elements of an offense, ... it must be recognized that there are instances in which context may well rebut that presumption."[226]

Remedial Statutes

One can search in vain for recent Supreme Court reliance on the canon that "remedial statutes" should be "liberally" or "broadly" construed.[227] This is probably due to a variety of factors,

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[220] United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994). *See also* Flores-Figueroa v. United States, 556 U.S. 646 (2009).

[221] "Our reluctance to simply follow the most grammatical reading of the statute is heightened by our cases interpreting criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them." *X-Citement Video*, 513 U.S. at 70. *See also* Staples v. United States, 511 U.S. 600 (1994) (National Firearms Act interpreted to require that defendant knew that the weapon he possessed was a "firearm" subject to the act's registration requirements); and Liparota v. United States, 471 U.S. 419 (1985) ("knowingly" read as modifying not only operative verbs "uses ... or possesses," but also "in a manner not authorized").

[222] Posters 'N' Things, Ltd. v. United States, 511 U.S. 513 (1994) (interpreting drug paraphernalia law as requiring that merchant knew that customers in general are likely to use the merchandise with drugs). On reading a *mens rea* requirement into a statute, Justice Scalia has stated that "[i]t is one thing to infer the common-law tradition of a *mens rea* requirement where Congress has not addressed the mental element of a crime. It is something else to expand a *mens rea* requirement that the statutory text has carefully limited." Flores-Figueroa v. United States, 556 U.S. 646, 658 (2009) (Scalia, J., concurring) (citations omitted).

[223] *See, e.g.*, United States v. Dotterweich, 320 U.S. 277 (1943) (upholding punishment of corporate officer whose company shipped misbranded and adulterated drugs in violation of Food and Drug laws); United States v. Freed, 401 U.S. 601 (1971) (upholding conviction under National Firearms Act for possession of unregistered hand grenades; Act does not and need not require proof of knowledge that weapons were not registered).

[224] *Compare* United States v. Freed, 401 U.S. 601 (1971) (knowledge of unregistered status of hand grenades not required for conviction under National Firearms Act) *with* Staples v. United States, 511 U.S. 600 (1994) (conviction under the Firearms Act must be predicated on defendant's knowledge of the particular characteristics making a semi-automatic rifle convertible to a machine gun and hence subject to registration requirement). The *Staples* Court distinguished *Freed*, partly on the basis that, given the "long tradition of widespread lawful gun ownership by private individuals in this country," possession of a semi-automatic rifle should not be equated with possession of hand grenades. *See* 511 U.S. at 610-12.

[225] United States v. United States Gypsum Co., 438 U.S. 422, 438 (1978) (applying principle to Sherman Act violation).

[226] Flores-Figueroa v. United States, No. 08-108, 546 U.S. 646, 660 (2009) (Alito, J., concurring).

[227] For not-so-recent reliance on the canon, see Peyton v. Rowe, 391 U.S. 54, 65 (1968) (petitioner is "in custody" in violation of Constitution for purposes of federal habeas corpus statute if any of consecutive sentences he is scheduled to (continued...)

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including recognition that the principle is difficult to apply and almost hopelessly general.[228] This is because many statutes are arguably "remedial," and consequently courts have wide discretion in determining scope of application. There may also be uncertainty over what "liberal" or "broad" construction means.[229] Nevertheless, if the principle is reformulated as merely requiring that ambiguities in a remedial statute be resolved in favor of persons for whose benefit the statute was enacted,[230] the principle should be no more difficult to apply (once a "remedial" statute has been identified) than the rule of lenity, which counsels resolution of ambiguities in penal statutes in favor of defendants.[231] The scarcity of this principle in the current Court's lexicon, therefore, may reflect substantive preferences of the Justices as well as recognition of its limitations. Then too, the Court may employ more specific or limited presumptions in circumstances in which earlier Courts might have cited the liberal-remedial maxim,[232] or may instead prefer in such circumstances to analyze a statute without reliance on canonical supports. Categorizing a statute as "remedial," or even as a "civil rights statute," is often employed as a springboard to more refined analysis of the purposes of the particular statute at issue.[233]

Statutes Benefiting Indian Tribes

Another subcategory of the "remedial" statutes canon is the proposition that "statutes passed for the benefit of dependent Indian tribes ... are to be liberally construed to favor Indians."[234] Most

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serve was imposed as a result of deprivation of his rights); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (term "security" should be construed broadly, in part because "Securities Exchange Act quite clearly falls into the category of remedial legislation"); and Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 475 (1793) (Jay, C.J.) (Constitution's extension of judicial power over controversies between a state and citizens of another state is "remedial, [and] therefore, to be construed liberally").

[228] The Court once referred to a variant of the canon (a statute should be liberally construed to achieve its purposes) as "that last redoubt of losing causes," explaining that "[e]very statute proposes, not only to achieve certain ends, but also to achieve them by particular means—and there is often a considerable legislative battle over what those means ought to be." Director, OWCP v. Newport News Shipbuilding, 514 U.S. 122, 135-36 (1995).

[229] Justice Scalia has inveighed against the maxim in a lecture reprinted as a law review article, calling it a "prime example[ ] of lego-babble." The rule, Justice Scalia concluded, "is both of indeterminate coverage (since no one knows what a 'remedial statute' is) and of indeterminate effect (since no one knows how liberal is a liberal construction)." Antonin Scalia, *Assorted Canards of Legal Analysis*, 40 CASE W. RES. L. REV. 581, 586 (1989-90).

[230] *See, e.g.*, Smith v. Heckler, 820 F.2d 1093, 1095 (9th Cir. 1987) (Social Security Act "is remedial, to be construed liberally ... and not so as to withhold benefits in marginal cases").

[231] This is not to say, however, that the same fairness considerations that underlie the rule of lenity justify application of the "remedial statute" rule.

[232] *See, e.g.*, King v. St. Vincent's Hosp., 502 U.S. 215, 220 n.9 (1991) ("Provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor."); FDIC v. Meyer, 510 U.S. 471, 480 (1994) ("sue-and-be-sued" waivers of sovereign immunity should be liberally construed).

[233] *See, e.g.*, Felder v. Casey, 487 U.S. 131, 149 (1988) (The Congress which enacted [42 U.S.C.] §1983 over 100 years ago would have rejected [a requirement of exhaustion of state remedies] as inconsistent with the remedial purposes of its broad statute."); Sullivan v. Little Hunting Park, 396 U.S. 229, 237 (1969) ("A narrow construction of §1982 would be inconsistent with the broad and sweeping nature of the protection meant to be afforded by §1 of the Civil Rights Act of 1866."); Northeast Marine Terminal v. Caputo, 432 U.S. 249, 268 (1977) ("The language of the 1972 Amendments [to the LHWCA] is broad and suggests that we should take an expansive view of the extended coverage. Indeed such a construction is appropriate for this remedial legislation.").

[234] Bryan v. Itasca County, 426 U.S. 373, 392 (1976) (quoting Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918)). Among broader statements of the canon is the following: "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985).

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cases resolving issues on tribal matters potentially raise this proposition,[235] but frequently there are also statute-specific considerations that amplify[236] or outweigh[237] any such generalities. A 2009 case did not mention an interpretive canon to favor Indians in disallowing a protective measure taken by the Secretary of the Interior.[238]

Miscellany

Titles of Acts or Sections

Although "it has long been established that the title of an Act 'cannot enlarge or confer powers,'"[239] the title of a statute or section "can aid in resolving an ambiguity in the legislation's text."[240] As Chief Justice Marshall explained, "[w]here the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived."[241] A title or heading, however, being only "a short-hand reference to the general subject matter involved" and "not meant to take the place of the detailed provisions of the text,"[242] can provide only limited interpretive aid. Thus, a heading may shed light on the section's basic thrust,[243] or on ambiguous language in the text, but it "cannot limit the plain meaning of the text,"[244] and "has no power to give what the text of the statute takes away."[245]

[235] *See, e.g.*, Washington v. Confederated Tribes, 447 U.S. 134, 154 (1980) (tribal sovereignty is subordinate only to the federal government, not to the states); Bryan v. Itasca County, 426 U.S. 373, 393 (1976) (states may tax reservation Indians only if Congress has indicated its consent); Hagen v. Utah, 510 U.S. 399, 411-12 (1994) (mild presumption against statutory diminishment of reservation land).

[236] *See, e.g.*, California v. Cabazon Band of Mission Indians, 480 U.S. 202, 214-22 (1987) (federal policy promoting tribal self-government and self-sufficiency, reflected in numerous statutes, is frustrated by state and county restrictions on operation of bingo and card games, profits from which were Tribes' sole source of income).

[237] *See, e.g.*, Negonsott v. Samuels, 507 U.S. 99, 110 (1993) (fact that Kansas Act unambiguously confers jurisdiction on Kansas courts over crimes on reservations makes resort to canon inappropriate).

[238] Carcieri v. Salazar, 555 U.S. 379 (2009). Justice Stevens observes in his dissent the failure of the Court to take this remedial canon into account. Carcieri v. Salazar, 555 U.S. 379, 413-14 (2009) (Stevens, J., dissenting).

[239] Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 19 n.14 (1981) (quoting United States v. Oregon & California R.R., 164 U.S. 526, 541 (1896) and Cornell v. Coyne, 192 U.S. 418, 430 (1904), and citing United States v. Fisher, 2 Cranch 358, 386 (1805) and Yazoo & Mississippi Valley R.R. v. Thomas, 132 U.S. 174, 188 (1889)).

[240] INS v. National Center for Immigrants' Rights, 502 U.S. 183, 189-90 (1991) (citing Mead Corp. v. Tilley, 490 U.S. 714, 723 (1989); and FTC v. Mandel Bros., Inc., 359 U.S. 385, 388-89 (1959)).

[241] United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805).

[242] Trainmen v. Baltimore & Ohio R.R., 331 U.S. 519, 528 (1947).

[243] *See, e.g.,* Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998) (the words "criminal penalties" in section heading relied on as one indication that the section does not define a separate crime, but instead sets out penalties for recidivists); INS v. National Center for Immigrants' Rights, 502 U.S. 183, 189 (1991) ("text's generic reference to 'employment' should be read as a reference to the 'unauthorized employment' identified in the paragraph's title").

[244] Trainmen v. Baltimore & Ohio R.R., 331 U.S. 519, 529 (1947); Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 256 (2004) (quoting *Trainmen*).

