Chapter 1

Laws and Judges

This book is about the relationship between lawmakers and judges. More specifically, it is about how judges judge disputes about laws. In cases involving the common law, judges determine how well the facts of a dispute fit into the earlier body of decisions, and reach a conclusion for the best outcome in the new case, which then becomes part of the tradition for the next judge to consider. Depending on which court in the judicial hierarchy makes the decision, the decision is not only advisory, but has official legal status as binding precedent under the doctrine of *stare decisis*.

But now, much of the law is made not by judges, but by legislatures. Laws governing crime and punishment, trademarks, patents, copyright, securities, corporations, taxation, environmental regulation, antitrust, the sale of goods, and insurance are all enacted through legislation. When a legislature passes a law in a particular domain, common law judges must give the statute priority over their own values and defer to the legislative judgment. At times, the legislature delegates to agencies the authority to write rules to implement the statute that have the force of law. For the most part, courts are also obliged to subordinate their own judgment to those of the rulemakers.

Common law judges are also charged with interpreting statutes, which they have done for centuries.¹ Some believe that judges, so accustomed to having the last word in common law cases, have not been willing to adjust to the role of taking a back seat to the legislature. Instead, judges attempt to legislate beyond their authority, by imposing their

own glosses and values onto statutes that should simply be applied as the legislature wrote them. The most prominent such critic is Supreme Court Justice Antonin Scalia. In his book, *A Matter of Interpretation*, he remarks:

> But though I have no quarrel with the common law and its process, I do question whether the attitude of the common-law judge – the mind-set that asks, “What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded? – is appropriate for most of the work that I do, and much of the work that state judges do. We live in an age of legislation, and most new law is statutory law.”

Justice Scalia is by no means alone in his concern. For example, Adrian Vermeule suggests that judges should eschew virtually all interpretive principles. They should instead, he claims, apply laws by their plain language when possible, and defer to administrative agencies (including prosecutors) when there is some uncertainty about a statute’s meaning. Because judges bent on finding the intent of the legislature have no reliable methodologies that will ensure that they have accomplished their goal successfully, the argument goes, the system would be better off if judges applied rules mechanically and let the experts take over when decisions must be made.

Others, in sharp contrast, believe that the common law tradition provides a special opportunity for judges to continue to do justice, even though so much of the law is statutory. Guido Calabresi takes this position in his book, *A Common Law for the Age of Statutes*, whose title states his thesis. Calabresi asks:

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4 Vermeule’s provocative proposal, which would take away far more judicial power than would most other theorists, including Scalia and other textualists, has generated critical response. See Jonathan R. Siegel, Judicial Interpretation in the Cost-Benefit Crucible, *92 Minnesota L. Rev.* 387 (2007); Caleb E. Nelson, Statutory Interpretation and Decision Theory, *74 Univ. Chi. L. Rev.* 329 (2007).
What, then, is the common law function to be exercised by courts today? *It is no more and no less than the critical task of deciding when a retentionist or revisionist bias is appropriately applied to an existing common law or statutory rule.* It is the judgmental function … of deciding when a rule has become sufficiently out of phase with the whole legal framework so that, whatever its age, it can only stand if a current majoritarian or legislative body reaffirms it.  

This position argues that because legislatures move slowly – or not at all – it is only by some reasonable sharing of power between the two branches of government that any reasonable legal system can sustain itself without irreparably compromising the goal of doing justice. William Eskridge, in his important book, *Dynamic Statutory Interpretation,* also would recognize the need for doctrinal development of statutory law, notwithstanding a constitutionally-mandated process, which, at least in principle, is intended to give statutes primacy over the views of judges. Focusing especially on civil rights legislation, Eskridge argues that this is already the norm in certain situations, an argument addressed further in chapter 5.

Whether one believes that judges should wield more power or less power in the age of statutes, there can be no doubt that judges indeed do continue to sound like common law judges even when they are interpreting laws. While they purport to defer to legislative judgment, they indeed make their own judgments about which pieces of the legislative history and other social facts surrounding the enactment of a law tell us what the legislature really had in mind; they adhere to the common law principles of precedent, so that an earlier interpretation of a statute – even a demonstrably bad interpretation – continues to have binding effect on future cases; they create all kinds of “canons of construction,” ranging from assumptions about the resolution of grammatical

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6 *Id.* at 164.

