A GUIDE TO READING, INTERPRETING AND APPLYING STATUTES[1]

Whether you are working in a law firm, a government agency, or a public interest organization, it is likely that you will be required to analyze and interpret statutes. Understanding the tools and techniques of statutory interpretation will help you to understand the possible implications a statute may have on your client's interests. Although the task of statutory interpretation can be quite nuanced and complicated, this handout will provide you with a few handy tools that will help you to discern the meaning of a statute, even when the terms of the statute seem unclear or ambiguous. In particular, this handout will address what to do before you begin interpreting a statute (Part I), tools of statutory interpretation (Part II), and theories of statutory interpretation (Part III) that can help inform which tools of interpretation you employ.

I. Preliminary Steps

There are three important preliminary steps you should take before attempting to interpret a given statute:

1. Read the statute. The primary language of the statute should always serve as the starting point for any inquiry into its meaning.[2] To properly understand and interpret a statute, you must read the text closely, keeping in mind that your initial understanding of the text may not be the only plausible interpretation of the statute or even the correct one.[3]
2. Understand your client's goals. Make sure that you have a firm grasp of your client's goals and the underlying facts of your client's legal problem so that you will be able to determine which statutes are relevant to your case.
3. Confirm the statute is still good law. Be sure to Shepardize or KeyCite the statute to determine: (a) whether the statute or parts of the statute have been repealed or

[1] The original handout was written in 2006 by Katharine Clark and Matthew Connolly consulting WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (3d. ed. 2001). The handout was revised in 2017 by Suraj Kumar and Taylor Beech.

[2] ESKRIDGE, *supra* note 1, at 819.

[3] CHRISTOPHER G. WREN AND JILL ROBINSON WREN, THE LEGAL RESEARCH MANUAL: A GAME PLAN FOR LEGAL RESEARCH AND ANALYSIS (2d. ed. 1986) (*hereinafter* "WREN & WREN").

otherwise invalidated; (b) whether the statute has been amended; and (c) whether there are any court decisions that can guide your analysis of the statute.

II. Tools of Statutory Interpretation

Although some statutes appear simple and straightforward at first glance, you may find, upon further examination, that the terms of the statute are ambiguous or do not directly address your legal issue. There are several tools that can help you to determine the meaning of an ambiguous statute or to choose between multiple plausible interpretations of the same statute. These tools fall into the following four categories: (A) the text of the statute; (B) legal interpretations of the statute; (C) the context and structure of the statute; and (D) the purpose of the statute.

Additionally, certain techniques of statutory construction have been used so often that they have become "formalized" into "canons of construction." While these canons may not be particularly useful for discerning the *meaning* of a statute, many courts find them persuasive, and you may use these canons to *justify and provide support for* a particular interpretation of a statute. Be aware, however, that for each canon that supports your interpretation, there is often an opposite canon that can be used to defeat your interpretation or support an alternative interpretation of the statute in question.[4] Additionally, your audience may find some canons more persuasive than others.

Each of the sections below addresses the tools of statutory interpretation and identifies relevant canons of construction[5] that you can use to justify and support your interpretations.

A. Statutory Text

a. *Statutory Definitions*

Many statutes contain a "definitions" section that sets forth and defines the key terms used in the statute. You might find these definitions either in the section of the statute you are analyzing or in one of the first sections of the entire act. Sometimes these specific terms are codified as definitions for a chapter or title of the relevant statute, meaning that they are intended to apply to the entire chapter or title (unless otherwise specified). These definitions are important because they suggest that legislatures intended for a term to have a specific meaning that might differ in important ways from its common usage.

