

University of Chicago Law School

Chicago Unbound

Journal Articles

Faculty Scholarship

1989

Interpreting Statutes in the Regulatory State

Cass R. Sunstein

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles



Part of the Law Commons

Recommended Citation

Cass R. Sunstein, "Interpreting Statutes in the Regulatory State," 103 Harvard Law Review 405 (1989).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

HARVARD LAW REVIEW

INTERPRETING STATUTES IN THE REGULATORY STATE

Cass R. Sunstein

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	408
A. <i>The Problem</i>	408
B. <i>Interpretive Principles</i>	411
II. STANDARD APPROACHES TO STATUTORY INTERPRETATION	414
A. <i>Courts As Agents</i>	415
1. <i>Textualism</i>	415
(a) <i>Ambiguity or Vagueness</i>	418
(b) <i>Overinclusiveness</i>	419
(c) <i>Underinclusiveness</i>	420
(d) <i>Delegation, Gaps, and Implementing Rules</i>	421
(e) <i>Changed Circumstances</i>	422
2. <i>Contextual Approaches</i>	424
(a) <i>Structure</i>	425
(b) <i>Purpose, Intent, and History</i>	426
(i) <i>Purpose</i>	426
(ii) <i>Legislative Intent and Legislative History</i>	428
3. <i>Legal Process</i>	434
4. <i>The Proper Role of Traditional Sources of Meaning and the Failure of the Agency View</i>	437
B. <i>Indeterminacy? Conventionalism?</i>	441
1. <i>Indeterminacy</i>	441
2. <i>Conventionalism</i>	442
C. <i>Extratextual Norms</i>	443
1. <i>Private Ordering</i>	443
2. <i>Deference to Agency Interpretations of Law</i>	444
3. <i>Public Choice Theory and "Deals"</i>	446
4. <i>Criteria</i>	450
III. THE ROLE OF INTERPRETIVE PRINCIPLES	451
A. <i>Karl Llewellyn and the Canons of Construction</i>	451
B. <i>The Functions of Interpretive Principles: A Catalogue</i>	454
1. <i>Orientation to Meaning</i>	454
2. <i>Interpretive Instructions</i>	456

3. <i>Improving Lawmaking: Institutional Considerations</i>	457
4. <i>Substantive Purposes</i>	459
C. <i>An Alternative Method: The Agency Theory of the Judicial Role Reconsidered</i>	460
IV. INTERPRETIVE PRINCIPLES FOR THE REGULATORY STATE	462
A. <i>Sources and Scope of Interpretive Principles</i>	464
1. <i>The Domain of Institutional and Substantive Norms</i>	464
2. <i>Sources: In General</i>	466
B. <i>The Principles</i>	468
1. <i>Constitutional Norms</i>	468
(a) <i>Avoiding Constitutional Invalidity and Constitutional Doubts</i>	468
(b) <i>Federalism</i>	469
(c) <i>Political Accountability; Checks and Balances; the Nondelegation Principle</i>	469
(d) <i>The Rule of Law</i>	471
(e) <i>Political Deliberation; the Constitutional Antipathy to Naked Interest-Group Transfers</i>	471
(f) <i>Hearing Rights</i>	472
(g) <i>Disadvantaged Groups</i>	472
(h) <i>Property and Contract Rights</i>	473
(i) <i>Welfare Rights</i>	473
2. <i>Institutional Concerns</i>	474
(a) <i>Appropriations Statutes</i>	474
(b) <i>A Cautious Approach to Legislative History</i>	474
(c) <i>The Presumption Against Implied Repeals</i>	475
(d) <i>Implied Exemptions from Taxation</i>	475
(e) <i>The Question of Administrative Discretion</i>	475
(f) <i>The Presumption in Favor of Judicial Review</i>	475
(g) <i>Ratification, Acquiescence, Stare Decisis, and Post-Enactment History</i>	476
3. <i>Counteracting Statutory Failure</i>	476
(a) <i>Promoting Political Accountability</i>	477
(b) <i>Taking Account of Collective Action Problems</i>	478
(c) <i>Promoting Consistency and Coherence Among Regulatory Programs</i>	479
(d) <i>Considering Systemic Effects</i>	480
(e) <i>Avoiding Private Law Principles</i>	480
(f) <i>Avoiding Irrationality and Injustice</i>	482
(g) <i>Protecting Disadvantaged Groups; Civil Rights Questions</i>	483
(h) <i>Protecting Nonmarket Values</i>	485
(i) <i>Minimizing Interest-Group Transfers</i>	486
(j) <i>Requiring Proportionality</i>	487
(k) <i>Allowing de Minimis Exceptions</i>	488
4. <i>Examples</i>	489
C. <i>Changed Circumstances or Obsolescence</i>	493
D. <i>Priority and Harmonization</i>	497
1. <i>Priority</i>	498
2. <i>Harmonization</i>	499
3. <i>An Illustration — Pennhurst</i>	500
E. <i>A Concluding Note: The Post-Canonical Universe</i>	502
V. CONCLUSION	503
APPENDIX: INTERPRETIVE PRINCIPLES, OLD AND NEW	506

ARTICLE

INTERPRETING STATUTES IN THE REGULATORY STATE

Cass R. Sunstein*

Discussing the judge's role in interpreting statutes, Justice Holmes wrote that "if my fellow citizens want to go to Hell I will help them. It's my job."¹ Critics of the view of the courts as passive agents of the legislature claim that it understates the difficulty of interpretation, the indeterminacy of both the language and the will of the citizens, and the resulting discretion of the judge. Similarly, a vigorous debate continues over the proper role of the traditional sources of statutory interpretation — the text, the legislative history, the purpose of the enacting Congress, and the structure of the statute. Professor Sunstein suggests that both the conventional understandings of interpretation and the recent critiques are seriously flawed. Because interpretation inevitably involves the application of "background norms" — often controversial, value-laden, and not found in any text — the traditional theories are incomplete. These theories, however, properly stress the democratic primacy of Congress. When congressional instructions are clear and do not create absurdity, courts should follow them. Often, however, the instructions are ambiguous, and judges must choose from a number of possible background norms.

Suggesting that many disputes over statutory meaning are in fact disagreements over appropriate background norms, Professor Sunstein contends that the debate should center on whether the proposed norms express a good understanding of constitutional values; are properly responsive to contemporary institutional arrangements involving the making, monitoring, and enforcement of law; and are sensitive to the aspirations and functions as

* Karl N. Llewellyn Professor of Jurisprudence, Law School and Department of Political Science, University of Chicago. I am grateful to many colleagues and friends for their help with this essay. Bruce Ackerman, Akhil Amar, Douglas Baird, Jack Beermann, Frank Buckley, Frank Easterbrook, Jon Elster, Richard Epstein, William Eskridge, Richard Fallon, Philip Frickey, Stephen Gilles, Don Herzog, Stephen Holmes, Donald Horowitz, Benjamin Kaplan, Larry Kramer, John Langbein, Howard Latin, Larry Lessig, Jon Macey, Geoffrey Miller, Martha Minow, Richard Posner, Susan Rose-Ackerman, Frederick Schauer, Richard Stewart, Geoffrey Stone, David Strauss, Lloyd Weinreb, Robin West, James Boyd White, and John Wiley offered valuable comments on all or parts of the manuscript. I am also grateful to participants in helpful workshops at the University of California at Los Angeles, Harvard University, the University of Michigan, New York University, Princeton University, Tulane University, and the University of Virginia. D. Gordon Smith, Gamhk Markarian, and Catherine O'Neill provided research assistance and useful comments. Finally, I am grateful to the Law and Government Program of the University of Chicago for generous support.

Some of the material in this Article is also included, in different form, as parts of chapters 4 and 5 in C. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: CONSTITUTIONAL GOVERNMENT AND THE REGULATORY STATE (forthcoming 1990).

¹ HOLMES-LASKI LETTERS 249 (M. Howe ed. 1953).

well as the shortcomings of regulatory statutes. Professor Sunstein concludes by outlining a series of norms — some based on current interpretive practices, others reflecting his own normative vision. All the norms are designed to focus disputes over statutory meaning more sharply on the underlying issues and to deepen understanding of the regulatory state.

I. INTRODUCTION

A. *The Problem*

IN the early part of the twentieth century, courts often treated regulatory statutes as foreign substances.² Starting from principles of laissez-faire, judges saw statutory protections of workers, consumers, and others as unprincipled interest-group transfers supported by theories that were at best obscure and often disingenuous.³ By contrast, judge-made doctrines of property, contract, and tort seemed to create a system with integrity and coherence.

The role of the courts in this period was one of damage control. The most important organizing principle for interpretation was that regulatory statutes should be construed narrowly — so as to harmonize as much as possible with principles of private markets and private rights.⁴ This approach grew out of the idea that courts should narrowly construe statutes in derogation of the common law.⁵

The New Deal period marked an enormous change in the size and character of the national government.⁶ The decade between 1930 and

² See, e.g., B. CARDODOZ, THE PARADOXES OF LEGAL SCIENCE 9 (1928) ("The truth is that many of us, bred in common law traditions, view statutes with a distrust which we may deplore, but not deny.").

³ See, e.g., United States v. Elgin, J. & E. Ry., 298 U.S. 492 (1936); FTC v. Eastman Kodak Co., 274 U.S. 619, 623–25 (1927); FTC v. American Tobacco Co., 264 U.S. 298, 305–06 (1924); FTC v. Gratz, 253 U.S. 421, 427–28 (1920).

⁴ See, e.g., cases cited *supra* note 3; F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 165–82 (1930) (exploring the federal courts' nullification of the Clayton Act); see also Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 387–88, 406–07 (1908) (criticizing use of interpretive principles that are out of touch with contemporary social and economic thought); Pound, *Courts and Legislation*, 7 AM. POL. SCI. REV. 361, 374–75 (1913) (same).

This principle of narrow construction, like many others of the past and present, was not always invoked explicitly. Often it operated invisibly or in the background. When interpretive principles are not referred to expressly, their use is often reflected in the court's treatment of the statutory language. See *infra* pp. 437–41; see also *infra* pp. 464–66 (discussing when controversial substantive and institutional norms should be applied).

⁵ See, e.g., Shaw v. Railroad Co., 101 U.S. 557, 565 (1879); Johnson v. Southern Pac. Co., 117 F. 462, 466 (8th Cir. 1902), *rev'd*, 196 U.S. 1 (1904); see also Fordham & Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438, 450–51 & nn.73–74 (1950) (listing cases in which courts ignored statutes instructing them not to construe statutes narrowly).

⁶ On the pre-New Deal developments, see S. SKOWRONEK, BUILDING THE NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920 (1982).

1940 saw the creation of as many agencies — seventeen — as had been created in the entire period between the framing of the Constitution and the close of the nineteenth century.⁷ During the “rights revolution” of the 1960’s and 1970’s, the national government substantially increased its regulatory responsibilities by moving to protect the interests of consumers, the national environment, and victims of discrimination.⁸ The emergence of the regulatory state represents a shift in both the substance of law and the institutions through which law is made and enforced,⁹ and the sheer volume of federal statutes and regulations has dramatically changed the business of the federal courts.¹⁰ In particular, the work of federal judges has increasingly involved the interpretation of federal enactments.

The demands of the modern administrative state ultimately made it impossible for courts to sustain a theory of interpretation rooted in nineteenth-century common law. As a result, interpretive practices have changed. Courts have often repudiated private-law baselines for interpreting public law and have been less antagonistic to regulatory statutes.¹¹

In many respects, however, the theory and practice of public law have not outgrown the understandings that underlay the initial period of judicial antagonism.¹² That period is unmistakably recalled by

⁷ See FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE 7–11 (1941).

⁸ For comparisons between the New Deal and the rights revolution, see R. HARRIS & S. MILKIS, THE POLITICS OF REGULATORY CHANGE 53–96 (1989); and Vogel, *The “New” Social Regulation in Historical and Comparative Perspective*, in REGULATION IN PERSPECTIVE 155 (T. McCraw ed. 1981).

⁹ See generally Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 437–46 (1987) (discussing substantive and institutional reform in the New Deal period).

¹⁰ The proliferation of statutes in modern law has been widely observed both on the bench, *see, e.g.*, R. POSNER, THE FEDERAL COURTS 53, 83–84 (1985); Traynor, *Statutes Revolving in Common Law Orbit*, 17 CATH. U.L. REV. 401, 402 (1968) (observing that cases “increasingly involve the meaning or applicability of a statute”), and in academia, *see, e.g.*, G. GILMORE, THE AGES OF AMERICAN LAW 95 (1977) (describing an “orgy of statute making”). Recent statistics confirm these intuitions. In 1985, for example, nearly 20% of all civil filings involved four regulatory areas — social security, labor, tax, and civil rights. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS at a-16 to a-17 (1985) (table C-3). Moreover, because most commercial disputes have been absorbed into the regulatory arena through the Uniform Commercial Code, and because “contract cases” account for nearly 40% of all filings, *see id.*, the federal courts probably hear many more statutory than common law claims.

¹¹ *See, e.g.*, Switchmen’s Union v. National Mediation Bd., 320 U.S. 297 (1943) (denying judicial review of agency decision); Gray v. Powell, 314 U.S. 402 (1941) (deferring to agency interpretation of law).

¹² Over 80 years ago, Roscoe Pound voiced similar complaints about the persistence of judicial adherence to common law principles. *See* Pound, *Common Law and Legislation*, *supra* note 4, at 385–86; accord Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213, 213 (1934).

recent suggestions that courts should indulge a presumption in favor of private ordering and should interpret regulatory statutes so as to intrude minimally on the private market.¹³ The nineteenth-century view that regulatory statutes should be viewed against a background of common law property and contract rights and hence as naked wealth transfers also finds a modern home, in the increasingly prominent idea that statutes should be seen as unprincipled "deals" among self-interested private actors.¹⁴ Similarly, those who emphasize the findings of public choice theory would treat statutes as lacking coherent normative underpinnings.¹⁵

The initial judicial skepticism about the legitimacy and coherence of statutory law is also recalled by both poles of the contemporary debate over the possibility of constrained or objective legal interpretation. At one extreme, some courts and observers see the text or "plain meaning" of statutory language as the exclusive or principal guide to meaning.¹⁶ At the opposite extreme, other commentators claim that legal terms are quite generally indeterminate¹⁷ or have the meaning that those with authority choose to impose on them.¹⁸ Despite their differences, the two camps share a number of assumptions. Both treat regulatory statutes as an undifferentiated and unprincipled whole, without distinct and accessible purposes. Because members of both camps see no way to mediate the sharp ideological disagreements that sometimes underlie interpretive disputes, some are driven to the

¹³ See, e.g., J. RABKIN, JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY (1989); Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544-51 (1983). Many recent decisions appear to respond to a principle in favor of private ordering. See, e.g., Independent Fed'n of Flight Attendants v. Zipes, 109 S. Ct. 2732 (1989) (discussed below at note 305); Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) (discussed below at pp. 484-85); Heckler v. Chaney, 470 U.S. 821 (1985); Grove City College v. Bell, 465 U.S. 555 (1984); Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 24-25 (1981) (discussed below at pp. 500-02).

¹⁴ See Easterbrook, *The Supreme Court, 1983 Term — Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15 (1984).

¹⁵ For a discussion of public choice theory, see Plott, *Axiomatic Social Choice Theory: An Overview and Interpretation*, in RATIONAL MAN AND IRRATIONAL SOCIETY? 231 (B. Barry & R. Hardin eds. 1982). See generally K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951); J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT (1962). The treatment in H. HART & A. SACKS, THE LEGAL PROCESS (tent. ed. 1958), runs into severe problems because of its failure to appreciate the difficulties raised by work of this sort. My ultimate goal, however, is to revive important elements of the treatment in *The Legal Process*, rather than to celebrate its demise or to emphasize its occasional naïveté about politics and interpretation.

¹⁶ This view is currently enjoying a renaissance in the courts. See cases cited *infra* note 29; see also Easterbrook, *supra* note 13 (advocating a presumption against applying a statute unless it expressly addresses the issue in question).

¹⁷ See, e.g., R. UNGER, KNOWLEDGE AND POLITICS 88-100 (1975).

¹⁸ See, e.g., S. FISH, DOING WHAT COMES NATURALLY 87-102 (1989); S. FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 338-55 (1980) [hereinafter S. FISH, IS THERE A TEXT IN THIS CLASS?].

pretense that words quite generally have "plain meanings," others to the uninformative view that meaning is a function of authority, others to the demonstrably false claim that statutes are usually indeterminate in meaning, and still others to the open-ended suggestion that statutes should be interpreted so as to be "reasonable" or "the best that they can be."¹⁹ In the face of contentions of this sort, debates about statutory interpretation, in and out of the judiciary, often dissolve into fruitless and unilluminating disputes about the constraints supplied by language "itself" (as if such a thing could be imagined).

B. Interpretive Principles

My project is to develop a theory of statutory construction that not only sheds light on current practices but also might claim to be worthy of adoption. In carrying out that task, it is first necessary to set out the proper relationships among the traditional sources of interpretation, including text, structure, purpose, intent, and history. A large part of the solution, however, lies in the identification and development of interpretive principles with which to approach regulatory statutes.²⁰ The meaning of a statute inevitably depends on the precepts with which interpreters approach its text. Statutes do not have pre-interpretive meanings, and the process of interpretation requires courts to draw on background principles. These principles are usually not "in" any authoritative enactment but instead are drawn from the particular context and, more generally, from the legal culture.²¹ Disagreements about meaning often turn not on statutory terms "themselves," but instead on the appropriate interpretive prin-

¹⁹ See R. DWORKIN, LAW'S EMPIRE 337-38 (1986) (arguing that judges should interpret statutes "in the best light overall"); 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, 399 (1950) (suggesting that courts interpret statutes to "make sense").

²⁰ It is important to emphasize that my approach is directed to regulatory statutes. I refer to other measures, including criminal law, largely by way of analogy. Much of the discussion, however, bears on statutory interpretation in general.

²¹ The illuminating treatment in Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989), presents a number of these background norms, including the idea that courts should defer to administrative interpretations of law if Congress has not clearly addressed the issue, *see Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); that criminal statutes should be construed in accordance with the "rule of lenity," *see Eskridge, supra*, at 1029; and that statutes and treaties should be construed favorably to Indian tribes, *see id.* at 1047.

Eskridge's treatment is flawed, however, by the implicit assumption that the role of "public values" in interpretive disputes is to add to ordinary interpretation, or to bend the meaning of statutes in various directions. *See id.* at 1045-47. For reasons suggested below, *see infra* pp. 416-25, ordinary interpretation is also pervaded by "public values"; the dichotomy between interpretation that rests on fidelity to text and interpretation that is based on extratextual values greatly oversimplifies the problem and is in important respects a false one.

ciples. Courts sometimes make the governing norms explicit, but frequently leave them unarticulated and latent. The principles are often misdirected or at least controversial.

In these circumstances, it is important to identify the prevailing principles and to subject them to scrutiny. The ultimate task is to develop norms of statutory interpretation that grow out of, and do not collide with, the basic purposes of the constitutional framework, of contemporary institutional arrangements, and of modern social and economic regulation. Above all, it is important to develop principles that improve the performance of modern government, and that are not based on pre-New Deal understandings, which seem to have overstayed their welcome.

To carry out this task, it will be necessary to develop distinctive understandings about both the nature of legal interpretation and the character of modern public law. Because interpretation is a function of background norms and cannot proceed without them, theories about statutory "meaning" cannot be separated from theories about how the modern regulatory state does and should operate. When interpretive norms are contested, and when neither the Constitution nor the Congress has specified the proper norms, there is no alternative but to base the inevitably value-laden choice among them on their role in improving or impairing governmental performance.

In the course of the discussion, I reject a number of generally accepted understandings about statutory construction:

- courts must always adhere to the original meaning of the statute, or the original intent of the enacting legislature;
- courts are or can be mere agents of the Congress;
- statutory meaning remains constant over time;
- statutory meaning is equivalent to legislative intent;
- controversial views about public policy are never and should never be part of statutory construction;
- canons of construction, or background interpretive norms, are an outmoded and unhelpful guide to the courts.

All of these aspects of the conventional wisdom, I suggest, are inconsistent with actual judicial behavior. Moreover, they provide incomplete instructions and often produce perverse results.

The discussion proceeds in three stages. Part II rejects the usual understandings of how courts do and should construe statutes. It also suggests the proper uses of the traditional sources of interpretation: text, structure, purpose, congressional intent, and legislative history. The recent emphasis on the primacy of the text is a step in the right direction, but structure, purpose, intent, and history sometimes help

to clarify ambiguities or to prevent unnecessary or unintended irrationality and injustice. I also suggest that the traditional sources offer incomplete guidance and that their incompleteness reveals the inevitable failure of the agency conception of the judicial role. At the same time, I reject the view that statutory disputes produce "indeterminacy" in most or all cases and the related idea that such disputes are resolved on the basis of conventions that are not subject to evaluation. Finally, I criticize, though on quite different grounds, the use of certain widely-held extratextual norms to resolve statutory disputes: private autonomy, deference to agency interpretations, and conceptions of statutes as "deals."

Part III attempts to understand statutory construction by means of a general defense of the much-maligned "canons" of construction, understood as background principles designed to help discern statutory meaning. I defend the use of such principles by disaggregating their various functions and by suggesting that the use of background norms is desirable and in any case inevitable. I also suggest that several current substantive norms can be supported through an understanding of the ways in which they incorporate constitutional principles, promote deliberation in government, and respond to New Deal reforms of the legal system.

Part IV proposes a series of interpretive principles for judicial adoption in the regulatory state. I argue that many such principles, whether existing in current law or proposed here, can be defended by reference to constitutional norms; that others are based on assessments of the performance of various governmental institutions; and that still others are an effort to counteract some of the failings in regulatory systems. A general purpose of Part IV is to describe and defend principles that will serve the purposes of deliberative government and, in particular, will alleviate rather than aggravate the defects in modern regulatory programs.

Although these suggestions are designed principally for reviewing courts in hard cases, their implications extend to administrative agencies attempting to implement statutes, and to Congress in its efforts to design and reform social and economic regulation. Debates over statutory meaning are often disputes over interpretive principles; these debates reflect broader divisions over the nature and performance of the regulatory state and, indeed, about the character of American democracy and constitutionalism as a whole.²²

²² The study of statutory construction is therefore one part of a more general effort to understand the performance of modern regulatory institutions — an effort that will ultimately make it necessary to focus more on Congress, the President, and the bureaucracy than on the courts. For discussion in this vein, see J. MASHAW & B. HARFST, THE FREEDOM MACHINE (forthcoming 1990); C. SUNSTEIN, cited above in note *; and Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989).

II. STANDARD APPROACHES TO STATUTORY INTERPRETATION

In the conventional account, the tools of statutory construction are language, structure, and history. The weight of each of these has been sharply contested, especially in recent years.²³ Disputes over questions of this sort have produced a range of approaches to statutory construction, all with support in the case law. Each, however, is flawed. My purpose here is to explain how these approaches fail, both as positive accounts of how courts in fact approach statutes and as normative theories of interpretation.

This Part is divided into three sections. The first deals with theories that see courts as agents of the legislature and that charge courts with the duty to implement legislative decisions. These theories fail because they ignore the inevitable use of interpretive principles in the process of construction. Arguing that it is possible to choose among interpretive principles, the second section rejects both conventionalist accounts of meaning and the view that statutory interpretation produces "indeterminacy."²⁴ The third section considers three prominent approaches that do invoke supplemental principles; it suggests that these approaches also fail, largely because the relevant principles are difficult to defend.

²³ Compare *Hirshey v. Federal Energy Regulatory Comm'n*, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring) (criticizing use of legislative history) and B. ACKERMAN & W. HASSSLER, *CLEAN COAL/DIRTY AIR* 108-09 (1981) (same) with Farber & Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988) (arguing in favor of attention to legislative history).

²⁴ All interpretation involves the application of norms. Some of these "norms" are not open to change or even to discussion. There is a difference, at least in principle, between the sorts of understandings that make ordinary words intelligible and the sorts of interpretive principles that give meaning to statutory gaps or that resolve cases that are otherwise in equipoise — as, for example, in the norms in favor of state autonomy or judicial review. Participation in the set of practices that make ordinary words intelligible is probably best conceived of not as interpretation but as understanding. See L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 201, at 81 (G. Anscombe trans. 1972) (discussing a way "of grasping a rule which is *not* an *interpretation*, but which is exhibited in what we call 'obeying the rule' and 'going against it' in actual cases" (emphasis in original)). This point holds even though one's participation in those practices is conditional on a wide range of background understandings that are not "part" of words "themselves."

The distinction is important because it is sufficient, for purposes of background understandings of this sort, that there be a social consensus on their behalf. Communication is possible only because of that consensus. But with respect to interpretive principles that are part of interpretation — for example, the idea that silence on the question of federal preemption means that state law continues to exist — a consensus may be inadequate if there are no good arguments on behalf of that consensus. In these latter cases, interpretive principles are at least in theory subject to evaluation and to replacement by alternatives. A pervasive problem with conventionalist accounts of meaning is that they treat all interpretation as akin to the sorts of understandings that make ordinary words intelligible. See *infra* pp. 442-43 (discussing conventionalism). I am grateful to Thomas Nagel for help with this point.

A. Courts As Agents

According to the most prominent conception of the role of courts in statutory construction, judges are agents or servants of the legislature.²⁵ On the agency view, courts should say what the statute means, relying on its language, structure, and history. Background norms, policy considerations, indeed all "outside sources," are immaterial. The judicial task is to discern and apply a judgment made by others, most notably the legislature.

The agency view is usually defended by a claim of judicial legitimacy.²⁶ In a democratic system, with an electorally accountable legislature and separated powers, it is said to be the appropriate and indeed constitutionally prescribed role of the courts to apply legislative commands; it is thus impermissible for them to invoke considerations that cannot be traced to an authoritative text. The claim of illegitimacy is buttressed by (and perhaps reducible to) a range of prudential considerations: the use of outside sources will tend to increase judicial discretion, decrease legislative attentiveness, produce uncertainty, and risk usurpation by judges of powers reserved for legislative and executive actors.²⁷ Justice Holmes provided a particularly crisp expression of the agency view: after describing a regulatory statute as "foolish," he added, "if my fellow citizens want to go to Hell I will help them. It's my job."²⁸

The agency view appears in several competing forms, and much of the history of statutory construction consists of shifts and disputes among the various possible sources of the instructions of the courts' "principal," the legislature. I discuss several variations here.

1. *Textualism*. — It is sometimes suggested that statutory language is the source of judicial power and the only legitimate object of judicial concern. Textualism appears to be enjoying a renaissance in a number of recent cases,²⁹ and perhaps in the academy as

²⁵ This conception has strong roots in the American legal tradition, *see, e.g.*, Schooner Paulina's Cargo v. United States, 11 U.S. (7 Cranch) 52, 60 (1812) (Marshall, C.J.) ("In construing these laws, it has been truly stated to be the duty of the court to effect the intention of the legislature."). For more modern advocates of the agency conception, see cases cited in note 29 below.

²⁶ *See, e.g.*, Easterbrook, *supra* note 13, at 534 n.2 ("If statutes' words do not convey meaning and bind judges, why should judges' words bind or even interest the rest of us?").

²⁷ In this sense, the debate resembles the debate over formalism in constitutional law. *See generally* Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).

²⁸ *I. HOLMES-LASKI LETTERS*, *supra* note 1, at 249.

²⁹ *See, e.g.*, Public Citizen v. United States Dep't of Justice, 109 S. Ct. 2558, 2573-74 (1989) (Kennedy, J., concurring in the judgment); Mallard v. United States Dist. Court, 109 S. Ct. 1814, 1818-19 (1989); Chan v. Korean Airlines, 109 S. Ct. 1676, 1680-81 (1989); Pittston Coal Group v. Sebben, 109 S. Ct. 414, 419-21 (1988); McLaughlin v. Richland Shoe Co., 108 S. Ct. 1677, 1681-82 (1988); Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421,

well,³⁰ partly because of dissatisfaction with alternative interpretive strategies, taken up below, which counsel courts to rely on "purpose" or to produce "reason" in regulatory regimes.³¹

Several considerations argue in favor of textualist strategies. First, textualism contains an important and often overlooked truth. Statutory terms are the enactment of the democratically elected legislature and represent the relevant "law." Statutory terms — not legislative history, not legislative purpose, not legislative "intent" — have gone through the constitutionally specified procedures for the enactment of law. Second, resort to the text promotes goals associated with the rule of law: citizens have access to the statutory words and can most readily order their affairs in response to those words. Third, the words of a statute, considered in light of widely shared conventions about how they should be understood, often have only one plausible interpretation, or at least sharply constrain the territory of legitimate disagreement. Finally, an emphasis on the primacy of the text serves as a salutary warning about the potential abuses of judicial use of statutory "purpose" and of legislative history.³²

Some textualists emphasize the "plain meaning" or dictionary definition of statutory terms; others are more sensitive to the particular settings. In its purest form, however, the textualist approach is inadequate. The central problem is that the meaning of words (whether "plain" or not) depends on both *culture* and *context*. Statutory terms are not self-defining, and words have no meaning before or without interpretation.³³ To say this is emphatically not to say that words

452–53 (1987) (Scalia, J., concurring in the judgment). In *Green v. Bock Laundry Mach. Co.*, 109 S. Ct. 1981 (1989), however, all nine Justices refused to follow the dictionary meaning of the text because it would have produced an absurd result. *See id.* at 1984–85; *id.* at 1994 (Scalia, J., concurring); *id.* at 1995 (Blackmun, J., dissenting); *see also Public Citizen*, 109 S. Ct. at 2565–67 (1989).

³⁰ For example, once-Professor and now-Judge Easterbrook has defended textualism with insight and vigor. *See, e.g.*, Easterbrook, *supra* note 13.

³¹ As we will see, strategies of that sort were suggested by commentators who disregarded or downplayed the existence of controversy about what "reason" required or about the "purposes" of statutory regimes, and who failed to come to terms with the existence of sharp, ideologically based disagreements on such questions. *See infra* pp. 426–28, 435–36. Textualism relies on firm linguistic anchors to control ideological divisions. It is here that there is a commonality between those who believe that legal interpretation is inevitably indeterminate — because of ideological strife — and those who, embracing textualism, do so for essentially the same reason.

³² *See infra* pp. 427–28 (purpose), 429–31 (legislative history).

³³ Consider Learned Hand's view: "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . ." NLRB v. Federbusch Co., 121 F.2d 954, 957 (2d Cir. 1941); *see also Shell Oil Co. v. Iowa Dep't of Revenue*, 109 S. Ct. 278, 281 & n.6 (1989) (quoting *Federbusch*).

The dependence of meaning on culture and context is a conventional point in both Anglo-American and Continental philosophy. *See, e.g.*, L. WITTGENSTEIN, *supra* note 24 (Anglo-American version); H. GADAMER, *TRUTH AND METHOD* (trans. 2d ed. 1975) (Continental

used in statutes or elsewhere can mean anything at all.³⁴ But it is to say that statutory terms are indeterminate standing "by themselves," and, even more important, they never stand by themselves. The significance of congressional enactments necessarily depends on the context and on background understandings about how words should be understood. Moreover, reliance on ordinary or dictionary definition, without reference to context, will sometimes lead to interpretive blunders.³⁵

Usually the context does not prevent reliance on ordinary meaning, and usually the background principles are so widely shared — for example, that Congress is speaking in English, that Congress is not joking or attempting to mislead, that statutes have purposes, or that judges should not decide cases simply according to their predilections — that they are invisible. Even in easy cases, however, courts must resort to background principles. For example, the question whether the enactment of federal environmental statutes preempts all of state tort law is an easy one, not because of the statutory text "itself," but because of shared understandings about the limited preemptive effect of federal enactments.³⁶

version). For legal writing on the inadequacy of textualism, see R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 217-27 (1975); S. FISH, IS THERE A TEXT IN THIS CLASS?, *supra* note 18, at 356-71 (discussing law as well as literature); H. HART & A. SACKS, *supra* note 15, at 1150-58; 9 J. WIGMORE, EVIDENCE § 2470, at 234-38 (J. Chadbourne ed. 1981); Fish, *Don't Know Much About the Middle Ages: Posner on Law and Literature*, 97 YALE L. J. 777, 778-80 (1988); Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1263-64 (1947); Horack, *The Disintegration of Statutory Construction*, 24 IND. L.J. 335, 338 (1949).

