Chapter 5

Stability, Dynamism and Other Values

Thus far, my argument has focused on fidelity to the legislature. There is passionate debate about how to be faithful, but no question about whether to be faithful. In this chapter, I consider other values that contribute to decisions about statutory interpretation. These include stability for its own sake; the contradictory value of responsiveness to changes in the legal and broader cultures; effective law enforcement; the purpose for the legislation; respect for the legislative process; coherence; fair notice; and adherence to constitutional norms. We will see that all of these compete with fidelity to the will of the legislature. In those relatively unusual cases in which fidelity and other values conflict, fidelity often – but not always – wins.

We will also see the presence of some values that are not, at least in a narrow sense, strictly legal in nature. For example, in some criminal cases, it is difficult to avoid the conclusion that a court has decided to err on the side of assisting the law enforcement community when the language of the statute and other extrinsic information allow some latitude in interpretation. More generally, it simply does not appear to be an accident that when a statute is linguistically susceptible to more than one interpretation, conservative jurists most often resolve the indeterminacy in favor of a conservative outcome, and liberal jurists most often resolve the indeterminacy in favor of a liberal outcome. Many
have made this observation, from the legal realists to Richard Posner in a recent book.\(^1\) Whether we find this fact disturbing should depend on the extent to which it determines outcomes. As we will see, the level of indeterminacy that justifies purely political outcomes does not occur in the typical case, and is far more prevalent in higher courts.

The presence of competing values in statutory interpretation should not be surprising to those who study constitutional interpretation. As Professor Richard Primus observes, most constitutional scholars acknowledge that the original intent of the framers should have at least some influence on interpretation, with some minority of scholars thinking that intent is everything, and another minority finding original intent irrelevant as a matter of principle.\(^2\) How other values -- such as adherence to earlier judicial precedent and the desire for coherence in the structure of government -- contribute depends in part on how the decision makers view the relationship between the framers and the people now being governed, and how changes in society over time might affect how the Constitution should be applied. Primus likens the array of available constitutional arguments to a toolkit, with certain tools more appropriate than others in a given situation.

Likewise, in the realm of statutory interpretation, the intent of the legislature might not be important to a decision maker when the statute was written in the nineteenth century and barely survives scrutiny under current constitutional doctrine. Similarly, decisions that would tend to render a particular body of law incoherent, or which will thwart reasonable law enforcement efforts without promoting countervailing values such as fair notice, might be unattractive to some decision makers even if they did serve to


enforce the legislative will. We begin by looking at the dynamics of stability and change, and turn later to other values.

### Stability and Change

#### The Dynamics of Stability

If one looks only at contemporary appellate opinions, it is easy enough to draw the conclusion that statutory interpretation often appears to be chaotic and arbitrary. However, it is a mistake to look only at the universe of cases over which there is maximum controversy and about which the law is maximally undetermined. If outcomes have precedential effect and become part of the meaning of the statute being interpreted, the law should become more stable over time even if there remain pockets of uncertainty and conflict. In this section, I will argue that it does just that.

In chapter 2, we saw that a small set of recurrent problems – controversy over word meaning and difficulty determining a defendant’s state of mind – account for a large proportion of all published judicial decisions interpreting the federal bribery statute. Steven Shepard, who worked as my research assistant while a law student at Yale, has reviewed justice statistics to determine the number of annual prosecutions, the number of appeals, and the number of published appeals in cases brought under that statute. Kimberly Finneran, while a student at Brooklyn Law School, conducted additional analysis of the data. The total number of appeals reflects instances in which

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4 The information comes from annual data sets made available by the Administrative Office of the Courts, part of the United States Department of Justice. The government sorts cases into categories, including bribery. However, that sorting includes a number of bribery statutes, only one of which is the one being studied here. Thus, analysis of the data required separating bribery prosecutions under 18 U.S.C. § 201. The data are available from the Inter-University Consortium for Political and Social Research (ICPSR), http://www.icpsr.umich.edu (search for “Federal Court Cases: Integrated Data Base”).
defense counsel concluded that there was a point worth making to an appellate court. The
total number of published opinions reflects instances in which an appellate court,
consistent with the court’s rules governing publication, determined that the case resolved
a legal issue of sufficient importance to merit publication.  

Table 1 displays some of the results. The first thing to notice is that the number
of prosecutions has been increasing, almost linearly – from 126 to 677-- during the 35
year period studied.

<table>
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<th>Year</th>
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<th>Total Appeals</th>
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</tr>
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<td>2005</td>
<td>677</td>
<td>2</td>
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</tbody>
</table>

Table 1

Bribery Prosecutions and Appeals
In Selected Years

In contrast, the total number of appeals has decreased over time, but not in a
smooth curve. The history of appeals under this statute appears to be a generally
downward slope with periods of punctuated activity. Prosecutions with respect to a

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5 The rules governing the publication of appellate opinions are not uniform among the federal circuit
courts, and have not been entirely stable during the period studied. See Deborah Jones Merritt and James J.
Brudney, Stalking the Secret Law: What Predicts Publication in the United States Court of Appeals, 54
Vanderbilt L. Rev. (2001). However, the slope of the curve is sufficiently uniform over time to suggest that
it is reliable as a general matter.

6 The figures in this graph are actually running 3-year averages. Presenting them in this way smooths the
curves to make trends easier to see. Had each year been presented without such averaging, the overall
trend of the total appeals would be exactly the same, but the graph more jagged. Moreover, in some
instances a prosecution brought in one year might not result in an appeal until the following year. This fact
should make only a small difference in the numbers presented here, since the total number of prosecutions
increased slowly and linearly.
particular scandal (such as ABSCAM or Wedtech, both discussed in chapter 2), or in which prosecutors attempt to introduce a new theory (such as counting contractors performing government functions as government officials) generate increased activity for a period of time. But once those cases are decided, the issues they raised remain more or less fixed. Eventually, fewer convictions, whether as the result of a guilty plea or a trial, raise important legal issues.

This is not to deny the presence of other factors within the legal system that might influence the number of appeals taken. For example, the United States Sentencing Guidelines took effect in 1987.7 Because the Guidelines placed significant emphasis on the acceptance of responsibility as a factor in reducing sentences,8 fewer defendants in federal cases have chosen to go to trial, reducing the grounds for appeal throughout the system. Nonetheless, the Sentencing Guidelines cannot explain the downward trend in the rate of appeal in the four years preceding their adoption, nor the continuing downward trend after they had been firmly established. Moreover, while the Guidelines increased the rate of plea bargaining and corresponding reduction in the number of trials, the trend had been in that direction for some time.9 Thus, the adoption of the Guidelines does not appear to explain the decrease in the rate of appeals taken by defendants in federal bribery cases.

Because of the increase in the number of prosecutions over time, the absolute number of appeals and published appellate decisions is not as meaningful as the number of appeals and published opinions as a percentage of total prosecutions. Figure 1

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9 For discussion see Marc L. Miller, Domination and Dissatisfaction: Prosecutors as Sentencers, 56 Stanford L. Rev. 1211, 1252 (2004).
presents this information, and shows that both the total appeals and the published appellate decisions have decreased as a percentage of total prosecutions.

![Figure 1](image)

**Figure 1**

*Total Appeals as a Percentage of Bribery Prosecutions and Published Appeals as a Percentage of Bribery Prosecutions*

To the extent that this study of the bribery statute is indicative, it suggest that the combination of statutory language and judicial decision making lead to stability over time. This is not to say that new theories will not arise from time to time, or that the resolution of recurrent situations by appellate courts is dispositive of all new, unforeseen circumstances that may arise later and generate additional disagreement about a statute’s application. Nonetheless, the story of the bribery statute is a positive one for those concerned about the development of certainty and stability.
Not all would agree with this assessment, however. An interesting study by Professors Stefanie Lindquist and Frank Cross\(^{10}\) draws somewhat contrary conclusions. Their study examines the relationship between adherence to precedent in statutory cases on the one hand, and reliance on ideology on the other. The statute they studied is 42 U.S.C. § 1983, which gives a cause of action to those whose federal rights have been violated “under color of state law.”\(^{11}\)

The project set out to determine whether Ronald Dworkin’s famous chain novel metaphor describes the reality when large numbers of cases are examined. Dworkin likens statutory interpretation to the writing of a chain novel. For Dworkin, interpreting a law resembles what happens when “a group of novelists writes a novel seriatim; each novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on.” The writers “aim jointly to create, so far as they can, a single unified novel that is the best it can be.”\(^{12}\) Implied in this analysis is an important role for precedent, for earlier decisions are part of the history that the author of the latest chapter will consider.

Focusing on cases decided by United States courts of appeals between 1961 and 1990, Lindquist and Cross found that ideology plays a significant role in cases of first impression. Conservative judges make conservative decisions, liberal judges liberal decisions. This should not be surprising: When there is no precedent to take into account, judges’ political orientation plays a more prominent role.


\(^{12}\) Ronald Dworkin, Law’s Empire 229 (1986).
What is especially interesting in Lindquist and Cross’s study is what happens over time. In the period immediately following interpretive decisions, courts of appeals generally respected precedent. But over time, adherence to earlier precedent dissipates and ideology begins to play a larger role again. If this is the case, then it would tend to undermine the conclusion that precedent plays a powerful role in statutory interpretation, as we saw in our analysis of federal bribery cases, and as we will see as a matter of principle below. They explain their results:

As more time passes and more precedents are decided, however, the proliferation of available prior decisions in turn expands judges’ discretion to decide cases in accordance with their attitudes simply because they have more precedents from which to choose. The influence of precedent could thus be conceptualized as quadratic or curvilinear over time.\(^{13}\)

But this dynamic does not describe the cases decided under the bribery statute examined earlier in this chapter. Perhaps one difference is that the bribery statute, although it involves the prosecution of political figures, conjures up less ideology, for the most part. Once the Supreme Court has decided, for example, that a contractor performing a governmental function should count as a “public official” under the statute, lower court judges will have little motivation to come up with unnaturally narrow understandings of “contractor.” Not enough is at stake. In contrast, the proper scope of the civil rights statute that Lindquist and Cross studied has been the subject of a great deal of controversy over the years, some of which has played out in linguistic games.\(^{14}\) It should not be surprising that politics plays a greater role when a statute is both broadly worded and controversial.

\(^{13}\) Lindquist & Cross, \textit{Empirically Testing}, at 1204.
Part of the difference between my results and theirs may also reflect an important issue of methodology. Lindquist and Cross show, somewhat ironically, that extensive precedent sometimes frees judges to rely upon ideology. Once enough appellated decisions seemingly go in both directions, it becomes easier for a judge performing his job earnestly to choose as persuasive some precedents and to distinguish others as less relevant to reach a result without thwarting traditional rule-of-law values. Missing from their study, however, is information about how frequently these decisions occur as a function of the number of cases brought in the lower courts and the total number of appeals taken, whether published or not. It may be the case, for example, that the percentage of Section 1983 cases resulting in published appeals is quite low, but that those cases that do make it so far are susceptible to multiple analyses based on current precedent, and are therefore ripe for ideological considerations. If this is so, it would serve to confirm the importance of precedent in statutory decisions.