[245] Demore v. Kim, 538 U.S. 510, 535 (2003) (O'Connor, J., concurring) (citing INS v. St. Cyr, 533 U.S. 289, 308-09 (2001)).

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Preambles ("Whereas Clauses")

Preambles, or "whereas clauses," precede the enacted language, have no "operative effect,"[246] "are not part of the act," and consequently "cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous."[247] Nonetheless, "whereas clauses" sometimes serve the same purpose as findings and purposes sections, and can provide useful insight into congressional concerns and objectives.[248] Preambles can sometimes help resolve ambiguity in enacted language.[249]

Findings and Purposes Sections

To apply the principle that statutory language be interpreted consistent with congressional intent, courts may consult the stated purposes of legislation to resolve ambiguities in the more specific language of operative sections. For example, the Court relied in part on the stated purpose of the Racketeer Influenced and Corrupt Organizations (RICO) statute to seek "the eradication of organized crime in the United States," to conclude that the term "enterprise" as used in the act includes criminal conspiracies organized for illegitimate purposes, and is not limited to legitimate businesses that are infiltrated by organized crime.[250] The Court also cited legislative findings in the Americans with Disabilities Act in determining the scope of the act's coverage: by finding that "some 43 million Americans" suffered from one or more physical or mental disabilities, Congress indicated that the ADA was not meant to cover all individuals with uncorrected, but correctable, infirmities (e.g., severe myopia).[251]

It is easy, however, to place too much reliance on general statutory purposes in resolving narrow issues of statutory interpretation. Legislation seldom if ever authorizes each and every means that can be said to further a general purpose,[252] and there is also the possibility that stated or inferred purposes may in some instances conflict with one another.[253]

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[246] Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163, 175 (2009) (quoting District of Columbia v. Heller, 554 U.S. 570 at 578 n.3 (2008)).

[247] Yazoo and Mississippi Valley R.R. v. Thomas, 132 U.S. 174, 188 (1889).

[248] *See, e.g.*, Donovan v. Dewey, 452 U.S. 594, 602 n.7 (1981) (citing the preamble to the Mine Safety and Health Act as evidence of congressional awareness of the hazardous nature of the mining industry); Gray v. Powell, 314 U.S. 402, 418 (Justice Roberts, dissenting) (citing the preamble of the Bituminous Coal Act as evidence of congressional purpose).

[249] "[T]he preamble may be referred to in order to assist in ascertaining the intent and meaning of a statute fairly susceptible of different constructions." Price v. Forrest, 173 U.S. 410, 427 (1899).

[250] United States v. Turkette, 452 U.S. 576, 588-90 (1981) (relying on RICO statement of findings and purpose, 18 U.S.C. §1961 nt.). *See also* Knebel v. Hein, 429 U.S. 288, 292 n.9 (1977) (rejecting, in view of Secretary of Agriculture's broad discretion to administer the Food Stamp Program, and in view of broad purpose of Act to "increase [households'] food purchasing power" (7 U.S.C. §2011), a holding that the Secretary lacked authority to determine that receipt of commuting expenses to attend a training program should be counted as household "income" determining eligibility for food stamps).

[251] Sutton v. United Airlines, Inc., 527 U.S. 471, 484-86 (1999) (holding that sisters denied jobs as pilots because of poor, but correctable, eyesight did not suffer from a "disability" under the ADA).

[252] "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (*per curiam*) (emphasis in original).

[253] *Compare* Justice Brennan's opinion of the Court in Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, (continued...)

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"Sense of Congress" Provisions

"Sense of Congress" language is appropriate if Congress makes a statement without making enforceable law. Ordinarily, a statement that it is the "sense of Congress" that something "should" be done is merely precatory, and creates no legal rights.[254] In the appropriate context "sense of Congress" language can have the same effect as statements of congressional purpose—that of resolving ambiguities in more specific language of operative sections of a law—but if that is the intent the more straightforward approach is to declare a "purpose" rather than a "sense."[255]

Savings Clauses

Savings (or "saving") clauses are designed to preserve remedies under existing law. "The purpose of a savings clause is merely to nix an inference that the statute in which it appears is intended to be the exclusive remedy for harms caused by the violation of the statute."[256] A corollary is that a savings clause typically does not create a cause of action.[257]

Inclusion of a savings clause, however, does not make all pre-existing remedies compatible with the newly enacted law. If there is a conflict, the savings clause gives way.[258] Courts will attempt to give the savings language some effect, but may have to narrow that effect to avoid eviscerating the new law. A reference to specific remedies to be preserved can ease interpretation.[259] In some cases, the legislative context and history of the savings provision can reveal its purpose.[260] In

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50-51 (1989) (Congress used undefined term "domicile" so as to protect tribal jurisdiction in child custody cases), *with* Justice Stevens's dissent, *id.* at 54 (Congress intended to protect the parents as well as the tribe).

[254] Monahan v. Dorchester Counseling Ctr., Inc., 961 F.2d 987, 994-95 (1st Cir. 1992) ("sense of Congress" that each state "should" review and revise its laws to ensure services for mental health patients); Yang v. California Dep't of Social Services, 183 F.3d 953, 958-61 (9th Cir. 1999) ("sense of Congress" that Hmong and other Lao refugees who fought in the Vietnam War "should" be considered veterans for purposes of receiving certain welfare benefits).

[255] *See* Accardi v. Pennsylvania R.R., 383 U.S. 225, 229 (1966) ("sense of Congress" that reemployed veterans should not lose seniority as a result of military service evidenced "continuing purpose" already established by existing law); State Highway Comm'n v. Volpe, 479 F.2d 1099, 1116 (8th Cir. 1973) ("sense of Congress" language "can be useful in resolving ambiguities in statutory construction," and in reinforcing the meaning of earlier law).

[256] PMC, Inc. v. Sherwin-Williams Co., 151 F.3d 610, 618 (7th Cir. 1998).

[257] The "sole function" of a saving clause in CERCLA, the Superfund law, is to clarify that the provision authorizing a limited right of contribution "does nothing to 'diminish' any cause(s) of action for contribution that may exist independently...." Cooper Industries v. Aviall Servs., 543 U.S. 157, 165-68 (2004).

[258] Thus, despite the inclusion of a savings clause preserving liability under common law, the National Traffic and Motor Vehicle Safety Act was found to have preempted a state common law tort action based on the failure of a car manufacturer to install front seat airbags: Giving car manufacturers some leeway in developing and introducing passive safety restraint devices was, according to the Court, a key congressional objective under the act, one that would frustrated should a tort action be allowed to proceed. Geier v. American Honda Motor Co., 529 U.S. 861 (2000). Even if there is no conflict, courts may construe a savings clause narrowly. *See, e.g.*, City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 125 (2005) (relief is not available under 42 U.S.C. §1983 as an alternative to a new statutory cause of action to enforce a new statutory right; a savings clause providing that the amendments do not "impair" existing law has "no effect" on the availability of Section 1983 actions because no such relief was available prior to creation of the new right).

[259] *See, e.g.*, 30 U.S.C. §189, which provides that nothing in the Mineral Leasing Act shall be construed to affect the rights of state and local governments to levy and collect taxes on improvements and "output of mines." The Supreme Court relied on this language in holding that states may impose severance taxes on coal extracted from federal lands. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 631-33 (1981).

[260] Here, as elsewhere, the Justices vary in their inclination toward reaching beyond "plain meaning" if the language of (continued...)

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other cases courts must reason from the scope and purpose of the new statute. For example, when the Carmack Amendment to the Interstate Commerce Act imposed comprehensive federal regulation governing the liability of interstate carriers, the Court held that savings language preserving "any remedy or right of action ... under existing law" applied only to federal, not state remedies. To allow resort to state law remedies that were inconsistent with the federal regulation would negate the Amendment's effect. "[T]he act cannot be said to destroy itself," the Court concluded.[261] Even very clear savings language will not be allowed to thwart what the Court views as an important element of a regulatory scheme carefully crafted by Congress and implemented by the executive branch.[262]

"Notwithstanding Any Other Provision of Law"

Congress sometimes seeks to underscore the primacy of a statutory directive by stating that it is to apply "notwithstanding" the provisions of another, specified statute or class of statutes. Courts take into account this expressed intent to override the provisions specified in a "notwithstanding" clause,[263] but when the clause purports to override "any other provision of law," its preclusive

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a savings clause arguably is facially consonant with the broader statutory structure. In *Chamber of Commerce of the United States v. Whiting*, five Justices straightforwardly adopted the "plain meaning" of a 1986 clause saving state "licensing and similar laws" from preemption by federal employer sanctions, and upheld a later enacted Arizona law suspending or revoking the licenses of businesses found by the state to have employed unauthorized aliens in violation of federal standards. By contrast, two dissenting opinions were troubled that the Arizona sanction was far more severe than that authorized for similar violations under either federal law or state laws in force prior to 1986, and they interpreted the savings law more narrowly to maintain what they perceived as the regulatory balance Congress sought in the 1986 law. 563 U.S. ___, No. 09-115, slip op. (May 26, 2011). *See also* Merrill, Lynch, Pierce, Fenner, & Smith v. Curran, 456 U.S. 353, 386-87 (1982) ("saving clause" stating that an amendment to the Commodity Exchange Act was not intended to "supersede or limit the jurisdiction" of state or federal courts, placed in the bill to alleviate fears that the new remedies would be deemed exclusive, was an indication of congressional intent not to eliminate an implied private right of action under the act).

[261] Adams Express Co. v. Croninger, 226 U.S. 491, 507 (1913). *Accord*, AT&T v. Central Office Tel., Inc., 524 U.S. 214, 227 (1998). In City of Milwaukee v. Illinois, 451 U.S. 304, 328-29 (1981), the Court held that the Federal Water Pollution Control Act of 1972 created a comprehensive regulatory program that eliminated previously available federal common law remedies. Savings language in the citizen suit section providing that "nothing in this section shall restrict any right which any person ... may have under ... common law" was irrelevant, since it was the act's standards-setting and permitting provisions, not the citizen suit section, that ousted federal common law.

