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Statutory Construction
General Principles and Recent Trends

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Summary

The Supreme Court has expressed an interest "that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts." This report identifies and describes some of the more important rules and conventions of interpretation that the Court applies. Because the Court has recently placed renewed emphasis on statutory text and somewhat reduced emphasis on legislative history and other interpretive sources "extrinsic" to the text, this report focuses primarily on the Court's methodology in construing statutory text. The Court's recent approaches to reliance on legislative history are also briefly described.

In analyzing a statute's text, the Court is guided by the basic principle that a statute should be read as a harmonious whole, with its separate parts being interpreted within their broader statutory context in a manner that furthers statutory purpose. The various canons of interpretation and presumptions as to substantive results are usually subordinated to interpretations that further a clearly expressed congressional purpose.

The Court frequently relies on "canons" of construction to draw inferences about the meaning of statutory language. For example, in considering the meaning of particular words and phrases, the Court distinguishes between terms of art that may have specialized meanings and other words that are ordinarily given a dictionary definition. Other canons direct that all words of a statute be given effect if possible, that a term used more than once in a statute should ordinarily be given the same meaning, and that specific statutory language ordinarily trumps conflicting general language. "Ordinarily" is a necessary caveat, since any of these "canons" gives way if context reveals an evident contrary meaning.

Not infrequently the Court stacks the deck, and subordinates the general, linguistic canons of statutory construction, as well as other interpretive principles, to overriding presumptions that favor particular substantive results. The Court usually requires a "clear statement" of congressional intent to negate one of these presumptions. A commonly invoked presumption is that Congress does not intend to change judge-made law. Other presumptions disfavor preemption of state law and abrogation of state immunity from suit in federal court. Congress must also be very clear if retroactive application of a statute or repeal of an existing law is intended. The Court tries to avoid an interpretation that would raise serious doubts about a statute's constitutionality. Other presumptions that are overridden only by "clear statement" of congressional intent are also identified and described.

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This report sets forth a brief overview of the Supreme Court's current approaches to statutory interpretation. The bulk of the report describes some of the more important recent usages by the Court in construing statutory text, and the remainder briefly describes the Court's recent approaches to reliance on legislative history. The Court has expressed an interest "that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts."[1] In reading statutes, the Supreme Court applies various rules and conventions of interpretation, and also sometimes superimposes various presumptions favoring particular substantive results. Other conventions assist the Court in determining whether or not to consider legislative history. Although there is some overlap and inconsistency among these rules and conventions, and although the Court's pathway through the mix is often not clearly foreseeable, an understanding of interpretational possibilities may nonetheless lessen the burdens of statutory drafting and aid Congress in choosing among various drafting options.

Executive Order 12988, which provides guidance to executive agencies on preparing legislation, contains a useful checklist of drafting issues.[2] Many items on the checklist are topics addressed in this report, and many of the court decisions cited under those topics have resulted from the absence of clear statutory guidance. Consideration of the checklist may facilitate clarification of congressional intent and may thereby lessen the need for litigation.

Of course, Congress can always amend a statute to require a result different from that reached by the Court. In interpreting statutes, the Court recognizes that legislative power resides in Congress, and that Congress can legislate away

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[1]Finley v. United States, 490 U.S. 545, 556 (1989).

[2] 61 Fed. Reg. 4729 (Feb. 5, 1996), *reprinted in* 28 U.S.C. § 519. The Order directs agencies to "make every reasonable effort to ensure" that proposed legislation, "as appropriate . . . specifies in clear language" – (A) whether causes of action arising under the law are subject to statutes of limitations; (B) the preemptive effect; (C) the effect on existing Federal law; (D) a clear legal standard for affected conduct; (E) whether arbitration and other forms of dispute resolution are appropriate; (F) whether the provisions of the law are severable if one or more is held unconstitutional; (G) the retroactive effect, if any; (H) the applicable burdens of proof; (I) whether private parties are granted a right to sue, and, if so, what relief is available and whether attorney's fees are available; (J) whether state courts have jurisdiction; (K) whether administrative remedies must be pursued prior to initiating court actions; (L) standards governing personal jurisdiction; (M) definitions of key statutory terms; (N) applicability to the Federal Government; (O) applicability to states, territories, the District of Columbia, and the Commonwealths of Puerto Rico and the Northern Mariana Islands; and (P) what remedies are available, "such as money damages, civil penalties, injunctive relief, and attorney's fees."

interpretations with which it disagrees.[3] In recent years Congress has revisited statutory issues fairly frequently in order to override or counter the Court's interpretations.[4] Corrective amendment can be a lengthy and time-consuming process, however, and Congress in most instances will probably wish to state its intent clearly the first time around.

Statutory Text

In General — Statutory Context and Purpose

The starting point in statutory construction is the language of the statute itself. The Supreme Court often recites the "plain meaning rule," that, if the language of the statute is clear, there is no need to look outside the statute to its legislative history in order to ascertain the statute's meaning. Twenty-five years ago it was axiomatic that this "rule" was honored more in the breach than in the observance. The trend in recent years, however, is for the Court to place more emphasis on statutory text and less emphasis on legislative history and other sources "extrinsic" to that text. More often than before, statutory text is the ending point as well as the starting point for interpretation.

A cardinal rule of construction is that a statute should be read as a harmonious whole, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purposes. Justice Scalia, who has been in the vanguard of recent efforts to redirect statutory construction toward statutory text and away from legislative history, has aptly characterized this general approach. "Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."[5] This was not a novel approach. In 1850 Chief Justice Taney described the same process: "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."[6] Thus, the meaning of a specific

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[3]It is because "'Congress is free to change this Court's interpretation of its legislation,'" that the Court adheres more strictly to the doctrine of *stare decisis* in the area of statutory construction than in the area of constitutional interpretation, where amendment is much more difficult. Neal v. United States, 516 U.S. 284, 295 (1996) (quoting Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977)). "*Stare decisis* is usually the wise policy [for statutes], because in most matters it is more important that the applicable rule of law be settled than that it be settled right." Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Justice Brandeis, dissenting).

[4]One scholar identified 187 override statutes from 1967 to 1990. William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).

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

[6]United States v. Boisdoré's Heirs, 49 U.S. (8 How.) 113, 122 (1850) (opinion of Court). For a modern instance in which the Court's reading of text was informed by statutory context and

statutory directive may be shaped, for example, by that statute's definitions of terms, by the statute's statement of findings and purposes, by the directive's relationship to other specific directives, by purposes inferred from those directives or from the statute as a whole, and by the statute's overall structure. Courts also look to the broader context of the body of law into which the enactment fits.[7]

The Supreme Court occasionally relies on general rules or canons of construction in resolving statutory meaning. The Court, moreover, presumes "that Congress legislates with knowledge of our basic rules of statutory construction."[8] This report sets forth a number of such rules, conventions, and presumptions that the Court has relied on in recent times. It is well to keep in mind, however, that the overriding objective of statutory construction is to effectuate statutory purpose. As Justice Jackson put it more than 50 years ago, "[h]owever well these rules may serve at times to decipher legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy."[9]

Canons of Construction

In General

"[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"[10] The Court says much the same thing when it chooses congressional intent rather than statutory text as its touchstone: a canon of

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statutory purpose, see Brotherhood of Locomotove Engineers v. Atchison, T. & S.F.R.R., 516 U.S. 152, 157 (1996) (purpose of Hours of Service Act of promoting safety by ensuring that fatigued employees do not operate trains guides determination of whether employees' time is "on duty").

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

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

[9]SEC v. Joiner, 320 U.S. 344, 350-51 (1943). Justice Jackson also explained that some of the canons derived "from sources that were hostile toward the legislative process itself," and that viewed legislation as "'interference'" with the common law "'process of intelligent judicial administration.'" *Id.* at 350 & n.7 (quoting the first edition of SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION).

[10]Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (citations omitted).

construction should not be followed "when application would be tantamount to a formalistic disregard of congressional intent."[11]

Canons of construction are basically context-dependent "rules of thumb." That is to say, canons are general principles, many of them of the common-sense variety, for drawing inferences about the meaning of language. Since language derives much of its meaning from context, canons should not be treated as rules of law, but rather as "axioms of experience" that do "not preclude consideration of persuasive [contrary] evidence if it exists."[12] Many of the difficulties that have been identified with reliance on canons of construction can be avoided if their importance is not overemphasized — if they are considered tools rather than "rules."

A basic difficulty, recognized years ago, is that there are so many "canons" or alleged canons that there is apparent conflict among some of them. A 1950 article by Professor Karl Llewellyn attempted to demonstrate that many canons can be countered by equally correct but opposing canons.[13] The case was somewhat strained, since in some instances Llewellyn relied on statements in court opinions that were not so generally accepted as to constitute "canons," but the clear implication was that canons are useless because judges may pick and choose among them to achieve whatever result is desired. The Supreme Court recently had to deal with such an alleged conflict in ruling on the retroactive effect of the Civil Rights Act of 1991; there were "seemingly contradictory statements" in earlier decisions declaring general principles that, on the one hand, "a court is to apply the law in effect at the time it renders its decision," but, on the other hand, that "retroactivity is not favored in the law." The Court explained that these two principles were really not inconsistent, and held that the provisions at issue were not retroactive.[14] But even for those canons that do have equal opposites, a review of the Supreme Court's recent usages can reveal current preferences of the Justices in choosing between the opposites, and may prove helpful during congressional debate on legislation in the many instances in which issues of clarity and meaning are raised.

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[11]Rice v. Rehner, 463 U.S. 713, 732 (1983).