Steven Shepard (who assisted me in my study of the bribery statute) has conducted his own study of four federal statutes to determine the relationship between prosecutions and appeals over time.\footnote{Steven Shepard, Settled Questions: The Interpretation of Federal Criminal Statutes in the Circuit Courts of Appeals (unpublished paper, Yale Law School) (2006) (on file with the author).} He examined a statute making it a crime to engage in a “continuing criminal enterprise;”\footnote{21 U.S.C. § 848.} The Hobbs Act, which makes it a crime to “obstruct, delay, or affect commerce” by means of “robbery or extortion;”\footnote{18 U.S.C. § 1951.} the federal credit card fraud statute;\footnote{18 U.S.C. § 1029.} and the federal money laundering statute.\footnote{18 U.S.C. § 1956.} Shepard then conducted analyses similar to the one presented above in which the number of published
appeals is analyzed in terms of the number of prosecutions for each year. Shepard’s study differed from the bribery study reported here in two respects. First, the bribery statute was enacted in 1962, but data rich enough to perform these analyses exist only beginning in 1971. The statues that Shepard studied, in contrast, were not enacted in their current form until after 1971, so he is able to track trends from the beginning of the statutes’ histories. Second, Shepard looked at the relationship between published appeals and total convictions, rather than total prosecutions. This difference should not be of great significance.

Shepard’s results for each of the four laws match the results concerning the bribery statute reported earlier in this chapter. Prosecutions and convictions increase over time, but the ratio of published appeals to convictions decreases over time. The federal money laundering statute, for example, which was enacted in 1986, has seen a steady rise in convictions over its twenty year existence. However, the percentage of convictions resulting in published appellate opinions reached a peak of about 45 percent in 1992, and has decreased steadily to about ten percent in 2005. As the most recurrent issues are resolved, there is simply less for appellate courts to resolve.

There remains ample opportunity for thoughtful empirical work on how statutory language and judicial decision making interact to bring certainty to the law. For example, one might expect less stability with respect to broadly worded statutes, such as the antitrust laws and the civil rights laws. Nonetheless, preliminary results certainly suggest that the legislature and the courts, working over time as a team, tend to decrease uncertainty in the law.

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Stability as a Value

It is hard to imagine that a court today would not consider an airplane to be a vehicle for purposes of a statute outlawing the interstate movement of stolen vehicles. Yet that is exactly what the Supreme Court did in 1931 in *McBoyle v. United States*, as we saw in chapter 3. A court making the same ruling today would surely subject itself to criticism for elevating formalism over common sense. There may be reasons, however, to value consistency by adhering to decisions made long ago, even if they do not seem to be the best ones in today’s world, and for that matter, even if in retrospect they do not today seem to have been good decisions in the first place. Law students learn this perspective on statutory interpretation by reading *Flood v. Kuhn*, a 1972 Supreme Court case that reaffirmed the Court’s 1922 decision that the antitrust laws do not apply to professional baseball because baseball is not a business engaged in interstate commerce. The original decision was probably ridiculous then, and certainly is unanchored to reality now. Even if you know nothing about sports, you can confirm the current reality with a quick visit to Major League Baseball’s web page. Nonetheless, courts stick to their earlier interpretations of statutes for the sake of consistency as a value in itself, and to protect reliance interests. For example, in 1953, the Supreme Court reaffirmed its earlier antitrust decision just on these grounds:

> Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective

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21 283 U.S. 25 (1931).
24 www.mlb.com
effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.  

In the meantime, there have been numerous unsuccessful efforts over the years to amend the antitrust laws legislatively to override the 1922 decision and its progeny, but to no avail, despite the fact that they have been held to apply to other professional sports, including football and basketball. By the time Flood v. Kuhn made its way to the Supreme Court, the only legitimate reason for continuing the fiction that baseball is not a business that affects interstate commerce was the ironic fact that so much interstate commerce had developed in reliance on the holding. Although the majority opinion clung to earlier holdings that Congress never intended the antitrust laws to apply to professional baseball, Chief Justice Burger jettisoned that insupportable claim in his concurrence:

[L]ike MR. JUSTICE DOUGLAS, I have grave reservations as to the correctness of Toolson v. New York Yankees, Inc; as he notes in his dissent, he joined that holding but has "lived to regret it." The error, if such it be, is one on which the affairs of a great many people have rested for a long time. Courts are not the forum in which this tangled web ought to be unsnarled. I agree with MR. JUSTICE DOUGLAS that congressional inaction is not a solid base, but the least undesirable course now is to let the matter rest with Congress; it is time the Congress acted to solve this problem.  

Whether one agrees with the holding in this case, it surely shows that values other than fidelity to the legislative will have the potential to drive the interpretation of statutes. One of these values is stability. Common law courts apply the principle of stare decisis

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26 407 U.S. at 285-86 (Burger, C.J., concurring)(citation omitted). The question of statutory interpretation and institutional choice is an important one. For recent work that relies heavily on the notion of institutional competence, see Adrian Vermeule, Judging Under Uncertainty (2006). For a broad, interesting study of questions of institutional choice, see Neil K. Komesar, Law's Limits: The Rule of Law and the Supply and Demand of Rights (2001). We return below to the question of how institutional choice can affect the course of statutory interpretation.
to their decisions about statutory interpretation just as they apply it to their common law and constitutional decisions. In fact, they are even more likely to adhere to precedent in statutory cases, since they are not prone to consider statutory law as their job to change if they do not like their earlier interpretations. As we have just seen, however, taking judicial precedent as binding in subsequent statutory cases has the effect of removing the interpretation of the statute from the legislative process, thus aggrandizing the role of the courts. And all judges, textualist or contextualist, appear content to leave this power in place.

The result is inevitably a sharing of legislative power between the two branches: the legislature writes laws which, at best, define rights and obligations in relatively clear cases, and the courts construe the statute when the statute is not clear, thus creating binding glosses on the statute. The legislature then gets the last word: It can override judicial decisions when they go too far afield. But resource limitations restrain the legislature from overriding often, leaving judicial decisions in place as part of the meaning of statutory law. And when the case law is left in place, reliance concerns often trump second thoughts about either legislative primacy or policy, leaving judge-made decisions in place for indefinite periods of time.

The Dynamics of Change Over Time

At the same time that consistency and stability drive statutory interpretation toward respect for precedent, flexibility and responsiveness to changing times tug in the opposite direction. William Eskridge’s book, Dynamic Statutory Interpretation,\(^\text{27}\)

\(^{27}\) William N. Eskridge, Dynamic Statutory Interpretation (1994).
provides strong arguments for the legitimacy of changes in interpretation over time, even if the new interpretations are inconsistent with the intent of the enacting legislature.

Professor Eskridge argues that even when linguistic change has not occurred, values reflected in judicial practice over time may take priority over the enacting legislature's intent.\(^{28}\) Eskridge's principal examples involve the civil rights laws, and especially cases concerning affirmative action. Although the Congress of 1964 that enacted the original federal Civil Rights Act could not be said, as a body, to favor affirmative action, the statute's early enforcement history, Eskridge argues, made it appropriate to accept affirmative action as necessary to enforce the civil rights laws without creating perverse incentives that would actually thwart the integration of nonwhite workers into the workforce.

Eskridge is not alone. As we saw in chapter 1, Guido Calabresi has written an important book suggesting that courts be given the right to update old statutes to avoid obsolescence.\(^{29}\) And Dworkin’s chain novel metaphor discussed earlier as an engine of stability necessarily involves change as well.\(^{30}\) The very fact that there is a next chapter in the chain novel means that developments in the law should be expected. The novel must balance fidelity to what happened in earlier chapters against new developments in plot and character made inevitable by the prior developments.

Although the interpretation of statutes clearly does change over time in some instances, I do not consider dynamism, whether in Eskridge’s or Dworkin’s sense, to be a “theory” of statutory interpretation. Rather, I believe dynamism occurs when certain values are important enough to the statutory interpreter that they can trump fidelity

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\(^{28}\) Eskridge, *Dynamic Statutory Interpretation* 48-80.
legislative intent. The most dramatic instances are the ones about which Eskridge writes: times change, and old understandings become untenable, even if it is crystal clear that the enacting legislature would not have wanted such a result. The situation becomes a bit easier when the language of the statute, as currently understood, would allow a result contrary to one contemplated by the enacting legislature. In those cases, fair notice to the parties is less of an issue, and apparent conflicts between intent and language of the kind discussed in chapter 4 do not arise.

But these are not the only ways in which statutory interpretation evolves over time. Statutes change in meaning when courts look to the language of their own earlier interpretive opinions, rather than to the language of the statute itself. Peter Tiersma writes about this phenomenon, which he calls “the textualization of precedent.” In addition, many statutes are written with dynamic interpretation in mind. Assault weapon bans, fraud, and many others actually contemplate that courts or agencies will respond to innovations in bad conduct, updating the law within bounds that the statute spells out. Law enforcement concerns can lead to evolving interpretations. And delegation to administrative agencies of authority to regulate and enforce a statute’s goals leads both to flexibility and to various dynamics that depend upon the institutional setting in which the statute is enforced.

**When Times Change, But Laws Don’t**

Capable of trumping the intent of the legislature are arguments that a statute's meaning has changed over time, or that its enforcement over time has resulted in a legal landscape worthy of preservation even if that means interpreting a statute in a way that

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makes sense in context, but would not have been acceptable to the enacting legislature. Eskridge provides a number of examples of this sort of dynamic, especially in the area of civil rights legislation. Below I describe a case that illustrates the kinds of change over time that Eskridge describes.

In *Gay & Lesbian Advocates & Defenders v. Attorney General*, the Supreme Judicial Court of Massachusetts was asked by advocacy groups to declare that state's sodomy statute unconstitutional. The court declined to do so, holding that the statute should be interpreted to ban only acts that are either public or nonconsensual. None of the parties in the case before the court claimed to engage in such conduct. The decision was in harmony with an earlier decision of the same court, *Commonwealth v. Balthazar*, which held that criminal liability under a statute banning “an unnatural and lascivious act with another person” should not apply to private, consensual behavior.

What counts as an unnatural and lascivious act can surely change over time, making it at least possible to argue that the legislature left the statute with room to develop as times change. But sodomy is sodomy, and there is little likelihood that the enacting legislature in 1887 would have endorsed any decision to legalize the practice, even if both consensual and private. The decision’s justification must lie in aspects of today’s culture in which enforcement is sought. In other words, cultural change over the course of a century has trumped intent leading to a prototype of Eskridge’s dynamic model.