[262] *See, e.g.*, Geier v. American Honda Motor Co., 529 U.S. 861 (2000) (despite a statute's savings clause providing that "compliance with" a safety standard "does not exempt any person from any liability under common law," a state common law tort action against auto manufacturer found to be preempted by a federal motor vehicle safety standard giving manufacturers a choice among types of passive restraints to install for front seats). *But see* Williamson v. Mazda Motor of America, 562 U.S. ___, No. 08-1314 (February 23, 2011) (applying same statute and savings clause at issue in *Geier*, state common law tort action held *not* to be pre-empted by federal safety standard giving manufacturers a choice of what type of seatbelts to install for center seats in the back of minivans). The *Williamson* Court distinguished *Geier* by emphasizing that the savings clause only preserved a state tort action from being *expressly* pre-empted by a federal motor vehicle safety standard. However, a state tort action could be barred nonetheless by *conflict* pre-emption if, as in *Geier*, the regulatory provision giving manufacturers a choice in selecting safety devices was key to accomplishing the agency's objective to promote safety. *See also* Sprietsma v. Mercury Marine, 537 U.S. 51, 63 (2003) (finding no such conflict preemption, and concluding that the Federal Boat Safety Act's savings clause, providing that compliance with federal standards "does not relieve a person from liability at common law," "buttresses" the conclusion that the act's preemption language does not encompass common-law claims).

[263] For example, several cases have given effect to the provision of the Mandatory Victims Restitution Act that states a restitution order can be enforced against any property of the person fined under the order, "[n]otwithstanding any other Federal law." *E.g.,* United States v. Hyde, 497 F.3d 103 (1st Cir. 2007) (superseding bankruptcy law); United States v. Novak, 476 F.3d 1041 (2007) (superseding ERISA).

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scope often is unclear. One court, for example, ruled that a directive to proceed with timber sale contracts "notwithstanding any other provision of law" meant only "notwithstanding any provision of *environmental* law," and did not relieve the Forest Service from complying with federal contracting law requirements governing such matters as non-discrimination, small business set-asides, and export restrictions.[264] "We have repeatedly held that the phrase 'notwithstanding any other law' is not always construed literally ... and does not require the agency to disregard all otherwise applicable laws."[265] Still, there are cases that have given full measure to "any other provision of law."[266] As a rule, though, it might be more effective to spell out which other laws are to be disregarded,[267] and it must be kept in mind, of course, that no "notwithstanding" clause can foreclose subsequent legislation that supersedes it expressly or implicitly.

Implied Private Right of Action

From time to time courts have held that a federal statute that does not explicitly create a private cause of action nonetheless *implicitly* creates one.[268] This notion traces to the old view that every right must have a remedy.[269] As the Supreme Court put it in an early case, where "disregard of the

[264] Oregon Natural Resources Council v. Thomas, 92 F.3d 792 (9th Cir. 1996). The court harmonized the "notwithstanding" phrase with other provisions of the act that pointed to the limiting construction.

[265] *Id.* at 796. The Three-Sisters Bridge saga offers another example. After a court decision had ordered a halt to construction of the bridge pending compliance with various requirements in D.C. law for public hearings, etc., the project was abandoned. Congress then directed that construction proceed on the bridge project and related highway projects "notwithstanding any other provision of law, or any court decision or administrative action to the contrary." The same section, however, directed that "such construction ... shall be carried out in accordance with all applicable provisions of title 23 of the United States Code." The federal appeals court held that, notwithstanding the "notwithstanding" language, compliance with federal highway law in title 23 (including requirements for an evidentiary hearing, and for a finding of no feasible and prudent alternative to use of parkland) was still mandated. D.C. Fed'n of Civic Ass'ns v. Volpe, 434 F.2d 436 (D.C. Cir. 1970). Then, following remand, the same court ruled that compliance with 16 U.S.C. §470f, which requires consultation and consideration of effects of such federally funded projects on historic sites, was also still mandated. 459 F. 2d 1231, 1265 (1972).

[266] *See, e.g.*, Schneider v. United States, 27 F.3d 1327, 1331 (8th Cir. 1994). The court there rejected an argument that language in the Military Claims Act ("[n]otwithstanding any other provision of law, the settlement of a claim under Section 2733 ... of this title is final and conclusive") does not preclude judicial review, but merely cuts off other administrative remedies. Noting different possible interpretations of "final," "final and conclusive," and the provision's actual language, the court concluded that "[t]o interpret the section as precluding only further administrative review would be to render meaningless the phrase 'notwithstanding any other provision of law.'"

[267] To be sure, not every potential roadblock can be anticipated and averted by narrowly tailored language, and broad language may be necessary to ensure that statutory purposes are not frustrated. But, in spite of the interpretation in *Schneider*, the "notwithstanding" phrase is a blunt instrument. The Trans-Alaska Pipeline Authorization Act may be a better model for such situations. That act directed that the Pipeline "be constructed promptly without further administrative or judicial delay or impediment," specified that construction was to proceed generally in accordance with plans set forth in the already-prepared Final Environmental Impact Statement, declared that no further action was to be required under the National Environmental Policy Act, specified which subsections of the law governing rights-of-way across federal land (a law that had been relied upon in earlier litigation to enjoin the project) were to apply, and severely limited judicial review. *See* 43 U.S.C. §1652. For a less complete identification of laws to be disregarded, and some concomitant interpretational problems, see Norfolk & Western Ry. v. Train Dispatchers, 499 U.S. 117, 138-39 (1991) (two dissenting Justices disputed the Court's conclusion that the exemption of a carrier in a rail consolidation from "the antitrust laws and all other law, including State and municipal law," comprehended an exemption from the terms of a collective bargaining agreement).

[268] What is usually at issue in these cases is whether a federal statute creates a right in a private individual to sue another private entity. Persons alleging that federal statutory rights have been violated by state or local governmental action may be able to sue state officials under 42 U.S.C. §1983.

[269] Marbury v. Madison, 5 U.S. (1 Cranch) 163 (1803) (citing Blackstone's Commentaries).

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command of a statute ... results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages from the party in default is implied."[270]

The Court has gradually retreated from that position,[271] and now is willing to find an implied private right of action only if it concludes that Congress intended to create one. This raises an obvious question: if Congress intended to create a cause of action, why did it not do so explicitly?[272] While the Court has attempted to explain that it does not mean direct intent,[273] the test now seems weighted against finding an implied private cause of action.[274] The Court appears particularly reluctant to find that a violation of a condition placed on funding (e.g., barring education funds to schools that do not require consent for release of student records) gives rise to a private remedy.[275]

When an implied right of a private cause of action has been found, the Court tends to give it "narrow dimensions," leaving to Congress the option to expand it.[276]

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[270] Texas & Pacific Ry. v. Rigsby, 241 U.S. 39-40 (1916).

[271] *See, e.g.*, Cort v. Ash, 422 U.S. 66 (1975) (creating a four-part test to determine whether a private right of action was implied, one part of which was congressional intent); and Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979) (calling congressional intent the "central inquiry").

[272] There may be plausible answers for some older statutes. Congress may have enacted the law at a time when the old rule held sway favoring remedies for statutory rights, or Congress may have patterned the language after language in another law that had been interpreted as creating a private right of action. *See, e.g.*, Cannon v. University of Chicago, 441 U.S. 677, 710-11 (1979) (Congress patterned Title IX of the Civil Rights Act after Title VI, and believed that Title VI was enforceable by private action). *See also* Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 378-82 (1982) (focusing on contemporary legal context in which Congress legislated, implied right of private action found to continue to exist under language carried over from a prior statute).

[273] "Our focus on congressional intent does not mean that we require evidence that Members of Congress, in enacting the statute, actually had in mind the creation of a private right of action. The implied cause of action doctrine would be a virtual dead letter were it limited to correcting drafting error when Congress simply forgot to codify its evident intention...." This "intention," the Court went on, "can be inferred from the language of the statute, the statutory structure, or some other source." Thompson v. Thompson, 484 U.S. 174, 179 (1988). Concurring in the same case, Justice Scalia found himself "at a loss to imagine what congressional intent to create a private right of action might mean, if it does not mean that Congress had in mind the creation of a private right of action." *Id.* at 188. Justice Scalia instead advocated "[a] flat rule that private rights of action will not be implied in statutes hereafter enacted," explaining that "[a] legislative act so significant, and so separable from the remainder of the statute, as the creation of a private right of action seems to me so implausibly left to implication that the risk should not be endured." *Id.* at 192.

[274] *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 285 (2001) (there is no private right of action to enforce disparate-impact regulations issued under the general regulation-issuing authority of §602 of Title VI of the Civil Rights Act; even though a private right of action does exist to enforce the anti-discrimination prohibition of §601, the disparate-impact regulations "do not simply apply §601," but go beyond it). For analysis of the whole topic, including the changing approach by the Court, see Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861 (1996).

[275] *E.g.,* Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) (federal funding provisions provide no right for private recourse under §1983 absent clear, unambiguous intent to the contrary).

[276] *See* Janus Capital Group, Inc. v. First Derivative Traders, 564 U.S. ___, No. 09-525, slip op. (June 13, 2011) (interpreting liability under SEC Rule 10b-5 for "making" an untrue statement as being confined to the entity with final authority over the content of the statement and whether to release it; preparation of misleading mutual fund prospectus by the fund's administrator held insufficient to make the administrator liable because ultimate legal control over the content of the prospectus lay with the fund).

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Incorporation by Reference

Interpretational difficulties may also arise if one statute incorporates by reference provisions of an existing statute. A leading treatise declares that incorporations by "general reference" normally include subsequent amendments, but that incorporations by "specific reference" normally do not.[277] A general reference "refers to the law on the subject generally," while a specific reference "refers specifically to a particular statute by its title or section number."[278]

Severability

When one section of a law is held unconstitutional, courts are faced with determining whether the remainder of the statute remains valid, or whether the whole statute is nullified. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."[279] Congress frequently includes a *pro forma* severability clause in a statute,[280] and this may reinforce a "presumption" of severability by removing much of the doubt about congressional intent.[281] A severability clause does not guarantee, however, that what remains of a statute after a portion has been invalidated is "fully operative"; courts sometimes find that valid portions of a statute cannot stand on their own even though Congress has included a severability clause.[282] Far less frequently, Congress includes non-severability language providing that remaining sections of a law shall be null and void if a part (sometimes a specified part) is held unconstitutional.[283] Case law is sparse,[284] but there is no apparent reason why courts should refuse to honor a clearly expressed non-severability directive.[285]

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[277] 2B SUTHERLAND, STATUTES AND STATUTORY INTERPRETATION, §51.07 (Norman J. Singer ed., 6th ed. 2000 revision).