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

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

[14]Landgraf v. USI Film Products, 511 U.S. 244, 263-64 (1994) (traditional presumption against retroactivity governs substantive rights, especially contractual or property rights; however, courts often may apply procedural laws, *e.g.*, those governing attorney's fees, enacted after underlying conduct occurred).

Ordinary and Specialized Meaning

Terms of art.

When the meaning of specific statutory language is at issue, courts often need to consider the meaning of particular words or phrases. If the word or phrase is defined in the statute (federal statutes frequently collect definitions in a "definitions" section), or elsewhere in the *United States Code*,[15] then that definition governs if applicable in the context used.[16] Even if the word or phrase is not defined by statute, it may have an accepted meaning in the area of law addressed by the statute,[17] it may have been borrowed from another statute under which it had an accepted meaning,[18] or it may have had an accepted and specialized meaning at common law.[19] In each of

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[15]The Dictionary Act, ch. 388, 61 Stat. 633 (1947), as amended, 1 U.S.C. §§ 1-6, has definitions of a few common terms used in federal statutes (*e.g.*, "person," "vessel," and "vehicle"). These definitions govern in all federal statutes "unless the context indicates otherwise." *See* Rowland v. California Men's Colony, 506 U.S. 194 (1993) (context indicates otherwise; the term "person" as used in 28 U.S.C. § 1915(a) refers only to individuals and does not carry its Dictionary Act definition that includes associations and artificial entities).

[16]Colautti v. Franklin, 439 U.S. 379, 392 (1979). If the context indicates otherwise, *i.e.*, if a mechanical application of a statutory definition throughout a statute would create an "obvious incongruity" or frustrate an evident statutory purpose for a particular provision, then it is permissible to depart from the definition. Lawson v. Suwannee S.S. Co., 336 U.S. 198, 201 (1949). But, as noted below, a term appearing in several places in a statute is ordinarily interpreted as having the same meaning each time it appears. *See* text accompanying nn. 52-54, *infra*.

[17]*See, e.g.*, Sullivan v. Stroop, 496 U.S. 478, 483 (1990) (phrase "child support" as used in Title IV AFDC provisions of Social Security Act). Note also that "where a phrase in a statute appears to have become a term of art . . . , any attempt to break down the term into its constituent words is not apt to illuminate its meaning." *Id.*

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

[19]*See, e.g.*, Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739-40 (1989) (relying on traditional common law agency principles for meaning of term "employee" as used without definition in the Copyright Act). *See also* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (following the same course after finding ERISA's "circular" definition of "employee" to be useless).

these situations the accepted meaning governs[20] and the word or phrase is considered a technical term or "term of art." Justice Jackson explained why this reliance is appropriate.[21]

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

Ordinary meaning and dictionary definitions.

Words that are not terms of art and that are not statutorily defined are customarily given their ordinary meanings, often derived from the dictionary.[22] Thus, the Court has recently relied on regular dictionary definitions to interpret the word "marketing" as used in the Plant Variety Protection Act,[23] and the word "principal" as used to modify a taxpayer's place of business for purposes of an income tax deduction,[24] and relied on Black's Law Dictionary for the more specialized meaning of the word "cognizable" as used in the Federal Tort Claims Act to refer to causes of action.[25]

Of course application of dictionary definitions is not always a clear course; many words have several alternative meanings, and context must guide choice among them.[26] "Ambiguity is a creature not of definitional possibilities but of statutory context."[27] Questionable choices are sometimes made — witness the Court's

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[20]"[W]here a common law principle is well established, . . . the courts may take it as a given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991) (quoting Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952)). No clear statement rule is required, however, in order to establish an "evident" contrary purpose. 501 U.S. at 108.

[21]Morissette v. United States, 342 U.S. 246, 263 (1952). *See also* Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation").

[22]In the absence of a statutory definition, "we construe a statutory term in accordance with its ordinary or natural meaning." FDIC v. Meyer, 510 U.S. 471, 476 (1994).

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

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

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

[26]*See, e.g.*, MCI Tel. Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 226-28 (1994) (FCC's authority to "modify" requirements does not include the authority to make tariff filing optional; aberrant dictionary meaning "to make a basic or important change" is antithetical to the principal meaning of incremental change and is more than statute can bear). If the court views the issue as one of deference to an administrative interpretation, then the agency's choice of one alternative dictionary definition over another may indicate sufficient "reasonableness." Smiley v. Citibank (South Dakota), 517 U.S. 735, 744-47 (1996).

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

conclusion that "use" of a firearm in commission of a drug offense or crime of violence includes trading a gun for drugs.[28] And sometimes dictionary meanings can lead courts astray even if there are not multiple choices. As Judge Learned Hand observed, "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."[29]

And/or.

Similar principles govern use of the words "and" and "or." Ordinarily, as in everyday English, use of the conjunctive "and" in a list means that all of the listed requirements must be satisfied,[30] while use of the disjunctive "or" means that only one of the listed requirements need be satisfied.[31] Courts do not apply these meanings "inexorably," however; if a "strict grammatical construction" will frustrate evident legislative intent, a court may read "and" as "or," or "or" as "and."[32]

General, Specific, and Associated Words

Ordinarily, the specific terms of a statute override the general terms. "However inclusive may be the general language of a statute, it will not be held to apply to a

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[28]Smith v. United States, 508 U.S. 223 (1993). Dissenting Justice Scalia cut to the core: "[to] use an instrumentality normally means to use it for its intended purpose. When someone asks 'Do you use a cane?' he is not inquiring whether you have your grandfather's silver-handled walking-stick on display in the hall; he wants to know whether you walk with a cane. Similarly, to speak of 'using a firearm' is to speak of using it for its distinctive purpose, *i.e.*, as a weapon." *Id.* at 242. The Court had less difficulty with the provision in 1995, overruling a lower court's holding that proximity and accessibility of a firearm are alone sufficient to establish "use." Bailey v. United States, 516 U.S. 137 (1995) (driving car with gun located in bag in car's trunk does not constitute "use" of gun; person who sold drugs after retrieving them from room in which gun was found in a locked trunk in a closet did not "use" that gun in sale). The *Bailey* Court, however, defined "use" in such a way ("active employment") as to leave the *Smith* holding intact. *See also* Muscarello v. United States, 524 U.S. 125 (1998) (the companion phrase "carries a firearm," found in the same statutory provision, is a broader category that includes transporting drugs with a handgun locked in the glove compartment of a vehicle).

[29]Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945).

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

[31]*See, e.g.*, Zorich v. Long Beach Fire and Ambulance Serv., 118 F.3d 682, 684 (9th Cir. 1997); United States v. O'Driscoll, 761 F.2d 589, 597-98 (10th Cir. 1985).

[32]*See, e.g.*, United States v. Moore, 613 F.2d 1029 (D.C. Cir. 1979); De Sylva v. Ballentine, 351 U.S. 570, 573 (1956) ("the word 'or' is often used as a careless substitute for the word 'and'"). Both "and" and "or" are context-dependent, and each word "is itself semantically ambiguous, and can be used in two quite different senses." Lawrence E. Filson, The Legislative Drafter's Desk Reference, § 21.10 (1992).

matter specifically dealt with in another part of the same enactment."[33] As with other canons, context can dictate a contrary result.[34]

Another interpretational guide trotted out from time to time is the principle *noscitur a sociis*, that "words grouped in a list should be given related meaning."[35] A corollary, *ejusdem generis*, instructs that, "where general words follow an enumeration of specific items, the general words are read as applying only to other items akin to those specifically enumerated."[36] These principles are probably honored more in the breach than in the acceptance, however. The Court explained on one occasion that they are only "instrumentalit[ies] for ascertaining the correct meaning of words when there is uncertainty."[37] A less charitable assessment is that the maxims do not aid in ascertaining meaning or deciding cases, but rather serve only to "classify and label results reached by other means."[38]

Grammatical Rules, Punctuation

The old rule, borrowed from English law, was that "[p]unctuation is no part of the statute," and that "[c]ourts will . . . disregard the punctuation, or repunctuate, if need be, to render the true meaning of the statute."[39] The modern Court recognizes that grammar and punctuation often clarify meaning, and that skilled drafters can be

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

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

[35]Dole v. United Steelworkers of America, 494 U.S. 26, 36 (1990); Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995) (reading a statutory definition as limited by the first of several grouped words).

[36]Harrison v. PPG Industries, Inc., 446 U.S. 578, 588 (1980); Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302 (2001). The principle cannot be applied if the enumerated categories are too "disparate." Arcadia v. Ohio Power Co., 498 U.S. 73, 78 (1990). And, of course, context may reveal that application is inappropriate. Norfolk & Western Ry. v. Train Dispatchers, 499 U.S. 117, 129 (1991) (exemption of carriers from "the antitrust laws and all other law, including State and municipal law," is "clear, broad and unqualified," and obviously applies outside of antitrust and similar laws).

[37]*Id. See also* Norfolk & Western Ry. v. Train Dispatchers, 499 U.S. 117, 129 (1991) ("the canon does not control . . . when the whole context dictates a different conclusion"); United States v. Turkette, 452 U.S. 576, 580-82 (1981) (appeals court erred in finding that a second category was merely a more general description of the first; context and language instead reveal two contrasting categories).

[38]REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES, 234 (1975).

