

Codified Canons and the Common Law of Interpretation

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*Every legislature in the United States has codified canons—interpretive “rules of thumb”—to guide statutory interpretation, but these codifications have received virtually no attention in the academy. By comparing the interpretive preferences of each legislature in the United States with the common law canons, this Article asks whether the common law canons, and the dominant theories of statutory interpretation underlying them, are consistent with how legislatures want their statutes to be interpreted. Because the canons are nothing more than common law, legislative enactments that repudiate or support canons should not only be included in any conversation about the canons, but also considered important and controlling. Thus, the codifications suggest that the prevailing interpretive toolbox should be revised and recalibrated, and that the three currently dominant theories of statutory construction—and their claims to being the most appropriate approach for construing statutes in a democracy—should be re-evaluated in light of these legislative choices. Some canons that are controversial in the judiciary and academy, such as recourse to legislative history, are not so controversial in the eyes of legislatures. Other judicially well-settled canons, such as *expressio unius*, are in fact unsettled because legislatures reject them in their codes. Additionally, the Article addresses the prevailing theories of statutory interpretation in the context of the widespread codification of canons and suggests, among other things, that textualism is disconnected from the positive law because textualism’s embargo on extratextual sources conflicts with widely codified legislative preferences. The Article thereby provides a meaningful way forward in the theoretical development of statutory interpretation by assessing which canons the drafters of statutes expect to inform statutory interpretation.*

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INTRODUCTION

How should a judge interpret a statute? When a speaker addresses an audience, the speaker has certain ideas about how his or her words convey meaning. Where there are prevailing rules extrinsic to the speaker's comments—

either the prevailing rules of the community, or perhaps even directives that the speaker himself gave—the speaker ought to expect that the audience will follow those rules.

So, too, with statutes. When a legislature enacts statutes, its members have certain ideas about how those words convey meaning. To economize language and the legislative process, the legislature will rely on prevailing rules of interpretation extrinsic to that particular statute. Legislatures may even prescribe rules and methods by which they wish their statutes to be construed. Scholars and commentators often discuss “legislative preferences,” as expressed in statutes, with respect to particular policies.¹ But “legislative preferences,” as expressed in statutes, with respect to interpretive method remains an uncharted subject.

Statutory construction has a vocabulary consisting of rules of thumb that are said to allow readers to draw inferences about the meaning of a particular statute. These “canons of construction” (also known as maxims of interpretation) guide the methods and sources used in statutory interpretation and are usually deployed according to an interpreter’s preferred methodology. The three dominant theories of how statutes should be interpreted—new textualism, intentionalism, and pragmatism—are each comprised of a collection of assertions about which interpretive rules are appropriate. These theories rely on judgments about how legislatures express their will in language and how legislatures actually operate. They each claim individually to be the most appropriate method for construing statutes in a democracy.² But without reference to how a legislature wishes its statutes to be construed, these methodological theories, and the particular interpretive rules that constitute them, are vulnerable to the criticism that they are not authoritative because they are not the work of the legislature. Judges, for instance, often adopt interpretive methods without supporting the implicit assumption that their methodological choice follows from legislative preferences.³ Some scholars employ rational-choice models that look to legislative reaction to determine whether a court has correctly interpreted a statute,⁴ or they may even attempt to deduce “likely legislative preferences” using probability theory,⁵ all without reference to whether the legislature pre-

1. See, e.g., EINER ELHAUGE, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* 8 (2008) (stating that interpreters should strive to maximize “the satisfaction of enactable political preferences” with respect to a particular policy).

2. See REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 228 (1975).

3. See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 *STAN. L. REV.* 321, 345–53 (1990) (using three Supreme Court cases to illustrate the impact Justices’ political assumptions have on their statutory interpretations).

4. See Linda R. Cohen & Matthew L. Spitzer, *Solving the Chevron Puzzle*, 57 *LAW & CONTEMP. PROBS.* 65, 68–70 (1994); Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases*, 6 *J.L. ECON. & ORG.* 263, 268 n.15 (1990).

5. Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 *COLUM. L. REV.* 2162, 2226–35 (2002) (using probabilistic formulas to justify the application of specific canons as preference-eliciting default rules that ultimately maximize the satisfaction of legislative preferences by spurring more explicit legislative action).

ferred those methods and sources of generating meaning.

But it is not necessary to speculate about “likely legislative preferences” in such a disconnected fashion.⁶ In many cases, legislatures have codified their preferred interpretive methods. More importantly, these codifications demonstrate which canons the legislatures prefer before a case or controversy arises, and before canons and counter-canons can be deployed with a specific policy result in mind.⁷ The result is the widespread codification of many canons across all fifty states.

Because the canons are nothing more than common law, legislative enactments that repudiate or ratify canons should not only be included in any conversation about the canons, but should be considered important and controlling. Observing the patterns of the codified canons enables jurists to follow more closely the interpretive map that legislatures have in mind when they pass statutes and to draw conclusions more generally about the degree to which legislative preferences support or disturb the three dominant interpretive methodologies. What are the prevailing interpretive preferences of legislatures across the United States?

I. THE CANONS AND LEGAL REASONING

The “canons of construction” are a set of background norms and conventions that are widely used by courts when interpreting statutes.⁸ For interpreters, the canons serve as rules of thumb or presumptions that help extract substantive meaning from, among other things, the language, context, structure, and subject matter of a statute.

Canons are integral to the process of interpretation. They have been used since antiquity, and their general contours have been remarkably stable over time.⁹ In Anglo-American law, courts and legal commentators have relied on canons since at least 1584, when Lord Coke laid out rules “for the sure and

6. When I use “legislative preferences,” I do not refer to the particular “expectations that legislators had when they enacted the statute” regarding particular policy results, Eskridge & Frickey, *supra* note 3, at 324, but rather the expectations legislators had regarding the sources and methods by which that statute would be interpreted.

7. 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, 399, 401–06 (1950). As an example of canons and counter-canons, Llewellyn puts forth a “set of mutually contradictory *correct* rules on How to Construe Statutes” that govern statutory construction. *Id.* at 399.

8. See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 817–18 (3d ed. 2001). It should be noted that many canons of construction are applicable to constitutional law, administrative law, and common law. My primary focus here is the canons as applied to statutory construction.

9. See generally Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179. Professor Miller’s impressive historical research demonstrates striking similarities between ancient interpretive texts and modern canons. The general contours of our modern canons are similar to much older interpretive tools, including norms and conventions used to construe ancient Hindu texts, medieval Christian commentary on interpreting the Bible, Talmudic commentary on construing the Old Testament, and rules governing the interpretation of Roman Law.

true . . . interpretation of all statutes in general” in *Heydon’s Case*.¹⁰ The canons were echoed by Blackstone¹¹ and now enjoy ascendancy among judges and legal scholars. Insofar as it can be quantified, one study found that reliance on the canons in the Supreme Court’s majority opinions has experienced a dramatic uptick in the past decade, from below 30% to above 40%.¹²

A. CANONS AS THE COMMON LAW OF INTERPRETATION

The common law should be understood to encompass judicial methodology in addition to the traditional substantive common law subjects, such as the law of torts.¹³ Black’s Law Dictionary does not treat the canons as common law, saying that “most jurisdictions treat the canons as mere customs not having the force of law.”¹⁴ Such “custom,” however, is law-like. The common law of interpretation develops because methods of legal reasoning attach to results and weakly constrain judges in future cases. Like the development of the common law generally, common law interpretive rules develop by “experience,” including “[t]he felt necessities of the time, the prevalent moral and political theories, [and] intuitions of public policy, avowed or unconscious.”¹⁵ As a result, various methods of legal reasoning become widespread because they produce substantive results in which the public has confidence and on which legal actors rely. Over the centuries, judges have developed certain techniques for investigating legislative intent. Courts are, to some extent, bound by those methods of inquiry (though some methods are more widely accepted than others). Lord Coke’s mischief rule, for instance, is still used today.¹⁶

10. *Heydon’s Case*, Y.B. 26 Eliz., fol. 7a, Pasch, (1584) 76 Eng. Rep. 637 (L.R. Exch.). Lord Coke thought judges should look to the mischief that the legislature was attempting to cure:

[F]or the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered:— 1st. What was the common law before the making of the Act. 2nd. What was the mischief and defect for which the common law did not provide. 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.

Id. at 638 (internal citations omitted).

11. See 1 WILLIAM BLACKSTONE, COMMENTARIES *87–92.

12. James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 36 fig. (2005). The set of opinions for this study focused on employment law and included 632 cases with published opinions directly addressing some aspect of the employment relationship. *Id.* at 5.

13. The common law develops through judicial decisionmaking rather than through legislative processes. Past opinions change how the law applies in future cases. *Stare decisis* presumes that future cases will defer to past legal reasoning.

14. BLACK’S LAW DICTIONARY 219 (8th ed. 2004).

15. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

16. See, e.g., *Elliot Coal Mining Co. v. Dir., Office of Workers’ Comp. Programs*, 17 F.3d 616, 631 (3d Cir. 1994) (“[A]dditional support for our parsing of the text of the Act . . . can be found in the

As with the substantive common law, departures from accepted methods of legal reasoning represent significant events. For instance, British courts developed the interpretive rule that judges would not consult legislative history. The rule arose in the absence of interpretive statutes and on the basis of repeated use by judges (and, therefore, was a common law interpretive rule).¹⁷ In 1992, the House of Lords, in *Pepper v. Hart*, departed from the common law rule that legislative history was not to be consulted.¹⁸ One law lord even admitted to peeking at legislative history in spite of the rule: “I have to confess that on many occasions I have had recourse to [legislative history], of course only to check if my interpretation had conflicted with an express Parliamentary intention.”¹⁹ But though he peeked in previous cases, Lord Griffiths was bound by England’s common law interpretation and, therefore, was unwilling to rely on legislative history in his opinions. *Pepper* was not a landmark case because of its legal result (a yawner of a holding: the taxable amount of a fringe benefit equals the cost to the employer of providing the benefit!); it was a landmark case because it changed England’s common law of interpretation.

Thus, the canons form a body of interpretive common law that legitimizes sources and methods of legal reasoning, all with an eye toward how the legislature would want its intent to be effectuated. As in *Pepper*, the canons do more to limit the sources of legal reasoning than they do to order them with precision.²⁰ Resort to context is fine, resort to statutory purpose is fine, but employing outlandish extrinsic sources of meaning is not. However, the com-

‘mischief’ rule, discussed in the venerable *Heydon’s Case*. That canon of construction directs a court to look to the ‘mischief and defect’ that the statute was intended to cure.” (quoting *Heydon’s Case*, Y.B. 26 Eliz., fol. 7a, Pasch, (1584) 76 Eng. Rep. 637, 638 (L.R. Exch.)); *In re Webb*, 214 B.R. 553, 556 (E.D. Va. 1997) (noting that the result is “consistent with the application Virginia’s venerable ‘mischief rule’ of statutory construction”); *N. X-Ray Co. v. State ex rel. Hanson*, 542 N.W.2d 733, 736–38 (N.D. 1996) (construing statute with “the ‘Mischief Rule’ in mind”); *Rector & Visitors of the Univ. of Va. v. Harris*, 387 S.E.2d 772, 775 (Va. 1990) (noting that Supreme Court of Virginia has “reiterated and reaffirmed the 400-year-old ‘mischief rule’ of statutory construction”). For a description of the mischief rule, see *supra* note 10.

17. See Rebecca R. Zubaty, *Foreign Law and the U.S. Constitution: Delimiting the Range of Persuasive Authority*, 54 UCLA L. Rev. 1413, 1423 n.40 (noting the House of Lords’s “longstanding precedent” prohibiting the use of legislative history).

18. [1993] A.C. 593 (H.L. 1992) (appeal taken from Eng.) (U.K.).

19. *Id.* at 618.

20. In *Pepper*, the House of Lords abandoned the rule that British courts may not consult legislative history, but the law lords did not state when legislative history trumps indicia of meaning in other sources. *Id.* Several Lords described the circumstances in which the use of legislative history is justifiable. See, e.g., *id.* at 613 (opinion by Lord Chancellor) (The Lord Chancellor stated that “reference to Parliamentary material” was “justifiable” to confirm textual meaning, “determine a meaning where the provision is ambiguous or obscure,” or “determine the meaning where the ordinary meaning is manifestly absurd or unreasonable”); *id.* at 620 (opinion by Lord Oliver of Aylmerton) (Lord Oliver of Aylmerton stated that legislative history could only be consulted “where the expression of the legislative intention is genuinely ambiguous or obscure or where a literal or prima facie construction leads to a manifest absurdity and where the difficulty can be resolved by a clear statement directed to the matter in issue”); *id.* at 634 (opinion by Lord Browne-Wilkinson) (Lord Browne-Wilkinson concluded that reference to Parliamentary material “should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure

mon law of interpretation has no prevailing rules for when an interpretation based on statutory purpose should trump a conflicting interpretation based on context.²¹ In this sense, though the “canons of construction are no more than rules of thumb that help courts determine the meaning of legislation,”²² they do, in fact, constrain and direct interpretive approaches to statutory construction, albeit weakly.²³

B. THREE THEORIZED ACCOUNTS OF STATUTORY INTERPRETATION

The “legitimacy of the canons” is bound tightly “to the issue of how statutes are (or ought to be) interpreted.”²⁴ Though, broadly speaking, there are widely recognized constraints on sources and methods of interpretation, there is remarkably little consensus about the specifics by which interpretation should proceed.²⁵ The array of canons that ought to be properly deployed in construing statutes, and the weight accorded to each canon, vary widely. American jurists and scholars generally subscribe to one of three leading theories of how statutes ought to be interpreted: intentionalist theory, new textualist theory, and pragmatic theory.²⁶ All three theories claim to be the most appropriate approach to construing statutes in a democracy, and they instruct decision-makers (whether

words”). These descriptions, however, do not place legislative history in a finely detailed hierarchy of sources of meaning.

21. *See, e.g.,* Llewellyn, *supra* note 7, at 401 (“[T]o make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon . . .”).

22. *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992).

23. *See* Eskridge & Frickey, *supra* note 3, at 381 (“Over time the hermeneutical discourse develops traditions that constrain the sorts of arguments that can be made, and new discourses build upon the agreements reached in prior discourses.”).

24. 3 NORMAN J. SINGER & J.D. SHAMBLE SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 65A:13, at 797 (7th ed. 2008) [hereinafter SUTHERLAND].

25. Nor is there even widespread consensus about the degree to which the canons should reflect the actual legislative process—for some scholars, canons are not even about substantive legislative preferences. They are about making judges’ lives easier. The key is “understanding that many of these canons reflect neither efforts to divine statutory meaning nor attempts to further judicial or legislative preferences, but rather reflect default rules designed to elicit legislative preferences under conditions of uncertainty.” Elhauge, *supra* note 5, at 2165. The judge’s application of whatever palette of canons he chooses to apply serves to “provoke a legislative reaction” if application of the canons produces a result contrary to legislative intent. The ultimate result of this conformity is (hopefully) a clearer expression of legislative choices as the legislature drafts statutes with greater precision. This means drafting statutes that press the right judicial buttons to achieve the legislature’s desired result. For other scholars, however, canons are closely connected to the legislative process and constitutional constraints. They are the product of careful observation of how substantive and procedural decisionmaking is made by the legislature, and aimed principally at achieving the legislature’s desired outcome rather than forcing a legislative response. In sum, the traditional view about how to go about deriving statutory meaning—which canons to apply, how to apply them, how heavy the presumptions—is “mere custom[]” and up to the judge and the judiciary. BLACK’S LAW DICTIONARY 219 (8th ed. 2004) (definition of “canon of construction”).

26. Descriptively, there are many different ways of dividing up the panorama of theories on statutory interpretation, but I believe these three accounts capture the field as it exists today. I adopt the division advanced in WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 219 (2d ed. 2006); *see also* 3 SUTHERLAND, *supra* note 24, § 65A:13, at 797 (7th ed. 2008) (stating that the “three traditional or ‘foundationalist’ theories of statutory interpretation which continue to influence modern theories of statutory interpretation [are] intentionalism, purposivism, and textualism”).

judges, agencies, or citizens) as to which canons are appropriate (or inappropriate) for use in statutory interpretation.

Intentionalist theories emphasize the realization of legislative intent as the aim of statutory interpretation. Democratic values play a critical part in shaping intentionalism. Statutes are the product of representative democracy, and the will of the legislative body is what constitutes “intent.” But how is that will expressed? Legislative intent must survive processes such as bicameralism and veto. Aggregating intent is also difficult, but it is the only way to determine the content of a legislative deal. Critics rightly suggest that it is impossible to ascertain the singular intent of hundreds of representatives regarding a factual situation none of them imagined.²⁷ There is no scientific way to solve this aggregation problem when the text of a statute is unclear. Careful study of the legislative process is the only way to identify evidence of the will of the legislative body. As a consequence, intentionalists view extrinsic legislative sources as legitimate sources of authority, if only as evidence of legislative intent to be given weight appropriate to their circumstances. Intentionalists will also consider the legislature’s general purpose in construing a statute.²⁸

New textualist theories react to the indeterminacy of intentionalist theories and advance a more constrained vision of intentionalism. For new textualists, the statutory language itself is the last best evidence of legislative intent. Consequently, new textualism discards legislative history as an illegitimate source of authority because it does not pass through the legislative process.²⁹ As a consequence, the new textualist view conceives of at least this aspect of statutory interpretation as constitutionally mandated. The new textualists embrace a less strict vision of textualism in which absurd results are discarded along with legislative history, and statutory text is examined in context. The new textualists will consider other provisions of the same statute or similar provisions in the code, examine how borrowed statutes are interpreted, and consult contemporary dictionaries. New textualists are no less focused on democratic values than the intentionalists: the pre-eminent democratic value embraced by new textualists is to hold the legislature clearly accountable by requiring it to say in the statutory text exactly what it means.

