INTERPRETING THE LAW
A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION

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DETAILED TABLE OF CONTENTS

Chapter 3 *Statutory Precedents*

The *Stare Decisis* Rule

The Super-Strong Presumption of Correctness for Statutory Precedents
- Canon Relaxing *Stare Decisis* for Common Law Statutes
- Acquiescence Canon
- Reenactment Canon

Other Precedent-Based Canons
- Common Law Canon
- Borrowed Act Canon
- Shadow Precedents Canon

Chapter 4 *Statutory and Legislative History*

The Statutory and Legislative History Rules
- Rule of Law: Meaning of Words and Statutory Structure
- Governance: Applying Statutory Text in Light of Legislative Purpose
- Democracy: Viewing Statutes Through the Eyes of Legislators

How Judges Ought to Read Legislative History
- Backwards Induction Canon
- Rules of Proceedings Canon
- Sore Losers Canon

More Legislative History Canons
- Committee Report Canon
- Sponsor's Statement Canon
- Rejected Proposal Canon
- Dog Didn't Bark Canon
- Subsequent Legislative History Canon
- Presidential Statements Canon

Chapter 5 *Administrative Practice*

The *Skidmore* Rule

The *Chevron* Rule
- Major Questions Non-Deference Canon
- Multiple Agencies Deference Canon
- *Brand X* Deference Canon

INTRODUCTION

CANONS AND NORMS IN STATUTORY INTERPRETATION

America is a Republic of Statutes. That is, most of the law Americans must obey originates in legislation—either direct statutory commands or regulatory requirements issued by agencies implementing statutes. This is a big change from the founding era, when most of the rules followed by businesses, individuals, and governmental officials were judge-made rules, namely, the "common law." Over time, statutes and agency regulations have displaced the common law. Since World War II, statutes have swept the field of applicable law.

Not only are statutes America's main source of law, but they are battlegrounds for our most serious values. Thus, family values find their legal foundation in statutory rules enforcing or rewarding marital commitments and parental duties to their children. Education codes are loaded with public goals and lessons schools should inculcate in our youth. Our collective disgust is most often expressed in criminal statutes. Legislation and agency implementing rules ensure cleaner air and water, protect biodiversity, and require companies to clean up their waste. Even the equality norm, traditionally associated with the Constitution, is increasingly implemented through anti-discrimination super-statutes. Workplace equality for older persons, people with disabilities, and lesbian and gay persons receives little constitutional protection but is strongly protected by federal and state statutes.[1]

[1] William N. Eskridge Jr. & John Ferejohn, *A Republic of Statutes: The New American Constitution* (2010); Ernest Young, *The Constitution Outside the Constitution,* 117 Yale L.J. 408 (2007).

No one questions the central role that statutes play in our polity and our culture—but there is a lot of dispute over the way those statutes ought to be interpreted. Consider a recent battle of books on statutory interpretation authored by Justices Stephen Breyer and Antonin Scalia, which is a continuation of their debates in Supreme Court cases. A simple example will illustrate their different approaches. Assume that Congress adopts a statute providing that "no vehicles will be allowed in Lafayette Park," a federal park across the street from the White House. Does this statute prohibit kids from riding their bicycles through Lafayette Park?[2]

Justice Scalia maintains that the alpha and the omega of statutory interpretation is the enacted text of the statute. "The 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 (2) most compatible with the surrounding body of law into which the provision must be integrated." Judges applying statutes should ignore legislative deliberations and other context extrinsic to the enacted legal text. Appealing directly to *rule of law values* in our polity, Justice Scalia claims that his new textualism makes statutory interpretation more predictable and constrains judicial

[2] The vehicles in the park hypothetical is inspired by the classic articulation in H.L.A. Hart, *The Concept of Law* 126-29 (1961); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 607-11 (1958); see generally Frederick Schauer, *A Critical Guide to Vehicles in the Park,* 83 NYU L. Rev. 1109 (2008) (situating the no vehicles in the park hypothetical within the jurisprudential debate between Hart and Fuller). For an exploration of a hypothetical "no animals in the park" law, see Robert E. Keeton, *Statutory Analogy, Purpose, and Policy in Legal Reasoning: Live Lobsters and a Tiger Cub in the Park*, 52 Md. L. Rev. 1192 (1993).

discretion better than other approaches, including the eclectic approach followed by the Supreme Court of the United States.[3]

In his recent book *Reading Law* (2012), Justice Scalia has teamed up with linguist Bryan Garner to endorse fifty-seven canons of statutory interpretation that, they maintain, will help judges and lawyers follow the foregoing approach, thereby delivering on his promise that textualism is the only methodology that can ensure predictability and objectivity to the application of laws to facts. The authors address the vehicles in the park law: Does such a statute prohibit bicycles? Scalia and Garner work their way through a variety of dictionary definitions of "vehicle" and contemplate how that term is used in ordinary parlance. Perform this exercise for yourself: As a matter of ordinary language, does this law apply to bicycles? If simple textualism creates a more predictable rule of law, you ought to be able to figure this out easily—and your answer ought to match the one reached by Scalia and Garner. Jot down your answer in the margin (or, if this is not your book, on a scrap of paper).