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

expected to apply good grammar,[40] but the Court remains reluctant to place primary importance on such factors. "A statute's plain meaning must be enforced . . . , and the meaning of a statute will typically heed the commands of its punctuation."[41] So said the Court — not, however, in applying a plain meaning consistent with punctuation, but instead while justifying a departure from that meaning. The Court went on to explain that "a purported plain meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning."[42] "Overwhelming evidence from the structure, language, and subject matter" of the law led the Court to conclude that "in this unusual case" the punctuation at issue was the result of "a simple scrivener's error."[43] While the Court has relied on comma placement to find that a plain meaning was "mandated by the grammatical structure of the statute," the Court in that case also found other support for its reading.[44]

Perhaps more typical was the Court's recent refusal to apply the rule that a modifying clause modifies the last antecedent, even though it could easily have concluded on the basis of the statutory language that application of the last antecedent rule was "mandated by the [statute's] grammatical structure." The rule "is quite sensible as a matter of grammar," the Court explained, but it "is not compelled."[45] So too, in another recent case the Court shied away from "the most natural grammatical reading" of a statute in order to avoid an interpretation that would have raised a serious issue of constitutionality.[46]

Refusal to be bound by the rules of punctuation and grammar, it seems, gives the Court some flexibility it desires in construing statutes. This is not to say, however, that grammatical rules should be disregarded in statutory drafting, since such rules are ordinarily strong guides to meaning.

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[40]*See, e.g.*, Arcadia v. Ohio Power Co., 498 U.S. 73, 78 (1990). "In casual conversation, perhaps, such absent-minded duplication and omission are possible, but Congress is not presumed to draft its laws that way." *See also* Ingalls Shipbuilding v. Director, OWCP, 519 U.S. 248, 255 (1997) (present tense of verb is an element of plain meaning).

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

[42]*Id. See also* Costanzo v. Tillinghast, 287 U.S. 341, 344 (1932) ("It has often been said that punctuation is not decisive of the construction of a statute. . . . Upon like principle we should not apply the rules of syntax to defeat the evident legislative intent.")

[43]*Independent Ins. Agents*, supra n.41, 508 U.S. at 462. This "unusual case" held that Congress did not in 1918 repeal a statutory provision enacted in 1916 allowing national banks located in small communities to sell insurance. The "scrivener's error" had erroneously credited the 1916 enactment with having amended a provision that was repealed by the 1918 enactment.

[44]United States v. Ron Pair Enterprises, 489 U.S. 235, 241 (1989).

[45]Nobelman v. American Savings Bank, 508 U.S. 324, 330-31 (1993). School children, of course, rely on this case at their peril.

[46]United States v. X-Citement Video, Inc., 513 U.S. 64, 68 (1994). Justice Scalia, dissenting, insisted that the language was perfectly clear, and that the rejected interpretation was "the only grammatical reading." *Id.* at 81.

Statutory Language Not to be Construed as "Mere Surplusage"

A basic principle of statutory construction is that courts should "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."[47] The modern variant is that statutes should be construed "so as to avoid rendering superfluous" any statutory language.[48] A related principle applies to statutory amendments: there is a "general presumption" that, "when Congress alters the words of a statute, it must intend to change the statute's meaning."[49] Resistance to treating statutory words as mere surplusage "should be heightened when the words describe an element of a criminal offense."[50] There can be differences of opinion, of course, as to when it is "possible" to give effect to all statutory language and when the general rule should give way in the face of evident contrary meaning.[51]

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

[48]Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991). *See also* Bailey v. United States,516 U.S. 137, 146 (1995) ("we assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning") (rejecting interpretation that would have made "uses" and "carries" redundant in statute penalizing using or carrying a firearm in commission of offense). The same principle applies to "redundancies across statutes." Two overlapping statutes may be given effect so long as there is no "positive repugnance" between them. Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992) (finding that, in spite of considerable overlap between two provisions, each addressed matters that the other did not).

[49]United States v. Wilson, 503 U.S. 333, 336 (1992) (nonetheless attributing no significance to deletion of a reference to the Attorney General; the reference "was simply lost in the shuffle" of a comprehensive statutory revision that had various unrelated purposes). There is also an exception for minor, unexplained changes in phraseology made during recodification — changes that courts generally assume are "not intended to alter the statute's scope." Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 318 (1985).

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

[51]*See, e.g.*, Moskal v. United States, 498 U.S. 103 (1990). Dissenting Justice Scalia objected to the Court's straining to avoid holding that "falsely made" is redundant in the federal forgery statute, which prohibits receipt of "falsely made, forged, altered, or counterfeited securities." "The principle [against mere surplusage] is sound, but its limitation ('if possible') should be observed. It should not be used to distort ordinary meaning. Nor should it be applied to obvious instances of iteration to which lawyers, alas, are particularly addicted . . . ." *Id.* at 120.

Same Phrasing in Same or Related Statutes

"A term appearing in several places in a statutory text is generally read the same way each time it appears."[52] This presumption is "at its most vigorous when a term is repeated within a given sentence."[53] The general presumption is not rigid, however, and "readily yields when there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent."[54] In other words, context can override the presumption.

Different Phrasings in Same Statutes

The other side of the coin is that "where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[55] "[N]egative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted."[56] This maxim has been applied by the Court — or at least cited as a

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[52]Ratzlaf v. United States, 510 U.S. 135, 143 (1994). *See also* Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995); and Wisconsin Dep't of Revenue v. William Wrigley, Jr. Co., 505 U.S. 214, 225 (1992). The Court cited this passage of *Wrigley* to invoke a quite different principle, described as "the established canon" that "similar [rather than identical] language" in the same section of a statute "must be accorded a consistent [rather than the same] meaning." National Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 501(1998).

[53]Brown v. Gardner, 513 U.S. 115, 118 (1994); Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 329-30 (2000).

[54]Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1933). *See also* Robinson v. Shell Oil Co., 519 U.S. 337, 342-43 (1997) (term "employees" means current employees only in some sections of Title VII of Civil Rights Act, but in other sections includes former employees); United States v. Cleveland Indians Baseball Co., 121 S. Ct. 1433 (2001) (different statutory contexts of worker eligibility for Social Security benefits and "administrability" of tax rules justify different interpretations). For disagreement about the appropriateness of applying this limitation, contrast the Court's opinion in *Gustafson v. Alloyd Co.*, supra n.52, 513 U.S. at 573, with the dissenting opinion of Justice Thomas in the same case, id. at 590 (interpreting a definition that, by its terms, was applicable "unless the context otherwise requires").

[55]Keene Corp. v. United States, 508 U.S. 200, 208 (1993) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)). *See also* Bailey v. United States. 516 U.S. 137, 146 (1995) (distinction in one provision between "used" and "intended to be used" creates implication that related provision's reliance on "use" alone refers to actual and not intended use); and Bates v. United States, 522 U.S. 23, 29 (1997) (inclusion of "intent to defraud" language in one provision and exclusion in a parallel provision).

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

justification — in distinguishing among different categories of veterans benefits[57] and among different categories of drug offenses.[58] A court can only go so far with the maxim, of course; establishing that language does *not* mean one thing does not necessarily establish what the language *does* mean.[59]

"Congress Knows How to Say . . ."

Occasionally the Court draws a contrast between the language at issue and other statutory language that clearly and directly requires the interpretation being pressed by one of the parties. There are some instances — e.g., failure to employ terms of art or other language normally used for such purposes — in which this can be a fairly persuasive argument. Recently, for example, the Court reasoned that, although "Congress knew how to impose aiding and abetting liability when it chose to do so," it did not use the words "aid" and "abet" in the statute, and hence did not impose aiding and abetting liability.[60] To say that Congress did not use the clearest language, however, does not necessarily aid the court in determining what the less precise language means in its statutory context. Some statutes are not well drafted,[61] and others represent conscious choices, born of political compromise, to leave issues for the courts to resolve.[62] It may not always be safe to assume, therefore, that "[i]f

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

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

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

[60]Central Bank of Denver v. First Interstate Bank, 511 U.S. 164, 176-77 (1994). *See also* Franklin Nat'l Bank v. New York, 347 U.S. 373, 378 (1954) (finding "no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances"); Meghrig v. KFC Western, Inc., 516 U.S. 479, 485 (1996) ("Congress . . . demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs, and . . . the language used to define the remedies under RCRA does not provide that remedy").

[61]See, *e.g.*, the provisions of the Plant Variety Protection Act at issue in Asgrow Seed Co. v. Winterboer,513 U.S. 179 (1995). Justice Scalia in his opinion for the Court in *Asgrow* called 7 U.S.C. § 2543 a "verbal maze," and conceded that "it is quite impossible to make complete sense of the provision." *Id.* at 185-86. In another case the Court found statutory language "incoherent" due to use of three different and conflicting standards identifying an evidentiary burden. Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602, 627 (1993). The Court resolved the issue by treating the "incoherence" as ambiguity, and by applying the one possible construction that did not raise constitutional issues. *Id.* at 628-30.

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

Congress had intended such an irrational result, surely it would have expressed it in straightforward English."[63]

Statutory Silence

Nor is it safe to assume that Congress can or will address directly and explicitly all issues that may arise. "As one court has aptly put it, '[n]ot every silence is pregnant.' In some cases, Congress intends silence to rule out a particular statutory application, while in others Congress' silence signifies merely an expectation that nothing more need be said in order to effectuate the relevant legislative objective. In still other instances, silence may reflect the fact that Congress has not considered an issue at all. An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent."[64] The Court recently identified a pregnant statutory silence, however, contrasting that silence with a consistent pattern in federal statutes under which departures from a general rule had been expressly authorized.[65]

While Congress cannot be expected to anticipate and address *all* issues that may arise, the Court does sometimes assume that Congress will address major issues, at least in the context of amendment. "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not . . . hide elephants in mouseholes."[66] This premise underlay the Court's reasoning in concluding that the FDA lacked authority to regulate tobacco. "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[67]

A variation on the statutory silence theme is the negative inference, a principle so venerable it is sometimes expressed in Latin: *expressio unius est exclusio alterius*

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

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

[65]Director, OWCP v. Newport News Shipbuilding Co., 514 U.S. 122 (1995) (agency in its governmental capacity is not a "person adversely affected or aggrieved" for purposes of judicial review). *See also* United States v. Bestfoods, 524 U.S. 51, 62 (1998) ("against this venerable common-law backdrop, the congressional silence is audible").