[4] *See* 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, 401-406 (1950).
[5] *See generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW (2012).

b. *Plain Meaning*

i. Ordinary or Reasonable Understanding

Courts generally assume that the words of a statute mean what an "ordinary" or "reasonable" person would understand them to mean.[6] Moreover, some courts adhere to the principle that if the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute.[7] Thus, you can often begin by looking at the ordinary or reasonable understanding of a statute's text based on your own experience and understanding of language and grammar.

ii. Dictionary Definitions

Dictionaries can also be helpful in interpreting the meaning of statutory language. It will likely be more effective to compare and contrast definitions from multiple dictionaries to obtain a broader consensus on the meaning of words. Analyzing interpretations from multiple sources will help you to reduce the risk of choosing an interpretation that may have been approved by one source but rejected by many others.[8] If you are asked to interpret a statute that was enacted a long time ago, you might consider digging up dictionary definitions (as well as other sources such as encyclopedias) from the time period in which the statute was enacted.[9]

Be aware however, that if a statute deals with a technical or specialized subject (e.g., ERISA, tax, telecommunications, etc.), the words in the statute may have meanings that differ from their ordinary usage. In such circumstances, courts may interpret the text dealing with a technical or specialized subject in a manner consistent with the way those words are used in the relevant industry or community.

iii. Common Law Definitions

Similar to words that have a technical or an industry-specific meaning, some statutory words can have a meaning in common law that is widely understood and accepted. In such cases, courts will adopt the common law meaning.[10] For example, the Supreme Court has noted that "extortion" is a common law word, and it has interpreted that term by reference to its meaning at common law.[11]

c. *Commonly Used Terms*

The chart below describes several terms that are commonly found in statutes and often used purposely to define the scope and function of the statute.

[6] ESKRIDGE, *supra* note 1, at 819.
[7] Desert Palace, Inc. v. Costa, 539 U.S. 90, 99 (2003).
[8] *See* MCI Telecommunications Corp. v. AT&T Co., 512 U.S. 218, 224-26 (1994).
[9] ESKRIDGE, *supra* note 1, at 820.
[10] Carter v United States, 530 U.S. 255, 266 (2000).
[11] *Id.*; Evans v. United States, 504 U.S. 255, 261–64 (1992).

Terms	Function
And v. Or	"And" typically signifies a conjunctive list, meaning each condition in the list must be satisfied, while "or" typically signifies a disjunctive list, meaning satisfying any one condition in the list is sufficient
May v. Shall	Generally, "shall" signifies that certain behavior is mandated by the statute, while "may" grants the agent some discretion
Unless **Except**	These terms usually signify an exception to the statute
Subject to… **Within the meaning of** **For the purposes of**	These terms may limit the scope of the statute, or may indicate that a certain part of the statute is controlled or limited by another section or statute
If…then… **Upon** **Before/After** **Provided that…**	Generally, these terms indicate that for one part of a statute to take effect, a precondition or requirement must be satisfied
Notwithstanding	Literally, "in spite of," this term usually signifies that a certain term or provision is not controlled or limited by other parts of the statute, or by other statutes
Each/Only **Every/Any/All**	These terms commonly limit the class of objects that are either included in or excluded from the statute

d. *Relevant Canons of Construction*

i. Omitted-Case Canon

Nothing is to be added to what the text states or reasonably implies; that is, a matter not covered is to be treated as not covered.[12] Essentially, this means that even though legal texts can sometimes be incomplete because they fail to address certain situations, courts should not fill in these gaps with rules of their own.[13] For example, in one Supreme Court opinion, a taxpayer underpaid his taxes by $7,000, but was only found to have negligently underpaid by $700. The taxpayer argued that the statute imposing a penalty for underpayment of taxes should be read to

[12] SCALIA & GARNER, *supra* note 5, at 93.
[13] *Id.*

require payment in "an amount equal to 5% *of the amount of the* underpayment *attributable to negligence*." The Court, however, refused to fill in the gaps of the statutory language that simply required payment in "an amount equal to 5% of the underpayment," even though this led to an arguably less reasonable result.[14]

ii. General-Terms Canon

General terms are to be given their general meaning and afforded their full and fair scope, without being arbitrarily limited.[15] This canon is based on the reality that it is often useful to create categories (e.g. "dangerous weapons") without knowing or anticipating everything that may fit or come to fit within that category.[16] For example, the Eighth Circuit construed a statute that allowed the government to seize "any property, including money," to mean both real and personal property.[17]

iii. Negative-Implication Canon

The expression of one thing implies the exclusion of others.[18] This means that where certain terms have been explicitly set forth in a statute, that statute may be interpreted not to apply to terms that have been excluded from the statute. For example, one could argue that a statute that prohibits "any horse, mule, cattle, hog, sheep, or goat" from running upon lands enclosed by a fence does not apply to turkeys because the statute does not explicitly proscribe turkeys.[19] Be aware, however, that this doctrine assumes that the enacting legislature thought through the statutory language "carefully, considering every possible variation."[20] In reality, there could be other reasons for legislatures to omit terms from a statute.