Pragmatic theories reflect a more dynamic and flexible view, and recognize that “human decisionmaking tends to be polycentric, spiral, and inductive, not

27. ESKRIDGE, FRICKEY & GARRETT, *supra* note 26, at 222.

28. See *Holy Trinity Church v. United States*, 143 U.S. 457 (1892) (interpreting a statute prohibiting paying for the transportation of an “alien” to the United States “to perform labor or service of any kind” to be inapplicable to Holy Trinity Church’s importation of an Englishman to serve as rector and pastor because “[n]o one reading [the statute] would suppose that congress had in its mind any purpose of staying the coming into this country of ministers of the gospel, or, indeed, of any class whose toil is that of the brain”).

29. See *Zedner v. United States*, 547 U.S. 489, 509–10 (2006) (Scalia, J., concurring) (“For reasons I have expressed elsewhere, I believe that the only language that constitutes ‘a Law’ within the meaning of the Bicameralism and Presentment Clause of Article I, § 7, and hence the only language adopted in a fashion that entitles it to our attention, is the text of the enacted statute.” (citation omitted))

unidimensional, linear, and deductive.”³⁰ As a result, pragmatism relies on multiple supporting arguments rather than any conclusive single argument. The authoritative sources associated with pragmatic theories, therefore, are similarly varied. The Funnel of Abstraction is the most inclusive shorthand account of pragmatism, reflecting multiple considerations from the concrete to the abstract: “statutory text, specific legislative intent, imaginative reconstruction, legislative purpose, evolution of statute, and current [democratic, rule of law, and social] values.”³¹ There is no single authoritative source. Rather, a responsible interpreter will make arguments based on multiple factors and weigh competing arguments against each other. The arguments and authorities are eclectic. Critics of pragmatism concede that it is compelling descriptively (because it is an amalgamation of many approaches) but worry that it does little to constrain judges or discipline interpretive methodology.

At all events, statutory interpretation today reflects the acceptance of canons as a law-like interpretive asset, which are then usually deployed in accordance with one of these three theories. Yet neither the three theories nor scholars of statutory interpretation take account of the fact that legislatures are extremely active when it comes to enacting or refuting canons.³² Congress, the legislatures in all fifty states, and the District of Columbia have codified canons in varying degrees. In this way, legislatures seek to instruct judges on how legislatures operate and to govern the sources and methods of statutory interpretation.³³

Much of these theories’ legitimacy depends on legislative action. Just as the legitimacy of a particular common law canon is tied to each theory’s normative claim that it is the most appropriate method for construing statutes in a democracy,³⁴ conversely, the legitimacy of each theory depends on whether legislatures have ratified or rejected the interpretive rules upon which the theory relies. Therefore, each of these three theories, their claims to upholding democratic values and the rule of law, and the authorities they view as legitimate, are implicated by the patterns of canons that legislatures across the United States have adopted or rejected in their codes. If the canons are understood as

30. ESKRIDGE, FRICKEY & GARRETT, *supra* note 26, at 249.

31. *Id.* at 250 fig.

32. Even Nicholas Rosenkranz, who has considered whether Congress should adopt federal interpretive rules, does not examine the interpretive rules of the states or appreciate their significance in the context of the common law of interpretation. See Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002). He considers whether Congress should adopt state interpretive codes but does not recognize the substance of state codifications of canons, nor consider how those patterns affect statutory interpretation more generally. See *id.* at 2132–33.

33. Even though Chief Justice Marshall emphasized that it is “the province and duty of the judicial department to say what the law is,” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), legislatures can guide judges in the exercise of that duty by codifying or rejecting interpretive canons. Legislating interpretive methodology provides a stable platform on which legislatures can write statutes and from which courts can interpret. At the very least, it is more difficult for courts to ignore particular canons when they are codified than when they are not. See also WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 284 (1994) (noting that Congress can be frustrated by changing interpretive regimes).

34. See 3 SUTHERLAND, *supra* note 24, § 65A:13, at 797 (7th ed. 2008).

methodological common law, then legislative enactments that ratify or discredit canons should not only be included in any analysis of the canons and, by extension, the prevailing theories of statutory interpretation; those enactments should control it. After examining the prevailing interpretive preferences of the states, this Article will consider how well the claims and practices of these theories match legislatures' preferences for interpretation.

II. THE CODIFIED CANONS

Codification of the canons forces interpreters to re-examine the theory and practice of statutory interpretation as the common law of interpretation is displaced by statutory interpretive rules. Based on a review of the general provisions of the codes of every state, the District of Columbia, and the United States, it appears that legislative codification of the canons is both a widespread and substantive practice. Each state, the District of Columbia, and the United States have a set of laws directing interpreters as to how the legislature wishes its statutes to be construed.³⁵

35. Federal Government, tit. 1, ch. 1 ("Rules of Construction"); Alabama, tit. 1, ch. 1 ("Construction of Code and Statutes"); Alaska, tit. 1, ch. 10, art. 2 ("General Definitions and Rules of Statutory Construction"); Arizona, tit. 1, ch. 2, art. 2 ("General Rules of Statutory Construction"); Arkansas, tit. 1, ch. 2, subch. 2 ("Construction"); California Civil Code ("Preliminary Provisions" & "Definitions and Sources of Law") (California was the only code for which there is no code-wide interpretive section because it is organized by subject matter and "[t]he general rules for the construction of statutes are contained in the preliminary provisions of the different codes." CAL. GOV'T CODE § 9603 (West 2007). As an imperfect solution, I used the California Civil Code's interpretive provisions with the exception of the California Civil Code's "Maxims of Jurisprudence," CAL. CIV. CODE §§ 3509–3548 (West 2007), which are unique to the Civil Code. The remaining codifications appear to be more or less typical of provisions governing the interpretation of other subject matter codes.); Colorado, tit. 2, art. 4 ("Construction of Statutes"); Connecticut, tit. 1, ch. 1 ("Construction of Statutes"); Delaware, tit. 1, ch. 3 ("Interpretation of Statutes"); District of Columbia, tit. 45 ("Compilation and Construction of Code"); Florida, tit. 1 ("Construction of Statutes"); Georgia, tit. 1, ch. 3 ("Laws and Statutes"); Hawaii, tit. 1, ch. 1 ("Common Law; Construction of Laws"); Idaho, tit. 73, ch. 1 ("Construction of Statutes"); Illinois, ch. 5, act 70 ("Statute on Statutes"); Indiana, tit. 1, art. 1, ch. 4 ("Construction of Statutes"); Iowa, tit. I, subtit. 2, ch. 4 ("Construction of Statutes"); Kansas, ch. 77, art. 2 ("Statutory Construction"); Kentucky, tit. XLI, ch. 446 ("Construction of Statutes"); Louisiana, tit. 1, ch. 1 ("Interpretation of Revised Statutes"); Maine, tit. 1, ch. 3 ("Rules of Construction"); Maryland, art. 1 ("Rules of Interpretation"); Massachusetts, pt. I, tit. I, ch. 4 ("Statutes"); Michigan, ch. 8 ("Statutes"); Minnesota, ch. 645 ("Interpretation of Statutes and Rules"); Mississippi, tit. 1, ch. 3 ("Construction of Statutes"); Missouri, tit. I, ch. 1 ("Laws in Force and Construction of Statutes"); Montana, tit. 1, chs. 2–3 ("Statutory Construction" & "Maxims of Jurisprudence"); Nebraska, ch. 49 ("Law"); Nevada, preliminary ch. ("General Provisions"); New Hampshire, tit. 1, ch. 21 ("Statutory Construction"); New Jersey, tit. 1, ch. 1 ("Definitions and General Rules of Construction"); New Mexico, ch. 12, arts. 2–2A ("Statutory Construction" & "Uniform Statute and Rule Construction Act"); New York ("General Construction Law"); North Carolina, chs. 12 & 164 ("Statutory Construction" & "Concerning the General Statutes of North Carolina"); North Dakota, tit. 1, chs. 1-01 to 1-02 ("General Principles and Definitions" & "Rules of Interpretation"); Ohio, ch. 1 ("Definitions; Rules of Construction"); Oklahoma, tit. 25, ch. 1 & tit. 75, ch. 2 ("Meaning of Terms and Construction of Statutes" & "Statutes and Session Laws"); Oregon, tit. 17, ch. 174 ("Construction of Statutes; General Definitions"); Pennsylvania, tit. 1, pt. V ("Statutory Construction"); Rhode Island, tit. 43 ("Statutes and Statutory Construction"); South Carolina, tit. 2, ch. 7 ("Legislative Enactments"); South Dakota, tit. 2, chs. 2–14 ("Construction and Effect of Statutes"); Tennessee, tit. 1, ch. 3 ("Construction of Statutes"); Texas, Government Code, tit. 3, subtit.

The very large set of interpretive rules is far from homogeneous. To name just a few species, there are canons, such as the *expressio unius* canon, that respond to the indeterminacy of written language. *Expressio unius* stands for the common sense language rule that the expression of one thing suggests the exclusion of another thing.³⁶ Other canons, such as the borrowed statute rule, are used to sanction the use of sources outside the text of the statute in order to illuminate statutory language. The borrowed statute rule states that when a legislature adopts a statute from a foreign jurisdiction, it implicitly incorporates the settled interpretations of the foreign statute's judiciary.³⁷ Still other canons, such as the purpose rule, which requires an interpreter to identify the object the legislature was attempting to achieve and interpret ambiguous provisions to achieve that object, are used to enhance the legislature's ability to achieve the policy goals that form the foundation of statutes. Because of this variety, scholars use a number of different taxonomies to classify the canons. Some scholars classify the canons along functional categories,³⁸ while others taxonomize according to the general values that various canons support.³⁹

The taxonomy adopted here must be responsive to both the practices of the judiciary and the values and sources of authority emphasized by statutory interpretation's three dominant sets of theories: intentionalism, new textualism,

B, ch. 312 ("Construction of Words and Phrases"); Utah, tit. 68, ch. 3 ("Construction"); Vermont, tit. 1, ch. 3 ("Construction of Statutes"); Virginia, tit. 1, ch. 2.1 ("Common Law and Rules of Construction"); Washington, tit. 1, ch. 1.12 ("Rules of Construction"); West Virginia, ch. 2, art. 2 ("Legal Holidays; Special Memorial Days, Construction of Statutes; Definitions"); Wisconsin, ch. 990 ("Construction of Statutes"); Wyoming, tit. 8, ch. 1 ("Common Law, Statutes and Rules of Construction").

Because the mission of this paper is to examine rules of interpretation that can be applied to the entire code, I only examine rules of interpretation that govern a polity's entire legal system. I do not examine legislative interpretive directives that apply only to a local section of the code, *see, e.g.*, 21 U.S.C. § 854(d) (2006) ("The provisions of this section shall be liberally construed to effectuate its remedial purposes."), or provisions that deal with the interpretation of dates, *see, e.g.*, OHIO REV. CODE ANN. § 1.14–15 (LexisNexis 1990) (explaining how to interpret time, legal holidays, and effective dates in statutes). In order to identify general legislative preferences for statutory interpretation, the rules must be of equally general application. Such rules must reflect relatively universal principles for interpreting statutes, and therefore must extend to the entire code. Specific interpretive rules that self-restrict to a particular portion of a code, with the exception of portions of California's Civil Code, are beyond the scope of this paper. I also did not examine the constitutions of each jurisdiction for interpretive rules because my focus is legislative preference. This methodology is far from perfect, but I believe it produces the most reliable conclusions from a comparative perspective. Many codes contain interpretive provisions that apply only to specific subject matter, but these specific rules do not provide a reliable means of comparison across states. General rules better reveal the legislative view of how legislatures operate, how the law functions, and how language interfaces with democratic directives.

36. *See, e.g.*, *Tate v. Ogg*, 195 S.E. 496, 499 (Va. 1938) (a statute that applied to "any horse, mule, cattle, hog, sheep or goat" did not apply to turkeys).

37. *See, e.g.*, *Zerbe v. State*, 578 P.2d 597, 598 (Alaska 1978) (looking to applications of Federal Tort Claims Act to interpret similar language in a state statute), *overruled on other grounds by Stephens v. State*, Dept. of Revenue, 746 P.2d 908 (Alaska 1987), and *Kinegak v. State*, Dept. of Corr., 129 P.3d 887 (Alaska 2006).

38. *See, e.g.*, CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 150 (1990).

39. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994).

and pragmatism. I adopt the basic taxonomy of Professors Eskridge, Frickey, and Garrett, who compiled an extensive list of canons derived from Supreme Court opinions from the 1986 through 1993 Terms.⁴⁰ The final list includes those canons that were both sufficiently general in scope to apply to the whole code and relevant to state and federal governments. The canons are organized into three general categories—textualist canons, extrinsic source canons, and substantive policy canons. The list of canons below is not meant to be exhaustive.⁴¹

A. TEXTUAL CANONS

Textual canons focus on the language of the statute itself and the relationships between statutory provisions.

1. Linguistic Inferences

Linguistic inference canons provide guidelines about what the legislature likely meant, given its choice of some words and not others. The linguistic inference canons include classic logical canons such as *expressio unius*,⁴² *noscitur a sociis*,⁴³ and *ejusdem generis*.⁴⁴ Other inferential rules encourage

40. ESKRIDGE, FRICKEY & GARRETT, *supra* note 8, app. B.

41. I have classified the canons as codified or rejected by a particular statute. The principle I have used to determine whether there is a codification or rejection is whether a codification forecloses or endorses the use or nonuse of a particular canon. These classifications should be treated as signposts to the common law canons rather than fully textured enactments. It is crucial to consult the source codification, as whenever complicated and diverse rules are forced into simplified boxes, resolution is lost; as will become clear by the large variety of codifications quoted, these rules are complex. I have omitted the total number of legislatures that do not appear to have taken a position on a particular canon. This omission is justified because sufficiently reliable inferences cannot be drawn from this kind of legislative inaction, *see supra* text accompanying note 182, and my focus is on manifest legislative preference. It is, at best, tenuous to draw legislative preference inferences based wholly on inaction or silence. Such inferences would just be guessing in the dark—silence could mean satisfaction with the conventional rules (as customary and loosely constrained as they may be), or it could mean nothing more than that a legislature has not yet considered interpretive rules, or it could mean agreement with the interpretive rules codified by other jurisdictions (if there is widespread agreement on the particular rule).

In some cases, only a few, or one, legislature has taken a position on a canon. Even when only a small number of legislatures have expressed a choice, it is possible to draw appropriately cautious conclusions, focusing on whether there is agreement between jurisdictions, and the precise form of the rule enacted. Where more legislatures actively reach consensus or actively disagree on the utility of a particular canon, the patterns increase in significance.

42. The inclusion of one thing indicates exclusion of others. *See Tate v. Ogg*, 195 S.E. 496, 499 (Va. 1938) (holding that where a statute applied to “any horse, mule cattle, hog, sheep or goat,” it did not apply to turkeys); 2A SUTHERLAND, *supra* note 24, § 47:23, at 404 (7th ed. 2007) (stating that where a list of things is designated, “all omissions should be understood as exclusions”).

43. Literally, “it is known from its associates,” but more usefully described as outlining the inference that ambiguous words may be illuminated by the words grouped with it in a statute. 2A SUTHERLAND, *supra* note 24, § 47:16 (7th ed. 2007); *see Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 305–07 (1961) (given the word string “resulting from exploration, discovery, or prospecting,” the Court construed “discovery” to mean only discovery of mineral resources and to not include scientific discoveries).

44. Meaning “of the same kind” and the touchstone for inferences that particular words implicitly establish a class of objects and that provision applies to that class. 2A SUTHERLAND, *supra* note 24, § 47:17 (7th ed. 2007); *see Heathman v. Giles*, 374 P.2d 839, 839–40 (Utah 1962) (given the word string “any sheriff, constable, peace officer, state road officer, or any other person charged with the

interpreters to follow the ordinary usage of text unless the legislature has itself defined the word or the phrase has acquired a technical meaning.⁴⁵ Because dictionaries report common usage, the dictionary rule supports consulting widely used dictionary definitions of terms the legislature has not defined.⁴⁶

Within the linguistic inference genus there are also rules that limit the scope of interpretive exploration and focus the reader on the text of the statute alone. The plain meaning rule advises interpreters to follow the plain meaning of language unless the text suggests an absurd result.⁴⁷ The rule of “strict” construction (as opposed to “liberal” construction) is a meta-textual rule that “limits the application of the statute by the words used.”⁴⁸ This means that no reading of the statute will be taken as legislative intent unless that particular reading is clearly expressed by the words of the statute. Strict construction, therefore, plays into other text-based language inferences: the application of the statute should be limited by its express terms, and those terms will be defined by their ordinary usage and the logical canons.