[66]Whitman v. American Trucking Ass'ns, Inc., 121 S. Ct. 903, 909-10 (2001). *See also* MCI Telecommunications Corp. v. AT&T, 512 U.S. 218, 231 (1994) (conferral of authority to "modify" rates was not a cryptic conferral of authority to make filing of rates voluntary); Director of Revenue of Mo. v. CoBank, ACB, 121 S. Ct. 941, 945 (2001) ("it would be surprising, indeed," if Congress had effected a "radical" change in the law "*sub silentio*" via "technical and conforming amendments").

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

(the inclusion of one is the exclusion of others). "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent."[68] The Court recently applied the principle, albeit without express recognition, in holding that a statute requiring payment of an attendance fee to "a witness" applies to an incarcerated state prisoner who testifies at a federal trial. Because Congress had expressly excepted another category (detained aliens) from eligibility for these fees, and had expressly excepted any "incarcerated" witness from eligibility for a different category of fees, "the conclusion is virtually inescapable . . . that the general language 'witness in attendance' . . . includes prisoners . . . ."[69] But here again, context may render the principle inapplicable. A statutory listing may be "exemplary, not exclusive," the Court recently concluded.[70]

De Minimis Principle

"The venerable maxim *de minimis non curat lex* ('the law cares not for trifles') is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept. . . . Whether a particular activity is a *de minimis* deviation from a prescribed standard must . . . be determined with reference to the purpose of the standard."[71]

Overriding Presumptions

There are a number of instances in which the Court stacks the deck, and subordinates the general, linguistic canons of statutory construction, as well as other interpretive principles, to overriding presumptions that favor particular substantive results. Some of the "weighty and constant values" protected by these presumptions are derived from the Constitution, and some are not.[72] Application of a presumption results in some form of "clear statement" rule, requiring that Congress, if it wishes to

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

[69]Demarest v. Manspeaker, 498 U.S. 184, 188 (1991). Congress quickly acted to override this result and prohibit payment of witness fees to prisoners, Pub. L. 102-417, 106 Stat. 2138 (1992), the House Judiciary Committee expressing the belief that "Congress never intended" that prisoners be paid witness fees. H.R. Rep. No. 194, 102d Cong., 1st Sess. 2 (1991).

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

[71]Wisconsin Dep't of Revenue v. William Wrigley, Jr. Co., 505 U.S. 214, 231-32 (1992) (company's activities within the state clearly exceeded *de minimis*, so company was subject to state franchise tax). *See also* Abbott Laboratories v. Portland Retail Druggists, 425 U.S. 1, 18 (1976) (occasional emergency dispensation of drugs to walk-in patients is *de minimis* deviation from Robinson-Patman Act's exemption for hospitals' purchase of supplies "for their own use"); Industrial Ass'n v. United States, 268 U.S. 64, 68 (1925) (3 or 4 "sporadic and doubtful instances" of interference with interstate commerce in what was in essence an intrastate matter were insufficient to establish a violation of the Sherman Act).

[72]Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 108-09 (1991).

achieve a particular result inconsistent with the Court's view of legal traditions, must state such an intent with unmistakable clarity.[73] Legislative drafters need to be especially careful whenever overriding presumptions may be implicated. To that end, a number are briefly described below.

Departure from Common Law or Established Interpretation

There is a presumption favoring continuation of judge-made law. "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."[74] In another case the Court declared that "[w]e will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure."[75] This principle is thus closely akin to the principle noted above that, when Congress employs legal terms of art, it normally adopts the meanings associated with those terms.

Displacing State Law, Impinging on State Operations

The Supremacy Clause of the Constitution, Article VI, cl. 2, provides that valid federal law supersedes inconsistent state law. Courts encounter difficulty in applying this simple principle, however, especially when federal law is silent as to preemptive effect. The Court usually begins preemption analysis "with the assumption that the historic police powers of the States were not to be superseded by [a federal law] unless that was the clear and manifest purpose of Congress."[76] If the statute in question contains an explicit statement of preemptive scope, therefore, either preempting state law or disclaiming intent to do so, that is usually the end of the matter.[77] The Court also, however, recognizes several categories of implied

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

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

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

[76]Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 605 (1991).

[77]A statement asserting preemption or disclaiming intent to preempt must be clear not only as to preemptive intent, but also as to scope. In International Paper Co. v. Ouellette, 479 U.S. 481 (1987), for example, the Court ruled that some aspects of state law were preempted in spite of a savings clause in the citizens suit provision of the Clean Water Act declaring that "nothing in this section" should be read as affecting an injured party's right to seek relief under any statute or common law. Other parts of the Act outside of the citizens suit section were read as implying preemption. "Because we do not believe Congress intended to undermine

preemption of state law, various formulations of which are that state law must give way to federal law if there is a direct conflict between them, if implementation of state law would "frustrate congressional purpose," or if federal law has "occupied the field" of regulation. These latter two categories lack precision, and, almost always, the surer course of legislative drafting is to spell out intended preemptive effect.

In the same vein, the Court will not lightly infer that Congress has enacted legislation that restricts how states constitute their own governments. In ruling that state judges are not "employees" for purposes of the Age Discrimination in Employment Act, the Court required a plain statement rule applicable to laws limiting the authority of the States to determine the qualifications of their most important government officials — an authority protected by the Tenth Amendment and by the Guarantee Clause.[78] "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."[79]

Abrogation of States' Eleventh Amendment Immunity

Also protective of state sovereignty is the rule that, in order to abrogate the states' Eleventh Amendment immunity from suit in federal court, "Congress must make its intention 'unmistakably clear in the language of the statute.'"[80] Congress, of course, has limited authority to abrogate states' Eleventh Amendment immunity; the Court recently held in *Seminole Tribe of Florida v. Florida*, that Article I powers may not be used to "circumvent the constitutional limitations placed upon federal jurisdiction [by the Eleventh Amendment]."[81] This leaves Section 5 of the Fourteenth Amendment as the principal source of power to abrogate state immunity.

Nationwide Application of Federal Law

Congress may, if it chooses, incorporate state law as federal law.[82] Federal law usually applies uniformly nationwide,[83] however, and there is a presumption that,

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this carefully drawn statute [leaving a source state responsible for control of point-source discharges within its boundaries] through a general savings clause, we conclude that the CWA precludes a court from applying the law of an affected state against an out-of-state source." *Id.* at 484.

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

[79]*Id.* at 461.

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

[81]517 U.S. 44, 73 (1996).

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

[83]Jerome v. United States, 318 U.S. 101, 104 (1943). The *Jerome* Court actually overstated the case, citing United States v. Pelzer, 312 U.S. 399, 402 (1941), for the proposition that "the application of federal legislation is nationwide." *Pelzer* was far less sweeping, holding only that "in light of their general purpose to establish a nationwide scheme of taxation

"when Congress enacts a statute . . . it does not intend to make its application dependent on state law."[84]

Waiver of Sovereign Immunity

"[T]he Government's consent to be sued 'must be construed strictly in favor of the sovereign.'"[85] Waiver of sovereign immunity must be effected by unequivocal expression in the statutory text itself; legislative history "has no bearing" on the issue.[86] As a consequence, "statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect."[87]

Non-retroactivity / Effective Date

There is a general rule, based on the unfairness of attaching new legal consequences to already-completed events, disfavoring retroactive application of civil statutes. Statutory provisions do not apply to events antedating enactment unless there is clear congressional intent that they so apply.[88] "Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits."[89] The prohibitions on *ex post facto* laws, of course, impose a constitutional bar to retroactive application of penal laws.[90]

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uniform in its application," provisions of the *revenue laws* "should not be taken as subject to state control or limitation unless the language or necessary implication of the section involved makes its application dependent on state law." 312 U.S. at 402-03.

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

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

[86]United States v. Nordic Village, *supra* n.85, 503 U.S. at 37. For criticism of the rule, see John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WISC. L. REV. 771, 836.

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

[88]Gozlon-Peretz v. United States, 498 U.S. 395, 404 (1991) ("absent a clear direction . . . to the contrary, a law takes effect on the date of its enactment").

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

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

Avoidance of Constitutional Issues

The doctrine of "constitutional doubt" requires courts to construe statutes, "if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."[91] "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. . . . 'The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.' This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution."[92] "Grave doubt" as to constitutionality does not arise simply because a Court minority — even a minority of four Justices — believes a statute is unconstitutional; rather, a Court majority must "gravely . . . doubt that the statute is constitutional."[93]

Extraterritorial Application Disfavored

"It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' This 'canon of construction' . . . serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."[94]

Judicial Review of Administrative Action

As a general matter, there is a "strong presumption that Congress intends judicial review of administrative action."[95] This presumption is embodied in the

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[91]United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916); Almendarez-Torres v. United States, 523 U.S. 224, 237-38 (1998); Jones v. United States, 120 U.S. 1904, 1911 (2000).

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

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

[94]EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) (quoting Foley Bros, Inc. v. Filardo, 336 U.S. 281, 285 (1949)). *See also* Smith v. United States, 507 U.S. 197, 203-04 (1993) (interpretation of Federal Tort Claims Act as inapplicable in Antarctica is reinforced by presumption against extraterritorial application). *Cf.* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) (Sherman Act applies to foreign conduct producing, and intended to produce, substantial effects in United States).