[278] *Id.* A clear example of a general incorporation was afforded by §20 of the Jones Act, providing that in an action for wrongful death of a seaman, "all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable." As the Court explained in Panama R.R. Co. v. Johnson, 264 U.S. 375, 391-92 (1924), this "generic reference" was "readily understood" as a reference to the Federal Employer Liability Act and its amendments.

[279] Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (quoting Buckley v. Valeo, 424 U.S. 1, 108 (1976)).

[280] *See, e.g.*, 2 U.S.C. §1438 (§509 of the Congressional Accountability Act of 1995): "If any provision of this Act or the application of such provision to any person or circumstance is held to be invalid, the remainder of this Act and the application of the provisions of the remainder to any person or circumstance shall not be affected thereby." These provisions are also sometimes called "separability" clauses. *See, e.g.*, 29 U.S.C. §114.

[281] Alaska Airlines, 480 U.S. at 486. Absence of a severability clause does not raise a presumption *against* severability. New York v. United States, 505 U.S. 144, 186 (1992).

One observer stated the following on the Court and severability: "Despite the unambiguous command of severability and inseverability clauses, the Court has repeatedly held that they create only a rebuttable presumption that guides—but does not control—a reviewing court's severability determination.... [T]he Court has chosen instead to focus on extrinsic evidence of legislative intent and on the potential functionality of the post-severance statutory scheme...." Michael Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 HARV. J. ON LEGIS. 227, 230 (2004).

[282] "A severability clause requires textual provisions that can be severed." Reno v. ACLU, 521 U.S. 844, 882 (1997). *See also* Hill v. Wallace, 259 U.S. 44 (1922); and Carter v. Carter Coal Co., 298 U.S. 238, 312-16 (1936).

[283] *See, e.g.*, 25 U.S.C. §941m(a) (§15(a) of the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993): "If any provision of §941b(a), 941c, or 941d of this title is rendered invalid by the final action of a court, then all of this subchapter is invalid."

[284] *But see, e.g.*, Zobel v. Williams, 457 U.S. 55, 65 (1982) (observing in dictum that, due to inclusion of non-severability language in an Alaska law, "we need not speculate as to the intent of the Alaska Legislature").

[285] *See* Israel E. Friedman, Comment, *Inseverability Clauses in Statutes*, 64 U. CHI. L. REV. 903 (1997). Friedman (continued...)

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Deadlines for Administrative Action

"If a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction."[286] Absent specified consequences, such deadlines "are at best precatory rather than mandatory,"[287] and are read "as a spur to prompt action, not as a bar to tardy completion."[288] "A statute directing official action needs more than a mandatory 'shall' before the grant of power can sensibly be read to expire when the job is supposed to be done."[289] Thus, agency actions taken after a deadline are ordinarily upheld as valid.[290] Although courts are loath to impose "coercive" sanctions that would defeat the purpose of the underlying agency duty, courts sometimes will lend their authority, backed by the possibility of contempt for recalcitrant agency officials, by ordering compliance with statutory directives after a missed deadline.[291]

"Jurisdictional" Rules

Under the Constitution, Congress determines what cases a federal adjudicatory body has authority to consider. Most fundamentally, Congress limits the subject matter a court or administrative adjudicator can hear. These subject matter limitations are "mandatory and jurisdictional"; an adjudicator is powerless over cases that lie outside them, however meritorious. Beyond subject matter rules, the Court at times also has held that statutory deadlines and preconditions to bringing a case are similarly "mandatory and jurisdictional." Thus, the Court in *Bowles v. Russell* held that a court of appeals could not hear an appeal when the notice to appeal was filed after a statutory 14-day deadline, but within a 17-day deadline set forth by the district court.

Nevertheless, the Court often distinguishes between rules of "jurisdiction," which speak to the power of the adjudicator, and those restrictions and conditions, sometimes referred to as "claim-processing requirements," which speak more to the rights and obligations of parties. "Jurisdictional" rules are absolute bars, but the latter types of requirement may be waived or overcome by considerations of equity. Key to the distinction is whether Congress "clearly states

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contends that "inseverability clauses are fundamentally different from severability clauses and should be shown greater deference." Id. at 904. Inseverability clauses, he points out, "are anything but boilerplate," usually are included only after extensive debate, and are often designed to preserve a legislative compromise. Id. at 911-13.

[286] United States v. James Daniel Good Real Property, 510 U.S. 43, 63 (1993) (failure of customs agent to "report immediately" a customs seizure should not result in dismissal of a forfeiture action).

[287] Liesegang v. Secretary of Veterans Affairs, 312 F.3d 1328, 1377 (Fed. Cir. 2002).

[288] Barnhart v. Peabody Coal Co., 537 U.S. 149, 172 (2003).

[289] Barnhart v. Peabody Coal Co., 537 U.S. at 161.

[290] In *Peabody Coal*, the Court held that a deadline in the Coal Industry Retiree Health Benefit Act for assignment of retired beneficiaries to coal companies did not prevent assignment after the deadline. *See also* United States v. Montalvo-Murillo, 495 U.S. 711 (1990) (failure to comply with the Bail Reform Act's requirement of an "immediate" hearing does not mandate release pending trial); Brock v. Pierce County, 476 U.S. 253 (1986) (Secretary of Labor's failure to comply with the statutory deadline for beginning an investigation about misuse of federal funds does not divest the Secretary of authority to launch a tardy investigation).

[291] *See, e.g.*, NRDC v. Train, 510 F.2d 692 (D.C. Cir. 1975) (setting general guidelines, based on equitable principles, for courts to follow in mandating agency compliance following missed deadlines); Sierra Club v. Thomas, 658 F. Supp. 165 (N.D. Cal. 1987) (using the length of time initially set by Congress as the measure of how much additional time to allow EPA after the agency missed a deadline for promulgating regulations).

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that a threshold limitation on a statute's scope shall count as jurisdictional...."[292] If Congress has not, the Court likely will regard the limitation's effect more flexibly.[293] Filing deadlines for administrative review of monetary claims, reimbursements, fees, and the like, are particularly apt to be held non-jurisdictional.[294]

Legislative History

Plain Meaning Rule

Different schools of statutory interpretation regard text differently. Textualists regard the words embodied in the text of a statute as the "law": "Congress' intent is found in the words it has chosen to use."[295] Intentionalism and related methods are less sanguine about whether statutory language alone can fully and adequately embody the "law" for purposes of applying statutes in individual cases.[296] Yet textualists on occasion recognize the value of extrinsic perspectives, and intentionalists regard statutory language as the analytical starting point and at least strong evidence of what a law intends.

The primacy of text in discerning meaning is expressed in the "plain meaning rule." That rule holds that where the language of a statute is plain, the sole role of the courts is to enforce it according to its terms. In practice, the cases vary in characterizing the rule as mandatory or prudential, and those differences often play out indirectly through arguments about whether particular language is sufficiently clear and unambiguous to preclude further inquiry.

There seems to be general consensus that the plain meaning rule aptly characterizes interpretational priorities (statutory language is primary, other considerations of intent and purpose secondary).[297] However, agreement on the basic meaning of the plain meaning rule—if it

[292] Arbaugh v. Y & H Corp., 546 U.S. 500, 515 (2006).

[293] *E.g.*, Henderson v. Shinseki, 562 U.S. ___, No. 09-1036 (March 1, 2011) (120-day deadline for filing an appeal to the U.S. Court of Veterans' Appeals, an Article I court, held not to be jurisdictional, especially given the liberal construction due veterans benefits provisions); Reed Elsevier, Inc. v. Muchnick, 559 U.S.154 (2010) (Copyright Act requirement that a copyright holder register a work before instituting an infringement suit held not to bar class action comprising both holders who had registered their work and those who had not); Arbaugh v. Y & H Corp., 546 U.S. 500 (2006) (Title VII's cause of action allowing sex discrimination suits against employers having at least 15 employees does not bar suits against smaller employers, but rather is a matter to be raised defensively by the defendant).

[294] *See* Sebelius v. Auburn Regional Medical Center, 568 U.S. ___, No. 11-1231 (January 22, 2013) and cases discussed therein.

[295] Harbison v. Bell, 556 U.S. 180, 198 (2009) (Thomas, J., concurring).

[296] *See, e.g.,* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848 (1992) ("Using legislative history to help interpret unclear statutory language seems natural. Legislative history helps a court understand the context and purpose of a statute.").

[297] Different views on the strictures posed by statutory text are not new. The classic extremes are represented by *Caminetti v. United States*, 242 U.S. 470 (1917), and *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892). In *Caminetti*, the Court applied the plain meaning rule to hold that the Mann Act, or "White Slave Traffic Act," which prohibits transportation of women across state lines for purposes of "prostitution, debauchery, or any other immoral purpose," clearly applies to noncommercial immorality, in spite of legislative history showing that the purpose was to prohibit the commercial "white slave trade." In *Holy Trinity*, the Court held that a church's contract with a foreigner to come to this country to serve as its minister was not covered by a statutory prohibition on inducements for importation of aliens "to perform labor or service of any kind." The Court brushed aside the fact that the statute made no exception for ministers, although it did so for professional actors, artists, lecturers, singers, and domestic servants, and declared (continued...)

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occurs—does not guarantee agreement in the rule's application. There have been cases in which Justices of the Supreme Court have agreed that the statutory provision at issue is plain, but have split 5-4 over what that plain meaning is.[298] There are other cases in which strict application is simply ignored; courts, after concluding that the statutory language is plain, nonetheless look to legislative history, either to confirm that plain meaning,[299] or to refute arguments that a contrary interpretation was "intended."[300] The one generally recognized exception to the rule is that a plain meaning is rejected if it would produce an "absurd result."[301] Nevertheless, even in cases of "absurd results" Justices can disagree over whether it is appropriate to consult legislative materials for interpretational insight.[302]

The commonest bridge from text to legislative history is a finding that the statutory language is not plain, but instead is unclear or "ambiguous."[303] Significant differences arise, however, in the willingness of courts to label particular statutory language as "ambiguous" and thereby resort to legislative history. Some judges are more sanguine than others in the ability to interpret statutory text without resort to the "extrinsic" aid of legislative history.[304] Some judges limit themselves to

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the law's purpose to be to prevent importation of cheap *manual* labor. "A thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers," the Court explained. 143 U.S. at 459.