Strict construction is a source-based canon that commends a textualist methodology. One famous new textualist—Justice Scalia—balks when textualism is associated with strict constructionism:

Textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute. I am not a strict constructionist, and no one ought to be—though better that, I suppose, than a nontextualist. A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.⁴⁹

duty of enforcement of the criminal laws of this state,” the court held that prosecutors were not “other person[s] charged with the duty of enforcement of the criminal laws” because “other person[s]” is limited by the class described in the initial word string).

45. See *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 228 (1994) (using ordinary usage canon to hold that the Federal Communication Commission’s authority to “modify” tariff requirements does not allow it to waive tariffs because “[m]odify,” in [the Court’s] view, connotes moderate change” and stating that “[i]t might be good English to say that the French Revolution ‘modified’ the status of the French nobility—but only because there is a figure of speech called understatement and a literary device known as sarcasm”).

46. See *Muscarello v. United States*, 524 U.S. 125, 128 (1998) (consulting the Oxford English Dictionary, Webster’s Third New International Dictionary, and Random House Dictionary of the English Language Unabridged for the meaning of the word “carry”); 2A SUTHERLAND, *supra* note 24, § 46:2, at 162–64 (7th ed. 2007).

47. 2A SUTHERLAND, *supra* note 24, § 46:1, at 137–41 (7th ed. 2007). One notable example, *United States v. Marshall*, 908 F.2d 1312 (7th Cir. 1990) (en banc), *aff’d sub nom Chapman v. United States*, 500 U.S. 453 (1991), demonstrates the difficulty surrounding the application of the plain meaning rule and whether or not an absurd result exception attaches to a particular circumstance. In *Marshall*, a mandatory minimum sentencing statute was triggered by selling more than one gram of a “mixture or substance containing a detectable amount” of LSD. *Id.* at 1315. The court held that it was “not possible to construe the words of [the statute] to make the penalty turn on the net weight of the drug rather than the gross weight of [the] carrier and drug,” even though the paper on which the LSD was delivered weighed 110 times the weight of the LSD. *Id.* at 1315, 1317. Judge Posner dissented partly because of a “constitutional commitment to rationality,” noting that “[a]ll this seems crazy.” *Id.* at 1333, 1317 (Posner, J., dissenting).

48. *Chrisman v. Terminal R. Ass’n*, 157 S.W.2d 230, 234 (Mo. Ct. App. 1942).

49. ANTONIN SCALIA, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 23 (Amy Gutmann ed., 1997).

But strict construction is already constrained in exactly that way: Sutherland warns that “[e]ven when one is construing a statute strictly, it must be reasonable.”⁵⁰ And this denunciation also seems to unfairly portray strict constructionism as giving a statute’s words the narrowest possible meaning of which they are susceptible, which strict construction does not.⁵¹ Rather, strict construction simply considers the meaning that will attach to the text of a statute and does not go beyond—it confines the operation of the law “to cases which plainly fall within its terms.”⁵²

Codification (or non-codification) of the linguistic inference canons is arrayed in a few identifiable patterns across the United States. Few states have codified the logical inference canons as a matter of general law. New Mexico has codified the *ejusdem generis* and *noscitur a sociis* canons in far less arcane language: “In considering the text of a statute or rule . . . the following aids to construction may be considered in ascertaining the meaning of the text: (1) the meaning of a word or phrase may be limited by the series of words or phrases of which it is a part; and (2) the meaning of a general word or phrase following two or more specific words or phrases may be limited to the category established by the specific words or phrases.”⁵³ One might consider context-directed interpretive statutes, such as Ohio’s directive that “[w]ords and phrases shall be read in context,”⁵⁴ to implicitly adopt *ejusdem generis* and *noscitur a sociis*.⁵⁵ However, while “context” might arguably include *ejusdem* and *noscitur* because both canons turn on a contextual relationship with other words in a series, “context” is too imprecise for these specific rules to count as a codification.

No legislature has expressly codified *expressio unius*, but a few states have implicitly repealed it. Alaska, Maryland, and Virginia all have statutes designed to create a presumption that the expression of certain subjects does not exclude unlisted subjects.⁵⁶ Alaska’s statute serves as a good example: “When the words ‘includes’ or ‘including’ are used in a law, they shall be construed as though followed by the phrase, ‘but not limited to.’”⁵⁷ Maryland’s statute provides an escape, repealing *expressio unius* “unless the context requires otherwise.”⁵⁸ In an interesting twist, Minnesota applies an *expressio unius*-like rule only to exceptions: “Exceptions expressed in a law shall be construed to exclude all others.”⁵⁹ In Minnesota, exceptions are therefore a limited special case in which an *expressio unius* maneuver is appropriate. Minnesota’s application of *expressio unius* to exceptions, however, is essentially a

50. 3 SUTHERLAND, *supra* note 24, § 58:2, at 90 (7th ed. 2008).

51. *Id.* (recognizing that strict construction “does not require that the words of a statute be given the narrowest meaning of which they are susceptible”).

52. *Id.*

53. N.M. STAT. § 12-2A-20(A) (2005). Minnesota has also implicitly codified *ejusdem generis* and *noscitur a sociis*: “general words are construed to be restricted in their meaning by preceding particular words.” MINN. STAT. § 645.08(3) (2008).

54. OHIO REV. CODE ANN. § 1.42 (LexisNexis 1990).

55. See 85 OHIO JUR. 3D *Statutes* § 215 (2004).

56. See ALASKA STAT. § 01.10.040(b) (2008); MD. CODE ANN. art. 1, § 30 (LexisNexis 2005 & Supp. 2008); VA. CODE ANN. § 1-218 (2008).

57. ALASKA STAT. § 01.10.040(b) (2008).

58. MD. CODE ANN. art. 1, § 30 (LexisNexis 2005 & Supp. 2008).

59. MINN. STAT. § 645.19 (2008).

restatement of the canon that exceptions should be construed narrowly⁶⁰—which is codified in an adjacent sentence⁶¹—and does not represent an endorsement of *expressio unius* generally. As a result, Minnesota was not coded as either rejecting or endorsing *expressio unius* as a general matter.⁶²

Codification of the ordinary usage canon is widespread, while no legislature has explicitly codified the dictionary rule. The Massachusetts rule has the usual formulation: “Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning.”⁶³ Consulting a dictionary is often the default primary route for interpreters to reveal the “common and approved usage of the language,” and therefore the dictionary rule is implicitly codified by these provisions.⁶⁴ The second part of the statute, technical words and phrases not defined by the legislature, can be taken as a gesture toward more specialized dictionaries.

The plain meaning rule has been widely codified. Many states have implicitly codified the plain meaning rule by referring to its absurd results exception. For instance, many states have enacted a code-wide presumption that “[a] just and reasonable result is intended.”⁶⁵ Others have legislated more directly that, “[w]here the words of a law are ambiguous: . . . Every construction which leads to an absurdity shall be rejected.”⁶⁶ Still others invoke the plain meaning rule but do not expound upon it.⁶⁷ Connecticut is one of the few states to expressly codify the plain meaning rule, requiring that

the meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.⁶⁸

60. See *infra* note 107.

61. MINN. STAT. § 645.19 (“Provisos shall be construed to limit rather than to extend the operation of the clauses to which they refer.”).

62. Pennsylvania has an identical provision. 1 PA. CONS. STAT. § 1924 (2006).

63. MASS. GEN. LAWS ANN. ch. 4, § 6 (West 2006).

64. See, e.g., *Muscarello v. United States*, 524 U.S. 125, 128 (1998) (consulting the Oxford English Dictionary, Webster’s Third New International Dictionary, and Random House Dictionary of the English Language Unabridged for the meaning of the word “carry”).

65. COLO. REV. STAT. § 2-4-201(c) (2008).

66. HAW. REV. STAT. § 1-15 (1993).

67. See, e.g., IND. CODE § 1-1-4-1(1) (1998) (“Words and phrases shall be taken in their plain, or ordinary and usual, sense.”). Oklahoma obliquely invokes the plain meaning rule by stating that words should be understood ordinarily unless a reason to do otherwise “plainly appears.” OKLA. STAT. ANN. tit. 25, § 1 (West 2008). This focus on the “plain” text is the hallmark of the plain meaning rule.

68. CONN. GEN. STAT. § 1-2z (2007); see also LA. REV. STAT. ANN. § 1:4 (2003) (“When the wording of a Section is clear and free of ambiguity, the letter of it shall not be disregarded under the pretext of pursuing its spirit.”); N.M. STAT. § 12-2A-19 (2005) (“The text of a statute or rule is the primary, essential source of its meaning.”).

Most surprising is the finding that a large number of states have rejected strict construction, while no legislature has codified strict construction.⁶⁹ States reject strict construction by passing general statutes adopting liberal construction. South Dakota exemplifies such an adoption: “[T]he law of this state respecting the subjects to which it relates and its provisions and all proceedings under it are to be liberally construed with a view to effect its objects and to promote justice.”⁷⁰

Why is it permissible to draw the inference that adopting liberal construction implicitly repeals the rule of strict construction? Although “[s]trict construction is not . . . the exact converse of liberal construction” because “it does not require that the words of a statute be given the narrowest meaning of which they are susceptible,”⁷¹ neither does strict construction commend the most comprehensive application of the words of the statute. Liberal construction is incompatible with strict construction; it asks interpreters to fill out the language to the brim, where strict construction would halt them at the line.⁷² Moreover, the logical conclusion that liberal construction rejects strict construction is especially appropriate where legislators themselves see the connection between the two. Washington State adopts a liberal interpretation and rejects strict interpretation in the same breath: “The provisions of this code shall be liberally construed, and shall not be limited by any rule of strict construction.”⁷³

2. Grammar and Syntax

It seems obvious that legislatures would follow basic conventions of grammar and syntax and would always encourage rigid adherence to these rules through their interpretive pronouncements. What seems obvious here, however, is wrong.

69. Pennsylvania has a limited and specific list of laws that should be strictly construed (“(1) Penal provisions. (2) Retroactive provisions. (3) Provisions imposing taxes. (4) Provisions conferring the power of eminent domain. (5) Provisions exempting persons and property from taxation. (6) Provisions exempting property from the power of eminent domain. (7) Provisions decreasing the jurisdiction of a court of record. (8) Provisions enacted finally prior to September 1, 1937 which are in derogation of the common law.”). But this is hardly an adoption of strict construction—that list is merely an exception to the directive that “[a]ll other provisions of a statute shall be liberally construed.” 1 PA. CONS. STAT. § 1928 (2006). Rather, the list is an example of the rejection of strict construction, but not as a code-wide default rule.

70. S.D. CODIFIED LAWS § 2-14-12 (2004). Texas has a liberal construction provision, but it is in a subchapter that applies to civil statutes. TEX. GOV’T CODE ANN. §§ 312.001, 312.006 (Vernon 2005) (“The Revised Statutes are the law of this state and shall be liberally construed to achieve their purpose and to promote justice.”). As a result, I did not count it towards rejecting strict construction or adopting liberal construction generally.

71. *Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d 828, 831 (Tex. 1958).

72. See 3 SUTHERLAND, *supra* note 24, § 58:2 (7th ed. 2008) (stating that liberal and strict construction “meaningfully characterize attitudes,” with “liberal” signifying “an interpretation which produces broader coverage or more inclusive application of statutory concepts,” whereas, strict construction “limits the application of the statute by the words used”).

73. WASH. REV. CODE § 1.12.010 (2008).

Table 1. Linguistic Inference Canons⁷⁴

CANON	CODIFIED	REJECTED BY CODE
<i>Expressio unius</i> : Expression of one thing suggests the exclusion of others.	0	3
<i>Noscitur a sociis</i> : Interpret a general term to be similar to more specific terms in a series.	2	0
<i>Ejusdem generis</i> : Interpret a general term to reflect a class of objects described in more specific terms accompanying it.	2	0
Ordinary usage: Follow ordinary usage of terms, unless the legislature gives them a specified or technical meaning.	34	0
Dictionary definition: Follow dictionary definitions of terms, unless the legislature has provided a specific definition.	34	0
Plain Meaning Rule/absurd result exception: Follow the plain meaning of the statutory text, except when the text suggests an absurd result or a scrivener's error.	15	0
Strict construction: Statutes should be strictly construed.	0	17

Common grammar canons include inferences relating to the use of and/or⁷⁵ and may/shall.⁷⁶ Another classic canon is the punctuation rule, in which interpreters are to presume that legislators intentionally place commas and colons to

74. See Appendix A for citations supporting Tables 1–11.

75. See 1A SUTHERLAND, *supra* note 24, § 21:14 (6th ed. 2002) (“Where two or more requirements are provided in a section and it is the legislative intent that all of the requirements must be fulfilled in order to comply with the statute, the conjunctive ‘and’ should be used. Statutory phrases separated by the word ‘and’ are usually to be interpreted in the conjunctive. Where a failure to comply with any requirement imposes liability, the disjunctive ‘or’ should be used.”); see, e.g., *Members of Jamestown Sch. Comm. v. Schmidt*, 405 A.2d 16, 19–20 (R.I. 1979) (finding that where the Rhode Island Constitution required the “general assembly to promote public schools, and to adopt all means which they may deem necessary and proper to secure to the people the advantages and opportunities of education,” the duty to promote public schools was independent of the duty to secure educational opportunities and, therefore, allowing students who were not enrolled in public schools to take advantage of busing also).

76. See 1A SUTHERLAND, *supra* note 24, § 21:8 (6th ed. 2002) (“When action is mandatory ‘shall’ should always be employed. When the action is permissive ‘may’ should be used.”); see, e.g., *Minor v. Mechanics’ Bank*, 26 U.S. 46, 60, 63 (1828) (holding that the statute incorporating Mechanics’ Bank and providing “that the capital stock of [Mechanics’ Bank], may consist of 500,000 dollars” did not require the bank to have 500,000 dollars capital because “it is not a fair construction . . . to interpret the terms ‘may consist’ into ‘must consist’”).

register their intended meaning.⁷⁷ The last antecedent rule is somewhat confusing and hypergrammatician; it limits the operation of qualifying phrases to the last phrase in a sentence (rather than applying that limitation to the entire sentence).⁷⁸ It is a partner to the punctuation rule: if a proviso is set off from other phrases by a comma, the qualifying phrase should apply to all preceding phrases—not just the last one.⁷⁹

A final syntactical rule liberates statutes from the rigidity of grammar. Under this bad grammar rule, if a legislature botches a grammar rule (such as using “that” with restrictive clauses, and “which” with nonrestrictive clauses), the error should not corrupt the statute.⁸⁰ The common law sense of grammar, therefore, is rather schizophrenic: legislatures adhere to the rules of grammar to express themselves, unless it is obvious they do not. Grammar is a coy mistress, and more than a few grammar rules are not rules at all.

Lawmaking bodies across the United States have uniformly adopted the bad grammar rule, preserving statutes marred by straightforward grammar errors and subordinating grammar to the evident intent of the legislature. Minnesota’s bad grammar statute is typical:

77. See 2A SUTHERLAND, *supra* note 24, § 47:15 (7th ed. 2007); see, e.g., *Tyrrell v. State*, 53 N.E. 1111, 1112–13 (N.Y. 1899) (interpreting a street cleaning statute that said that salaries “shall not exceed the following: . . . of the section foremen, one thousand dollars each; . . . of the hostlers, seven hundred and twenty dollars each, and extra pay for work on Sundays,” the court read the comma between “each” and “and” to conclude that foremen were not entitled to Sunday extra pay).

78. The last antecedent rule limits provisos to the clause that immediately precedes it. 2A SUTHERLAND, *supra* note 24, § 47:33 (7th ed. 2007). In *Barnhardt v. Thomas*, 540 U.S. 20, 21–22 (2003), the statute at issue provided that a person was eligible for Social Security disability insurance benefits and Supplemental Security Income (SSI) “only if his physical or mental impairment or impairments [were] of such severity that *he [was] not only unable to do his previous work but [could not]*, considering his age, education, and work experience, *engage in any other kind of substantial gainful work which exist[ed] in the national economy*” (emphasis added). The Court held that the Social Security Administration can find a claimant not disabled where “she remains physically and mentally able to do her previous work, *without* investigating whether the work exists in significant numbers in the national economy” because of “the grammatical ‘rule of the last antecedent,’ according to which a limiting clause or phrase (here, the relative clause ‘which exists in the national economy’) should ordinarily be read as modifying only the noun or phrase that it immediately follows (here, ‘any other kind of substantial gainful work’).” *Id.* at 22, 26 (emphasis added). The last antecedent rule, however, can be overcome by ordinary usage. For instance, courts have applied the last antecedent rule multiple times to the aggravated identity theft statute, which punishes anyone who “knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person or a false identification document.” 18 U.S.C. § 1028A (2006). One court concluded that “[s]ince the term ‘knowingly’ is immediately antecedent to the phrase ‘transfers, possesses, or uses,’ it must be read only to qualify those words.” *United States v. Montejo*, 353 F. Supp. 2d 643, 648 (E.D. Va. 2005). However, the Supreme Court arrived at a contrary result because “[i]n ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as *knowingly*) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence.” *Flores-Figueroa v. United States*, 129 S. Ct. 1886, 1890 (2009).