iv. Presumption of Nonexclusive "Include"

The verb *to include* introduces examples, not an exhaustive list.[21] The Eighth Circuit opinion referenced *supra* as an example of the general terms canon illustrates this canon as well. The statutory language "any property, including money" did not limit the meaning of property solely to money.[22] On the other hand, language such as "consists of" or "comprises" indicates a group contains precisely that number or description. Statutes in the intellectual property context are, however, an exception to this canon.[23]

B. Legal Interpretations

a. *Judicial Interpretations Through Case Law*

Oftentimes you will find that the statute you are analyzing has already been interpreted by a court. Additionally, court decisions may also discuss what alternative interpretations of the

[14] *Id.*; *See* Comm'r v. Asphalt Products Co., 482 U.S. 117, 121 (1987).
[15] SCALIA & GARNER, *supra* note 5, at 101.
[16] *Id.*
[17] *Id.*; United States v. South Half of Lot 7 & Lot 8, Block 14, 910 F.2d 488, 490-91 (8th Cir. 1990).
[18] SCALIA & GARNER, *supra* note 5, at 107.
[19] Tate v. Ogg, 195 S.E. 496, 499-500 (Va.1938).
[20] ESKRIDGE, *supra* note 1, at 824.
[21] SCALIA & GARNER, *supra* note 5, at 132.
[22] *See* United States v. South Half of Lot 7 & Lot 8, Block 14, 910 F.2d at 490-91.
[23] *Id.*

statute were plausible (or at least considered) and why the court either approved or rejected those alternatives. You can find references to case law in the case annotations of an annotated statute, by Shepardizing/KeyCiting the relevant section of the statute, or through your own legal research on platforms such as LexisNexis and Westlaw.

b. *Agency Interpretations Through Regulations*

Sometimes the agency in charge of administering a given statute has issued regulations to clarify how that statute should be interpreted and applied. Agency regulations can be found in the Code of Federal Regulations (CFR) and can be helpful in determining both the meaning of a particular term or phrase and the policy concerns that underlie the statute. Regulations are often cross-referenced in annotated statutes in addition to relevant case law. Courts will grant deference to an agency's interpretation of statutes, interpretation of the agency's own regulations, and interpretation of the agency's guidance, publications, and research, generally depending on the vagueness of the underlying text and how reasonable the agency's interpretation is.[24]

c. *Relevant Canons of Construction*

i. Rule of Lenity

Ambiguity in a statute defining a crime or imposing a penalty should be resolved in favor of the defendant.[25] For example, in one case, a criminal statute prohibited the use of "proceeds" of criminal activities for various purposes, and the meaning of "proceeds" could reasonably be construed to mean both "receipts" and "profits." The Court adopted the defendant-friendly "profits" definition of "proceeds" rather than the "receipts" definition because the rule of lenity required the statute to be interpreted in favor of the defendant.[26] Be aware, however, that application of this rule is vague and it is often the subject of controversy.[27]

ii. Presumption Against Change in Common Law

A statute will be construed to alter the common law only when that disposition is clear.[28] While this alteration of common law must be clear, it need not be express.[29] For example, a D.C. statute provided that "any dog wearing a tax tag . . . shall be regarded as personal property." The court refused to read this statute in a way that would prevent a dog owner from recovering under a common law rule that all pets are considered personal property when the owner's dog was not wearing a tax tag, thus refusing to change the common law without an "exactness of expression" to do so.[30]

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[24] *See generally* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (statutes); Auer v. Robbins, 519 U.S. 452 (1997) (agency regulations); Skidmore v. Swift Co., 323 U.S. 134 (1944) (agency guidance).
[25] SCALIA & GARNER, *supra* note 5, at 296.
[26] United States v. Santos, 553 U.S. 507, 514 (2008).
[27] SCALIA & GARNER, *supra* note 5, at 296.
[28] SCALIA & GARNER, *supra* note 5, at 318.
[29] *Id.*
[30] *Id.*; Sharfeld v. Richardson, 133 F.2d 340, 341 (D.C. Cir. 1942).