[95]Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986). *See also* McNary v. Haitian Refugee Center, 498 U.S. 479, 496 (1991) ("it is most unlikely that Congress intended to foreclose all forms of meaningful judicial review," given the presumption

Administrative Procedure Act, which provides that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review."[96] The Administrative Procedure Act applies "except to the extent that . . . statutes preclude judicial review,"[97] and issues relating to application of the presumption usually arise in determining whether there is "clear and convincing evidence"[98] or "persuasive reason to believe"[99] that Congress intended to preclude judicial review. The presumption may be overcome by specific statutory language, but it also "may be overcome by inferences of intent drawn from the statutory scheme as a whole."[100]

Deference to Administrative Interpretation

When a court reviews an agency's formal interpretation of a statute that the agency administers, and when the statute has not removed agency discretion by compelling a particular disposition of the matter at issue, courts defer to any reasonable agency interpretation. This is the *Chevron* rule announced in 1984.[101] In two decisions, one in 2000[102] and one in 2001,[103] the Court clarified and narrowed *Chevron's* application, ruling that *Chevron* deference applies only if an agency's interpretation is the product of a formal agency process, such as adjudication or notice-and-comment rulemaking, through which Congress has authorized the agency "to speak with the force of law."[104] Other agency interpretations that are made

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"that Congress legislates with knowledge of our basic rules of statutory construction").

[96]5 U.S.C. § 704.

[97]5 U.S.C. § 701(a).

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

[99]Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967) (pre-enforcement review of regulations under Federal Food, Drug, and Cosmetic Act is not precluded as a result of negative inference arising from fact that Act has explicit authorization for review of other kinds of regulations).

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

[101]Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

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

[103]United States v. Mead Corp. 121 S. Ct. 2164 (2001).

[104]*Mead Corp.*, 121 S. Ct. at 2172.

without the protections of a formal and public process are reviewed under pre-*Chevron* principles set forth in *Skidmore v. Swift & Co.*[105]

If *Chevron* applies, the first question is "whether Congress has directly spoken to the precise question at issue."[106] If the court, "employing the traditional tools of statutory construction," determines that Congress has addressed the precise issue, then that is the end of the matter, because the "law must be given effect."[107] But if the statute does not directly address the issue, then "the court does not simply impose its own construction of the statute," but rather determines "whether the agency's answer is based on a permissible construction of the statute."[108]

On its face, the *Chevron* rule is quite deferential, and was perceived as a significant break from the multi-factored approach that preceded it. One would expect that a court's conclusion as to whether Congress has "directly spoken" to the issue would be decisive in most cases, that most of the myriad of issues that can arise in the administrative setting would not be directly addressed by statute, and that, consequently, courts would most often defer to what are found to be "reasonable" agency interpretations.[109] Surprisingly, however, *Chevron* did not usher in an era of increased deference by the Supreme Court. The Court has frequently determined that in fact Congress *has* settled the matter, and that consequently there is no need to proceed to the second, more deferential step of the inquiry.[110] The Court has also found that, even though Congress has left the matter for agency resolution, the agency's interpretation is unreasonable.[111]

How the Court determines whether Congress has "directly addressed" an issue takes on critical importance. *Chevron* is not a strong "clear statement" rule, since the Court has considered legislative history as well as text in assessing the controlling weight of statute.[112] And even when relying solely on text, the Court has not adhered

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[105]323 U.S. 134 (1944).

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

[107]467 U.S. at 843 n.9.

[108]*Id.* at 843.

[109]*See, e.g.*, Sullivan v. Everhart, 494 U.S. 83 (1990) (regulations are a reasonable interpretation of Social Security Act); Smiley v. Citibank (South Dakota), 517 U.S. 735 (1996) (upholding Comptroller of the Currency's interpretation of 1864 Bank Act); and Lopez v. Davis, 121 S. Ct. 714, (2001) (Bureau of Prisons regulation denying early release is reasonable interpretation of discretionary authority).

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

[111]Whitman v. American Trucking Ass'ns, Inc., 121 S. Ct. 903 (2001).

[112]*See, e.g.*, Dunn v. CFTC, 519 U.S. 465, 473-74 (1997) (legislative history supports Court's conclusion that statute is clear and agency's interpretation is untenable). *See also* Babbitt v. Sweet Home Chapter, 515 U.S. 687, 708 (1995) (Court concludes, "based on the text, structure, and legislative history of the ESA, that the Secretary reasonably construed the intent

strictly to the original *Chevron* step-one formulation, sometimes instead employing a broad textualist approach that emphasizes "plain meaning" and abandons inquiry into whether Congress has addressed the "precise question" at issue.[113] This "plain meaning" alternative has the effect of expanding the circumstances under which the Court can resolve a case on statutory grounds rather than proceeding to stage two and deferring to an agency's interpretation.

The Court has recognized that there are some circumstances in which it is less likely that Congress intended to leave resolution of statutory ambiguity to the administering agency.[114] Thus, in holding that the FDA lacked authority to regulate tobacco products, the Court concluded that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[115] Rather than finding *Chevron* analysis inapplicable, however, the Court ruled that Congress had "directly spoken" to the regulatory issue – not through the FDCA itself, but rather through subsequently enacted tobacco-specific legislation and through rejection of legislative proposals to confer jurisdiction on the FDA.[116] In another case, the Court deemed deference to be inappropriate where the agency interpretation "invokes the outer limits of Congress' power," and there is no "clear indication" that Congress intended that result.[117]

A logical consequence of applying *Chevron* is to render irrelevant whether an agency interpretation was "contemporaneous" with a statute's enactment, or whether an agency's position has been consistent over the years. "Neither antiquity nor contemporaneity with the statute is a condition of validity."[118] The fact that an agency has changed its position over the years "is not fatal," because "the whole point of

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of Congress" in defining "harm").

[113]*See, e.g.*, K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) (courts should look "to the particular statutory language at issue, as well as the language and design of the statute as a whole" in order to ascertain statute's "plain meaning"); Ohio Pub. Employees Retirement System v. Betts, 492 U.S. 158, 171 (1989) ("no deference is due to agency interpretations at odds with the plain language of the statute itself").

[114]*See, e.g.*, MCI Telecommunications Corp. v. AT&T Co., 512 U.S. 218, 231 (1994) ("it is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion").

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

[116]The subsequent legislation created "a distinct regulatory scheme for tobacco products." 529 U.S. at 159. As Justice Breyer's dissent pointed out, tobacco products clearly fell within the generally worded jurisdictional definitions of the Food, Drug, and Cosmetic Act, and it was also clear that Congress had not spoken directly to the issue anywhere else in that Act. 529 U.S. at 162.

[117]Solid Waste Agency v. Army Corps of Engineers, 121 S. Ct. 675, 683 (2001).

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

Chevron is to leave the discretion provided by the ambiguities of a statute with the implementing agency."[119]

Agency interpretations that take place in the many less formal contexts where *Chevron* deference is inapplicable (*e.g.*, opinion letters, policy statements, agency manuals, and enforcement guidelines, "all of which lack the force of law"[120]) can still be "entitled to respect" under the *Skidmore* decision,[121] "but only to the extent that [they] have the power to persuade."[122] To make this determination, courts look to such factors as whether an interpretation dealt with technical and complex matters that fell within an area of agency expertise,[123] whether an agency's decision was well-reasoned,[124] whether the agency's interpretation was contemporaneous with the statute's enactment,[125] and whether the agency's interpretation was longstanding or consistent.[126]

Repeals by Implication

If Congress intends one statute to repeal an earlier statute or section of a statute *in toto*, it usually says so directly in the repealing act. There are other occasions when Congress intends one statute to supersede an earlier statute to the extent of conflict, but intends the earlier statute to remain in effect for other purposes. This too is often spelled out, usually in a section captioned "effect on existing law," "construction with other laws," or the like. "[It] can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change."[127] Not infrequently, however, conflicts arise between the operation of two federal statutes that are silent as to their relationship. In such a case, courts will try to harmonize the two so that both can be given effect. A court "must read [two allegedly conflicting] statutes to give effect to each if [it] can do so while preserving their sense and purpose."[128] Only

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[119]*Id.* at 742. In other words, the Court presumes "that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency . . . ." *Id.* at 740-41.

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

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

[122]Christensen v. Harris County, 529 U.S. at 587. As the Court put it in *Skidmore*, agency interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort . . . . The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140.

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

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

[125]*See, e.g.*, Udall v. Tallman, 380 U.S. 1, 16 (1965).

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

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

[128]Watt v. Alaska, 451 U.S. 259, 267 (1981). *See also* Lewis v. Lewis & Clark Marine, Inc., 121 S. Ct. 993 (2001) (reconciling "tension" between the saving to suitors clause and the

if provisions of two different federal statutes are "irreconcilably conflicting,"[129] or "if the later act covers the whole subject of the earlier one and is clearly intended as a substitute,"[130] will courts apply the rule that the later of the two prevails. "[R]epeals by implication are not favored, . . . and will not be found unless an intent to repeal is clear and manifest."[131] As Judge Posner has pointed out, this canon is "a mixed bag. It protects some old statutes from . . . inadvertent destruction, but it threatens to impale new statutes on the concealed stakes planted by old ones."[132]

Laws of the same session.

The presumption against implied repeals "is all the stronger" if both laws were passed by the same session of Congress.[133] But, in the case of an irreconcilable conflict between two laws of the same session, the later enactment will be deemed to have repealed the earlier one to the extent of the conflict.[134] Because the focus here is on legislative intent (or presumed legislative intent), time of legislative

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

[129]Watt v. Alaska, *supra* n.128, at 266.