Now consider the conclusion reached by the distinguished jurist and the learned linguist: "The proper colloquial meaning in our view (not all of them are to be found in dictionaries) is simply a *sizable* wheeled conveyance (as opposed to one of any size that is motorized)." According to Justice Scalia and Professor Garner, the scrupulous textualist would have to apply the prohibitory ordinance to automobiles, golf carts, and mopeds—but can safely assume that the vehicles in the park law does not apply to "airplanes, bicycles,

[3] *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring in the judgment) (quotation in text); *Chisom v. Roemer*, 501 U.S. 380, 504 (1991) (Scalia, J., dissenting); Antonin Scalia, *A Matter of Interpretation* (1997); Antonin Scalia & John Manning, *A Dialogue on Statutory and Constitutional Interpretation,* 80 Geo. Wash. L. Rev. 1610, 1617-18 (2012). See also William N. Eskridge Jr., *The New Textualism,* 37 UCLA L. Rev. 621 (1990); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum L Rev 673, 728 (1997).

roller skates, and toy automobiles."[4] Is this the answer you derived from the statutory language? Is this a predicable application of dictionaries, ordinary meaning, and grammar to this rather simple statutory problem? Does the Scalia-Garner simple textualist methodology always deliver the predictability its authors promise?[5]

One reason that the Scalia and Garner exercise may not generate a predictable rule of law is that their analysis did not deeply consider the background and purpose of the statute, considerations that typically clarify the issues and often solve the statutory puzzle. For example, if Congress adopted the vehicles in the park law in order to make Lafayette Park safer for elderly tourists and small children—a highly plausible reason—then Justice Scalia seems too quick to say that the statute cannot cover bicycles. If the relevant congressional committee reports described the statute as responsive to a series of accidents in which bicyclists and skateboarders ran into and injured children and elderly visitors, the rule of law is not well-served by a naïve textualist rendering of the statute. At least in some circumstances, the predictable rule of law may be undermined, rather than advanced, by a context-denying stance asserting that bicycles are never "vehicles" subject to the policy of our vehicles in the park law.[6]

Justice Breyer adds another concern about the new textualism's inattention to legislative and policy context. He worries that "an overemphasis on text can lead courts

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[4] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 37-38 (2012).

[5] William N. Eskridge Jr., *The New Textualism and Normative Canons,* 113 Colum. L. Rev. 531 (2013); Richard A. Posner, *The Incoherence of Antonin Scalia,* The New Republic, Aug. 28, 2012.

[6] Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv. L. Rev. 630, 661-69 (1958); accord, Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I*, 65 Stan. L. Rev. 901 (2013).

astray, divorcing law from life—indeed, creating law that harms those whom Congress meant to help." Thus, he argues, the judge in the case of the bicycle in the park ought to interpret "vehicle" in light of the statutory purpose. His approach is responsive to rule of law concerns, perhaps better than Justice Scalia's approach. One hundred judges given the statutory text *and* the committee reports are more likely to deliver the same interpretation than one hundred judges given just the statutory text. More important, Justice Breyer believes that his approach is more *legitimate,* because it is more consistent with our nation's democratic premises. "Legislation in a delegated democracy is meant to embody the people's will," either directly or indirectly. Thus, "the interpretation of a statute that tends to implement the legislator's will helps to implement the public's will and is therefore consistent with the Constitution's democratic purpose."[7]

Because democratically elected and accountable legislators deliberate about how to address social and economic problems and enact statutes to solve those problems, Justice Breyer maintains that the process of interpretation should be informed and driven by study of the discussions, purposes, and other context within which the legislature acted. Thus, judges interpreting the vehicles in the park law should ask how a "reasonable member of Congress" would have wanted judges to apply the statute to particular facts, in light of the "language, structure, and general objectives" adopted by Congress. Although Justice Breyer does not challenge the primacy of statutory text, he insists that a "fair reading" of

[7] Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 85 (2006) (first quotation in text); *id.* at 99 (second quotation). See, e.g., *Utility Air Regulatory Group v. EPA*, 134 S.Ct. (2014) (Breyer, J., concurring in part and dissenting in part); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 308-16, 323-24 (2006) (Breyer, J., dissenting).

statutory text consider the underlying legislative expectations and problem-solving purposes.[8]

Purposive readings of statutory text seem to be a sounder approach to the bicycle case: Interpret "vehicle" in light of the deliberations that produced the statute and the purpose it was expected to advance. In ordinary parlance, it is certainly possible to refer to a bicycle as a vehicle, and if the purpose of the statute is public safety, it makes sense of the legislators' goal to say that bicycles are "vehicles" excluded from Lafayette Park. Especially if bicycle accidents were a specific occasion for the public demand for the statute, the fair reading of the statutory text is that the statute covers bicycles—precisely the opposite result from that reached by Justice Scalia and Professor Garner. Because a purposive approach to statutes is responsive to both rule of law and democracy values, most academics and many judges prefer this kind of theory.[9]

But the diligent interpreter will resolve few "hard cases" through Justice Breyer's approach, which threatens both rule of law and democracy values if applied simplistically. Recall that Justice Breyer seeks to carry out the "will" of Congress and implement the

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[8] Breyer, *Active Liberty,* 88 (quotation in text); Stephen Breyer, *Making Our Democracy Work: A Judge's View* 94-96 (2010); cf. Commencement Address of Justice David Souter, Harvard University, May 27, 2010 (also offering a "fair reading" approach to legal interpretation). Justice Breyer's approach is an update of the purpose-oriented approach classically developed in Henry M. Hart Jr. & Albert M. Sacks, *The Legal Process: Basic Materials on the Making and Application of Law* (William N. Eskridge Jr. & Philip P. Frickey eds., 1994) (tent. ed. 1958).