³⁴ But see, e.g., Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 819 (1983) (arguing, unpersuasively, that a good lawyer can always find an argument for the result he wants).

³⁵ Courts have conspicuously rejected literalism on many occasions. See *Missouri v. Jenkins*, 109 S. Ct. 2463, 2471 (1989) (holding that "attorney's fee" should be read to include award of paralegal fees); and *Hensley v. Eckhart*, 461 U.S. 424, 429 n.2, 433 (1983) (observing that under § 1988, which provides attorney's fees to the "prevailing party," prevailing plaintiffs may recover if they prevail on any significant issue, but defendants may recover only if the plaintiff's suit was groundless) (dictum); *United States v. Colon-Ortiz*, 866 F.2d 6, 11 (1st Cir. 1989) (refusing to adhere to an obvious drafting error); *In re House Bill No. 1,291*, 178 Mass. 605, 60 N.E. 129 (1901) (holding that a requirement in the Massachusetts Constitution of a "written vote" allows a voting machine involving no writing); *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889) (refusing to allow a testator's murderer to recover under the will); R. DICKERSON, *supra* note 33, at 230. For other examples, see note 44 below.

³⁶ See R. STEWART & J. KRIER, ENVIRONMENTAL LAW AND POLICY 440-41 (1978); see also *Mansell v. Mansell*, 109 S. Ct. 2023, 2027-28 (1989) (observing that Congress must specifically preempt state law, especially in the area of domestic relations); *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 108 S. Ct. 1350, 1353 (1988) (requiring evidence of clear and manifest congressional purpose to preempt state law regarding gasoline price regulations); *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 715 (1985) (discussing the assumption that states' powers to regulate health and safety are not preempted by congressional acts). Similarly, a law that says nothing about whether administrative action is reviewable is

Those who accept textualist approaches might agree that the meaning of words is partly a function of the context and of background norms about how texts should be approached. Indeed, we may define an easy case as one in which the context produces no dispute and there is a consensus about the governing norms.³⁷ In many hard cases, however, the source of the difficulty is that the particular background norm and the nature of its application will be highly controversial. Textualism or "plain meaning" approaches can resolve these questions only by covertly introducing background principles, which are often controversial.

Consider the question whether a statute creating a regulatory agency to police racial discrimination in employment implicitly authorizes victims of discrimination to bring private suits against employers who allegedly have engaged in discrimination. If the statute and its history do not resolve the question, the introduction of background norms is necessary to discern the meaning of the statute. It should thus be unsurprising that judges skeptical about implied causes of action have relied not on statutory "text" but instead on a highly controversial background assumption, traceable to a particular, contestable understanding of separation of powers, that only the legislature may create such rights, and that statutory silence should be assumed not to do so.³⁸ Without that assumption or a different one, statutory silence on the existence of an implied cause of action has no meaning.

Background norms are ubiquitous in any legal system, and indeed in grammar itself; they are necessary to make reliance on "text" an intelligible concept. These considerations account for the pervasive difficulties with textualist approaches to statutory construction: ambiguity or vagueness, overinclusiveness, underinclusiveness, delegation or gap-filling, and changed circumstances.

(a) *Ambiguity or Vagueness.* — The most familiar problem with textualism is that statutory language is sometimes ambiguous or vague. To say that courts should rely on the words or on their

unambiguous, not because of the text "itself," but because of the strong presumption, created by courts but now widely shared, in favor of judicial review of administrative behavior. See *infra* pp. 475-76.

³⁷ Cf. Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 413-14 (1985) (suggesting that easy cases arise when the relationship between legal norms and human behavior is uncontroversial).

³⁸ See *Jett v. Dallas Indep. School Dist.*, 109 S. Ct. 2702, 2720-22 (1989); *Karahalios v. National Fed'n of Fed. Employees, Local 1263*, 109 S. Ct. 1282, 1286 (1989) (describing a "canon" of construction against implied causes of action); *Thompson v. Thompson*, 108 S. Ct. 513, 520-23 (1988) (Scalia, J., concurring); *Cannon v. University of Chicago*, 441 U.S. 677, 730-31 (1979) (Powell, J., dissenting). See generally P. BATON, D. MELTZER, P. MISHKIN, D. SHAPIRO, HART AND WECHSLER'S *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 943-50 (3d ed. 1988) (recounting the changes in the Supreme Court's treatment of implied causes of action).

ordinary meaning — the plain meaning approach — is unhelpful when statutory words have more than one dictionary definition, or when the context produces interpretive doubt. It is not clear, for example, whether the term "feasible" contemplates a cost-benefit analysis, or whether a prohibition of "discrimination" bars voluntary race-conscious measures designed to counteract the effects of past and present discrimination against blacks.³⁹ In both of these cases, moreover, it is uncertain whether the language should be taken to refer to the original meaning of those words for the enacting legislature (assuming that idea can be made intelligible in light of the problems of aggregating the views of numerous actors) or should instead take account of contemporary understandings of what the words mean. Indeed, it is not even clear what bearing the desires, or interpretive instructions, of the enacting legislature should have for judicial interpretation. By itself, textualism cannot answer these questions. Nor can the agency conception of the judicial role resolve such problems.

(b) *Overinclusiveness*.⁴⁰ — If textualism is taken, as it often is, to call for reliance on the literal⁴¹ language of statutory words — their dictionary definition or meaning in ordinary settings — it will sometimes suggest an outcome that makes little or no sense. For example, suppose that a state law says that no vehicles are permitted in public parks, and a city proposes to build in a park a monument consisting of tanks used in World War II.⁴² The literal language must yield, for the statute could not reasonably be taken to forbid a monument, which causes none of the harms the statute could be thought to prevent.

A passage from Wittgenstein indicates the basic difficulty: "Someone says to me: 'Shew the children a game.' I teach them gaming with dice, and the other says 'I didn't mean that sort of game.' Must the exclusion of the game with dice have come before his mind when he gave me the order?"⁴³ The example shows that sometimes the best interpretation of a textual command is one that runs counter to its apparent literal meaning — even if the author did not have in mind the case at issue, or make a judgment about how that case should be resolved.

³⁹ See, e.g., *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980) (plurality opinion) (interpreting "feasible"); *United Steelworkers of America v. Weber*, 443 U.S. 193, 201–02 (1979) (rejecting an interpretation of "discriminate" that would bar affirmative action).

⁴⁰ "Overinclusiveness" and "underinclusiveness," as used in the text, refer to the fact that the best interpretation of a word, all things considered, sometimes calls for a restriction on or a departure from a word's dictionary meaning.

⁴¹ The notion of "literal" meaning is a crude one. It usually refers to the meaning of words in "most" contexts, but because meaning is a function of context, it is wrong to suggest, as the concept of "literal meaning" does, that words have context-independent meanings.

⁴² This famous example comes from H.L.A. HART, *THE CONCEPT OF LAW* 121–32 (1961).

⁴³ L. WITTGENSTEIN, *supra* note 24, at 33.

Courts encounter the problem of overinclusiveness frequently.⁴⁴ The Supreme Court recently held that a statute exempting state and local public housing obligations "from all taxation . . . imposed by the United States" should not be interpreted to include an exemption from federal estate tax.⁴⁵ The Court held that the exemption did not mean what it appeared to say in light of the contemporaneous understanding that an excise tax was not ordinarily comprehended within the category of "taxation."⁴⁶ As another example, suppose that the legislature has said that an employer may discharge an employee "for any reason." Is the employer thereby authorized to fire workers who have refused to commit crimes on his behalf? If a state law says that one spouse will inherit from another "in all circumstances," may a husband who has murdered his wife make a claim against the estate?⁴⁷ These are examples of what might be described as the overinclusiveness of a prominent version of textualism:⁴⁸ the possibility that statutory language, read without sufficient regard to context or its intended field of application, will reach situations that it could not reasonably cover.

(c) *Underinclusiveness*. — Although it arises less frequently, there is also a possibility that textualism will be underinclusive. Justice Holmes warned that "[c]ourts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them."⁴⁹ A particular difficulty here is that a statute may be

⁴⁴ See, e.g., *Public Citizen v. United States Dep't of Justice*, 109 S. Ct. 2558, 2573-74 (1989); *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 284 (1987); *Kelly v. Robinson*, 479 U.S. 36, 43-44 (1986); *O'Connor v. United States*, 479 U.S. 27, 31 (1986); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220-21 (1986); *United Steelworkers of America v. Weber*, 443 U.S. 193, 201 (1979); *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940); *Armstrong Co. v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1933); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892); *Perry v. Strawbridge*, 209 Mo. 621, 108 S.W. 641 (1908); see also *Arizona v. California*, 373 U.S. 546, 568-75 (1963) (finding that despite the interstate compact's express inclusion of the "Colorado River System," Arizona could not be forced to give up water from a portion of that system entirely within its borders because legislative history shows Congress intended to include mainstream water only).

⁴⁵ See *United States v. Wells Fargo Bank*, 108 S. Ct. 1179, 1182, 1184 (1988).

⁴⁶ See *id.* at 1182.

⁴⁷ See *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889); see also *Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2, 433 (1983) (discussed above in note 35).

⁴⁸ See, e.g., *Public Citizen v. United States Dep't of Justice*, 109 S. Ct. 2558, 2573-74 (1989) (Kennedy, J., concurring in the judgment); *Riggs*, 115 N.Y. at 516, 22 N.E. at 191 (Gray, J., dissenting).

⁴⁹ *Olmstead v. United States*, 277 U.S. 438, 469 (1928) (Holmes, J., dissenting). See, e.g., *Missouri v. Jenkins*, 109 S. Ct. 2463, 2471 (1989) (holding that "attorney's fee" should be read to include award of paralegal fees); *Friedrich v. City of Chicago*, 1989 U.S. App. LEXIS 16693 (No. 88-3043, 7th Cir. Oct. 31, 1989) (Posner, J.) (holding that although § 1988 specified recovery for an "attorney's fee," a proper interpretation of Congress' instructions allows no distinction between paying for an attorney and paying for an expert witness).

"evaded" by private ingenuity. The literal language of the statute does not cover the situation, but because the private conduct causes all of the harms that the statute could be thought to prevent, courts sometimes hold a statute applicable notwithstanding its literal terms.⁵⁰ The problem of evasion should not be an excuse for judicial stretching of statutes (to be sure, a most ill-defined concept in this setting), but the problem has elicited judicial responses in a number of areas, most notably taxation.⁵¹

(d) *Delegation, Gaps, and Implementing Rules.* — The incompleteness of textualism is most conspicuous when Congress has explicitly or implicitly delegated lawmaking power to the courts or when Congress has simply left a gap. In cases of delegated power or gap-filling, the problem is not that words are susceptible to more than one construction, but instead that the words necessarily require courts to look to sources outside of the text.⁵²

The Sherman Act, for example, raises a serious gap-filling problem. The language of the Act does not answer the question of what practices amount to "conspiracies in restraint of trade." The legislative history is suggestive but unclear,⁵³ and the courts have inevitably taken the Act as a delegation of policymaking power pursuant to quite open-ended criteria.⁵⁴ Similarly, section 1983⁵⁵ is silent on many im-

⁵⁰ See, e.g., *Helvering v. Gregory*, 69 F.2d 809 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935).

⁵¹ See, e.g., *Commissioner v. Court Holding Co.*, 324 U.S. 331 (1945); *Goldstein v. Commissioner*, 364 F.2d 734 (2d Cir. 1966); *Helvering v. Gregory*, 69 F.2d 809. Outside the area of taxation, there are many examples as well. See, e.g., cases cited *supra* note 49; *Stoner v. Hudgins*, 568 S.W.2d 898, 902-03 (Tex. Civ. App. 1978) (holding that despite a narrow verbal construction, a statute providing for credit against damages for advance payments made to tort claimants should be read to mean that the credit should be applied *after* the damage award is reduced to account for comparative negligence). See generally *Isenbergh, Musings on Form and Substance in Taxation* (Book Review), 49 U. CHI. L. REV. 859 (1982). *Johnson v. Southern Pac. Co.*, 117 F. 462 (8th Cir. 1902), *rev'd*, 196 U.S. 1 (1904), which held that the term "cars" in a statute requiring cars on common carriers to be equipped with automatic couplers did not extend to locomotive engines, is persuasively criticized by Hart and Sacks on the ground that the literalist court interpreted the statute too narrowly. See H. HART & A. SACKS, *supra* note 15, at 1173-74.

⁵² The problems of delegation or gap-filling must be distinguished from a "gap" that is best taken as a legislative decision not to prohibit conduct or not to change the status quo. Here silence is a straightforward absence of law, and one that allows private conduct to go on as before. This latter sort of gap — which is essentially an exclusion or exemption from a statute — is confused with the sort of gap that requires judicial elaboration of the law in Easterbrook, cited above in note 13; and OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION 100-04 (1989) [hereinafter USING AND MISUSING LEGISLATIVE HISTORY]. The confusion produces a version of the old idea that statutes in derogation of the common law must be narrowly construed.

⁵³ See 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 106, at 14-16 (1978).

⁵⁴ See, e.g., *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 688 (1978).

⁵⁵ 42 U.S.C. § 1983 (1982).

portant questions, including available defenses, burdens of pleading and persuasion, and exhaustion requirements. Because of the textual silence, judges must fill the gaps. To this extent, the statute delegates power to make common law.⁵⁶

Judicial implementation of title VII of the Civil Rights Act of 1964⁵⁷ can be understood in similar terms, though this example is more controversial. The basic prohibition of "discrimination" provides no guidance on the role of discriminatory effects, the appropriate burdens of proof and production, and the mechanisms for filtering out discriminatory treatment. Judicial answers to these questions sometimes purport to be relatively mechanical responses to congressional commands,⁵⁸ but in fact they amount to judge-made implementing devices that reflect the judges' own, inevitably value-laden views. In light of the existence of textual gaps on many questions, this approach is hardly an embarrassment or a usurpation, but instead an inevitable part of interpretation. Much of the law of title VII is an unavoidable, and therefore legitimate, norm-ridden exercise in developing gap-filling rules.⁵⁹ In this respect, the Sherman Act and title VII are closely analogous.

When the language of a statute does not specify its implementing rules, textualism is incomplete: courts must look elsewhere. When Congress has delegated power or left a gap, the line between interpreting and creating federal common law⁶⁰ becomes quite thin.

(e) *Changed Circumstances.* — The discussion thus far has assumed that circumstances have not changed significantly since the statute was enacted. Textualism becomes even more problematic

⁵⁶ The Court has sometimes indicated that gaps should be filled by reference to the common law of the time. See, e.g., *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981); *Wood v. Strickland*, 420 U.S. 308, 318 (1975). Frequently, however, it has filled gaps in accordance with its own views about how best to implement the statute — an approach that is probably consistent with the drafters' own understanding about how courts would act. See Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51 (1989); Kramer & Sykes, *Municipal Liability Under Section 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 263–66.

⁵⁷ 42 U.S.C. §§ 2000e to 2000e-17 (1982 & Supp. V 1987).

⁵⁸ See, e.g., *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252–53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800–01 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

⁵⁹ See, e.g., *Independent Fed'n of Flight Attendants v. Zipes*, 109 S. Ct. 2732, 2737–38 (1989) (deciding that, under title VII, attorneys' fees may not be awarded against nonfrivolous intervenors, largely because of courts' perceptions about the social consequences of such a rule).

⁶⁰ Federal common law is usually thought to involve judicial lawmaking when little or no guidance has been supplied by the legislature. See Friendly, *In Praise of Erie — And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 410–11 (1964). Statutory interpretation, by contrast, is usually thought to involve a decision about the meaning of ambiguous enactments. For the reasons stated in the text, this distinction is far too simple.

when time has affected the assumptions under which the statute was originally written. Changed circumstances may produce ambiguity or interpretive doubt in the text where neither existed before.

Consider the Delaney Clause, which forbids the use as food additives of substances that "induce" cancer.⁶¹ The Delaney Clause was enacted at a time when carcinogenic substances were difficult to detect and all detectable carcinogens were extremely dangerous. These facts, however, no longer hold true, and under current conditions the Delaney Clause almost undoubtedly increases health risks by keeping relatively safe substances off the market and by forcing consumers to resort either to noncarcinogenic substances that pose other risks or to substances that were approved by earlier administrators using the cruder technology of their day. Because the factual premises under which the enacting Congress operated are now demonstrably false, might the word "induce" allow the government to exempt from regulation carcinogens that pose trivial risks?⁶² Similarly, would a "public policy" exception to the charitable deduction in the Internal Revenue Code require the government to deny the deduction to schools that engage in racial discrimination, even if those who enacted the Code many decades before believed that such discrimination was perfectly consistent with public policy?⁶³ In short, it is by no means obvious that the statutory text should be understood in accordance with its "original meaning," even if that concept were unproblematic.⁶⁴

* * *

The discussion thus far suggests two principal points. First, and most fundamentally, there is no such thing as an acontextual "text" that can be used as the exclusive guide to interpretation. In easy cases, interpretive norms — on which there is wide or universal consensus — and context both play a part in the process of ascertaining statutory meaning. Because such norms are so widely shared, they are invisible and are not an object of controversy. Only in these cases can meaning ever be said to be "plain." With these qualifications, textualism is generally appropriate. In hard cases, however, courts must resort to a highly visible background norm,⁶⁵ or a con-

⁶¹ See 21 U.S.C. § 348(c)(3)(A) (1982).

⁶² See *infra* pp. 496-97.

⁶³ See *infra* note 100 (discussing *Bob Jones University v. United States*, 461 U.S. 574 (1983)).

⁶⁴ Indeed, I will be offering reasons to suggest that it should not be. See *infra* pp. 493-97; accord Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988).

⁶⁵ In hard cases, a claimed reliance on the text often disguises the actual basis for decision, which does not turn on text at all. In these cases, discretion is inevitable. For a powerful demonstration in the context of environmental law, see R. MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 371 (1983), which shows that the constant resort to statutory text in cases in which text is at best indeterminate can lead judges to act on the basis of unarticulated and uninformed policy considerations.

testable one, or some gap-filling device in order to resolve an interpretive dispute. In these settings, and in this sense, textualism is incomplete.

Second, it is by no means obvious that courts should always rely solely on the text or on the "plain meaning" of its words even in cases in which such reliance leads to determinate results. Although textualism properly draws on the democratic primacy of the legislature, legislative instructions are often unclear and the claim of a command is a myth. An interpretive strategy that relies exclusively on the ordinary meaning of words is precisely that — a strategy that reflects a choice among competing possibilities — and it will sometimes produce irrationality or injustice that the legislature did not intend.⁶⁶ Textualism of this sort is not incomplete but instead pernicious.

In cases of overinclusiveness, underinclusiveness, changed circumstances, or divergence between ordinary meaning and contextual or legislatively intended meaning, textualism — with its disregard of the irrational, unjust, and often unintended outcomes produced by literalism in hard cases — is best defended as a fighting faith, an inference from the system of separation of powers, rather than as a necessary understanding of statutory interpretation. On this view, reliance on ordinary meaning and indifference to context, irrationality, and injustice will discipline the judges, limit their discretion, hold them to Congress' actual words, and warn the lawmakers to be careful about statutory language.⁶⁷ It is by no means clear, however, that a system of textualism, so defended, will lead to a superior system of law, and there is considerable reason to suspect otherwise.⁶⁸ Even the most attractive form of textualism, emphasizing not literalism but the meaning of words read in context and against shared interpretive norms, is inadequate in light of the need to use contestable norms in hard cases and the interpretive difficulties produced by unintended irrationality and injustice.

2. *Contextual Approaches.* — Sometimes those who rely on the agency theory stress not the statutory text alone, but text as understood in the light of the context and background of the statute. Contextual approaches provide at least partial responses to the problems with textualism, mostly by helping to resolve ambiguities or fill gaps. The traditional efforts to supplement text with context, however, have

⁶⁶ Consider, for instance, the examples of overinclusiveness mentioned earlier: a law allowing spousal inheritance "in all circumstances," invoked by someone who murdered his wife; or a law allowing employers to discharge employees "for any reason" invoked by an employer who fired a worker for refusing to commit murder. *See supra* p. 420; *see also* cases cited *supra* notes 35 & 44.

⁶⁷ *See, e.g.*, Public Citizen v. United States Dep't of Justice, 109 S. Ct. 2558, 2573-80 (1989) (Kennedy, J., concurring).

⁶⁸ *See infra* pp. 438-40.

problems of their own. Sometimes they reproduce the failings of textualism, sometimes they operate at the expense of the text, and sometimes they depend on poor understandings of the legislative process and the constitutional background. The most prominent efforts to adhere to the agency theory while venturing beyond the text of the provision at issue involve structure, purpose, intent, and legislative history.

(a) *Structure*. — Courts often respond to the various problems in textual approaches by reference to other parts of the text and, more importantly for our purposes, to the structure of the statute. On this view, an interpretation should be disfavored if it would make the disputed provision fit awkwardly with another provision or produce internal redundancy or confusion. An interpretation that would make sense of the statute as a whole should be adopted. Structural argument has proved helpful in many cases.⁶⁹

Structural approaches to statutory construction are entirely unobjectionable — on the contrary, they provide significant interpretive guidance. Such approaches promote fidelity to congressional instructions and at the same time help to make sense of complex regulatory enactments. If an interpretation of one provision works against or makes meaningless another provision, there is good reason to reject that interpretation.

Structural approaches, however, suffer from two problems. First, they depend on an assumption that statutes are in fact internally consistent and coherent — an assumption that recent theories of legislation have questioned in light of the influence of interest groups, compromise, and irrationality.⁷⁰ If that assumption is false, the court's treatment of statutes as internally consistent wholes cannot be justified

⁶⁹ See, e.g., *Carlucci v. Doe*, 109 S. Ct. 407, 412–14 (1988); *Milwaukee v. Yeutter*, 877 F.2d 540, 544 (7th Cir. 1989). *Community for Creative Non-Violence v. Reid*, 109 S. Ct. 2166 (1989) is an instructive example. In *Reid*, the Supreme Court was asked to construe the “work-for-hire” provision of the Copyright Act of 1976, 17 U.S.C. § 201(b) (1982). Section 201 entitles an artist to the copyright of her work unless the work was “made for hire.” In § 101, work for hire is defined in two provisions: under the first definition, it is “a work prepared by an employee within the scope of his or her employment”; under the second definition, “a work specially ordered or commissioned for use as a contribution to a collective work” or under any of eight other enumerated categories. See 17 U.S.C. § 101 (1982).

The Court considered the claim that when the buyer retains the right to control the work, the artist is a common law employee under the first definition of work for hire. The Court rejected this claim because it would make the exceptions to the second definition superfluous: Congress could not have intended a right-to-control test for employment because that “would mean that many works that could satisfy § 101(2) would already have been deemed works for hire under § 101(1).” *Reid*, 109 S. Ct. at 2173.

⁷⁰ See, e.g., Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983); Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 27–31; Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

as an accurate way of implementing legislative instructions. If the concern with promoting rationality is to be supported, it must be on independent grounds.⁷¹ Second, structural approaches offer only partial help. In many cases, an examination of structure will reveal ambiguities, silences, or delegations.⁷² In the hardest cases, the characterization of structure depends largely, not on structure itself, but on a value-laden idea about what conception of the statute works best.⁷³ To resolve these problems, it will be necessary to look elsewhere.

(b) *Purpose, Intent, and History.* — In addition to consulting statutory structure, a natural and time-honored response to the problems of textualism has been to look to the purpose, intent, and history of a statute.

(i) *Purpose.* — Resort to the “purpose” of the statute was especially popular among academic commentators in the 1950’s and 1960’s. Steeped in legal realism, these commentators disparaged approaches — such as reliance on text alone — that substituted mechanical rules for more functional and purposive inquiries.⁷⁴ Their resort to purpose was an effort to maintain the role of the courts as agents of the legislature while at the same time acknowledging the inadequacy of textualism. Thus, in the case of the war memorial in the park, the question whether the memorial is a “vehicle” within the meaning of the statute might be answered by asking whether the memorial creates harms (such as noise or pollution) that undermine the purposes for which the statute was enacted. Because the memorial does not, the case is an easy one, and the statutory proscription does not apply.

In some cases, then, reliance on purpose will be a valuable way of providing a context within which to understand statutory terms. Purposive interpretation is, however, far from a complete solution to the problem of statutory construction, for it reproduces all of the problems of textualism in slightly different guise. For example, the purpose may be ambiguous or may reveal a gap or delegation. Are the antitrust laws designed to promote consumer welfare in the economic sense or to protect small business? Is a statute forbidding racial

⁷¹ See *infra* pp. 437–41.

⁷² Cf. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172–73 (1968) (holding that the FCC could regulate new technologies not on the list of regulated activities enumerated in the Communications Act of 1934).

⁷³ The same criticism applies to the most well-known justification of structural analysis, C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969). Black’s characterization of the Constitution’s structural commitments generates a number of controversial conclusions; many of them are not clearly supported by constitutional structure and rest instead on value-laden assumptions of his own.

⁷⁴ See, e.g., H. HART & A. SACKS, *supra* note 15, at 1148–79, 1218–26; Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 661–69 (1958); see also *infra* pp. 451–52 (discussing legal realism and statutory construction).

discrimination designed to proscribe all distinctions on the basis of race, or only those distinctions that burden members of minority groups?⁷⁵ Often the legislature itself will not have anticipated such questions. The characterization of legislative purpose is an act of creation rather than discovery.

All of these problems would be formidable even if the legislature consisted of one or a few persons. In the face of multimember institutions, the problem becomes even more troublesome. There will be not one but many purposes in any statute; those purposes will sometimes conflict with one another; legislators will have complex and conflicting views on purposes; the purposes could be described at different levels of generality; and purposes will have been compromised and traded off in complex ways. A statute designed to protect workers might also be intended to help union at the expense of non-union employment; a statute designed to protect the environment might also be intended to protect eastern coal producers.⁷⁶

Purposive interpretation may also suffer from overinclusiveness or underinclusiveness. By taking the purpose of a statute out of context, one might broadly read a provision to prevent behavior that under the most plausible reading the statute should not reach.⁷⁷ Similarly, an unduly narrow categorization might prevent a statute from reaching a situation that should fall within its scope.⁷⁸ Advocates of purposive interpretation sometimes disregard the fact that purposes are expressed through and have no life independent of statutory words. The words represent the law.

When circumstances change, reliance on the statutory purpose becomes even trickier. Assume, for example, that Congress enacts a statute imposing significant procedural requirements on regulatory agencies engaging in adjudicative tasks but lenient requirements on agencies engaging in rulemaking, and that Congress thought almost all important administrative business would be done through adjudication. But thirty years after enactment, those assumptions no longer

⁷⁵ Cf. *United Steelworkers of America v. Weber*, 443 U.S. 193, 200–08 (1979) (holding that title VII does not forbid voluntary affirmative action plans).

⁷⁶ See B. ACKERMAN & W. HASSLER, *supra* note 23, at 26–54. Those who emphasize the ambiguity and multiplicity of statutory purposes often stress as well the intractability of the ideological disputes that sometimes lie beneath interpretive questions. See Easterbrook, *supra* note 13, at 544–51. Textualism thus provides a natural refuge from purposive approaches — even if the refuge itself is ultimately doomed.

⁷⁷ See, e.g., *United States v. Turkette*, 452 U.S. 576, 588–93 (1981) (interpreting “enterprise” in RICO to encompass both legitimate and illegitimate enterprises, even though legitimate enterprises were not within Congress’ original contemplation).

⁷⁸ See, e.g., *United States v. Elgin, J. & E. Ry.*, 298 U.S. 492 (1936) (finding no violation of the commodities clause of the Interstate Commerce Act where a railroad company owned by a holding company transported the products of the holding company’s subsidiary, even though the transportation caused all of the harms the statute was enacted to prevent).

hold, as agencies engage in extensive rulemaking and do most of their significant work in that way. Is it so clear that judicial "bending" of ambiguous provisions in the statute to impose greater procedural requirements in rulemaking is unfaithful to the purpose of the law?⁷⁹ Indeed, is it so clear that such an interpretation is bending at all? In view of the changed context, what would it mean for courts to be "faithful" to the original purpose?⁸⁰

The problem in these settings is that mechanical transplantation of statutory purposes to new settings is unlikely to produce sensible results even from the standpoint of the enacting legislature. Nor is it sufficient to say that the legislature rather than the courts should respond to changed circumstances. Often it is unrealistic to expect a legislative response.⁸¹ More important, the issue for interpretation is the meaning of the statute in the new circumstances. Meaning does not remain static across changes in law, policy, and fact.⁸² Interpretation that brings the legislature into the present will, however, inevitably involve a large measure of discretion and a corresponding danger of judicial abuse.

Purposive interpretation, then, is far from a panacea. Although it is frequently helpful in giving context to statutory terms, the effort to characterize legislative purpose often produces serious problems, whether or not circumstances have changed. In some cases, the purpose might be characterized in many ways, all of which are faithful to the original enactment. The act of characterization is therefore one of invention rather than discovery.

(ii) *Legislative Intent and Legislative History.* — It is often suggested that in hard cases, the meaning of the statute should be derived by ascertaining the intent of those who enacted it.⁸³ This approach

⁷⁹ See Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 381-82 (arguing in favor of such judicial "bending").

⁸⁰ Or suppose Congress enacted a statute regulating banking with the understanding that the banking and securities businesses could be quite discrete and that banks would face little competition — but the rise of the money market fund forced banks to compete in an integrated and competitive national market. In such circumstances, how should the Court decide whether a bank holding company can provide securities brokerage services in the face of ambiguous restrictions on combining securities business with banking? See Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 MICH. L. REV. 672 (1987).

⁸¹ See, e.g., Merrill, *FDA's Implementation of the Delaney Clause: Repudiation of Congressional Choice or Reasoned Adaptation to Scientific Progress?*, 5 YALE J. ON REG. 1 (1988) (noting Congress' failure to come to terms with the obsolescence of the Delaney Clause).

⁸² This point is insufficiently emphasized by Dean Calabresi, who suggests that the remedy for obsolete statutes is "overruling" them. See G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 163-66 (1982). In fact, "obsolescence" frequently involves just the opposite problem: discerning the meaning of a statute in light of changed circumstances.

⁸³ See, e.g., *Mississippi Band of Choctaw Indians v. Holyfield*, 109 S. Ct. 1597, 1605 (1989); *Train v. Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1, 23-25 (1976).

is similar to purposive interpretation, but here the goal is not to look at a general legislative aim or purpose, but instead to see more particularly how the enacting legislature would have resolved the question, or how it intended that question to be resolved, if it had been presented. For those who emphasize legislative intent, the legislative history is a central object of concern.

In recent years, the Supreme Court has been divided about the significance of legislative intent and legislative history. The Court has suggested that the question for interpretation is in fact one of "congressional intent,"⁸⁴ and has generally treated legislative history as a key to the identification of "intent." Justice Scalia, however, has expressed considerable doubt about legislative intent in general and legislative history in particular.⁸⁵ In Justice Scalia's view, the role of the courts is to ascertain statutory meaning rather than legislative "intent." Moreover, Justice Scalia suggests that legislative history is frequently written by well-organized private groups, and much of it, especially the floor debates, reflects little, if any, general congressional will.⁸⁶ Judicial reliance on legislative history thus increases the power of interest groups over the interpretive process at the expense of Congress

⁸⁴ See, e.g., *Thompson v. Thompson*, 108 S. Ct. 513 (1988); cases cited *supra* note 83.

⁸⁵ See, e.g., *Green v. Bock Laundry Mach. Co.*, 109 S. Ct. 1981, 1994 (1989) (Scalia, J., concurring in the judgment); *United States v. Stuart*, 109 S. Ct. 1183, 1193-97 (1989) (Scalia, J., concurring in the judgment); *Blanchard v. Bergeron*, 109 S. Ct. 939, 946-47 (Scalia, J., concurring in part and concurring in the judgment); *United States v. Taylor*, 108 S. Ct. 2413, 2423-24 (1988) (Scalia, J., concurring in part); *Thompson*, 108 S. Ct. at 522-23 (Scalia, J., concurring in the judgment). Consider also the critical discussion of legislative intent in MacCallum, *Legislative Intent*, 75 YALE L.J. 754 (1966); and Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 866 (1930).