The argument that a nineteenth century legislature had in mind that lewd and lascivious conduct is a flexible concept subject to change as social values develop has no

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basis in fact. It is a legal fiction licensed by the gratuitous linguistic fact that, in retrospect, values really have changed over the past century. The value of legislative primacy is so important in statutory interpretation that courts are sometimes willing to attribute to the legislature a flexibility that it cannot possibly have had.

**Laws Written for a Changing World**

Sometimes, however, that flexibility is no fiction. Laws are written intentionally to permit subsequent interpreters to deal with changing circumstances. Consider the federal mail fraud statute. It criminalizes mailing a “thing” or causing a thing to be mailed for the purpose of “executing” a “scheme or artifice to defraud.”\(^{34}\) The very purpose of this statute is to remain responsive to new, creative ways of committing fraud. It is the prime example of what Dan Kahan calls a federal common law of crimes.\(^{35}\) Such laws constitute legislative delegations to the courts, whose responsibility will be to determine what conduct should be criminalized, within broadly drawn guidelines.

Let us look at the leading mail fraud case, *Schmuck v. United States*.\(^{36}\) Wayne T. Schmuck had been involved in a fraudulent scheme: He purchased automobiles, set back the odometers, and resold them to car dealers, who would in turn sell the cars. However, only after Schmuck had reaped the benefit of his fraudulent scheme did a mailing occur.

As Justice Blackmun explained:

> To complete the resale of each automobile, the dealer who purchased it from Schmuck would submit a title-application form to the Wisconsin Department of Transportation on behalf of his retail customer. The receipt of a Wisconsin title was a prerequisite for completing the resale; without it, the dealer could

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\(^{34}\) 18 U.S.C. § 1341.


not transfer title to the customer and the customer could not obtain Wisconsin tags. The submission of the title-application form supplied the mailing element of each of the alleged mail frauds.\textsuperscript{37}

The question was whether this scheme met the statute's requirement that the mailing be in furtherance of a fraudulent scheme. Schmuck argued that the fraud was complete by the time the mailing occurred.

The Supreme Court disagreed and upheld the conviction reasoning that “[a] rational jury could have concluded that the success of Schmuck’s venture depended upon his continued harmonious relations with, and good reputation among retail dealers, which in turn required the smooth flow of cars from the dealers to their Wisconsin customers.”\textsuperscript{38} Justice Scalia dissented:

[I]t is mail fraud, not mail and fraud, that incurs liability. This federal statute is not violated by a fraudulent scheme in which, at some point, a mailing happens to occur--nor even by one in which a mailing predictably and necessarily occurs. The mailing must be in furtherance of the fraud.\textsuperscript{39}

\textit{Schmuck} is an instance of expansive interpretation of a criminal statute. Not only was lenity not a consideration, but the mail fraud statute was interpreted as broadly as “a rational jury” would take it. Courts do not ordinarily leave such decisions in the jury's hands, a fact to which we return in chapter 7. Yet the Supreme Court’s interpretation recognizes that at least some statutes are designed to be construed flexibly, as long as there is fair notice. Surely, Mr. Schmuck could not argue that he thought his behavior was legal, a fact which apparently was enough to permit a majority of justices to stretch the language, and for that matter, the traditional division of labor between judge and jury.

\textsuperscript{37} \textit{Id.} at 707.
\textsuperscript{38} \textit{Id.} at 711-12.
\textsuperscript{39} \textit{Id.} at 723 (Scalia, J. dissenting).
Lawmakers do not have an easy time writing laws that both meet due process concerns and are sufficiently flexible to block circumvention. Moreover, it is not simple to draw the line between legitimate avoidance of an undesired obligation, and evasion of a duty. Tax shelters, for example, reflect a battle between legislators and skilled tax lawyers over opportunities to circumvent the tax code by creating transactions that do not appear to be taxable.\(^{40}\)

Legislation banning assault weapons share this dynamic.\(^{41}\) The legislature enacts a law banning assault weapons. If it is not precise enough, it will be stricken as unconstitutionally vague. But if it is too precise, it will leave opportunities to engineer new weapons that perform just as the banned weapons do, but which do not come within the statute’s bounds. Since its repeal in 2004, there has been no federal ban on assault weapons. But many states have such bans, and their different approaches illustrate the difficulty in legislating against efforts to engineer around a statute.

Consider, for example, California’s statute, which contains an extensive list of banned weapons\(^{42}\) and a separate list of definitional features that further characterize illegal assault weapons. Among them is the following:

- (1) A semiautomatic, centerfire rifle that has the capacity to accept a detachable magazine and any one of the following:
  - (A) A pistol grip that protrudes conspicuously beneath the action of the weapon.

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\(^{42}\) *CAL. PENAL CODE* § 12276(a) - (c).
(B) A thumbhole stock.
(C) A folding or telescoping stock.
(D) A grenade launcher or flare launcher.
(E) A flash suppressor.
(F) A forward pistol grip.  

An additional provision permits the Attorney General to add to the list of banned weapons by applying to the Superior Court on notice for “a declaration of temporary suspension of the manufacture, sale, distribution, transportation, or importation into the state” of the firearm. The criteria that a weapon must meet to be listed as a banned assault weapon include copies and slight modifications of weapons listed in the statute. The statute contains a non-exclusive list of what counts as a “slight modification.” Subsequently, the Attorney General can apply for a “permanent declaration that the weapon is an assault weapon.” The statute has survived constitutional challenges on both equal protection and due process grounds, although it has been held that a court cannot, on its own initiative, declare a weapon to be an assault weapon, absent an application from the Attorney General. This creates a safe harbor between the time that a new weapon enters the scene and the time that the Attorney General begins a proceeding. If a particular Attorney General decides not to commence a proceeding for any reason, including a lack of political commitment to the law, then new weapons that meet the statutory criteria will remain legal. This uncertainty is an ordinary consequence

43 CAL. PENAL CODE § 12276.1(a).
44 CAL. PENAL CODE § 12276.5.
46 Jackson v. Dep’t. of Justice, 102 Cal. Rptr.2d 849 (2001).
of delegation of statutory interpretation to administrative agencies, an issue addressed more closely in chapter 6.

**Change through Precedent in “Common Law Statutes”**

Lawyers often have the experience of recognizing, prior to an appellate argument, that there are enough cases supporting either position to permit the judges to rule in either direction. As this happens, statutory reasoning moves toward becoming common law reasoning, at least with respect to cases that stray from prototypical situations. The legal question no longer arises solely from the language of the statute. Rather, the question arises from the language of the statute and a great deal of analogical reasoning, in which the most heated inquiry is whether the case before the court is more like the ones that had earlier been decided in one direction or the other.

Now let us look at an extreme version of this dynamic that results not from the proliferation of precedent, but rather from precedent on an important statutory question becoming so central that future decisions turn toward the interpretation of the earlier precedent rather than the statute itself. This happens when precedent becomes “textualized,” to use Peter Tiersma’s term. The textualization of precedent is more a phenomenon of common law and constitutional argument than of statutory interpretation. Nonetheless, it also occurs frequently in the interpretation of what Judge Posner has called “common law statutes,” laws that either codify a developing area of common law,

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48 Tiersma, *The Textualization of Precedent.*
or which are written in such broad terms as to invite further development by the courts.\footnote{Richard A. Posner, \textit{The Federal Courts: Crisis and Reform} 285-86 (1985); Richard A. Posner, Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution, 37 \textit{Case W. Res. L. Rev.} 179 (1987).}

Below I describe two examples from statutes governing intellectual property.

\textit{The Nonobviousness Requirement in Patent Law.} Consider the following difficult question of patent law: When is an invention or improvement to an invention creative enough to deserve patent protection? In an important nineteenth century case, the Supreme Court held, quite sensibly, that the substitution of a porcelain doorknob for the standard wood doorknob is not good enough.\footnote{Hotchkiss v. Greenwood, 52 U.S. (11. How.) 248 (1851).} After almost a century of struggling with this problem, in 1941, the Court held: “[T]he new device … must reveal the flash of \textit{creative genius} ….”\footnote{Cuno Engineering Corp. v. Automatic Devices Corp., 314 U.S. 84, 91 (1941).} This expression became textualized, not as a matter of statutory interpretation, but under the common law of patents, which then controlled. It is not difficult to find courts of appeals denying patent protection because the new invention failed to reveal the flash of creative genius.\footnote{See, e.g., Koochook Co. v. Barrett, 158 F.2d 463, 466 (8th Cir. 1946)(denying patent for new method of making brake shoes for automobiles).}

Possibly in response to this court-imposed standard, which made patent protection quite difficult to obtain, Congress enacted the Patent Act of 1952, which contains the following requirement:

\begin{quote}
provides that: “A patent may not be obtained … if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole \textit{would have been obvious} at the time the invention was made to a person having ordinary skill in the art ….”\footnote{35 U.S.C. § 103(a).}
\end{quote}

This is referred to as the “nonobviousness” requirement.
The Court first interpreted this language fifteen years after its passage, in
*Graham v. John Deere Co.* 54 There, the Court considered several patents filed by
William Graham and his small Texas company, Graham Plow. Graham’s patents were all
variations of a “spring clamp” that would, when attached to the shank of a chisel plow,
permit the shank to better withstand its impact with rocks buried in the soil. In 1950,
Graham obtained his first patent on a spring clamp. In 1953 he obtained a second patent
on a slightly refined version of the clamp. When the John Deere Company began
manufacturing a spring clamp very similar to Graham’s second, 1953 patent, Graham
sued for an injunction. Deere defended by claiming that Graham’s 1953 patent was
invalid under the § 103, because the slight modifications on Graham’s 1950 design would
have been “obvious” to any “person having ordinary skill in the art.” (The question of
whether Deere’s plow also infringed Graham’s first 1950 patent was not presented).

In holding that Graham’s 1953 patent was invalid because its modification of
Graham’s 1950 patent was “obvious,” the Court noted that § 103 “lends itself to several
basic factual inquiries.” 55 The words of the statute call for courts to determine: (1) the
“scope and content of the prior art,” that is, the existing patents and other knowledge
available at the time of the patent; (2) “differences between the prior art and the claims
[of the patent] at issue”; and (3) the “level of ordinary skill in the pertinent area ….” 56
These three factual questions are all set forth in the statute itself.

The Court went on, however, to note several “secondary considerations” that
might “have relevancy” as “indicia of … nonobviousness,” namely: (a) “commercial
success” of the patented invention; (b) “long felt but unsolved needs” that were met by

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55 *Graham*, 383 U.S. at 17.
56 Id.
the invention; and (c) “failure of others” to meet those needs through a similar invention.

Neither (a), (b), nor (c) appears in the text of § 103; for support for these “secondary considerations,” the Court cited only a 1964 student law review Note.