C. Context and Structure

a. *Cross-References and Companion Statutes*

When reading complex statutes, be aware of references to other statutes. These references may lead you to other statutes that affect the meaning and function of the statute you are trying to analyze. For example, an immigration statute defines an "aggravated felony" as, among other things, "a crime of violence."[31] That provision references another federal statute, which in turn defines "crime of violence."[32]

b. *Relevant Canons of Construction*

i. The Whole Act Rule

The text should be construed as a whole. A legal instrument typically contains many interrelated parts, and thus the entirety of the document provides the context for each of its parts.[33] This canon typically "establishes that only one of the possible meanings that a word or phrase can bear is compatible with use of the same word or phrase elsewhere in the statute."[34]

ii. Presumption of Consistent Usage (and Meaningful Variation)

A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in its meaning.[35] For example, the provisions in section 77j of the Securities Act require that certain information be included in a "prospectus" and that certain information can be omitted from a "prospectus." The presumption of consistent usage suggests that each time the word "prospectus" is used in the above provisions, it should be interpreted in a way that is consistent with the way the term is interpreted in other parts of the statute.[36] The presumption of meaningful variation suggests that when the legislature has departed from the consistent usage of a particular term, the legislature intended for that particular term to have a different meaning.[37] For example, if a statute says *land* in once place and *real estate* in another, the use of a different term in the second place presumably includes improvements as well as raw land.[38]

iii. Rule to Avoid Surplusage

If possible, every word and every provision should be given effect. None should be ignored and none should needlessly be given interpretation that causes it to duplicate another provision or to have no consequence.[39] For example, the Securities Act of 1933 defines the term "prospectus" as "any prospectus, notice, circular, advertisement, letter, or communication,

[31] 8 U.S.C. § 1101(a)(43)(F).
[32] 18 U.S.C. § 16.
[33] SCALIA & GARNER, *supra* note 5, at 167.
[34] *Id.*
[35] SCALIA & GARNER, *supra* note 5, at 170.
[36] Gustafson v. Alloyd Co., 513 U.S. 561, 567-69 (1995).
[37] ESKRIDGE, *supra* note 1, at 834.
[38] SCALIA & GARNER, *supra* note 5, at 170.
[39] SCALIA & GARNER, *supra* note 5, at 174.

written or by radio or television, which offers any security for sale or confirms the sale of any security." If the term "communication" were interpreted to include any type of written communication, the words "notice, circular, advertisement, letter" would serve no independent purpose in the statute.[40] However, if "communication" were interpreted to include oral statements made through radio or television, then all the words in this section of the statute would contribute something to its meaning, and none would be considered "surplusage."

iv. Associated Words Canon

Associated words bear on one another's meaning.[41] This doctrine is useful when the term you are trying to interpret is grouped together with two or more terms that have similar meanings. These terms may provide clues on how broadly or narrowly a term should reasonably be interpreted.[42] For example, the Supreme Court considered whether actions taken by the governor of Virginia constituted "official acts" within the meaning of federal anticorruption laws.[43] The relevant statute defined "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy."[44] Because "a word is known by the company it keeps," the Court concluded that a "'question' or 'matter' must be similar in nature to a 'cause, suit, proceeding, or controversy.'"[45] Those last three terms suggested "a formal exercise of government power."[46] Governor McDonnell's actions—attending meetings, calling officials, and hosting events—were not formal exercises of government power, and therefore did not qualify as "official acts."[47]

v. *Ejusdem Generis* Canon

Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned.[48] In other words, you should use the specific objects or things explicitly set forth in the statute to determine what other objects or things the legislature intended to include. For example, if a statute lists "dogs, cats, horses, cattle, and other animals," this canon would suggest that the catchall phrase *other animals* refers to other *similar* animals.[49] This might include animals like sheep, but not include protozoa.

vi. Related-Statutes Canon

Statutes dealing with the same subject are to be interpreted together, as though they were one law.[50] According to Justice Frankfurter, "statutes cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes," and part of the statute's context is the body of law of which it forms a part.[51] In certain areas of law, interpretations may cut across