79. 2A SUTHERLAND, *supra* note 24, § 47:33 (7th ed. 2007).

80. “[B]ad grammar does not vitiate a statute if the legislative intent is clear.” *Id.* § 47:1. This rule is related to the rule that “courts should be willing to revise scrivener’s errors—obvious mistakes in the transcription of statutes into the law books.” ESKRIDGE, FRICKEY & GARRETT, *supra* note 8, at 829 (emphasis omitted).

Grammatical errors shall not vitiate a law. A transposition of words and clauses may be resorted to when a sentence is without meaning as it stands. Words and phrases which may be necessary to the proper interpretation of a law and which do not conflict with its obvious purpose and intent nor in any way affect its scope and operation may be added in the construction thereof.⁸¹

Not only does this statute permit *editing* of bad grammar statutes by cutting and pasting words, it actually permits interpreters to *add in words* to achieve the purpose of the statute. In fact, bad grammar statutes that do not expressly permit the addition of words are in the minority.⁸² Virtually all bad grammar statutes expressly allow for transposition. This is interpretation of the most interactive kind—make the text fit the meaning, rather than gather the meaning from the text. However circular such meaning-bootstrapping rules may be, legislatures have codified them, and no legislature has expressly rejected them.⁸³ The bad grammar rule may be less destructive of the integrity of the text and rules of grammar than it appears because its initial posture is ambiguity. As a result, the rule does not shake the presumption that lawmakers follow the rules of grammar. In fact, the presumption that legislatures follow grammar is itself implied in the bad grammar rule.

Legislatures have been relatively vocal and insistent when it comes to interpretive rules regarding *and/or* and *may/shall*. Many have codified the *may/shall* canon, while no legislature has repealed it. For example, the general law in Louisiana states that “[t]he word ‘shall’ is mandatory and the word ‘may’ is permissive.”⁸⁴ The codification of the *may/shall* canon is either found in the general definitional sections of codes⁸⁵ or in laws dictating how to construe statutes.⁸⁶ No state has undermined the distinction between *may* and *shall*

81. MINN. STAT. § 645.18 (2008).

82. The Hawaii statute does not mention adding in words, HAW. REV. STAT. § 1-14 (1993), while the Georgia, Minnesota, Pennsylvania, and Texas statutes do, GA. CODE ANN. § 1-3-1(a) (2000 & Supp. 2009) (“A transposition of words and clauses may be resorted to when a sentence or clause is without meaning as it stands.”); MINN. STAT. § 645.18 (“A transposition of words and clauses may be resorted to when a sentence is without meaning as it stands.”); 1 PA. CONS. STAT. § 1923(a) (2006) (“A transposition of words and clauses may be resorted to where a sentence is without meaning as it stands.”); TEX. GOV’T CODE ANN. § 312.012(a) (Vernon 2005) (“If the sentence or clause is meaningless because of the grammatical error, words and clauses may be transposed to give the law meaning.”). Rather than codify transposition, the Hawaii statute simply directs interpreters to ignore grammar when necessary: Interpreters should not “attend[] so much to the . . . strictly grammatical construction of the words.” HAW. REV. STAT. § 1-14.

83. Expressly codified plain meaning rules, such as Connecticut’s, might imply an aversion to the wordsmithing bad grammar rule, but in my view, plain meaning rules do not frontally assault the bad grammar rule. On the contrary, the plain meaning rule talks past the bad grammar rule. The plain meaning rule requires adherence to text where the meaning is clear and runs out in the face of ambiguity. By contrast, the bad grammar rule is triggered *only* by ambiguity or meaninglessness.

84. LA. REV. STAT. ANN. § 1:3 (2003). Louisiana, despite its Napoleonic nature, does not have a set of codified canons that is so unusual when compared with other states.

85. See, e.g., KY. REV. STAT. ANN. § 446.010(20), (29) (West 2006).

86. See, e.g., LA. REV. STAT. ANN. § 1:3.

through a general statute.⁸⁷

Unlike may/shall, there is no unison when it comes to rules regarding and/or. Sutherland's lament that "[t]he terms 'and' and 'or' are often misused in statutes"⁸⁸ has only been heard by a single state. Louisiana, alone, has codified Sutherland's preferred rule that "or" means any one of several terms: "Unless it is otherwise clearly indicated by the context, whenever the term 'or' is used in the Revised Statutes, it is used in the disjunctive and does not mean 'and/or.'"⁸⁹ The only two other legislatures that have statutes governing the use of "and" and "or"—Hawaii and Maine—have abandoned Sutherland's preference by collapsing any distinction between "and" and "or." Hawaii, for instance, offends Sutherland by declaring that "[e]ach of the terms 'or' and 'and,' has the meaning of the other or both."⁹⁰ Through this technical rule, legislatures state that lawmakers are not technical enough, and that the difference between "and" and "or" indicates nothing at all.

Such codified deviations from Sutherland's recommendation, however, may be a positive development—the result of a legislature recognizing its own drafting errors.⁹¹ Notably, Sutherland recognizes the legislative propensity for error related to and/or but sees a judicial—not a legislative—solution: "[W]here the word 'and' is used inadvertently and the intent or purpose of the statute seems clearly to require the word 'or,' this is an example of a drafting error which may properly be rectified by a judicial construction."⁹²

The codifications related to the punctuation rule are far from straightforward, and as a result, the binary classifications used here are less revealing. Pennsylvania has codified the rule: "In no case shall the punctuation of a statute control or affect the intention of the General Assembly in the enactment thereof but punctuation may be used to aid in the construction thereof if the statute was finally enacted after December 31, 1964."⁹³ Pennsylvania therefore now permits punctuation to be used in statutory interpretation. Another legislature expresses a very weak commitment to punctuation as a source of meaning: South Dakota declares that "[p]unctuation shall not control or affect the construction of any

87. Maryland has an interesting formulation that focuses on the meaning of "may not": "the phrase 'may not' or phrases of like import have a mandatory negative effect and establish a prohibition." MD. CODE ANN. art. 1, § 26 (LexisNexis 2005 & Supp. 2008). Because this codified canon does not necessarily define "may" or "shall," the statute was not counted as either codifying or rejecting the common law canon. See also OR. REV. STAT. ANN. § 174.100(4) (West 2007 & Supp. 2009) ("'May not' and 'shall not' are equivalent expressions of an absolute prohibition.").

88. 1A SUTHERLAND, *supra* note 24, § 21:14 (6th ed. 2002).

89. LA. REV. STAT. ANN. § 1:9 (2003).

90. HAW. REV. STAT. § 1-18 (1993).

91. Sutherland might, perhaps, find comfort that these and/or collapsing statutes are, at least, an accurate reflection of the interpretive world, in which "there has been, however, so great laxity in the use of these terms that courts have generally said that the words are interchangeable and that one may be substituted for the other, if consistent with the legislative intent." 1A SUTHERLAND, *supra* note 24, § 21:14 (6th ed. 2002).

92. *Id.*

93. 1 PA. CONS. STAT. § 1923 (2006).

provision when any construction based on such punctuation would not conform to the spirit and purpose of such provision,”⁹⁴ and thereby undermines the presumption that the placement of punctuation is a strong source of meaning, but leaves room for punctuation as a weak source of meaning. Though similarly worded to the South Dakota statute codifying the rule, another statute indicates that punctuation is an altogether inert source of meaning⁹⁵ and, therefore, was codified as rejecting the punctuation rule. At all events, the punctuation rule codifications are consistent with a leading authority who concludes that “looking on punctuation as a less-than-desirable, last-ditch alternative aid in statutory construction. . . . seems to have prevailed as the majority rule [in the common law of interpretation].”⁹⁶

The last antecedent rule is unsettled by actual legislative preference. The single state that has spoken on the issue has rejected it:

The general assembly hereby finds and declares that the rule of statutory construction expressed in the Colorado supreme court decision entitled *People v. McPherson*, 200 Colo. 429, 619 P.2d 38 (1980), which holds that “. . . relative and qualifying words and phrases, where no contrary intention appears, are construed to refer solely to the last antecedent with which they are closely connected . . .” has not been adopted by the general assembly and does not create any presumption of statutory intent.⁹⁷

Such a rejection can be viewed as illustrative of the conflict between the common law canons and legislative preferences. Not only does the legislature call attention to the fact that the common law canon is a judge-made artifact, it also declares that it is inconsistent with legislative preference.

3. Textual Integrity

Textual integrity canons clarify meaning by focusing on the context of statutory language. Coherence is the watchword of textual integrity and many common law canons have developed to support that value.⁹⁸ The whole act rule views statutory interpretation as a “holistic endeavor” and directs interpreters to consider the rest of the statutory scheme to clarify ambiguous provisions “because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings

94. S.D. CODIFIED LAWS § 2-14-8 (2004).

95. TEX. GOV'T CODE ANN. § 312.012(b) (Vernon 2005) (“Punctuation of a law does not control or affect legislative intent in enacting the law.”).

96. Raymond B. Marcin, *Punctuation and the Interpretation of Statutes*, 9 CONN. L. REV. 227, 240 (1977).

97. COLO. REV. STAT. § 2-4-214 (2008).

98. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 655 n.134 (1990) (paraphrasing a statement made by Justice Scalia: “[S]tatutory interpretation is a process of rationalizing the law-making those adjustments that coexisting texts require in order that the corpus of the law be coherent” (citing Justice Antonin Scalia, Speech on Use of Legislative History Delivered at Various Law Schools 9 (1985–1986) (transcript on file with the UCLA Law Review))).

Table 2. Grammar and Syntax Canons

CANON	CODIFIED	REJECTED BY CODE
And/Or: “Or” means in the alternative, “and” does not.	1	2
May/Shall: “May” is permissive, while “shall” is mandatory.	10	0
Punctuation Rule: The legislature is presumed to follow accepted punctuation standards, so placements of commas and other punctuation are meaningful but not controlling.	2	1
Last Antecedent Rule: Apply the “rule of the last antecedent,” if practical.	0	1
Errors: Grammar errors do not vitiate a statute.	5	0

produces a substantive effect that is compatible with the rest of the law.”⁹⁹

Judges developed other common law canons with consistency in mind. Generally, identical or similar terms in statutes should be construed in the same way (though interpreters should be alert to whether differences between “similar” terms are significant). Where the language of statutes varies, that variance should be given meaning.¹⁰⁰ Inconsistency with legislative policy,¹⁰¹ the assumptions of other provisions,¹⁰² and the structure of the statute should be avoided.¹⁰³

99. U.S. Sav. Ass’n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) (internal citation omitted); see 2A SUTHERLAND, *supra* note 24, § 47:2 (7th ed. 2007). *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), articulates the rule in stronger terms and adds an important temporal component: “[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.” *Id.* at 133. At issue was whether the Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. §§ 301–399a (2006), granted the Food and Drug Administration (FDA) jurisdiction to regulate tobacco products. The Court reasoned that “if tobacco products were within the FDA’s jurisdiction, the Act would require the FDA to remove them from the market entirely.” *Id.* at 143. A ban, however, “would contradict Congress’ clear intent as expressed in its more recent, tobacco-specific legislation. The inescapable conclusion is that there is no room for tobacco products within the FDCA’s regulatory scheme. If they cannot be used safely for any therapeutic purpose, and yet they cannot be banned, they simply do not fit” within the FDA’s regulatory jurisdiction. *Id.*

100. 2A SUTHERLAND, *supra* note 24, § 46:5 n.10 (7th ed. 2007) (“A presumption exists that the legislature uses the same term consistently in different statutes.”). A corollary to this presumption is the principle of meaningful variation—that where the legislature changes language between statutes that might otherwise be similar, an interpreter should consider that difference to be significant. See ESKRIDGE, FRICKEY & GARRETT, *supra* note 8, at 833–35 (“[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” (quoting Keene Corp. v. United States, 508 U.S. 200, 208 (1993))).

101. 2B SUTHERLAND, *supra* note 24, § 51:2 n.19, at 229 (7th ed. 2008) (“[T]wo statutes relating to the same general subject matter should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy . . .”).

102. ESKRIDGE, FRICKEY & GARRETT, *supra* note 26, app., at 390.

103. *Id.*

The rule to avoid surplusage is another broad coherence-based common law canon and a close relative of the whole act rule: interpreters should avoid interpretations of statutes that would render provisions of an act superfluous or unnecessary.¹⁰⁴

More concrete textual integrity canons guide the interpretation of exceptions to the application of a statute and define which parts of the published code are relevant to interpreters. One staple common law canon presumes that specific provisions targeting a particular issue apply instead of provisions more generally covering that issue. This canon cautions interpreters to avoid broad readings of statutory provisions where the legislature has specifically provided more specific language elsewhere.¹⁰⁵ Other well-established common law canons deal with restrictions on, or exceptions to, the operation of a statute (provisos). Interpreters are cautioned to read provisos narrowly.¹⁰⁶ Consistent with the narrow reading canon, a closely related common law canon warns interpreters not to create exceptions in excess of those specified by the legislature.¹⁰⁷

Titles are generally not viewed as part of the statute because in old English practice, the legislature did not provide them. Rather, a clerk of Parliament supplied the title.¹⁰⁸ In the United States, the prevailing common law rule views act and statute titles as extralegal sources of authority (even though some state constitutions require an accurate title¹⁰⁹ and legislatures do provide them). More specifically, the general common law rule treats titles as if they were in purgatory: titles are not law, but they are not banished from interpretive significance. Titles cannot control the plain meaning of a statute, but judges will

104. 2A SUTHERLAND, *supra* note 24, § 46:6 (7th ed. 2007); *see, e.g.*, *Lowery v. Klemm*, 845 N.E.2d 1124, 1128 (Mass. 2006) (rejecting an interpretation that “would require [the court] to ignore much of the definition of ‘sexual harassment’ provided in” Massachusetts law).

105. 2A SUTHERLAND, *supra* note 24, § 46:05, at 177 (7th ed. 2007) (“Where there is inescapable conflict between general and specific terms or provisions of a statute, the specific will prevail.”); *see, e.g.*, *Richardson v. One 1972 GMC Pickup*, 826 P.2d 1311, 1314 (Idaho 1992) (“While the words ‘equipment of any kind’ as defined in the forfeiture statute were arguably intended to incorporate a wide variety of items, we are unable to include firearms in this definition because of a specific statutory provision that directly provides for the confiscation and forfeiture of firearms.”).

106. 2A SUTHERLAND, *supra* note 24, § 47:8, at 312–13 (7th ed. 2007) (“[W]here there is doubt concerning the extent of the application of the proviso on the scope of another provision’s operation, the proviso is strictly construed.”); *see, e.g.*, *In re Opinion of the Justices*, 151 N.E. 680, 681 (Mass. 1926) (“It is a cardinal rule of interpretation that: ‘. . . the proviso is to be strictly construed’”).

107. 2A SUTHERLAND, *supra* note 24, § 47:8, at 313–14 (7th ed. 2007) (“[T]he legislative purpose set forth in the purview of an enactment is assumed to express the legislative policy, and only those subjects expressly exempted by the proviso should be freed from the operation of the statute.”); *see, e.g.*, *Pace v. Armstrong World Indus., Inc.*, 578 So. 2d 281, 285 (Ala. 1991) (“[W]e will restrict from the operation of § 6-5-410 only those actions that are expressly restricted”).

108. 2A SUTHERLAND, *supra* note 24, § 47:3 (7th ed. 2007).

109. For instance, Iowa’s Constitution provides: “Every act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title.” IOWA CONST. art. III, § 29.

consider titles to resolve ambiguities.¹¹⁰

Codifications of these canons across the United States are largely consistent with the common law of interpretation. Reading a provision in context (the whole act rule) is wildly popular, with thirty states codifying some version of it.¹¹¹ No state has rejected it. Delaware's statute is both direct and typical: "Words and phrases shall be read with their context . . ." ¹¹² Hawaii's is more elaborate but not outside the norm: "The meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning."¹¹³ A third common type of statute requires interpreters to use context as a shield against incorrect interpretations: "In the construction of the statutes, the following rules shall be observed, unless such construction would be . . . repugnant to the context of the statute . . ." ¹¹⁴ A fourth type focuses on the provision's context within the statutory scheme. For instance, in Pennsylvania, "[s]tatutes or parts of statutes are *in pari materia* when they relate to the same persons or things or to the same class of persons or things" and such statutes or provisions "shall be construed together, if possible . . ." ¹¹⁵ In Connecticut, "[t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes."¹¹⁶ Some states, such as Massachusetts, New Hampshire, North Carolina, Rhode Island, and Vermont, restrict the context-based inquiry "to the context of the same statute" as the original provision.¹¹⁷ This restriction is a weaker version of the context rule, which normally waxes to allow coherence throughout the whole code by looking across different statutes.¹¹⁸

Though avoiding interpretations that are inconsistent with the policy underly-

110. 2A SUTHERLAND, *supra* note 24, § 47:3 (7th ed. 2007); *see, e.g.*, Holy Trinity Church v. United States, 143 U.S. 457, 463 (1892) (interpreting the title, "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its territories and the District of Columbia," the Court concluded that "[n]o one reading such a title would suppose that congress had in its mind any purpose of staying the coming into this country of ministers of the gospel").