[298] *See, e.g.*, Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) (disagreement over the scope of civil RICO). *See also* Corley v. United States, 556 U.S. 303 (2009).

[299] Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 209 (1994) ("The legislative history of the Mine Act confirms this interpretation.").

[300] *See* Darby v. Cisneros, 509 U.S. 137, 147 (1993) ("Recourse to the legislative history of §10(c) is unnecessary in light of the plain meaning of the statutory text." The Court considered the legislative history, nevertheless, and found nothing inconsistent between it and the Court's reading of statutory language.); Toibb v. Radloff, 501 U.S. 157, 162 (1991) ("[E]ven were we to consider the sundry legislative comments urged [upon us] ..., the scant legislative history does not suggest a 'clearly expressed legislative intent [to the] contrary'."); Arcadia v. Ohio Power Co., 498 U.S. 73, 84 n.2 (1990) (rejecting reliance on legislative history said to be "overborne" by the statutory text). The Court has declared that it will not allow a literal reading of the statute to produce a result "demonstrably at odds with the intentions of its drafters," but in the same breath has indicated that it is only "the exceptional case" in which that can occur. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982).

[301] *See, e.g.*, United States v. Granderson, 511 U.S. 39, 47 n.5 (1994) (dismissing an interpretation said to lead to an absurd result); Dewsnup v. Timm, 502 U.S. 410, 427 (1992) (Scalia, J., dissenting) ("If possible, we should avoid construing the statute in a way that produces such absurd results."); Public Citizen v. Department 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.").

[302] Concurring in *Green v. Bock Laundry Machine Co.*, Justice Scalia agreed on the appropriateness of consulting legislative history for the limited purpose of determining whether what appeared to be an absurd meaning of a key statutory term was indeed considered and intended. Beyond this, however, "[t]he meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated ... I would not permit any of the historical and legislative material discussed by the Court, or all of it combined, to lead me to a different result from the one that these factors suggest." 490 U.S. 504 at 527, 528 (1989) Scalia, J., concurring).

[303] "In aid of the process of construction we are at liberty, if the meaning be uncertain, to have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress." United States v. Great Northern Ry., 287 U.S. 144 (1932). On the other hand, "we do not resort to legislative history to cloud a statutory text that is clear." Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994).

[304] "When aid to the construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" United States v. (continued...)

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a narrow focus on the clarity or ambiguity of a particular statutory phrase, while others look more broadly to statutory context for insight into phrases that may seem ambiguous in isolation.[305] And, inevitably, tensions may arise between apparently clear language and perceived intent.[306]

Uses of Legislative History

Over time, the Court has by turns been relatively more receptive or skeptical toward mining the legislative process for insight into a statute's meaning.[307] Legislating is a collective exercise. Drafters seek to capture a sponsor's intent in words, however imperfectly. Language introduced as legislation is subjected to examination, criticism and revision in diverse congressional fora—large and small, formal and informal—as it moves toward approval—again, via diverse groups with varying degrees of expertise and interest—and eventual enactment into law. Particularly since the 1980s, some Court opinions have characterized modern congressional processes as too fractured to admit any statement or explanation made in any step along the way as an authoritative declaration by Congress as a whole (assuming Congress had a discernible "collective understanding" on the matter at issue before the Court in the first place[308]).[309] Adding to this reluctance is the perception of some that the published history could be skewed by the partisanship of committee staff, the manipulation of interest groups, or the dominant influence of federal agencies.[310] It is preferable, under this view, to re-focus on the statutory text to gain some space for judicial independence and clarity.

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American Trucking Ass'ns, 310 U.S. 534, 543-44 (1940). Justice Frankfurter, dissenting in United States v. Monia, 317 U.S. 424 (1943), made much the same point: "[t]he notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification." Justice Scalia explains why he opposes ready resort to legislative history: "Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent." INS v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (concurring).

[305] United Savings Ass'n v. Timbers of Inwood Forest Associates, 484 U.S. 365, 371 (1988) ("only one of the permissible meanings [of an ambiguous phrase] produces a substantive effect that is compatible with the rest of the law").

[306] *Compare* United States v. Locke, 471 U.S. 84, 92 (1985) (a requirement that a filing be made "*prior* to December 31" could not be stretched to permit a filing *on* December 31) *with* Davis v. United States, 495 U.S. 472, 479 (1990) (phrase "for the use of"—a phrase which "on its face ... could support any number of different meanings," is narrowed by reference to legislative history). In *Locke* the Court explained that "the plain language of the statute simply cannot sustain the gloss appellees would put on it.... [W]ith respect to filing deadlines a literal reading of Congress' words is generally the only proper reading of those words. To attempt to decide whether some date other than the one set out in the statute is the date actually 'intended' by Congress is to set sail on an aimless journey." 471 U.S. at 93. Despite the evident clarity of this language, three Justices dissented.

[307] *See generally* WILLIAM N. ESKRIDGE, JR., PHILLIP P. FRICKEY & ELIZABETH GARRETT, CASES & MATERIALS ON LEGISLATION: STATUTES & THE CREATION OF PUBLIC Policy at 689-798 (4th ed. 2007) (historical survey, with example cases, of theories of interpretation applied by the federal courts and the role of legislative history in them).

[308] *See, e.g.,* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("Because legislatures comprise many members, they do not have "intents" or "designs," hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes.").

[309] *E.g.,* ANTONIN SCALIA, MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 31-34 (1997).

[310] *See, e.g.,* Blanchard v. Bergeron, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring). The complexity and volume of legislative materials also has been said to make use of legislative history malleable and susceptible of supporting any number of outcomes. As an oft-quoted passage in an article by Judge Patricia Wald stated: "It sometimes seems that citing legislative history is still ... akin to 'looking over a crowd and picking out your friends.'" Patricia Wald, *Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting Judge Harold Leventhal). As to the one-time dominance of the federal bureaucracy in shaping and using (continued...)

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More recently, some commentators and jurists who look at congressional processes have had a different take. They, too, see complexity and fragmentation in Congress, but argue that one can ascribe an "institutional purpose" to legislation even though the motives of individual legislators may be unknown or unknowable. Under this "busy Congress" model, for example, congressional committees, as specialists in their field, are regarded as reporting accurate accounts of information and insight to their respective chambers so that Members may better consider legislation they have limited knowledge of.[311]

The stuff of legislative history itself potentially comprises a wide variety of materials. On the one hand, a current statute may be compared to its predecessors and differences among their language and structure analyzed. This use is limited to examining language passed by Congress, which, unlike materials attending congressional deliberations, is often thought to best reflect the intent of Congress as a whole. Considering past statutes and their evolution is not a particularly controversial exercise.[312] On the other hand are the committee reports, hearings, floor debates, and other records of deliberations and correspondence on legislation as it moves through the legislative process. One aspect of examining this material can be to compare different versions of a provision as it progresses, a use somewhat like the comparing of statutes to their predecessors, but without each version having been approved by Congress as a whole.

Courts may read contemporaneous congressional materials for many reasons: background information and context, explanations of specific legislative language, or expectations of how a provision will be applied to the particular fact situation before them. Reliance on these materials varies among courts, with the circumstances of a statute's passage and its clarity or complexity being factors. Courts also may be more willing to consult committee reports and the like for insight into the particular problem Congress sought to address than they are to consult language that purports to direct certain interpretations or outcomes. The nature of the issue before a court is another variable that may bear on what materials the court uses and why.[313]

Among published history, some sources may be considered relatively more authoritative. As a rule, committee report explanations, and especially those of conference committees, are considered more persuasive and reliable than statements made during floor debates or hearings. Within floor debates, statements of sponsors and explanations by floor managers are usually accorded the most weight, and statements by other committee members of the reporting committee[s] next. Floor statements by Members not associated with sponsorship or committee consideration of a bill have little weight, and statements by bill opponents less weight still. Hearings may be useful in providing background, less so as to illuminating the meaning of particular language.

This hierarchy generally characterizes where a court might go to seek to clarify an unclear statute, but several factors might tip the scales in favor of one bit of history or another of a particular bill.

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legislative history, see Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. 266 (2013).

[311] *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); *see also* Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WISC. L. REV. 205 (2000) (discussing the "Breyer-Stevens" concept of "institutional" legislative history).

[312] *See, e.g.,* Powerex Corp. v. Reliant Energy Services Inc., 551 U.S. 224, 231-32 (2007).

[313] James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231 (2009).

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Final language might have arisen from a floor amendment, in which case earlier reports and debates may be of interest only as a point of contrast. Similarly, final language might have been added by the second chamber to consider a bill, in which case the history developed in it would be most pertinent, especially absent conference consideration. Also, a court's willingness to delve into the more remote reaches of legislative history can vary with the issue at hand and the point sought to be clarified.

Again, courts may consult explanatory documents to gain a better feel for context or to shed light on particular language. Reference to legislative history for background is commonplace. A "proper construction frequently requires consideration of [a statute's] wording against the background of its legislative history and in the light of the general objectives Congress sought to achieve."[314] Looking to published history to help explain the meaning of statutory terms[315] may be more controversial, either because contrary indications may be present in other passages of legislative history,[316] or because the degree of direction or detail may be an unwarranted narrowing of a more general statutory text.[317] The concern in the latter instances is whether the legislative history is a plausible explanation of language actually contained in the statutory text, or whether instead explanatory language (e.g., report language containing committee directives or "understandings") outpaces that text. As the Court observed in rejecting reliance on "excerpts" said to reflect congressional intent to preempt state law, "we have never [looked for] congressional intent in a vacuum, unrelated to the giving of meaning to an enacted statutory text ... [U]nenacted approvals, beliefs, and desires are not laws."[318]

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[314] Wirtz v. Bottle Blowers Ass'n, 389 U.S. 463, 468 (1968). For examples of reliance on legislative history for guidance on broad congressional purposes, see Shell Oil Co. v. Iowa Dep't of Revenue, 488 U.S. 19, 26 (1988) (purposes of OCSLA, as evidenced in legislative history, confirm a textual reading of the statute and refute the oil company's reading); Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 515 (1990) (reference to Senate report for evidence of "the primary objective" of the Boren amendment to the Medicaid law).