Justice Scalia's hostility to the use of legislative history derives in part from his characteristic but quite extraordinary antagonism to approaches that increase complexity in the law. A reliance on the text seems to have the comparative virtue of simplicity. For illustrations of Justice Scalia's hostility to complexity in a range of areas, see *Mistretta v. United States*, 109 S. Ct. 647, 675 (1989) (Scalia, J., dissenting) (criticizing the Court in part because of the complex character of the balancing test it adopts); *Morrison v. Olson*, 108 S. Ct. 2597, 2622-41 (1988) (Scalia, J., dissenting) (same); *Thompson*, 108 S. Ct. at 522-23 (Scalia, J., concurring in the judgment) (calling for a bright-line rule against implied causes of action); and *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 170 (1987) (Scalia, J., concurring in the judgment) (calling for the use of the state statute of limitations or no limitations period at all when the federal statute lacks an explicit limitations period).

⁸⁶ As a self-conscious example, consider these words:

Mr. Speaker, having received unanimous consent to extend my remarks in the RECORD, I would like to indicate that I am not really speaking these words. . . . As a matter of fact, I am back in my office typing this out on my own hot little typewriter Such is the pretense of the House that it would have been easy to just quietly include these remarks in the RECORD, issue a brave press release, and convince thousands of cheering constituents that I was in there fighting every step of the way, influencing the course of history in the heat of debate.

117 CONG. REC. 36506 (1971) (statement of Rep. Heckler).

itself. Above all, Justice Scalia argues, the legislative history was never enacted and is therefore not law.⁸⁷

Concerns of this sort are both legitimate and well-taken. Although it is proper to look at a statute's background in the form of actually enacted and repealed provisions, the legislative history, which was never enacted, should rarely be permitted to supplant the statutory words as they are ordinarily understood.⁸⁸ This is so because attention to the language promotes the rule of law and because of democratic and constitutional considerations — the words rather than the intent survived the procedures of article I. Moreover, such an approach might both discipline Congress, by forcing it to attend to its words, and minimize judicial discretion by barring judges from relying on policies and principles of their own. But Justice Scalia somewhat overstates the point.⁸⁹ The legislative history will sometimes reveal what some or many members of the Congress thought about the meaning of an ambiguous term, and that understanding is relevant. It is unlikely that the history will only reflect the views of self-interested private groups.⁹⁰ Moreover, legislative history provides a sense of the context and purpose of a statutory enactment, which, as we have seen, can provide important interpretive help.

Finally, and most fundamentally, it is not clear where judges are to look if they refuse to consider the legislative history. Without reference to the history, interpretation sometimes becomes far less bounded,⁹¹ and it is no surprise that those who reject intent and history tend to be textualists⁹² — a strategy that in hard cases will

⁸⁷ See, e.g., *Bock*, 109 S. Ct. at 1994 (Scalia, J., concurring in the judgment); *Stuart*, 109 S. Ct. at 1193-97 (Scalia, J., concurring in the judgment); *Blanchard*, 109 S. Ct. at 946-47 (Scalia, J., concurring in part and concurring in the judgment); *Taylor*, 108 S. Ct. at 2423-24 (Scalia, J., concurring in part).

⁸⁸ See, e.g., *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989).

⁸⁹ Cf. Farber & Frickey, *supra* note 23, at 423-25, 437-61 (criticizing Justice Scalia's rejection of the use of intent and legislative history); *The Role of Legislative History in Judicial Interpretation: A Discussion Between Judge Kenneth W. Starr and Judge Abner J. Mikva*, 1987 DUKE L.J. 367, 381-86 (Judge Mikva) (arguing that the use of legislative history is compelled by inherent ambiguities in many statutes).

⁹⁰ See Farber & Frickey, *supra* note 23, at 445-46 (suggesting that legislative history is more likely to reflect the views of congressional staff members than those of private interest groups). It is also possible to create a hierarchy within the sources of legislative history. Thus, for example, floor debates, which are often conducted before few legislators and sometimes are added after the fact, are entitled to less weight than a committee report. See Eskridge, *The New Textualism*, 37 U.C.L.A. L. REV. (forthcoming 1990).

⁹¹ The combination of textualism, disregard of legislative history, and the *Chevron* principle, see *infra* pp. 444-46, would produce a dramatic increase in the executive's power to make law. When the language is ambiguous, the executive's interpretation will control, even if the legislative history argues in the other direction. Consider in this regard Justice Scalia's general enthusiasm for executive power. See *Mistretta v. United States*, 109 S. Ct. 647, 680-83 (1989) (Scalia, J., dissenting); *Morrison v. Olson*, 108 S. Ct. 2597, 2622-41 (1988) (Scalia, J., dissenting).

⁹² As Justice Scalia often is. See sources cited *supra* note 23 (debating the merits of using

leave large gaps or produce mistakes. One might say all this without denying that Justice Scalia is saying something correct and important in cautioning courts not to accord weight to legislative history at the expense of statutory language, and in recognizing the risk that parts of the history may have been composed by one side or the other. In short, courts should approach legislative history cautiously.⁹³ Except in rare cases of unintended irrationality or injustice,⁹⁴ courts should not permit history to overcome statutory language; but they should also not ignore it, especially when the text is unclear.

For present purposes, the more fundamental point is that judicial reliance on legislative intent, whether or not derived on the basis of legislative history, suffers from three basic difficulties. The first is that Congress enacts statutes rather than its own views about what those statutes mean; those views, while relevant, are not controlling unless they are in the statute. The words, not the "intent," represent the law. The enactment, not the legislature's unenacted views, binds the public and the judges.⁹⁵

To say this is not to deny that the intentions of a group or majority of lawmakers will be pertinent and helpful. Legislative history has in fact provided a valuable sense of context in a number of recent cases.⁹⁶ If the legislators understood a statutory word as a term of

legislative history); Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (acknowledging his textualism while detailing the necessity of deferring to an agency's greater expertise and accountability). Justice Scalia has, notably, endorsed some canons of construction. See, e.g., *Green v. Bock Laundry Mach. Co.*, 109 S. Ct. 1981, 1994 (1989) (Scalia, J., concurring in the judgment) (advocating an interpretation "most compatible with the surrounding body of law into which the provision must be integrated — a compatibility which, by a benign fiction, we assume Congress always has in mind"); *Chan v. Korean Air Lines*, 109 S. Ct. 1676, 1683–84 & n.5 (1989) (invoking the *expressio unius* canon); *Coit Independence Joint Venture v. FSLIC*, 109 S. Ct. 1361, 1377 (1989) (Scalia, J., concurring in the judgment) (advocating a presumption against preemption of state law); *Pierce v. Underwood*, 108 S. Ct. 2541, 2547–49 (1988) (arguing that lower court interpretations should be presumed valid); *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 453–54 (1987) (Scalia, J., concurring in the judgment) (arguing for deference to agency interpretations of law).

⁹³ For a vivid illustration of why courts ought to do this, see B. ACKERMAN & W. HASSLER, cited above in note 23, at 48–54, 108–109 (revealing the power of the eastern coal lobby to obtain legislative history, but not statutory text, in its favor).

⁹⁴ See, e.g., *Bock*, 109 S. Ct. 1981 (discussed below in note 96); cases cited *supra* note 44.

⁹⁵ "We do not inquire what the legislature meant; we ask only what the statute means." Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899); see also *Thompson v. Thompson*, 108 S. Ct. 513, 522–23 (1988) (Scalia, J., concurring) (arguing that the Court should refuse to infer federal private rights of action in the absence of express legislation).

⁹⁶ The Department of Justice's Office of Legal Policy vigorously argues in favor of actual rather than intended meaning, *see USING AND MISUSING LEGISLATIVE HISTORY*, *supra* note 52, at 21–26. The argument, however, understates the usefulness of intended meaning in clearing up ambiguities, correcting unintended absurdities, and avoiding irrationality.

In *Bock*, 109 S. Ct. 1981, for example, all the members of the Court refused to read the relevant text literally, and all agreed that the legislative history helped to reveal that literalism

art, that understanding should prevail; courts should attend to the intended meaning rather than the usual meaning of the words if the former is clear and the latter would produce absurdity. Moreover, an undisputed congressional intent should ordinarily be followed in the event of linguistic ambiguity.⁹⁷ But the subjective intentions, even if ascertainable, are not controlling unless enacted.⁹⁸

would lead to inadvertent absurdity. The case involved the meaning of rule 609(a)(1) of the Federal Rules of Evidence, which allows the introduction of prior crimes of a witness, for purposes of attacking credibility, when "the probative value of admitting this evidence outweighs its prejudicial effect to the defendant." FED. R. EVID. 609(a)(1). All nine members of the Court agreed that rule 609 could not plausibly mean that evidence would be automatically introduced against civil plaintiffs, but not against civil defendants. The legislative history revealed that such an interpretation was unintended — for no one, at any point in the background and history of the rules, ever proposed or assumed a distinction between the rights of civil plaintiffs and those of civil defendants. Indeed, even Justice Scalia acknowledged the usefulness of history here: "I think it entirely appropriate to consult all public materials, including . . . the legislative history . . . to verify that what seems to us an unthinkable disposition . . . was indeed unthought of, and thus to justify a departure from the ordinary meaning of the word 'defendant' in the Rule." *Bock*, 109 S. Ct. at 1994 (Scalia, J., concurring in the judgment).

Legislative history can also help the courts to avoid irrationality while vindicating congressional will in the face of ambiguity. In *Public Citizen v. United States Department of Justice*, 109 S. Ct. 2558 (1989), the Court faced the question whether the Federal Advisory Committee Act, 5 U.S.C. App. §§ 1–15 (1982 & Supp. V), which imposes detailed requirements for openness, publicity, and balance in membership of federal advisory committees, applied to the consultations of the American Bar Association's Standing Committee on Federal Judiciary. That committee consults with the President regarding potential nominees for federal judgeships. The Court acknowledged that the Act's language, which defined an advisory committee as one "utilized by" the Executive, appeared to apply to the ABA committee. But use of a dictionary definition of "utilize" would be absurd because it would make the Act apply even to presidential decisions to consult with his own political party before selecting his Cabinet. The Court instead examined the legislative history, which strongly suggested that the ABA committee — a private group not established by the federal government and not receiving federal funds — did not fall within the category of advisory entities that Congress wanted to control. See *Public Citizen*, 109 S. Ct. at 2567–73. See also *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 432–43 (1987) (finding that asylum could be granted to aliens reasonably fearing persecution, in part because the legislative history demonstrated that Congress did not intend a more demanding standard).

⁹⁷ The intent should also control in the event of inadvertent error. For an example, see the inadvertent insertion of the word "not" in a bill revising the boundaries of the Olympic Park and the Olympic National Forest. The statute says that the Secretary of Agriculture must design and construct a forest logging road, but also provides that the Secretary "shall not construct the road as close as practically possible to the park boundary but not more than five hundred feet east of the divide." Pub. L. No. 99-635, § 2(a), 100 Stat. 3527, 3528 (1986) (emphasis added).

⁹⁸ See R. DWORKIN, *supra* note 19, at 313–54. Dworkin rejects the use of subjective intention to resolve ambiguities in favor of a principle that would call on courts to use "the best principle" that justifies "what the legislature has done." This position is discussed in more detail at p. 436 below. For present purposes, it is sufficient to say that Dworkin almost entirely ignores the risks of judicial error, venality, or confusion in generating "the best principle"; in light of those risks, presumptive reliance on subjective intentions in the face of ambiguity or irrationality seems desirable from the standpoint of democratic theory.

The second set of problems is that legislative intent, like legislative purpose, is largely a fiction in hard cases — a problem aggravated by the extraordinary difficulties of aggregating the “intentions” of a multimember body. With or without these problems, there are risks of ambiguity, overinclusiveness, and underinclusiveness in relying on legislative intent, just as there are in relying on text and purpose.

The third problem is that Congress may have enacted a concept capable of change over time. Those who emphasize legislative intent sometimes say that interpreters should attempt to “go back” to the beliefs and hopes of the enacting legislature to see how it would decide the question had it been presented.⁹⁹ It is unclear that this “imaginative reconstruction” approach is either consistent with Congress’ interpretive instructions or a sensible way of ascertaining the meaning of statutory terms. In the face of changed circumstances, perhaps the better route would be to imagine that the enacting legislature could be “brought forward” into the present and then to ask how it would decide the question in light of new developments of law, fact, and policy.¹⁰⁰

⁹⁹ This was Learned Hand’s view. See *Borrella v. Borden Co.*, 145 F.2d 63, 64 (2d. Cir. 1944), *aff’d*, 325 U.S. 679 (1945); L. HAND, *How Far Is a Judge Free in Rendering a Decision?*, in THE SPIRIT OF LIBERTY 106–09 (I. Dilliard 3d ed. 1960). Judge Posner recently suggested: “The judge’s job is not to keep a statute up to date in the sense of making it reflect contemporary values, but to imagine as best he can how the legislators who enacted the statute would have wanted it applied to situations they did not foresee.” R. POSNER, *supra* note 10, at 287; *see generally id.* at 286–93.

This approach suffers from three difficulties in addition to those identified in the text. First, in hard cases, this advice is open-ended, and perhaps contradictory. The legislature may have intended that the statute not contradict contemporary values when applied to unforeseen situations. Second, an entirely backward-looking approach of this sort may lead to a less sensible system of law than would alternative approaches, because it would perpetuate anachronistic views. Finally, background norms of interpretation play an inevitable part in the process, and those norms cannot readily be captured in the notion of imaginative reconstruction.

¹⁰⁰ As Justice Holmes commented:

[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago.

Missouri v. Holland, 252 U.S. 416, 433 (1920).

There is a significant difference between backward-looking and forward-looking interpretation. Consider, for example, *Bob Jones University v. United States*, 461 U.S. 574 (1983), in which the Court was asked to decide whether a public policy exception to the charitable deduction required the Internal Revenue Service to deny tax deductions to schools that discriminated on the basis of race. There is no doubt that if that question had been put to the Congress that initially enacted the relevant provision of the Code, it would have answered that there was no such requirement. But if the enacting Congress were brought forward to the present — to be sure, a difficult conceptual exercise — it would probably have concluded that the deduction was impermissible in light of its inconsistency with recent law and policy proscribing and penalizing private racial discrimination.

When circumstances have changed, backward-looking interpretation may produce absurd results, and often it is fully plausible to think that members of the enacting legislature intended the meaning of the statute not to be controlled by its original understanding. In such cases — signaled most obviously by open-ended terms capable of change over time — it should be relatively uncontroversial for courts to depart from original meaning; here meaning obviously shifts with circumstances. More generally, the legislature will often have had no considered view on the question of backward-looking or forward-looking interpretation. In these circumstances, reliance on intent will lead to intractable problems. Something other than intent must be the basis for decision.¹⁰¹

For all of these reasons, the notion of legislative intent is at best an incomplete guide to statutory construction. If the legislative intent is ascertainable, it should be used to resolve otherwise doubtful questions about statutory meaning. Nevertheless, difficult questions will often remain.

* * *

In sum, the traditional contextual approaches can help remedy some of the problems with reliance on text "alone." But sometimes structure, purpose, intent, and history will leave gaps or ambiguities, and reliance on purpose, intent, and history may lead to interpretive mistakes. Although it would be foolish to dispense with these tools, they cannot generate a workable approach to interpretation without considerable supplementation.

3. *Legal Process.* — Some of those who stress the importance of background and context acknowledge that in some cases, a reliance on these sources will be inadequate. Thus the celebrated treatment by Hart and Sacks in *The Legal Process*¹⁰² suggests that to solve hard cases, the court "should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably."¹⁰³ In a similar vein, Karl Llewellyn counseled courts to "strive to make sense *as a whole* out of our law *as a whole*."¹⁰⁴

Legal process approaches stand poised somewhere between agency theories of the judicial role and understandings of an altogether dif-

¹⁰¹ See *supra* note 100; see also Aleinikoff, *supra* note 64 (advocating interpretation that departs from original meaning in the face of changed circumstances).

¹⁰² H. HART & A. SACKS, *supra* note 15.

¹⁰³ *Id.* at 1415.

¹⁰⁴ Llewellyn, *supra* note 19, at 399 (emphasis in original). Many of the most astute writers on statutory interpretation spoke very much in these terms. See, e.g., Freund, *supra* note 44, at 231; Radin, *supra* note 85, at 884.

ferent sort. On the one hand, some such approaches (particularly that of Hart and Sacks) are designed to implement legislative commands by counseling courts to replicate the judgment the legislature would have made.¹⁰⁵ On the other hand, some such approaches are designed to produce "reason" or "rationality" in statutes, quite apart from any actual or hypothetical judgment by the legislature.¹⁰⁶ In either case, the legal process reference to "reasonableness" or "sense" points to the context of the statute's application rather than to its background and development.

For those who endorse the agency model, the first problem with such approaches is that they appear to be based on poor understandings of the actual nature of the legislative process.¹⁰⁷ Hart and Sacks, for example, dealt inadequately with the role of interest groups in determining the content of statutes — an unsurprising omission in light of the fact that most of the relevant literature has emerged in the last generation. The view that courts should treat statutes as if they promoted reasonable purposes in a reasonable way is an attractive one — indeed, it plays a central role in this Article. But this claim is normative, not descriptive. The task of imposing reason on regulatory legislation is sometimes inconsistent with the legislation itself, and it takes courts far from the role of faithful agents of the legislature.

More fundamentally, the suggestion that courts should attempt to "make sense" of regulatory statutes or to treat them as would "reasonable people acting reasonably" is a conspicuous outgrowth of 1950's jurisprudence, when the "end of ideology" thesis played such a large role in political science and the study of law.¹⁰⁸ Advice of this sort is useful only when there is a consensus or a defense of particularized judgments about what approach "makes sense" or is "reasonable." In many interpretive disputes, however, such guidance is too open-ended to be helpful. Without much more, a reference to "sense" cannot determine whether the Occupational Safety and Health Act (OSHA) requires the agency to undertake cost-benefit analyses, or whether the Civil Rights Act of 1964 outlaws race-conscious programs designed to increase the representation of blacks. A recognition of this point has

¹⁰⁵ See H. HART & A. SACKS, *supra* note 15, at 1414.

¹⁰⁶ This is true of Llewellyn, who calls for an active, synthetic role for the courts; it is also true of Freund and Radin. See sources cited *supra* note 104.

¹⁰⁷ See sources cited *supra* note 70 (discussing the public choice analysis of the congressional process); see also pp. 446-47.

¹⁰⁸ See generally D. BELL, *THE END OF IDEOLOGY: ON THE EXHAUSTION OF POLITICAL IDEAS IN THE FIFTIES* (1960) (describing the "end of ideology" in America as a result of political and social changes); Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 765-66 (1987) (associating the decline of the autonomy and authority of purely legal inquiry with the demise of the political consensus of the 1950's).

led many to return to the text — an understandable but unsuccessful strategy.

The same problems underlie Ronald Dworkin's influential treatment of this subject.¹⁰⁹ Dworkin argues that courts should interpret statutes in accordance with the best principle that can be brought forward in support of what the legislature "has done." In Dworkin's view, the judge should see himself as "a partner continuing to develop, in what he believes is the best way, the statutory scheme Congress began."¹¹⁰ The judge should ask "what coherent system of political convictions would best justify what [the legislature] has done,"¹¹¹ and should find and apply to disputed issues of interpretation "the best justification . . . of a past legislative event."¹¹²

This position is a clear heir to the legal process position — above all, in its emphasis on the use of judicial interpretation to produce reasonable results, to guard against arbitrariness, and to produce coherence in the legal system. As did its legal process predecessors, Dworkin's approach sees the courts partly as agents (hence the emphasis on "what the legislature has done") and partly as creative actors relying on normative theories of their own. In a number of respects, Dworkin's approach fits congenially with what I suggest here: it, too, insists on judicial efforts to promote a principled rather than ad hoc set of legal requirements and to foster what Dworkin calls "integrity," sometimes in the face of legislative "intent" or the actual character of the legislative process.¹¹³

Dworkin's approach is marred, however, by the open-ended character of its guiding interpretive principle — a failing that provides the final link between Dworkin's effort and that of the legal process school. The dangers of judicial discretion in searching for and giving content to "the best principle" are largely unaddressed. Dworkin fails to explore the institutional background, or the substantive functions and failures of statutory regimes. The characteristics of the modern regulatory state are entirely invisible in Dworkin's treatment. Dworkin's account draws far too sharp a dichotomy between "the best principle" — found through tools external (to what extent?) to the disputed provision or the prevailing legal culture — and "what the legislature has done," with the latter sometimes treated as if it were a kind of brute fact.¹¹⁴

¹⁰⁹ See R. DWORKIN, *supra* note 19, at 313-54.

¹¹⁰ *Id.* at 313.

¹¹¹ *Id.* at 335.

¹¹² *Id.* at 338.

¹¹³ Indeed, the notion of "integrity" bears some resemblance to the goals of statutory construction described in Part IV.

¹¹⁴ By contrast, the approach of this Article charges the judge neither with invoking an external "best principle" nor with assessing, as if it were a datum, something the legislature "has

For this reason — and this is the central problem — Dworkin's effort to find the principle that best justifies what the legislature has done is largely untethered. An emphasis on text, history, or intention seems a most appealing refuge from a general inquiry of that sort. In particular, reliance on the text seems to have a far better democratic pedigree and to hold far more promise for limiting judicial discretion.

4. The Proper Role of Traditional Sources of Meaning and the Failure of the Agency View. — The discussion thus far suggests several conclusions about the use of traditional tools of statutory construction. The text, understood in its context and in concert with shared background norms, is usually sufficient to resolve interpretive disputes. Sometimes, however, the text is ambiguous or reveals a delegation or gap. Moreover, the ordinary meaning of the text should not be decisive when the statutory structure or purpose (if subject to an uncontroversial characterization) suggests an alternative meaning, and when a literal interpretation would produce a patently unjust or irrational application that was not clearly sought by the legislature. Similarly, the legislative "intent" — as reflected in the legislative history — is admissible to resolve ambiguities, but it usually should not be permitted to overcome the ordinary meaning of the statutory words if that meaning is otherwise clear. The only exception is when the history supports the conclusion that literalism would produce unintended irrationality or injustice.¹¹⁵ In some cases, however, all of these sources of statutory meaning will leave serious gaps or uncertainties, and sometimes interpretive principles are properly invoked to press language in particular directions.

As complete theories of statutory construction, then, the most prominent examples of the agency view of the judicial role appear to fail; it is time to consider the implications of that failure.¹¹⁶ The agency view starts from the important truth that it would be improper for judges to construe statutes to mean whatever the judges think best; the lawmaking primacy of the legislature, with its superior democratic pedigree,¹¹⁷ prohibits such a conception of statutory "interpretation." It follows from this understanding that where there is neither interpretive doubt nor constitutional objection, the judgment of the electorally accountable branch should prevail.

done." The interpreter's understanding of what the legislature has done and the interpreter's own principles are a product of background norms; the two cannot be separated.

¹¹⁵ See, e.g., *Green v. Bock Laundry Mach. Co.*, 109 S. Ct. 1981 (1989).

¹¹⁶ In fact, it is doubtful that any judge subscribes to the view that the agency theory is a complete one. The theory operates largely as a rhetorical device or a rallying cry, and as such, it is useful in disciplining judges but also highly misleading.

¹¹⁷ Both disparities in political influence and the difficulties described by Arrow, see K. ARROW, *supra* note 15, make it necessary to be cautious about this point. See generally *infra* note 148 (describing difficulties with attributing purpose to multimember legislative bodies).

The agency theory requires that judges exercise minimal discretion and avoid inquiries into the constitutional backdrop, appropriate institutional arrangements, statutory function, or larger social goals. Instead, the judge must be largely a functionary performing a mechanical process. This is, at bottom, a formalist position — formalist because it sees the process as entirely autonomous and free from value-laden inquiries. Formalism and the agency view are entirely unobjectionable insofar as they recognize an important distinction — itself value-laden to be sure — between the relatively constrained operation of adjudicating statutory questions (“interpretation”) and the relatively open-ended process of legislating. But like all formalist positions, the agency view of statutory interpretation is subject to two sorts of objections.

First, the agency conception of “meaning” is too crude. As we have seen, language is not self-interpreting, and sometimes legislators delegate, self-consciously or otherwise, gap-filling power to the courts. Moreover, the instructions of the principal are unintelligible without background norms that interpreters alone can supply. Usually such norms are uncontested within the legal culture, and therefore it is sufficient to rely on the generally accepted meanings of words. In such cases, the incompleteness of formalism is not troublesome for interpretive practice, and the uncontested meanings should ordinarily be given their full scope. In other cases, courts must resort to contestable or conspicuous interpretive principles, or gap-filling devices, in order to decide the question of meaning. It is important to emphasize that this is a conceptual or logical claim, not a proposition about the appropriate distribution of powers among administrative agencies, courts, and legislatures. It depends not at all on a belief in the wisdom and decency of the judges. To recognize the need for interpretive norms when Congress has not enacted them is not to confer on courts power that they do not already, and necessarily, have.

Second, the broad legitimacy claims of the agency theory rely on question-begging and probably indefensible premises. For such claims to be persuasive, those who invoke the agency theory¹¹⁸ must claim that a formalist approach to construction — again, to the (limited) extent that it is possible — is constitutionally compelled, or (what may amount to much the same thing) will lead on balance to the best or most sensible system of law.¹¹⁹ This latter claim must be under-

¹¹⁸ See sources cited *supra* notes 25 & 29.

¹¹⁹ For examples of such claims, see *Public Citizen v. United States Dep't of Justice*, 109 S. Ct. 2558, 2573–74 (1989) (Kennedy, J., concurring in the judgment); *Green v. Bock Laundry Mach. Co.*, 109 S. Ct. 1981, 1994 (1989) (Scalia, J., concurring in the judgment); and Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988).

stood as a belief that the ordinary or original meaning of statutory words must control, even if it would lead to absurd or unjust results. But it is far more likely that the occasional introduction of other considerations will lead to a superior system.

For example, assume that statutory language, while ambiguous, is most naturally read to lead in a direction that is, by consensus, irrational; that a statute might be understood as giving open-ended authority to a bureaucracy; that the most obvious reading of a statute provides bizarre or unjust results in light of changes in the fifty years since its enactment. We will encounter many such cases below. In all of these settings, courts that act as more than mere agents and that invoke contestable background norms will produce a more sensible system of law. Indeed, sometimes such a role will be consistent with the best reading of Congress' interpretive instructions, or will be the best understanding to attribute to Congress when it has made no considered judgment on the point. For this reason, courts should be authorized to depart from the ordinary or original meaning and to press ambiguous words in particular directions if the context suggests that this would lead to superior outcomes.¹²⁰

Of course, there are risks in admitting power of this sort, largely in the form of increased judicial discretion. For this reason, invocation of controversial background norms should be modest. Although no decisive argument is available to demonstrate why and to what extent the recognition of such authority will make matters better rather than worse, it is possible to point to institutional characteristics of the judiciary that occasionally justify what might seem an aggressive role in interpretation.

First, the focus on the particular circumstances enables judges to deal with applications that no legislature, no matter how farsighted, could conceivably have foreseen. Under changed or unforeseen circumstances, mechanical application of statutory terms is unlikely to produce sound results, even from the standpoint of the enacting legislature. By contrast, judicial resolution of individual cases, allowing an emphasis on particular settings with which a lawmaker could not be familiar, contains significant advantages for interpretation.¹²¹

¹²⁰ In civil law systems, this point is conventional, and a judicial role of this sort is fully consistent with legal practice throughout this country's history, even before nationhood. See Zweigert & Puttfarken, *Statutory Interpretation — Civilian Style*, 44 TUL. L. REV. 704, 707–08 (1970); *infra* note 124. Something like it was suggested by Alexander Hamilton himself. See *infra* note 123. It is one thing to say that courts must defer to the lawmaking primacy of the legislature; it is quite another thing to say that this principle implies a theory barring courts from interpreting statutes with the aid of sometimes controversial background norms. In light of the relevant history, the view that the Constitution carries with it this quite novel theory of interpretation is hard to sustain.

¹²¹ Consider Wittgenstein's game with dice, discussed above at p. 419; consider also the cases

Second, because of their independence and their deliberative capacities, courts have significant advantages over a legislature that may be influenced by parochial interests and is frequently responsive to momentary demands.¹²² Considerations of this sort were emphasized in *The Federalist*, quite outside of the context of constitutional review.¹²³ Those considerations support a relatively aggressive role for the courts in statutory interpretation, one that sees judges as something other than agents. That position is consistent as well with historical practice.¹²⁴

It would of course be possible to use contestable principles modestly or quite aggressively, and courts have occasionally used interpretive norms to construe statutes in ways that are plainly inconsistent with the outcome that would be reached through reliance on text, structure, purpose, and ordinary understandings of linguistic commands.¹²⁵ As a general rule, however, courts should use controversial background norms sparingly, in deference to the basic principle of democratic primacy. But in some situations — for example, when conventional interpretation would produce absurdity or gross injustice, when changed circumstances call for creativity, when constitutional considerations counsel courts to interpret statutes in one direction —

involving interpretation of the Occupational Safety and Health Act and the Delaney Clause. See *infra* pp. 489–93, 496–97.

¹²² Public choice theory shows that legislation imperfectly reflects the desires of the “public” and indeed that the concept of a public will is a confused one. See, e.g., K. ARROW, *supra* note 15; see also sources cited *infra* note 148 (discussing the economic theory of legislation).

¹²³ In *The Federalist* No. 78, Hamilton wrote:

But it is not with a view to infractions of the constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humours in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity, and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled by the very motives of the injustice they meditate, to qualify their attempts.

THE FEDERALIST No. 78, at 528 (A. Hamilton) (J. Cooke ed. 1961); cf. R. POSNER, SOME PROBLEMS IN JURISPRUDENCE (forthcoming 1990) (discussing how interpretation “civilizes” statutes).

¹²⁴ Consider, for example, the central role that canons of construction have played in statutory interpretation throughout the history of Anglo-American law. See 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *87–*92 (discussing statutory interpretation in a nonformalist way, with principles of construction); E. BEAL, CARDINAL RULES OF LEGAL INTERPRETATION (A. Randall ed. 1924) (same); T. MCLEOD, PRINCIPLES OF STATUTORY INTERPRETATION (1984) (same); Eskridge, *supra* note 21, at 1010–11 (same); Landis, *supra* note 12, at 222–23 (same); Pound, *Common Law and Legislation*, *supra* note 4, at 385–86 (same); see also T. PLUCKNETT, STATUTES AND THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY (1922) (discussing various interpretive principles of the fourteenth century).

¹²⁵ See *infra* p. 465.

courts should be more aggressive in statutory interpretation. In the abstract, these observations make it difficult to decide to what extent departures from the agency model are appropriate. The discussion in Part IV is designed to provide a more concrete understanding of the problem.

B. Indeterminacy? Conventionalism?

The problems with textualism and with the agency view lead some to conclude that statutory interpretation produces unpredictability and indeterminacy in most or all cases.¹²⁶ Noting that interpretation is possible only within the context of interpretive conventions,¹²⁷ others argue that it is not possible to change, debate, or even theorize about interpretation. One just does it.

Those who accept conventionalism differ from those who believe that statutory meaning produces indeterminacy. For conventionalists, meaning is hardly open-ended. But the two camps have much in common. Both reject the possibility of criteria with which to distinguish between good and bad interpretations, or to mediate disputes over meaning. In both accounts, words have the meanings that they do simply because people in positions of authority so interpret them. On this point, both accounts are inadequate.

r. Indeterminacy. — It is not always clear whether the claims of indeterminacy are meant to be normative or positive. According to the normative version, there are no correct answers to questions of statutory interpretation, but instead merely subjective (and perhaps arbitrary) opinions.¹²⁸ In contrast, the positive version has it that judicial decisions cannot be predicted in advance, even if there are criteria by which reasonable people might mediate among interpretive disputes.

Whether normative or positive, the claim that statutory meaning is "indeterminate" is wildly overstated. Claims about the inevitable indeterminacy of interpretation usually suffer from a failure to take account of the contextual character of linguistic commands. Communication is possible only because of agreement over the governing

¹²⁶ See J. FRANK, LAW AND THE MODERN MIND 190–92 (1930); see also R. UNGER, *supra* note 17, at 94–98 (arguing that a coherent theory of legal adjudication is not possible on the premises of liberal thought).