[40] *Gustafson*, 513 U.S. at 577-78.
[41] SCALIA & GARNER, *supra* note 5, at 195.
[42] ESKRIDGE, *supra* note 1, at 823.
[43] McDonnell v. United States, 136 S. Ct. 2355 (2016).
[44] 18 U.S.C. § 201(a)(3).
[45] *McDonnell*, 136 S. Ct. at 2368.
[46] *Id.* at 2369.
[47] *Id.* at 2371–72.
[48] SCALIA & GARNER, *supra* note 5, at 199.
[49] *Id.*
[50] SCALIA & GARNER, *supra* note 5, at 252.
[51] *Id.*

statutes. For example, in a recent case interpreting the federal bank fraud statute, the Supreme Court considered how it had interpreted "the analogous mail fraud statute."[52]

D. Purpose

Tools that deal with a statute's purpose focus on establishing the legislature's intent for enacting the statute and using that intent to understand and interpret a statute's meaning. According to Chief Judge Robert Katzmann of the Second Circuit, "legislation is a purposive act," and "judges should construe statutes to execute that legislative purpose."[53] Because legislation is the product of a deliberative and informed process, it has discernable purposes and objectives.[54] The following tools of interpretation aim to discern those purposes.

a. *Preamble or Purpose Clauses*

Many statutes begin with a preamble or purpose clause, which can be helpful in discerning the intent of the legislature with respect to ambiguous terms of the statute.[55] Thus, when choosing between multiple plausible interpretations, you might refer to the statute's purpose in deciding which interpretation is superior. However, be aware that if a court determines that the terms of the statute are clearly expressed in the part of the statute you are analyzing, the preamble or purpose clauses may not persuade a court to adopt a contrary interpretation.[56]

b. *Legislative History*

Legislative history can provide useful guidance for determining the legislature's intent, and thus the meaning of ambiguous statutory language. However, as Chief Justice Roberts noted at his confirmation hearings, "[a]ll legislative history is not created equal."[57] Different weight should be given to different documents to reflect the legislative process, its rules, and internal hierarchy of communications. Chief Judge Katzmann suggests placing more weight on conference committee reports and committee reports, followed by "statements of a bill's managers in the Congressional Record," and lastly "stray statements of legislators on the floor."[58]

c. *Relevant Canons of Construction*

i. Supremacy of Text Principle

"The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means."[59] Proponents of this canon reject extratextual sources, like legislative history, and determine purpose from the text alone.[60] This principle is premised on the

[52] Shaw v. United States, 137 S. Ct. 462, 467 (2016).
[53] ROBERT A. KATZMANN, JUDGING STATUTES 31 (2016).
[54] *Id.*
[55] ESKRIDGE, *supra* note 1, at 832.
[56] *Id.*
[57] KATZMANN, *supra* note 53, at 54.
[58] *Id.*
[59] SCALIA & GARNER, *supra* note 5, at 56.
[60] *Id.*

idea that *context* includes the purpose of the text, and the *subject matter of the document* helps give the words meaning; therefore, the purpose must be derived from the text.[61]

ii. Presumption Against Ineffectiveness

A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored.[62] This presumption ensures that a text's manifest purpose is furthered, not hindered. For example, the Supreme Court has held that an offense did not need to include a domestic relationship as an element to qualify as a "misdemeanor crime of domestic violence."[63] The Court rejected an interpretation that would have construed that statute "to exclude the domestic abuser convicted under a generic use-of-force statute."[64] Such an interpretation "would frustrate Congress' manifest purpose" of addressing domestic violence and would have rendered the law "'a dead letter' in some two-thirds of the States from the very moment of its enactment."[65]

III. Theories of Statutory Interpretation

Given the range of interpretive tools, which ones should you use? Which tool should you start with? The answers to these questions may depend on your theory of statutory interpretation. To justify your interpretation of a particular statutory provision, you may need to describe which tools of statutory interpretation you used to reach your conclusion. Some readers find certain interpretive tools more persuasive than others. Understanding the various interpretive theories will help you anticipate your reader's reaction to your use of a particular tool of statutory interpretation.

This Part briefly describes three major interpretive theories: textualism, intentionalism, and pragmatism. The Supreme Court's recent decision in *King v. Burwell* shows these theories in action.