[9] E.g., Aahron Barak, *Interpretation in Law* 85-86, 340-41 (2006); Kent Greenawalt, *Statutory and Common Law Interpretation* (2012); Richard A. Posner, *The Problematics of Moral and Legal Theory* 208-10, 257-58 (1999); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 Mich. L. Rev. 20, 26-27 (1988); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 Stan L Rev 395, 407-08 (1995); Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: The 1964 Civil Rights Act and Its Interpretation*, 151 U. Pa. L. Rev. 1417 (2003); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State,* 103 Harv. L. Rev. 405 (1989).

legislators' "purpose." But does Congress as an institution have a "will" apart from the statutory language? Article I, Section 7 of the Constitution says that Congress expresses its collective "will" when the House and the Senate vote for the identical statutory text, which is then presented to the President and signed into law. To be sure, when Justice Breyer talks about the "will" of Congress, he is usually referring to committee reports and speeches by legislative floor managers—but he does not explain why these subgroups and individuals reflect the collective "will" of the legislature, much less that of the Congress acting with the President.[10]

If the "will" of Congress is rather murky, perhaps Congress's "purpose" is more useful. After all, we presume legislation to be purposeful activity, and so it may seem natural to supposed that statutes have purposes. Unfortunately, statutory purpose does not always resolve hard cases. The purpose that one might fairly attribute to Congress as a whole is often set at such a high level of generality that it could support a variety of interpretations. Moreover, statutes usually have more than one purpose, and often a constellation of purposes, cutting in different directions. Consider how these difficulties play out in the case of the bicycle in the park.[11]

Thus, the Senate sponsor of the vehicles in the park law might have pitched the bill on safety grounds: speedy vehicles will often injure tourists visiting the park. But other senators might have announced their support for other reasons, such as aesthetic ones:

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[10] Jeremy Waldron, *Law and Disagreement* (1999); Max Radin, *Legislative Intent*, Harv. L. Rev. (1930).

[11] For critiques of too-little-constrained purposivism, see Richard A. Posner, *How Judges Think* 324-42 (2008); William N. Eskridge Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era,* 48 U. Pitt. L. Rev. 871 (1987); *United States v. Pino-Perez,* 870 F.2d 1230, 1231-35 (7th Cir., en banc, 1989).

noisy, fume-generating vehicles disrupt the tranquility and family atmosphere desirable for the park's visitors. Some senators might have invoked security concerns: because Lafayette Park is right in front of the White House, the park should not have vehicles of any sort. If the Senate votes for the bill, even if by a large margin, who is to say what the purpose is? And whatever legislative purpose or expectations the Senate adopts has to be matched up with that of the House. Assume that the House sponsor only mentions the aesthetic purpose. As applied to bicycles, the House sponsor's purpose cuts in a different direction (exempting bicycles from regulation) from the Senate sponsor's purpose (the law targets bicycles). Which purpose represents the "intent" of Congress? Often, there is no neutral way to figure this out. If anything, members of Congress would probably have agreed with *both* purposes, which would only deepen the difficulty purposivist theory encounters with the simple cases such as our bicycle hypothetical. While theoretically superior to a simple textualist approach, a purely purposivist approach lacks the great virtue of textualism, namely, an authoritative foundation (the statutory text) that everybody can locate and would agree is binding upon us all; in most cases, the agreed-upon text provides determinate and predictable answers.[12]

The foregoing criticisms of a strict textualism or an expansive purposivism do not suggest that either text nor purpose is irrelevant to statutory interpretation. Indeed, *both* statutory text *and* legislative purpose are critically important to a proper application of statutes—and that they best operate together and not as competing approaches. That is, statutory interpretation is the application of enacted texts to new and often unanticipated

[12] Posner, *How Judges Think,* 80-81, 197-98, 253-54; John F. Manning, *What Divides Textualists from Purposivists?,* 106 Colum. L. Rev. 70 (2006); Damien M. Schiff, *Purposivism and the "Reasonable Legislator": A Review Essay of Justice Stephen Breyer's* Active Liberty, 33 Wm. Mitchell L. Rev. 3 (2007).

circumstances in light of the legislature's design and purposes. Text and purpose are like the two blades of a scissors; neither does the job without the operation of the other.[13]

More important, statutory text and legislative purpose do not exhaust the context that is relevant for the proper application of statutes. Indeed, the operation of the rule of law depends, critically, on context that goes beyond and often against Justice Scalia's new textualism, and the democracy values hailed by Justice Breyer require something more than attention to legislative history and purpose. And, as we shall see below, there are other values that do and ought to inform responsible statutory interpretation.

To take the most obvious example, the rule of law requires the judge to consider practice and precedent before she confidently declares statutory meaning. If the Supreme Court has already applied the vehicles in the park law (or a similar statute) to bicycles, then the Court's statutory precedent is binding unless it is overruled, a super-high hurdle. Thus, however he views the ordinary meaning of vehicle in the abstract, Justice Scalia would—and should—follow a binding precedent holding that bicycles are vehicles for purposes of this or a similar statute. Likewise, even if he were persuaded that the legislative purpose of the law were visitor safety and that bicycles are big threats to safety, Justice Breyer would—and should—follow a binding precedent holding that bicycles are *not* vehicles for purposes of this or a similar statute. Rather than an afterthought, as it is treated in almost all the textualist and purposivist theories, *stare decisis* is central to statutory interpretation, largely because it strongly serves the rule of law values of predictability, objectivity, and neutrality in the ongoing application of statutes. Less

[13] *Carr v. United States*, 560 U.S. 438, 444-48, 450-58 (2010); William N. Eskridge Jr., *Dynamic Statutory Interpretation* ch. 1 (1994); Posner, *How Judges Think,* 253-54. The scissors metaphor is inspired by L.L. Fuller, *American Legal Realism*, 76 Proc. Am. Phil. Soc'y 191, 223-23 (1936) (suggesting that Law and Society are like two blades of a scissors).