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

[131]Rodriguez v. United States, 480 U.S. 522, 524 (1987) (citations omitted). *See also* Morton v. Mancari, 417 U.S. 535, 550-51 (1974). For an instance in which the Court found repeal by implication, see Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 438 (1989) (concluding that Congress had intended to "deal comprehensively with the subject of foreign sovereign immunity in the [Foreign Sovereign Immunities Act of 1976]," and that consequently suit against the Argentine Republic could not be brought under the Alien Tort Statute).

[132]Friedrich v. City of Chicago, 888 F.2d 511, 516 (7th Cir. 1989). On the plus side, the rule serves the "superior values of harmonizing different statutes and constraining judicial discretion in the interpretation of the laws." Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 109 (1991).

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

[134]SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 23.17 (Norman J. Singer, ed., 5th ed. 1993).

consideration, rather than effective dates of the statutes, is the key to determining which enactment was the "later" one.[135]

Appropriations laws.

The doctrine disfavoring repeals by implication also "applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act," since it is presumed that appropriations laws do not normally change substantive law.[136] Nevertheless, Congress can repeal substantive law through appropriations measures if intent to do so is clearly expressed.[137]

Rule of Lenity

The "rule of lenity" requires that "before a man can be punished as a criminal . . . . his case must be plainly and unmistakably within the provisions of some statute."[138] Lenity principles "demand resolution of ambiguities in criminal statutes in favor of the defendant."[139] The reasons for the rule are that "'fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed'" and that "'legislatures and not courts should define criminal activity.'"[140] If statutory language is unambiguous, the rule of lenity is inapplicable.[141]

Scienter

Intent is generally a required element of a criminal offense, and consequently there is a presumption in favor of a scienter or *mens rea* requirement in a criminal statute. The presumption applies "to each of the statutory elements which criminalize otherwise innocent conduct."[142] The Court may read an express scienter requirement

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[135]*Id.*

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

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

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

[139]Hughey v. United States, 495 U.S. 411, 422 (1990). *See also* United States v. Granderson, 511 U.S. 39, 54 (1994) ("In these circumstances — where text, structure, and [legislative] history fail to establish that the Government's position is unambiguously correct — we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor"); Cleveland v. United States, 121 S. Ct. 365, 374 (2000) (before choosing a "harsher alternative" interpretation of the mail fraud statute, "it is appropriate . . . to require that Congress should have spoken in language that is clear and definite").

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

[141]Beecham v. United States, 511 U.S. 368. 374 (1994) (quoting Chapman v. United States, 500 U.S. 453, 463-64 (1991)). *Accord*, National Org. for Women v. Scheidler, 510 U.S. 249, 262 (1994).

[142]United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994).

more broadly than syntax would require or normally permit,[143] and may read into a criminal prohibition a scienter requirement that is not expressed.[144] The Court recognizes some "strict liability" exceptions, especially for "public welfare" statutes regulating conduct that is inherently harmful or injurious and that is therefore unlikely to be perceived as lawful and innocent.[145] Determining whether such an exception applies can be difficult.[146] However, if the statute does not preclude a holding that scienter is required, and if the public welfare exception is deemed inapplicable, "far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement."[147]

Remedial Statutes

One can search in vain for recent Supreme Court reliance on the canon that "remedial statutes" should be "liberally" or "broadly" construed.[148] This is probably

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

[144]Posters 'N' Things, Ltd. v. United States, 511 U.S. 513 (1994) (interpreting drug paraphernalia law as requiring that merchant knew that customers in general are likely to use the merchandise with drugs).

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

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

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

[148]For not-so-recent reliance on the canon, see Peyton v. Rowe, 391 U.S. 54, 65 (1968) (petitioner is "in custody" in violation of Constitution for purposes of federal habeas corpus statute if any of consecutive sentences he is scheduled to serve was imposed as a result of deprivation of his rights); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (term "security" should be construed broadly, in part because "Securities Exchange Act quite clearly falls into the category of remedial legislation"); and Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 475 (1793) (opinion of Chief Justice Jay) (Constitution's extension of judicial power over controversies between a state and citizens of another state is "remedial, [and] therefore, to be

due to a variety of factors, including recognition that the principle is difficult to apply and almost hopelessly general.[149] In a sense all statutes are "remedial," and consequently courts have wide discretion in determining scope of application. There may also be uncertainty over what "liberal" or "broad" construction means.[150] But if the principle is reformulated as merely requiring that ambiguities in a remedial statute be resolved in favor of persons for whose benefit the statute was enacted,[151] the principle should be no more difficult to apply (once a "remedial" statute has been identified) than the rule of lenity, which counsels resolution of ambiguities in penal statutes in favor of defendants.[152] Absence of this principle from the current Court's lexicon, therefore, may reflect substantive preferences of the Justices as well as recognition of its limitations. Then too, the Court may employ more specific or limited presumptions in circumstances in which earlier Courts might have cited the liberal-remedial maxim,[153] or may instead prefer in such circumstances to analyze a statute without reliance on canonical crutches. Categorizing a statute as "remedial," or even as a "civil rights statute," is no substitute for more refined analysis of the purposes of the particular statute at issue.[154]

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construed liberally").

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

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

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

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

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

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

Statutes Benefiting Indian Tribes

Another subcategory of the "remedial" statutes canon is the proposition that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed to favor Indians."[155] Most cases resolving issues relating to tribal matters implicate some variation of this proposition,[156] but frequently there are also statute-specific considerations that amplify[157] or outweigh[158] any such generalities.

Common Usages and Interpretations

Findings and Purposes Sections

In applying the general principle that statutory language should be interpreted in a manner consistent with statutory purpose, courts naturally look to the stated purposes of legislation in order to resolve ambiguities in the more specific language of operative sections. For example, the Court relied in part on RICO's broad purpose of seeking "the eradication of organized crime in the United States," to conclude that the term "enterprise" as used in the Act includes criminal conspiracies organized solely for illegitimate purposes, and is not limited to legitimate businesses that are infiltrated by organized crime.[159]

It is easy, however, to place too much reliance on general statutory purposes in resolving narrow issues of statutory interpretation. Legislation seldom if ever

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

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

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

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

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

authorizes each and every means that can be said to further a general purpose,[160] and there is also the possibility that stated or inferred purposes may in some instances conflict with one another.[161]

"Sense of Congress" Provisions

"Sense of Congress" language is appropriate if Congress wishes to make a statement without making enforceable law. Ordinarily, a statement that it is the "sense of Congress" that something "should" be done is merely precatory, and creates no legal rights.[162] In the appropriate context "sense of Congress" language can have the same effect as statements of congressional purpose – that of resolving ambiguities in more specific language of operative sections of a law – but if that is the intent the more straightforward approach is to declare a "purpose" rather than a "sense."[163]

Savings Clauses

Savings (or "saving") clauses are designed to preserve remedies under existing law. "The purpose of a savings clause is merely to nix an inference that the statute in which it appears is intended to be the exclusive remedy for harms caused by the violation of the statute."[164] Inclusion of a savings clause, however, does not make all pre-existing remedies compatible with the newly enacted law. If there is a conflict, the savings clause gives way. Courts will attempt to give the savings language some effect, but may have to narrow that effect to avoid eviscerating the new law. A reference to specific remedies to be preserved can ease interpretation.[165] In some

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

[161]*Compare* Justice Brennan's opinion of the Court in Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 50-51 (1989) (Congress used undefined term "domicile" so as to protect tribal jurisdiction in child custody cases), *with* Justice Stevens' dissent, *id.* at 54 (Congress intended to protect the parents as well as the tribe).

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

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

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

[165]*See, e.g.*, 30 U.S.C. § 189, which provides that nothing in the Mineral Leasing Act shall be construed to affect the rights of state and local governments to levy and collect taxes on

cases, the legislative history of the savings provision can reveal its purpose.[166] In other cases courts must reason from the scope and purpose of the new statute. For example, when the Carmack Amendment to the Interstate Commerce Act imposed comprehensive federal regulation governing the liability of interstate carriers, the Court held that savings language preserving "any remedy or right of action . . . under existing law" applied only to federal, not state remedies. To allow resort to state law remedies that were inconsistent with the federal regulation would negate the Amendment's effect. "[T]he act cannot be said to destroy itself," the Court concluded.[167] Even very clear savings language will not be allowed to thwart what the Court views as the objective of the federal enactment.[168]

"Notwithstanding Any Other Provision of Law"

Congress sometimes underscores statutory directives by requiring that they be undertaken "notwithstanding any other provision of law." This phrase seldom aids interpretation. It is the statutory equivalent of a parent telling a child "I'm serious," or "I really mean it." Despite the admonition, courts and administrators still must determine what the underlying directive means. And, ordinarily, there will still be other provisions of law that apply; the trick is to determine which ones.[169] Courts have recognized these difficulties. One court, for example, ruled that a directive to proceed with offering and awarding of timber sale contracts "notwithstanding any other provision of law" meant only "notwithstanding any provision of *environmental* law," and did not relieve the Forest Service from complying with federal contracting law requirements governing such matters as non-discrimination, small business set-

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improvements and "output of mines." The Supreme Court relied on this language in holding that states may impose severance taxes on coal extracted from federal lands. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 631-33 (1981).

[166]*See, e.g.*, Merrill, Lynch, Pierce, Fenner, & Smith v. Curran, 456 U.S. 353, 386-87 (1982) ("saving clause" stating that amendment to Commodity Exchange Act was not intended to "supersede or limit the jurisdiction" of state or federal courts, placed in the bill to alleviate fears that the new remedies would be deemed exclusive, was an indication of congressional intent not to eliminate an implied private right of action under the Act).

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

[168]*See, e.g.*, Geier v. American Honda Motor Co., 529 U.S. 861 (2000) (state common law negligence action against auto manufacturer is preempted by a federal motor vehicle safety standard in spite of statute's saving clause providing that "compliance with" a safety standard "does not exempt any person from any liability under common law").