7 William N. Eskridge, Jr., *Dynamic Statutory Interpretation* (1994).
ambiguity to the rule of lenity, which calls for ambiguities in criminal statutes to be resolved in favor of the defendant; and they impose on legislators “plain statement rules,” through which they warn lawmakers to draft disfavored provisions in an especially “clear” manner if they expect courts to enforce them. Even when the legislature reacts to a court decision by changing the law to override the judges, courts often continue to refer to their own precedents, construing the new law narrowly, as if the legislature were an inconvenience whose effect on the decision making of judges should be minimized to the extent possible. 8

When the language of the law leaves uncertainty, and it predictably does leave uncertainty, then discretion is unavoidable, whether we like it or not. For those concerned with there being a crisp rule of law conveyed in language that we can understand and comply with, this is unfortunate, since the these interpretive gaps permit argument on both sides of an issue that is consistent with both some legitimate understanding of the language, and at least some set of values sufficient to justify the interpretation. No wonder the personal values of the individual judge seep in to the statutory analysis.

Judges exercise even more judicial power when the language of a law seems sufficiently at odds with a reasonable application in a particular situation that it seems only fair to construe the law as not applying. As Judge Posner observes, no one would arrest a prosecutor for possession of child pornography when her only reason for having it is to use it as evidence against a pornographer. 9 Judges and scholars disagree about how far such judicial power may be taken. Some would limit to the erasure of absurd

8 This last point is made by Deborah Widiss, Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides (7/08 draft).
results, while others would go a little further in an effort to enforce the statute’s intent even when the literal application is not so bad as to be absurd. This occurs when the legislature apparently has made an error in the language it has used.

Despite all of this judicial activity in the realm of statutory law, as the argument of this book unfolds, I hope to show that laws work fairly well. Most of the time most people understand their obligations well enough, and most of the time the law’s application is clear. Hard cases arise because of a gap between our ability to write crisp yet appropriately flexible laws on the one hand, and the design of our cognitive and linguistic faculties on the other. That gap is small enough to permit some to fall prey to the illusion that it is even smaller than it actually is. But it does exist, and as we will see, beginning in chapter 2, most of the time it occurs in linguistically predictable circumstances.

Yet it would be a mistake to make too much of this gap. If one focuses only on the highly contested cases decided by the United States Supreme Court, one might sensibly infer that legal interpretation is a mess, full of arbitrary decisions. But if one focuses on all the times that a law applies without even generating a dispute, and on the times that it is clear enough to resolve a dispute without much difficulty, then the hard cases become just that: difficult situations embedded in a system of order that appears to be working fairly well. I argue in this book that this is what happens, and thus I am neither terribly worried about the fact that judges must actually make decisions some of the time, or about their seemingly having too little power to do so. As long as judges constrain themselves by staying within the range of reasonable interpretations that the language of the statute affords, or in unusual situations by articulating a good reason for
not doing so (such as a legislative error or an obviously anomalous result) legislators really will be given primacy over judges in forming and applying statutory law.

And judges typically do so. Judges of all political stripes repeatedly articulate legislative primacy as an overarching value in the decision making process. They often disagree about what evidence of the legislative will is legitimate and useful, and weigh differently other values, such as fair notice, coherence, adherence to constitutional norms, and stability. All of this disagreement, however, comes within a fairly narrow range of discourse in which it is a relatively straightforward matter to identify the many simple cases and to apply them without controversy. As for the hard cases, only a naïve apologist could ignore the fact that judges’ personal values contribute to their decisions. It can be no accident that the five conservative Supreme Court justices, in recent cases, construed an ambiguous labor statute in favor of the employer,¹⁰ and a regulatory statute in favor of the tobacco industry and against regulation,¹¹ whereas the four more liberal justices did just the opposite. In both of these cases, the dueling justices evoked the intent of the legislature to justify their opposing positions.