obviously, the Court's respect for its own precedents may serves democratic accountability in at least one way: it vests Congress with responsibility for correcting erroneous or outdated statutory decisions.[14]

Even when there is no binding judicial precedent on point, there will typically be administrative practice that is relevant to statutory interpretation. Few issues reach the Supreme Court that do not carry with them years of administrative experience. If Congress enacted the vehicles in the park law as a safety measure 50 years ago and the police had never applied the law to bicycles, does that administrative practice have bearing on the proper interpretation of the statute? Even if Justice Breyer believed that the law was enacted for safety reasons and that bicycles are safety hazards, he would—and should—be reluctant to apply the law to a bike rider after 50 years of administrative practice to the contrary. Conversely, if the police and prosecutors had been applying the vehicles in the park law to bicycles for the last 50 years, Justice Scalia would not—and should not—be so certain that "vehicle" has a plain meaning that excludes bicycles. Indeed, two generations of administrative application would suggest a stable rule of law regime that Justice Scalia ought not disrupt—just as two generations of administrative nonapplication would suggest to Justice Breyer that the statutory safety purpose is not necessarily served by barring bicycles from the park.

No complete or satisfactory theory of statutory interpretation can ignore statutory precedents or administrative practice. Nor do the judicial opinions of Justices Scalia and

[14] *Michigan v. Bay Mills Indian Community*, 134 S.Ct. (May 27, 2014) (majority and concurring opinions); Edward Levi, *An Introduction to Legal Reasoning*, 15 U. Chi. L. Rev. 501, 540 (1948); William N. Eskridge Jr., *Overruling Statutory Precedents*, 76 Geo. L.J. 1361 (1990). Although they neither emphasize the role of precedent front and center nor explain how precedent plays into their respective theories, both Scalia and Breyer endorse *stare decisis*. Breyer, *Making Our Democracy Work,* 149-56; Scalia & Garner, *Reading Law,* 42-43.

Breyer ignore or slight these considerations; instead, each Justice in his career has devoted more pages of analysis of precedent and practice than he has to plain meaning and purpose (respectively). To this complexity, consider a third, and very important, element critical to any complete theory of statutory interpretation: the practical purpose of law to provide effective governance for a complex and diverse society.[15]

Almost all statutory opinions by state and federal judges, as well as most academic theories of statutory interpretation, situate judges as neutral interpreters, making no value judgments when they apply statutory text or purpose to generate predictable and democratically accountable answers to statutory questions. But this is not the tradition of our legal system—nor is it the actual practice of the Supreme Court.[16]

This is a striking claim, one as to which few judges would confess. But look at what they do: even the most legalistic judicial practice is heavily informed by substance. An appendix to this volume lists the canons of statutory interpretation that have been applied by the Rehnquist and Roberts Courts (1986-2015), whose Justices celebrate their neutral role as nothing more than umpires calling balls and strikes. As the merest glance at the appendix reveals, the textualist and purposivist canons, as well as the precedent canons, are vastly outnumbered by substantive canons that the Court openly and repeatedly invokes. Substantive evaluation, grounded upon governance purposes and public values, saturates the interpretation and application of statutes. Normative evaluation informs and

[15] Eskridge, *Dynamic Statutory Interpretation,* ch. 6; Posner, *Problematics of Legal Theory*, 256-57.

[16] Posner, *How Judges Think*, 369-72. For a thoughtful counter-statement regarding American legal traditions and the practice of judges, and one that has influenced this volume, see Jeffrey S. Sutton, *A Review of Richard A. Posner,* How Judges Think, 108 Mich L. Rev. 859 (2010).

supports the general principles and policies characteristic of the substantive regulatory regime being applied.[17]

Our nation's traditions and commitments influence statutory interpretation both generally and in particular cases. In the application of law to particular facts and to the lives of human beings, the law is concerned with fairness, justice, and a wide array of other values. At the more general level, namely, judicial treatment of broad categories of statutes, the law is concerned with systemic principles and policies that have been considered legitimate and desirable for much of our history. Somewhere in between the general and the particular is the fact that each area of law operates in a normative context of principles and policies distinctive to that area of law.[18]

Thus, it would be significant if the vehicles in the park law were a criminal statute (a matter left elliptical in my report of the law's brief language). That a citizen violating the statute is subject to social censure and punitive sanctions affects the interpretive process. For example, if the Supreme Court had interpreted a federal vehicle-registration statute to include bicycles, that interpretation of a civil regulatory law would not necessarily carry over to a criminal law such as this one. Indeed, even a purposivist such as Justice Breyer might hesitate to enforce Congress's safety purpose against recreational vehicles, when the sanctions are punitive rather than remedial. The criminal penalties

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[17] On normative context in statutory interpretation, see *Michigan v. Bay Mills Indian Community*, 134 S. Ct. (2014) (Sotomayor, J., concurring); William N. Eskridge Jr., *Public Values in Statutory Interpretation,* 137 U. Pa. L. Rev. 1007 (1989); Francis Mootz III, *Ugly American Hermeneutics,* 10 Nev. L.J. 587 (2010); Cass R. Sunstein, *Interpreting the Regulatory State,* 103 Harv. L. Rev. 405 (1989).