¹²⁷ See S. FISH, DOING WHAT COMES NATURALLY, *supra* note 18, at 357–58; S. FISH, IS THERE A TEXT IN THIS CLASS?, *supra* note 18, at 13–15, 331–32. Compare the conventionalist position with Holmes' claim that law consists of "what the courts will do in fact, and nothing more," Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) — a claim that is unhelpful for a judge trying to decide what to "do in fact."

¹²⁸ But cf. S. FISH, IS THERE A TEXT IN THIS CLASS?, *supra* note 18, at 268 (arguing that, in interpretation, there are obvious and inescapable meanings resulting from shared interpretive assumptions).

rules; these rules enable people to understand each other, and they sharply limit the number of possible interpretations.¹²⁹ When taken in their setting — in their context and culture — statutes are usually susceptible to only one plausible meaning. Judicial interpretation of statutes is therefore quite predictable, largely because background norms are uncontested among the judges. Even where background norms are in conflict, it is often possible to know how the case will come out, or at least to limit the number of possible outcomes, because one can predict which norms will govern in the circumstances. For this reason, the claim of indeterminacy, if taken as a positive one, is implausible.

It is possible to show as well that some interpretations are correct.¹³⁰ This is most obviously true in easy cases, in which there is no controversy over the meaning of text in light of background norms; but it is true in hard cases as well — a point to which I return below. To make the unsurprising point that the choice among interpretive strategies or background norms implicates a value judgment is hardly to say that the choice is arbitrary. The existence of judgments of value leads to a conclusion of arbitrariness only for the most incorrigible of positivists. Moreover, the fact that someone might argue that a statute does not mean what it appears to say, or might characterize the legislative purpose in a counterintuitive way, does not mean that such arguments are convincing or even plausible. Nor does the existence of some hard cases mean that all cases are hard. The ultimate task is to develop criteria by which to mediate among conflicting value judgments in concrete cases, including hard ones — a task taken up in Part IV.

2. *Conventionalism.* — These points help to identify the flaws in conventionalist accounts of legal interpretation. It is correct and salutary to emphasize, as conventionalists do, that interpretive assumptions are always in force, and that texts do not have “inherent” or “necessary” meanings in the strong sense that those meanings remain constant across different contexts and cultures. Moreover, some words simply mean what they mean; they are not a subject of reflection and criticism to someone who speaks the language.¹³¹ But these claims — attacks on implausible versions of textualism or formalism — provide little help in the descriptive or normative tasks of interpre-

¹²⁹ See Easterbrook, *supra* note 13, at 533 n.2 (discussing Wittgenstein’s contention that “meaning” is supplied by the community).

¹³⁰ The criteria for correctness here are intended to be pragmatic in character. See R. POSNER, *supra* note 123; Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1554–55 (1988). In so saying, I do not mean to take a side in the debate between realists and skeptics about foundations for right answers in the law or speculate on the possibility that a resort to interpretation will make that debate unnecessary. See generally Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871 (1989).

¹³¹ Compare S. FISH, DOING WHAT COMES NATURALLY, *supra* note 18, at 358–59 with note 24, *supra*.

tation. They do not explain how conflicts within a group of interpreters should be, or in fact are, resolved. Above all, they do not suggest that participants in the legal culture should rest content with existing interpretive strategies, or that it is impossible to evaluate those strategies or proposed alternatives. Interpreters in fact choose among strategies on the basis of the reasons offered on their behalf. To claim that meaning is only a function of culture is to give up on the important questions altogether.

Moreover, the conventionalist suggestion that interpretive norms themselves need interpretation¹³² hardly suggests that there are no criteria for assessing particular norms, or that people are unable to explain why some such norms would make things worse rather than better.¹³³ In short, the conventionalist account is both too crude and too flat. It treats interpreters as always the objects or recipients, and never the subjects or creators, of interpretive practice. It fails to account for the related phenomena of choice among interpretive strategies and of change over time.

C. Extratextual Norms

In recent years, courts and commentators have proposed three theories of statutory construction that rely on extratextual norms. The first involves a background rule in favor of private ordering; the second calls for a rule of deference to regulatory agencies; the third refers to the difficulties in aggregating diverse legislative views and the notion that statutes represent "deals" among self-interested actors. Each of these approaches suffers from significant flaws.

1. *Private Ordering.* — On one view, the constitutional system leaves citizens free to conduct their affairs without governmental interference, and that basic principle requires courts to interpret statutes to extend only as far as their explicit language and history require.¹³⁴ For example, courts should not recognize implied causes of action, since statutes ought not be taken to intrude on private autonomy except to the extent that they do so unambiguously.¹³⁵ An interpretive principle of this sort would have enormous consequences for statutory interpretation; it would limit statutes in all areas of social and economic regulation, from discrimination law to pollution control to securities fraud. In short, the private ordering norm requires that statutes with gaps or ambiguities be interpreted unfavorably towards their intended beneficiaries.

¹³² See S. FISH, DOING WHAT COMES NATURALLY, *supra* note 18, at 120–21.

¹³³ See, e.g., West, *Adjudication Is Not Interpretation: Some Reservations About the Law-As-Literature Movement*, 54 TENN. L. REV. 203, 253–57 (1987).

¹³⁴ See Easterbrook, *supra* note 13, at 549–50.

¹³⁵ See sources cited *supra* note 38.

The presumption in favor of private ordering is merely the most recent incarnation of the view, set out in the early twentieth century and before, that statutes in derogation of the common law should be read against a laissez-faire baseline and narrowly construed.¹³⁶ In some legal systems, and in some contexts, such a presumption would be desirable; and the presumption is always sound insofar as it recognizes that where Congress has neither legislated nor left a gap for interpreters to fill, no law constrains private behavior. In the wake of the New Deal, however, a broad interpretive norm in favor of private ordering can no longer be sustained. This is so partly because the post-New Deal system is generally superior to its common law predecessor insofar as it recognizes that private autonomy is a product of legal controls and that modern regulation often promotes both economic welfare and distributive justice.¹³⁷ The more fundamental problem with the broad presumption in favor of private autonomy is its inconsistency with the values that underlie modern government. Such a presumption would invoke understandings repudiated by the democratic branches of government in order, ironically, to discern the reach of statutes enacted and administered by those very branches. It would be highly undemocratic, and indeed presumptuous, for courts to invoke laissez-faire principles in support of such a judicial role. Gaps should not be filled in, and ambiguities should not be resolved, by reference to norms that run counter to those of the enacting Congress in particular and the modern regulatory state in general.

2. *Deference to Agency Interpretations of Law.*¹³⁸ — Another view, finding considerable support in recent cases, maintains that courts should defer to agency interpretations of law whenever the statute is ambiguous. Because of their superior accountability, expertise, and ability to coordinate complex enactments, agencies should be given the benefit of every doubt. Unlike the private ordering principle, this view has roots in the New Deal period, with that era's endorsement of administrative autonomy; and it places a strong emphasis on the

¹³⁶ See *supra* pp. 407–08. This basic approach to regulatory statutes operated as the statutory analogue to the constitutional principle in *Lochner v. New York*, 198 U.S. 45 (1905), in which the Court treated certain statutory measures as impermissible deviations from the "neutral" principles reflected in the common law. Both principles were properly rejected. They used a highly controversial set of regulatory ideas, embodied in nineteenth-century common law, as the baseline against which to decide the scope of innovations developed by the democratic branches in a conscious rejection of the common law. The legal realists — important forces behind the New Deal reformation — argued that governmental power lay behind common law rules, which could not, therefore, be treated as merely facilitative of private desires; they played a constitutive role as well. See Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

¹³⁷ See C. SUNSTEIN, *supra* note *, chs. 1–2.

¹³⁸ The discussion in the following paragraphs draws from Sunstein, *supra* note 9, at 437–46.

displacement of judicial lawmaking represented by the creation of regulatory schemes. Thus, in the exceptionally important *Chevron* case,¹³⁹ the Supreme Court said that courts should defer to agency interpretations of law unless "Congress has directly spoken to the precise question at issue."¹⁴⁰

Even if read for all that it is worth, the *Chevron* position would not resolve every disputed statutory question. Threshold interpretive questions must be asked and answered even under *Chevron*. For example, courts have to rely on some methodology that is independent of the rule of deference to decide when statutes are ambiguous. The rule of deference would, however, have significant consequences, because it would remit all uncertain cases to regulatory agencies for administrative resolution. Moreover, such a rule is quite appealing,¹⁴¹ especially when Congress has delegated law-interpreting power to the agency or when the question involves the agency's specialized fact-finding and policymaking competence, as do "mixed" issues of law and fact.

For several reasons, however, a general rule of judicial deference to all agency interpretations of law would be unsound. The case for deference depends in the first instance on congressional instructions.¹⁴² If Congress has told courts to defer to agency interpretations, courts must do so. But many regulatory statutes were born out of legislative distrust for agency discretion; they represent an effort to limit administrative authority through clear legislative specifications.¹⁴³ A rule of deference in the face of ambiguity would be inconsistent with understandings, endorsed by Congress, of the considerable risks posed by administrative discretion.¹⁴⁴ An ambiguity is simply not a delegation of law-interpreting power. *Chevron* confuses the two.

¹³⁹ *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984); see also *NLRB v. United Food & Commercial Workers Union, Local 23*, 108 S. Ct. 413, 421 (1987) (advocating deference to administrative interpretation in the absence of an unambiguous statutory command).

¹⁴⁰ *Chevron*, 467 U.S. at 842. But see *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987) (arguing that courts should not defer to agency interpretations on pure questions of law but only on mixed questions of law and fact).

¹⁴¹ See, e.g., Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549 (1985); Scalia, *Judicial Deference to Administrative Interpretations of Law*, *supra* note 92; Strauss, *One Hundred and Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1117-29 (1987). The *Chevron* approach might enable agencies to apply rigid measures in a way that takes account of difficulties in applications to concrete settings; facilitate coordination and consistency in the regulatory process; counteract the effects of obsolete statutes; and promote accountability by considering the different views of different administrations.

¹⁴² See Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 25-28 (1983).

¹⁴³ See Vogel, *supra* note 8, at 172.

¹⁴⁴ On those risks, see J. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE*

Second, the notion that administrators may interpret statutes that they administer is inconsistent with separation of powers principles that date back to the early days of the American republic¹⁴⁵ and that retain considerable vitality today.¹⁴⁶ The basic case for judicial review depends on the proposition that foxes should not guard henhouses. It would be most peculiar, for example, to argue that courts should defer to congressional or state interpretations of constitutional provisions whenever there is ambiguity in the constitutional text. Those who are limited by a legal restriction should not be permitted to determine the nature of the limitation, or to decide its scope. The relationship of the Constitution to Congress parallels the relationship of governing statutes to agencies. In both contexts, an independent arbiter should determine the nature of the limitation.

This basic principle assumes special importance in light of the awkward constitutional position of the administrative agency. Broad delegations of power to regulatory agencies have been allowed largely on the assumption that courts would be available to ensure agency fidelity to whatever statutory directives have been issued.¹⁴⁷ If agencies are able to decide on the meaning of ambiguities in these directives, the nondelegation problem grows dramatically. A firm judicial hand in the interpretation of statutes is thus desirable.

The point can be made more vivid by imagining cases involving such questions as whether agency action is reviewable; whether agencies may issue fines; whether agency jurisdiction extends to new or unforeseen areas. In all of these cases, it would be peculiar to say that the agency is permitted to decide the meaning of a law whose scope is so directly relevant to agency self-interest. In short, a general rule of deference to agency interpretations of law would be inconsistent with the best reading of Congress' interpretive instructions, with the constitutional backdrop, and with the goal of promoting sound regulatory policy.

3. *Public Choice Theory and "Deals."* — A number of commentators have recently attempted to find guidance for statutory interpretation in welfare economics and public choice theory. Two claims are crucial here — the first descriptive, the second normative. The first claim is that the concept of legislative purpose is incoherent.¹⁴⁸ Seeing

PROCESS AND AMERICAN GOVERNMENT (1978); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1676-88 (1975).

¹⁴⁵ See, e.g., THE FEDERALIST No. 78, at 523 (A. Hamilton) (J. Cooke ed. 1961) ("There is no liberty, if the power of judging be not separated from the legislative and executive powers.") (quoting MONTESQUIEU, THE SPIRIT OF LAWS bk. xi, ch. 6, para. 4, at 151-52 (T. Nugent trans. rev. ed. 1949))).

¹⁴⁶ See Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 488-99 (1989).

¹⁴⁷ See *Crowell v. Benson*, 285 U.S. 22, 42-46 (1932); Farina, *supra* note 146, at 487.

¹⁴⁸ Public choice theorists have outlined a number of problems with attributing purpose to

politics not as an effort to carry out coherent or public-regarding purposes but as a battle for scarce resources among self-interested private groups, these commentators maintain that the legislative process is a series of interest-group struggles. They also emphasize the difficulties in aggregating the preferences and beliefs of numerous legislators. From this they conclude that statutes reflect unprincipled "deals" and not intelligible collective "purposes." Some of those who urge this view claim that it has foundations in the thought of the framers of the Constitution.¹⁴⁹

The second claim is that courts charged with interpreting statutes should not rely on unitary or public-regarding purposes, but instead should enforce the statute according to its terms, which reveal the relevant "deal." Courts should not see legislators as "reasonable people acting reasonably." Instead, statutes are often unprincipled outcomes of multiple pressures imposed on multiple actors. The contrast with the legal process school in particular could not be sharper.¹⁵⁰

Consider, for example, how an advocate of the deals approach would analyze the question whether a federal statute regulating pollution implicitly authorizes victims of pollution to bring suits against polluters. If the statute does not expressly provide for such suits, the victims have not obtained that right as part of the statutory "deal," and the right should be denied. By contrast, a court that saw the legislature as "reasonable people acting reasonably," or that treated

a multimember body. First, efforts to aggregate multiple points of view through legislation will not yield an intelligible preference of the collectivity. Even if legislators vote according to their actual preferences, the outcome may not reflect a coherent aggregation of preferences because the outcome eventually chosen depends on the order in which different proposals were considered rather than on a collective preference for that outcome. See K. ARROW, *supra* note 15, at 46–60 (describing the Impossibility Theorem).

Second, legislators may engage in strategic behavior, especially if there are three or more alternatives up for a vote. For example, a legislator might decide to misrepresent her preferences by voting for proposition *x* instead of proposition *y* because the defeat of *y* will increase the likelihood that proposition *z*, which our sample legislator prefers, will pass. See Gibbard, *Manipulation of Voting Schemes: A General Result*, in RATIONAL MAN AND IRRATIONAL SOCIETY?, *supra* note 15, at 358. Legislators also trade votes or "logroll." See B. BARRY & R. HARDIN, *Introduction to Vickrey, Utility, Strategy, and Social Decision Rules*, in RATIONAL MAN AND IRRATIONAL SOCIETY?, *supra* note 15, at 341–42. These difficulties make it hard to discern a unitary purpose behind legislative enactments, other than the purpose to do what the legislature has done.

Third, the legislative outcome may reflect organizational difficulties faced by diffuse, poorly organized groups, and it is unclear how the complex interactions between the well-organized and the poorly organized should enter into the depiction of "purpose." See, e.g., R. HARDIN, COLLECTIVE ACTION (1982).

¹⁴⁹ See, e.g., J. BUCHANAN & G. TULLOCK, *supra* note 15, at 24–25; Macey, *Competing Economic Views of the Constitution*, 56 GEO. WASH. L. REV. 50 (1987) (arguing that the framers of the Constitution sought to prevent, rather than promote, wealth transfers by interest groups).

¹⁵⁰ For a discussion comparing approaches toward public-interest statutes and "deals" statutes, see Easterbrook, cited above in note 14, at 42–51.

legislation as public-spirited, might well recognize private suits as a way of enforcing the statutory mandate.

Advocates of the "deals" approach correctly emphasize legislative compromise, and they have also performed a valuable role in suggesting that legislative purposes are often multiple and even conflicting. As a theory of statutory interpretation, however, the "deals" approach suffers from many of the failings of textualism. The first problem is indeterminacy. In many cases, the terms of any deal will be hopelessly unclear in the absence of background norms that a system of interpretation — one that has nothing to do with deals — alone can supply. For example, an approach that sees statutes as deals is in fact unhelpful in cases involving implied causes of action. If a statute is treated as a deal between industries seeking protection against too much regulation on the one hand, and environmental groups attempting to prevent pollution on the other, what result is appropriate? The answer would be obvious if there were a background norm to the effect that regulatory statutes generally create private rights of action. In that case, the failure of industry to obtain a prohibition on such rights would suggest that the deal authorized them. The result would also be clear if the background norm forbade private rights without explicit legislative authorization: the deal did not include them. The central question is what the relevant norm should be. The claim that statutes should be understood as deals provides no help in deciding on the background against which deals must be read. In the end, advocates of the "deals" approach — like most formalists — rely in fact on a substantive background norm;¹⁵¹ it is that norm, on which the "deals" approach is utterly unhelpful and indeed silent, that is the true basis for decision.

Even if the problem of indeterminacy could be overcome, the question would remain whether courts should treat statutes as unprincipled deals. The argument in favor of that system would have to claim that it is constitutionally required, or that the legal system that would emerge would be preferable to the alternatives. Some have stressed the dangers of judicial discretion, the fact that statutes are in fact deals, the likelihood that a system of deals will be responsive to constituents' demands for law, and the value of obtaining deals in the first place.¹⁵²

¹⁵¹ See, e.g., Easterbrook, *supra* note 13, at 549–50 (relying on the background norm of private autonomy). Consider also Justice Scalia's enthusiastic resort to the principle in favor of judicial deference to agency interpretations of law. See *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 453–55 (1987) (Scalia, J., concurring).

¹⁵² Compare Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975) (arguing that an independent judiciary is essential to enforce the "deals" struck in a pluralist system) with Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537, 1547–56 (1983) (criticizing the interest-group model).

Often, however, efforts to understand statutes as deals depend on highly artificial premises. The empirical work points in both directions. There is evidence that public officials often respond to their own conception of the public interest.¹⁵³ Numerous people, moreover, help to produce statutes, and it is not easy to see how the multiple forces can meaningfully be thought to produce a deal. The problems of aggregating multiple desires do not always prevent the ascription of "purpose" to legislation. The claim of realism is therefore overstated.

Even if statutes were deals, the argument that courts should always treat them as such is hardly self-evident. Indeed, the "deals" approach tends to break down if conceptions of politics rooted in interest-group pluralism cannot be defended on normative grounds. Far from having a good constitutional pedigree, the pluralist understanding runs afoul of the fundamental constitutional norm against naked interest-group transfers.¹⁵⁴ That norm proscribes legislative efforts to transfer resources from one group to another simply because of the political power of the latter. The norm has firm roots in both Madisonian republicanism — designed to ensure a measure of deliberation in government — and in current law under a number of constitutional provisions, including the equal protection, due process, eminent domain, and contract clauses.¹⁵⁵ An effort to treat statutes as mere deals is thus inconsistent with the basic constitutional background.

Moreover, interest-group pluralism cannot be defended as a method for ensuring accurate aggregation of citizen preferences. Public choice theory itself reveals that pluralist systems reflect collective

¹⁵³ See, e.g., M. DERTHICK & P. QUIRK, THE POLITICS OF DEREGULATION (1985); Kalt & Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279 (1984).

¹⁵⁴ See Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

¹⁵⁵ On Madisonian republicanism, see Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 38–48 (1985). On the norm against naked interest-group transfers, see *id.*; Sunstein, cited above in note 154; and sources cited in note 245 below.

To be sure, courts usually find a public-regarding justification for legislation, and therefore invalidate statutes as naked interest-group transfers only infrequently. See, e.g., United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980) (finding that distinctions among railroad employee retirement benefits plausibly protect employees with greater equitable claims); Williamson v. Lee Optical, 348 U.S. 483 (1955) (holding that requiring an ophthalmologist prescription to allow an optician to fit eye glasses is rational due to occasional necessity of medical prescriptions). But judicial deference here is a product of the institutional position of the judiciary, which leads courts to give legislatures the benefit of every doubt. Cf. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213–20 (1978) (positing that many constitutional norms are underenforced due to institutional concerns rather than conceptual limits). The fact of infrequent enforcement should not be taken to deny the constitutional status of the norm, which can be vindicated by courts much less intrusively, and to that extent more justifiably, through statutory construction.

action problems, strategic behavior, cycling problems, the power of various groups over the agenda, and a host of other difficulties.¹⁵⁶ Here descriptive work in the public choice tradition¹⁵⁷ helps to supply a strong normative argument against a theory of statutory construction that is inspired by public choice theory. Courts that treat statutes as deals will tend to produce incoherence and irrationality in the law.

Even if accurate preference-aggregation could be achieved through politics, it is far from clear that the system would warrant support. Politics performs a number of functions that cannot be captured in the notion of aggregation of private preferences. Collective aspirations about social justice; democratic preferences for others, including future generations; and social subordination, which has consequences for the preferences of both the advantaged and the disadvantaged — all these have called forth statutory regimes promoting a range of values that a pluralist system cannot sufficiently protect.¹⁵⁸

A system of interpretation that treats statutes as interest-group deals or as incoherent compromises therefore would suffer from a wide range of problems. By contrast, a regime in which courts treat statutes as purposive, rational, and public-regarding would be more likely to push statutes in purposive, rational, and public-regarding directions. Of course, a court should respect a deal if it is unambiguously reflected in law. But an interpretive approach that is alert to the risks of deals and that attempts to make sense of statutory enactments will produce a superior system of law.¹⁵⁹

4. *Criteria.* — It will be useful to conclude this section by seeing whether the discussion of extratextual norms suggests some general criteria by which to evaluate such norms. We have seen that a broad private autonomy principle may well be objectionable as a theory of the appropriate role of the state¹⁶⁰ and that it lacks fit with the modern regulatory structure and its underlying values. Unlike the autonomy principle, the principle of agency deference has the advantage of attempting to respond to the real-world operation of the regulatory state. It is, however, inconsistent with likely congressional desires and with the constitutional backdrop, and if adopted, it would impair the performance of regulatory institutions. The “deals” approach properly brings to bear a realistic understanding of legislative processes. The

¹⁵⁶ See K. ARROW, *supra* note 15; J. BUCHANAN & G. TULLOCK, *supra* note 15; see also *supra* note 148 (discussing the problems faced by multimember representative bodies).

¹⁵⁷ See sources cited *supra* notes 148 & 156.

¹⁵⁸ See Stewart, *supra* note 152, at 1566–81; Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1152–58 (1986).

¹⁵⁹ See Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

¹⁶⁰ See *supra* pp. 443–44; see also C. SUNSTEIN, *supra* note *, chs. 1–2 (discussing rationales for regulation).

understanding is, however, only a partial one. The "deals" approach would ultimately engraft onto interpretation a conception of politics that would increase regulatory irrationality and injustice and that would in any case be in severe tension with the constitutional framework.

If these points provide persuasive grounds for rejecting these interpretive norms, they suggest that in order to be acceptable, interpretive norms must be consistent with the constitutional structure and the fabric of modern public law; must improve rather than impair the performance of governmental institutions; and must reflect a conception of politics that is likely, if adopted, to help combat defects in regulatory practice. Criteria of this sort are highly value-laden; but they suggest that it is possible both to criticize conventions and to mediate among different interpretive norms.¹⁶¹

III. THE ROLE OF INTERPRETIVE PRINCIPLES

A. Karl Llewellyn and the Canons of Construction

The discussion thus far has suggested that the agency view is inadequate and that interpretive norms play an indispensable role in statutory construction. The relative silence about the role of such norms therefore presents something of a puzzle.

Some help in this regard might be found in the fate in academic circles of the "canons" of construction. Although courts have always used something like "canons" as background principles for interpretation, the canons were criticized and indeed virtually discredited by the legal realist movement. The most conspicuous example is Karl Llewellyn's celebrated effort to demonstrate that for each canon there is an equal canon pointing in the opposite direction.¹⁶² An inspection of the decisions revealed that the canons of construction did not help to decide cases; instead they operated as mechanical, after-the-fact recitations disguising the reasons for decision.

¹⁶¹ To say this is not to suggest that criteria can ever be entirely external to "conventions," at least if these are defined broadly enough. The inquiry here is pragmatic in character, *see supra* note 130; it is sufficient to suggest that some norms can be shown, for good reasons, to be preferable to others. *See also infra* pp. 460-62 (discussing freedom and constraint in developing interpretive norms).

¹⁶² *See* Llewellyn, *supra* note 19, at 401-06. For example, the canon calling for adherence to the "plain meaning" of the text is countered by the principle that courts should vindicate the spirit of the law; the notion that statutes in derogation of the common law should be narrowly construed meets the principle that remedial statutes should be broadly construed; and the idea that every word and clause should be given effect is countered by the principle that words and clauses may be rejected as surplusage when they were inadvertently inserted or repugnant to the rest of the statute. *See id.* at 404.

The realists argued that the canons substituted unhelpful, misleading, and mechanical rules for a more pragmatic and functional inquiry into statutory purposes and structure.¹⁶³ This view has deeply penetrated modern legal culture. Almost no one has had a favorable word to say about the canons in many years.¹⁶⁴ For the most part, the canons are treated as anachronisms.

Llewellyn's demonstration was persuasive insofar as it characterized the use of canons as a crude version of formalism. In fact, however, his claim of indeterminacy and mutual contradiction was greatly overstated; some of the canons actually influenced judicial behavior insofar as they reflected background norms that helped to give meaning to statutory words or to resolve hard cases. The notion that courts should narrowly construe statutes in derogation of the common law is the most prominent example. As we have seen, Llewellyn's abandonment of the canons left him with the hopelessly banal claim that decisions depended on "*the sense of the situation as seen by the court*"¹⁶⁵ and that "a court must strive to make sense as a whole out of our law as a whole."¹⁶⁶ Llewellyn did not unpack the notion of "sense" and its possible relationship to canons of construction. Indeed, he did not recognize that quite particular — and defensible — conceptions of "sense," often forming the judge's initial, intuitive, or even considered response to a statutory dispute, might themselves be reflected in canons of construction. Llewellyn, like many of the realists, attempted to liberate legal thought from flawed structures by denying the need for structures altogether, but structures are inevitably present.

The canons of construction continue to be a prominent feature in the federal and state courts. The use of general guides to construction

¹⁶³ See Posner, *Statutory Interpretation — In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 805 (1983).

¹⁶⁴ See *id.* There are notable exceptions, including H. HART & A. SACKS, cited above in note 15, at 1221–41; Eskridge, cited above in note 21, at 1011; Macey, cited above in note 159, at 264–66. An especially useful treatment can be found in W. ESKRIDGE & P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 639–95 (1988).

Consider also the suggestion in Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947):

[C]anons give an air of abstract intellectual compulsion to what is in fact a delicate judgment, concluding a complicated process of balancing subtle and elusive elements. . . . So far as valid, they are what Mr. Justice Holmes called them, axioms of experience. . . . Insofar as canons of construction are generalizations of experience, they all have worth.

Id. at 544.

¹⁶⁵ Llewellyn, *supra* note 19, at 397 (emphasis in original).

¹⁶⁶ *Id.* at 399 (emphasis in original). See also Radin, *supra* note 85, at 884 (advising judges to ask: "Will the inclusion of this particular determinate in the statutory determinable lead to a desirable result? What is desirable will be what is just, what is proper, what satisfies the social emotions of the judge, what fits into the ideal scheme of society which he entertains.").

— in the form of “clear-statement” principles and background understandings — can be found in every area of modern law.

An analogy may be helpful here. The law of contracts is pervaded by — indeed, it consists largely of — a set of principles filling contractual gaps when the parties have been silent, or when the meaning of their words is unclear.¹⁶⁷ Imagine, for example, that the parties have been silent on the time of performance, damages in the event of breach, or the consequences of dramatically changed circumstances and partial default. The use of implied terms, or “off-the-rack” provisions, is a familiar part of the law of contract; and it would be most peculiar to say that they are an illegitimate incursion into the usual process of “interpreting” the parties’ intent. Without implied terms of some sort, contracts simply would not be susceptible to construction. Implied terms also provide the background against which people enter into agreements.

To a large degree, interpretive principles — including the traditional “canons”¹⁶⁸ — serve the same function in public law. They too help judges to construe both statements and silences; they too should not be seen as the intrusion of controversial judgments into “ordinary” interpretation. There are, however, differences as well as similarities. In the law of contracts, it is often said that implied terms should attempt to “mimic the market” by doing what the parties would do if they had made provision on the subject.¹⁶⁹ In this respect, contract law is pervaded by a background norm in favor of party autonomy and the market. In statutory construction, by contrast, the notion of “mimicking the market” is unavailable, and the idea that one should do what Congress would have done is far from a complete guide. As we have seen, how Congress would have resolved the question is sometimes unclear; sometimes the resolution of the enacting Congress would produce difficulties as a result of changed circumstances;¹⁷⁰ sometimes courts properly call into play principles — many of them

¹⁶⁷ See generally Goetz & Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261, 264–89 (1985) (discussing the courts’ role in creating implied contract terms).

¹⁶⁸ I use the term “interpretive principles” to encompass both the “canons” and the full range of norms that are used in statutory construction. The notion of “canons” has an unduly mechanistic connotation, and it is a misleading description of the norms I am proposing insofar as it suggests that those norms operate as rules.

¹⁶⁹ See Goetz & Scott, *supra* note 167, at 266. There is not universal agreement on this point. First, it is sometimes impossible to “mimic the market” because the market is itself the function of the governing legal rule. See Sunstein, *supra* note 158, at 1145–52. Second, even when possible to do so, one might prefer terms that serve redistributive functions, see Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982), or that transform preferences, see Sunstein, *supra* note 158, at 1158–66.

¹⁷⁰ See *infra* pp. 493–97.

constitutionally inspired — that push statutes in directions that diverge from the conclusion that Congress would have reached if it had resolved the matter. Despite these differences, the critical point is that, as in contract law, the interpretation of a text requires courts to refer to background norms in interpreting terms.

B. *The Functions of Interpretive Principles: A Catalogue*

Part of the problem in coming to terms with the canons is that they have served different functions, as do the interpretive principles courts generally employ. Some of these functions are nearly invisible: the norms are so widely shared, and so central to the very process of communicating in English, that they seem to be part of the words rather than part of the interpreter's tools. Some such "norms" are simply part of meaning and not open to discussion; others are also invisible but value-laden and potentially subject to evaluation.¹⁷¹ Still other norms look to values that more visibly serve substantive or institutional goals and are applicable principally in the context of interpreting statutes: these norms — here referred to as background norms — often seem extratextual. It is useful to distinguish between the invisible norms and background norms because usually only the latter are controversial and constitute the subject of interpretive disputes. The distinction, however, is imprecise, for interpretive norms often serve multiple functions simultaneously, and substantive and institutional functions are served by invisible norms as well.

1. *Orientation to Meaning.* — Interpretive principles may be designed to orient judicial readers to the text in order to help them to ascertain its meaning in the particular case. This is the most uncontroversial function of interpretive principles. Most of these "principles" are so internalized that they are invisible and serve as an ordinary part of communication itself. They operate as rules of syntax or grammar.

Some of these syntactic norms have been explicitly identified as guides to interpretation. Consider, for example, the idea that the language of a particular provision will be taken in the context of the statute as a whole and will not be interpreted so as to do violence to the statutory structure.¹⁷² As we have seen with structural approaches to interpretation, this idea is helpful in ascertaining the meaning of a term that, if understood in a different context, would be ambiguous or indeed would have a "literal" meaning contrary to that indicated by the particular setting. Even apparently unambiguous statutory terms might have a counterintuitive meaning if other provisions of

¹⁷¹ See *supra* note 24.

¹⁷² See, e.g., *O'Connor v. United States*, 479 U.S. 27, 32 (1986).

the statute so indicate.¹⁷³ The same considerations support the principle that statutory provisions should be read so as not to create internal inconsistency or conflict with other enactments,¹⁷⁴ and the idea that, where there is a potential conflict, specific provisions should prevail over general terms in the same statute.¹⁷⁵

Many of the infamous Latin-phrased canons serve similarly mundane functions. For example, the principle of *ejusdem generis* — where general words follow a specific enumeration, the general words should be limited to persons or things similar to those enumerated¹⁷⁶ — derives from an understanding that the general words are probably not meant to include matters entirely far afield from the specific enumeration. If understood to be truly general, the general words would make the specific enumeration redundant.