111. Jurisdictions only defining specific terms subject to context were not classified as codifying a code-wide contextual inquiry. Although such provisions clearly privilege a contextual inquiry, such provisions only endorse context more locally with respect to those specific terms; they do not codify or reject contextual inquiry as a code-wide matter. *See, e.g.*, 1 U.S.C. § 1 (2006) (specific word definitions are to be used "unless the context indicates otherwise"); NEB. REV. STAT. § 49-801 (Supp. 2008) (definitions of specific terms are to be used "[u]nless the context is shown to intend otherwise").

112. DEL. CODE ANN. tit. 1, § 303 (2001).

113. HAW. REV. STAT. § 1-15(1) (1993).

114. IOWA CODE § 4.1 (1999).

115. 1 PA. CONS. STAT. § 1932 (2006). For a definition of *in pari materia*, *see infra* note 178.

116. CONN. GEN. STAT. § 1-2z (2007).

117. MASS. GEN. LAWS ANN. ch. 4, § 6 (West 2006 & Supp. 2009); N.H. REV. STAT. ANN. § 21:1 (LexisNexis 2008); N.C. GEN. STAT. § 12-3 (2007); VT. STAT. ANN. tit. 1, § 101 (2003). *See also* R.I. GEN. LAWS § 43-3-2 (2005) (interpretive rules should be applied unless "repugnant to some other part of the statute").

118. *See supra* note 99 and accompanying text (citing sources describing the whole act rule as permitting reference to other statutes, including subsequent legislation).

ing another provision and avoiding interpretations that are inconsistent with a necessary assumption of another statute are both cousins of the whole act rule, American legislatures have not expressed a view on them.

Legislative adoption of context-based interpretation implies adoption of the presumption of consistent usage. The holistic assumptions of the whole act rule support the expectation that where a phrase is used in other statutes and has a settled meaning, interpreters should extract the same meaning from that phrase in other contexts.¹¹⁹ Indeed, it is “reasonable to presume that the same meaning is intended for the same expression in every part of the Act.”¹²⁰ The implication is even more reasonable given that, in many cases, the context codification is in the same statute as ordinary usage—a statute which usually also provides that phrases can acquire meaning that may be applied across statutes.¹²¹

States have adopted interpretive rules directing that provisos be construed consistently with the structure of the statute. The starkest form is a South Dakotan innovation that refers to the structural arrangement or position of provisions: “Provisions contained in any title, part, or chapter of the code of laws . . . may be construed and considered in the light of such arrangement and such position in any case where such arrangement or such position tends to show the intended purpose and effect thereof.”¹²² The canon is also implicitly adopted by the many other states that require provisions to be interpreted consistent with the expansive umbrella of context,¹²³ which refers to the structure of a statute in addition to the text.¹²⁴ Context is “holistic”—the context of a particular provision must include the provision’s functional relationship between the parts and the whole of the statute. It is worth noting that South Dakota has not codified the context rule, which may explain the need for a strong-form structure statute. The South Dakota legislature, therefore, could not have enacted its structure statute because it thought that its overarching context statute does not cover structure. It is reasonable, then, to infer that “context” generally includes “structure.” No state has rejected this canon.

Ten states have codified the rule against surplusage, and none have rejected it. The usual codification simply states the rule as a presumption: “In enacting a

119. *See, e.g.*, HAW. REV. STAT. § 1-16 (1993) (“Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another.”).

120. PETER BENSON MAXWELL, ON THE INTERPRETATION OF STATUTES 282 (Fred B. Rothman & Co. 1991) (1875).

121. For example, Louisiana provides that “[w]ords and phrases shall be read with their context and shall be construed according to the common and approved usage of the language. Technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.” LA. REV. STAT. ANN. § 1:3 (2003).

122. S.D. CODIFIED LAWS § 2-14-11 (2004).

123. *See, e.g.*, N.J. STAT. ANN. § 1:1-1 (West 1992) (“[W]ords and phrases shall be read and construed with their context . . .”).

124. *See, e.g.*, *Necanicum Inv. Co. v. Employment Dep’t.*, 190 P.3d 368, 370 (Or. 2008) (describing “context” as “including the structure . . . of the statutory scheme as a whole” (citing *Astleford v. SAIF Corp.*, 874 P.2d 1329, 1333 (Or. 1994))).

statute, it is presumed that: . . . The entire statute is intended to be effective.”¹²⁵ Montana has a more elaborate formulation. In construing a statute “[w]here there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.”¹²⁶ Montana also has a unique statutory section in addition to its “Statutory Construction” chapter. Entitled “Maxims of Jurisprudence,” it is intended to aid but not qualify statutory construction.¹²⁷ It counsels that “[a]n interpretation which gives effect is preferred to one which makes void,”¹²⁸ but it also warns that “[s]uperfluity does not vitiate.”¹²⁹ Montana’s formulation expresses what is implicit in the other codified versions of the rule against surplusage: that it should not be used as a destructive interpretive tool, but as a guide to fit an interpretation to the breadth of the statute.

The specific/general canon is also widely codified and never statutorily rejected. Eleven legislatures have stated that specific provisions targeting a particular issue apply instead of provisions more generally covering the issue. There are several levels of generality to this interpretive rule. At its most specific are words and phrases: “[G]eneral words are construed to be restricted in their meaning by preceding particular words”¹³⁰ On a broader level, legislatures also require that

[w]hen a general provision in a law is in conflict with a special provision in the same or another law, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions be irreconcilable, the special provision shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted at a later session and it shall be the manifest intention of the legislature that such general provision shall prevail.¹³¹

These types of codifications also usually contain a temporal provision that allows a more recent general presumption to impliedly repeal an older specific provision.¹³²

Legislatures also prefer that provisos be read narrowly and reject the creation of exceptions in addition to those the legislature has specified. Two legislatures have codified these common law canons, and none have rejected them. Minnesota and Pennsylvania’s statutes are almost identical. First, they provide that “[p]rovisos shall be construed to limit rather than to extend the operation of the clauses to which they refer”¹³³ and, therefore, support Sutherland’s formulation that provisos

125. IOWA CODE § 4.4 (1999).

126. MONT. CODE ANN. § 1-2-101 (2007).

127. *Id.* § 1-3-101 (“The maxims of jurisprudence set forth in . . . this chapter are intended not to qualify any of the other provisions of this code but to aid in their just application.”)

128. *Id.* § 1-3-232.

129. *Id.* § 1-3-228.

130. MINN. STAT. § 645.08(3) (2008).

131. *Id.* § 645.26.

132. See rule against implied repeals *infra* text accompanying notes 285–89.

133. MINN. STAT. § 645.19; 1 PA. CONS. STAT. § 1924 (2006).

should be narrowly construed. Second, they state that “[e]xceptions expressed in a statute shall be construed to exclude all others.”¹³⁴ Notably, that legislatures would prefer provisos to be read narrowly (or strictly) comports with the general legislative preference that statutes should be broadly (liberally) construed.¹³⁵

The confusion surrounding the use of titles in construing statutes has not been clarified, mostly because the codifications transcend the common law canon. The pattern of state codifications indicates that the prevailing common law rule—that section headings may be considered in the construction of a statute—is not very useful. That rule does not specify when consulting a title might be useful or what an interpreter is supposed to do once she considers the title.

Legislatures, then, are doing more than simply taking positions on this common law canon. They add texture as they codify it. As a consequence, Table 3’s binary codified/rejected classification is less revealing than it is for other canons. The states I have classified as “rejecting” the canon merely codify, for instance, that “[t]he titles to subchapters, sections, subsections, paragraphs and subdivisions of the statutes and history notes are not part of the statutes.”¹³⁶ This does not rule out considering the title to resolve ambiguities in the same way (nonstrict textualist) interpreters might consider a committee report, legislative history, or colloquy: if the title is not part of the statute, then it certainly cannot contradict or limit statutory provisions.¹³⁷ This type of formulation is far more useful to interpreters than simply saying that interpreters may consider titles (what do we do with it once we look at it?). The Texas and Pennsylvania legislatures updated the common law canon in their codifications. One provides that “[t]he heading of a title, subtitle, chapter, subchapter, or section does not limit or expand the meaning of a statute,”¹³⁸ while the other states that “[t]he headings prefixed to titles, parts, articles, chapters, sections and other divisions of a statute shall not be considered to control but may be used to aid in the construction thereof.”¹³⁹ Other states go further and completely reject using

134. MINN. STAT. § 645.19; 1 PA. CONS. STAT. § 1924.

135. See *infra* text accompanying notes 329–30 (rule of liberal construction); see also *supra* text accompanying notes 69–73; *infra* note 327 (rejection of rule of strict constructionism).

136. WIS. STAT. ANN. § 990.001(6) (West 2007). Kansas has a statute that permits the reviser of statutes to “change descriptive-subject-word headings” and states that “[n]o change made . . . shall effect any change in the substantive meaning of the section.” KAN. STAT. ANN. § 77-136 (1997). Because it does not describe the interpretive weight of any original section headings, I did not count this odd statute towards codifying or rejecting the common law canon.

137. Texas provides, in the same statute permitting the use of legislative history, that “[i]n construing a statute . . . a court may consider . . . title (caption).” TEX. GOV’T CODE ANN. § 311.023 (Vernon 2005).

138. *Id.* § 311.024.

139. 1 PA. CONS. STAT. § 1924. In determining whether or not to draw meaning from a title, a dispositive factor may be whether the title or section heading was added by the legislature as part of the statute or was added outside of the legislative process. The Pennsylvania provision, which refers to “[t]he title and preamble of a statute,” appears to stress that the title was created by the legislature. *Id.* In some jurisdictions, however, the fact that a heading passed through the legislative process does not place it on equal footing as the rest of the law. See, e.g., UTAH CODE ANN. § 68-3-13 (2008) (“A short summary of each section, part, chapter, or title, called boldface, may be printed in numbered bills introduced in the Legislature. This boldface is not law; it is intended only to highlight the content of

Table 3. Textual Integrity Canons

CANON	CODIFIED	REJECTED BY CODE
Whole Act Rule (context): Each statutory provision should be read by reference to the whole act. Statutory interpretation is a “holistic” endeavor.	30	0
Presumption of consistent usage/meaningful variation (context): Interpret the same or similar terms in a statute or statutes the same way.	30	0
Inconsistent policy: Avoid interpreting a provision in a way inconsistent with the policy of another provision.	0	0
Inconsistent assumption: Avoid interpreting a provision in a way inconsistent with a necessary assumption of another provision.	0	0
Inconsistent structure (context): Avoid interpreting a provision in a way inconsistent with the structure of the statute.	31	0
Rule Against Surplusage: Avoid interpreting a provision in a way that would render other provisions of the act superfluous or unnecessary.	10	0
Specific/General: Specific provisions targeting a particular issue apply instead of provisions more generally covering the issue.	11	0
Narrow exceptions: Provisos and statutory exceptions should be read narrowly.	2	0
No exceptions created: Do not create exceptions in addition to those specified by the legislature.	2	0
Section headings: Section headings may be considered in the construction of a statute.	2	22

titles to infer legislative intent. For example, West Virginia states:

Chapter, article or section headings, headlines or headnotes of any act of the Legislature, whether in the act at the time of passage or inserted by the clerk

each section, part, chapter, or title for legislators. . . . The Office of Legislative Research and General Counsel is authorized . . . to change the boldface in the enrolling process so that it more accurately reflects the substance of each section, part, chapter, or title.”); W. VA. CODE ANN. §§ 2-2-10(z), -12 (LexisNexis 2006) (“Chapter, article or section headings, headlines or headnotes of any act of the Legislature, whether in the act at the time of passage or inserted by the clerk of the House of Delegates in editing, compiling and publishing the acts of the Legislature, are hereby declared to be mere catchwords and shall not be deemed or construed to be titles of such chapters, articles or sections, or as any part thereof, or as indicating or expressing legislative intent or purpose.”).

of the House of Delegates . . . are hereby declared to be mere catchwords and shall not be deemed or construed to be titles of such chapters, articles or sections, or as any part thereof, or as indicating or expressing legislative intent or purpose.¹⁴⁰

One important final note on context generally: it trumps other interpretive tools. Generally the entire rules of construction chapter is subordinate to the context of the statute.¹⁴¹ In New York, for instance, the General Construction Law is “applicable to every statute unless . . . the context of the language construed, or other provisions of law indicate that a different meaning or application was intended from that required to be given by this chapter.”¹⁴² In Connecticut, “[t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes.”¹⁴³

4. Technical Changes

The interpretive common law also contains technical rules that govern when word substitutions do not thwart legislative intent.¹⁴⁴ Ordinarily, interpreters are expected to follow syntax, but courts have interpreted masculine pronouns to include the feminine.¹⁴⁵ Courts also interpret the singular to include the plural.¹⁴⁶ The singular and plural rule developed because most legislation speaks in nonnumeric, abstract terms. Courts also construe one verb tense to include others because English forces a speaker to apply a single tense while most legislation must be broad enough to cover objects existing before, during, and after enactment.¹⁴⁷ However, as will be shown, these common law canons are default rules; where a contrary intent or context is indicated, courts will refrain from substituting genders, numbers, or tenses. Another technical common law rule is that written words govern the expression of numbers where a numeral and written number conflict.¹⁴⁸

The common law’s gender neutral interpretive rule has been adopted by Congress, every State in the United States, and the District of Columbia. However, some jurisdictions are more gender neutral than others. Many legislatures

140. W. VA. CODE ANN. § 2-2-12.

141. *See infra* note 355.

142. N.Y. GEN. CONSTR. LAW § 110 (McKinney 2003).

143. CONN. GEN. STAT. § 1-2z (2007).

144. Sometimes these rules are included along with grammar rules because they respond to grammatical and syntactical meaning. *See* ESKRIDGE, FRICKEY & GARRETT, *supra* note 8, at 829 (noting that grammar rules regarding singular and plural numbers and pronoun genders are rarely followed). I view these types of “substitution rules” as highly technical and more meaningful when isolated in a separate typology.

145. 2A SUTHERLAND, *supra* note 24, § 47:32 (7th ed. 2007).

146. *Id.* § 47:34.

147. 2B *id.* § 49:2 (7th ed. 2008). *But see* United States v. Wilson, 503 U.S. 329, 333 (1992) (“[U]se of a verb tense is significant in construing statutes.”).

148. *See, e.g.*, Upton v. Santa Rita Mining Co., 89 P. 275, 282 (N.M. 1907) (“[I]n the conflict between a number written out and in figures, the latter will be rejected and the former control . . .”).

have not codified absolute gender neutrality.¹⁴⁹ These legislatures say that “words importing the masculine gender include the feminine as well”¹⁵⁰ but do not say that the feminine includes the masculine. Other legislatures are absolutely neutral (short of adopting or inventing gender neutral pronouns), adopting the rule that “[w]ords of any gender may, when the sense so indicates, refer to any other gender.”¹⁵¹ Though these codifications are different, I count both types as codifying a gender neutral interpretive rule.

Codified tense rules are also widespread, and there is not a single instance in which flexible tense rules have been rejected. As with gender, there are subtle, but significant, differences between states where tense is concerned. One type of rule says that “the past or present tense include[s] the future, as well as the past and present.”¹⁵² A second type states that “words used in the present tense include the future as well as the present”¹⁵³ (but not requiring the future to include the past). A third type considers the past and mandates that “[w]ords used in this code in the past or present tense include the future, and the future tense includes the present”¹⁵⁴ (leaving out the future including the past). A fourth version considers the future’s relationship with the past and says that “[t]he present tense of a verb includes the future when applicable. The future perfect tense includes past and future tenses.”¹⁵⁵ I classified all four types as

149. Touching off a heated exchange, Marguerite E. Ritchie, in *Alice Through the Statutes*, 21 MCGILL L.J. 685 (1975), explores the implications of the lack of absolute gender identity. She notes that “women, demanding to be treated as humans, have protested constantly about the use of male terms to apply to both sexes” and that “legislation which defines the male as including the female” thereby appears “to place a lower value on the latter.” *Id.* at 685–86. Ritchie argues that mitigating phrases such as “‘unless a contrary intention appears,’” merely permit “equality . . . purport[edly] give[n] with one hand” to be “taken away by the other” and, therefore, “women have no guarantee of any kind that any provision . . . which grants rights to the male, will be interpreted to confer the same rights on women.” *Id.* at 689; *see also* E.A. Driedger, *Are Statutes Written for Men Only?*, 22 MCGILL L.J. 666, 666, 671 (1976) (responding that “Ritchie’s problem is not one that was created or is curable by legislative draftsmen, male or female,” but rather that “[t]he problem lies with pronouns”; according to her, pronouns are “a defect in the English language” and an amendment will not solve the problem because “[w]e would still be stuck” with language as it exists); Marguerite E. Ritchie, *The Language of Oppression—Alice Talks Back*, 23 MCGILL L.J. 535, 535–36, 542–43 (1977) (criticizing Driedger’s article for failing “to listen when women cry out against the injustices which they suffer” because “[t]he law has, in fact, operated as a ‘con’ game, in which male terms include women for the purposes of pains and penalties but not for rights and privileges,” and proposing the use of “it” as a gender neutral substitute or “[t]he invention of a new series of pronouns”). None of the statutes reviewed here have followed Ritchie’s suggestions.