[315] *See, e.g.*, Reves v. Ernst & Young, 507 U.S. 170, 179-83 (1993) (RICO section proscribing "conduct" of racketeering activity is limited to persons who participate in the operation or management of the enterprise); Gustafson v. Alloyd Co., 513 U.S. 561, 581-82 (1995) (legislative history supports reading of "prospectus" in Securities Act as being limited to initial public offerings); Babbitt v. Sweet Home Chapter, 515 U.S. 687, 704-06 (1995) (relying on committee explanations of word "take" in Endangered Species Act).

[316] The dissent in *Babbitt v. Sweet Home* found legislative history that suggested a narrower use of the word "take," reflecting a consistent distinction between habitat conservation measures and restrictions on "taking" of endangered species. 515 U.S. at 726-30 (Justice Scalia).

[317] "The language of a statute—particularly language expressly granting an agency broad authority—is not to be regarded as modified by examples set forth in the legislative history." Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 649 (1990).

[318] Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 501 (1988). The Court explained further that, "without a text that can, in light of those [legislative history] statements, plausibly be interpreted as prescribing federal pre-emption it is impossible to find that a free market was mandated by federal law." *See also* Secretary of the Interior v. California, 464 U.S. 312, 323 n.9 (1984) (a committee report directive purporting to require coordination with state planning is dismissed as purely "precatory" when the accompanying bill plainly exempted federal activities from such coordination); Shannon v. United States, 512 U.S. 573, 583 (1994) (Court will not give "authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute"); and Roeder v. Islamic Republic of Iran, 333 F.3d 228, 237-38 (D.C. Cir. 2003) (explanatory statement accompanying conference report purported to explain a previous enactment rather than the current one, and could not operate to abrogate an executive agreement). For what is arguably a departure from the general principle, *see* Wisconsin Project on Nuclear Arms Control v. United States Dep't of Commerce, 317 F.3d 275 (D.C. Cir. 2003) (relying on "congressional intent" relating to a lapsed statute). As dissenting Judge Randolph characterized the majority's approach, "the statute has expired but its legislative history is good law." *Id.* at 285.

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A distinct but related inquiry focuses not on the explanations that accompanied committee or floor consideration, but rather on the sequence of changes in bill language. Consideration of the "specific history of the legislative process that culminated in the [statute at issue] affords ... solid ground for giving it appropriate meaning" and for resolving ambiguity present in statutory text.[319] Selection of one house's version over that of the other house may be significant.[320] In some circumstances rejection of an amendment or earlier version can be important,[321] but there is no general "rejected proposal rule."[322] While courts are naturally reluctant to attribute significance to the failure of Congress to act,[323] that reluctance may be overcome if it can be shown that Congress considered and rejected bill language that would have adopted the very position being urged upon the court.[324]

Even more than in the case of legislative language, discussed above, silence in the published legislative history of a bill is seldom significant.[325] There is no requirement that "every permissible application of a statute be expressly referred to in its legislative history."[326] The Court

[319] United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 222 (1952). "Statutory history" as well as bill history can also be important. *See, e.g.*, United States v. Wells, 519 U.S. 482, 492-93 (1997) (consolidation of a number of separate provisions supports the "natural reading" of the current law); Booth v. Churner, 532 U.S. 731, 740 (2001) (elimination of "the very term" relied on by the Court in an earlier case suggests that Congress desired to preclude that result in future cases).

Dissenting in *Burwell v. Hobby Lobby*, Justice Ginsburg recounted the statutory history of the Affordable Care Act to argue for the primacy of preventive health care for women over the religious beliefs of employers. 573 U.S. ___, No. 13-354, slip op. at 3-6 (June 30, 2014) (Ginsburg, J., dissenting).

[320] *See, e.g.*, United States v. Riverside Bayview Homes, 474 U.S. 121, 136-37 (1985) (attaching significance to the conference committee's choice of the Senate version, retaining the broad definition of "navigable waters" then in current law, over a House version that would have narrowed the definition).

[321] In *Hamdan v. Rumsfeld*, the Court examined three provisions of the Detainee Treatment Act. In two of the provisions, Congress had immediately restricted access to the courts by individuals in certain pending military proceedings, but the third provision did not expressly limit access to the courts by individuals in pending proceedings through petitions for writs of habeas corpus. The Court recounted that Congress had adopted its final language only after having rejected versions that would have immediately curtailed habeas relief in pending cases: "Congress' rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government's interpretation." 548 U.S. 557, 579-80 (2006).

[322] Compare Justice Scalia's plurality opinion in *Rapanos v. United States*, which saw no significance in Congress's rejection of an amendment to overcome wetlands regulations, to Justice Stevens's dissent, which saw such rejection as evidence of acquiescence. 547 U.S. 715, 749-52, 797 (2006). For a leading example of reading acquiesce into an extended history of congressional rejection of regulatory legislation, see FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

[323] "This Court generally is reluctant to draw inferences from Congress' failure to act. Indeed, those members of Congress who did not support these bills may have been as convinced by testimony that the NGA already provided 'broad and complete ... jurisdiction and control over the issuance of securities' as by arguments that the matter was best left to the States." Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 306 (1988).

[324] Pacific Gas & Elec. Co. v. Energy Resources Conserv. & Dev. Comm'n, 461 U.S. 190, 220 (1983) (noting that language had been deleted to insure that there be no preemption); INS v. Cardoza-Fonseca, 480 U.S. 421, 441-42 (1987) (rejection of Senate language limiting the Attorney General's discretion in granting asylum in favor of House language authorizing grant of asylum to any refugee); Doe v. Chao, 540 U.S. 614, 622 (2004) ("drafting history show[s] that Congress cut the very language in the bill that would have authorized any presumed damages").

[325] "[A] statute is not to be confined to the 'particular application[s] ... contemplated by the legislators.'" Diamond v. Chakrabarty, 447 U.S. 303, 315 (1980) (ruling that inventions not contemplated when Congress enacted the patent law are still patentable if they fall within the law's general language) (quoting Barr v. United States, 324 U.S. 83, 90 (1945)).

[326] Moskal v. United States, 498 U.S. 103, 111 (1990). *Accord*, Pittston Coal Group v. Sebben, 488 U.S. 105, 115 (1988) ("it is not the law that a statute can have no effects which are not mentioned in its legislative history"); PBGC v. LTV Corp., 496 U.S. 633, 649 (1990) ("the language of a statute—particularly language expressly granting an agency (continued...)

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does, however, occasionally attach importance to the absence of any indication in a statute or its legislative history of an intent to effect a "major change" in well-established law.[327] And sometimes the Justices disagree over the significance of congressional silence.[328]

Inferences Based on "Subsequent" Legislative History

Once a statute is enacted, later Congresses may comment on it or choose to revisit it (or not) as circumstances change. Views expressed in the documents or deliberations of a subsequent Congress generally are eschewed.[329] It has been stated in this context that "[t]he legislative history of a statute is the history of its consideration and enactment. 'Subsequent legislative history'—which presumably means the *post*-enactment history of a statute's consideration and enactment—is a contradiction in terms."[330]

The Court also is wary about reading significance into the actions of a subsequent Congress, having warned that they are "a hazardous basis for inferring the intent of an earlier one.'"[331] To the degree congressional action is considered (as opposed to the statutory language), it is the enacting Congress that is key, and interpretation is ordinarily not affected by the several different kinds of congressional actions and inactions frequently characterized as "post-enactment history." However, depending on context, including intervening developments, what a subsequent Congress does may have interpretational value.

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broad authority—is not to be regarded as modified by examples set forth in the legislative history"). *See also* Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1998) (male-on-male sexual harassment is covered by Title VII although it "was assuredly not the principal evil Congress was concerned with"); and Cook County v. United States ex rel. Chandler, 538 U.S. 119, 128-29 (2003) (local governments are subject to *qui tam* actions under the expansive language of the False Claims Act even though the enacting Congress was primarily concerned with fraud by Civil War contractors).

[327] Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266-27 (1979) (silence of legislative history "is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely"); United Savings Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 380 (1988) (major change "would not likely have been made without specific provision in the text of the statute," and it is "most improbable that it would have been made without even any mention in the legislative history"); Dewsnup v. Timm, 502 U.S. 410, 419 (1992) (Court reluctant to interpret the Bankruptcy Code as effecting "a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history").

[328] *Compare* Justice Stevens's opinion for the Court in Chisom v. Roemer, 501 U.S. 380, 396 n.23 (1991) ("Congress' silence in this regard can be likened to the dog that did not bark.") *with* Justice Scalia's dissenting rejoinder, *id.* at 406 ("Apart from the questionable wisdom of assuming that dogs will bark when something important is happening, we have forcefully and explicitly rejected the Conan Doyle approach to statutory construction in the past.").

[329] Sullivan v. Finkelstein, 496 U.S. 617, 628 n.8 (1990). An extensive, long-running record of hearings and statements across subsequent Congresses may, in combination with other factors, weigh in favor of interpreting a statute narrowly. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 147-55(2000).

[330] *Sullivan*, 496 U.S. at 631 (Scalia, J., concurring in part). Elsewhere, Justice Scalia has stated that "[r]eal (pre-enactment) legislative history is persuasive to some because it is thought to shed light on what legislators understood an ambiguous statutory text to mean when they voted to enact it. But post-enactment legislative history by definition 'could have had no effect on the congressional vote.'" Bruesewitz v. Wyeth LLC, 562 U.S. ___, No. 09-152, slip op. at 18 (February 22, 2011), quoting District of Columbia v. Heller, 554 U.S. 570 605 (2008).

[331] Mackey v. Lanier Collection Agency & Serv., 486 U.S. 825, 840 (1988) (quoting United States v. Price, 361 U.S. 304, 313 (1960)).