Judges are acutely aware of the ramifications of their decisions,¹² and cannot help but steer the legal system in a direction they believe to be the best course when more than one outcome is licensed by a statute whose application is not sufficiently clear in a particular case. How much one is troubled by this observation should depend upon the extent to which judges are constrained, and the relative frequency of straightforward cases to ones in which political judgment is permitted to masquerade as close legal

¹² Judge Posner argues, in fact, that the most important thing for a judge to do is to take seriously the consequences of a decision for future actors. See Richard A. Posner, Law, Pragmatism, and Democracy (2003).
analysis. I maintain that because language works quite well as a vehicle for conveying rules, and because judges indeed take seriously the concept of legislative primacy as a value, the residue of unrestrained political judgment is well within tolerable limits. Because my argument depends upon the salience of legislative primacy as a value, much of this book is devoted to developing that concept and defending its legitimacy. For now, though, let us turn to some easy cases.

Laws Work … Most of the Time

In our everyday lives, we can generally tell in advance what we are required to do, what we are permitted to do, and what benefits we have from the obligations of others. Consider the person who commutes to work from New Jersey to New York by train. A host of laws regulate his commute. Passengers are not permitted to get on or off a moving train, they must pay the fare, and they are not allowed to walk on the tracks. Passengers must also obey the criminal law and refrain from violence toward the train crew, and heed the signs that say it is prohibited to pull the emergency stop cord without a good reason. We barely notice such rules. They conform to our own norms of conduct, so for the most part we would act in accordance with them even if they were not articulated.

This may not be so for everyone, however. Some people might be thrill-seekers who would get some pleasure out of walking on the railroad tracks with a train close by. Others might be anti-social enough to get pleasure from pulling the emergency stop cord for no legitimate reason. The rules are written to proscribe conduct that violates ordinary

social norms, but in which some people would engage if they were not told that they
cannot do so. Compliance with these norms would be expected even if there were no
laws making it illegal to violate them. Their clear articulation serves to legitimize legal
sanctions against violators.

Laws do not always work that well, however. Let us say that the commute also
includes a ride on the New York City subway. It has long been illegal to ride between
cars on the subway. Since 2005, it has also been illegal to move between cars, even when
the train is stopped. The Transit Authority web page has the following listed under its
Rules of Conduct: “It is a violation to … Move between end doors of a subway car
whether or not train is in motion, except in an emergency or when directed by police
officer or conductor.”16 Arrests for riding or moving between cars jumped from about
700 in 2005 to 3,600 the next year, and more than 17,000 in 2007, reflecting a
crackdown, and the fact that most riders did not know about the new rule and were
cought off guard when they behaved as they always had.17

Riders made aware of the new rule complained. There is a long tradition in New
York of moving between cars to evade loud passengers, unwanted entertainment, broken
air conditioners and foul odors. New Yorkers are also often in a hurry, and move
between cars so they are closer to the appropriate exit in their destination station.

Yet the rule has a purpose: impeding those who wish to engage in crimes on the
subway system. A newspaper article quotes a Transit Bureau police chief: “We’ve tried
to really hammer down on moving between cars. A lot of bad guys move between cars,

17 Letter from New York City Transit Authority dated 6/30/08. I am grateful to the Transit Authority’s
office of legal counsel for providing this information.
really, prowling for victims.”

The rule also addresses safety concerns. Deaths and injuries have occurred by virtue of passengers riding between cars, sometimes resulting in lawsuits against the Transit Authority.

Small signs are posted on the end doors of subway cars. The signs have a cartoon-like picture of a person riding between cars with a diagonal red stripe through him to indicate that his conduct is prohibited. Until recently, they bore the words, “Riding Between Cars Prohibited.”

Since the new rule was put in place, the Transit Authority has replaced many of these signs with ones that state the rule verbatim, but even several years after the rule was changed, some of the cars continue to have the sign pictured above. Moreover, the web page entitled Subway Safety has only the following warning: “When you're inside a

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moving train, never ride between cars or lean against doors. When you are standing, always hold on.” It does not mention the new rule.