150. 1 U.S.C. § 1 (2006).

151. ALASKA STAT. § 01.10.050 (2008); *see, e.g.*, MASS. GEN. LAWS ANN. ch. 4, § 6 (West 2006) (“[W]ords of one gender may be construed to include the other gender and the neuter.”).

152. ALA. CODE § 1-1-2 (LexisNexis 1999).

153. 1 U.S.C. § 1; *see, e.g.*, N.Y. GEN. CONSTR. LAW § 48 (McKinney 2003) (“Words in the present tense include the future.”).

154. TENN. CODE ANN. § 1-3-104(a) (2003).

155. WIS. STAT. ANN. § 990.001(3) (West 2007). The future perfect tense is used to refer to an event that is expected to occur before another event but that may not have happened yet. For example, the future perfect tense is often used when describing statutory prerequisites: “No person shall be eligible for appointment to the following titles until *he shall have completed* the following period of service as a

Table 4. Technical Changes

CANON	CODIFIED	REJECTED BY CODE
Gender neutrality: Gender is neutral unless implicitly or expressly referring to one sex.	52	0
Singular/Plural: Singular includes plural.	52	0
Tense: Tenses are generally interchangeable, with some important exceptions.	27	0
Written numbers: Words govern expression of numbers.	4	0

having codified that tenses are interchangeable, though some states with tense statutes allow interchangeability to differing degrees. There are important exceptions to interchangeability not reflected in the binary classifications: for instance, out of the twenty-seven jurisdictions with code-wide tense codifications identified, only two expressly permit words in the present tense to include the past tense, while the remainder do not.¹⁵⁶

Unlike gender neutrality and tense, singular/plural statutes are relatively straightforward and are universally codified. Legislatures usually simply codified that “[t]he singular includes the plural, and the plural the singular,”¹⁵⁷ or that “[w]ords importing the singular number only may be extended to several persons or things, and words importing the plural number only may be applied to one person or thing.”¹⁵⁸

The final technical rule that written words trump arabic numerals is also an ordinary statute that no code rejects. Legislatures typically codify that, “[i]f there is a conflict between figures and words in expressing a number, the words govern.”¹⁵⁹

B. EXTRINSIC SOURCE CANONS

The common law of extrinsic sources permits interpreters to look for mean-

uniformed member of the state police: sergeant, five years; lieutenant, eight years; captain, twelve years; and major, fourteen years.” MASS. GEN. LAWS ANN. ch. 22C, § 28 (West 2006) (emphasis added).

156. ALA. CODE § 1-1-2 (“Words used in this Code in the past or present tense include the future, as well as the past and present.”); ALASKA STAT. § 01.10.050 (2008) (“Words in the present tense include the past and future tenses, and words in the future tense include the present tense.”). Where an interpreter must construe tense, and the legislature has not made its own rule clear, judges should take great care in choosing and justifying interpretations that the present tense includes the past tense, especially in light of the presumption against retroactivity (another widely codified canon), *see infra* text accompanying notes 268–72, which looms in the background whenever legislation is applied to the past.

157. ALA. CODE § 1-1-2; *see, e.g.*, 1 U.S.C. § 1 (“[W]ords importing the singular include and apply to several persons, parties, or things; words importing the plural include the singular . . .”).

158. KAN. STAT. ANN. § 77-201 (Supp. 2008).

159. OHIO REV. CODE ANN. § 1.46 (LexisNexis 1990).

ing beyond a code's text. It also guides interpreters when they look at such sources.

1. Agency Interpretations

As the administrative state expanded, agencies increasingly became legislative actors with the power to create gap-filling rules with the force of law. Agency interpretations of statutes complemented those of courts. Courts developed common law canons in response, the shorthand for which is deference to administrative interpretations.¹⁶⁰ The judiciary took deference and ran with it, creating a wide variety of deferential rules to guide interpreters.

An academic cottage industry has emerged to identify and catalog agency common law canons. The titans of this industry would (probably correctly) point out that there is a diverse spectrum of deference canons. But that spectrum boils down to basically four common law canons. First is the canon of no deference. There is no need to complicate the landscape here—that agency interpreters get no deference is simply a restatement of the plain meaning rule.¹⁶¹ If the language of a statute is already clear, an agency cannot make policy contrary to the statute.¹⁶² Second is the canon of general deference, where courts grant deference according to considerations of an agency's expertise, reasoning, and other factors that give the agency interpretation the power to persuade.¹⁶³

Now come more aggressively deferential canons. A third basic common law canon is the presumption that an agency interpretation of its own regulations is correct.¹⁶⁴ Finally, a fourth common law canon affords extreme deference to agencies where the legislature has given express lawmaking authority to the agencies.¹⁶⁵

Oddly, none of the codified administrative referent statutes contemplate a

160. See 1A SUTHERLAND, *supra* note 24, § 31:6 (6th ed. 2002).

161. See *supra* Table 1 and text accompanying note 74.

162. See *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 229, 231 (1994) (“[A]n agency’s interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear” and an agency cannot effect “a fundamental revision of the statute”).

163. “The weight [of deference given to an agency interpretation] will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The Supreme Court has continued to use this general deference canon as a common law tool, even after *Chevron*. See *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (“*Chevron* did nothing to eliminate *Skidmore*’s holding.”).

164. “An administrative agency’s interpretation of its own regulation is controlling ‘unless it is plainly erroneous or inconsistent with the regulation.’” 1A SUTHERLAND, *supra* note 24, § 31:6 (6th ed. 2002); see, e.g., *Sawyer v. Cen. La. Elec. Co.*, 136 So. 2d 153, 156 (La. Ct. App. 1962) (“An administrative body can interpret its own rules and such interpretation becomes a part of the rule.”).

165. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (“If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”).

large number of agency deference regimes.¹⁶⁶ This is remarkable, given the steady stream of highly varied levels of administrative deference that the judiciary has developed to cope with agency interpretation.¹⁶⁷ American legislatures have only codified one version of deference: specifying that interpreters may simply “consider” agency interpretations in construing statutes. One formulation reads, “If a statute is ambiguous, the court, in determining the intention of the general assembly, may consider among other matters: . . . The administrative construction of the statute.”¹⁶⁸ Another states that “[w]hen the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters . . . legislative and administrative interpretations of the statute.”¹⁶⁹ The Texas legislature provides for a form of agency deference that pierces the plain meaning rule’s terminus of clear text. It allows courts to consider administrative constructions of a statute “whether or not the statute is considered ambiguous on its face.”¹⁷⁰

But in each formulation, interpreters are never required to *do* anything as a result of such consideration. This collective legislative choice seems to elevate the general deference canon over more aggressively deferential interpretive rules. Legislatures recognize the generic deference canon (*Skidmore*)¹⁷¹ and the no deference canon through the plain meaning rule.¹⁷² They legitimize the generic deference canon, but they take no position on more aggressive deference schemes.¹⁷³ Given their behavior, legislatures seem to stress that interpreters should weigh agency statutory construction according to an agency’s power

166. I focused on provisions applying to the entire code, but not those applying only to the administrative section, which are likely codified in a particular subject matter section. A fuller exploration of this phenomenon would need to examine both.

167. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1098–1100 (2008) (identifying a continuum of deference with seven discrete types of deference: (1) *Curtiss-Wright* deference (super-strong deference to executive interpretations); (2) *Seminole Rock* deference (strong deference to an agency’s interpretations of its own regulations); (3) *Chevron* deference (two-step approach—step 1: is the statute ambiguous? step 2: If so, defer to reasonable agency interpretation of the statute); (4) *Beth Israel* deference (defer to reasonable agency interpretations consistent with a statute); (5) *Skidmore* deference (defer to agency interpretations based on consideration of expertise, continuity, persuasiveness, and other factors); (6) Consultative (*Skidmore-Lite*) deference (outcome of case is weighted towards agency-generated materials, but where deference language in opinion is absent); (7) Anti-deference (presumption against agency interpretation in criminal cases and in some cases where agency interpretation raises serious constitutional concerns)).

168. COLO. REV. STAT. § 2-4-203(f) (2008).

169. MINN. STAT. § 645.16 (2008). I refer to these rather opaque directives as “generic considerative deference.”

170. TEX. GOV’T CODE ANN. § 311.023 (Vernon 2005).

171. The generic deference canon would seem to follow the most flexible form of deference identified by scholars—*Skidmore* deference. See *supra* note 163 and accompanying text, and note 167. *Skidmore* deference is accorded to an agency according to the “thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Skidmore v. Swift*, 323 U.S. 134, 140 (1944).

172. See *supra* text accompanying notes 65–68.

173. See *supra* note 167.

Table 5. Agency Interpretations

CANON	CODIFIED	REJECTED BY CODE
Generic (<i>Skidmore</i>) deference to agencies: If a statute is ambiguous, courts may consider an agency's interpretation of it.	8	0
Agency's own regulations: Presume that an agency interpretation of its own regulations is correct.	0	0
Rule of Extreme Deference: Courts should be highly deferential to agency interpretations when the legislature has expressly delegated lawmaking duties to it.	0	0

to persuade rather than adhering to agency choices only where a statute is ambiguous and the legislature delegates authority to an agency. At the very least, legislatures are comfortable with approaches to deference that are less formalist than *Chevron*.

Legislative comfort with informal deference butts up against Justice Scalia's admonition in his *Mead* dissent, which rejects generic considerative deference for more formalist approaches.¹⁷⁴ The *Mead* dissent rejects the principle that "ambiguity in legislative instructions to agencies is to be resolved not by the agencies but by the judges" as "neither sound in principle nor sustainable in practice."¹⁷⁵ It may be both. But generic considerative deference is the regime that every American legislature with a deference statute has codified and no legislature has rejected.¹⁷⁶

2. Continuity in Law

Many common law canons use sources outside the statute at issue to help an interpreter recognize when a legislature exercises its power to change the status quo and when a legislature seeks to maintain it. The presumption that the legislature uses the same term consistently in different statutes is an echo of the

174. See *United States v. Mead Corp.*, 533 U.S. 218, 239 (2001) (Scalia, J., dissenting).

175. *Id.* at 241, 243.

176. Justice Scalia may be right where the federal government is concerned. Congress, after all, has no general deference rule in its statutory construction chapter. But the background preferences of the states need to be dispatched before *Skidmore* can be wholly rejected. Justice Scalia may have begun down this path in his *Mead* dissent, where he started to distinguish the federal government from the states. The federal government may present a special case because of its size and scope. State agencies may be less pervasive in the lives of state citizens than federal agencies. See *id.* at 250 ("It was possible to live with the indeterminacy of *Skidmore* deference in earlier times. But in an era when federal statutory law administered by federal agencies is pervasive, and when the ambiguities (intended or unintended) that those statutes contain are innumerable, totality-of-the-circumstances *Skidmore* deference is a recipe for uncertainty, unpredictability, and endless litigation.").

presumption of consistent usage.¹⁷⁷ In this form, the canon—also known as construing statutes *in pari materia*¹⁷⁸—stresses consulting other laws in the code to clarify the meaning of a specific statute.

Other canons approve of looking to authoritative non-legislative interpretations of the statute. The reenactment rule assumes that if a legislature reenacts a statute without making any material changes in its wording, the legislature intends to incorporate authoritative agency and judicial interpretations of the language into the reenacted statute.¹⁷⁹ Common law use of the reenactment rule is robust—Sutherland reports that “[h]oldings have been clear on this issue.”¹⁸⁰ The acquiescence rule is a less vocal cousin of the reenactment rule. The acquiescence rule presumes that the legislature approves of an agency or judicial interpretation of a statute if the legislature is aware of it and does not amend the statute.¹⁸¹ Because inaction is not necessarily dispositive of anything, the acquiescence rule has been the subject of substantial criticism. One court charges, “Legislative inaction is a weak reed upon which to lean in determining legislative intent.”¹⁸²

Judges also have developed canons that look outside the code to enforcement rates, the values of the community, and the mischief the law was intended to address. These canons mediate the durability of statutory law and the discontinuation of the conditions that spurred enactment. The desuetude canon approves of judicial abrogation of statutes that remain on the books: if the reason underlying a statute has expired, then the statute itself should not survive, or it should be interpreted in light of the changed conditions.¹⁸³ Sutherland reports that this is not the prevailing view: “[C]ourts generally insist that abrogation on these grounds is exclusively within the province of the legislature, exercisable by enactment of repealing legislation, and not a judicial function.”¹⁸⁴ A corollary canon upholds continuity and predictability, seeking to apply the law in the

177. See *supra* text accompanying note 119.

178. The *in pari materia* rule directs interpreters to use other statutes and provisions employing the same terminology, or treating the same issue, to illuminate the statute being interpreted. ESKRIDGE, FRICKEY & GARRETT, *supra* note 8, at 1039.

179. 2B SUTHERLAND, *supra* note 24, § 49:9 (7th ed. 2008); see, e.g., *Hause v. City of Tucson*, 19 P.3d 640, 643 (Ariz. Ct. App. 2001) (“It is universally the rule that where a statute which has been construed by a court of last resort is reenacted in the same or substantially the same terms, the legislature is presumed to have placed its approval on the judicial interpretation given and to have adopted such construction and made it a part of the reenacted statute.” (quoting *Madrigal v. Indus. Comm’n*, 210 P.2d 967, 971 (Ariz. 1949))).

180. 2B SUTHERLAND, *supra* note 24, § 49:9 (7th ed. 2008).

181. *Id.* § 49:10; see, e.g., *Flood v. Kuhn*, 407 U.S. 258, 283–84 (1972) (“We continue to be loath . . . to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.”).

182. *Berry v. Branner*, 421 P.2d 996, 998 (Or. 1966) (quoted in 2B SUTHERLAND, *supra* note 24, § 49:10, at 137–40 (7th ed. 2008)).

183. 2 SUTHERLAND, *supra* note 24, § 34:6 (7th ed. 2009).

184. *Id.*

same way to similar circumstances.¹⁸⁵

Another common law canon encourages interpreters to look to interpretations outside the enacting legislature's jurisdiction. The borrowed statute rule encourages interpreters to look at judicial opinions outside the enacting jurisdiction to interpret imported legislation. Under the common law rule, courts assume that when a legislature adopts a statute similar or identical to one in another jurisdiction, the legislature also adopts judicial interpretations of that statute from the originating jurisdiction.¹⁸⁶

Legislatures strongly endorse the presumption that the same term is used consistently in different statutes. The presumption of consistent usage and *in pari materia*,¹⁸⁷ which both accept an interpreter's examination of the context of a particular term and what sort of meaning that term has acquired in other statutes, are implicitly the same canon as the presumption of consistency between statutes. However, those statutes that stress context, but restrict the context-based inquiry "to the context of the same statute" as the original provision, have not been counted as codifying this canon.¹⁸⁸ Many states expressly encourage interpreters to look outside of the statute at issue.¹⁸⁹ Colorado has a standard form of this extrinsic source reference: "If a statute is ambiguous, the court, in determining the intention of the general assembly, may consider . . . [t]he common law or former statutory provisions, including laws upon the same or similar subjects . . ." ¹⁹⁰ No states reject this presumption.

The codes support the reenactment rule, with three legislatures enacting this rule and none rejecting it. However, there is some variability in these rules. These legislatures have either enacted presumptions or simply allowed interpreters to consider reenactment as evidence of legislative intent. Pennsylvania's legislature has codified the interpretation presumption that "when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to

185. See ESKRIDGE, FRICKEY & GARRETT, *supra* note 26, at 286 (describing the rule that stare decisis is stronger when applied to judicial decisions involving statutes than when applied to judicial decisions involving the common law because "although the legislature can, by ordinary legislation, override both common law decisions and decisions interpreting statutes, the legislature has greater responsibility to monitor the latter (where the courts have interpreted a legislative product) than the former (where, arguably, courts have a larger, ongoing responsibility to monitor a judicial product, the common law)").

186. 2B SUTHERLAND, *supra* note 24, § 52:2 (7th ed. 2008); see *Zerbe v. State*, 578 P.2d 597, 598 (Alaska 1978) ("As there is no Alaska case law interpreting the statute here in question, we turn for guidance to federal cases construing the similar federal provisions.").