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Subsequent Legislation

If the views of a later Congress are expressed in a duly enacted statute, then the views embodied in that statute must be interpreted and applied. Occasionally a later enactment declares congressional intent about interpretation of an earlier enactment rather than directly amending or clarifying the earlier law. Such action can be given prospective effect because, "however inartistic, it ... stands on its own feet as a valid enactment."[332] "Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction."[333] Other statutes may be expressly premised on a particular interpretation of an earlier statute; this interpretation may be given effect, especially if a contrary interpretation would render the amendments pointless or ineffectual.[334]

The Court closely adheres to judicial precedents in interpreting statutes, on the grounds that Congress is free to supersede the Court's interpretation of a particular statute through subsequent legislation. But it may not always be evident exactly how far Congress went in subsequent legislation to sweep aside an earlier construction. For example, when Congress acts narrowly against a result in a Court decision, is it also discrediting the Court's reasoning that led to the result? A female employee who is adversely affected by a discriminatory seniority system is barred from relief under a Supreme Court decision that holds Title VII's statute of limitation clock is intended to tick solely from the time of the discriminatory act, not from the time harm is realized.[335] Congress adopts a provision that specifies time of harm as restarting the statute of limitations clock for those discriminated against under a seniority system. Later, a female brings suit alleging that she had been discriminated against in raise decisions over time and that consequently her pay continued to be lower than that of men in similar positions. Is the Court's more general "time of the act" interpretation in the seniority case still to be accorded weight in the later raise discrimination case, even though the interpretation no longer pertains in a seniority system context? In *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, five Justices substantially relied on the earlier interpretation to hold that the raise discrimination was barred by the statute of limitations, over the objection of a four-Justice dissent.[336]

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[332] F. REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 179 (1975).

[333] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-81 (1969). By contrast, a "mere statement in a conference report ... as to what the Committee believes an earlier statute meant is obviously less weighty" because Congress has not "proceeded formally through the legislative process." South Carolina v. Regan, 465 U.S. 367, 379 n.17 (1984).

[334] Mount Sinai Hosp. v. Weinberger, 517 F.2d 329, 343 (5th Cir. 1975), quoted with approval in Bell v. New Jersey, 461 U.S. 773, 785 n.12 (1983). *See also* Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 343, 382-87 (1982), relying on congressional intent to preserve an implied private right of action as the reason for a "savings clause" on court jurisdiction. In FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 156 (2000), the Court ruled that, because legislation restricting the advertising and labeling of tobacco products had been premised on an understanding that the FDA lacked jurisdiction over tobacco, Congress had "effectively ratified" that interpretation of FDA authority. Additionally, the labeling statutes were "incompatible" with FDA jurisdiction in one "important respect"—although supervision of product labeling is a "substantial component" of the FDA's regulatory authority, the tobacco labeling laws "explicitly prohibit any federal agency from imposing any health-related labeling requirements on ... tobacco products."

[335] Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989).

[336] 550 U.S. 618 (2007). On January 29, 2009, the Lilly Ledbetter Fair Pay Act of 2009 was enacted as P.L. 111-2. Criticizing the Supreme Court in its finding, the act restarts the statute of limitation clock on compensation claims each time harm is realized from past unlawful discrimination (including each paycheck). Also, the act explicitly extends beyond Title VII to claims under other specified civil rights laws. For an extended discussion of the persistence of more general interpretations beyond narrow congressional overrides, see Deborah A. Widiss, *Shadow Precedents and the Separation of Powers*, 84 NOTRE DAME L. REV. 511 (2009).

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Reenactment

If Congress reenacts a statute and leaves unchanged a provision that had received a definitive administrative or judicial interpretation, the Court sometimes holds that Congress has ratified that interpretation.[337] The stated rationale is that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."[338] Similarly, if Congress in enacting a new statute incorporates sections of an earlier one, "Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."[339] However, congressional ratification of a judicial interpretation will not be inferred from reenactment unless "the supposed judicial consensus [is] so broad and unquestioned that Congress knew of and endorsed it."[340] Also, the reenactment presumption is usually indulged only if the history of enactment shows that Congress conducted a comprehensive review of the reenacted or incorporated statute, and changed those aspects deemed undesirable.[341] Though the presumption can come into play in the absence of evidence that Congress directly considered the issue at hand, the Court may require other indicia of congressional awareness of the issue before reading significance into reenactment. Congress may have simply overlooked the matter, or may have intended to leave it "for authoritative resolution in the courts."[342]

Acquiescence

Congressional inaction is sometimes construed as approving or "acquiescing" in an administrative or judicial interpretation.[343] There is no general presumption that congressional inaction in the face of interpretation bespeaks acquiescence, and there is no consistent pattern of application by the Court. When the Court does infer acquiescence, the most important factor

[337] Pierce v. Underwood, 487 U.S. 552, 567 (1988) (reenactment of "a statute that had in fact been given a consistent judicial interpretation ... generally includes the settled judicial interpretation"). *See also* Farragher v. City of Boca Raton, 524 U.S. 775, 792 (1998) ("[T]he force of precedent here is enhanced by Congress's amendment to the liability provisions of Title VII since the *Meritor* decision, without providing any modification of our holding."). In *Pierce*, however, a committee report's approving reference to a minority viewpoint was dismissed as not representing a "settled judicial interpretation," since 12 of the 13 appellate circuits had ruled to the contrary. *See also* Metropolitan Stevedore Co. v. Rambo, 515 U.S. 291, 299 (1995) (reenactment carried with it no endorsement of appellate court decisions that were not uniform and some of which misread precedent).

[338] Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 343, 382 n.66 (1982), quoting Lorillard v. Pons, 434 U.S. 575, 580 (1978).

[339] Lorillard v. Pons, 434 U.S. 575, 581 (1978).

[340] Jama v. Immigration and Customs Enforcement, 543 U.S. 335, 349-52 (2005).

[341] Lorillard, 434 U.S. at 582. The Court "bluntly" rejects ratification arguments if Congress "has not comprehensively revised a statutory scheme but has made only isolated amendments." Alexander v. Sandoval, 532 U.S. 275, 292 (2001) (also expressing more general misgivings about the ratification doctrine's reliance on congressional inaction).

[342] Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 336 n.7 (1971). "[C]ongressional inaction is perhaps the weakest of all tools for ascertaining legislative intent, and courts are loath to presume congressional endorsement unless the issue plainly has been the subject of congressional attention. Extensive hearings, repeated efforts at legislative correction, and public controversy may be indicia of Congress's attention to the subject." Butterbaugh v. Department of Justice, 336 F.3d 1332, 1342 (Fed. Cir. 2003) (citations omitted).

[343] Although acquiescence and reenactment are similar in that each involves an inference that Congress has chosen to leave an interpretation unchanged, there is a fundamental difference: reenactment purports to involve interpretation of duly enacted legislation, while acquiescence attributes significance to Congress's failure to act. *Cf.* INS v. Chadha, 462 U.S. 919 (1983) (Congress may legislate only in conformity with the bicameralism and presentment requirements of Art. I, §7). At times, acquiescence and reenactment have been used in tandem. *See* Zuni Pub. Sch. Dist. No. 89 v. Department of Educ., 550 U.S. 81, 90-91 (2007).

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seems to be congressional awareness that an interpretation has generated widespread attention and controversy.[344] As with reenactment, however, there are other inferences that can be drawn from congressional silence.[345]

"Isolated Statements"

Although congressional inaction or silence is sometimes accorded importance in interpreting an earlier enactment, post-enactment explanations or expressions of opinion by committees or members are often dismissed as "isolated statements" or "subsequent legislative history" not entitled to much if any weight. As the Court has noted, statements as to what a committee believes an earlier enactment meant are "obviously entitled to less weight" than is subsequent legislation declaring such intent, because in the case of the committee statement Congress had not "proceeded formally through the legislation process."[346] The Court has also explained that "isolated statements by individual Members of Congress or its committees, all made after enactment of the statute under consideration, cannot substitute for a clear expression of legislative intent at the time of enactment."[347] "It is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means."[348] The disfavor in which post-enactment explanations are held is sometimes expressed more strongly when the views are those of a single member. The Court has declared that "*post hoc* observations by a single member carry little if any weight."[349]

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[344] In Bob Jones Univ. v. United States, 461 U.S. 574, 601 (1983), for example, the Court, in finding congressional acquiescence in a revenue ruling that denied tax-exempt status to educational institutions with racially discriminatory policies, pointed to inaction on a number of bills introduced to overturn the ruling as evidencing Congress's "prolonged and acute awareness of so important an issue." *See also* United States v. Rutherford, 442 U.S. 544 (1979) (finding acquiescence, and pointing to congressional hearings as evidencing congressional awareness of FDA policy). On the other hand, failure to include in an amendment language addressing an interpretation described as then-prevailing in a memo placed in the *Congressional Record* is "too slender a reed" on which to base an inference of congressional acquiescence. McLaughlin v. Richland Shoe Co., 486 U.S. 128, 132 n.8 (1988).

[345] "The 'complicated check on legislation' ... erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice." Johnson v. Transportation Agency, 480 U.S. 616, 672 (1987) (Justice Scalia, dissenting).

[346] Consumer Product Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 118 n.13 (1980) (dismissing as not "entitled to much weight here" a statement at hearings made by the bill's sponsor four years after enactment, and language in a conference report on amendments, also four years after enactment).

[347] Southeastern Community College v. Davis, 442 U.S. 397, 411 n.11 (1979) (dismissing 1974 committee report language and 1978 floor statements purporting to explain 1973 enactment). *See also* Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 714 (1978) (one member's "isolated comment on the Senate floor" a year after enactment "cannot change the effect of the plain language of the statute itself").

[348] NLRB v. Health Care & Retirement Corp., 511 U.S. 571, 582 (1994) ("isolated statement" in 1974 committee report accompanying amendments to other sections of act is not "authoritative interpretation" of language enacted in 1947).

[349] Bread Political Action Comm. v. FEC, 455 U.S. 577, 582 n.3 (1982) (1977 litigation affidavit of a Senator and his aide as to intent in drafting a 1974 floor amendment cannot be given "probative weight" because such statements, made after enactment, represent only the "personal views" of the legislator). *But see* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 530-31 (1982), citing a bill summary placed in the *Congressional Record* by the bill's sponsor after passage, and explanatory remarks made two years later by the same sponsor; and Pacific Gas & Elec. Co. v. Energy Resources Conserv. & Dev. Comm'n, 461 U.S. 190, 220 n.23 (1983) (relying on a 1965 explanation by "an important figure in the drafting of the 1954 [Atomic Energy] Act").

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Presidential Signing Statements

Under the Constitution, the President's formal role in enacting statutes is one of "take it or leave it." Article I, Section 7, clause 2 provides that, after Congress passes a bill and presents it to the President, "if he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it." Thus, the recording of a President's views as part of the constitutional lawmaking process is limited to objections attending a veto. Also, the President may not amend the language of a presented bill before acting on it. Nor may the President pick and choose which provisions of a presented bill to sign into law, while vetoing others. The President's options are "thumbs up" or "thumbs down" on a bill in its entirety.[350] The President may have an integral role in the enactment of statutes into law, but "[a]ll legislative Powers" reside in Congress,[351] and it is exclusively up to the houses of Congress, at least formally, to come to common agreement on statutory language.