A. Textualism

Textualists "look for meaning in the governing text, ascribe to that text the meaning that it has borne from its inception, and reject judicial speculation about both the drafters' extratextually derived purposes and the desirability of the fair reading's anticipated consequences."[66] Rather than consulting legislative history or inquiring into a statute's purpose, textualists rely on the ordinary meaning of the words in the statute and generally accepted canons of statutory construction. To discern the meaning of statutory language, textualists may turn to dictionary definitions.[67]

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[61] *Id.*
[62] SCALIA & GARNER, *supra* note 5, at 63.
[63] United States v. Hayes, 555 U.S. 415, 418 (2009).
[64] *Id.* at 427.
[65] *Id.* (citing a statement by Sen. Lautenberg). *But see id.* at 435 (Roberts, C.J., dissenting) ("We dismiss the value of such statements due to inherent flaws as guides to legislative intent, flaws that persist (and indeed may be amplified) in the absence of other indicia of intent").
[66] SCALIA & GARNER, *supra* note 5, at xxvii.
[67] *See, e.g.*, MCI Telecommunications Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 225–26 (1994) (Scalia, J.) ("Virtually every dictionary we are aware of says that 'to modify' means to change moderately or in minor fashion.").

There are several common justifications for textualism. First, textualism constrains judicial discretion, thereby limiting "the tendency of judges to imbue authoritative texts with their own policy preferences."[68] Second, confining the interpretive task to what is fairly discernable from the text will encourage more precisely drafted laws.[69] As a result, textualism "will provide greater certainty in the law, and hence greater predictability and greater respect for the rule of law."[70] Third, textualism is the only principled and coherent method of statutory interpretation because any search for legislative intent is futile. The notion that there is a discernable legislative intent is "pure fantasy," as "most legislators could not possibly have focused on the narrow point before the court," and "[t]he few who did undoubtedly had varying views."[71] Judges should look for the meaning of the text, not the intent of the legislature.[72]

B. Intentionalism

Intentionalists focus on the meaning that the legislature intended to give the statute. Courts should interpret laws "in a manner consistent with legislative purposes."[73] When statutes are unambiguous, the interpretive task typically ends with the plain meaning of the words.[74] When interpreting ambiguous laws, judges should consult "the interpretive materials the legislative branch thinks important to understanding its work." Some sources of legislative history are more reliable than others—intentionalists typically consider conference committee reports and committee reports the most authoritative sources. [75] Therefore, intentionalists not only examine the statutory text and structure but also consult legislative history to determine the underlying purpose of the legislature when it enacted the statute.

Intentionalists have advanced several arguments for their preferred mode of interpretation. First, relying solely on the statutory text is simply "inadequate when interpreting ambiguous laws," and legislative history can help judges interpret undefined or specialized terms in complex statutes.[76] Discerning legislative intent may not always be easy, but it is not impossible. Second, "legislation is the product of a deliberative and informed process," and judges should "provide the meaning that the legislature intended." Such an approach "facilitates healthy interbranch relations" by promoting comity between the legislature and the judiciary.[77] Third, textualism is actually more likely to increase judicial discretion and produce unintended consequences. If judges can consult dictionaries, then they should be able to consult other extratextual sources such as committee reports. Moreover, ignoring the legislature's underlying

[68] SCALIA & GARNER, *supra* note 5, at xxviii.
[69] *See id.* (arguing that textualism will "discourage legislative free-riding, whereby legal drafters idly assume that judges will save them from their blunders").
[70] *Id.*
[71] *Id.* at 376.
[72] *Id.* at 375 ("To be 'a government of laws, not of men' is to be governed by what the laws *say*, and not by what the people who drafted the laws intended.").
[73] KATZMANN, *supra* note 53, at 10.
[74] *But see id.* at 29 ("At times, even when the statute is plain on its face, the judge may find legislative history helpful in reinforcing the court's understanding of the words.")
[75] *Id.*
[76] *Id.* at 35.
[77] *Id.* at 29.

purpose in enacting the statute risks adopting an interpretation "that the legislators did not intend."[78]