187. See *supra* Table 3 and text accompanying note 99.

188. See *supra* note 117 and accompanying text.

189. See, e.g., FLA. STAT. ANN. § 1.04 (West 2004) ("Acts passed during the same legislative session and amending the same statutory provision are in pari materia, and full effect should be given to each, if that is possible."); 1 PA. CONS. STAT. § 1932 (2006) ("Statutes or parts of statutes are in pari materia when they relate to the same persons or things or to the same class of persons or things. . . . [S]tatutes in pari materia shall be construed together, if possible, as one statute.").

190. COLO. REV. STAT. § 2-4-203 (2008).

be placed upon such language.”¹⁹¹ New Mexico has not codified any such presumption, but interpreters are allowed to “consider[] . . . a reenactment of a statute or re adoption of a rule that does not change the pertinent language after a court or agency construed the statute or rule.”¹⁹² The presumption, however, is probably unavailing because none of the codified versions of the reenactment rule require an interpreter to do anything (interpreters only *may* presume).¹⁹³

Are legislatures as hostile to the acquiescence rule as they might be? If they are hostile, it is not evidenced by their codification patterns. No legislatures have codified or rejected the acquiescence rule.

Though authorities are critical of judicial abrogation based on desuetude, one legislature seems to have codified this common law rule, while two others have rejected it. Montana’s legislature states affirmatively that “[w]hen the reason of a rule ceases, so should the rule itself.”¹⁹⁴ Bizarrely, however, this statute seems to have been declawed by another law. Montana’s desuetude rule is “intended not to qualify any of the other provisions of this code but to aid in their just application.”¹⁹⁵ One law encourages judicial abrogation, while another law expressly forbids it. Despite this schizophrenia, I coded Montana as codifying the desuetude canon because its statement of abrogation is more specific than the general limitation, and in Montana, “[w]hen a general and particular provision are inconsistent . . . a particular intent will control a general one that is inconsistent with it.”¹⁹⁶ The two legislatures that expressly reject desuetude as an interpretive tool admonish that “[a] law shall not be deemed repealed because the reason for its passage no longer exists.”¹⁹⁷ Only Montana has taken a position on the corollary canon to desuetude, enacting the maxim that “[w]here the reason is the same, the rule should be the same.”¹⁹⁸

Legislative preferences affirm the borrowed statute rule, with eight states enacting some version of it and none renouncing it. Many states thereby give a nod to Justice Brandeis’s metaphor of the states as laboratories for policy experiments.¹⁹⁹ When a policy has been vindicated in another jurisdiction, other states may adopt it. Wyoming’s formulation of the borrowed statute rule is typical: “Any uniform act shall be interpreted and construed to effectuate its general purpose to make uniform the law of those states which enact it”²⁰⁰ Thus, states should look to the courts of other jurisdictions in addressing problems in

191. 1 PA. CONS. STAT. § 1922; *see also* MINN. STAT. § 645.17(4) (2008) (using substantially similar language).

192. N.M. STAT. § 12-2A-20(B)(7) (2005).

193. *See, e.g.*, MINN. STAT. § 645.17; N.M. STAT. § 12-2A-20; 1 PA. CONS. STAT. § 1922.

194. MONT. CODE ANN. § 1-3-201 (2007).

195. *Id.* § 1-3-101.

196. *Id.* § 1-2-102; *see also id.* § 1-3-225 (“Particular expressions qualify those which are general.”).

197. MINN. STAT. § 645.40; *see also* 1 PA. CONS. STAT. § 1972 (“A statute shall not be deemed repealed because the reason for its passage no longer exists.”).

198. MONT. CODE ANN. § 1-3-202.

199. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

200. WYO. STAT. ANN. § 8-1-103(a)(vii) (2009).

Table 6. Continuity in Law

CANON	CODIFIED	REJECTED BY CODE
Consistency between statutes/ <i>in pari materia</i> (context): Presume that the legislature uses the same term consistently in different statutes.	26	0
Reenactment Rule: When the legislature reenacts a statute, it incorporates settled interpretations of the reenacted statute.	3	0
Acquiescence Rule: Presume that the legislature approves of an agency or a judicial interpretation where the legislature is aware of the interpretation and does not amend the statute.	0	0
Obsolete reason, obsolete rule (desuetude): When the reason of a rule ceases, so should the rule itself.	1	2
Same reason, same rule: Where the reason is the same, the rule should be the same.	1	0
Borrowed Statute Rule: When the legislature borrows a statute, it adopts by implication interpretations placed on that statute, absent an express statement to the contrary.	8	0

uniform statutes. New Mexico’s borrowed statute rule is more finely tuned, adding a temporal component to the typical formulation—interpreters should consider the “settled judicial construction in another jurisdiction as of the time a statute or rule is borrowed from the other jurisdiction.”²⁰¹

3. Extrinsic Legislative Sources

Legislative history includes all of the materials related to the drafting and passage of a statute.²⁰² The American judiciary generally consults background materials to illuminate statutes despite criticism that legislative history is an untrustworthy indicator of legislative intent.²⁰³ It is protested just as vehemently as it is commonly used. If a statute is ambiguous, courts are generally not shy

201. N.M. STAT. § 12-2A-20(B)(1) (2005). The typical formulation is at *id.* § 12-2A-18 (“A statute that is intended to be uniform with those of other states is construed to effectuate that purpose with respect to the subject of the statute.”); *see also* 1 PA. CONS. STAT. § 1927 (“Statutes uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them.”).

202. 2A SUTHERLAND, *supra* note 24, § 48.1 (7th ed. 2007).

203. *See, e.g.,* SCALIA, *supra* note 49, at 29–37 (noting that legislatures likely had no idea of the issue facing the court, that legislative intent is likely to encompass the views of only a limited number of

about examining legislative history.²⁰⁴

Consulting legislative history is a monolithic common law canon that has developed to accommodate a varied landscape of sources. It invokes a collection of subcanons, including, but not limited to, the following: provisions should be interpreted consistently with subsequent amendments and, therefore, there is a presumption against an interpretation considered and rejected by a floor vote of the legislative body (either legislature or committee);²⁰⁵ committee reports are authoritative sources of statutory meaning, but they cannot trump the clear text of the statute;²⁰⁶ legislative debates can illuminate the meaning of the statute, especially if the debate includes explanatory statements by the sponsor of the bill or by someone on the relevant committee, but the interpretation of opponents of a bill are accorded less weight;²⁰⁷ and the “dog didn’t bark” canon, in which courts channel Sherlock Holmes and find it significant in the legislative history that, despite prolonged debate on proposed legislation, no “change in current laws . . . of the magnitude of the . . . proposed interpretation” was “discussed, mentioned, or at least alluded to.”²⁰⁸

Broader extrinsic legislative source canons permit interpreters to examine the circumstances under which a statute was enacted. This common law canon stresses a more panoramic historical view of the conditions that led to enactment. In *Leo Sheep Co. v. United States*, then-Justice Rehnquist employed this approach—sketching out a historical epic that included wagon trains, the gold rush, and the checkerboard land abutting the transcontinental railroad—before holding that the government did not have an implied easement to build a road

senators or representatives, and that it is not certain that members of the legislature even read committee reports before voting).

204. Though use of legislative history in the Supreme Court may be on the decline, it is still featured as a tool of statutory interpretation. 2A SUTHERLAND, *supra* note 24, § 48:1, at 540–41 (7th ed. 2007); see also James J. Brudney & Corey Ditslear, *Liberal Justices’ Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 117–23 (2008) (analyzing more than 320 majority opinions authored by eight liberal Justices of the Court between 1969 and 2006, and finding a positive relationship between reliance on legislative history and pro-employer decisions, but also concluding that, in the face of Justice Scalia’s opposition to legislative history, liberal Justices avoided the use of legislative history for pro-employer decisions that Justice Scalia joined); James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History?: Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220, 222 (2006) (reliance on legislative history in majority opinions in the area of workplace law “declined from 50 percent in the 1986 term to 33 percent during the following three terms (1987–89) and to 17 percent for the 1990–92 terms. . . . [T]hen [it] leveled off at 23 percent for almost a decade before rebounding to 37 percent,” then rose to 43 percent for the 2002 and 2003 Terms, but dropped to 17 percent for the 2004 Term).

205. 2A SUTHERLAND, *supra* note 24, § 48:18 (7th ed. 2007).

206. *Id.* § 48:6, at 573–75.

207. *Id.* § 48:13.

208. *Mont. Wilderness Assoc. v. U.S. Forest Serv.*, 655 F.2d 951, 955 n.7 (9th Cir. 1981); cf. ARTHUR CONAN DOYLE, *Silver Blaze*, in *THE ADVENTURES OF SHERLOCK HOLMES* 534 (Edgar W. Smith ed., Heritage Press 1981) (1892) (“[Inspector Gregory:] ‘Is there any point to which you would wish to draw my attention?’ [Holmes:] ‘To the curious incident of the dog in the night-time.’ [Gregory:] ‘The dog did nothing in the night-time.’ [Holmes:] ‘That was the curious incident.’”).

across petitioners' land.²⁰⁹ A similar canon admits contemporaneous understandings of legislation as relevant to identifying legislative intent (both before and, to a lesser extent, after enactment).²¹⁰ Yet another canon accords persuasive power to official commentaries published and available before the enactment or adoption of the statute.²¹¹

Despite the criticisms of legislative history and its drawbacks, American legislatures have ratified judicial use of legislative history. Eleven states have expressed a preference with respect to legislative history, and all of them have given it the nod. The most common form of the statute is rather direct: "If a statute is ambiguous, the court, in determining the intention of the legislation, may consider among other matters: . . . The legislative history."²¹² Hawaii has endorsed the use of legislative history more implicitly: When confronted with an ambiguous statute, "the cause which induced the legislature to enact it, may be considered to discover its true meaning."²¹³ The cause for enactment gestures at legislative history, which is a primary tool for identifying a statute's purpose. New Mexico finishes the implication, codifying that uncertain interpreters may consider "the purpose of a statute or rule as determined from the legislative or administrative history of the statute or rule."²¹⁴ Even Connecticut's plain meaning rule *tour de force* is implicitly permissive of extrinsic legislative sources: the directive that "extratextual evidence of the meaning of the statute shall not be considered" if the meaning of text is "plain and unambiguous" sanctions the use of extratextual sources when statutory language is unclear.²¹⁵ Texas goes further than all other states, having codified that "whether or not the statute is considered ambiguous on its face, a court may consider among other matters the . . . legislative history."²¹⁶

But when accepting legislative history as an interpretive tool, what types of legislative history go in the toolbox? Pennsylvania has a particularly precise description of what counts as legislative history in addition to demanding that legislative history must be both generally available and published before a law is passed:

209. 440 U.S. 668, 669–77, 681–82 (1979).

210. 2B SUTHERLAND, *supra* note 24, § 49:1 (7th ed. 2008).

211. *See* ESKRIDGE, FRICKEY & GARRETT, *supra* note 8, at 1017 (expressing skepticism about the reliance on statements made after enactment because such statements were not available during the enactment process).

212. N.D. CENT. CODE § 1-02-39(3) (2008).

213. HAW. REV. STAT. § 1-15(2) (1993).

214. N.M. STAT. § 12-2A-20(c)(2) (2005).

215. CONN. GEN. STAT. § 1-2z (2007). If Connecticut's legislature wanted to exclude extratextual sources of meaning, they certainly would have done so here. It manifestly did not. As a category, extratextual sources at the very least includes legislative history (and may include all the other extrinsic legislative sources in Table 7, though I did not count these canons as codified for lack of specificity in the statute). Thus in Connecticut, legislative history may be considered under certain circumstances.

216. TEX. GOV'T CODE ANN. § 311.023 (Vernon 2005).

The comments or report of the commission, committee, association or other entity which drafted a statute may be consulted in the construction or application of the original provisions of the statute if such comments or report were published or otherwise generally available prior to the consideration of the statute by the General Assembly, but the text of the statute shall control in the event of conflict between its text and such comments or report.²¹⁷

This rule of recognition helps legislators and practitioners. It enhances legislators' ability to be vigilant for manipulative uses of legislative history, while marking the boundaries of legal research that practitioners may undertake to reveal a statute's legislative history.²¹⁸

Legislatures have not provided much guidance on what interpreters are to do with the legislative history they consider. Oregon's instruction, however, seems to fill out what it means to "consider" legislative history: "A court shall give the weight to the legislative history that the court considers to be appropriate."²¹⁹ The provision also states that "[a] court may limit its consideration of legislative history to the information that the parties provide to the court"—it does not force judges to go on a fishing expedition for relevant information.²²⁰

Not wanting to bar interpreters from relying on the circumstances in which a statute was enacted, legislatures have codified their permission. As explained above, the common law canon permitting the consideration of contemporaneous understandings of a statute contains general historical inquiry.²²¹ Ten states have codified this canon, with most specifically providing that "[i]f a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters: . . . The circumstances under which the statute was enacted."²²² As with legislative history, interpreters of Texas law may consider the circumstances of enactment regardless of whether the statute at issue is facially ambiguous.²²³

Legislative history codifications also bear on the timing of the historical evidence to be considered. By permitting reliance on legislative history and the

217. 1 PA. CONS. STAT. § 1939 (2006).

218. Two major criticisms of the use of legislative history are related to its cost and scope. Researching it imposes an onerous cost on parties that undertake to assemble and analyze the universe of legislative information, while its indeterminate size and variety makes it impossible to police for manipulative content. *See* SCALIA, *supra* note 49, at 36; *see also* Wallace v. Christensen, 802 F.2d 1539, 1559 (9th Cir. 1986) (Kozinski, J., concurring in the judgment) (arguing that the majority relies too extensively on legislative history). Both concerns can be remedied through statutes similar to Pennsylvania's.

219. OR. REV. STAT. ANN. § 174.020(3) (West 2007).

220. *Id.*

221. *See supra* text accompanying notes 209–11.

222. IOWA CODE § 4.6 (1999). Georgia's less specific, but more dramatic, codification of this canon refers to the original problem confronting the legislature and its solution. GA. CODE ANN. § 1-3-1(a) (2000 & Supp. 2009) ("In all interpretations of statutes, the courts shall . . . keep[] in view at all times the old law, the evil, and the remedy.").

223. TEX. GOV'T CODE ANN. § 311.023 (Vernon 2005).

circumstances in which a statute was enacted, legislatures also implicitly affirm that contemporaneous understandings are admissible. Several codes, for instance, mention “contemporaneous legislative history,”²²⁴ and another maxim of interpretation declares that “[c]ontemporaneous exposition is in general the best.”²²⁵ As a formalist matter, legislative history occurs before a statute is adopted.²²⁶ Although legislatures generally do not expressly stress that extrinsic sources must have existed before enactment, there is nothing to suggest that legislatures have sought to incorporate postenactment commentary as an interpretive tool by reference to “legislative history.” After a statute is passed, political actors are no longer constrained by the deal or compromise that facilitated passage.²²⁷ Indeed, at least one state affirmatively rejects postenactment commentaries: Official commentaries are eligible for consideration only if they are “published and available before the enactment or adoption of the statute or rule.”²²⁸

Legislatures permit the use of extrinsic legislative sources to a remarkable degree, especially given the persistent criticisms leveled against their use. Every state that has addressed extrinsic legislative sources supports their use when the language of the statute is unclear (and at least one state goes further to allow its use even when a statute is clear).²²⁹ Aside from usefully pruning legislative history through a rule of recognition, no state stands against extrinsic legislative sources, though many put restrictions on its use.

C. SUBSTANTIVE POLICY CANONS

Another family of common law canons includes canons that are not policy neutral. Some of these canons privilege certain policy results over others. Other substantive policy canons are based on social values like justice and reasonableness.

1. Separation-of-Powers Canons

Judges have developed common law canons to protect and reinforce the separation of powers across constitutionally created governmental organs. The avoidance canon buttresses legislative authority to make law and, at the same time, acknowledges judicial review to prevent the legislature from overstepping

224. *See, e.g.*, MINN. STAT. § 645.16 (2008); 1 PA. CONS. STAT. § 1921 (2006).

225. MONT. CODE ANN. § 1-3-226 (2007).

226. “The term ‘legislative history’ is mostly used to refer to the internal legislative pre-history of a statute—the institutional progress of a bill to enactment and the deliberation accompanying that progress,” but “[s]ometimes . . . the legislature . . . will continue to talk about the statute after enactment.” ESKRIDGE, FRICKEY & GARRETT, *supra* note 8, at 937, 1013. *See, e.g.*, Mont. Wilderness Ass’n v. U.S. Forest Serv., 655 F.2d 951, 957 (9th Cir. 1981) (changing previous opinion on rehearing because the appellees “uncovered subsequent legislative history that, given the closeness of the issue, [was] decisive”); *supra* text accompanying note 208.

227. *See supra* note 211.

228. N.M. STAT. § 12-2A-20(B)(3) (2005).

229. *See* TEX. GOV’T CODE ANN. § 311.023 (Vernon 2005).