[169]In this sense, the statutory phrase is analogous to a parent telling a child "don't under any circumstances leave the house until I return." The parent doesn't really mean for the child to remain under any and all circumstances, but instead assumes that the child will try to get out if the house catches on fire or some other emergency occurs.

asides, and export restrictions.[170] "We have repeatedly held that the phrase 'notwithstanding any other law' is not always construed literally . . . and does not require the agency to disregard all otherwise applicable laws."[171] In the few instances in which the "notwithstanding" phrase may be marginally helpful to interpretation, it still must play second fiddle to a clear and unambiguous statement of the underlying directive,[172] and it is not as helpful as spelling out which other laws are to be disregarded.[173]

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

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

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

[173]To be sure, not every potential roadblock can be anticipated and averted by narrowly tailored language, and broad language may be necessary to ensure that statutory purposes are not frustrated. But, in spite of the interpretation in *Schneider*, supra n.172, the "notwithstanding" phrase is a blunt instrument. The Trans-Alaska Pipeline Authorization Act is a better model for such situations. That Act directed that the Pipeline "be constructed promptly without further administrative or judicial delay or impediment," specified that construction was to proceed generally in accordance with plans set forth in the already-prepared Final Environmental Impact Statement, declared that no further action was to be required under the National Environmental Policy Act, specified which subsections of the law governing rights-of-way across federal land (a law that had been relied upon in earlier litigation to enjoin the project) were to apply, and severely limited judicial review. *See* 43 U.S.C. § 1652. For a less complete identification of laws to be disregarded, and some concomitant interpretational problems, see Norfolk & Western Ry. v. Train Dispatchers, 499 U.S. 117, 138-39 (1991) (two dissenting Justices dispute Court's conclusion that the exemption of a carrier in a rail consolidation from "the antitrust laws and all other law, including State and municipal law," comprehended an exemption from the terms of a collective bargaining agreement).

Implied Private Right of Action

From time to time courts have held that a federal statute that does not explicitly create a private cause of action nonetheless *implicitly* creates one.[174] This notion traces to the old view that every right must have a remedy.[175] As the Supreme Court put it in an early implication case, where "disregard of the command of a statute . . . results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages from the party in default is implied."[176] The Court has gradually retreated from that position,[177] and now is willing to find an implied private right of action only if it concludes that Congress intended to create one. This raises an obvious question: if Congress intended to create a cause of action, why did it not do so explicitly?[178] While the Court has attempted to explain that it does not mean *actual* intent,[179] the test now seems weighted against finding an implied

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

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

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

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

[178]There may be plausible answers for some older statutes. Congress may have enacted the law at a time when the old rule held sway favoring remedies for statutory rights, or Congress may have patterned the language after language in another law that had been interpreted as creating a private right of action. *See, e.g.*, Cannon v. University of Chicago, 441 U.S. 677, 710-11 (1979) (Congress patterned Title IX of Civil Rights Act after Title VI, and believed that Title VI was enforceable by private action).

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

private cause of action.[180] Legislative drafters wishing to create a private right of action should therefore do so explicitly.

Incorporation by Reference

Interpretational difficulties may also arise if one statute incorporates by reference provisions of an existing statute. A leading treatise declares that incorporations by "general reference" normally include subsequent amendments, but that incorporations by "specific reference" normally do not.[181] A general reference "refers to the law on the subject generally," while a specific reference "refers specifically to a particular statute by its title or section number."[182]

Severability

When one section of a law is held unconstitutional, courts are faced with determining whether the remainder of the statute remains valid, or whether the whole statute is nullified. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law"[183] Congress frequently includes a *pro forma* severability clause in a statute,[184] and this reinforces a "presumption" of severability by removing much of the doubt about congressional intent.[185] A severability clause does not guarantee, however, that what remains of a

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[180] *See, e.g.*, Alexander v. Sandoval, 121 S. Ct. 1511 (2001) (there is no private right of action to enforce disparate-impact regulations issued under the general regulation-issuing authority of section 602 of Title VI of the Civil Rights Act; even though a private right of action does exist to enforce the anti-discrimination prohibition of section 601, the disparate-impact regulations "do not simply apply § 601," but go beyond it). For analysis of the whole topic, including the changing approach by the Court, see Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861 (1996).

[181] 2A SUTHERLAND, STATUTES AND STATUTORY INTERPRETATION, § 51.07 (Sands, 4th ed. 1984 revision).

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

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

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

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

statute after a portion has been invalidated is "fully operative"; courts sometimes find that valid portions of a statute cannot stand on their own even though Congress has included a severability clause.[186] Far less frequently, Congress includes non-severability language providing that remaining sections of a law shall be null and void if a part (sometimes a specified part) is held unconstitutional.[187] Case law is sparse,[188] but there is no apparent reason why courts should refuse to honor a clearly expressed non-severability directive.[189]

Legislative History

Plain Meaning Rule

The plain meaning rule, which purports to bar courts from relying on legislative history when statutory language is plain, is often the semantic bridge to a court's consideration of legislative history. That is to say, a court that actually relies on legislative history will usually do so only after expressing a belief that the statutory language is not plain, but instead is unclear or "ambiguous."[190] Significant differences arise, however, in the willingness of courts to label particular statutory language as "ambiguous" and thereby legitimize resort to legislative history. Some judges are more confident than others in their ability to read and interpret statutory text, and some are more convinced than others of the propriety of attempting to do so without resort to the "extrinsic" aid of legislative history.[191] Correspondingly, there are basic

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

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

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

[189]*See* Israel E. Friedman, Comment, *Inseverability Clauses in Statutes*, 64 U. CHI. L. REV. 903 (1997). Friedman contends that "inseverability clauses are fundamentally different from severability clauses and should be shown greater deference." Id. at 904. Inseverability clauses, he points out, "are anything but boilerplate," usually are included only after extensive debate, and are often designed to preserve a legislative compromise. Id. at 911-13.

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

[191]"When aid to the construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" United States v. American Trucking Ass'ns, 310 U.S. 534, 543-44 (1940). Justice Frankfurter, dissenting in United States v. Monia, 317 U.S. 424 (1943), made much the same point: "[t]he notion that because the words of a statute are plain,

differences in approach, from narrow focus on the clarity or ambiguity of the particular statutory phrase at issue, to recognition that phrases that may seem ambiguous in isolation may be clarified by statutory context.[192] And, inevitably, there are real differences in the clarity of statutory language.[193]

Agreement on the basic meaning of the plain meaning rule — if it occurs —does not guarantee agreement over the rule's application. There have been cases in which Justices of the Supreme Court have agreed that the statutory provision at issue is plain, but have split 5-4 over what that plain meaning is.[194] There are other cases in which strict application is simply ignored; courts, after concluding that the statutory language is plain, nonetheless look to legislative history, either to confirm that plain meaning,[195] or to refute arguments that a contrary interpretation was "intended."[196]

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its meaning is also plain, is merely pernicious oversimplification." Justice Scalia explains why he opposes ready resort to legislative history: "Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent." INS v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (concurring).

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

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

[194]*See, e.g.*, Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) (disagreement over the scope of civil RICO).

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

[196]*See* Darby v. Cisneros, 509 U.S. 137, 147 (1993) ("Recourse to the legislative history of § 10(c) is unnecessary in light of the plain meaning of the statutory text. Nevertheless, we consider that history briefly because both sides have spent much of their time arguing about its implications."); Toibb v. Radloff, 501 U.S. 157, 162 (1991) ("even were we to consider the sundry legislative comments urged [upon us] . . . , the scant legislative history does not suggest a 'clearly expressed legislative intent [to the] contrary'"); Arcadia v. Ohio Power Co., 498 U.S. 73, 84 n.2 (1990) (rejecting reliance on legislative history said to be "overborne" by the statutory text). The Court has declared that it will not allow a literal reading of the statute to produce a result "demonstrably at odds with the intentions of its drafters," but in the same breath has indicated that it is only "the exceptional case" in which that can occur. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982).

The one generally recognized exception to the rule is that a plain meaning is rejected if it would produce an "absurd result."[197]

There is, needless to say, scholarly debate over the merits of the plain meaning rule.[198] There is probably general consensus, however, that the plain meaning rule aptly characterizes interpretational priorities (statutory language is primary, legislative history secondary), but that its usage often merely announces rather than determines results.

Uses of Legislative History

Once a court has decided to look to legislative history, there is a question of how legislative history should be used. Possibilities range from background information about the general problems Congress sought to address in the legislation, to explanation of the specific statutory language at issue, to specific instructions about how to deal with the particular factual situation giving rise to the litigation. The first of these uses is generally considered legitimate, the second may or may not be, and the third is generally considered to be improper.

Reference to legislative history for background and historical context is commonplace. A "proper construction frequently requires consideration of [a statute's] wording against the background of its legislative history and in the light of the general objectives Congress sought to achieve."[199]

A distinct but related inquiry focuses not on the explanations that accompanied committee or floor consideration, but rather on the sequence of changes in bill language. Consideration of the "specific history of the legislative process that culminated in the [statute at issue] affords . . . solid ground for giving it appropriate meaning" and for resolving ambiguity present in statutory text.[200] Selection of one

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[197]*See, e.g.*, United States v. Granderson, 511 U.S. 39, 47 n.5 (1994) (dismissing an interpretation said to lead to an absurd result); Dewsnup v. Timm, 502 U.S. 410, 427 (1992) (Justice Scalia, dissenting) ("[i]f possible, we should avoid construing the statute in a way that produces such absurd results"); Public Citizen v. Department of Justice, 491 U.S. 440, 454 (1989) ("[w]here the literal reading of a statutory term would compel 'an odd result,' . . . we must search for other evidence of congressional intent to lend the term its proper scope").