The Federal Circuit, however, has come to treat these secondary considerations as a required fourth element in § 103 analysis. For example, in Greenwood v. Hattori Seiko Co., the Federal Circuit stated:

[C]ertain factual predicates are required before the legal conclusion of obviousness or nonobviousness can be reached. … The underlying factual determinations to be made are (1) the scope and content of the prior art, (2) the differences between the claimed invention and the prior art, (3) the level of ordinary skill in the art, and (4) objective evidence of non-obviousness, such as commercial success, long-felt but unsolved need, failure of others, copying, and unexpected results.57

There is now a lively debate in the academic literature on patent law about which of these secondary considerations are most important.58 And courts continue to quote this language as part of the law. A Lexis search reveals federal courts having used the expression “long-felt but unsolved need” more than 700 times.59 Their importance, however, derives from the textualization of a court decision interpreting a statute – not directly from the language of the statute itself. The dynamic of the law developing as the result of later courts interpreting the words that earlier courts used to define statutory terms illustrates Tiersma’s notion of change through the textualization of judicial opinions.

Is Décor a False Advertisement? Section 43(a) of the 1946 Lanham Act creates a civil cause of action for anyone harmed by another’s false advertising:

58 For a brief but useful account of this debate, see Robert P. Merges et al., Intellectual Property in the New Technological Age 194-96 (3d ed., 2003).
59 The search was conducted in the federal courts library, March 31, 2008, and revealed 710 cases using that expression, including five cases decided by the Supreme Court.
Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which ... [i]is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services or commercial activities by another person ... shall be liable in a civil action .... 60

Though nothing in § 43(a) expressly refers to trademarks (which are covered elsewhere in the Lanham Act), courts and commentators have come to refer to § 43(a) as providing “federal common law” protection for trademarks that have not yet been officially registered with the Patent and Trademark Office. 61

Consider an important Supreme Court case interpreting § 43(a), Two Pesos, Inc. v. Taco Cabana, Inc. 62 The parties to the case were rival chains of Mexican restaurants in Texas. The older chain, Taco Cabana, opened its doors in 1978 with a distinctive décor: various colors, artifacts, and painted designs that, taken together, created a “festive eating atmosphere.” 63 The newer chain, Two Pesos, allegedly copied Taco Cabana’s décor. Incensed at the loss of business to the upstart Two Pesos chain, Taco Cabana sued under § 43(a). The words of § 43(a) would lead a normal reader to raise four factual questions:

(A) Was Two Pesos’s interior a “word, term, name, symbol, or device, or any combination thereof”?

(B) Was the interior “use[d] in commerce”?

63 Id. at 765.
(C) Was the interior used “on or in connection with” Two Pesos’s “goods or services, or any container for goods”?

(D) Was Two Pesos’s interior “likely to cause confusion, or to cause mistake, or to deceive … as to the origin, sponsorship, or approval of” Taco Cabana’s “goods, services or commercial activities”?

Now consider the five questions that the trial court actually presented for the jury to answer:

1. Did Taco Cabana have a “trade dress”? (The jury answered, “yes.”)
2. Was Taco Cabana’s trade dress, taken as a whole, non-functional? (“Yes,” again.)
3. Was Taco Cabana’s trade dress inherently distinctive? (“Yes,” the jury said.)
4. Had Taco Cabana’s trade dress acquired a secondary meaning in the Texas market? (“No,” the jury found.)
5. Finally, was there a “likelihood that customers might associate or confuse a Taco Cabana restaurant with a Two Pesos restaurant”?⁶⁴ (“Yes.”)

Where do all these new words come from? The term “trade dress” is shorthand for “the total image of the business”⁶⁵—in this case, the restaurant’s décor. But the terms “non-functional,” “inherently distinctive” and “secondary meaning” come not from the statute itself but from the textualization of past court precedents in the field of trademark law. Only the trial court’s final question was drawn from the actual text of § 43(a). When Taco Cabana took its loss on question (4) to the Supreme Court, Justice White framed the question using that vocabulary:

⁶⁴ The District Court’s opinion is unreported. The questions are reproduced in the Brief for Respondent, Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763 (1992).
⁶⁵ Id. at 764 n.1 (quoting the District Court’s instructions to the jury).
The issue in this case is whether the trade dress of a restaurant may be protected under § 43(a) ... based on a finding of inherent distinctiveness, without proof that the trade dress has secondary meaning.\textsuperscript{66}

Let us now examine how this question came to supplant the questions posed by the actual text of § 43(a). This transportation took place in two steps. The first step was to decide that “the general principles qualifying a [trade]mark for registration under § 2 of the Lanham Act are for the most part applicable in determining whether an unregistered mark is entitled to protection under § 43(a).”\textsuperscript{67} In other words, the Court decided that § 43(a) would only protect Taco Cabana’s trade dress if that dress was sufficiently distinctive that it could have been registered as a trademark despite the limits on registration set forth in § 2 of the Lanham Act.\textsuperscript{68} This first step was not motivated by the plain text of § 43(a), because the words “mark” and “trademark” are nowhere to be found in § 43(a). The first step thus shifted the question from an inquiry into the match between the facts of the case and the language of the statute to whether § 2 would have barred that registration if Taco Cabana had attempted to register its décor as a trademark.

Section 2(e) forbids registration of marks that are either “merely descriptive” or “functional.” Section 2(f), however, carves out an exception: even “merely descriptive” marks can still be registered if they have become “distinctive of the applicant’s goods in commerce.” Even “distinctive” marks, however, may still be cancelled if they become “generic” or are “abandoned” by their owners.\textsuperscript{69}

The Court’s second step was to follow the hugely influential 1976 opinion of Judge Henry Friendly in \textit{Abercrombie & Fitch Co. v. Hunting World, Inc.}, in which he

\begin{itemize}
  \item \textsuperscript{66} \textit{Id.} at 764-65.
  \item \textsuperscript{67} \textit{Two Pesos}, 505 U.S. at 768.
  \item \textsuperscript{68} 15 U.S.C. § 1052.
  \item \textsuperscript{69} 15 U.S.C. § 1064(3).
\end{itemize}
distilled the standards set out in § 2 and the holdings of cases decided under prior trademark statutes into five comprehensible categories, complete with helpful examples to make the standards seem concrete. In increasing order of distinctiveness, Judge Friendly explained that marks could be: (1) generic (e.g., the word “ivory” used to describe a product made from elephants’ tusks) (2) descriptive (e.g., the term “deep bowl” used to describe a spoon); (3) suggestive (“Tide” laundry detergent is a modern-day example); (4) arbitrary (“Camel” cigarettes is a modern example); or (5) fanciful (“Kodak” cameras).

Though merely descriptive marks cannot normally be registered, they become registrable when buyers recognize the mark’s “secondary meaning,” that is, when buyers recognize that the product comes from a single source: for example, when consumers recognize a bag labeled “Tender Vittles” as containing a unique cat food. Returning to the text of the statute: a “secondary meaning” saves a merely descriptive mark from cancellation under § 2(e) by causing it to become “distinctive” under § 2(f).70

Having taken these two steps away from the actual text of § 43(a), the Court had opened the door to just such a confusing jury verdict as the one rendered in favor of Taco Cabana: while the jury found the décor to be “inherently distinctive,” the jury also found that the décor did not have a “secondary meaning” in the minds of Texas customers. Two Pesos argued to the Court that this verdict was incoherent: Taco Cabana’s décor could only be “inherently distinctive” if it had taken on a “secondary meaning.” Lack of “secondary meaning” logically entailed a lack of inherent distinctiveness. The Court disagreed, and upheld the jury’s verdict. If trade dress is “inherently distinctive,” the

70 Well before the Two Pesos litigation, the Court had acknowledged that a “secondary meaning” would generally cause a “merely descriptive” mark to become “distinctive,” and therefore registrable under § 2(f). Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 851 (1982).
Court held, there is no need to show that they also have “secondary meaning” in the minds of consumers.

   The courts continue to rely heavily on the language of Judge Friendly’s taxonomy, now deeply entrenched in trademark law, and continue to develop a common law of trademarks by further parsing their own language, rather than the legislature’s.\(^71\)

The result of this textualization of precedent is that the actual language of § 43(a) says very little to the owner of an unregistered trade dress.

\textbf{Statutory Inflation.}\(^72\)

Let us now consider another way in which laws change over time. Many laws, such as the Food, Drug and Cosmetics Act, are remedial in nature. They promote welfare by setting standards of conduct for industry, those in the health professions, and so on. A number of these statutes, in addition to permitting various civil remedies, have provisions that make it a crime to violate the law willfully. In fact, such laws are commonplace, and include the antitrust laws, the Copyright Act, various environmental laws, and the securities laws.\(^73\) In general, remedial laws are interpreted broadly, criminal laws narrowly according to the rule of lenity. A dilemma arises when a single statute is both remedial and criminal. One possibility is that the statute will be interpreted narrowly in criminal and civil cases alike on the theory that the rule of lenity is needed even in civil


\(^{72}\) Portions of this section are extracted from my article, Statutory Inflation and Institutional Choice, 44 \textit{William & Mary L. Rev.} 2209 (2003).

cases to ensure the narrow interpretation of the statute when criminal cases are later brought. This has happened a number of times over the past two decades, although it is not the norm. Courts do not routinely interpret statutes narrowly in civil cases to avoid the interpretation of criminal statutes in later cases. Rather, they often interpret these statutes expansively in civil cases according to the perceived intent of the legislature, and later incorporate these broad rulings into criminal prosecutions. I call this dynamic statutory inflation. Statutory inflation is most likely to occur when an administrative agency is charged with the civil enforcement of a statute, and a bureau of the Department of Justice is empowered to bring criminal cases. In this institutional setting, government agencies have the greatest incentive to try to convince judges to construe statutes expansively. Sometimes they succeed.

Perhaps the most dramatic example of statutory inflation lies in the area of securities law. Rule 10b-5, the principal antifraud regulation promulgated under the securities laws, says nothing about insider trading. Rather, the rule addresses deceit and fraud generally. Nonetheless, the enforcement division of the Securities and Exchange Commission began charging corporate directors who traded on inside information with


75 17 C.F.R. § 240.10b-5 (2002). That rule states:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud, [or]

... 