Nevertheless, recent Presidents have frequently used the occasion of signing a bill into law to issue statements that contend that portions of the bill are unconstitutional, claim a law is of limited application, or otherwise signal that a law will be implemented strictly in accord with the President's views of the office's prerogatives and authorities.[352] Assertions in signing statements vary in specificity and purported scope; the statements would not appear to have any immediate, direct legal effect in and of themselves; and they may best be understood in the context of the enduring tension between the political branches over accountability, control of executive agencies, and similar institutional concerns.[353] At the same time, Administrations since the 1980s have asserted that signing statements have weight as legislative history and should be taken into account by courts.[354] There is no legal impediment to a President commenting on a statute's meaning in a signing statement,[355] and the political reality is that an Administration is not a passive spectator during congressional deliberations.[356] Often, the Administration forwards draft

[350] Clinton v. City of New York, 524 U.S. 417 (1998).

[351] U.S. CONST., art. I, §1.

[352] Signing statements have a long history, but their frequency and intent changed beginning with the Reagan Administration. WILLIAM N. ESKRIDGE, JR., PHILLIP P. FRICKEY & ELIZABETH GARRETT, CASES & MATERIALS ON LEGISLATION: STATUTES & THE CREATION OF PUBLIC Policy at 1043-44 (4th ed. 2007). An example from the Obama Administration is found in a statement accompanying the signing of P.L. 113-17, which concerned Taiwan's participation in the International Civil Aviation Organization: "I note that sections 1(b) and 1(c) contain impermissibly mandatory language purporting to direct the Secretary of State to undertake certain diplomatic initiatives.... Consistent with longstanding constitutional practice, my Administration will interpret and implement these sections in a manner that does not interfere with my constitution authority to conduct diplomacy...." 2013 U.S.C.C.A.N. S5, 2013 WL 4405724 (leg. hist.) (July 12, 2013).

[353] *See* CRS Report RL33667, *Presidential Signing Statements: Constitutional and Institutional Implications*, by (name redacted).

[354] In a 1986, Samuel A. Alito Jr., then a Deputy Assistant Attorney General in DOJ's Office of Legal Counsel, drafted a memorandum to a Litigation Strategy Working Group on how "to ensure that Presidential signing statements assume their rightful place in the interpretation of legislation.... [I]n interpreting statutes, both the courts and litigants (including lawyers in the Executive branch) invariably speak of "legislative" or "congressional" intent. Rarely if ever do courts or litigants inquire into the President's intent. Why is this so?" He proceeded to review potential obstacles to wider acceptance and proposed a course of action for overcoming them.

[355] A report by a task force of the American Bar Association that was critical of the types of constitutional and institutional assertions being made in presidential signing statements apparently had no objection to the President using signing statements to voice views on the meaning, purpose, or significance of bills. American Bar Association, Report of the Task Force on Presidential Signing Statements and the Separation of Powers Doctrine at 5 (2006).

[356] *See, e.g.,* Frank B. Cross, *The Constitutional Legitimacy and Significance of Presidential "Signing Statements*," 40 (continued...)

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legislation for introduction, and liaisons from the executive branch regularly communicate its views on bills as they proceed. If the President or the Administration worked closely with Congress in developing legislation, and if the approved version incorporated the President's recommendations, reference to a signing statement arguably may help complete the picture of a bill's purpose, especially in the absence of published congressional documents on a bill.[357] The same might also be said with respect to bills whose final content arose from compromise negotiations between the Administration and Congress.[358]

Citation of signing statements may be more controversial when statutory language appears clear or the meaning attributed in a signing statement conflicts with congressional history. Congress has no opportunity during the legislative process to respond as an institution to a characterization in a signing statement.[359] Giving the President "the last word" on the meaning of a bill he approves, it may be pointed out, stands in contrast to the procedure for congressional consideration of the President's objections in the case of a vetoed bill.

The Supreme Court has not accorded legal weight to signing statements. And, in longstanding litigation on a statute implicating the status of Jerusalem, the prominence of President George W. Bush's signing statement as an issue has steadily declined. Neither the latest court of appeals decision, nor recent briefs by the parties to the Supreme Court, do more than mention it in passing as part of the case's history.[360] Also, lower courts have seldom had to resolve cases that require a choice between conflicting presidential and congressional interpretations.[361] Presidents' routine

(...continued)

ADMIN. L. REV. 209 (1988).

[357] "It may ... be appropriate for the President, when signing legislation, to explain what his (and Congress's) intention was in making the legislation law, particularly if the Administration has played a significant part in moving the legislation through Congress." Department of Justice, Office of Legal Counsel, "The Legal Significance of Presidential Signing Statements," 17 U.S. Op. Off. Legal Counsel 131, 136 (1993).

[358] "[T]hough in some circumstances there is room for doubt as to the weight to be accorded a presidential signing statement in illuminating congressional intent ..., President Reagan's views are significant here because the Executive Branch participated in the negotiation of the compromise legislation." United States v. Story, 891 F.2d 988, 994 (2d Cir. 1989).

[359] *See* Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J ON LEGIS. 363, 367 (1987) ("The danger inherent in [an 'executive history' statement] is that its author will graft ambiguities and exceptions onto an act that was not so encumbered during the legislative process...."). *Compare* Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power,* 23 CONST. COMMENTARY 307, 344-47 (2006).

[360] Zivotofsky v. Secretary of State, 725 F. 3d 197 (D.C. Cir. 2013), *cert. granted sub nom.* Zivotofsky v. Kerry, No. 13-628 (April 21, 2014) ("The signing statement is irrelevant."); Petition for Writ of Certiorari, Zivotofsky v. Kerry, No.13-628 (November 20 2013); Brief for the Respondent in Opposition, No. 13-628 (February 21, 2014); Brief of Petitioner, No. 13-628 (July 15, 2014). This is the second time the case has been before the Court. *See* M.B.Z. v. Clinton, 565 U.S. ___, No. 10-699, slip op. (March 26, 2012) (finding that political question did not bar judicial review of statement allowing optional designation on U.S. passport of "Israel" as place of birth of those born in Jerusalem; case remanded). Neither the legal effect nor the persuasive weight of President Bush's signing statement was briefed or argued on the merits.

[361] *See, e.g.*, William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699 (1991); Brad Waites, *Let Me Tell You What You Mean: An Analysis of Presidential Signing Statements*, 21 GA. L. REV. 755 (1987); Marc N. Garber and Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363 (1987); Frank B. Cross, *The Constitutional Legitimacy and Significance of Presidential "Signing Statements*," 40 ADMIN. L. REV. 209 (1988); Kristy L. Carroll, Comment, *Whose Statute Is It Anyway?: Why and How Courts Should Use Presidential Signing Statements When Interpreting Federal Statutes*, 46 CATH U. L. REV. 475 (1997); Department of Justice, Office of Legal Counsel, "The Legal Significance of Presidential Signing Statements," 17 U.S. Op. Off. Legal Counsel 131 (1993).

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use of signing statements to try to influence statutory interpretation by courts is a relatively recent development.[362] Thus far, courts have not been particularly receptive, even while citing them on occasion.[363]

Judicial reluctance to consider signing statements would not appear to be contrary to judicial deference to agency action. Deference is premised on the conclusion that Congress has, by statute, authorized the agency to "speak with the force of law" through a rulemaking or other formal process. Congress has not authorized the President (or, indirectly, an agency) to speak with the force of law through signing statements. So, although signing statements may influence or even control agency implementation of statutes, it is the implementation, and not the signing statement itself, that would be measured against the statute's requirements.[364] At most, signing statements might be considered analogous to informal agency actions, entitled to respect only to the extent that they have the power to persuade.[365]

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[362] President Andrew Jackson used a signing statement in 1830, and in 1842 an ad hoc congressional committee strongly condemned President Tyler for having filed a statement of his reasons for signing a bill (See 4 Hinds' Precedents §3492), but routine use of signing statements began during the Reagan Administration, when Attorney General Meese persuaded West Publishing Company to include the President's signing statements with legislative histories published in *United States Code Congressional and Administrative News*. The Attorney General explained this as facilitating availability of signing statements to courts "for future construction of what the statute actually means." Address by Attorney General Edwin Meese, III, National Press Club (February 25, 1986). Presidents since Reagan have continued this practice.

[363] *See, e.g.*, Zivotofsky v. Secretary of State, 571 F.3d 1227 (D.C. Cir. 2009) (citing President George W. Bush's signing statement on non-binding nature of a provision authorizing designation of Israel as place of birth on the passport of a U.S. citizen born in Jerusalem), *cert. granted sub nom.* M.B.Z. v. Clinton, No. 10-699 (May 2, 2011); United States v. Perlaza, 439 F.3d 1149, 1163 (9th Cir. 2006) (citing President Clinton's signing statement to reinforce statement of purpose in the conference report); Berry v. Department of Justice, 733 F.2d 1343, 1349 (9th Cir. 1984) (citing signing statement as well as congressional committee reports as affirming one of the broad goals of the Freedom of Information Act); Clifton D. Mayhew, Inc. v. Wirtz, 413 F.2d 658, 661-62 (4th Cir. 1969) (cited as elaborating on floor manager's explanation of good-faith defense in Portal-to-Portal Act); United States v. Yacoubian, 24 F.3d 1, 8 (9th Cir. 1994) (cited along with conference report to establish rational purpose of statute); Taylor v. Heckler, 835 F.2d 1037, 1044 n.17 (3d Cir. 1987) (refusing to consider a signing statement that was "largely inconsistent" with legislative history on which the court had previously relied); Caruth v. United States, 688 F. Supp. 1129, 1146 n.11(N.D. Tex. 1987) (relying extensively on legislative history but refusing to give "any weight" to signing statements).

[364] If Congress has directed that the President rather than an agency implement a statute, then, by analogy, it can be argued that Congress has implicitly delegated to the President whatever policymaking authority is necessary to fill in gaps and implement the statutory rule. But here again, the signing statement would not usually constitute an act of implementation.

[365] The Constitution's vesting in the President of the executive power and of the duty to "take care that the laws be faithfully executed" implies authority to interpret the law in order to determine how to execute it, but this implicit authority would not appear to require change to the *Chevron*/*Skidmore* deference approaches.

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