How should the law apply to a passenger who, without knowledge of the rule, walks from one car to another to avoid heat, noise or smells while the train is stopped in a station? On the one hand, the rule is clear, and the passenger has violated the rule. It generally should not matter that he does not know the rule, since ignorance of the law is no excuse for disobedience, unless the legislature has made such knowledge a prerequisite for conviction. On the other hand, the sign might give a misimpression as to what is really prohibited, and the Transit Authority’s web page contains conflicting information, depending on whether one reads the safety tips or the rules themselves.

The best result would be, I believe, for the police to explain the law and to let the passenger go. He meant no harm and will not move between cars again. Thus, the police themselves act as the first line of statutory interpreters. If they conclude that the purpose of the law is not being served by an arrest, they can simply not make the arrest and avoid the need for a decision about the legality of their actions. When police, prosecutors, or for that matter, plaintiffs’ lawyers refrain from bringing legal cases that raise difficult questions about the proper application of a law, they permit the system to treat laws that are unclear at the margins as though they were clear. We will see in chapter 6 that, for example, federal prosecutors bring very few criminal copyright cases, and the ones they bring are clear, egregious violations of the Copyright Act. The result is that whatever uncertainty in meaning the copyright laws contain becomes irrelevant in the criminal

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context, since prosecutors do not raise such issues. They would rather devote the
resources needed to try to expand judicial interpretation of the copyright laws elsewhere.

Let us say, however, that the passenger is arrested and charged with moving
between cars. He decides to fight the case because he regards himself as a law-abiding
citizen and he is angry about the entire incident.\textsuperscript{22} The problem is that the government
has enacted a law, but has communicated its substance to the public in a way that would
mislead them into thinking that the law is narrower than it really was written to be.

This sometimes happens in actual cases. For example, the Internal Revenue
Service assists taxpayers in meeting their obligations, but having received misinformation
from an IRS agent is no excuse for not paying one’s taxes, both in full and on time.\textsuperscript{23}
Similarly, in chapter 5 I discuss \textit{United States v. Locke},\textsuperscript{24} a case in which the government
had misled a miner about the deadline for renewing his claim to federal land. The Court
there held that a deadline is a deadline no matter who said what, but still found a clever
way to do justice and get Mr. Locke back his mine.

Our subway problem, while in some sense a novelty, illustrates the same core
problem in the interpretation of statutes raised in \textit{Locke}: the legislature intends to convey
a message imposing an obligation on members of society, but somehow that message
does not come through. What is unusual about this story (and \textit{Locke}) is that the
government enacted a clear statute but later muddied the waters by issuing a conflicting
statement. In the ordinary case, the statute itself fails to communicate adequately just
what is expected. Most often this happens because the statute uses words that were

\begin{itemize}
\item 23 For a recent case, see \textit{Volvo Trucks of North America, Inc. v. United States}, 367 F.3d 204, 211-12 (4th
         Cir. 2004).
\item 24 471 U.S. 84 (1985).
\end{itemize}
chosen with a particular set of scenarios in mind, and a disputed event comes within the
scope of the word’s meaning, but does not fit the scenarios that led to the statute’s
enactment; or something happens that fits the scenario but does not come within the
scope of the word’s meaning; or it comes within the word’s meaning in one sense, but not
another.

These problems most often result not from sloppy drafting or bad judging, but
from a partial cognitive mismatch between our ability to regulate ourselves with precision
through detailed laws whose language we take seriously, and the architecture of our
linguistic and conceptual faculties. We flexibly absorb new situations into categories that
we have already formed. In the realm of law, however, those new situations might not
have been intended to come within the law. By the same token, a new event might seem
not to fit a legal category, when from a perspective of justice, it should. Aristotle
observed the problem in the *Nicomachean Ethics*. He explained:

The reason is that all law is universal, but about some things it is not
possible to make a universal statement which shall be correct. In those
cases, then, in which it is necessary to speak universally, but not possible
to do so correctly, the law takes the usual case, though it is not ignorant of
the possibility of error. And it is none the less correct; for the error is not
in the law nor in the legislator but in the nature of the thing, since the
matter of practical affairs is of this kind from the start.25

Aristotle recognized that because of this “error” in “the nature of the thing”
decision makers might have to make adjustments in applying the law to avoid anomalous
results, a recognition that seemed obvious enough to him but which is currently a matter
of great debate in American jurisprudence. He explained:

When, therefore, the law lays down a general rule, but a particular case
occurs which is an exception to this rule, it is right, where the legislator

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discussion, see Frederick Schauer, *Profiles, Probabilities and Stereotypes* (2004).
fails and is in error through speaking without qualification, to make good
this deficiency, just as the lawgiver himself would do if he were present,
and as he would have provided in the law itself if the case had occurred to
him.26

Aristotle recognized that judges cannot avoid contributing to the meaning of legislation,
and had no problem with that fact, which, in contrast is a matter of considerable
discomfort to contemporary thinkers concerned about judges usurping the legislative role.

Also controversial, this time among psychologists and philosophers, is the extent
to which the problems lie in the nature of the thing, as Aristotle saw it, or in the nature of
the mind. Both must be in play.27 We do not say that a window is a type of ball at least
in part because windows are not balls. Thus, the nature of things plays a role in how we
conceptualize the world. But when we have trouble deciding whether having a gun in the
trunk of the car should count as “carrying” the gun to a site of a drug crime, at least part
of the decision appears to lie not in some independent essence of carrying that can be
discovered through, say, scientific research, but rather from some aspects of how we fit
situations into the categories that we have formed.28 That psychology, and the role it
plays in statutory interpretation, is the subject of much of chapters 3 and 4.

Given that the core problem in the interpretation of laws has been recognized
since antiquity, it is no wonder that the scholarly literature and law school casebooks are
full of discussion of old cases. In the realm of statutory interpretation, the classic one is
United States v. Church of the Holy Trinity,29 an 1892 case that continues to receive
significant attention in the literature, and which is discussed in chapter 3 of this book.

26 Id. at ___. (?)
27 For some interesting discussion, see Paul Bloom, Descartes’ Baby: How the Science of Child
29 143 U.S. 457 (1892).
The question was whether the church had violated a law prohibiting the importation of people performing a service or labor of any kind when it paid to bring a minister to New York from England. The case raises the same problem as whether the defendant in the previous paragraph was carrying a firearm, and for that matter the same problem that Aristotle observed.

When such things happen, judges must decide whether to enforce the law’s plain meaning (when the language is unequivocal), or its ordinary meaning (when there is more than one interpretation, but one of them seems more typical than the others), or according to some other set of values, such as the purpose of the statute, evidence of what the enacting legislature had in mind, coherence with other laws, consistency with earlier decisions of other courts, the need for evolution so that the law remains responsive, and so on.

I develop those arguments and the debates over which should be given priority in chapters 3 through 5. In thinking about them, it is important to keep in mind the examples contained in the first paragraph of this section. These were the rules that we understand without controversy, such as do not pull the emergency cord unless there is an emergency. The clear rules, too, can generate hard cases when, for instance, a passenger concludes that some sort of physical discomfort constitutes an emergency, but the train crew does not, or it becomes necessary to walk across the tracks to avert harm. Most of the time, however, the rules work so well that the possibility of concocting unusual situations in which they do not work clearly goes unnoticed. That is generally true of laws that codify social norms. It is less true of laws that attempt to regulate behavior in ways that are counterintuitive or in ways to which people would rather not conform.
Such situations sometimes create a game of cat and mouse, where the legislature attempts to set standards and the regulated attempt to comply with the letter of the law, but to thwart its intent by engaging in conduct that is largely equivalent to what is not allowed, but different enough in form to come outside the law. We see this in such areas as tax shelters\(^{30}\) and the manufacture of weapons\(^{31}\) that circumvent the statutory definitions of assault weapons, to take two of many examples.