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.
Rule 10b-5 violations in civil enforcement proceedings.\textsuperscript{76} In 1968, the Second Circuit affirmed an SEC insider trading decision in \textit{SEC v. Texas Gulf Sulphur Co.}\textsuperscript{77} In so doing, it held that “the securities laws should be interpreted as an expansion of the common law both to effectuate the broad remedial design of Congress ... and to insure uniformity of enforcement ....”\textsuperscript{78}

Subsequently, civil plaintiffs, using the implied private right of action under Rule 10b-5, began bringing successful actions against those who disseminated and traded on inside information. In \textit{Shapiro v. Merrill Lynch, Inc.},\textsuperscript{79} the Second Circuit held that its reasoning in \textit{Texas Gulf Sulphur} also applied in private lawsuits. For support, it quoted the Supreme Court's admonition that the securities laws be construed broadly to effectuate their remedial purpose. It also expanded insider trading doctrine further, by not requiring that the plaintiffs prove that the actual shares they purchased on the open market were the same shares that the defendants sold. Rather, the defendants had breached a duty to “all persons who during the same period purchased Douglas stock in the open market without knowledge of the material inside information which was in the possession of defendants.”\textsuperscript{80}

It was not until 1980 that the Supreme Court approved prosecution of insider trading as a criminal violation of Rule 10b-5. In \textit{Chiarella v. United States},\textsuperscript{81} the Court reversed

\textsuperscript{77} 401 F.2d 833 (2d Cir. 1968).
\textsuperscript{78} Id. at 855 (citations and footnotes omitted).
\textsuperscript{79} 495 F.2d 228 (2d Cir. 1974).
\textsuperscript{80} Id. at 237. Subsequently, the Supreme Court endorsed the "fraud on the market" theory of Rule 10b-5 liability. See \textit{Basic, Inc. v. Levinson}, 485 U.S. 224 (1988).
\textsuperscript{81} 445 U.S. 222 (1980).
the conviction of an employee of a financial printer who bought stock based on
information he had read in the course of printing announcements of corporate takeover
bids that had not yet been made public. Though the Court held that the employee owed
no duty, it embraced the position that insider trading could constitute a violation of Rule
10b-5, and that prosecution for such violators was appropriate. The Court relied on
earlier administrative decisions and circuit court decisions in civil cases, including Texas
Gulf Sulphur. It did not mention the fact that Chiarella was a criminal case, whereas all
the earlier ones were civil, and it certainly did not consider the rule of lenity.\textsuperscript{82}

Thus, criminal application of Rule 10b-5 in the context of insider trading grew out of
the broad interpretation of the rule in civil cases, in part as the result of aggressive
administrative enforcement actions brought earlier by the SEC.\textsuperscript{83} As noted, the inflation
of criminal liability without further legislative action typically arises from institutional
settings in which an agency has an incentive to drive expansive readings in civil
litigation, which can then feed subsequent criminal prosecutions.

\textbf{Other Values in Statutory Interpretation}

\textbf{Fair Notice and The Marshall Test}

While stability and flexibility can be interpretive values in their own right, fidelity
to the legislature remains a principal value in statutory interpretation, as we saw in

\begin{itemize}
  \item \textsuperscript{82} Roberta Karmel has recognized the tension between the broad interpretation of remedial statutes and the rule of lenity in the context of insider trading cases. See Transcript, Roundtable on Insider Trading: Law, Policy, and Theory after O'Hagan, 20 Cardozo L. Rev. 7, 15 (1998).
  \item \textsuperscript{83} It is not unusual for civil and criminal cases to arise from the same set of circumstances, which may lead to complicated intragovernmental issues. See Thomas C. Newkirk & Ira L. Brandriss, The Advantages of a Dual System: Parallel Streams of Civil and Criminal Enforcement of U.S. Securities Laws, 2 Int'l & Comp. L.J. 29 (2000). For a thorough and insightful discussion of the history of insider trading doctrine, see William K.S. Wang & Marc I. Steinberg, Insider Trading ch.4 (1996).
\end{itemize}
chapters 3 and 4. Judges who disagree about such issues as the use of legislative history or the difference between plain and ordinary meaning all acknowledge that their ultimate goal is to effectuate the will of the legislature. To see just how strong a value it is, let us return to Chief Justice John Marshall’s decision in *United States v. Wiltberger*, a case discussed in chapter 2. In that case, Marshall held that a law that made manslaughter committed on the high seas a federal crime did not apply to manslaughter committed on a vessel docked on a river in China. Provisions of the statute governing other crimes also referred to rivers, basins, and other bodies of water, but these were mysteriously left out of the manslaughter section. Marshall held that the rule of lenity should apply, even though Congress likely intended to write a statute broader in scope than the words conveyed:

> The probability is, that the legislature designed to punish all persons amenable to their laws, who should, in any place, aid and assist, procure, command, counsel, or advise, any person or persons to commit any murder or piracy punishable under the act. And such would have been the operation of the sentence had the words, upon the land or the seas' been omitted. But the legislature has chosen to describe the place where the accessorial offence is to be committed, and has not referred to a description contained in any other part of the act. The words are, upon the land or the seas.' The Court cannot reject this description.

To Marshall, then, the value of providing fair notice to criminal defendants was important enough to override the intent of the legislature, and he was willing to say so bluntly.

We can generalize from Marshall’s holding in *Wiltberger* by creating a test that will provide evidence of whether a court seriously values other considerations above the intent of the legislature. Let us call it the Marshall Test.

*The Marshall Test*

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84 18 U.S. (5 Wheat.) 76 (1820).
85 Id. at 101.
For any given value proposed to replace legislative intent in the interpretation of a statute, that value supersedes legislative intent if a decision maker would accept the following proposition:

“There are values more important than intent at stake here, so I am willing to undermine what I know to be the intent of the legislature in order to promote those competing values.”

Marshall put fair notice into this category. Yet as far as I know, no other values stand up to the Marshall Test routinely, although many values become part of the mix of considerations that courts use in deciding cases, as Professor Eskridge has shown.⁸⁶ For lenity, courts at least sometimes answer affirmatively. If the language of a statute does not criminalize particular conduct, courts are not likely to expand its scope, even if the enacting legislature mistakenly wrote the statute more narrowly than it intended. Similarly, plain language arguments outside the context of lenity at times also survive the Marshall Test, even in the teeth of strong evidence that a mistake was made.⁸⁷

It is not easy to find values that are routinely considered important enough to pass the Marshall Test and trump the intent of the legislature. Often, other values are used to bolster a result that resort to legislative intent would have called for in the first place. These cases tell us very little about the role that such values play on their own. In other cases, legislative intent is adduced to support resort to other values, sometimes disingenuously, as in the claims in some of the baseball cases that Congress had intended the antitrust laws to exclude baseball.⁸⁸ These interactions among various seemingly

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⁸⁷ See, e.g., United States v. Locke, 471 U.S. 84, 93 (1985) (taking literally a statutory deadline that requires filings "prior to December 31," despite likelihood that Congress intended to set deadline as the end of the year).
legitimate values are what make statutory interpretation complicated, and are what cause judges to be accused of being activists. We will look at a few of them in this chapter: coherence, constitutionalism, and the desire to assist law enforcement.

**The Purpose of the Legislation**

Chapter 4 was devoted to the question of intent. Sometimes, intent is contrasted with purpose. The practical difference between the two is not always clear because the legislature’s intent is to write a law that fulfills the legislative purpose. To the extent they differ, *purpose* typically refers to more abstract goals that the legislature was trying to accomplish when it enacted a law. *Intent*, when contrasted with *purpose*, is generally used to describe a more specific state of mind toward a situation at hand. Consider once again, *Church of the Holy Trinity*,\(^89\) discussed in chapter 3. A law banning the transportation of labor of any kind had been enacted shortly after the Irish potato famine. The law was almost certainly intended to stifle an influx of cheap labor that would compete with American workers for jobs, and depress wages by increasing supply. The Supreme Court recognized this purpose, and construed the law narrowly in keeping with the legislative goals: “It was never suggested that we had in this country a surplus of brain toilers, and, least of all, that the market for the services of Christian ministers was depressed by foreign competition.”\(^90\) It could not have conceivably advanced the purpose of this statute to have held that the law banned a church from paying to bring its next minister to New York from England, and the Court agreed unanimously that it would not so hold.

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\(^89\) 143 U.S. 457 (1892).
\(^90\) *Id.* at 464.
In civil law countries, purposive interpretation is considered the norm,\(^\text{91}\) although courts are no more consistent elsewhere than they are in this country in approaching statutory cases.\(^\text{92}\) Here, it is also a constant refrain. A combined search of state and federal courts for the use of “purpose” within five words of “Congress or legislature” yielded more than 3,000 hits for the first five years of the millennium.\(^\text{93}\) For that matter, Supreme Court justices talk about congressional purpose routinely. For example, in *Begay v. United States*,\(^\text{94}\) decided in 2008, the Court construed a provision of the Armed Career Criminal Act, which calls for a minimum sentence of fifteen years in prison for armed offenders who had earlier been convicted of three or more violent felonies. The term “violent felony” is defined in relevant part as, a felony that is “burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.”\(^\text{95}\) Begay, who was convicted of illegally possessing a firearm, had earlier been convicted a dozen times for driving under the influence of alcohol in New Mexico. The question was whether driving under the influence should count as a “violent felony” under the statutory definition since it presents a serious potential risk of physical injury, as the statutory definition requires. In a 6 – 3 ruling, the Court held that it should not, and invoked the purpose of the statute to justify its holding. Criticizing the three dissenting justices for ignoring the four named offenses, the majority used the principle of *ejusdem generis* (without so naming it) and

\(^{93}\) Lexis search conducted on 7/12/08: “(Congress or legislature) w/5 purpose and date aft 1999 and date bef 2006) in the federal and state cases library.
\(^{95}\) 18 U.S.C. § 924(e)(2).
limited the statute to the sorts of crimes that were listed in order to “effectuate Congress' purpose to punish only a particular subset of offender, namely career criminals.”

In a number of his writings, Judge Posner espouses this purposive approach to statutory interpretation as in keeping with legal pragmatism. The goal of pragmatism is for decision makers to focus on the consequences of their decisions rather than on formalistic considerations, such as minute nuances in language. As Posner notes, purposivism in statutory interpretation is very much inconsistent with the kind of rigid textualism discussed in chapters 3 and 4. To take one of Posner’s examples, read literally, a law criminalizing the possession of child pornography applies to prosecutors and court personnel who have seized such material from a wrongdoer and are using it to prosecute. But no one would ever even consider holding such people criminally liable because the possession of pornography by the law enforcement community has nothing to do with the functions and purpose of the law.

Earlier, I argued that even the most devoted textualist must be an intentionalist in practice, because the only serious justification for being a textualist in the first place is the claim (often, but not always correct), that the words the legislature uses are the best evidence of what it intended. Not so when it comes to a statute’s broader purpose, however, Thus, while chapter 4 is replete with examples of Justice Scalia making reference to legislative intent, he does not do the same when it comes to construing statutes in light of the larger legislative goals. His concurrence in Begay, for example, did not endorse the majority’s purposive analysis. Rather, it expressed his ambivalence in calling drunk driving a dangerous activity per se.

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96 128 S.Ct. at 1588.
97 See, e.g., Richard Posner, How Judges Think ___ (2008); __________
It is rare to find Scalia referring to the legislature’s purpose in his majority opinions, except to criticize those who would refer to it in rendering a decision. For example, in *MCI Telecommunications, Inc. v. AT&T*, discussed in chapter 3, Scalia explained, in rejecting the FCC’s interpretation of its authority to relax the rules requiring publication of tariffs: “But we (and the FCC) are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.”