[198]*See, e.g.*, Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231; Arthur W. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM L. REV. 1299 (1975); Clark Cunningham, Judith Levi, Georgia Green, and Jeffrey Kaplan, *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561 (1994).

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

[200]United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 222 (1952). "Statutory history" as well as bill history can also be important. *See, e.g.*, United States v. Wells, 519

House's version over that of the other House may be significant.[201] In some circumstances rejection of an amendment can be important. While courts are naturally reluctant to attribute significance to the failure of Congress to act,[202] that reluctance may be overcome if it can be shown that Congress considered and rejected bill language that would have adopted the very position being urged upon the court.[203]

Explanatory legislative history is also consulted on occasion for more narrowly focused explanation of the meaning of specific statutory language that a court believes is unclear.[204] Reliance on legislative history for such purposes may be more controversial, either because contrary indications may be present in other passages of legislative history,[205] or because the degree of direction or detail may be an unwarranted narrowing of a more general statutory text.[206] The concern in the latter instances is whether the legislative history is a plausible explanation of language actually contained in the statutory text, or whether instead explanatory language (e.g., report language containing committee directives or "understandings") outpaces that text. As the Court observed in rejecting reliance on legislative history "excerpts" said

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U.S. 482, 492-93 (1997) (consolidation of a number of separate provisions supports the "natural reading" of the current law); Booth v. Churner, 121 S. Ct. 1819, 1824-25 (2001) (elimination of "the very term" relied on by the Court in an earlier case suggests that Congress desired to preclude that result in future cases).

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

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

[203] Pacific Gas & Elec. Co. v. Energy Resources Conserv. & Dev. Comm'n, 461 U.S. 190, 220 (1983) (noting that language had been deleted to insure that there be no preemption); INS v. Cardoza-Fonseca, 480 U.S. 421, 441-42 (1987) (rejection of Senate language limiting the Attorney General's discretion in granting asylum in favor of House language authorizing grant of asylum to any refugee).

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

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

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

to reflect congressional intent to preempt state law, "we have never [looked for] congressional intent in a vacuum, unrelated to the giving of meaning to an enacted statutory text. . . . "[U]nenacted approvals, beliefs, and desires are not laws."[207]

Statutory silence is not always "pregnant," and silence of legislative history is seldom significant. There is no requirement that "every permissible application of a statute be expressly referred to in its legislative history."[208] The Court does, however, occasionally attach import to the absence of any indication in a statute or its legislative history of an intent to effect a "major change" in well-established law.[209]

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[207]Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 501 (1988). The Court explained further that, "without a text that can, in light of those [legislative history] statements, plausibly be interpreted as prescribing federal pre-emption it is impossible to find that a free market was mandated by federal law." *See also* Secretary of the Interior v. California, 464 U.S. 312, 323 n.9 (1984) (committee report directive purporting to require coordination with state planning dismissed as purely "precatory" when the accompanying bill plainly exempted federal activities from such coordination); Shannon v. United States, 512 U.S. 573, 583 (1994) (Court will not give "authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute").

[208]Moskal v. United States, 498 U.S. 103, 111 (1990). *Accord*, Pittston Coal Group v. Sebben, 488 U.S. 105, 115 (1988) ("it is not the law that a statute can have no effects which are not mentioned in its legislative history"); PBGC v. LTV Corp., 496 U.S. 633, 649 (1990) ("the language of a statute — particularly language expressly granting an agency broad authority — is not to be regarded as modified by examples set forth in the legislative history"). *See also* Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1998) (male-on-male sexual harassment is covered by Title VII although it "was assuredly not the principal evil Congress was concerned with").

[209]Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266-27 (1979) (silence of legislative history "is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely"); United Savings Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 380 (1988) (major change "would not likely have been made without specific provision in the text of the statute," and it is "most improbable that it would have been made without even any mention in the legislative history"); Dewsnup v. Timm, 502 U.S. 410, 419 (1992) (Court reluctant to interpret the Bankruptcy Code as effecting "a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history"). Sometimes the Justices disagree over the significance of congressional silence. Compare Justice Stevens' opinion for the Court in Chisom v. Roemer, 501 U.S. 380, 396 n.23 (1991) ("Congress' silence in this regard can be likened to the dog that did not bark") with Justice Scalia's dissenting rejoinder, *id.* at 406 ("apart from the questionable wisdom of assuming that dogs will bark when something important is happening, we have forcefully and explicitly rejected the Conan Doyle approach to statutory construction in the past").

Post-Enactment or "Subsequent" Legislative History

"The legislative history of a statute is the history of its consideration and enactment. 'Subsequent legislative history' — which presumably means the *post*-enactment history of a statute's consideration and enactment — is a contradiction in terms."[210] The Court frequently observes that "'[t]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'"[211] Actually, however, "post-enactment history" and "subsequent legislative history" are terms sometimes used as loose descriptions of several different kinds of congressional actions and inactions, and it is helpful to distinguish among them. The interpretational value — if any — of the views of a subsequent Congress depends upon how those views are expressed.

Subsequent legislation.

If the views of a later Congress are expressed in a duly enacted statute, then of course the views embodied in that statute must be interpreted and applied. Occasionally a later enactment declares congressional intent about interpretation of an earlier enactment rather than directly amending or clarifying the earlier law. Such action can be given prospective effect because, "however inartistic, it . . . stands on its own feet as a valid enactment."[212] "Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction."[213] Other statutes may be premised on a particular interpretation of an earlier statute; this interpretation may be given effect, especially if a contrary interpretation would render the amendments pointless or ineffectual.[214]

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[210]Sullivan v. Finkelstein, 496 U.S. 617, 631 (Justice Scalia, concurring in part).

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

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

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

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

Reenactment.

If Congress reenacts a statute and leaves unchanged a provision that had received a definitive administrative or judicial interpretation, the Court sometimes holds that Congress has ratified that interpretation.[215] The stated rationale is that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."[216] Similarly, if Congress in enacting a new statute incorporates sections of an earlier one, "Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."[217] The reenactment presumption is usually indulged only if the history of enactment shows that Congress conducted a comprehensive review of the reenacted or incorporated statute, and changed those aspects deemed undesirable.[218] Note, however, that the presumption comes into play in the absence of direct evidence that Congress actually considered the issue at hand. Under these circumstances, other inferences as to the significance of congressional silence seem equally strong. Congress may have simply overlooked the matter, or may have intended to leave it "for authoritative resolution in the courts."[219]

Acquiescence.

Congressional inaction is sometimes construed as approving or "acquiescing" in an administrative or judicial interpretation even if unaccompanied by the positive act of reenactment of the statute as a whole.[220] There is no general presumption that congressional inaction in the face of interpretation bespeaks acquiescence, and there is no consistent pattern of application by the Court. But when the Court does infer

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[215]Pierce v. Underwood, 487 U.S. 552, 567 (1988) (reenactment of "a statute that had in fact been given a consistent judicial interpretation . . . generally includes the settled judicial interpretation"). In *Pierce*, however, a committee report's approving reference to a minority viewpoint was dismissed as not representing a "settled judicial interpretation," since 12 of the 13 appellate circuits had ruled to the contrary. *See also* Metropolitan Stevedore Co. v. Rambo, 515 U.S. 291, 299 (1995) (reenactment carried with it no endorsement of appellate court decisions that were not uniform and some of which misread precedent).

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

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

[218]*Id.* at 582. The Court "bluntly" rejects ratification arguments if Congress "has not comprehensively revised a statutory scheme but has made only isolated amendments." Alexander v. Sandoval, 121 S. Ct. 1511, 1523 (2001) (also expressing more general misgivings about the ratification doctrine's reliance on congressional inaction).

[219]Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 336 n.7 (1971).

[220]Although acquiescence and reenactment are similar in that each involves an inference that Congress has chosen to leave an interpretation unchanged, there is a fundamental difference: reenactment purports to involve interpretation of duly enacted legislation, while acquiescence attributes significance to Congress' failure to act. *Cf.* INS v. Chadha, 462 U.S. 919 (1983) (Congress may legislate only in conformity with the bicameralism and presentment requirements of Art. I, § 7).

acquiescence, the most important factor (other than the Court's agreement that the administrative or judicial interpretation is the correct one) seems to be congressional awareness that the interpretation has generated controversy.[221] As with reenactment, however, there are other inferences that can be drawn from congressional silence.[222]

"Isolated statements".

Although congressional inaction or silence is sometimes accorded importance in interpreting an earlier enactment, post-enactment explanations or expressions of opinion by committees or members are often dismissed as "isolated statements" or "subsequent legislative history" not entitled to much if any weight. As the Court has noted, statements as to what a committee believes an earlier enactment meant are "obviously entitled to less weight" than is subsequent legislation declaring such intent, because in the case of the committee statement Congress had not "proceeded formally through the legislation process."[223] The Court has also explained that "isolated statements by individual Members of Congress or its committees, all made after enactment of the statute under consideration, cannot substitute for a clear expression of legislative intent at the time of enactment."[224] "It is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means."[225] The disfavor in which post-enactment

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

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

[223]Consumer Product Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 118 n.13 (1980) (dismissing as not "entitled to much weight here" a statement at hearings made by the bill's sponsor 4 years after enactment, and language in a conference report on amendments, also 4 years after enactment).

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

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

explanations are held is sometimes expressed more strongly when the views are those of a single member. The Court has declared that "*post hoc* observations by a single member carry little if any weight."[226]

"authoritative interpretation" of language enacted in 1947).

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