[18] Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U.L. Rev. 1023 (1998), and *Guardians of the Background Principles,* 2009 Mich. St. L. Rev. 123.

might also affect one's willingness to read the statutory text broadly. For a criminal statute with punitive sanctions, Justice Scalia would be on stronger ground when he limits "vehicle" to its prototypical meaning and declines to apply it to reach all mechanisms that might be included in the broad reach of that term. To be clear, however, reading bicycles out of a criminal prohibition of vehicles in the park is *not* an exercise of simple plain meaning; instead, it is an example of how statutory words are interpreted through the prism of norms applicable to the subject matter of that law.

Constitutional concerns also motivate a narrow reading of "vehicle" in a criminal version of the vehicles in the park law. The Due Process Clause requires that citizens have adequate notice of what actions are subject to criminal sanctions. Even if a bicycle is often considered a vehicle and even if bicycles may be safety hazards in parks, judges will tend to confine the terms of criminal statutes to their core, prototypical meanings, perhaps from an excess of caution. If you told them that a criminal statute bars "vehicles" from the park, a lot of kids and their parents would not be aware that such a bar includes bicycles. Without researching the matter thoroughly, the thirteen-year-old bike rider would very likely think that automobiles, motorcycles, and maybe mopeds were subject to the vehicular ban. Many kids and their parents would be shocked to learn that bicycles fall within the offense. And how about the six year-old riding his tricycle? Would a parent think twice about whether a no-vehicles rule sweeps up his kid?

Other constitutional values are relevant to the construction of criminal statutes. Thus, constitutional separation of powers bars judges from creating "common law crimes." (Common law regimes are those where judges make the specific rules through case-by-case adjudication.) Article I, section 1 of the Constitution vests Congress with all the "legislative" powers; Article III vests federal judges with "judicial" power only. One

legislative power is the authority to specify certain conduct as criminal; because criminal penalties reflect social opprobrium and often impose liberty as well as monetary penalties, Congress as the organ most broadly accountable to We the People in all Our Variety is particularly critical for criminal law. Hence, federal judges would violate Article I if they recognized criminal behaviors without a statutory basis. The same precept also entails a constitutional aversion to judicial case-by-case adjudication that reads generally phrased criminal laws with ever-expanding capacity. Thus, judges are careful not to read vague terms (like "vehicle") broadly, lest they create criminal liability common-law style, without the democratic sanction of the legislative process.[19]

Finally, the larger normative context of society pervasively influences the application of statutory text to particular circumstances (a process that often operates subconsciously). A famous example is the *absurd results rule*: judges will not apply the literal reading of a statutory text when it would be "absurd" to do so. Thus, even an archtextualist such as Justice Scalia embraces the absurd results exception to the plain meaning rule. Assume the vehicles in the park law mobilizes only civil sanctions and includes a broad definition of "vehicle" to mean "any mechanism for conveying a person from one place to another." Does the law bar baby carriages from the park? Almost no one, whether textualist or purposivist, would apply the statute to bar baby carriages. Why not?[20]

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[19] *United States v. Wiltberger*, 18 U.S. 76, 92 (1820) (Marhall, C.J.) (leading case); Dan Kahan, *Lenity and Federal Common Law Crimes*, 1994 Sup. Ct. Rev. 345.

[20] On Justice Scalia's tendency to read text in light of his normative commitments, see *Brown v. Plata*, 131 S. Ct. 1910, 1950-51 (2011) (Scalia, J., dissenting); Miranda McGowan, *Do as I Do, Not as I Say: An Empirical Investigation of Justice Scalia's Ordinary Meaning Method of Statutory Interpretation,* 78 Miss. L.J. 129 (2008); Jane Schacter, *Text or Consequences?*, 76 Brooklyn L. Rev.

Although such contraptions fall under the literal terms of the statute, judges would fall over one another finding reasons to exempt them from the statutory definition. Some judges would say that baby carriages do not fall under the ordinary meaning of the law; others would say that they do not pose the safety problems that bicycles and motor vehicles do; yet others would say that they are beyond the intent of the legislators. Most judges would say that applying the law to baby carriages would be reading the statute "literally" (rather than "reasonably"). All of these arguments have merit, yet none of these arguments completely explains why virtually all judges would rule that baby carriages are not regulated vehicles. No explanation would be complete without an understanding of the value-based concerns with such a rule. Not only do baby carriages seem like a far cry from the prototypical vehicles the statute is aimed at (motorcycles, bicycles, and the like), but they also symbolize the family values Americans claim to cherish, and they fit snugly into the whole purpose of a park.

There is a larger point to be made about the debate between textualists and purposivists. How one reads words, how one understands the statutory purpose(s), how one applies statutory or regulatory precedents is not completely independent of how one understands and evaluates the factual context to which the statute is being applied. This is a point that judges are loathe to admit, because it is a concession that statutory interpretation is not simply a mechanical application of preexisting rules to cases and controversies. Yet that is what statutory interpretation amounts to in the hard cases that are the best learning experiences. And the reason the Constitution vests federal judges

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1007 (2011). For a textualist objection, see John F. Manning, *The Absurdity Doctrine,* 116 Harv. L. Rev. 2387 (2003).

with life tenure is so that they can exercise *judgment* of the sort I am suggesting for the case of the baby carriage.[21]

Assume the broad text and strict safety purpose of the vehicles in the park law, and assume that both administrative practice and judicial precedent have categorized bicycles as "vehicles" for purposes of this statute. In the next case, the judge faces a six-year-old defendant hauled into court for riding her tricycle at alarming speeds through the park. Will a judge throw the book at this defendant? Most judges would *not* convict the young defendant, nor should they, in part because of the injustice of applying such a statute to a person who is too young to be held legally responsible. As before, different judges can justify this sensible result through a variety of different kinds of canons. The textualist can say that "vehicle" should not be read literally and that a "reasonable" meaning of the term would be mechanisms only an older person would operate. The purposivist can say that someone so young is rarely a safety threat. Either can invoke the rule of lenity, or the presumption that the criminal law requires a bad intent, a feature hard to attribute to someone so young.