The availability of competing values is also why our subway story presents a difficult problem. It would be perfectly reasonable to hold people to the new law as written and enforce the summons for moving between cars. The law was duly enacted and is clear, and it might cause a disproportionate administrative burden if the 17,000 people charged with violating this rule in 2007 were given grounds to challenge their violations. As for the sign, it does not say that people are permitted to move between cars, only that they are not permitted to ride between cars. This, one can argue, is not enough to remove the ordinary requirement that people be familiar with the laws or face the consequences. On the other hand, the sign is seriously misleading in a way that courts routinely recognize. The principle *expressio unius est exclusio alterius* recognizes that when a law proscribes one thing and not another, we typically infer that the missing event was intentionally omitted. Of course the sign is not itself a law, but we nonetheless tend to draw the inference. I would certainly think that it is alright to move between cars when the train is stopped if I saw that sign on the door of a subway car. Fair notice is an important value in the criminal law, and this surely is not fair notice.

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\(^{30}\) For discussion of some linguistic strategies that arise in the context of tax shelters, see Steven A. Dean & Lawrence M. Solan, Tax Shelters and the Code: Navigating Between Language and Intent, 26 Va. Tax Rev. 879 (2007).

\(^{31}\) See chapter 5 for further discussion.
If I were a judge listening to a challenge by a subway passenger, I would rule in the passenger’s favor, but suggest first that the Transit Authority seriously consider dropping all charges to avoid the precedential effect of my ruling. Perhaps many readers would rule differently. I have little doubt that my own political tendencies are at work here. Those who place a higher value on enforcing the legislative will than on fair notice might feel differently. Without question, however, both solutions come within the range of legitimate judgments that a court could make.

This Book

This book, then, will not present a method of statutory interpretation that claims to come up with the right answer in each hard case. By their nature, hard cases are ones in which ordinary legal principles – most often construing the language of the statute – do not force a single interpretation. At that point, decisions are made through weighing various values that the legal system deems legitimate, the most significant of which is legislative primacy. How any individual decision maker assigns the weights necessarily depends upon the values implicated by the case, their relative importance in legal analysis, and on the personal values of the decision maker herself. It is a mistake to pretend that this interpretive space does not exist, just as it is a mistake to make so much of the indeterminacy as to believe that statutes never have a single legitimate application in a particular situation.

Rather, the book will explore the problems – largely stemming from our psychology – that lead to recurrent difficulties in statutory interpretation, and will argue that a rather expansive array of tools is appropriate to use in resolving disputes that arise.
Just as importantly, the book will discuss the dogs that do not bark – the aspects of lawmaking that appear to present very little problem, and which, therefore, make it possible for us to govern ourselves more or less successfully in a complex legal system based on finely articulated rules. Finally, the book will discuss the question of who should interpret statutes and whether certain drafting strategies can reduce the burden on judges by better defining the range of discretion that the legislature wishes to delegate to others.

The basic argument of the book is that laws generally work well; when they fail to provide us with sufficient information to know our rights and obligations it is usually (but by no means always) because of uncertainties in how well the concepts contained in a statute’s words match the events that are in dispute. That is, most problems of statutory interpretation, including most of the famous cases, are about problems of conceptualization.

Chapter 2 presents this argument through a case study: the federal bribery statute. Most of the terms of the bribery statute have been litigated to the hilt, but little else in the language of a long, syntactically complex statute has caused the legal system any problems. I describe some of the psychology that underlies this distribution of difficulty. As we will see over and over again, many of the problems of statutory interpretation have at their roots a gap between our capacity to make laws that are at once crisp enough to apply, but flexible enough to deal with new situations. At the same time, the organization of our language faculty makes some aspects of lawmaking second nature. Throughout this book, I will take issue with some of the claims that modern textualists make about the ease with which statutory language produces clear results. Yet such claims, even if
they are wrong when it comes to hard cases, must be sufficiently grounded in everyday experience to resonate to the point of attracting supporters. In chapter 2, we will see what makes such theories attractive, and where they are limited.