It is not unusual, on the other hand, for dissenters, in response to a majority opinion written by Scalia, to evoke the purpose for which a statute was written in response to what seems to them an unjustifiably narrow interpretation of the law. That is what happened in *Great-West Life Assurance & Annuity Co. v. Knudson*. The case was one of many in the Supreme Court interpreting provisions of ERISA, the statutory scheme that regulates employee benefit plans. ERISA limits private rights of action, but permits civil enforcement

by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

In *Knudson*, the plan provided for the payment of medical expenses in the event that an employee was injured in an accident, but also permitted the plan to recover from the employee amounts paid by the plan that the employee recovered from a third party. Knudson’s wife was injured in an accident and sued the individual that caused the accident. The plan attempted to recover the amount that she was to receive for medical

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expenses that the plan had paid for on the theory that such recovery constituted “appropriate equitable relief” to prevent violation of the plan. The plan lost in both the district court and the court of appeals because a law suit to recover money damages is not considered equitable relief. Rather, it is considered legal relief. Five Supreme Court justices agreed and affirmed the lower court.

Relying heavily on the historic distinction between law and equity, Justice Scalia rejected even considering the fact that a ruling against the plan would thwart the purposes of the statute. Quoting from an earlier case, he wrote, “vague notions of a statute's ‘basic purpose’ are . . . inadequate to overcome the words of its text regarding the specific issue under consideration.”

Justice Ginsburg’s dissent, in sharp contrast, relied heavily on the law’s purposes, which were to establish a uniform regulatory scheme and to assure that a plan’s provisions would be enforced. The contrasting legal values are clear: a narrow, historical reading of equity really does lead to the conclusion the majority reached. A broader reading of equity combined with consideration of the statute’s purpose really does lead to the conclusion that the dissenters reached.

What these cases have in common is that the language is sufficiently indeterminate to allow different interpretations that are legitimate. When there is room for people to differ, courts are often willing to approach problems pragmatically, as Posner suggests, especially when it is easy enough to ascertain what the legislature was trying to accomplish. Notwithstanding the fears Scalia expressed in Knudson, such reference to purpose should actually serve to constrain judges. It is no accident that the five justices who voted in the majority were the conservative members of the Court, with

101 534 U.S. at 220.
102 Id. at 227 (Ginsburg, J. dissenting).
the liberals dissenting. Limiting private lawsuits by civil litigants to enforce rights granted by regulatory statutes is part of the conservative legal agenda. In this case, the purpose appeared to favor the dissenters. By finding the vague language plain and ignoring the legislative purpose, the majority was able to further an agenda without ever mentioning it. Perhaps Justice Scalia could have made a good argument for why certain legislative goals would be best served by the result that was reached. Taking on that burden would have reduced the set of legitimate interpretations by requiring additional justification. This is not to say that such analysis will always lead to agreement. There often are various values embedded in a law, with hard cases placing them in conflict. Which values a judge considers the most important will likely influence her vote. Nonetheless, when a statute is susceptible to more than one interpretation, a candid debate about what the law was intended to accomplish and how to best achieve that result does not appear to be any more of a threat to rule of law values than pretending that the law is clear and avoiding the substantive issues.

The Legislative Process

It is possible to make the situation more difficult for those who would consider a statute’s purpose. Sometimes the legislature has a particular goal in mind, and then writes a law whose substance does not fulfill its purpose at all because the legislature was mistaken about various facts. The legislature intended to write the law it wrote, but would have written a different law if it had gotten the facts straight. The legislative errors discussed in chapter 4 all involved what appear to be statements that the legislature
did not likely intend. In *Locke*,\textsuperscript{103} the legislature seems to have accidentally set a deadline at December 30 rather than December 31; in *Granderson*,\textsuperscript{104} it referred to “the original sentence” in a law revoking probation when there was no original sentence; in *Green v. Bock Laundry Machine Company*,\textsuperscript{105} the legislature wrote an absurd rule of evidence, if the rule is read literally; and in *X-Citement Video*, the legislature made a grammatical error. The Court corrected the errors in the last three of these cases, and elegantly avoided injustice in the first.

In contrast, sometimes the legislature gets the legislative facts wrong, and then writes a law based on these erroneous findings.\textsuperscript{106} Courts are far more reluctant to correct such errors. In these situations, courts tend to place respect for the enactment process above fulfilling the law’s intended purpose. Consider the following history of a law based on mistaken facts. The law was repealed before any cases made their way through the courts. What is interesting for our purposes is that no one took the position that the law should not be enforced according to its letter in any event because literal interpretation would not further the law’s purpose.

On January 1, 1992, the New Jersey Department of Health promulgated a regulation that became known as the “runny egg law.” It required restaurants to cook eggs to a minimum temperature of 140 degrees Fahrenheit.\textsuperscript{107} In essence, this banned the serving of sunny side up eggs and eggs over easy, because by the time an egg gets to that temperature, the yolk congeals. It also banned such dishes as Caesar salad, whose

\textsuperscript{103} United States v. Locke, 471 U.S. 84 (1985).
\textsuperscript{105} 490 U.S. 504 (1989).
\textsuperscript{106} For interesting discussion of the role of legislative facts in adjudication, see Robert Keeton, Legislative Facts and Similar Things: Deciding Disputed Premise Facts, 73 Minn. L. Rev. 1 (1988).
\textsuperscript{107} N.J.A.C. § 8:24-3.3(d) Supp. 1-3-84.
dressing includes a raw egg yolk. The result, not surprisingly, was that New Jersey became a laughing stock. Late night talk shows made fun of the law. Johnny Carson, remarked, “There’s something wrong with a state in which I can buy an Uzi, but there’s a 10-day waiting period to get a Caesar salad.” Governor Jim Florio didn’t think Carson’s joke was funny (Uzis actually were not legal in New Jersey), but still called the law “unenforceable, intrusive and silly.” He made a point of being seen in a New Jersey diner flouting the law by eating an egg cooked sunny side up. In February, the law was amended to require restaurants to continue handling eggs as a potentially hazardous food in general, but allowing them to resume the serving of undercooked eggs. In June, it was repealed altogether.

The law really was silly. Just walk into any diner in New Jersey and watch one person after another eating eggs that would have been illegal to serve. They do not get sick, and they do not want to have the government telling them what to eat for breakfast. But the law was triggered by a reality. The Federal Food and Drug Administration had recommended that eggs be treated as a “potentially hazardous” foodstuff because outbreaks of salmonella poisoning had been attributed to eggs. Salmonella grows on eggs in temperatures between 45 and 140 degrees F. No one really disputed any of that. What they disputed was the cause of the outbreaks. In arguing for the law’s immediate repeal, the New Jersey Restaurant Association pointed out that many restaurants crack dozens of eggs in advance of the morning rush, and store them in a vat, for making such dishes as scrambled eggs, omelets, and French toast. One bad egg can contaminate the

110 N.J.A.C. § 8:24-3.3(d)
entire batch. It is in that phase, or even earlier when egg producers fail to refrigerate the
eggs, that the risk of bacteria growth is greatest.

The Restaurant Association had a good point. The other potentially hazardous
foods subject to this regulation included raw meats, poultry and fish, well-known to be
the source of salmonella outbreaks. Apart from requiring that these foods be well enough
cooked to kill the bacteria, the regulation required that that other foods not be permitted
to touch them during preparation, and that restaurants have appropriate utensils and
equipment, which they keep both clean and separate from other foods. It seems, then,
that when eggs were declared “potentially hazardous,” they got swept into a set of
requirements tailored for the cooking and serving of meat. Many of them, such as the use
of clean, segregated equipment, fit eggs as well as meat, and would not have provoked
ridicule. To the contrary, it was a good idea to include eggs in the rule. But the rule had
to be tailored to permit eggs to be served in ordinary preparations, while outlawing their
being handled in ways that could jeopardize people’s health.

Through all the debate and ridicule, it was not argued that no court would ever
construe the law to exclude, say, sunny-side-up eggs, because their inclusion would not
serve the purposes of the regulation. It was clear to everyone, it seems, that the
regulation was enacted with the intention of treating eggs and meat alike. Absent an
“absurd result” argument, the language and intent would trump considerations of the
rule’s broader purpose.

Now let us look at a well-studied case of this nature that did make it to court,
United States v. Marshall,111 a case in which Judge Easterbrook wrote the majority
opinion, and in which Posner was a dissenting judge. Congress had enacted a statute

setting minimum penalties for the distribution of illegal drugs depending on the weight of the drugs distributed. It called for a sentence of five years in prison for selling more than one gram of a “mixture or substance containing a detectable amount” of LSD,\footnote{21 U.S.C. § 841(b)(1)(A)(v).} and additional time for additional grams. Marshall was sentenced to 20 years for distributing more than 10 grams of LSD.

The problem with the statute has to do with the weight of the carrier. LSD is made as a liquid, diluted with alcohol, then spread over a piece of blotter paper, and eventually cut into one-dose squares. Comparatively, the blotter paper weighs a great deal, the LSD, very little. Because the ratio of the weight of the carrier to the weight of the drug is much greater for LSD than for the other drugs covered in the statute (e.g., heroin, PCP), the sentence per dose of LSD is far greater. For example, “to have received a comparable sentence for selling heroin, Marshall would have had to have sold ten kilograms, which would yield between one and two million doses.”\footnote{Id. at ___ (Posner, J. dissenting).} Moreover, LSD can be distributed on different carriers, including sugar cubes and orange juice. It makes no sense for the length of a prison sentence to depend upon how thirsty a user or distributor is at the time of sale.

The majority affirmed the sentence based largely on the language of the statute and the right of Congress, through the legislative process, to set whatever penalties it wishes to set. Arguing that the carrier should be excluded notwithstanding the literal language of the statute, Posner noted:

The positivist [majority] view, applied unflinchingly to this case, commands the affirmance of prison sentences that are exceptionally harsh by the standards of the modern Western world, dictated by an accidental, unintended scheme of punishment nevertheless implied by the words...
(taken one by one) of the relevant enactments. The natural law or pragmatist view leads to a freer interpretation, one influenced by norms of equal treatments ... 114

Posner continues, arguing that excluding the medium would lead to a rational system of sentencing under the statute, far more in line with what the legislature intended to accomplish.

But Posner’s position did not prevail, and it usually does not prevail in these circumstances. 115 Congress erred. But the mistake it made was not in drafting a statute that adequately communicated its intent. Rather, the mistake was in its understanding of the underlying facts that led it to decide on this legislation. The same result obtained in *Locke*. The Court refused to construe a December 30 filing deadline as meaning December 31, claiming that it was unable to find any extrinsic evidence of congressional intent to the contrary, and the only purpose of a deadline is to set an arbitrary time for compliance. 116 In all likelihood, the majority understood perfectly well that Congress had intended to set the deadline for the end of the year, but made a drafting error. However, Article I, Section 7 requires that laws be passed by both houses of Congress and signed by the President. When the language is as clear as it was in this case, courts are not always willing to give the process a back seat, even if that means undermining the obvious intent of the legislature.