The role of public values and other context does not mean that statutory interpretation is unconstrained judicial legislation, however. Judges are constrained by the proper sources of guidance, and an important purpose of this volume is to lay out and illustrate the variety of considerations outside pure political preferences that guide and constrain judges when they apply statutes to factual circumstances that are typically

[21] *The Federalist* No. 78 (Hamilton) (defending life tenure for federal judges on the ground that it assures them independence from normal politics and frees them up to exercise "judgment" [not "will"], such as a judgment "mitigating" the effect of "partial and unjust" laws); Posner, *How Judges Think,* 259-60, 369; Commencement Address by Justice David Souter, Harvard University, May 27, 2010 (importance of reasoned judgment, rather than mechanical rules, in judicial interpretation of the Constitution).

unanticipated by the enacting legislators. Before embarking on this ambitious project, I should explain that I understand the traditional sources of guidance—the so-called "canons of statutory interpretation"—differently from other theorists and practitioners.

Some judges and scholars view the canons as strong rules and presumptions that, if followed religiously, would ensure predictability, neutrality, objectivity, and transparency in statutory interpretation. Justice Scalia and Professor Garner take this position in *Reading Law*. Following the fifty-seven canons they identify (and avoiding legislative history that they denounce) "will curb—even reverse—the tendency of judges to imbue authoritative texts with their own policy preferences" and "will provide greater certainty in the law, and hence greater predictability and greater respect for the rule of law."[22] Others take a less confident stance, suggesting that at least some of the canons "reflect the probabilities generated by normal usage or legislative behavior. These represent either * * * judgments of how legislatures tend to use language and its syntactical patterns, or descriptions of how legislatures tend to behave. They serve as useful presumptions of supposed actual legislative intent and are, therefore, modestly useful in carrying [out] legislative meaning."[23]

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[22] Scalia & Garner, *Reading Law,* xxvii-xxix. Nineteenth century Anglo-American treatises took this position as well. E.g., Joel Prentiss Bishop, *Commentaries on the Written Laws and Their Interpretation* § 2, at 3 (1882).

[23] Reed Dickerson, *The Interpretation and Application of Statutes* 228 (1975); accord, Antonin Scalia, *A Matter of Interpretation* (1997) (a more cautious endorsement of the canons than that announced in *Reading Law*); Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 Colum. L. Rev. 2027 (2002). This is the approach taken by the classic treatises on statutory interpretation. E.g., 2A Norman J. and J.D. Shambie Singer, *Sutherland Statutes and Statutory Interpretation* ch. 45 (7th ed. 2008-2015) (introductory essay, followed by dozens of chapters on particular canons in volumes 2A, 2B, and 3A).

Other scholars and judges view the canons as unconstraining; at most, the canons are window-dressing for judicial opinions that pretend to be neutral application of law but that are actually creative applications of old law to unforeseen circumstances. As Professor Karl Llewellyn famously put it, "the courts pretend that there has been only one single correct answer possible," and the vocabulary of "that foolish pretense" is the canons. Because "there are two opposing canons on almost every point," the canons are neither directive nor constraining, and judges appropriately consider their own sense of the situation (rather than the canons) when deciding cases.[24] Some scholars press Llewellyn's point further, to denounce the canons as not only unconstraining but positively obfuscating or downright dishonest, deployed by ideological judges to smuggle their own partisan values into statutes.[25]

A thesis of this volume is that the canons are *neither* mechanical rules that pre-determine the results in statutory cases, *nor* cynical instruments for result-oriented judges to decorate judicial opinions like ornaments on a Christmas tree. Rather, the canons constitute an *interpretive regime* (the background array of relevant considerations the interpreter needs to consider), namely, a set of conventional considerations relevant to

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[24] Karl Lewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed,* 3 Vand. L. Rev. 395, 399, 401 (1950); see id. at 401-405, famously arraying twenty-eight "canons" and their "counter canons" to demonstrate that almost any *conclusion* can be reached in hard statutory cases by application of widely accepted canons. See also Quentin Johnstone, *Evaluating the Rules of Statutory Interpretation,* 3 Kan. L. Rev. 1 (1954); Stephen Ross, *Where Have You Gone Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?,* 45 Vand. L. Rev. 561 (1992), and Edward L. Rubin, *Modern Canons, Loose Canons, and the Limits of Practical Reason: A Response to Farber and Ross*, 45 Vand. L. Rev. 579 (1992).

[25] Frank C. Newman & Stanley S. Surrey, *Legislation: Cases and Materials* 654 (1955); James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 Calif. L. Rev. 1199 (2010); James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning,* 58 Vand. L. Rev. 1 (2005); Richard A. Posner, *Statutory Interpretation in the Classroom and in the Courtroom,* 50 U. Chi. L. Rev. 800 (1983).

statutory interpretation. To be sure, there is no evidence that mechanical application of the canons causes the law to be more predictable, statutes to be more democratically accountable, or legislative policy to be more coherent. There are simply too many canons, many of them cross-cutting, for this to be the case.[26]

But, practically speaking, the canons *matter*. Neither judges nor lawyers ought to ignore the canons. Most of them are longstanding foundations of judicial vocabulary for talking about statutory application. Every state legislature has codified a set of canons. That the Supreme Court and most state high courts cite them pervasively means that lower court judges need to take them seriously. For this reason, even skeptical pragmatists cannot ignore the brute fact that the canons saturate statutory interpretation. Indeed, *the canons are the vocabulary of statutory interpretation.* If you do not know and understand the canons, you cannot talk to judges about statutory interpretation these days.