Chapters 3 and 4 are the heart of the book. Chapter 3 portrays many of the important statutory interpretation cases as instances of grappling with borderline instances of word meaning. It argues that there is actually little difference between textualists and contextualists on the large issue: The principal goal of the statutory interpreter is to be loyal to the legislator. Just about all judges and scholars believe that the best first step in achieving this goal is to pay close attention to the language of the law. Just about all judges and scholars believe that some combination of extrinsic evidence, consequentialist reasoning, and substantive values must play a role when the language of the statute, as applied to the case at hand, does not yield a clear answer. Differences arise with respect to what kind of extrinsic evidence is considered legitimate evidence. Even there, just about all judges and scholars make reference to the circumstances facing the legislature when the law was enacted. The biggest difference at this time is the propriety of reference to legislative history. I support the use of legislative history in statutory interpretation, but as a general matter, find there to be far more agreement than disagreement about which tools are appropriate for judges to use.

Chapter 4 delves more deeply into these issues by discussing the concept of legislative intent. Many have argued that legislative primacy must be achieved without reference to the intent of the legislature (whether by studying legislative history or otherwise) because the concept of legislative intent makes no sense. Intent is not enacted – laws are enacted. Moreover, how can more than 500 people with all kinds of
unannounced personal agendas be said to have a single intent? In chapter 4, I defend the notion of intent against claims that it is not democratic and against claims that it is incoherent. We routinely talk about the intent of groups. Using literature from psychology and philosophy, I show how doing so makes perfect sense in the context of the legislature.

Chapter 5 returns to a theme discussed earlier in this chapter: What values other than legislative primacy contribute to the interpretation of statutes. Those explored include the competing values of stability and responsiveness to changing circumstances, coherence, constitutional values, fair notice, support for law enforcement and the personal values of judges. The last two are outside the scope of what is typically considered to be legitimate. Yet, it is difficult to ignore their role, and important to determine the extent of their contribution to the legal decision making process.

Chapters 6 and 7 move to the question of who should interpret statutes. Chapter 6 deals with suggestions that other branches of government replace judges as statutory interpreters. Some have proposed that judges have too much of a role in statutory interpretation, and that various agencies would do a better job. Others propose that the legislature keep more control over the interpretation of laws by specifying how they wish the laws to be construed in the event that a dispute occurs. In fact one state, Connecticut, has enacted a law requiring courts to ignore evidence of legislative intent other than the statute’s language upon a finding that the statutory language is clear. I argue that this law is not an unconstitutional usurpation of the judicial function, despite the fact that it is typically judges who have the power to interpret statutes. I also argue that it is a bad idea. Because the problems that lead to difficult statutory cases are conceptual in nature,
a legislature might thwart what it would regard as reasonable interpretation of the laws it
enacts if it takes away important tools from judges. As the law is currently applied,
judges appear to find sufficient ambiguity to retain their discretion in hard cases.

Chapter 7 addresses the role that juries have in the interpretation of statutes.
Traditionally, the interpretation of laws is a matter for the judge, and the application of
the law as interpreted by the judge is left to the jury. But it does not always happen that
way. Jury instructions often leave to the jury all kinds of interpretive decisions, which I
discuss and evaluate.

The last chapter, chapter 8, turns to the legislature. Most of the book focuses on
what statutory interpreters should consider, and who should do the interpreting. But the
legislature also has a role to play. For one thing, legislatures can write the purpose of a
law into the statute itself, averting some of the problems that textualists raise. This
chapter looks at a few instances in which the Congress has done so, and examines how
the courts have reacted. Moreover, legislatures cannot write statutes with sufficient
clarity to avert interpretive problems. They can, however, make decisions about how
much discretion to delegate to judges or other decision makers. They can do this by
varying the style of the legislation from hard-and-fast rules at one extreme, to laws
defining non-inclusive models and prototypical cases in the middle, to rough standards at
the other extreme. Legislatures already do this, but they do not appear to understand, in a
systematic way, how they can control the amount and nature of residual discretion that
judges will have to exercise in applying the law.

The book ends with a short statement of conclusion, summarizing some of the
major points, and asking what might make the system better.