A more controversial example is the principle *expressio unius est exclusio alterius*: to include one thing is to exclude another. Courts sometimes use this principle when Congress has specified a list of actors entitled to something — say, the people authorized to obtain review of federal administrative action, or to obtain welfare benefits — in order to support the conclusion that those not specified are not entitled to the good in question.¹⁷⁷ The assumption is that by expressly singling out those people to whom it wanted to grant the good, Congress implicitly decided to deny all others the good. The *expressio unius* canon should not be used mechanically. The failure to refer explicitly to the group in question may reflect inadvertence, inability to reach consensus, or a decision to delegate the decision to the courts, rather than an implicit negative legislative decision on the subject. Moreover, Congress could have explicitly solved the problem by specifying that the group in question may *not* receive the benefit, and the availability of that option weakens the inference that silence resolves

¹⁷³ See, e.g., *Shell Oil Co. v. Iowa Dep't of Revenue*, 109 S. Ct. 278, 282 (1988). Suppose, for example, that the question is whether the term "feasible" requires an agency to weigh costs and benefits, or instead tells the agency to act unless the industry would be seriously jeopardized by the regulation. If the word "feasible" is used in the same sentence or provision as the term "cost-benefit analysis," then it is reasonable to assume that the word "feasible" itself does not call for cost-benefit balancing — otherwise the statute would be redundant or incoherent.

¹⁷⁴ See, e.g., *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986); *Washington Mkt. Co. v. Hoffman*, 101 U.S. 112, 116 (1879).

¹⁷⁵ See, e.g., *Jett v. Dallas Indep. School Dist.*, 109 S. Ct. 2702, 2722 (1989); *id.* at 2724 (Scalia, J., concurring in part and concurring in the judgment); *Northern Border Pipeline Co. v. Jackson County*, 512 F. Supp. 1261, 1264 (D. Minn. 1981).

¹⁷⁶ See 2A C. SANDS, *SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION* § 47.17, at 166 (N. Singer rev. 4th ed. 1984) [hereinafter *SUTHERLAND ON CONSTRUCTION*].

¹⁷⁷ See, e.g., *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974); see also *United Steelworkers of America v. Weber*, 443 U.S. 193, 205–06 (1979) (suggesting that title VII's express disclaimer of a requirement of affirmative action supports the view that it does not prohibit voluntary plans).

the issue against the group. Sometimes, however, the principle is a helpful way of discovering statutory meaning in a particular case.¹⁷⁸ When it is plausible to assume that Congress has considered all the alternatives, the legislative failure to grant authority to one person suggests that it intended to deny the relevant authority to that person.

Although particular interpretive principles of this type will be controversial, many of them serve the time-honored function of helping to discern the meaning of the statute in the particular case.

2. Interpretive Instructions. — Interpretive principles may also serve as guides to what might be called the interpretive instructions of the legislature. The goal is to capture an actual or hypothetical legislative judgment about how statutes should be construed.¹⁷⁹ The easiest cases involve explicit legislative instructions about interpretation. The first sections of the United States Code thus set out such instructions,¹⁸⁰ as do the codes of other countries.¹⁸¹ Such statutes may attempt to provide substantive guidance.¹⁸²

Some interpretive principles, however, are a product of an understanding of implicit rather than explicit legislative interpretive instructions. For example, a familiar and often quite important principle is that appropriations measures should not lightly be taken to amend substantive statutes.¹⁸³ That principle does not of course indicate Congress' specific instructions on every bill. Appropriations measures are often designed to amend substantive statutes. As a general matter, however, this norm tracks an understanding about how Congress would want courts to interpret appropriations measures: the rules of

¹⁷⁸ Consider, for example, *United Steelworkers v. Weber*, in which the Court was asked to decide whether Congress had outlawed voluntary affirmative action by prohibiting racial discrimination. See 443 U.S. at 197. In concluding that Congress had not done so, the Court relied on the fact that Congress enacted a provision saying that it did not intend to "require" race-conscious decisions, an enactment that would be most puzzling if the basic antidiscrimination principle already invalidated affirmative action. *See id.* at 205–06.

¹⁷⁹ As noted, Congress may intend that the courts fill gaps or that general terms be construed in accordance with contemporary understandings. *See supra* pp. 421–22.

¹⁸⁰ *See* 1 U.S.C. §§ 1–6 (1988); *see also* R. DICKERSON, *supra* note 33, at 262–81 (discussing the Uniform Statutory Construction Act); 1A SUTHERLAND ON CONSTRUCTION, *supra* note 176, § 27.03, at 463–64 (discussing state interpretation acts).

¹⁸¹ *See, e.g.*, DAS ALLGEMEINE BÜRGELICHE GESETZBUCH § 7 (Aus.) (instructing judges that when interpreting an ambiguous code provision, they should look to the purpose of the statute, to analogous cases, and finally to general legal principles); C.C.D.F. art. 9 (Mex.) (presuming that previous laws are not repealed unless a statute expressly does so or its provisions are incompatible with the previous laws); ZGB, Cc, Cc art. 1(2) (Switz.) (instructing a judge when faced with a gap in the code to apply the customary law and, if that does not resolve the case, to place himself in the role of a legislator and decide accordingly).

¹⁸² *See, e.g.*, CAL. CIV. PROC. CODE § 1866 (West 1983) (instructing judges in cases of ambiguity to interpret provisions in favor of "natural right").

¹⁸³ *See, e.g.*, *United States v. Will*, 449 U.S. 200, 221–22 (1980); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190–91 (1978).

the House and Senate prohibit substantive lawmaking through appropriations.¹⁸⁴

Consider, as another example, the idea that statutes should be construed to avoid constitutional invalidity.¹⁸⁵ Although this principle does not attempt to discern statutory meaning in the particular case, it might be justified as an accurate reflection of Congress' likely preference for validation rather than invalidation.¹⁸⁶

3. Improving Lawmaking: Institutional Considerations. — A third function of interpretive principles is to promote better lawmaking. Some principles, for example, minimize judicial or administrative discretion, or push legislative processes in desirable directions. The effort is to improve lawmaking processes and the deliberation and accountability that are supposed to accompany them. In this respect, some interpretive principles fulfill goals associated with the separation of powers and with plausible assessments of comparative institutional competence.

The "plain meaning" principle, for example, might be an effort not to discover what Congress meant in the particular case, but instead to tell Congress to be careful with statutory language. The principle warns Congress that courts will not guess about the meaning of statutes or supply remedies for language that leads to absurd results.¹⁸⁷ The hope — probably a false one — is that the principle will lead Congress to express itself clearly in the future. The principle also helps to discipline the judiciary by warning courts not to implement policies of their own choosing.

Some principles designed to fulfill institutional goals require a "clear statement" before courts will interpret a statute to disrupt time-honored or constitutionally grounded understandings about proper

¹⁸⁴ See HOUSE OF REPRESENTATIVES, RULES OF THE HOUSE OF REPRESENTATIVES, H.R. Doc. No. 279, 99th Cong., 2d Sess. 573-74 (1987) (rule XXI(2)) (prohibiting provisions or amendments in general appropriations bills that change existing law); COMMITTEE ON RULES & ADMIN., UNITED STATES SENATE, STANDING RULES OF THE UNITED STATES SENATE 18 (Comm. Print 1972) (rule 16.4) (same); see also Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 458 (favoring these limitations).

¹⁸⁵ See, e.g., *Communications Workers of America v. Beck*, 108 S. Ct. 2641, 2657 (1988); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986); *NLRB v. Catholic Bishop*, 440 U.S. 490, 507 (1979); *American Airways Charters, Inc. v. Regan*, 746 F.2d 865, 867 (D.C. Cir. 1984).

¹⁸⁶ This norm also serves other purposes. See *infra* p. 459.

¹⁸⁷ See, e.g., *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546-48 (1987) (refusing to find that the outer continental shelf is in Alaska for purposes of the Alaskan National Interest Lands Conservation Act); *Garcia v. United States*, 469 U.S. 70, 74 (1984) (relying on plain language and arguing that it would be absurd to give a statute a construction that would result in "a federal robbery statute without jurisdiction"); *Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980) (holding that genetically engineered bacteria can be patented because of plain meaning of statutory language); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978) (refusing to exempt federal projects from the Endangered Species Act).

governmental arrangements. Clear-statement principles force Congress expressly to deliberate on an issue and unambiguously to set forth its will; they commonly appear in statutory interpretation as a subset of the category of interpretive norms. Presumptions in favor of state autonomy,¹⁸⁸ of noninterference with executive power in foreign affairs,¹⁸⁹ and of continued judicial power to balance the equities,¹⁹⁰ all preserve traditional institutional roles. All of these principles are designed to require a clear statement before courts will find congressional displacement of the usual allocation of institutional authority.

The principle that appropriations measures should not be construed to amend substantive statutes also has an institutional function. This principle is designed in part to promote responsible lawmaking by ensuring that casual, ill-considered, or interest-driven measures do not overcome ordinary statutes.¹⁹¹ The narrow construction of appropriations measures promotes the primacy of ordinary lawmaking, in which the constellation of interests is quite different and the likelihood of deliberation higher.

Similar goals are served by the idea that when there is doubt, statutes should be construed to limit the discretion of regulatory agencies.¹⁹² The principle in favor of narrowing discretion works against regulatory pathologies produced by factional power or self-interested behavior of bureaucrats.¹⁹³ Also in this category are the notions that statutes regulating the same subject should be construed harmoniously¹⁹⁴ and that courts should defer to interpretations of the law by regulatory agencies.¹⁹⁵ As noted above, this latter idea, prominent in recent cases,¹⁹⁶ is often defended by reference to a judicial belief that when statutes have ambiguities or leave gaps, discretionary

¹⁸⁸ See sources cited *supra* note 36.

¹⁸⁹ See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 682 (1981); *Haig v. Agee*, 453 U.S. 280, 301 & n.50 (1981); *Zemel v. Rusk*, 381 U.S. 1, 12 (1965).

¹⁹⁰ See *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 319 (1982).

¹⁹¹ See Devins, *supra* note 184, at 481–99; cf. R. KATZMAN, *INSTITUTIONAL DISABILITY* (1986) (criticizing special interest groups' role in halting the federal government's effort to ensure handicapped access to public transportation); Macey, *supra* note 159 (advocating the use of traditional statutory interpretation to regulate interest groups' effect on lawmaking).

¹⁹² See, e.g., *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 640 n.45 (1980) (plurality opinion); *Kent v. Dulles*, 357 U.S. 116, 128 (1958).

¹⁹³ To say this is not to deny that congressional specificity has risks of its own. See Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L., ECON. & ORGANIZATION 81, 83 (1985).

¹⁹⁴ See, e.g., *Jett v. Dallas Indep. School Dist.*, 109 S. Ct. 2702, 2724 (1989) (Scalia, J., concurring in part and concurring in the judgment).

¹⁹⁵ See, e.g., *Gray v. Powell*, 314 U.S. 402, 413 (1941).

¹⁹⁶ See, e.g., *NLRB v. United Food & Commercial Workers Union, Local No. 23*, 108 S. Ct. 413, 421 (1987); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984).

judgments should be made by the relatively more accountable agency rather than by courts. That substantive value judgment cannot be traced to Congress. It is a judicial construction designed to promote electoral accountability and to reduce the policymaking discretion of judges.¹⁹⁷

4. *Substantive Purposes.* — Finally, interpretive principles may serve substantive purposes wholly apart from statutory meaning, interpretive instructions, or the lawmaking process. These functions are usually the most visible and the most controversial. Substantive principles may reflect an objectionable judicial value judgment; but they might result instead from policies that derive from the Constitution or are otherwise easy to defend.

Interpretive principles are often a product of constitutional norms.¹⁹⁸ The idea that when a statute might be interpreted to be constitutionally valid or invalid, courts should construe it so that it survives challenge, vindicates constitutionally grounded substantive values; it also reflects probable interpretive instructions and promotes superior lawmaking.¹⁹⁹ A somewhat broader version of this idea would suggest that where statutes might be thought to raise a constitutional question, they should be construed so as to steer clear of constitutional doubt.²⁰⁰ The Constitution provides the background against which statutory terms are read.²⁰¹

¹⁹⁷ See *Chevron*, 467 U.S. at 865–66; see also Monaghan, *supra* note 142 (discussing administrative accountability).

¹⁹⁸ Some of the substantive interpretive principles may be treated as a form of “constitutional common law,” in which courts, responding to policies having a kind of constitutional status, press statutes in particular directions. See Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

¹⁹⁹ See, e.g., *Kent v. Dulles*, 357 U.S. 116, 129 (1958); *Crowell v. Benson*, 285 U.S. 22, 46 (1932).

²⁰⁰ See, e.g., *NLRB v. Catholic Bishop*, 440 U.S. 490, 507 (1979); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 461, 472 (1892).

²⁰¹ Interpretive principles rooted in constitutional provisions help account for a large number of other decisions. Consider, for example, the rule of lenity in criminal law, which counsels courts to construe ambiguous criminal statutes narrowly. See, e.g., *United States v. Campos-Serrano*, 404 U.S. 293, 297 (1971) (requiring clear and definite language before choosing the harsher of alternative readings). The principle is rooted in due process notions, which require clear notice before the imposition of criminal liability. Another example is the principle that congressional statutes should not lightly be taken to preempt state law. See, e.g., *Puerto Rico Dep’t of Consumer Affairs v. Isla Petroleum Corp.*, 108 S. Ct. 1350, 1355 (1988); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978); see also Frankfurter, *supra* note 164, at 539–40 (defending the anti-preemption canon). Also rooted in due process is the principle that disfavors the retroactive application of statutes. See *Bowen v. Georgetown Univ. Hosp.*, 109 S. Ct. 468, 471 (1988).

The frequently invoked idea that “remedial statutes should be broadly construed,” see, e.g., 3 SUTHERLAND ON CONSTRUCTION, *supra* note 176, § 60.01, at 55–56, however, is largely useless. All statutes are in a sense remedial, and it would be odd to suggest that all statutes should be broadly construed. The principle is best defended as a necessary corrective to the

Another substantive principle, one without constitutional foundations but easily defended, holds that statutes and treaties should, in the face of ambiguity, be construed favorably to Indian tribes.²⁰² There is no reason to think that this notion will tend accurately to describe congressional intent in particular cases. It is instead a judge-made rule responding to obvious disparities in bargaining power and to inequitable treatment of Native Americans by the nation in the past. Other substantive norms counsel courts not to infer private causes of action from regulatory statutes,²⁰³ to assume that legislation of Congress applies only within the territorial jurisdiction of the United States,²⁰⁴ not to imply exemptions from taxation,²⁰⁵ to assume that criminal statutes require mens rea,²⁰⁶ to avoid irrationality,²⁰⁷ to counteract obsolescence,²⁰⁸ and to protect common law rights in the absence of a clear statement from Congress.²⁰⁹

C. An Alternative Method: The Agency Theory of the Judicial Role Reconsidered

The functions played by background norms suggest an alternative to the conventional understandings of statutory interpretation, an alternative that explains both the substantial areas of agreement and the nature of interpretive disputes. On this account, the statutory text is the starting point, but it becomes intelligible only because interpretive norms give it content. In most cases, the text, together with widely shared background norms, will be unambiguous. In other cases, the text alone will produce doubt, but a careful consideration of the context, structure, purpose, and legislative history of a statute will lead to a single conclusion. In the remaining cases, the history will itself be ambiguous or will reflect the work of an unrepresentative, self-interested group; the "purpose" of a multimember body will be impossible to characterize; and other contextual considerations will be unhelpful. In these hard cases, faced with the familiar problems of ambiguity, overinclusiveness, underinclusiveness, and gaps, courts must resort to more conspicuous background norms.

canon calling for narrow construction of statutes in derogation of the common law. The legal system would be better off without either canon.

²⁰² See, e.g., *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764–66 (1985); *Three Affiliated Tribes v. Wold Eng'g*, 467 U.S. 138, 149 (1984); cf. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (invoking the federal interest in Native American sovereignty to preempt a contrary state law).

²⁰³ See sources cited *supra* note 38.

²⁰⁴ See, e.g., *Foley Bros. v. Filardo*, 336 U.S. 281 (1949).

²⁰⁵ See, e.g., *United States v. Wells Fargo Bank*, 108 S. Ct. 1179 (1988).

²⁰⁶ See 3 *SUTHERLAND ON CONSTRUCTION*, *supra* note 176, § 59.04, at 26 nn.8 & 9.

²⁰⁷ See *infra* pp. 482–83.

²⁰⁸ See *infra* pp. 493–97.

²⁰⁹ See 3 *SUTHERLAND ON CONSTRUCTION*, *supra* note 176, § 61.02, at 87.

Many of these cases will involve norms that are visible but not controversial; others will involve the application of norms that are both. Such norms serve the full range of interpretive functions. In the most controversial cases, they are intended to improve lawmaking or to further substantive policies. Sometimes the goals motivating these norms are disputable — consider the protection of federalism, the rule of lenity, the protection of Native Americans — and sometimes it is unclear how well the particular principle serves those goals. In hard cases, however, the dispute is over the background principles, not the dictionary meaning of the words. Although it is tempting to see the use of such principles as a controversial intrusion of "value judgments" or "policy concerns" into the process of legal interpretation, this view misconceives the nature of statutory construction. As we have seen, norms of this sort are an indispensable part of the process of deriving meaning from text.

The challenge is, first, to identify norms on which participants in the legal culture do or might agree and, second, to generate principles under which conflicting norms can be reconciled. Inevitably that task will be highly value-laden. It is impossible to select interpretive norms without assessing their role in improving or impairing the operation of statutory law.²¹⁰ The choice of norms will call for judgments of value and policy precisely to the considerable extent that formalist approaches to statutory construction are incomplete or unacceptable. It follows that the interpretive norms will be defensible only to the extent that good substantive and institutional arguments can be advanced on their behalf.

Undertaken properly, however, the task of developing interpretive norms will not amount to an unanchored or entirely open-ended inquiry into the best outcomes in particular cases. Even when the traditional sources of interpretation leave gaps, courts should not resolve cases merely by deciding what result would in their view be best, all things considered. Instead, the legal culture should be taken to impose a degree of constraint on the selection of the governing principles. For example, we have seen that a broad private autonomy norm is unacceptable largely because of its inconsistency with the fabric of the modern regulatory state; the same would be true for a norm in favor of, say, communism or fascism. Moreover, some interpretive principles — for example, the idea that statutes should be interpreted favorably to the Indian tribes or so as not to override state law — are so well-established that they have the status of precedent. Of course, the decision to follow such constraints must itself be justified on normative grounds. But there are good institutional reasons

²¹⁰ As we have seen, even the most formalist approaches must resort to such norms, but often at a high level of abstraction and without acknowledgment. See *supra* pp. 416-24.

to require courts to use principles that are consistent both with the modern regulatory state and with existing interpretive norms — at least if the existing norms are not anachronistic²¹¹ and if the state and the norms are not themselves conspicuously irrational or unjust.

We are left, then, with the task of generating interpretive principles — a task that does not amount to an open-ended search for the right results in particular cases, that faces some serious constraints, but that has a significant normative or evaluative dimension. If properly executed, that task will significantly increase the candor and clarity of interpretation, by making the relevant norms explicit and well-ordered rather than invisible and ad hoc. The resulting system will also make it easier to understand the actual dynamics of the interpretive process; provide a clear and structured background against which Congress, administrators, and courts can do their work; and increase the likelihood of legislative or public correction of outmoded or unjustified norms. Finally, in hard cases, such an approach will give rationality and justice the benefit of the doubt, while furnishing relatively concrete guidance for unpacking those concepts.

IV. INTERPRETIVE PRINCIPLES FOR THE REGULATORY STATE

Background norms vary from one country to another; they also vary from one period to another within any particular country. In the United States, for example, the principles of the late nineteenth and early twentieth centuries reflected a belief in common law ordering that was largely repudiated in the 1930's.²¹² In the Warren Court period, the background norms differed from those that prevailed in the Burger Court era and those that operate today.²¹³

²¹¹ See *infra* p. 480 (calling for judicial consideration of systemic effects to promote rationality in regulation); *infra* pp. 480–81 (calling for abandonment of private law principles when they are inconsistent with public law goals).

²¹² See *supra* p. 408.

²¹³ See generally Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982). Consider, for example, the dramatically shifting reaction to implied causes of action. Compare *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (willingly creating such actions) with *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979) (requiring affirmative evidence of a congressional intent to create implied causes of action). Consider also the Court's increasing reluctance to find federal preemption of state law, see Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975), and the increasingly narrow interpretation of statutes protecting disadvantaged groups, compare *Griggs v. Duke Power Co.*, 410 U.S. 424 (1971) (interpreting title VII to require only proof of disparate impact) with *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989) (limiting use of statistical evidence and placing the burden of proof on plaintiff at all times). In all of these areas, the source of the disagreement is not the "text" — although that is frequently the articulated basis of argument — but instead a dispute over which interpretive norms should be applied when the traditional sources of statutory construction leave gaps or ambiguities.

Despite the shift in the New Deal period, courts have continued to use institutional and substantive norms that are a legacy of common law understandings. Those norms seem to have taken on a life of their own; indeed they appear invisible to those who rely on them. Sometimes, however, these norms conflict with the values that underlie the modern regulatory state, or they otherwise impair governmental performance.²¹⁴ A task for the future is to design background norms that are well-adapted to contemporary conceptions of the relationship between the citizen and the state and that are rooted in a solid understanding of the purposes and pathologies of regulation.

Outside of law, and to some extent within the legal academy, it has become fashionable to suggest that interpretive disputes are resolved on the basis of agreements within a community of interpreters.²¹⁵ It should be clear by now that the central tasks here — description and prescription — require far more, especially in light of the fact that the community will frequently be divided. In these circumstances, the task is to locate the sources of interpretive principles and to identify those that deserve general respect.²¹⁶

In this Part, I attempt to carry out that task by outlining a series of institutional and substantive principles designed to promote constitutional purposes and to improve the operation of deliberative government in the post-New Deal period. All of the principles have at least some basis in current law, with some more firmly rooted than others. My goal, however, is not solely descriptive. All of the principles described here have justifications deriving from the constitutional backdrop, the promotion of sound institutional arrangements,

²¹⁴ See *infra* pp. 480-81. A similar problem arises from the use of principles that reflect a poor understanding of the operation of regulatory law, including above all misconceptions of the probabilistic character of regulatory injuries and of the complex systemic effects of regulation. See *infra* p. 480.

²¹⁵ See S. FISH, DOING WHAT COMES NATURALLY, *supra* note 18; S. FISH, IS THERE A TEXT IN THIS CLASS?, *supra* note 18; Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 745 (1982). The disagreement between Fish and Fiss — involving the degree of "constraint" imposed by rules of interpretation — should not disguise the substantial overlap in their positions; both advert to convention as the basic source of interpretation and argue that those who undertake or evaluate interpretive practices must be content with invoking agreed-upon background principles.

²¹⁶ The development of defensible background norms, and of criteria of this sort, would furnish a decisive response to those who view legal texts as inevitably indeterminate or who refuse to engage in the process of evaluating competing conceptions of meaning. See *supra* pp. 441-42.

"Deconstruction" within the law — which attempts to draw on the work of Derrida, *see, e.g.*, J. DERRIDA, OF GRAMMATOLOGY (G. Spivak trans. 1976), but usually amounts in practice to quite ordinary efforts at undermining a particular line of reasoning — is inadequate in large part because it fails to account for interpretive norms and criteria. In law and elsewhere, texts have relatively fixed meanings because of shared interpretive principles. Even where meaning is contested, standards for mediating among conflicting views can be discussed and evaluated.

and the prevention of statutory irrationality and injustice. I outline the relevant justifications while discussing the norms.

In general, these principles are not designed to allow courts to depart from the approach prescribed by the agency conception of the judicial role where that approach leaves no ambiguity. In easy cases, the agency conception leads — with the inevitable aid of generally shared interpretive principles — to a clear result. The principles discussed in this Part are intended both as guides to statutory meaning and to fill gaps. Politically contestable background principles do not provide a license for courts to ignore the otherwise clear meaning of the statute. Sometimes, however, these principles will call for a more aggressive judicial role — requiring a clear legislative statement, for example, before interpreting congressional action to have violated constitutional norms or to have produced irrationality.²¹⁷

A. Sources and Scope of Interpretive Principles

1. The Domain of Institutional and Substantive Norms. — Because this Part considers cases in which the traditional sources of meaning do not yield a single answer, I focus on norms that read legislative instructions in light of institutional or substantive concerns. Norms that perform the other two functions — orientation to meaning or capturing interpretive instructions — are not considered, except to the extent that norms serving institutional or substantive functions also serve those functions. In focusing on institutional and substantive norms, an initial question arises: when should they be applied?

In easy cases, substantive and institutional norms often seem unnecessary, and norms serving syntactic functions — mostly those so widely shared that they need not be identified — appear sufficient to resolve the case. But substantive and institutional norms are ubiquitous. Consider a federal environmental statute that allegedly preempts all of state tort law. The reason that it does not do so is not syntax alone, but syntax along with, and indeed inseparable from, a wide range of agreed-upon substantive and institutional understandings about, among other things, the limited preemptive effect of federal enactments and the appropriate role of the judiciary.

²¹⁷ My discussion of background norms is directed in particular to courts seeking to discern statutory meaning. Its implications do, however, extend to other institutions, including regulatory agencies and Congress itself. In the first instance, agencies are charged with interpreting and enforcing their statutory mandates, and administrative practice inevitably involves interpretation, with all the necessary reliance upon background norms. Moreover, ideas about the constitutional backdrop, the institutional practice, and statutory function and failure influence legislative drafting. Ultimately, a system of interpretive norms aims to describe the nature of modern social and economic regulation, and to suggest the ways in which national institutions might improve its performance — a goal that reaches far beyond the topic of statutory interpretation.

For these reasons, no cases can be resolved without reference to norms having substantive and institutional functions. But sometimes syntax or interpretive instructions, accompanied by other norms on which there is a wide consensus, are so clear that it would be wrong or unnecessary to introduce controversial substantive or institutional norms. This is a more precise formulation of the usually correct claim that substantive norms should not be permitted to override "the text."

*Young v. Community Nutrition Institute*²¹⁸ provides an instructive example. Congress has instructed the Food and Drug Administration (FDA) that when dangerous substances are required in the preparation of food, "the Secretary shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health, and any quantity exceeding the limits so fixed shall also be deemed to be unsafe."²¹⁹ In *Young*, the FDA was asked to regulate the quantity of aflatoxin, a carcinogenic substance. Because "to such extent as he finds necessary" follows "thereon" rather than "regulations," the syntax of the provision suggests that when dangerous substances are required in the production of food, the Secretary must promulgate regulations setting a tolerance level. Under this reading, the words "to such extent as he finds necessary" allow the Secretary discretion to decide on the tolerance level but do not confer on him discretion not to promulgate regulations at all.²²⁰ Although perhaps not compelled by the text, this reading is strongly supported by the fact that an interpretation conferring on the Secretary discretion not to issue regulations would make the entire provision unnecessary. The discretion to promulgate or not already belonged to him.

The Supreme Court, however, invoked the principle of deference to agency interpretations of law in order to uphold the FDA's view that the statute allows the Secretary not to promulgate regulations.²²¹ This decision may be taken as an example of a case wrongly invoking a contestable institutional norm — deference to agency interpretations — in a context in which syntax and structure alone, accompanied by agreed-upon background norms, led to a single answer.

In other settings, however, norms that go to syntax or to interpretive instructions, even accompanied by generally held institutional and substantive understandings, will lead to uncertainty, to irrationality, or to an intrusion on constitutionally grounded arrangements. Conspicuous or contestable norms should be invoked only in narrowly defined settings: to "break ties"; to require a clear statement before

²¹⁸ 476 U.S. 974 (1986).

²¹⁹ 21 U.S.C. § 346 (1982) (emphasis added).

²²⁰ See *Young*, 476 U.S. at 984–88 (Stevens, J., dissenting).

²²¹ See *Young*, 476 U.S. at 980 (following *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

reaching an outcome that would be absurd or would intrude upon constitutionally grounded arrangements; to fill a gap or respond to a delegation of lawmaking power; or to help decide what to do in the face of changed circumstances or the apparently irrational results of literalism.²²²

2. *Sources: In General.* — Institutional and substantive norms are of course value-laden, and the choice among them is a subject of disagreement. Nevertheless, it is possible to identify sources of values, and values themselves, that are or deserve to be widely shared. The first and most straightforward source is the Constitution. Understandings about constitutional arrangements provide a significant amount of the background against which statutory construction occurs. To be sure, constitutional meaning is frequently uncertain, and statutory disputes are sometimes, in part, a function of a broader dispute about the best way to characterize the constitutional backdrop. Often, however, there is sufficient consensus about the meaning of the Constitution to ground a large part of interpretation. When no such consensus exists, the position one takes will be a function of a more narrowly held account of what the Constitution requires. Whether the position is persuasive depends on the reasons that can be marshaled on behalf of that account.

The second source of interpretive norms — also straightforward — consists of understandings about how statutory interpretation will improve or impair the performance of governmental institutions. Some such understandings are a firmly rooted and probably unavoidable part of interpretation. One might, for example, conclude that legislative history, produced by private groups and never enacted, is entitled to little weight; or that appropriations statutes, written hastily and without deliberation, should be narrowly construed. If one were simply describing statutory construction as it is currently practiced, one would find a number of background norms traceable to understandings of precisely this sort.

The third and final source of background norms is more complex; it emerges from the intended functions of regulatory statutes and the ways in which such statutes fail in practice. An understanding of statutory function and failure — curiously neglected topics — is indispensable not only to an appreciation of modern law, but also to an understanding of statutory construction. In hard cases, the familiar notion that statutes should be construed so as not to produce absurd

²²² See *Public Citizen v. United States Dep't of Justice*, 109 S. Ct. 2558, 2573-74 (1989) (refusing to attribute to Congress the intent to dictate absurd results); *Green v. Bock Laundry Mach. Co.*, 109 S. Ct. 1981, 1984 (1989) (same). See generally T. MCLEOD, *supra* note 124, ¶¶ 1-14 to -17 (describing the idea that statutes should be construed to avoid absurdity as "the Golden Rule").

or irrational results is too abstract to be helpful; one needs a particularized understanding of regulatory statutes. A detailed discussion of these points would be well beyond the scope of this Article,²²³ but a brief outline will be useful.

The goals of statutory regimes span a wide range. Some statutes are designed to promote economic efficiency, others to redistribute resources in public-regarding ways, to protect future generations from irreversible losses, to reflect nonmarket values or aspirations, to counteract the social subordination of disadvantaged groups, or to enforce the terms of pure interest-group deals. Moreover, statutes fail for a number of different reasons.²²⁴ Some are flawed in conception as a result of interest-group power, collective action problems,²²⁵ the absence of political accountability or political deliberation, changed circumstances or obsolescence, or lack of coordination with other statutes. Other statutes fail because of implementation problems. For example, a regulation may be based on a poor understanding of the way that the market can nullify its intended effects.²²⁶ Legislation apparently intended to protect consumers, workers, or tenants may have undesirable and unintended consequences.²²⁷ Finally, statutes designed to reduce or eliminate the social subordination of disadvantaged groups, or to promote public values like environmental quality and the protection of endangered species, frequently encounter in the implementation process the same obstacles — collective action prob-

²²³ For a more complete discussion, see C. SUNSTEIN, cited above in note *, chs. 1-3.

²²⁴ If it were possible, it would be extremely valuable to establish a tight connection between identifiable statutory functions and particular forms of statutory failure. Any such enterprise faces serious obstacles. The empirical work on the consequences of social and economic regulation remains primitive. For a review, see C. SUNSTEIN, cited above in note *, ch. 3. For helpful work in this area, see SENATE COMM. ON GOVERNMENTAL AFFAIRS, 96TH CONG., 2D SESS., BENEFITS OF ENVIRONMENTAL, HEALTH, AND SAFETY REGULATION (Comm. Print 1980); R. CRANDALL, CONTROLLING INDUSTRIAL POLLUTION (1983); R. CRANDALL, H. GRUEN-SPECHT, I. KEELER & L. LAVE, REGULATING THE AUTOMOBILE (1986); K. MEIER, REGULATION: POLITICS, BUREAUCRACY, AND ECONOMICS (1985); J. MENDELOFF, THE DILEMMA OF TOXIC SUBSTANCE REGULATION (1988); W. ROSENBAUM, ENVIRONMENTAL POLITICS AND POLICY (1985); D. VOGEL, NATIONAL STYLES OF REGULATION (1986); and Graham & Vaupel, *Value of a Life: What Difference Does It Make?*, 1 RISK ANALYSIS 89 (1981). In any case, an assessment of those consequences cannot depend on empirical work alone; it must also rest on some ideas, normative in character, about what a well-functioning regulatory system would look like.