A deeper appreciation of the canons must consider the larger contours of the normative regime that the canons, as a group, constitute. As Professor David Shapiro opined a generation ago, the canons reflect the wisdom that "close questions of construction should be resolved in favor of continuity and against change," when judges are interpreting statutes.[27] Consider this underlying coherence of the canons as you read the chapters that follow. Almost all of them reveal the canonical value presuming continuity, subject of course to rules that are generated by the Article I, Section 7 lawmaking process, as well as rules delegated to agencies by that process (chapter five of this volume).

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[26] Eskridge, *Normative Canons*; Richard A. Posner, *Legislation and Its Interpretation: A Primer*, 68 Neb. L. Rev. 431, 442-43 (1989).

[27] David L. Shapiro, *Continuity and Change in Statutory Interpretation,* 62 NYU L. Rev. 921, 925 (1992); see Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 Nw. U. L. Rev. 1389, 1418-21 (2005).

The presumption of continuity is well-suited to the limited competence and legitimacy of judges in our system. It is also broadly consistent with the three normative criteria for any system of statutory interpretation, identified and discussed above. Not only does the rule of law famously value continuity (and abhor surprises), but continuity is a value undergirding the particular structure of statute-creation in Article I, Section 7 of the Constitution.[28] Perhaps most surprising is that continuity of legal rules contributes, modestly at least, to the overall legitimacy of our republic of statutes. Philosophers as well as empiricists maintain that a community of principle (where people follow rules because they find them coherent and rational) is more legitimate than a rulebook community (where people follow the rules because they fear penalties).[29]

A focus on the canons as traditional practice, rooted in notions of continuity, is in striking contrast to Professor Cass Sunstein's notion that the canons ought to advance the agenda of the regulatory state through substantive presumptions generated by public choice and other theories.[30] Judges have revealed neither interest in nor competence for this kind of project. Rather than forcing the canons into procrustean roles they cannot perform, this volume suggests the opposite tack: Understand and apply the canons in light of the proper goals of statutory interpretation—namely, the inculcation of a stable and

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[28] William N. Eskridge Jr. & John Ferejohn, *The Article I, Section 7 Game,* Geo. L.J. (1992); John F. Manning, *Continuity and the Legislative Design,* 79 Notre Dame L. Rev. 1863 (2004).

[29] Ronald Dworkin, *Law's Empire* (2006) (originating the contrast between a community of principle and a rulebook community). For empirical support, consider Tom R. Tyler, *Why People Obey the Law* (1990, 2d ed. 2006); Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement*, 20 Psychol. Pub. Pol'y & Law 78 (2014).

[30] Cass R. Sunstein, *Interpreting Statutes in the Regulatory State,* 103 Harv. L. Rev. 405 (1989) (appendix listing proposed canons, most of which do not reflect judicial practice and many of which are directly contrary to federal judicial practice).

understandable system of rules that are linked to democratic deliberation and advance the project of reasonable governance. Understood this way, the canons might even help guide the neutral judge toward the relevant considerations that contribute to a predictable rule of law, to the projects launched by our democratically elected legislators and implemented by executive officials accountable to the President, and to the community of principle that binds us together as a nation.[31]

Ironically, my sharpest disagreement with Justices Scalia and Breyer goes to their emphasis on the incoherence of American statutory interpretation practice. Their books focus on cases and precepts from which they dissent, and their tone is one of dissatisfaction. Justice Scalia, in particular, evidences a contempt for what he considers the chaotic, incoherent practice of statutory interpretation by the Supreme Court and other courts. But do not mistake complexity for chaos. Lack of simplicity is not the same as incoherence. In fact, the practice of American judges is coherent and is defensible. And the interpretive regime presented in this book is an understandable and, I think, cogent approach to statutes.

Likewise, this volume transcends the textualism versus purposivism debate, which oversimplifies the art of statutory interpretation and obscures the creative and normatively productive role that judges necessarily play in our democracy. Working off of more detailed versions of a hypothetical vehicles in the park law, each of the following chapters will introduce the reader to a fundamental precept of statutory interpretation and will explain why that precept contributes to the larger goals of our legal system. Recall these larger goals: We the People believe that the official application of statutes to new circumstances

[31] *Astoria Fed. Sav. & Loan v. Solimino*, 501 U.S. 104, 108-09 (1991); William N. Eskridge Jr., *Dynamic Statutory Interpretation* ch. 9 (1994).

ought (1) to be both neutral and largely predictable, (2) to respect the democratic accountability of their elected representatives, and (3) to operate to advance (or at least not defeat) the purposes of the law and the public values of the community. I am sure most readers appreciate that these goals will sometimes be in tension or open conflict with one another. One argument of this volume is that these tensions and conflicts cannot (and will not) be resolved through a one-size-fits-all rule and must be approached with an appreciation of particular context.

American statutory interpretation is not a simple exercise—but neither is it unguided. The longstanding judicial practice of statutory interpretation aptly considers the ordinary meaning of the statutory text, in the context of the entire statutory scheme, judicial precedent, legislative purpose, administrative practice, and constitutional and other public values. The practice is not simply a laundry list of considerations, however. Like Justice Scalia, we are all textualists: the starting point and usually the answer to a statutory problem is a fair reading of the statutory text on point. Like Justice Breyer, all of us engage in a practice whereby we do not know whether there is a single fair reading until we have considered the legal context of the relevant text. That context includes the whole statute, applicable precedent, legislative purpose, administrative practice, and public values. Statutory interpretation has always been, and ought to be, a pragmatic exercise in textual exegesis in light of democratic projects and the larger norms that bind together our community.