Courts take seriously the obligation to respect the results of the legislative process. When more than one result is possible consistent with statutory language, they employ a host of values to decide a case, including the statute’s purpose. But when the

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114 Id. at ________
116 *Locke*, 470 U.S. at 95-96.

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language makes the intent clear, courts are reluctant to put purpose over process in order to fix a bad law.

**Coherence**

In chapter 4 we saw that courts sometimes look at coherence as a surrogate for intent. We assume that legislatures intend to write laws that work in harmony with each other. When an interpretive issue arises, the law should be construed in a manner that makes it coherent with other laws, not to impose a better legal order from the bench, but simply in order to effectuate what was probably what the legislature intended in the first place. As Justice Scalia put it in *Green v. Bock Laundry Machine Co., Inc.*

The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated -- a compatibility which, by a benign fiction, we assume Congress always has in mind.117

But this is not the only reason for a court to value coherence. Consider Justice Scalia's opinion in *West Virginia University Hospitals v. Casey*.118 The issue there was whether the fees paid to expert witnesses should count as part of “a reasonable attorney's fee” with respect to a statute that allows the prevailing party in certain actions to recover attorney's fees. Writing for a majority of six justices, Justice Scalia argued that they should not. The most compelling argument was that Congress had enacted other statutes

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that shift fees, some of which mention expert fees specifically. Therefore, if Congress had intended the statute in question to provide for expert fees, it would have said so.

Arguments like this are frequently stated in intentionalist terms even by devoted textualists, as we saw in chapter 4. But they need not be. One can say: Regardless of what Congress had in mind, the Court should, in order to contribute productively to the legislative process, interpret statutes in such a way as to keep codes maximally coherent. Dan Simon has argued that there is a strong psychological impulse toward coherence that governs a great deal of legal decisionmaking, including inferences about state of mind.  

This principle would be a case in point. In fact, Justice Scalia made his point in just that way in *Casey*:

> Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law. See 2 J. Sutherland, Statutory Construction § 5201. We do so not because that precise accommodative meaning is what the lawmakers must have had in mind (how could an earlier Congress know what a later Congress would enact?), but because it is our role to make sense rather than nonsense out of the *corpus juris*.

This interpretive methodology no doubt has merit in many cases. But the drive to reach coherence must serve some purpose for it to be justified. One such purpose, asserted frequently by judges, is effectuating the intentions of the lawmakers. Absent evidence to the contrary, it is fair enough to infer that legislators want to write coherent codes, and would be happy enough if courts maximized that value when a case arises involving some issue that they never noticed.

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120 499 U.S. at 100-01 (citations omitted).
Justice Scalia's stated purpose for promoting coherence in *Casey* is more radical. He justifies the practice as good judicial lawmaking, regardless of what the legislature might have intended. It shows less respect for legislative primacy than does the intentional approach. It more resembles Ronald Dworkin's approach to statutory interpretation, which requires decisionmakers to decide statutory cases in a manner that “follows from the best interpretation of the legislative process as a whole.”\(^{121}\) It is at least arguable that working towards coherence in the interpretation of legal codes serves the goal of “making sense of the *corpus juris*.” Yet Scalia's approach is less constrained than Dworkin's, because Dworkin espouses looking at history as an important means of reducing the options available to the interpreter at any given time.

Whether the focus on coherence serves any other purpose, how well it serves as a proxy for intent is an open matter. Professor Buzbee has argued that coherence arguments are not very good surrogates for intent,\(^{122}\) which suggests that heavy reliance on coherence may at times undermine the principle of legislative primacy, not at all what Scalia purports to be doing. In reality, legislatures do not always pay attention to how a word in, say, the criminal code, might have been used in a statute that regulates mining or in some other remote law. *Casey*, in fact, may be just such a case. As Justice Stevens' dissent makes clear, in enacting the fee-shifting statute, Congress had intended to override a parsimonious Supreme Court decision that refused to shift fees in civil rights cases absent legislation requiring it.\(^{123}\) Congress responded by enacting the disputed statute. The Court in *Casey* then construed this new statute narrowly, and Congress had

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\(^{123}\) *Casey*, 499 U.S. at 108-09 (Stevens, J., dissenting).
to respond once again by amending the statute to make it clear that it was to apply to 
expert fees as well.\textsuperscript{124} This dynamic may explain why coherence arguments are, by and large, also justified by the goal of enforcing the will of the legislature.

Professor Elhauge presents a somewhat different argument, to the effect that coherence is a poor surrogate for enforcing the will of the legislature.\textsuperscript{125} Although he directs his remarks against Dworkin's reliance upon coherence,\textsuperscript{126} his critique has far more general application. Elhauge points out that various dictionary acts that are parts of the codes of many states often contain rules to the effect that specific legislative directives be given priority over general ones when conflicts occur. As Elhauge observes, the fact that a legislature instructs courts to ignore general principles in favor of specific, inconsistent rules provides evidence that the legislature does not itself value coherence; coherence cannot in such cases be supported on grounds of legislative intent.

As for Justice Scalia's argument that intent is irrelevant because the Court should concern itself instead with coherence, his opinion does not test Elhauge's proposition, because coherence is evidence of intent as well as a value in its own right. To argue against the relevance of intent in such cases, Scalia would have to take the position that coherence values must prevail even if they thwart the clear intent of the legislature. Although the \textit{Casey} dissent in fact accuses him of doing just that, Scalia never made that argument in \textit{Casey}, and I doubt that he would make it in any case in which coherence is the principal argument. In fact, Scalia argued in \textit{Casey} that Congress uses specific

\textsuperscript{126} Dworkin, \textit{Law's Empire} at 329-37.
language to call for the shifting of expert fees in certain circumstances “when a shift is intended.” 127

I know of no case in which a court has expressed a willingness to thwart the intentions of the legislature for the sake of adding coherence to the corpus juris, to use Scalia’s term. Certainly, interpreting a code to enhance coherence makes good sense as a default position. Absent evidence of intent to the contrary, why not promote coherence as a value, especially within a statute or a closely related cluster of statutes? Moreover, coherence can at least arguably serve as a proxy for intent in some cases. But coherence on its own is not a strong enough value to justify rejecting the contrary will of the legislature.

Promoting Constitutional Values

Consider the rule that statutes are construed to avoid constitutional questions. This canon is often stated in intentionalist terms: the court assumes that the legislature did not intend to enact an unconstitutional statute, and therefore resolves difficulties in favor of a reading that survives constitutional challenge. For example, in United States v. X-Citement Video, Inc., 128 the Supreme Court observed: “[W]e do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution as construed by this Court.” In that case, the Court corrected what appeared to be a legislative error in the federal child pornography statute: It failed to require that the person who committed the crime knew that he was trafficking in child pornography. If interpreted literally, the statute might have applied, say, to the Federal Express driver who knew he was delivering films, but had no idea that they involved child pornography. To solve the

127 Casey, 499 U.S. at 90.
problem, the Court inserted a state of mind requirement on the assumption that Congress had most likely intended to do so, but drafted the statute incorrectly.

Contrast this approach with that of *NLRB v. Catholic Bishop of Chicago*,\(^{129}\) in which the Supreme Court held that the National Labor Relations Act did not give religious school teachers the right to unionize. The Court set a high hurdle for the National Labor Relations Board to vault: because application of the labor laws to religious school teachers could, on some future occasion, cause the courts to become enmeshed in questions of religious freedom, the Court required some “clear expression” by Congress that it intended to include this group. Otherwise, the Court would assume the group not to be included:

There is no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act. Admittedly, Congress defined the Board's jurisdiction in very broad terms; we must therefore examine the legislative history of the Act to determine whether Congress contemplated that the grant of jurisdiction would include teachers in such schools.\(^{130}\)

Notably, the Court did not claim that such values can survive the Marshall Test. That is, the Court did not say that the constitutional values are sufficiently important that the judiciary is willing to override the clear intention of the legislature. But a fair reading of the opinion suggests that is exactly what happened, as Professor Eskridge correctly notes.\(^{131}\) Congress had actually considered and rejected the insertion of a provision that would exempt religious schools from the labor laws,\(^{132}\) just as they had considered and rejected amending the antitrust laws to include baseball.

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\(^{130}\) Id., at 504.


\(^{132}\) Id., at 512-18 (Brennan, J. dissenting).
What *Catholic Bishop* reflects, then, is an effort to protect parochial schools from governmental interference into the religious aspects of their day to day affairs. What would happen, for example, if Catholic school teachers claimed that the church had committed an unfair labor practice by refusing to negotiate in good faith over work rules that gave teachers time off just when religious activities were likely to occur? But the Court did not admit that it was balancing legislative primacy against other values that it thought more important.

**Supporting Law Enforcement**

Consider the following dilemma: From a fair reading of the legislative history and other contemporaneous data, such as old dictionaries, it appears that the legislature had intended to write a narrow statute some time ago. Now, however, the statute is most easily understood as including conduct that the legislature did not contemplate. Moreover, that conduct is bad on its face. Should a court subordinate the value of legislative primacy to good law enforcement and hold that the statute applies? That is what happened in *Moskal v. United States*.\(^\text{133}\) The statute in question banned the interstate transportation of “falsely made” securities. As Justice Scalia argued convincingly in his dissent, at the time the statute was enacted, “falsely made” was largely a synonym for “counterfeit.”\(^\text{134}\)

In *Moskal*, the defendant was a car dealer who had been rolling back odometers, sending the false information to the motor vehicle authorities, and then receiving clean titles procured with the false information. There was nothing counterfeit about any of the

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\(^{134}\) *Id.* at 119-20 (Scalia, J. dissenting).
documents, but the new titles certainly contained misinformation. The majority found that the clear notice of the statute was enough to trump the more limited mission of the enacting legislature, and affirmed Moskal's conviction.

Over time, the “counterfeit” meaning of the expression seems to have become less salient, and we are likely to understand it in terms of the meanings of its components: “made to be false.” I have conducted a LEXIS search of articles from major newspapers that use the words “falsely made” during a five-year period beginning in 2000. There were 40 instances. Several report indictments that used the expression “falsely made securities,” quoting statutory language. Thus, one article reports that “District Attorney Terrence Parker said Mary Colletta ‘falsely’ made a ‘written statement, which was calculated to become, when completed,’ the surgeon’s will.”

Interestingly, in that case, it appears that the prosecutor making the statement intended the expression to mean a forgery, but that the reporter did not understand it that way. The preceding sentence refers to false information contained in the document, and the quotation marks around the single word “falsely” suggest that the reporter thought this particular part of the story was about the defendant’s having lied about being married to the person whose will she later forged.

None of the instances quoting anything other than legal documents, however, appears to use the expression as a synonym for counterfeit. Instead, we read of falsely-made exit poll data containing bogus information, a “falsely-made” confession

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referring to its content, and falsely made claims for repayment. From this, it seems fair to conclude that considerations of law enforcement have trumped legislative intent.