²²⁵ See *supra* note 148.

²²⁶ Thus, for example, the minimum wage has increased unemployment. See F. WELCH, MINIMUM WAGES: ISSUES AND EVIDENCE (1978).

²²⁷ Rent control legislation and implied warranties of habitability have not merely protected tenants, but have also decreased the supply of housing and had at least some harmful effects on poor people. See, e.g., Hirsch, Hirsch & Margolis, *Regression Analysis of the Effects of Habitability Laws upon Rent*, 63 CALIF. L. REV. 1098, 1130-31 (1975) (discussing warranties of habitability).

lems, the unrepresented character of future generations, and other disparities in political influence — that make such statutes necessary in the first place.²²⁸ Government failure mimics market failure.

Although conclusions of this sort are principally of interest to officials in the legislative and executive branches, they are relevant to the judiciary as well. Judicial conceptions of the likely function and potential failure of regulatory statutes inevitably shape legal interpretation. Moreover, such understandings will likely improve interpretation, for a sensitivity to regulatory failure can aid courts in promoting legislative goals in the face of textual ambiguities. Recognizing that conflicts among the principles will exist in some settings, I discuss rules of priority and harmonization below.

B. The Principles

1. Constitutional Norms. — Many constitutional norms deserve a prominent place in statutory interpretation. Some of them have been mentioned in Part III. The central point is that the Constitution provides the backdrop against which statutes are written and interpreted, and it furnishes the basic assumptions of interpretation.

Federal courts underenforce many constitutional norms, and for good reasons. Institutional constraints — most notably, limited fact-finding capability and attenuated electoral accountability — make courts reluctant to vindicate constitutional principles with the vigor appropriate to governmental bodies with a better democratic and policymaking pedigree. As a result, there is a gap between what the Constitution actually requires and what constitutional courts are willing to require the political branches of government to do. In this context, courts should recognize that some statutes respond to Congress' constitutional responsibilities even if courts would not, for institutional reasons, require Congress to carry out those responsibilities in the first instance. Relatively aggressive statutory construction — pushing statutes away from constitutionally troublesome ground — provides a way for courts to vindicate constitutionally based norms and does so in a way that is less intrusive than constitutional adjudication.²²⁹

(a) *Avoiding Constitutional Invalidity and Constitutional Doubts.* — The principle that statutes should be construed so as to survive

²²⁸ See, e.g., K. BUMILLER, THE CIVIL RIGHTS SOCIETY (1988) (discussing barriers to enforcement of civil rights laws); Wood, *Does Politics Make a Difference at the EEOC?*, 34 AM. J. POL. SCI. (forthcoming 1990) (arguing that politics does make a difference in the enforcement of civil rights).

²²⁹ Cf. Sager, *supra* note 155 (arguing that Congress and state courts should be allowed to enforce constitutional norms to their fullest extent). One might accept this general point while acknowledging the highly controversial nature of particular views about which constitutional norms are underenforced.

constitutional challenge serves a number of functions: it is a natural outgrowth of the system of separation of powers; it minimizes inter-branch conflict; it responds to Congress' probable preference for validation over invalidation ("implicit interpretive instructions"); and it strengthens judicially underenforced constitutional norms. The mild statutory "bending" that sometimes occurs is legitimate, for courts are not mere agents of the enacting legislature but have an obligation to the citizenry and the legal system as a whole.

This basic idea supports the broader principle, reflected in many cases, that courts should construe statutes to avoid not only constitutional invalidity but also constitutional doubts.²³⁰ This latter principle calls for a far more aggressive judicial posture in statutory construction, one that allows judicial "bending" of a greater range of statutes. Judge Posner criticizes this principle on the ground that it furnishes a kind of "judge-made 'penumbra'" around the Constitution,²³¹ by allowing courts to press statutes in particular directions even though they would ultimately be found not to offend the Constitution.

Judge Posner's objection becomes less forceful, however, in light of the fact that constitutional norms are often underenforced. As we have seen, there is a difference between what the Constitution requires and what the Supreme Court, interpreting the Constitution, is willing to compel. The aggressive construction of questionable but not invalid statutes — removing them from the terrain of constitutional uncertainty — is a less intrusive way of vindicating norms that do in fact have constitutional status.

(b) *Federalism*. — In the system of American public law, the basic assumption is that states have authority to regulate their own citizens and territory. This assumption justifies an interpretive principle requiring a clear statement before judges will find federal preemption of state law.²³² Although no substitute for an inquiry into the relationship between state and federal law in the particular context, this principle will frequently aid interpretation in disputed cases.

(c) *Political Accountability; Checks and Balances; the Nondelegation Principle*. — Some interpretive norms represent constitutionally inspired efforts to promote a sound allocation of institutional responsibility. Courts hesitate to interpret statutes as intruding on the President's power in foreign affairs,²³³ or as interfering with judicial power to "balance the equities" in cases involving possible injunctive relief.²³⁴

²³⁰ See, e.g., NLRB v. Catholic Bishop, 440 U.S. 490 (1979).

²³¹ See R. POSNER, *supra* note 10, at 285.

²³² See, e.g., Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 108 S. Ct. 1350, 1355 (1988); Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978).

²³³ See cases cited *supra* note 189.

²³⁴ See Weinberger v. Romero-Barcelo, 456 U.S. 305, 319 (1982). This idea, however, is vulnerable in the post-New Deal era. See *infra* pp. 480-81.

Other interpretive strategies can be similarly understood. For example, courts have, since the New Deal, permitted Congress to delegate exceptionally broad policymaking authority to regulatory agencies. Such broad delegations were at one time thought to offend article I of the Constitution, which vests legislative power in Congress.²³⁵ In recent years, courts have been reluctant to enforce the nondelegation doctrine. This reluctance is partly attributable to the difficulty of developing standards for distinguishing between prohibited and permissible delegations, partly a product of the intrusiveness of any such judicial role, and partly a result of the frequent existence of good reasons for the delegation of discretionary power to regulatory agencies.²³⁶ Through statutory construction, however, courts are sometimes able to vindicate the constitutional principle against delegation of legislative authority. They can do so, for example, by narrowly construing grants of policymaking power.²³⁷

Various doctrines dealing with the degree of judicial deference to agency interpretations promote principles of nondelegation, accountability, and checks and balances. For example, the controversial proposition that courts should interpret congressional enactments on their own, without deferring to agency constructions, is intended to avoid the delegation problem that would arise if administrators could interpret the scope of their own authority. It is bad enough for administrators to have broad lawmaking power; the problem is aggravated if administrators can judge the scope of whatever constraints Congress has imposed on them. As we have seen, courts should not permit foxes to guard henhouses.²³⁸ The exceptionally important idea that a delegation of power to an administrator implicitly permits presidential supervision and control similarly tries to promote political accountability.²³⁹ This idea promotes the constitutionally grounded

²³⁵ See, e.g., A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–42 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935).

²³⁶ See Mistretta v. United States, 109 S. Ct. 647, 654–58 (1989). See generally Stewart, *supra* note 144, at 1693–97 (criticizing attempts to revive the nondelegation doctrine).

²³⁷ Cf. *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (holding as a matter of constitutional law that aliens could only be prevented from serving as federal employees by a decision of the President or the Congress but not the Civil Service Commission). In other cases, the Court has suggested that the Constitution permits certain disabilities to be imposed on groups only when an accountable actor has so decided. The most celebrated example is *Kent v. Dulles*, 357 U.S. 116 (1958), in which the Supreme Court concluded that the Secretary of State may not deny a passport to a member of the Communist Party unless Congress clearly authorized him to do so. Decisions of this sort impose a “clear-statement” principle to the effect that important decisions are to be made by accountable actors and that only a clear statement to the contrary will rebut this presumption.

²³⁸ See *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 445–48 (1987); see also *Farina*, *supra* note 146, at 502–11 (discussing how Congress and the President control agency discretion, and criticizing *Chevron*).

²³⁹ See, e.g., *Myers v. United States*, 272 U.S. 52, 63 (1926); *Sierra Club v. Costle*, 657 F.2d 298, 407 (D.C. Cir. 1981), *rev'd on other grounds*, 463 U.S. 680 (1983).

goals of a unitary executive branch: centralization, expedition, and accountability in law enforcement.²⁴⁰

(d) *The Rule of Law.* — In interpreting statutes, courts employ a clear-statement principle in favor of the “rule of law”: a system in which legal rules exist, are clear rather than vague, do not apply retroactively, operate in the world as they do in the books, and do not contradict each other.²⁴¹ The due process clause provides a constitutional basis for the rule of law ideal.²⁴² The most celebrated aspect of this general idea is the rule of lenity, which leads courts to resolve ambiguities favorably to the criminal defendant.²⁴³ Courts also interpret statutes to minimize administrative discretion, to apply prospectively, and to require or permit rules. “[T]he law in general . . . does not interpret a grant of discretion to eliminate all ‘categorical rules.’”²⁴⁴

(e) *Political Deliberation; the Constitutional Antipathy to Naked Interest-Group Transfers.* — Designed to ensure a kind of deliberative democracy, the constitutional system is hostile to measures that impose burdens or grant benefits merely because of the political power of private groups.²⁴⁵ Governmental actions require some public value.²⁴⁶ This norm, firmly rooted in current law, has a number of implications for statutory interpretation. It suggests, for example, that courts should develop interpretive strategies that promote deliberation in government — by, for example, remanding issues involving constitutionally sensitive interests or groups for reconsideration by the legislature or by regulatory agencies when deliberation appears to have been absent. It also suggests that courts should narrowly construe statutes that embody mere interest-group deals.²⁴⁷ This principle does not authorize elaborate judicial review of legislative and administrative processes, but it does require a clear statement before courts will construe statutes as amounting to naked wealth transfers or as intruding into constitutionally sensitive areas.

²⁴⁰ See Strauss & Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 189–90 (1986).

²⁴¹ For a discussion of these values and how they fail, see L. FULLER, THE MORALITY OF LAW (rev. ed. 1969).

²⁴² See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

²⁴³ See, e.g., *United States v. Nofziger*, 878 F.2d 442, 452 (D.C. Cir. 1989).

²⁴⁴ Independent Fed'n of Flight Attendants v. Zipes, 109 S. Ct. 2732, 2746 (1989) (emphasis in original) (applying “traditional” balancing as a background rule).

²⁴⁵ See D. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST (1984); M. MEYERS, *Reflection and Choice: Beyond the Sum of the Differences, an Introduction*, in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON at xi (rev. ed. 1981); Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, in HOW DEMOCRATIC IS THE CONSTITUTION? 102 (R. Goldwin & W. Schambra eds. 1980).

²⁴⁶ See *supra* note 154.

²⁴⁷ On narrow construction, see pp. 486–87 below. Much of American administrative law is founded on these ideas. See Sunstein, *supra* note 155, at 59–64.

(f) *Hearing Rights.* — One of the most important functions of the Constitution is to provide procedural safeguards by affording rights to a hearing and to judicial review in cases involving important interests.²⁴⁸ The precise extent of these safeguards is sharply disputed. It is unclear, for example, whether Congress has the constitutional power to eliminate hearing rights for those seeking regulatory benefits, or to provide that federal courts may not review certain claims.²⁴⁹

In this area, courts often interpret statutes in the shadow of constitutional hearing rights. For this reason, courts narrowly interpret statutory provisions purporting to eliminate rights to a hearing and to judicial review.²⁵⁰ The ordinary presumption is that such rights are available, and that the constitutional issue therefore need not be resolved.

(g) *Disadvantaged Groups.* — Some of the most difficult questions in contemporary constitutional law involve the degree of protection afforded to disadvantaged groups by the equal protection clause of the fourteenth amendment. In many of the cases, courts have afforded less protection than they otherwise might have because of a desire to minimize interferences with the democratic branches of government.

For example, in one of its most important and controversial decisions since World War II, the Supreme Court held that to establish a violation of the equal protection clause, blacks, women, and others must show "discriminatory intent" on the part of the enacting legislature.²⁵¹ This requirement has furnished a significant barrier to constitutional complainants.²⁵² It is best understood at least partly as an outgrowth of institutional concerns. If courts held that a disproportionate effect sufficed to raise constitutional doubts, a wide variety of governmental policies would be seriously questioned — an extremely intrusive outcome that might be inappropriate in light of the properly limited role of the judiciary in American government.

Courts have also invoked institutional considerations to justify an interpretation of the Constitution that affords little protection to certain groups, including most notably the handicapped and gays and

²⁴⁸ See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970) (affording hearing rights); Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 974-89 (1988) (discussing when judicial review is necessary); Hart, *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372 (1953) (suggesting that the due process clause generally requires judicial review).

²⁴⁹ See Fallon, *supra* note 248, at 974-91.

²⁵⁰ See, e.g., *Webster v. Doe*, 108 S. Ct. 2047, 2053 (1988); *Johnson v. Robison*, 415 U.S. 361, 367 (1974).

²⁵¹ See *Washington v. Davis*, 426 U.S. 229 (1976).

²⁵² See, e.g., *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979). See generally Strauss, *Discriminatory Intent and the Taming of Brown*, 54 U. CHI. L. REV. 935, 1000-03 (1989) (criticizing Feeney).

lesbians.²⁵³ In this light, statutes that provide protection for these groups, or against discriminatory effects, might well represent the legislature's response to its judicially underenforced constitutional responsibilities. Through statutory construction, courts can ensure that the relevant norms are vindicated. Aggressive construction of ambiguous statutes designed to protect disadvantaged groups provides a way for courts to protect the constitutional norm of equal protection in a less intrusive manner.²⁵⁴

(h) *Property and Contract Rights.* — In the aftermath of the New Deal reformation, courts have been reluctant to use the Constitution's explicit protection of property and contracts in a way that would seriously interfere with social and economic regulation.²⁵⁵ To a large degree, the reluctance is a product of the Court's substantive belief that redistributive goals fall within the state's police power under these clauses — a large shift from the understanding of the founding generation. Part of the Court's reluctance, however, derives from its belief that in the post-New Deal period, regulatory interferences with private contract and private property have considerable democratic support, and the judiciary ought to intervene only in egregious cases.

Whether or not the Court's unwillingness to provide more protection to rights of contract and property is justified,²⁵⁶ courts can vindicate those rights less intrusively by narrowly construing regulatory statutes that raise serious constitutional doubts under the contracts and takings clauses.

(i) *Welfare Rights.* — In the 1960's and 1970's, a number of commentators urged the Supreme Court to give constitutional protection to the right to minimum levels of subsistence.²⁵⁷ These claims

²⁵³ See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding a Georgia sodomy statute over objections based on the right of privacy); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439–47 (1985) (holding that mental retardation is not a quasi-suspect classification, but that requiring a special-use permit for group homes for the mentally retarded nevertheless violated the equal protection clause).

²⁵⁴ The much-maligned decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), raises related issues. Under *Griggs*, a showing of disparate impact shifts to the defendant the burden of demonstrating business necessity. *See id.* at 432. In light of the fact that proof of "discriminatory purpose" is exceptionally difficult even when purpose exists, the *Griggs* framework seems appropriately to further the congressional command. *See Strauss, supra* note 252, at 1012–14; *see also infra* pp. 484–85 (discussing *Griggs* in light of other substantive norms).

²⁵⁵ *See, e.g., Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (finding no violation of the public use requirement); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983) (contracts clause); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (takings clause); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (contracts clause).

²⁵⁶ For an emphatic negative answer, see R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

²⁵⁷ For the most prominent defense of welfare rights, see Michelman, *The Supreme Court*,

have plausible if not firm substantive roots in some of the most prominent theories of judicial review²⁵⁸ and in the New Deal reformation of the constitutional structure.²⁵⁹ There are, however, formidable institutional objections to such a judicial role,²⁶⁰ which would involve careful monitoring of a massive national bureaucracy. For the Supreme Court to undertake to protect welfare rights entirely on its own would raise serious questions of democratic legitimacy and remedial competence. Perhaps a Court that saw substantive force in the claim for constitutional welfare rights would attempt to vindicate that claim, not through the Constitution itself, but through aggressive statutory construction to ensure against irrational or arbitrary deprivations of benefits. Such an approach would tend to produce even-handedness in the distribution of funds to the poor in a democracy that has committed itself to a "social safety net." Statutory construction, requiring a clear statement before allowing selective exclusions, might produce many of the advantages of recognition of welfare rights without imposing nearly so severe a strain on the judiciary.

2. *Institutional Concerns.* — A number of interpretive principles respond directly to institutional concerns and are designed to improve the performance of governmental entities. Most of these principles are straightforward and can be discussed quite briefly.

(a) *Appropriations Statutes.* — Courts construe appropriations provisions quite narrowly in light of judicial understandings about the character of the appropriations process, in which careful legislative deliberation is highly unlikely.²⁶¹ Interest-group power is particularly likely to influence results in this context.

(b) *A Cautious Approach to Legislative History.* — As Justice Scalia has emphasized,²⁶² legislative history is sometimes written by one side or another in a dispute over the content of the law, and the history will sometimes reflect a view that could not prevail in the processes of congressional deliberation.²⁶³ In any case, the history is not law. Courts should therefore adopt a firm principle of the priority

²⁵⁸ 1968 Term — Foreword: *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659 [hereinafter Michelman, *Welfare Rights*].

²⁵⁹ See Michelman, *Welfare Rights*, *supra* note 257, at 684 (arguing that Dean Ely's theory of judicial review based on representation reinforcement makes a case for minimum welfare rights).

²⁶⁰ See Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. (forthcoming 1990) (discussing the transformation of American law brought about by the New Deal's recognition of affirmative duties on the part of national government).

²⁶¹ See, e.g., Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41 (challenging the proposed constitutional right to various goods).

²⁶² See *supra* pp. 456-57.

²⁶³ See *supra* note 85 and accompanying text.

²⁶⁴ See, e.g., B. ACKERMAN & W. HASSLER, *supra* note 23, at 44-54.

of statutory text to statutory history — a principle that does not call on courts entirely to disregard the history, but that gives the history limited weight in cases of conflict.

(c) *The Presumption Against Implied Repeals.* — Courts do not lightly assume that one statute has implicitly repealed another.²⁶⁴ This principle is a product of a set of beliefs about the legislative process — in particular, a belief that Congress, focused as it usually is on a particular problem, should not be understood to have eliminated without specific consideration another program that was likely the product of sustained attention.

(d) *Implied Exemptions from Taxation.* — Courts do not infer exemptions from taxation.²⁶⁵ This principle derives partly from a desire to protect the Treasury; it also responds to the perception that Congress is highly attentive to tax matters; and it rests partly on a view that selective exemptions from taxation might represent a departure from ordinary principles of equality and should therefore be disfavored.

(e) *The Question of Administrative Discretion.* — Courts defer to agency understandings of policy and fact in cases in which discretion has lawfully been conferred.²⁶⁶ This idea is based on a recognition of the superior democratic accountability and fact-finding capacity of the agency and the corresponding belief that courts ought to treat agency decisions with a fair degree of respect. Similarly, the rare judicial decisions finding agency action not subject to judicial review are based on perceptions that judicial intervention would likely be counterproductive in the circumstances.²⁶⁷

(f) *The Presumption in Favor of Judicial Review.* — By contrast, courts presume that the legislature has not precluded judicial review of agency decisions. This presumption is partly attributable to a belief — vindicated by recent experience²⁶⁸ — that regulatory agencies are susceptible to factionalism and self-interested representation. Judicial review operates as both an *ex ante* deterrent against dangers of this sort and an *ex post* corrective. If Congress is to eliminate judicial review, it must do so unambiguously.

There is a tension between the goal of limiting administrative discretion and the desire to ensure that courts defer to the agency's

²⁶⁴ See 1A SUTHERLAND ON CONSTRUCTION, *supra* note 176, § 23.10, at 346.

²⁶⁵ See, e.g., United States v. Wells Fargo Bank, 108 S. Ct. 1179, 1183 (1988).

²⁶⁶ See, e.g., Baltimore Gas & Elec. Co. v. National Resources Defense Council, Inc., 462 U.S. 87, 97 (1983).

²⁶⁷ See Heckler v. Chaney, 470 U.S. 821, 831 (1985); Hahn v. Gottlieb, 430 F.2d 1243, 1249–51 (1st Cir. 1970).

²⁶⁸ See, e.g., B. ACKERMAN & W. HASSSLER, *supra* note 23, at 79–103; K. SCHLOZMAN & J. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 63–87 (1986); Stewart, *supra* note 144, at 1795–96.

specialized fact-finding and policymaking competence. The best reconciliation of these competing concerns would call for a principle requiring a clear legislative displacement of judicial review; for judicial deference to agency decisions on facts, policy, and "mixed" questions having legal components; and for independent judicial review of pure questions of law except where Congress has delegated interpretive power to the agency.

(g) *Ratification, Acquiescence, Stare Decisis, and Post-Enactment History.* — Although Congress' post-enactment views do not have the authority of law, stare decisis and post-enactment history should play a limited role in interpretation.²⁶⁹ Post-enactment history deserves the least deference. Like other legislative history, it can provide a sense of context, but it has the normal difficulties of unenacted views; indeed, it is even worse than pre-enactment history in the sense that it is uninformative about the desires of the enacting Congress. On the other hand, evidence that part or all of Congress has endorsed a judicial construction or interpreted a statute in a particular way is important in furthering the goals of rationality, consistency, and coordination in interpretation. Stare decisis principles have traditionally served the same function of ensuring rationality and consistency, even though the previous decision may not have accurately understood the original meaning of the statute.²⁷⁰

3. *Counteracting Statutory Failure.* — I have suggested that a number of interpretive principles in current law are intended to counteract failures in social and economic regulation.²⁷¹ The general idea that statutory construction should combat characteristic pathologies in regulatory legislation is well-grounded in existing doctrine. In this section, I outline and defend a series of interpretive norms designed to promote this goal. Some of the particular norms have solid roots in current case law; others are implicit; still others find at best ambiguous support and are proposed here for the first time. I indicate the relationship between the suggested norms and current law in the particular discussions.

Courts should, I argue, try to avoid characteristic failures in regulation — caused, for example, by a failure to understand the systemic effects of regulation or to coordinate statutes regulating the same area. Courts should also be aware of the risks of overenforcement and underenforcement and therefore permit de minimis exceptions, assume proportionality in regulation, and generously construe statutes de-

²⁶⁹ See, e.g., Eskridge, *Public Values*, *supra* note 21, at 1042–44. See generally Eskridge, *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 90–108 (1988).

²⁷⁰ See Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2370 (1989); R. DWORKIN, *supra* note 19, at 348–50; Eskridge, *Interpreting Legislative Inaction*, *supra* note 269, at 108–22.

²⁷¹ See *supra* pp. 457–59.

signed to protect traditionally disadvantaged groups and nonmarket values.

Some of these ideas, depending for their support on views about regulatory failure, are of course products of contestable substantive claims. Notwithstanding their number and variety, moreover, the principles are united by certain general goals, which include, above all, the effort to promote accountability and deliberation in government, to furnish surrogates when both are absent, to limit factionalism and self-interested representation, and to further political equality. All of the principles respond to an understanding of the various reasons for statutes and of the various ways that statutes fail.

(a) *Promoting Political Accountability.* — Courts should construe statutes so that those who are politically accountable and highly visible will make regulatory decisions. This norm finds its justification in constitutional and institutional considerations deriving from the basic premise of electoral accountability and also in a perception that regulatory failure is sometimes a product of factional power.²⁷² As we have seen, a number of cases growing out of constitutional concerns recognize this basic principle.²⁷³ Reflecting judicial reluctance to allow agencies to exercise discretionary power that has not been clearly delegated, these cases often require accountable actors to make decisions involving important rights and politically weak groups. Such decisions can also be understood as an effort to counteract regulatory failure that occurs from a lack of accountability.

Other doctrines also draw from the goal of promoting political accountability. The principle that courts should defer to administrative interpretations of statutes is an example.²⁷⁴ Indeed, in the most important recent case invoking that principle, the Supreme Court referred expressly to the greater accountability of the President in comparison to the judiciary.²⁷⁵ Because the President, unlike a judge, is elected, interpretation of statutes raising controversial questions of public policy should be made by the executive branch, at least where the legislature has granted the executive the power to construe ambiguous statutes. As lawmaker, however, Congress is in a superior position to the President or the regulatory agency. In order to ensure compliance with legislative instructions, courts, not potentially self-interested regulators, should resolve statutory ambiguities involving pure questions of law.²⁷⁶ But the principle of leaving decisions to electorally accountable officials is sound insofar as it recognizes that

²⁷² See *supra* pp. 467-68.

²⁷³ See sources cited *supra* notes 234-40.

²⁷⁴ See, e.g., *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984).

²⁷⁵ See *id.*

²⁷⁶ See Sunstein, *supra* note 9, at 444-52.

Congress may and often does delegate to regulatory agencies and the President the power to fill in statutory gaps.²⁷⁷

(b) *Taking Account of Collective Action Problems.*²⁷⁸ — Regulatory statutes are sometimes subverted in the implementation process, often as a result of the diffuse character of the class of regulatory beneficiaries.²⁷⁹ In one common scenario, the beneficiaries of regulatory programs, though numerous and ordinarily disorganized, are able to mobilize to obtain protective legislation. As the statute is implemented, however, the group tends to dissipate, and well-organized members of the regulated class are able to exert continuing pressure on the agency. The regulatory program is skewed against effective implementation.²⁸⁰ Congress' words become purely symbolic, and inadequate implementation prevents the statute from accomplishing legislative goals. Judicial interpretation of ambiguous statutes that takes account of this phenomenon will promote fidelity to these goals.

Many decisions appear to have reacted to the possibility that collective action problems will undermine regulatory programs. The most conspicuous examples are decisions aggressively construing regulatory statutes in order to protect the environment.²⁸¹ The context presents a classic setting for regulatory "failure" resulting from collective action problems (not to mention unrepresented future generations, which cannot wield political power). Other illustrations include judicial decisions taking a careful look at administrative decisions that jeopardize the interests of regulatory beneficiaries.²⁸² These decisions also respond to a perception that poorly organized beneficiaries are at risk during implementation, and that as a result, legislative goals will not be carried out in the real world.

Cases responding to overzealous regulation may be motivated by a similar concern.²⁸³ In this context, a collective action problem or structural infirmity may incline the agency toward excessive intrusion

²⁷⁷ See Monaghan, *supra* note 142, at 25–28.

²⁷⁸ See *supra* note 148.

²⁷⁹ See Wilson, *The Politics of Regulation*, in THE POLITICS OF REGULATION 357, 369–72 (J. Wilson ed. 1980).

²⁸⁰ This phenomenon has at times impaired national environmental policy in the United States. See, e.g., R. MELNICK, *supra* note 65, at 195–238; D. VOGEL, *supra* note 224, at 146–52.

²⁸¹ See cases cited *infra* note 334.

²⁸² See Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 189–97 (discussing Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29 (1983)); see also Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 330–34 (1988) (challenging the Court's conclusion because of a collective action problem in *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984)).

²⁸³ See, e.g., *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 639–52 (1980) (plurality opinion).

into the marketplace. Cases involving OSHA regulation²⁸⁴ and banking controls²⁸⁵ provide examples.

(c) *Promoting Consistency and Coherence Among Regulatory Programs.* — The post-New Deal proliferation of regulatory programs has sometimes led to inconsistency and incoherence in the law. For example, the standards for regulating carcinogens are notoriously variable; they call for excessive controls in some areas and unduly weak regulation in others.²⁸⁶ Some carcinogens are thus regulated at a cost of \$40 million per life saved, whereas others cost \$400,000 or less.²⁸⁷ The absence of centralization has led to regulatory failures — in the form of incoherent and even chaotic regulation — in numerous areas.²⁸⁸

As a partial solution, courts should require a clear statement by Congress before allowing a statute to create significant inconsistency in the law. A judicial role of this sort has clear precedent in contemporary administrative law and in the old canon that statutes governing the same subject matter should be construed together.²⁸⁹ In light of the potentially chaotic pattern of social and economic regulation, judicial decisions limiting agency authority to impose huge costs for uncertain or speculative gains might be seen as part of an integration of statutory systems into a coherent whole.²⁹⁰ Similar considerations

²⁸⁴ See *id.*; Natural Resources Defense Council, Inc. v. EPA, 824 F.2d 1146, 1152-54 (D.C. Cir. 1987) (en banc); Asbestos Information Ass'n v. Occupational Safety & Health Admin., 727 F.2d 415, 424-27 (5th Cir. 1984); Aqua Slide 'n' Dive Corp. v. Consumer Prod. Safety Comm'n, 569 F.2d 831, 839-43 (5th Cir. 1978).

²⁸⁵ See Langevoort, *supra* note 80, at 729-33 (concluding that, when changing financial markets undermined the premises of the McFadden and Glass-Steagall Acts, courts began to construe regulations to accommodate this change).

²⁸⁶ See EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT 274-75 (1985); R. LITAN & W. NORDHAUS, REFORMING FEDERAL REGULATION 48, 77 n.26 (1983). See generally Graham & Vaupel, *supra* note 224, at 94 (pointing out large cost differences between types of life-saving programs; in particular, noting that the OSHA regulations are normally hundreds of times more expensive per life saved than highway regulations).

²⁸⁷ See J. MENDELOFF, *supra* note 224, at 22.

²⁸⁸ See, e.g., E. BERKOWITZ, DISABLED POLICY I-II (1987); R. KATZMAN, *supra* note 191, at 144-51, 188 (chronicling "uncertainty and vacillation"); Huber, *Electricity and the Environment: In Search of Regulatory Authority*, 100 HARV. L. REV. 1002, 1002 (1987) ("Current regulation of [the electric power industry] now promises both less electricity and more damage to health and the environment.").

²⁸⁹ See Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 787-88 (1976); Estate of Sanford v. Commissioner, 308 U.S. 39 (1939); Daigneault v. Public Fin. Corp., 562 F. Supp. 194, 197 n.2 (D.R.I. 1983); Preston State Bank v. Ainsworth, 552 F. Supp. 578, 580 (N.D. Tex. 1982); Jones v. Illinois Dep't of Rehabilitation Servs., 504 F. Supp. 1244, 1254 (N.D. Ill. 1981), aff'd, 682 F.2d 724 (7th Cir. 1982).

²⁹⁰ See Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980) (plurality opinion) (OSHA); Natural Resources Defense Council, Inc. v. EPA, 824 F.2d 1146 (D.C. Cir. 1987) (en banc).

help explain *Bob Jones University v. United States*.²⁹¹ This decision might be understood as an effort to ensure that the IRS takes account of the widespread social antagonism toward racial discrimination, as part of the general thrust of contemporary "public policy."

(d) *Considering Systemic Effects.* — Regulation is frequently unsuccessful because of a failure to understand the complex systemic effects of governmental controls.²⁹² Courts dealing with regulatory issues often act as if the decision will create only ex post winners and losers in the particular case. This misunderstanding leads to statutory construction that is uninformed by the real-world impact of regulation. Examples include the Supreme Court's OSHA decisions,²⁹³ in which several members of the Court appeared to assume that greater protection for workers would automatically follow from more stringent statutory requirements.²⁹⁴ This assumption is false. By requiring government to regulate to the point of "feasibility" and forbidding balancing of benefits and costs, stringent statutory requirements have at times harmed workers themselves. Faced with such onerous requirements,²⁹⁵ regulators have often underenforced the statute by failing to enforce the rules on the books or by refusing to issue rules at all.²⁹⁶ Interpreting an environmental or occupational health law as especially protective may ultimately decrease regulatory protection. The problem of unintended or perverse side-effects is pervasive. Courts should understand the sometimes counterintuitive systemic consequences of different interpretations of regulatory statutes.

(e) *Avoiding Private Law Principles.* — As suggested above, courts cannot properly invoke common law principles of private autonomy as the backdrop for interpreting public law.²⁹⁷ Suppose, for example, that a statute allows employees to file workers' compensation claims, and that an employer attempts to discharge an employee for filing such a claim. In this setting, courts should not invoke the background rule of at-will employment in order to uphold the discharge, even if the legislature has not explicitly displaced that rule in this context.²⁹⁸

²⁹¹ 461 U.S. 574 (1983).