The remainder of this book will demonstrate how this works, but here is a preview. The late Professor Philip Frickey and I once proposed that statutory interpretation is a

matter of structured practical reasoning.[32] There is no foundational theory or practice of statutory interpretation, but the rule of law, democratic accountability, and governance features of the enterprise all support the traditional rule that gives primacy to the ordinary meaning of a statute's relevant text. Ordinary meaning is the anchor for statutory interpretation, and chapter one of this volume is devoted to this concept and its associated canons. Ordinary meaning is how the statutory provision would be understood by a competent speaker of the English language, in the context of the statute and the facts to which it is applied. (That context includes the purpose attributed to the statute or the particular provision.)

Chapter one will present ordinary meaning as a continuum, starting with circumstances that fall within the prototypical or core of the statutory rule, moving along the continuum to circumstances that are similar to the core but peripheral, and rounding out the continuum with circumstances that are so distant from the core as to be clearly excluded. The ordinary meaning continuum depends on legal context, however, and the next chapters will show how the legal context—namely, the entire statute (chapter two) and authoritative judicial precedents (chapter three)—can and ought to affect a judge's understanding of a statute's core, periphery, and beyond. Thus, chapter two focuses on the statutory context—namely, the whole act and even other provisions in the entire statutory code—for understanding the legal text that is on point. Even when the most relevant statutory language is ambiguous, reading it in light of the rest of the statute and its plan may decisively support one reading. In this volume, such statutory context will establish a plain meaning for the statute. Notice the contrast between *ordinary meaning* that a

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[32] William N. Eskridge Jr. and Philip P. Frickey, *Statutory Interpretation as Practical Reasoning,* 42 Stan. L. Rev. 321 (1990).

statutory provision may or may not have for the regular speaker of English, and the *plain meaning* that a judge may impose upon the provision, based upon larger statutory context.[33]

Ordinary meaning and statutory context are not the only hard evidence of legal meaning, however. If the Supreme Court has authoritatively construed particular statutory language, that precedent will control interpretation in subsequent cases—even if the earlier interpretation is not the one that the current interpreter believes to reflect the law's ordinary meaning or its plain meaning in light of the whole act. Chapter three will explore the important role that *stare decisis* ("the decision stands") plays in statutory interpretation.

Judicial opinions are usually structured around the question whether a statute has a plain meaning justified by ordinary meaning, the whole act, and precedent. When judges say the law has a plain meaning, they typically say that their inquiry is complete. Yet those same judges often continue their analysis, usually concluding that various other considerations confirm the plain meaning they have already declared. Chapters four through six explore those other considerations and demonstrate that they have a role to play when a judge is deciding about the ordinary as well as plain meaning of the law. In other words, judges for generations have not separated larger context from ordinary or plain meaning, not should they, for reasons developed in these chapters.

Legislative materials, the focus of chapter four, are controversial among judges and legal academics—much more controversial than they ought to be. Such materials are often

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[33] See Brian G. Slocum, *Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation* ch. 1 (2015) (distinguishing between largely descriptive "ordinary meaning" and prescriptive "plain meaning" in statutory interpretation).

highly relevant to the ordinary meaning of a statute, because they can reveal ways in which language is used by contemporary speakers and groups (such as legislative committees) and because they help the interpreter understand the statute's purposes more deeply. Like *The Federalist Papers* in constitutional interpretation, moreover, legislative materials also help render statutory interpretation better accountable to the democratic deliberation that produced the statute. Accordingly, one does not need to ground statutory interpretation in some theory of legislative intent to consider legislative materials relevant to that enterprise.

Generally speaking, the whole act, judicial precedent, and legislative history will tend to focus the ordinary meaning inquiry in ways that improve predictability and objectivity in statutory application. But the whole act might have little to say about an interpretive issue, there may be no authoritative judicial decision for a wide range of reasons, and legislative history is often repetitive of the statutory language. Surprisingly, the rule of law is often most advanced by clear administrative rules and practices—sources of legal understanding that have the additional virtues of indirect democratic accountability and good governance by administrators who are relatively expert. Chapter five considers the relevance of administrative practice and how it interacts with ordinary meaning.

Finally, larger constitutional norms and public values affect statutory interpretation in many cases. As explained in chapter six, when ordinary meaning analysis, even as supplemented by a variety of sources, leaves the interpreter uncertain, substantive canons provide gapfilling rules that judges apply. Operating as clear statement rules, substantive canons often create presumptions so strong that they supplant or dominate ordinary meaning analysis. Whether a statute has a plain meaning depends, critically, on the baseline suggested by the many substantive canons.

The six chapters of this volume suggest the following hierarchy of sources for statutory interpretation, which Professor Frickey liked to call a "funnel of abstraction":

Least Concrete

Constitutional Norms & Public Values

Administrative Practice

Legislative Materials (Purpose)

Judicial Precedent

Whole Act (Holistic)

Most Concrete Sources of Statutory Meaning

Ordinary Public Meaning

FIGURE 1. THE FUNNEL OF ABSTRACTION
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The conclusion to this volume will apply the funnel approach to constitutional interpretation, framed around a slightly different hypothetical statute—one barring "homosexuals" (rather than "vehicles") from Lafayette Park. As we shall see, the basic techniques of statutory interpretation are also applicable to constitutional cases, with some practical differences noted and discussed in the conclusion.