C. Pragmatism

Pragmatists employ tools of statutory interpretation to reach a result that appropriately balances a number of factors, including predictability and certainty, economic efficiency, fairness, and the public interest.[79] To reach the best interpretation, judges should consult traditional sources—"cases, statutes, regulations, constitutions, conventional legal treatises, and other orthodox legal materials."[80] But pragmatists also argue that judges should take real-world consequences and societal understandings into account when interpreting an ambiguous statutory provision.[81]

Unlike textualists and intentionalists, pragmatists reject the notion that a statute has one objectively correct meaning. Statutory text has no fixed meaning until it is interpreted.[82] There are multiple permissible understandings, and a pragmatist judge should choose the interpretation "that will produce the best results."[83] Many of the tools advocated by textualists and intentionalists do not definitively resolve ambiguous statutes. For example, "there is no canon for ranking or choosing between canons; the code lacks a key."[84] Similarly, legislatures often leave gaps in laws they pass; given the time it takes for legislatures to pass new laws clarifying prior ambiguities, judges must step in to fill gaps in a reasonable way.[85]

D. Theories in Action: *King v. Burwell*

The Affordable Care Act gives individuals subsidies to buy health insurance in the form of tax credits, to be used in regulated marketplaces called "exchanges." Under the Act, each state was to set up its own exchange, but the federal government would create an exchange if the state did not. One provision of the Act stated that the availability of subsidies would depend on whether an individual purchased insurance through "an Exchange established by the State." The IRS interpreted this provision to allow individuals to receive tax credits "regardless of whether the Exchange is established and operated by a state . . . or HHS." The issue before the Court in *King v. Burwell* was "whether the Act's tax credits are available in States that have a Federal Exchange rather than a State Exchange."[86]

In an opinion by Chief Justice Roberts, the Court rejected the challenge to the law and held that the subsidies could go to exchanges established by the federal government. The opinion contains elements of intentionalism and pragmatism. The Court acknowledged that the

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[78] *Id.* at 48.
[79] *See, e.g.*, Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1 (1996).
[80] *Id.*
[81] Richard A. Posner, *Comment on Professor Gluck's "Imperfect Statutes, Imperfect Courts,"* 129 HARV. L. REV. F. 11 (2015); *see also* Posner, *supra* note 79, at 13.
[82] ESKRIDGE, *supra* note 1, at 803.
[83] Posner, *supra* note 79, at 8.
[84] KATZMANN, *supra* note 53, at 52 (quoting Posner, J.).
[85] Posner, *supra* note 79, at 18–20.
[86] 135 S. Ct. 2480, 2487 (2015).

provision could be read to exclude subsidies for federally established exchanges.[87] However, a "fair reading of legislation demands a fair understanding of the legislative plan," and here, "Congress passed the Affordable Act to improve health insurance markets, not to destroy them."[88] Accepting the challengers' argument would also undermine the larger statutory scheme and produce absurd results. Without the subsidies, other parts of the Act—including the requirement that individuals buy health insurance or pay a penalty—"could well push a State's individual insurance market into a death spiral."[89] To avoid such an outcome, the Court concluded from the statutory context and legislative purpose that the subsidies should flow to federal established exchanges.

Justice Scalia's dissent is a classic articulation of textualism. According to Justice Scalia, "Words no longer have meaning if an Exchange that is *not* established by a State is 'established by the State.'"[90] Context matters, but as "a tool for understanding the terms of the law, not an excuse for rewriting them."[91] He also criticized the Court's efforts to discern legislative intent. It is "interpretive jiggery-pokery," he argued, "to subordinate the express words of the section that grants tax credits to the mere implications of other provisions with only tangential connections to tax credits."[92] In any event, the Court's resort to context and purpose was an unnecessary adventure. "Rather than rewriting the law under the pretense of interpreting it, the Court should have left it to Congress to decide what to do about the Act's limitation of tax credits to state Exchanges."[93]

Conclusion

The interpretive techniques offered in this handout can help you identify and explain the meaning of a statute. Be aware that your reader may respond better to certain tools than to others. Choose your interpretive tools wisely.

[87] *Id.* at 2490.
[88] *Id.* at 2495.
[89] *Id.* at 2493.
[90] *Id.* at 2497 (Scalia, J., dissenting).
[91] *Id.*
[92] *Id.* at 2500.
[93] *Id.* at 2506.