²⁹² See Rose-Ackerman, *Comment: Progressive Law and Economics — and the New Administrative Law*, 98 YALE L.J. 341, 364–67 (1988); see also Ackerman & Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985) (advocating decentralized, cost-effective environmental regulation).

²⁹³ See *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981) (refusing to apply cost-benefit analysis to OSHA's cotton dust standard); *American Petroleum*, 448 U.S. 607 (plurality opinion).

²⁹⁴ See, e.g., *American Textile Mfrs.*, 452 U.S. at 499.

²⁹⁵ See Ackerman & Stewart, *supra* note 292, at 1335–40; Rose-Ackerman, *supra* note 292, at 355–58.

²⁹⁶ See, e.g., J. MENDELOFF, *supra* note 224, at 22; W. VISCUSI, *RISK BY CHOICE* 25–36 (1983); D. VOGEL, *supra* note 224, at 164–69, 192.

²⁹⁷ See *supra* pp. 443–44.

²⁹⁸ See, e.g., *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976).

The at-will rule would undermine the purpose of the workers' compensation statute. When the legislature intends to transform the relationships created by the common law, principles rooted in the common law do not provide an appropriate background rule.

Private law principles are wrongly applied in several areas of modern law. In interpreting the provisions of the Administrative Procedure Act (APA),²⁹⁹ the Supreme Court has held that agency action is presumptively reviewable, but that agency inaction is presumptively unreviewable, in part because agency inaction is not "coercive."³⁰⁰ This understanding depends on an outmoded conception that finds coercion only in cases in which government intrudes on common law rights. Under this view, for example, the failure to protect against environmental harms or discrimination is not coercive at all. But the New Deal reformation, and the existence of social and economic regulation in general, are largely based on an understanding that the market creates a kind of coercion against which government must guard. For this reason, it is quite troublesome to use common law principles of coercion as the basis for creating a presumption against review of inadequate regulatory protection.³⁰¹

On occasion, the Court's treatment of the standing provisions of the APA³⁰² has likewise disserved the goals of the legislature in enacting regulatory statutes. In some cases construing the APA, the Court has barred regulatory beneficiaries from seeking relief because they lacked a common law injury.³⁰³ In others, the Court has used a clear-statement principle in favor of continued judicial power to "balance the equities" in environmental cases and has thus decreased the likelihood of injunctive relief in such cases.³⁰⁴ In both of these contexts, the Court has used traditional private law principles in order to give content to modern public law; in both settings, the resulting doctrine disserves the goals of the legislature.³⁰⁵

²⁹⁹ 5 U.S.C. § 702 (1988).

³⁰⁰ See *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

³⁰¹ See Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 666-69 (1985).

³⁰² See 5 U.S.C. § 701 (1988).

³⁰³ See, e.g., *Allen v. Wright*, 468 U.S. 737, 756-61 (1984); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40-46 (1976). For a discussion of the dependence of these holdings on private law principles, see Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1461-69 (1988).

³⁰⁴ See, e.g., *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 541-46 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

³⁰⁵ A similar error can be found in *Independent Federation of Flight Attendants v. Zipes*, 109 S. Ct. 2732 (1989), in which the Court was asked to decide whether a successful plaintiff in a civil rights case could obtain attorneys' fees against an intervening party. The relevant provision states that a "court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 2000e-5(k) (1982). The Court held that intervenors would be liable to a prevailing plaintiff only if the intervention

(f) *Avoiding Irrationality and Injustice.* — A time-honored principle in Anglo-American law is that statutes should be construed to avoid irrationality and injustice, even when the language of the statute seems to lead in that direction.³⁰⁶ The principle is controversial because there is no obvious basis for deciding whether an outcome is irrational, and because it is plausible to suggest that the correction for any such defect should come from the legislature rather than the courts. Because courts are able to focus upon the concrete and often unforeseeable effects of general statutory provisions, however, they are in a much better position to judge whether a particular provision produces peculiar consequences in a particular setting. The judgment that the consequence is peculiar — and could not plausibly have been intended — is sometimes irresistible. On occasion the text, read literally, will appear to compel results that the legislature could not have anticipated and resolved in enacting a broad standard. It would be unrealistic to think that any legislature could or should correct every such problem.

In such circumstances, what might appear to be aggressive construction is entirely legitimate³⁰⁷ — at least if the injustice or irrationality is palpable and there is no affirmative evidence that the legislature intended the result. Usually the interpretive issue in such cases resembles Wittgenstein's game of dice.³⁰⁸ Here it is fully plau-

were wholly frivolous, even if the intervenor had acted only after the defendant had agreed to settle. *See Zipes*, 109 S. Ct. at 2736–39. The Court reasoned that the fee-award provision is subject to “the competing equities that Congress normally takes into account,” and those equities called for a rule that would permit an intervenor — who was not a wrongdoer — to participate free from liability for fees. *See id.* at 2736.

The dissent argued that in light of the congressional effort to encourage civil rights plaintiffs to bring suit and to settle as well, intervenors should be liable for fees. *See id.* at 2741–46 (Marshall, J., dissenting). The Court responded that “the essential difference” between the two sides had to do with whether title VII should be interpreted as reconciling “competing rights” in the traditional way, or instead as placing plaintiffs at the highest point of a hierarchy. *See 109 S. Ct. at 2738 n.4.* On this score, the Court’s resolution depended on its assumption that the fee-shifting provisions of title VII should be interpreted against the backdrop of the rights possessed before the statute was enacted. But the enactment of title VII in general and of the fee-shifting provision in particular probably should have been considered a repudiation of the more open-ended equitable balancing that preceded it. *See id.* at 2742–46 (Marshall, J., dissenting).

³⁰⁶ *See Public Citizen v. United States Dep’t of Justice*, 109 S. Ct. 2558, 2566–67 (1989); *O’Connor v. United States*, 479 U.S. 27, 31 (1986); *Brock v. Pierce County*, 476 U.S. 253, 258–59 (1986); cases cited *supra* note 44.

³⁰⁷ *See, e.g., Public Citizen*, 109 S. Ct. at 2566 (rejecting the literal meaning of a statute when it would “compel an odd result” (quoting *Green v. Bock Laundry Mach. Co.*, 109 S. Ct. 1981, 1984 (1989)); *see also id.* (citing cases). The emphasis of the legal process school on the need to construe statutes so that they are “reasonable” has continuing relevance, and provides a degree of interpretive guidance. *See R. DWORKIN*, *supra* note 19, at 148–60; H. HART & A. SACKS, *supra* note 15, at 1410–17.

³⁰⁸ *See supra* p. 419.

sible to interpret a statute so as not to apply notwithstanding its literal meaning.

In *Eisen v. Carlisle & Jacquelin*,³⁰⁹ for example, the Court confronted the issue of the notice requirements for class members in a class action in which the individual claims were extremely small. Federal Rule of Civil Procedure 23 requires "the best notice practicable under the circumstances, including individual notice to all class members who can be identified through reasonable effort."³¹⁰ Interpreting the language literally, a unanimous Supreme Court held that identifiable class members had to be notified of the suit.³¹¹

The result of *Eisen* — which effectively bars small claim class actions in most settings — is exceedingly peculiar. The purpose of notice is to protect those who are to be notified; in a case in which those notified do not have individually viable claims, it seems odd to suggest that notice is required in deference to their interests. Moreover, it is utterly irrational on the one hand to allow balancing with respect to the costs of identifying class members, but on the other to impose a per se rule in favor of notice when the costs of identification are low and the costs of providing notice are extremely high. The drafters of the notice provision of rule 23 probably were not thinking about the problem of individually small but collectively large claims when they drafted the notice provision. As in Wittgenstein's game of dice, the literal language, read acontextually, leads to an absurd result.

(g) *Protecting Disadvantaged Groups; Civil Rights Questions.* — Disadvantaged groups are especially at risk in the process of implementation. The same stereotypes and prejudices that afflict disadvantaged groups in the marketplace can also affect those responsible for implementing statutory protections. Those in a position to enforce the law thus tend to do so inadequately. Difficulties of organization and mobilization — including the costs, stigma, threat to future employment, and other burdens of bringing an enforcement action — undermine implementation as well.³¹² In the face of ambiguity, courts should resolve interpretive doubts in favor of disadvantaged groups so as to ensure that regulatory statutes are not defeated in the implementation process.

This idea has roots in existing law, though the basic principle has rarely been explicitly recognized.³¹³ The well-established idea that statutes should be interpreted in favor of Indian tribes is the most conspicuous example of this general idea.³¹⁴ Likewise, the Supreme

³⁰⁹ 417 U.S. 156 (1974).

³¹⁰ FED. R. CIV. P. 23(c)(2).

³¹¹ See *Eisen*, 417 U.S. at 173–77.

³¹² See *supra* pp. 467–68.

³¹³ For an exception, see Eskridge, *Public Values*, cited above in note 21, at 1032–34.

³¹⁴ See *id.* at 1047–48.

Court's general hostility to the creation of implied rights of action finds an exception in the civil rights laws. In a number of cases, courts have created implied rights to protect disadvantaged groups in the face of an ambiguous text.³¹⁵ A number of decisions reflect generous interpretations of statutes protecting the disabled.³¹⁶ Responding to this rationale, courts have often aggressively construed statutes forbidding discrimination on the basis of race and sex³¹⁷ — although recent cases suggest a movement in the opposite direction, perhaps rooted in a competing norm of private autonomy.³¹⁸

An example here is *Wards Cove Packing Co. v. Antonio*,³¹⁹ which involved the standards governing disparate-impact cases brought under title VII.³²⁰ In *Griggs v. Duke Power Co.*,³²¹ the Court held that once a plaintiff showed that an employment practice had a discriminatory impact on members of a minority group, the burden shifted to the defendant to show that the practice was justified by "business necessity."³²² In *Wards Cove*, the Court altered *Griggs* in two major ways. First, it held that the defendant's burden is one of production, not of persuasion, and the plaintiff must carry the burden of persuasion on the issue of business justification.³²³ Second, and more fundamentally, the Court held that the defendant need not show that a challenged practice is "'essential' or 'indispensable' to the employer's business."³²⁴ Instead, the question is "whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer."³²⁵

The textual proscription of "discrimination" does not resolve the questions in *Wards Cove*. The text does not indicate whether discrim-

³¹⁵ See, e.g., *Cannon v. University of Chicago*, 441 U.S. 677, 687-717 (1979) (title IX); *Allen v. State Bd. of Elections*, 393 U.S. 544, 554-57 (1969) (Voting Rights Act).

³¹⁶ See R. KATZMAN, *supra* note 191, at 152-87; see also *School Bd. v. Arline*, 480 U.S. 273, 280-86 (1987) (interpreting the Rehabilitation Act of 1973 to protect individuals with contagious diseases).

³¹⁷ See, e.g., *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (holding that title VII allows voluntary affirmative action plans); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that title VII prohibits facially neutral practices with disparate impact on minorities).

³¹⁸ This tendency was especially pronounced in 1989. See, e.g., *Independent Fed'n of Flight Attendants v. Zipes*, 109 S. Ct. 2732 (1989); *Jett v. Dallas Indep. School Dist.*, 109 S. Ct. 2702 (1989); *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989); *Wards Cove Packing Co. v. Antonio*, 109 S. Ct. 2115 (1989).

³¹⁹ 109 S. Ct. 2115 (1989).

³²⁰ 42 U.S.C. § 2000e-2(a) (1982).

³²¹ 401 U.S. 424 (1971).

³²² *Id.* at 429-32.

³²³ See *Wards Cove*, 109 S. Ct. at 2126.

³²⁴ *Id.* at 2125-26.

³²⁵ *Id.* at 2125. The burden of production seems, however, to have unusual substantive weight. Although the defendant need not show a practice is "indispensable," it must serve legitimate goals "in a significant way." *Id.*

inatory effects are in themselves troublesome or impermissible, or whether such effects might shift all the relevant burdens to the defendant — not because they are objectionable in themselves, but in order to flush out a discriminatory purpose. Although the legislative history reveals that the legislators were thinking largely of obvious cases of racial nonneutrality, it does not indicate whether the statutory proscription applies when the defendant adopts a practice, not justified by business necessity, that "freeze[s] the status quo of prior discriminatory practices,"³²⁶ or when the practice has a disproportionate effect on blacks that the employer would not be willing to tolerate if the burdened group consisted of whites.³²⁷ *Wards Cove* thus raises questions about gaps and implementing devices, questions that the text and history of the statute inform but do not answer.³²⁸

To resolve the disagreement between the majority and the dissent, one must ask a value-laden question: what sorts of devices best implement the nondiscrimination guarantee if it is properly characterized? The *Wards Cove* Court did not discuss this question at all; instead it acted as if the statute and relevant precedents largely disposed of the question. Although the issue is complex, one might start by observing that discriminatory purpose is exceptionally difficult to show even when it exists. A test that makes discriminatory effects probative of discriminatory purpose might invalidate some practices that should, given perfect implementing devices, be upheld. *Wards Cove*, however, will validate many practices that should, given such devices, be struck down. Moreover, discrimination exists when an employer has been nonneutral in the sense that it has adopted a practice having a discriminatory effect on blacks that it would not have adopted if the burden had been imposed on whites; *Wards Cove* will not reach this form of discrimination. For these reasons, *Wards Cove* will produce substantial underenforcement of the law. By contrast, systemic barriers to the implementation of antidiscrimination statutes³²⁹ make any concern about overenforcement highly speculative. No approach is perfect in this situation, but *Griggs* was probably a better method of implementing the statutory proscription.

(h) *Protecting Nonmarket Values.* — Statutes are frequently designed to protect aspirations or other values that the market under-

³²⁶ *Griggs*, 401 U.S. at 430.

³²⁷ This conception of neutrality might well satisfy an intent requirement. On this view, if the employer would not be willing to use the same test if the burdened and benefited groups were switched, he has discriminated. This understanding of neutrality includes racially selective concern and indifference as well as conscious racial animus. See Strauss, *supra* note 252, at 956-59.

³²⁸ For this reason, the decision must be regarded as a form of federal common law, akin to the implementation of the Sherman Act and § 1983. See *supra* pp. 421-22.

³²⁹ See *supra* pp. 467-68.

values.³³⁰ Those "nonmarket" values — reflected in laws regulating broadcasting and protecting the environment and endangered species — are often jeopardized in the post-enactment political "market," for the same reasons that nonmarket values are threatened by the willingness-to-pay criterion of the economic marketplace. If this characterization is accurate, an aggressive judicial role, combating a characteristic form of regulatory failure, is an appropriate way to achieve legislative goals. In many decisions interpreting the "public interest" standard of the Federal Communications Act,³³¹ courts have prodded the FCC to promote diversity, local control, local participation, and high-quality programming, and to work against racism and sexism in broadcasting³³² — all notwithstanding the fact that the market for broadcasting may fail to respect such norms. A similar solicitude for nonmarket values helps account for decisions taking a skeptical look at efforts to deregulate broadcasting³³³ and perhaps most notably for the aggressive judicial protection of the environment.³³⁴

(i) *Minimizing Interest-Group Transfers.* — Courts should narrowly construe statutes that serve no plausible public purpose, and amount merely to interest-group transfers. This idea is traceable to a basic constitutional norm³³⁵ and follows from the proportionality principle considered below. The idea helps explain a number of decisions

³³⁰ See Stewart, *supra* note 152, at 1566–87; Sunstein, *supra* note 158, at 1133–38.

³³¹ 47 U.S.C. §§ 151–610 (1982).

³³² See Stewart, *supra* note 152, at 1582–87 (discussing the treatment of noncommodity values in the courts).

³³³ See, e.g., *Office of Communications of the United Church of Christ v. FCC*, 779 F.2d 702 (D.C. Cir. 1985) (broadcast deregulation); *Office of Communications of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983) (same); see also *Central Florida Enter. Inc. v. FCC*, 598 F.2d 37 (D.C. Cir. 1978) (public interest standard), cert. dismissed, 441 U.S. 957 (1979); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 26–43 (D.C. Cir.) (invalidating FCC regulations limiting "siphoning" of programming from broadcast to pay television as beyond the Commission's authority), cert. denied, 434 U.S. 829 (1977); *Pasadena Broadcasting Co. v. FCC*, 555 F.2d 1046 (D.C. Cir. 1977); *Citizens Comm. To Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974) (en banc); *Friends of the Earth v. FCC*, 449 F.2d 1164 (D.C. Cir. 1971); *Citizen's Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971), *opinion clarified per curiam*, 463 F.2d 822 (1972). But see *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501 (D.C. Cir. 1986) (concluding that the fairness doctrine had not been codified), cert. denied, 482 U.S. 919 (1987). See generally Stewart, *supra* note 152 (using broadcast rights to exemplify noncommunity values).

³³⁴ See, e.g., *California Coastal Comm. v. Granite Rock Co.*, 480 U.S. 572 (1987); *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980); *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872 (1st Cir.), cert. denied, 439 U.S. 824 (1978); *Natural Resources Defense Council, Inc. v. Train*, 545 F.2d 320 (2d Cir. 1976); *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971); *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966); *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972) (mem. opinion). See generally R. MELNICK, *supra* note 65 (discussing the Clean Air Act).

³³⁵ See *supra* pp. 471–72; Macey, *supra* note 159, at 261–66.

in areas of economic regulation, such as banking and agriculture.³³⁶ It also informs the courts' approach to the Robinson-Patman Act³³⁷ and their effort to understand the Sherman Act as an attempt to promote consumer welfare rather than as protection of small business as such.³³⁸ When a public purpose is palpably absent, this principle should be unexceptionable.³³⁹

(j) *Requiring Proportionality.* — Another interpretive principle would understand statutes to impose benefits roughly commensurate with their costs, unless there is a clear legislative statement to the contrary. This proportionality norm, implicit in several recent cases,³⁴⁰ draws on an understanding of likely legislative purpose and on perceptions about regulatory failure. Statutes often fail because of excessive controls or inadequate implementation,³⁴¹ and courts should generally assume that Congress wants to avoid those problems and therefore intends agencies to impose regulations after a balancing process.³⁴² As we have seen, the absence of a proportionality principle

³³⁶ See, e.g., *Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys.*, 821 F.2d 810 (D.C. Cir. 1987), cert. denied, 483 U.S. 1005 (1988); *Investment Co. Inst. v. FDIC*, 815 F.2d 1540 (D.C. Cir. 1987) (per curiam), cert. denied, 484 U.S. 847 (1988); *Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys.*, 807 F.2d 1052 (D.C. Cir. 1986), cert. denied, 483 U.S. 1005 (1987); *Investment Co. Inst. v. Conover*, 790 F.2d 925 (D.C. Cir.), cert. denied, 479 U.S. 939 (1986); *Langevoort*, *supra* note 80, at 701, 725-33.

³³⁷ See R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 409-10 (1978).

³³⁸ See *id.* at 72-89; *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 108 S. Ct. 1515, 1519-24 (1988); *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19-22 (1979); *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51-59 (1977).

³³⁹ This principle must not, however, be confused with the unjustifiable idea that statutes in derogation of the common law should be narrowly construed; it is not a license for grudging interpretation of statutes that promote noncommodity values or that embody public-spirited redistribution, as suggested in Easterbrook, cited above in note 13, at 539-43. This is also a problem with the otherwise excellent treatment in Macey, cited above in note 159. As the experience of the early part of this century reveals, it is not for courts — in the process of statutory construction — to take a side in the regulatory debate that runs in the face of a legislative judgment. Courts should therefore attempt to discern a public-regarding purpose and give the benefit of every doubt to the legislature. But sometimes such purposes are not even plausibly at work. Of course, some difficult line-drawing problems will exist.

³⁴⁰ See, e.g., *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 652 (1980) (plurality opinion) ("[T]he mere possibility that some employee somewhere in the country may confront some risk of cancer is [not] a sufficient basis for the exercise of the Secretary's power to require the expenditure of hundreds of millions of dollars to minimize that risk."); *Natural Resources Defense Council, Inc. v. Thomas*, 824 F.2d 1146 (D.C. Cir. 1987) (en banc) (calling for consideration of feasibility).

³⁴¹ See J. MENDELOFF, *supra* note 224, at 1-12.

³⁴² Consider, for example, *Natural Resources Defense Council, Inc. v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987). In that case, the court concluded that § 112 of the Clean Air Act, 42 U.S.C. § 7412 (1982), which requires emissions standards that provide "an ample margin of safety," permits the Administrator to consider cost and technology despite the statute's failure to refer expressly to those factors. The decision is best understood as founded on a background principle of proportionality, one that Congress may eliminate only through a clear statement.

may produce harmful systemic consequences as well as overregulation. Ironically, it will also produce severe underregulation. Moreover, bureaucratic self-interest or factional pressures sometimes incline agencies toward overzealous enforcement, which Congress is unable routinely to monitor or remedy. The proportionality norm is reinforced as well by interpretive norms calling for legislative deliberation. It leads to narrow construction of statutes enacted as a result of interest-group pressure or as myopic or impulsive reactions to short-term problems.

The difficulty with this principle is that there is no uncontroversial metric with which to measure social costs and social benefits. If courts understand benefits and costs technically — as in the economic formulation — and make the assessment turn on private willingness to pay, they will undervalue aspirations and nonmarket values and ultimately undermine statutory goals.³⁴³ The very decision to create a regulatory system often reflects a rejection of private willingness to pay as the criterion of social choice. Many statutes are designed to transform rather than to implement preferences, to redistribute resources, or to reflect the outcome of a deliberative process about relevant public values.³⁴⁴ Moreover, a statute that protects (for example) endangered species may have symbolic or aspirational benefits. The various values that are served by regulatory programs should be treated hospitably.

For these reasons, the proportionality principle is most useful for cases of economic regulation. It becomes most workable when it is clear, by reference to a widely held social consensus, that the social benefits are small in comparison to the social costs. Even in cases of public aspirations or nonmarket values, the proportionality idea should be invoked when the disadvantages of regulation seem to dwarf the advantages, at least when the statute is ambiguous.³⁴⁵

(k) *Allowing de Minimis Exceptions.* — It follows from the proportionality principle that regulatory statutes should ordinarily be understood to contain de minimis exceptions. In such cases, the costs of regulation outweigh the benefits, which are by hypothesis insubstantial. Moreover, the failure to allow de minimis exceptions will

³⁴³ See, e.g., Anderson, *Values, Risks, and Market Norms*, 17 PHIL. & PUB. AFF. 54 (1988); see also Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 206–12 (1980) (arguing that wealth maximization in itself is not a value).

³⁴⁴ Thus, title VII is partly an effort to transform preferences; the minimum wage has redistributive purposes; the Clean Air Act is partly an outcome of a deliberative process. On these and other regulatory functions, see C. SUNSTEIN, cited above note *, chs. 1–2.

³⁴⁵ This principle casts in doubt the outcome in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), which held that the Endangered Species Act blocked construction of a dam that would destroy the habitat of the snail darter. See also R. DWORAKIN, *supra* note 19, at 347 (concluding that *Tennessee Valley Authority* was wrongly decided).

probably decrease rather than increase health and safety.³⁴⁶ Administrators should be allowed to refuse to impose costly regulations for highly speculative or minimal gains.³⁴⁷ Many courts have reached precisely this conclusion. Indeed, courts should probably require such exceptions in the absence of an explicit statutory text or plausible substantive justifications³⁴⁸ to the contrary.

4. *Examples.* — Two important cases involving the meaning of the Occupational Safety and Health Act illustrate the basic framework. The pertinent language of the statute³⁴⁹ directs OSHA to promulgate the standard that "most adequately assures, to the extent feasible . . . that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard . . . for the period of his working life."³⁵⁰ The statute also contains a general definition of "occupational safety and health standard," which says that the term refers to measures that require "conditions . . . reasonably necessary or appropriate to provide safe or healthful employment and places of employment."³⁵¹

In *Industrial Union Department, AFL-CIO v. American Petroleum Institute*,³⁵² the Supreme Court invalidated an OSHA regulation of benzene. Although the precise consequences of the regulation were sharply contested, there was evidence that the regulation would impose enormous costs in exchange for small or speculative gains. OSHA itself concluded that its regulation would require capital investments of \$266 million, first-year operating costs of \$187 to \$205

³⁴⁶ See *supra* p. 423.

³⁴⁷ Courts have reached somewhat conflicting conclusions on this point. The background rule, however, seems to be in favor of de minimis exceptions. See *Public Citizen v. Young*, 831 F.2d 1108, 1118-22 (D.C. Cir. 1987) (rejecting "literalism" and endorsing the de minimis exception, but refusing to imply such an exception to the Delaney Clause); *Gilhooley, Plain Meaning, Absurd Results and the Legislative Purpose: The Interpretation of the Delaney Clause*, 40 ADMIN. L. REV. 267 (1988) (advocating an "absurdity exception" that would be applied to the Delaney Clause); see also *Alabama Power Co. v. Costle*, 636 F.2d 323, 356-61 (D.C. Cir. 1979) ("[T]he ability . . . to exempt *de minimis* situations from a statutory command is not an ability to depart from the statute, but rather a tool to be used in implementing the legislative design."); *Monsanto Co. v. Kennedy*, 613 F.2d 947, 955-56 (D.C. Cir. 1979) (inferring a de minimis exception from the Food and Drug Act's definition of "food additive"); cf. *Bowen v. Yuckert*, 48 U.S. 137 (1987) (upholding denial of a benefit based on an interpretation of "disability" to mean "severe impairment"); *Mumpower, An Analysis of the de Minimis Strategy for Risk Management*, 6 RISK ANALYSIS 437 (1982) (emphasizing the complexity of risk management). See generally *Fiksel, Toward a de Minimis Policy in Risk Regulation*, 5 RISK ANALYSIS 257 (1985).

³⁴⁸ These might include the high aggregate costs of making such exceptions. See *Latin, Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine-Tuning" Regulation*, 37 STAN. L. REV. 1267, 1314-32 (1985).

³⁴⁹ 29 U.S.C. § 655(b)(5) (1982).

³⁵⁰ *Id.*

³⁵¹ *Id.* § 652(8).

³⁵² 448 U.S. 607 (1980) (plurality opinion).

million, and recurring annual costs of \$34 million.³⁵³ Contemporary scientific knowledge appeared to preclude a clear prediction of significant benefits, which in the Court's view "may be relatively small."³⁵⁴

A plurality of the Court concluded that the definitional clause required OSHA to establish a "significant risk" before regulating a toxic substance. The plurality justified its conclusion by referring to the Act's definition of occupational safety and health standards as those "reasonably necessary or appropriate to provide safe or healthful employment."³⁵⁵ In the Court's view, a standard was not "reasonably necessary or appropriate" if OSHA was unable to demonstrate a significant risk.

There was, however, little direct basis in the text or history of the Act for the plurality's conclusion. Congress did not explicitly require OSHA to show a "significant risk." The plurality found that such a requirement was implicit in the definitional clause, but it is very unusual to read a definitional clause, ordinarily carrying no weight, as creating a substantive limitation on administrative power. The clause is more plausibly treated as having no substantive content, or as having substantive content defined by other provisions of the Act. It is even more unusual for the Court to look to a definitional clause when the definition, so interpreted, contradicts a far more specific substantive provision, which in this case says that toxic substance standards must ensure "to the extent feasible . . . that *no employee will suffer material impairment of health or functional capacity*."³⁵⁶ The reference to "no employee" seems to suggest that the statute forbids OSHA from permitting risks from toxic substances even if only one or a few workers would suffer "material impairment of health." The judicially created "significant risk" requirement, by contrast, forbids regulation unless enough workers will be affected to make the benefits of regulation significant. Nothing in the legislative history supports the Court's interpretation of the definitional clause, and indeed the history argues against that interpretation.³⁵⁷

Unable to point to a solid textual basis for its "significant risk" requirement, the plurality invoked a clear-statement principle:

In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view Expert testimony that a substance is probably a human carcinogen . . . would justify the conclusion that the substance poses some risk of serious harm no matter how minute the exposure

³⁵³ See *id.* at 628–29.

³⁵⁴ *Id.* at 630.

³⁵⁵ *Id.* at 638 (discussing 29 U.S.C. § 652(8)).

³⁵⁶ 29 U.S.C. § 655(b)(5) (1982) (emphasis added).

³⁵⁷ See *American Petroleum*, 448 U.S. at 708–13 (Marshall, J., dissenting).

and no matter how many experts testified that they regarded the risk as insignificant. That conclusion would in turn justify pervasive regulation limited only by the constraint of feasibility. . . . [T]he Government's theory would give OSHA power to impose enormous costs that might produce little, if any, discernable benefit.³⁵⁸

The plurality further suggested that the government's interpretation would give the Secretary of Labor "open-ended" policymaking authority that might amount to an unconstitutional delegation of legislative power.³⁵⁹

The plurality's conclusion in *American Petroleum* is difficult to defend in either formalist or textualist terms. The "significant risk" requirement has no textual basis, at least not in any ordinary sense; it was a judicial creation. It would therefore be possible to caricature the result in the case as an impermissible judicial rewriting of the statute.³⁶⁰ But the conclusion in the case was nonetheless sound. A realistic interpretation of the statutory language would recognize that it was not addressed to the problem at hand. It is simply a myth to suggest that the Congress that enacted OSHA focused on the question of imposing enormous expenditures to redress trivial risks — recall Wittgenstein's game of dice. Despite the broad language of the toxic substances provision, Congress simply did not deal with the problem.

In these circumstances, the plurality's opinion can be seen as invoking several of the substantive norms defended above. The case provided an excellent setting for the application of the principle calling for de minimis exceptions to social and economic regulation. An exclusive focus on the one or two employees who suffer "material health impairment" as a result of a lifetime of exposure would in the long run produce less, not more, protection of workers.³⁶¹ If OSHA must regulate to the point of feasibility in the face of trivial risk, the Department of Labor will be reluctant to embark on any regulation at all.

Moreover, the proportionality principle and the background norm counseling avoidance of irrationality both argue in favor of the plurality's reading. The beneficiaries of OSHA regulation are well-organized and able to protect themselves in the implementation process.

³⁵⁸ *American Petroleum*, 448 U.S. at 645 (plurality opinion).

³⁵⁹ See *id.* at 651–52. In his concurring opinion, Justice Powell, advocating an interpretation of the Act that would call for cost-benefit balancing, suggested that "a standard-setting process that ignored economic considerations would result in a serious misallocation of resources and a lower effective level of safety than could be achieved under standards set with reference to the comparative benefits available at a lower cost." *Id.* at 670 (Powell, J., concurring in part and concurring in the judgment).

³⁶⁰ Similarly, a background principle in favor of interpreting words in accordance with their plain meaning would point toward acceptance of the government's position. See *id.* at 688 (Marshall, J., dissenting).

³⁶¹ See *supra* p. 480.

There was therefore a ready political corrective both to the plurality's conclusion, if it was contrary to public consensus, and to inadequate implementation in general. For all these reasons, the plurality correctly interpreted OSHA to require a showing of a significant risk as a predicate for regulation.³⁶²

In *American Textile Manufacturers Institute v. Donovan*,³⁶³ the Supreme Court decided a question left open in *American Petroleum*: whether the OSHA statute required cost-benefit analysis. In arguing that it did, the industry contended that the word "feasible" required OSHA not only to show a significant risk, but also to demonstrate that the benefits of regulation justified the costs. "Feasibility," in the industry's view, contemplated a balancing of costs and benefits. The government contended that once OSHA had shown a significant risk, it could regulate to the point where the survival of the regulated industry would be endangered by additional controls. For the government, the term "feasibility" did not connote cost-benefit balancing, but instead meant "possible."³⁶⁴

In accepting the government's argument, the Court relied on the dictionary definition of "feasible" to conclude that the term meant "capable of being done, executed, or effected," rather than justified by a balancing of costs and benefits.³⁶⁵ This literal approach to the statute was not entirely unreasonable. The structure of the toxic substances provision — consider the "no employee shall suffer" language — is in considerable tension with the industry's construction. Moreover, Congress has sometimes used the term "feasible" as a self-conscious alternative to "cost-benefit" balancing,³⁶⁶ and that fact argues against the view that the two terms have the same meaning. But the same principles that support the decision in *American Petroleum* cast serious doubt on *American Textile Manufacturers*.