Whether one agrees with the Court’s balancing of values in Moskal, it is not radical in principle. Imagine the result if \textit{McBoyle v. United States}\footnote{283 U.S. 25 (1931).} were decided today. Recall from chapter 3 that \textit{McBoyle}, decided by a unanimous Supreme Court in 1931, held that an airplane should not count as a vehicle for purposes of construing a statute that made it a crime to transport stolen vehicles across state lines. In all likelihood, the 1919 legislature that enacted the statute would not have had airplanes in mind, as Justice Holmes wrote in his opinion. But nearly a century later, with commercial air traffic being a part of daily life for about 50 years, it would be strange for a court to let a McBoyle off the hook, no matter what the enacting legislature had in mind. Our prototype of a vehicle has changed over time, and people are on adequate notice that if they steal an airplane they have stolen a vehicle. It would not be surprising if fair notice is enough to trump legislative intent, as it was in Moskal, especially when the statute is an old one.

\textbf{Political Ideology}

There are too many cases in which the conservatives vote for the conservative outcome, the liberals for the liberal outcome, to deny that a judge’s individual political values play a role in statutory interpretation. We saw this in the discussion of \textit{Circuit City Stores v. Adams}\footnote{532 U.S. 105 (2001).} in chapter 2. The federal arbitration act can be interpreted as

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\begin{itemize}
  \item \textsuperscript{137} Art Barnum, Doubt Cast on Confession in Girl’s Death, \textit{Chicago Tribune}, April 26, 2001, page 6.
  \item \textsuperscript{138} Law & Order, \textit{Tampa Tribune}, October 26, 2001, page 6 Metro.
  \item \textsuperscript{139} 283 U.S. 25 (1931).
  \item \textsuperscript{140} 532 U.S. 105 (2001).
\end{itemize}
}
permitting lawsuits to be brought in court by employees who would have been deemed to engage in interstate commerce when the law was passed early in the twentieth century, or to permit such lawsuits by those deemed to be engaged in interstate commerce whenever their claims arise. The five conservative justices prevailed, choosing the first alternative, the four liberals opting for the second. The statute is susceptible to both meanings, and both the majority and dissenting opinions contain legitimate argumentation that most judges employ at one time or another, making use of ordinary meaning, nuances in the way related statutory provisions are worded, the context in which the law was enacted, and so on. Is it plausible that the political views of the justices played no role in the outcome of this case?

Or consider Ledbetter v. Goodyear Tire and Rubber Company, decided by the Supreme Court in 2007. Ledbetter claimed she was being paid less because of her sex. A jury agreed with her, but the case was reversed on appeal, and then went to the Supreme Court. The Civil Rights Act requires that claims of discrimination be brought within 180 days of a discriminatory act. The statute makes it an “unlawful employment practice” to discriminate “against any individual with respect to his compensation … because of such individual’s … sex.” Ledbetter claimed that her case was timely, because each paycheck that she received constituted a discriminatory act, since each paycheck reflected the intention to pay her less because of her sex. Goodyear argued that if there was a discriminatory act, it happened when Goodyear first set her pay as below the pay of men, and that therefore, the 180 day period had expired before she filed her claim.

142 421 F.3d 1169 (11th Cir. 2005).
Ultimately, Goodyear prevailed in the Supreme Court, with Justice Alito, a conservative, writing for the majority, and Justice Ginsburg, a liberal, writing the dissent. It is possible to conceptualize the language, “discriminatory act” either way. The majority is correct in its argument that the clearest act of discriminatory intent occurred when Goodyear’s management decided to pay her less than they paid men. After that, the issuance of paychecks at a big company like Goodyear is merely ministerial, and thus occurred without the intent needed to prove employment discrimination. At the same time, the dissent is correct that the decision creates such huge hurdles for those who actually have suffered wage discrimination that it is unlikely that Congress would have at the same time outlawed wage discrimination and made it almost impossible to assert one’s rights to be free of such discrimination. Compensation decisions, unlike, say, promotion decisions, are typically “hidden from sight” and only come to light, if at all, after their effects have continued for a lengthy period of time. Both sides relied opportunistically on the Court’s earlier decisions, with most of the disagreement over which earlier cases were more analogous with the case at hand.

If I were a judge, I would have voted with the dissenters. I do not believe that Congress would have intended the law to be construed so narrowly. We saw in chapters 3 and 4 that effectuating the intent of the legislature is a major goal of just about all statutory interpreters, whatever their political stripe. The language permits the interpretation I prefer, and principles of interpretation make my perspective fully legitimate, perhaps even the better of the two options given the strong role that legislative primacy plays in statutory interpretation. Yet it is self-evident to me that my own political values play a role. I not only would construe the statute as permitting such

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144 127 S.Ct. at 2181 (Ginsburg, J. dissenting).
claims, but I would be glad that I had done so, because doing so helps to further values
that I consider important. And I have little doubt that those conservative justices who
voted to limit the scope of such claims considered such facts as the importance of
providing certainty to employers of their litigation risks to enable them to thrive. They,
too, were faced with a statute that permitted an interpretation they would prefer, and were
in a position to do what they considered to be the right thing without doing significant
damage to the vocabulary of statutory interpretation.

Thus, the question is not whether the political values of the interpreter play a role
in how statutes are construed, but rather whether statutory interpretation is so political
that it has no substance at all other than as a vehicle for judges to do as they wish. Karl
Llewellyn demonstrated more than a half century ago145 that the canons of construction
are so subject to manipulation that for many canons there is a matched canon that tells the
court to do the opposite of the first one. The plain language and absurd result rules is
perhaps the prime example. Others have made similar observations.146 Moreover,
Linquist and Cross’s study discussed earlier in this chapter convincingly shows that the
political affiliation of appellate judges correlates with their decisions in civil rights
cases.147

A recent study by James Brudney and Corey Ditslear confirms that there is a
relationship between a justice’s ideology and the strategic use of various interpretive

145 Karl N. 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, 401-06 (1950).
146 See, e.g., Bradford C. Mank, Textualism's Selective Canons of Statutory Construction: Reinvigorating
Individual Liberties, Legislative Authority, and Deference to Executive Agencies, 86 Ky. L.J. 527 (1998);
Max Radin, Statutory Interpretation, 43 Harv. L. Rev. 863, (1930).
147 Lindquist and Cross, Empirically Testing Dworkin’s Chain Novel Theory, 80 N.Y.U. L. Rev. 1156
(2005).
They examined 632 “workplace law” cases decided by the Supreme Court over the 35-year period ending in 2003. (Both of the cases discussed above would fit into their data set, but only Circuit City Stores was decided within their period of study.) They found that canons of construction related to the language of a statute are used more or less equally to justify both liberal (pro-worker) and conservative (pro-employer) decisions. Moreover, depending on the issue and the level of statutory indeterminacy, justices sometimes vote contrary to their political leanings. Nonetheless, the liberal justices are far more likely to use these canons to justify a liberal decision than to justify a conservative one, while just the reverse holds true for the conservative justices. The same distribution of canon usage holds for substantive canons of construction. From this, the authors conclude

that the canons are not having an independent, constraining effect on the Justices' decisionmaking - in particular, they are not functioning as a set of overarching "neutral principles" in the hands of either liberal or conservative Justices. Put differently, the canons' self-evident persuasiveness and logical force are not leading liberal, or conservative, Justices whose opinions rely on the canons closer to the Court's ideological center.¹⁵⁰

Thus, liberals typically use the canons to justify liberal results and conservatives use them to justify conservative results.

How much this infiltration of ideology into statutory interpretation should concern us depends both upon how deep the infiltration goes, and upon our initial expectations. Because of the precedential effect of Supreme Court decisions, it matters that the political leanings of appellate judges influence, say, the breadth with which civil rights statutes

¹⁴⁹ Id. at 55-56.
¹⁵⁰ Id. at 59.

5-58
employment statutes designed to protect workers are construed. At the margins, workers will have more rights (and employers more burden) if a liberal court resolves disputes in close cases than they will after a conservative court does so. Nonetheless, as I argued earlier, the impact of these decisions must be measured against the overall applicability of the statutes, and for the most part laws are clear enough to give us a sense of what we must, may, and cannot do. Appellate decisions in close cases constitute only a small fraction of all cases decided, a much smaller fraction of cases brought, and an even smaller fraction of instances in which the law applies, including those many times it does so without controversy. Even less indicative are the cases decided by the Supreme Court, which are pre-selected for their controversial nature, often because of conflicts among the courts of appeals.

One partial solution to the problem is to eliminate – or at least reduce – the precedential value of judicial decisions interpreting statutes. A court deciding a hard case will certainly know how other courts – including the Supreme Court – has ruled in the past, but it need not follow earlier cases if the judges believe that doing so would undermine the value of legislative primacy. That, in fact, is how most civil law countries approach statutory interpretation. This solution, however, would so undermine the value of stability and be so at odds with our common law tradition that it would have no chance of being accepted. We will, therefore, continue to accept, whether we like it or not, and whether we deny it or not, some degree of political ideology in the resolution of difficult statutory cases. Our ability to make laws is simply not so crisp to avoid this.

How Should Courts Decide Statutory Cases?
To the extent that the law requires certainty, the kinds of cases discussed in this chapter are not comforting. As we have seen, courts strongly favor legislative primacy as a value, although they disagree over how best to be faithful to the law makers. In earlier chapters, I showed why these problems are virtually intractable, explaining why they do not go away. It is no accident that cases more than a century old resonate today.

The same holds true for cases in which competing values are at stake. How old must a statute be before nuances of legislative intent seem less important when a defendant today seems to be on notice? How much should a reasonable sense of the relationship between the Constitution and the statute books influence interpretation when the law is itself constitutional? How wedded to old decisions should courts remain when times have changed and the earlier decisions were weakly argued even on their own terms? These questions all require judgments in which conflicting evidence and values compete.

How these judgments are made is complicated and a matter of controversy. Nonetheless, work by such scholars Dan Simon,\(^{151}\) Gilbert Harman and Sanjeev Kulkarni\(^{152}\) suggest that in close cases, decisionmakers, over time, form mental models that tend to reinforce that evidence that tends to support even small initial preferences, and to minimize evidence that runs contrary to initial preferences. The result is that decision makers become more and more confident in decisions that they earlier recognized as hard ones. Experimentation shows that this is the case, whichever side the

\(^{151}\) Simon, *Freedom and Constraint*.

decisionmaker ultimately takes, and whether it involves jury decisions or the interpretation of statutes.\textsuperscript{153}

How much uncertainty this brings to the legal system depends largely on the extent to which decision makers are faced with difficult problems in which they must weigh conflicting evidence and adduce inconsistent values. I have argued both in this chapter and in chapter 2 that such cases are relatively rare in the context of a baseline of clear cases. If I am right, this chapter suggests once again that we cannot dispense with decision makers who must use their discretion, and that judges are not “activists” simply because they have exercised judgment. But it also suggests that the application of laws is clear enough most of the time to prevent this residue of uncertainty from having a crippling effect on the rule of law.