Notwithstanding the statute's language, it is probably unrealistic to believe that Congress actually focused on, and resolved, the ques-

³⁶² A different result might be appropriate if the scientific evidence were uncertain. If a significant risk were impossible to show because the data were unclear, perhaps employers, rather than workers, should bear the burden of medical uncertainty. The plurality did not make clear how such considerations would bear on the problem of carcinogen regulation if they had been squarely confronted by OSHA.

³⁶³ 452 U.S. 490 (1981).

³⁶⁴ See *id.* at 494–95.

³⁶⁵ See *id.* at 508–09 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 831 (1976)).

³⁶⁶ In construing feasibility, courts have not weighed the benefits of the practice against its costs but inquired instead whether the regulation would prevent the industry from functioning. See *National Cottonseed Prod. Ass'n v. Brock*, 825 F.2d 482, 487 (D.C. Cir. 1987) ("[A] standard is economically feasible if the cost of compliance does not threaten the 'competitive structure or posture' of the industry." (quoting *Industrial Union Dep't, AFL-CIO v. Hodgson*, 499 F.2d 467, 478 (D.C. Cir. 1974))).

tion whether to favor the government's approach over some kind of balancing of costs and benefits. The question never arose during the debates. The general and more fundamental problem is the basic irrationality of a system in which OSHA is required to find a significant risk, but is prohibited from undertaking cost-benefit analysis. Whether a risk is "significant" depends in large part on the costs of eliminating it. A relatively small risk might justify regulation if the costs are also small, but a larger risk might best be left unregulated if the costs are enormous. A rational system of regulation looks not at the magnitude of the risk alone, but assesses the risk in comparison to the costs.

These considerations would deserve little weight if the statute unambiguously dictated a contrary result, but the word "feasible" is flexible enough to accommodate a proportionality requirement. By refusing to read the statute in this way, the Supreme Court has contributed to the irrationality of the Occupational Safety and Health Act — an irrationality that has harmed workers, employers, consumers, and the public at large.³⁶⁷

C. *Changed Circumstances or Obsolescence*

When circumstances change, statutory interpretation becomes especially difficult. Older statutes may depend on factual assumptions that no longer hold, or may conflict with more recent statutes, thus producing inconsistency and incoherence in regulation. This problem is complicated by the fact that the statutory term may have been clear when enacted, and at that time it may have been inappropriate to invoke controversial substantive norms to interpret it; but changed conditions can render a term ambiguous and thus make it appropriate to apply conspicuous or controversial norms. Because it represents a recurring hard case for statutory interpretation, the confrontation between statutory terms and new or unforeseen contexts deserves separate treatment.

In cases of changed circumstances, statutory construction appears informed by an effort to ensure integrity and coherence in the law by "updating" obsolete statutes — or, to put it less contentiously and probably more accurately, by interpreting them in a way that takes account of changing conditions.³⁶⁸ Here courts reject the idea that the original understanding of its audience or authors exhausts the meaning of a statute. There are good reasons to permit courts to go beyond the original understanding in the face of dramatically changed

³⁶⁷ See Rose-Ackerman, *supra* note 292, at 360–66.

³⁶⁸ See Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

circumstances, at least when the statutory text is ambiguous.³⁶⁹ Such an approach is likely to produce greater coherence in the law; to reduce the problem, pervasive in modern government, of regulation by measures that are badly out of date; and to lead to a legal system that is both more rational and more consistent with democratic norms.³⁷⁰ It is tempting but inadequate to say that the legislature should respond to the problem of changed circumstances. The question is what the statute means in those circumstances, and that question must be answered by those who interpret it, including the courts. This claim does not, of course, mean that changed circumstances should be understood to authorize courts to amend or rewrite statutes, but it does mean that "meaning" is itself a function of those circumstances.³⁷¹

The problem of changed circumstances presents questions not only of statutory meaning in new settings, but also of implicit interpretive instructions: how would Congress have wanted courts to approach its enactments in the face of obsolescence or changed circumstances? There will rarely be a direct answer to this question. As in constitutional law, the problem of changed circumstances requires courts to decide whether the content of legal rules should change when there have been changes in law, policy, and fact. At the very least, courts should answer in the affirmative³⁷² when a statute contains an open-ended term like "public policy" or "psychopathic"³⁷³ that invites interpretations that change over time; when statutory language already contains an ambiguous term ("feasible") whose meaning depends on current conditions,³⁷⁴ or when the statute contains a phrase ("induce cancer") that has been rendered ambiguous because of changed circumstances.³⁷⁵

Even when no clear interpretive instructions allow a judge to adapt statutory terms to new conditions, courts may do so when those conditions have rendered a statute ambiguous. This problem typically occurs in three ways. First, the factual assumptions underlying the

³⁶⁹ See Aleinikoff, *supra* note 64, at 56–61; Eskridge, *supra* note 368, at 1497–539; see also Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 219–23 (noting that changed circumstances have traditionally provided a rationale for departing from stare decisis).

³⁷⁰ See sources cited *supra* notes 224–28.

³⁷¹ Dean Calabresi has argued that courts should have the power to invalidate obsolete statutes and to return them to the legislature for reconsideration. See G. CALABRESI, *supra* note 82, at 163–66. A judicial role of this sort would be extremely controversial, and properly so. The principal problem posed by obsolescence or changed circumstances is that it complicates ordinary interpretation.

³⁷² See R. DWORKIN, *supra* note 19; Eskridge, *supra* note 368, at 1538–44.

³⁷³ See Aleinikoff, *supra* note 64, at 47–54.

³⁷⁴ See *supra* pp. 492–93.

³⁷⁵ See *infra* pp. 496–97.

original statute may no longer be valid. For example, statutes regulating broadcasting were enacted with the understanding that because of the limitations of the spectrum, few broadcasting licenses would be available. In the face of new technology and the rise of cable television, that assumption has become hopelessly unrealistic.

Second, a statutory provision may no longer be consistent with widely held social norms. In such cases a court must ask whether this change so alters the landscape that a reading of the statute that does not accord with the original understanding of its authors is justified — a question the enacting legislature may well have intended courts to answer in the affirmative.

Third, the legal background may have changed dramatically as a result of legislative and administrative innovations. A statute enacted in 1935 may have ignored environmental considerations widely recognized in statutes enacted after 1960. The question is whether the change in the legal background has consequences for interpreting the 1935 statute.

Judicial responses to all three kinds of obsolescence are not difficult to find. The first kind has resulted in aggressive construction, particularly in banking and broadcasting.³⁷⁶ In light of the changed nature of the relevant markets, it is implausible to resolve ambiguities by examining Congress' intent at the time of enactment. Such an approach would be a recipe for absurdity, and absurdity would hardly promote legislative purposes.

The second form of obsolescence is reflected in judicial construction of statutes of the 1920's and 1930's so as to require old-line agencies to take account of environmental concerns. In this context, the legal backdrop has changed so dramatically that seemingly straightforward interpretation of the old statutes would be undesirable.³⁷⁷ The same point helps to explain the courts' narrow construction of provisions of the UCC not anticipating the revolution in the law of products liability.³⁷⁸ The Court's decision in *Bob Jones* can be understood in similar terms. Changing legislative and judicial developments had made racial discrimination inconsistent with "public policy" in the 1980's, even if no such inconsistency existed when the charitable deduction was first enacted.

Decisions reading ambiguous statutes to require regulatory agencies to consider costs and benefits illustrate the third form of judicial response to obsolescence.³⁷⁹ The Court may also have been reflecting

³⁷⁶ See Langevoort, *supra* note 80.

³⁷⁷ See, e.g., *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).

³⁷⁸ See Peters, *Common Law Judging in a Statutory World: An Address*, 43 U. Pitt. L. REV. 995, 1010 (1982).

³⁷⁹ See *supra* note 340.

contemporary values in reading the Sherman Act as an effort to promote consumer welfare.³⁸⁰ The underlying argument would be that a welfare-based interpretive principle is the only basis for a judicially administrable standard, and that such a principle conforms best to current understandings about a well-functioning antitrust law.³⁸¹

Several substantive norms apply to cases of obsolescence. Obsolete statutes are by hypothesis inconsistent with other regulation or with the current legal framework. They may also have pernicious, if unintended, systemic effects. If the text allows, courts should attempt to harmonize such statutes with current circumstances.

* * *

We might explore the problem of obsolescence in more detail by examining the Delaney Clause. As noted above, the clause prohibits the sale of food additives that "induce cancer when ingested by man or animal" or are found "after tests which are appropriate for the evaluation of the safety of food additives, to induce cancer in man and animal."³⁸² As we have seen, the drafters of the clause believed that few additives caused cancer, and that those that did so were extremely dangerous. By the 1980's, however, it was clear that many substances were carcinogenic, but that a number of them created exceptionally minor risks.³⁸³

These developments severely undermined the assumptions of the Congress that enacted the Delaney Clause. Indeed the clause, read literally, appeared quite perverse in many of its applications because it banned substances that posed no real risk to health. Having been forbidden to use food additives posing a de minimis risk of cancer,

³⁸⁰ See, e.g., R. BORK, *supra* note 337, at 72-89. A similar method was at work in *King v. Smith*, 392 U.S. 309 (1968), in which the Supreme Court invalidated a state rule depriving women of welfare benefits whenever they lived with a man — even if cohabitation occurred as rarely as once a month. Although there had been a steady trend in the direction of eliminating moral requirements for welfare recipients, and although the "man-in-the-house" rule had been widely condemned as irrational, punitive, and probably both sexist and racist in operation, the Court was unable to point to any statutory provision that unambiguously invalidated the state rule. The decision in *King v. Smith* amounted to an aggressive reading of the statute to conform to what the Court understood to be the current (and well-founded) national consensus.

³⁸¹ See R. BORK, *supra* note 337, at 72-115; R. POSNER, *ECONOMIC ANALYSIS OF LAW* 265-97 (3d ed. 1986).

³⁸² 21 U.S.C. § 348(c)(3)(A) (1982).

³⁸³ Albert Kolby argues:

[A]nalytical chemists can now detect a whole new galaxy of low levels of substances in food. Previously the limits of qualitative identification and quantitative measurement were in the parts per thousand range: today parts per trillion are not uncommon and in some instances routine. This represents a millionfold increase in our ability to detect 'chemicals' in food.

Kolby, *Decision-Making Issues Relevant to Cancer-Inducing Substances*, in *REGULATORY ASPECTS OF CARCINOGENESIS AND FOOD ADDITIVES: THE DELANEY CLAUSE* 93, 94 (F. Coulston ed. 1979); see also Merrill, *supra* note 81, at 15-16 (discussing these technological advances).

manufacturers instead used additives that caused more serious risks of other diseases — thus creating what was quite possibly a significant increase in illnesses and deaths from food additives. In response, the FDA — invoking background principles against obsolescence and in favor of rationality and de minimis exception — interpreted the clause to permit the exemption of trivial risks. The claim, in short, was that changed circumstances made the word “induce” ambiguous. The FDA said that it would approve food additives that posed a de minimis risk of cancer.

The United States Court of Appeals for the District of Columbia held that the FDA’s position was unlawful.³⁸⁴ In that court’s view, the Delaney Clause was unambiguous on the point. Read in context, however, the statute’s meaning was far from clear. Because Congress did not focus on the question of de minimis risks in its original enactment, a de minimis exception would not have defeated Congress’ will. The factual background against which the Delaney Clause was written was so different from the present circumstances that the statutory terms “induce cancer” must be treated as ambiguous. The word “induce” should be read in its setting: whether a substance “induces” cancer within the meaning of the clause might well be a function of the degree of risk that it poses. We have seen that where there has been no clear legislative statement, agencies should be free to create de minimis exceptions to regulation. In these circumstances, interpretation of the clause to permit such exceptions seems consistent with permissible understandings of statutory construction, and quite sensible to boot. The D.C. Circuit’s decision to the contrary was therefore misguided.

D. Priority and Harmonization

It will not have escaped notice that the interpretive principles I have proposed will sometimes conflict with one another. For example, the principle favoring state authority might collide with the principle favoring disadvantaged groups, and the presumption against amendment through the appropriations process might contradict the principle in favor of generous construction of statutes protecting nonmarket values. The examples could easily be multiplied. The possibility of conflict renders the basic approach vulnerable to a neo-realist objection that, in practice, the interpretive norms will provide contradictory guidance for the judiciary.

Principles of harmonization and priority can in fact be developed to resolve cases of conflict. To make this claim is not, however, to say that the application of interpretive norms can be purely mechan-

³⁸⁴ See *Public Citizen v. Young*, 831 F.2d 1108 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1470 (1988).

ical. Inevitably, statutory construction is an exercise of practical reason, in which text, history, and purpose interact with background understandings in the legal culture.³⁸⁵ In light of the dependence of outcomes on particular contexts, a fully systematized approach to statutory construction would be unmanageable. But short of a complete system, it is possible to develop some guidelines.

1. *Priority.* — The first task is to develop principles by which to rank interpretive norms. Although different judges and administrators will rank such norms in different ways, it should be possible to achieve a more precise understanding of statutory construction — both as a descriptive and as a normative matter — by generating a hierarchy of interpretive principles.

In that hierarchy, the presumptions in favor of decisions by politically accountable actors and in favor of political deliberation should occupy the very highest place. The principle of political accountability has a clear foundation in article I of the Constitution, is an overriding structural commitment of the document, has roots in assessments of institutional performance,³⁸⁶ and is also designed to counteract characteristic failures in the regulatory process.³⁸⁷ In this sense, the norm of political accountability draws on all three basic sources of interpretive principles.

The commitment to political deliberation belongs on the same plane. The belief in deliberative democracy is also a basic constitutional commitment.³⁸⁸ Implicit in the systems of checks and balances and federalism, it draws on Madison's conception of political representation. The absence of deliberation has also contributed to regulatory failure.³⁸⁹ In these ways, the belief in political deliberation and the belief in political accountability are closely allied.

Other interpretive principles traceable to constitutional norms deserve great respect. They should occupy the next highest position in the hierarchy. This category would include the norms in favor of broad interpretation of statutes protecting disadvantaged groups, against delegations of legislative authority, in favor of state autonomy, and in favor of narrow construction of interest-group transfers. As we have seen, all of these principles have constitutional status but are underenforced as a result of the institutional position of the judiciary.³⁹⁰ Moreover, it is possible to create a kind of hierarchy within constitutionally based interpretive principles. Thus, for example, the

³⁸⁵ See Eskridge & Frickey, *Statutory Interpretation As Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

³⁸⁶ See *supra* p. 475.

³⁸⁷ For a discussion of these failures, see pp. 467-68 above.

³⁸⁸ See *supra* pp. 471-72.

³⁸⁹ See, e.g., J. MENDELOFF, *supra* note 224; Rose-Ackerman, *supra* note 292, at 351-54.

³⁹⁰ See *supra* p. 466.

principle in favor of state autonomy should occupy a lower place than the principle in favor of protection of disadvantaged groups, which is the product of the fourteenth amendment, a self-conscious attempt to limit the scope of state power. The case law in fact reflects this hierarchy.³⁹¹

Finally, interpretive principles without constitutional status should occupy the lowest rung, precisely because the judgments they represent are not so closely connected with the foundational commitments of American constitutionalism. This category includes norms in favor of coordination and of proportionality, norms requiring consideration of systemic effects, norms against implied repeals, and norms against obsolescence. All these norms should play a less significant role in cases of conflict. Moreover, these principles might themselves be placed in lexical order. For example, the principles calling for de minimis exceptions and for proportionality, and for taking account of systemic effects, should occupy the highest position among nonconstitutional principles. To use (for example) the principle calling for broad construction of statutes favoring nonmarket values as a reason to abandon proportionality would sacrifice those very values — because of the likelihood that stringent regulation that bars balancing will produce regulatory irrationality and, ultimately, underregulation. The background principles calling for proportionality and de minimis exceptions, and requiring consideration of systemic effects, should ordinarily apply unless a constitutional principle trumps them.

2. *Harmonization.* — Principles of harmonization are designed not to rank interpretive norms but to minimize the number of conflicts among norms. For example, courts should apply the proportionality principle differently when nonmarket values are at stake. In cases of economic regulation, translating costs and benefits into dollars, measured in terms of private willingness to pay, is entirely sensible. In cases implicating nonmonetary values, the fact that monetized costs and benefits are disproportionate is not controlling. Reflecting a similar understanding, the courts have interpreted statutes quite generously, and in a way that conspicuously departs from private willingness to pay, when aspirations and noncommodity values are involved.³⁹²

Another principle of harmonization would recognize that cases turn not simply on the applicability of interpretive norms, but also on the degree of their infringement. Thus, for example, an enormous grant of discretionary lawmaking power to a regulatory agency would argue more strongly in favor of an aggressive narrowing construction than a minor grant of such power. Moreover, if the norm in favor of

³⁹¹ See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453–56 (1976).

³⁹² See cases cited *supra* notes 333–34.

limited delegations conflicts with the norm in favor of coordination of regulatory policy, the degree of the infringement on both norms would be highly relevant to the decision.

3. *An Illustration* — *Pennhurst*. — *Pennhurst State School & Hospital v. Halderman*³⁹³ illustrates the operation of principles of priority and harmonization. In *Pennhurst*, a group of mentally retarded people brought suit against a mental health facility that was found to contain dangerous conditions. Many of the residents had been physically abused, brutally mistreated, or drugged; the facility was utterly inadequate for the treatment of the retarded. As the basis of their legal claim, the plaintiffs invoked the "bill of rights" in the Developmentally Disabled Assistance and Bill of Rights Act.³⁹⁴ The bill of rights contained a set of legislative findings, including the following:

- (1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.
- (2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in a setting that is least restrictive of the person's personal liberty.
- (3) The Federal Government and the States both have an obligation to assure that public funds are not provided to any institution[] . . . that[] does not provide treatment, services, and habilitation which is appropriate to the needs of such persons. . . .³⁹⁵

The question in *Pennhurst* was whether the bill of rights created legally enforceable rights, or whether it instead enacted a set of goals or aspirations that could not be vindicated in court. The history of the Act supported an argument that Congress intended to create legally cognizable rights.³⁹⁶ On the other hand, it was not unreasonable to suggest that the bill of rights should be taken, like some other prefaces to legislation, as a statement of goals and purposes that amounted to an essentially precatory statement of congressional aspirations — a statement that would not permit the developmentally disabled to bring suit against a facility that failed to respect the bill of rights. There was no affirmative indication that the "findings" were intended to give rise to legally enforceable rights, costing the state enormous sums. Without a background interpretive principle, the case was probably impossible to resolve.

³⁹³ 451 U.S. 1 (1981).

³⁹⁴ 42 U.S.C. §§ 6000–6081 (1982 & Supp. 1989).

³⁹⁵ *Id.* § 6009.

³⁹⁶ See, e.g., 451 U.S. at 42–47 (White, J., dissenting).

In holding for the governmental defendant, the Supreme Court did not deny that the conventional sources of interpretation left the case in equipoise. Instead it invoked a background principle: "[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation."³⁹⁷ The Court decided *Pennhurst* on the basis of an interpretive norm derived from the constitutional background, not from the statute at issue.

For reasons explored above, federalism principles are properly invoked, at least in ordinary settings, to require a clear statement from Congress for the imposition of significant duties on the states. If the Court had held the bill of rights legally enforceable, the states would have faced an enormous financial burden — one that they had not, in view of the statute's ambiguity, necessarily expected to incur. It is for this reason that the outcome in *Pennhurst* is a plausible one. But two considerations suggest that *Pennhurst* was incorrectly decided.

First, a constitutional norm calls for aggressive construction of statutes involving the developmentally disabled. The Court has been extremely cautious in using the Constitution to protect the disabled, largely for institutional reasons.³⁹⁸ In holding that the equal protection clause does not entitle the mentally retarded to special judicial protection, for example, the Court stressed that federal and state legislatures have responded to the pervasive mistreatment of the retarded, and that unelected judges should be reluctant to intrude so dramatically into democratic processes.³⁹⁹ In these circumstances, the best substantive theory of the equal protection clause accords special protection to the disabled, and when other branches give such protection, they are fulfilling their constitutional responsibilities.

Second, federalism principles have much less force in cases in which Congress attempts to protect a traditionally disadvantaged group from state political processes. The ordinary presumption in favor of state autonomy is countered by the fourteenth amendment — a self-conscious limitation on state power. Invocation of principles of state autonomy in the context of a socially subordinated group — to justify a narrow reading of a statute enacted on its behalf — is positively perverse in light of constitutional structure and history.⁴⁰⁰

³⁹⁷ 451 U.S. at 17 (footnote and citations omitted).

³⁹⁸ See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

³⁹⁹ See *id.* at 442–47.

⁴⁰⁰ To be sure, this conclusion depends on the (controversial) view that the developmentally disabled should for these purposes be treated the same as blacks, the unquestionable principal beneficiaries of the fourteenth amendment. But that view should not be difficult to defend in light of the past and present treatment of the developmentally disabled, treatment that led to

It follows that when Congress has taken steps to provide safeguards for that group, the Court should take into account the fourteenth amendment and the underenforced character of the equality norm in order to give statutes involving the disabled a hospitable rather than a grudging interpretation.⁴⁰¹ The *Pennhurst* Court should not have relied on a background norm in favor of federalism in order to render meaningless a statutory provision involving a group and a right safeguarded by the fourteenth amendment.⁴⁰²

E. A Concluding Note: The Post-Canonical Universe

What would the universe of statutory interpretation be like if all of these proposals were accepted? In one sense, it would not be dramatically different from the one we inhabit. All of the principles suggested here have some foundations in current law. A system of interpretation without interpretive norms, even substantive and institutional ones, would be inconceivable. On the other hand, a legal system that adopted such principles self-consciously would have a far greater degree of uniformity and coherence. It would be especially responsive to constitutional norms, to institutional considerations, and to an informed understanding of the functions and failures of the modern regulatory state. Above all, the system would rely on norms that promote the goals and that improve the performance of statutory regimes, and it would use the process of statutory construction as a corrective against some of the pervasive weaknesses, injustices, and irrationalities of modern regulation.

In all likelihood, a set of explicitly articulated interpretive norms would elicit administrative and legislative responses. In time, members of Congress, and others involved in the lawmaking process, would become aware of those norms and would enact statutes in the shadow of such norms. Some statutes would look quite different, for Congress would know that courts would, in the face of statutory silence or ambiguity, press legislation in one direction rather than another.⁴⁰³ Judicial adoption of interpretive norms of this sort would

and made necessary the very statute at issue in *Pennhurst*. See Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111, 144-52 (1987).

⁴⁰¹ But cf. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (upholding tribal sovereign immunity against equal protection claim under the Indian Civil Rights Act).

⁴⁰² Principles of priority and harmonization were also at work in *Bob Jones University v. United States*, 461 U.S. 574 (1983). See *supra* note 100. That decision reflects an implicit understanding that the nonsubordination principle trumps the interest in the autonomy of religious organizations, at least in the context of tax policy.

⁴⁰³ In light of the absence of solid evidence that legislative activity is materially affected by interpretive norms in general, this effect would, however, probably not be as great as one might expect.

ultimately shift the burden of legislative inertia — giving rationality of various sorts the benefit of the doubt, and raising the costs of absurdity or injustice — and at the same time would offer legislators and others a clear rather than murky background against which to do their work.

The interpretive norms suggested here would convert some hard cases into easy ones, by providing principles with which to decide cases that might otherwise be in equipoise. Examples include cases like *American Petroleum*, which involved the operation of the proportionality principle, and cases involving allegations of preemption, which implicate the principle in favor of state autonomy. But the norms would also make some easy cases into hard ones, by shifting the legal backdrop and requiring clear legislative instructions before certain results could be reached. For this reason, a legal framework pervaded by explicit background norms of the sort outlined here would in some settings create rather than diminish legal uncertainty.⁴⁰⁴ This cost, however, is a small price to pay for increased clarity in a variety of contexts, and, much more fundamentally, an improvement in the performance of regulatory law, an increase in rationality, and a greater sensitivity to the constitutional backdrop, statutory function, and regulatory failure.

V. CONCLUSION

The traditional understandings of statutory construction are inadequate. They fail to describe existing practice or to set out an approach that deserves support. Under the approach suggested here, the statutory text is the foundation for interpretation, but structure, purpose, intent, history, and "reasonableness" all play legitimate roles. It is possible, moreover, to distinguish among those roles, and thus to produce a system in which dictionary definitions of statutory terms ordinarily suffice, but are subject to various forms of contextual qualification.

As complete theories of interpretation, however, all of the traditional sources depend on fictions or leave large interpretive gaps. Efforts to approach statutes as "deals," or to justify a general background rule in favor of either administrative interpretation or "private ordering,"⁴⁰⁵ cannot be defended, for they produce indeterminacy, lead

⁴⁰⁴ The Delaney Clause might be an example. On one understanding of a textualist approach, the case is an easy one, and the FDA loses; it is the norm against de minimis exceptions that introduces uncertainty into a case that might be otherwise resolved on the basis of the "text."

⁴⁰⁵ The quotation marks are necessary because of the dependence of private ordering on legal decisions — a prominent New Deal theme. See Sunstein, *supra* note 9, at 437–38, 451–52.

to an inferior system of law, or depend on values that were repudiated by the decision to create the regulatory regime in the first instance.

Because language "by itself" lacks meaning, and in light of the existence of gaps or ambiguities in hard cases, interpretive principles of various sorts are desirable and in any case inevitable. Interpretation cannot occur without background principles that fill gaps in the face of legislative silence and provide the backdrop against which to read linguistic commands. In easy cases, the text, in conjunction with generally held interpretive principles, is enough to solve interpretive disputes; in other cases, also relatively easy, a resort to purpose, context — including legislative history — or reasonableness will be proper, necessary, and sufficient. In many cases, however, courts must invoke interpretive principles that appear controversial.

Some such principles aid courts in discerning the meaning of particular statutes, or help to implement Congress' actual or likely interpretive instructions. Others are rooted in constitutional concerns; others derive from assessments of institutional performance; still others attempt to respond to characteristic failings of regulatory legislation. Because statutory meaning is a function of interpretive principles and cannot exist without them, something like "canons" of construction, far from being obsolete, must occupy a prominent place in the theory and practice of statutory interpretation.

In these circumstances, it is especially important to avoid three common errors. The first is to treat interpretive principles as the illegitimate intrusion of discretionary policy judgments into "ordinary" interpretation; as we have seen, there is no such thing. The second is to think that the existence of competing, and value-laden, principles is a reason to give up on the enterprise of statutory construction altogether, and in hard cases to resort to a sometimes fictional "plain language," to treat interpretation as inevitably indeterminate, or to rest content with the conclusion that statutes turn out to mean what people in authority say that they mean. Even in hard cases, it is possible to mediate among competing principles and to assess them in terms of their sensitivity to constitutional structure, to institutional arrangements, and to regulatory function and failure. The third error is to use traditional principles of private law — carried over from anachronistic conceptions of the relationship between the citizen and the state — to resolve disputes about the meaning of modern enactments.

The interpretive principles suggested here are intended for the President, regulatory agencies, and Congress, as well as for the courts. Even more fundamentally, they provide a basis for understanding the ideas that underlie the fabric of the modern regulatory state. Indeed, it is in disputes over background norms of interpretation that one finds principles that organize and divide understandings not only of the New Deal reformation, but of American constitutionalism and democracy as a whole.

The ultimate task is to develop a set of interpretive norms — sensitive to constitutional structure, institutional design, the New Deal reformation, and the diverse functions and failings of governmental actors and statutory regimes⁴⁰⁶ — with which to approach social and economic regulation in a system that has largely abandoned common law categories. It is possible to generate a series of interpretive principles, all with support in current law, that can promote the goals of deliberative government in the post-New Deal period. In this way, statutory construction can serve as an ally of other, more ambitious strategies designed to promote some of the original constitutional goals in a dramatically changed legal environment. It is far too much to expect statutory construction to respond to all of the failings of the modern regulatory state. But it is not too much to expect that the process of interpretation can make the situation better rather than worse.

⁴⁰⁶ See Pound, *Common Law and Legislation*, *supra* note 4, at 386 (deplored the courts' failure to conceive of statutes "as entering into the legal system as an organic whole" and the judicial treatment of statutes "as introducing a sort of temporary innovation which is not at all to be thought of as on the same footing with common law doctrines"); see also Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 15 (1936) ("[A] statute is not an alien intruder in the house of the common law, but a guest to be welcomed and made at home there as a new and powerful aid in the accomplishment of its appointed task of accommodating the law to social needs.").

APPENDIX: INTERPRETIVE PRINCIPLES, OLD AND NEW

I. EXISTING OR DEFUNCT PRINCIPLES: A TYPOLOGY

A. *Principles Designed To Reveal Statutory Meaning in Particular Cases*

1. Plain meaning (questionable).
2. Understanding words in context of statutory structure.
3. Understanding specific provisions to overcome general provisions.
4. *Expressio unius* (questionable).
5. Construing statutes in context of and harmoniously with other statutes.
6. *Ejusdem generis*.

B. *Principles Designed To Reflect Congress' Actual or Likely Interpretive Instructions*

1. 1 U.S.C. §§ 1–6.
2. Narrow construction of appropriations statutes.
3. Construing statutes so as to avoid constitutional invalidity.
4. Presumption in favor of judicial review of administrative decisions.
5. Accounting for changed circumstances.

C. *Principles Designed To Promote Institutional Goals or To Improve Lawmaking*

1. Plain meaning (questionable).
2. Narrow construction of appropriations statutes.
3. Narrow construction of exemptions from taxation.
4. Deferring to agency interpretations of law, or to agency decisions where discretion has been conferred.
5. Construing statutes so as to limit administrative discretion and force decision by politically accountable persons.
6. Presumption in favor of judicial review of agency decisions.
7. Interpreting congressional refusal to disrupt longstanding judicial or administrative interpretations of statutes as acquiescence or ratification.

D. *Principles Designed To Promote Substantive Goals*

1. Presumption against preemption of state law (questionable when discrimination is at issue).
2. Presumption against implied repeals.
3. Construing statutes so as to harmonize with one another.
4. Narrow construction of statutes in derogation of common law (obsolete).
5. Narrow construction of statutes abrogating sovereign immunity (obsolete).

6. Construing statutes in favor of Indian tribes.
7. Presumption against implied causes of action (questionable).
8. Presumption against judicial review of agency inaction (questionable).
9. Rule of lenity in criminal cases.
10. Presumption that laws apply only within territory of United States.
11. Presumption against standing for "regulatory harms" (questionable).
12. Broad construction of remedial statutes (indefensible except as a corrective to 4 above).
13. Presumption against retroactivity.
14. Presumption against interference with traditional powers of the President and federal courts.

II. PROPOSED PRINCIPLES FOR THE REGULATORY STATE

A. *Constitutional Principles*

1. Avoiding constitutional invalidity and constitutional doubts.
2. Federalism.
3. Political accountability; the nondelegation principle.
4. Political deliberation; checks and balances; the constitutional antipathy to naked interest-group transfers.
5. Disadvantaged groups.
6. Hearing rights.
7. Property and contract rights.
8. Welfare rights.
9. Rule of law.

B. *Institutional Concerns*

1. Narrow construction of appropriations statutes.
2. Presumption in favor of judicial review.
3. Presumption against implied exemptions from taxation.
4. Presumption against implied repeals.
5. Question of administrative discretion.
6. Cautious approach to legislative history.
7. Ratification, acquiescence, stare decisis and post-enactment history.

C. *Counteracting Statutory Failure*

1. Presumption in favor of political accountability.
2. Presumption against subversion of statute through collective action problems.
3. Presumption in favor of coordination and consistency.
4. Presumption against obsolescence.
5. Narrow construction of procedural qualifications of substantive rights.

6. Understanding systemic effects of regulatory controls.
7. Presumption against irrationality and injustice.
8. Proportionality (to counteract overzealous implementation).
9. *De minimis* exceptions (same).
10. Narrow construction of statutes embodying interest-group transfers (to counteract "deals").
11. Broad construction of statutes protecting disadvantaged groups.
12. Broad construction of statutes protecting nonmarket values.
13. Avoiding private law principles.

III. PRIORITY AND HARMONIZATION

- A. *Political Accountability and Political Deliberation As Meta-Principles*
- B. *Principles with Constitutional Foundations (e.g., protect disadvantaged groups, prevent interest-group deals, ensure against procedural unfairness)*
- C. *Proportionality; Systemic Effects; de Minimis Exceptions*
- D. *Other Nonconstitutional Principles*