Table 7. Extrinsic Legislative Sources

CANON	CODIFIED	REJECTED BY CODE
Consider legislative history: Legislative history may be considered under various circumstances.	11	0
Contemporaneous circumstances: The circumstances under which a statute was enacted may be considered.	10	0
Contemporaneous understandings: Contemporaneous understandings of a statutory scheme may be considered.	10	0
Commentary prior to passage: Official commentary published and available before the enactment or adoption of a statute or rule may be considered.	7	0

its power. It presumes that acts of the legislature are constitutional, and as a result, interpreters should construe such acts to avoid serious, but potentially unavailing, constitutional objections.²³⁰ The modern form of the avoidance canon does not require courts to first conclude that a particular ambiguity is unconstitutional before marking out the boundaries of the statute's constitutionality.²³¹ The avoidance canon, however, is controversial, with some scholars suggesting that courts should reject it altogether.²³² Despite substantial criticism, the avoidance canon is a bedrock principle of statutory construction.²³³

Comity has produced other common law canons that bear more specifically on the division of authority between branches. The core executive powers canon protects the Executive Branch from invasions of its core powers (such as prosecutorial discretion, security, and relations with other sovereigns),²³⁴ while another canon protects against review of executive actions for abuse of discretion. The Judicial Branch is protected from curtailment of its own inherent and equitable powers.²³⁵ Other canons focus on legislative authority: the presumption against judicial expansion of injury in fact to include intangible or proce-

230. 2 SUTHERLAND, *supra* note 24, § 44A:19 (7th ed. 2009).

231. See Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1203 (2006).

232. See, e.g., Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71 (arguing that avoidance may result in judicial interpretations of statutes that are not aligned with the legislature's intentions).

233. 2 SUTHERLAND, *supra* note 24, § 44A:19 (7th ed. 2009).

234. See 3 SUTHERLAND, *supra* note 24, § 65A:7 (7th ed. 2008) (referencing a “[p]resumption[] in favor of . . . noninterference with executive power in foreign affairs . . . and [a p]resumption against interference with traditional powers of the President”).

235. 2B *id.* § 50:2 (7th ed. 2008) (“[L]egislation creating new rights or benefits has received enforcement limited by the inherent powers of the courts of equity.”).

dural injuries protects legislative authority.²³⁶ The nondelegation doctrine presumes that legislatures do not delegate authority without giving sufficient guidance to their agents.²³⁷ The presumption against implied causes of action protects the legislature's ability to create rights and remedies independent of each other.²³⁸

Finally, another separation-of-powers canon—the presumption favoring severability of unconstitutional provisions—saves acts from nullification if discrete portions are unconstitutional.²³⁹ Instead of rendering a statute altogether unconstitutional, courts will often leave the valid parts in force on the assumption that the legislature would have intended those provisions to stand alone. Courts deploy this doctrine to permit stable legislative policies. For example, the Federal Sentencing Guidelines faced a constitutional challenge in *United States v. Booker*.²⁴⁰ Rather than declare them unconstitutional and entirely void, Justice Breyer excised specific unconstitutional provisions.²⁴¹ The Guidelines were preserved in an advisory capacity instead of being eliminated, yielding a statutory system for federal criminal sentencing that still retained a measure of consistency.²⁴²

Legislatures have adopted the common law avoidance canon but have left room for it to grow. Five legislatures have codified the avoidance canon, while none have rejected it. This uniformity nullifies the argument from critics of the avoidance canon that legislatures do not want interpreters to avoid unconstitutional interpretations.²⁴³ Legislatures have taken essentially two approaches in adopting the avoidance canon: direct and indirect. New Mexico has taken the most direct approach, codifying the canon almost word for word from the description found in treatises: “A statute or rule is construed, if possible, to . . . avoid an unconstitutional . . . result.”²⁴⁴ Other states have taken an indirect approach and codified the underlying presumption that legislative acts are constitutional: “In ascertaining the intention of the legislature the courts may be

236. See, e.g., *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (explaining that injury in fact occurs only when there is a “case” or “controversy,” and denial of concrete interest protected by the statute).

237. See 1 SUTHERLAND, *supra* note 24, § 3:2 (6th ed. 2002 & Supp. 2006).

238. 2A *id.* § 48A:7 (7th ed. 2007).

239. 2 *id.* § 44A:19, at 976 (7th ed. 2009).

240. 543 U.S. 220, 226 (2005) (Stevens, J., delivering opinion of the Court in part).

241. See *id.* at 259 (Breyer, J., delivering opinion of the Court in part) (excising those parts that made enhancements mandatory on the basis of judicially found facts and the standard of appellate review).

242. See *id.* at 264–65.

243. For example, Professor Schauer advocates for the abandonment of the avoidance canon, *inter alia*, because the judicial invalidation of legislation is “less unauthorized by the people than . . . in the past,” and he claims that the “imbalance” between “judicial intrusion of rewriting an Act” and the “judicial intrusion of invalidating an Act” is far less. Schauer, *supra* note 232, at 96. However, codifying the avoidance canon provides at least some compelling evidence that, contrary to Schauer's claim, legislatures may prefer the “judicial intrusion of rewriting an Act” to the “judicial intrusion of invalidating an Act.” *Id.*

244. N.M. STAT. § 12-2A-18 (2005).

guided by the following presumptions: . . . the legislature does not intend to violate the Constitution of the United States or of this state.”²⁴⁵ The avoidance canon flows naturally from this presumption, which essentially instructs interpreters to avoid constitutional objections in construing statutes. It is worth noting, however, that none of these codifications take a position in the modern/classic debate over the proper application of the avoidance canon.²⁴⁶ Neither of the two forms of the avoidance canon statute indicate whether the canon should be applied to avoid serious but potentially unavailing constitutional objections or whether the canon should be applied only after a particular construction is deemed unconstitutional. Having not expressed a preference, the legislatures permit this debate to continue.

Oddly, none of the legislatures have codified any of the more specific separation-of-powers or comity canons. It may, however, be no surprise that legislatures refrain from adopting canons that protect the core powers of other branches, such as the rule against invasion of core executive powers, the rule against review of core executive actions for abuse of discretion, the rule against legislative curtailment of the judiciary’s “inherent” or equity powers, the rule against including procedural or intangible injuries within the ambit of injury in fact, or the presumption against implied causes of action. Not adopting these canons—which affirmatively distribute power to other branches—localizes power in the legislative branch. This is consistent with the observation that government institutions self-protect.²⁴⁷

No legislature expressly opposes separation of powers or comity, but statutes rejecting comity towards other branches would almost certainly violate the federal and (perhaps all) state constitutions. Most surprising is that no legislature has codified the canons that reinforce legislative power, such as the presumption that when legislatures delegate authority, they do so with sufficient guidance.²⁴⁸ Adopting this canon would make it easier for legislatures to create agencies and afford legislators plausible deniability when their agents resolve controversial political issues. There are constitutional limits to the nondelegation doctrine, but those limits are consistent with the presumption that the legislature would be adopting.

Legislatures are wildly enthusiastic about severability: it is codified in thirty-five jurisdictions; none have rejected it. Severability generally reinforces legisla-

245. MINN. STAT. § 645.17(3) (2008); *see also* N.D. CENT. CODE § 1-02-38 (2008) (“In enacting a statute, it is presumed that . . . [c]ompliance with the constitutions of the state and of the United States is intended.”); 1 PA. CONS. STAT. § 1922 (2006) (“In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used: That the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth.”); TEX. GOV’T CODE ANN. § 311.021 (Vernon 2005) (“In enacting a statute, it is presumed that . . . compliance with the constitutions of this state and the United States is intended . . .”).

246. *See supra* notes 230–31 and accompanying text.

247. *See Morrison, supra* note 231, at 1229–38 (describing the avoidance canon as a self-protective device).

248. Ironically, such a canon might actually impair the legislature in the long term by strengthening agencies and broadening their discretion.

tive power because it permits as much of a questionable act to survive as possible.²⁴⁹ Thus, the widespread codification of the severability canon raises no eyebrows. Alabama adopts the most widely codified formulation of the severability canon:

If any provision of this code or any amendment hereto, or any other statute, or the application thereof to any person, thing or circumstances, is held invalid by a court of competent jurisdiction, such invalidity shall not affect the provisions or application of this code or such amendment or statute that can be given effect without the invalid provisions or application, and to this end, the provisions of this code and such amendments and statutes are declared to be severable.²⁵⁰

Other states require severability unless a court makes an explicit finding either that “the valid provisions or application of the act are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the Legislature would have enacted the remaining valid provisions without the void one” or that “the remaining valid provisions or applications of the act, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.”²⁵¹ Other states are more direct: “If any provision of any act passed by the General Assembly or its application to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of such act.”²⁵²

It is remarkable how far legislatures will go to ensure that their statutes are severable. After adopting severability for its laws, the Georgia legislature’s emphatic statute basically makes every part of the code severable:

The General Assembly declares that it would have enacted the remaining parts of this Code if it had known that such portion hereof would be declared or adjudged invalid or unconstitutional. The General Assembly further declares that it would have enacted the remaining parts of any other Act or resolution if it had known that such portion thereof would be declared or

249. Under limited circumstances, however, severability can work in unexpected ways to limit legislative power. For instance, in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), Congress delegated power to the Attorney General but tried to reserve a legislative veto over the delegation of power. It included a severability provision in the legislation. The Court, however, construed the severability provision to excise the legislative veto provision without excising the provision delegating power to the Attorney General.

250. ALA. CODE § 1-1-16 (LexisNexis 1999).

251. OKLA. STAT. ANN. tit. 75, § 11a (West 2008); see also OR. REV. STAT. ANN. § 174.040 (West 2007) (using substantially the same language).

252. CONN. GEN. STAT. § 1-3 (2007); see, e.g., MICH. COMP. LAWS ANN. § 8.5 (West 2004) (“If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable.”).

adjudged invalid or unconstitutional unless such Act or resolution contains an express provision to the contrary.²⁵³

Many states, such as Massachusetts, essentially require that severability clauses be read into every statute: “The provisions of any statute shall be deemed severable, and if any part of any statute shall be adjudged unconstitutional or invalid, such judgment shall not affect other valid parts thereof.”²⁵⁴

One legislature is so vehement about protecting severability that it rejects another canon to serve severability. Nevada protects severability by preventing interpreters from making any *expressio unius*-based inferences that threaten severability, declaring that “[t]he inclusion of an express declaration of severability in the enactment of any provision of [the Code] or the inclusion of any such provision in [the Code], does not enhance the severability of the provision so treated or detract from the severability of any other provision of [the Code].”²⁵⁵ In a notable departure from the trend, Congress has not codified any version of the severability canon in the United States Code’s Rules of Construction chapter.

2. Due Process Canons

Judges have developed other common law canons to support the protection of procedural rights. These due process canons should be viewed in the shadow of the state and federal constitutions. Judges have created common law canons requiring proof of specific intent in criminal cases where no specific mental state is required by the statute;²⁵⁶ presuming that ambiguous statutes should not be interpreted to deny a right to trial by jury; creating a presumption in favor of judicial review of agency action (particularly where constitutional questions are involved), but not where an agency takes no action;²⁵⁷ presuming that ambiguous or absent pre-enforcement provisions do not permit pre-enforcement challenges to agency or statutory action;²⁵⁸ presuming that a party need not exhaust all remedies before bringing a lawsuit to vindicate constitutional rights;²⁵⁹ presuming that judgments are not binding upon entities that are not parties to a

253. GA. CODE ANN. § 1-1-3 (2000).

254. MASS. GEN. LAWS. ANN. ch. 4, § 6 (West 2006); *see also* MD. CODE ANN. art. 1, § 23 (LexisNexis 2005) (provisions are severable unless otherwise provided by statute); MINN. STAT. § 645.20 (2008) (same); MISS. CODE ANN. § 1-3-77 (2005) (all provisions are severable unless an act clearly sets forth a “contrary intent”).

255. NEV. REV. STAT. § 0.020 (2007). I did not count this statute as rejecting *expressio unius* because it is specific to severability.

256. 3 SUTHERLAND, *supra* note 24, § 65A:12, at 773 (7th ed. 2008).

257. *See id.* § 65A:7, at 684–85.

258. *See* 3B *id.* § 77A:26, at 983–98 (6th ed. 2003) (discussing the requirement that Congress enact statutes to permit pre-enforcement challenges and suggesting that there is a background presumption against pre-enforcement challenges).

259. *See* 3 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 13.22 (2d ed. 1997) (observing that constitutional claims “seeming substantial on their face” or that cannot “be remedied by a post-deprivation review in the courts” create an exception to the exhaustion requirement).

Table 8. Separation-of-Powers Canons

CANON	CODIFIED	REJECTED BY CODE
Avoidance/Unconstitutionality: Avoid interpretations that would render a statute unconstitutional.	5	0
Core executive powers: Rule against legislative invasion of core executive powers.	0	0
Executive abuse of discretion: Rule against review of core executive actions for “abuse of discretion.”	0	0
Judiciary’s equity or “inherent” powers: Rule against legislative curtailment of the judiciary’s “inherent powers” or its “equity” powers.	0	0
Injury in fact: Rule against legislative expansion of injury in fact to include intangible and procedural injuries.	0	0
Nondelegation: Presumption that the legislature does not delegate authority without sufficient guidelines.	0	0
Implied cause of action: Presumption against “implying” causes of action into statutes.	0	0
Severability: Presumption favoring severability of unconstitutional provisions.	35	0

case;²⁶⁰ presuming that ambiguous statutes do not foreclose private enforcement of rights;²⁶¹ and presuming that in civil cases, the standard for factual questions is a preponderance of the evidence.²⁶²

The retroactivity rule is a bedrock common law canon rooted in “[a] fundamental principle of jurisprudence [that] holds that retroactive application of new laws is usually unfair.”²⁶³ The canon also has constitutional roots in an important limit on congressional power: “No . . . ex post facto Law shall be passed.”²⁶⁴ The common law rule provides that laws should not adhere to acts or conditions existing before an act is passed and that “courts favor prospective application of statutes.”²⁶⁵ Though express provisions declaring retroactivity are generally preferred, judges have developed wide exceptions to this preference.²⁶⁶

260. ESKRIDGE, FRICKEY & GARRETT, *supra* note 8, app. B, at 23.

261. *Id.*

262. *Id.*

263. 2 SUTHERLAND, *supra* note 24, § 41:2, at 386 (7th ed. 2009).

264. U.S. CONST. art. I, § 9, cl. 3.

265. 2 SUTHERLAND, *supra* note 24, § 41:2, at 393 (7th ed. 2009).

266. For example, where a statute is not expressly retroactive, the courts will decline to apply a law retroactively where a “manifest injustice”—identified by examining three factors: “(a) the nature and

The collective legislatures express no preference regarding many of the due process canons. Because due process canons exist in the shadow of the state and federal constitutions, the due process canons are an offshoot of the avoidance canon's avulsion to unconstitutional interpretations (which many legislatures have codified) and may present more detailed explanations of the avoidance canon's contents. Because some of these canons relate to specific subject matter, it is possible that the legislature codified them in a particularized part of the code, rather than in the statutory interpretation rule section that applies to the whole code, and therefore they should not be included in this code-wide examination.²⁶⁷

Legislative preferences, however, predominantly feature codification of the retroactivity rule. No state rejects it. The usual form of the codified canon is brief and to the point: "No statute is retrospective unless expressly declared therein."²⁶⁸ The majority of legislatures require an express statement of retroactivity before an interpreter can construe a statute to apply to past conditions.²⁶⁹ Other states approach retroactivity by stating a corollary of the presumption against retroactivity: "A statute is presumed to be prospective in its operation."²⁷⁰ A third and more formal way to codify the retroactivity canon gives interpreters a default future effective date for statutes and requires the legisla-

identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights"—would result. *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 716–17 (1974); *see also United States ex rel. McCoy v. Cal. Med. Rev., Inc.*, 723 F. Supp. 1363, 1368 (N.D. Cal. 1989) (same); 2 SUTHERLAND, *supra* note 24, § 41:2, at 393 (7th ed. 2009) ("The general rule that courts favor prospective application of statutes is founded on the premise that fundamental fairness requires that citizens be given notice . . .").

267. For example, the rule of lenity, which requires ambiguity in penal statutes to be resolved against the government, *see* 3 SUTHERLAND, *supra* note 24, § 59:4, at 182–82 (7th ed. 2008), may be codified in the local section of the code governing criminal law. *See, e.g.,* FLA. STAT. ANN. § 775.021 (West 2004) (adopting the "principle of lenity" in Title XLVI ("Crimes") for Florida's penal statutes by stating that the "provisions of this code and offenses defined by other statutes shall be strictly construed" such that "when the language is susceptible of differing constructions, it shall be construed most favorably to the accused").

268. ALASKA STAT. § 01.10.090 (2008); *see, e.g.,* KY. REV. STAT. ANN. § 446.080 (West 2006) ("No statute shall be construed to be retroactive, unless expressly so declared."); N.D. CENT. CODE § 1-02-10 (2008) ("No part of this code is retroactive unless it is expressly declared to be so.").

269. The following codified canons require a statute's retroactive effect to be express, obvious, plain, manifest, or clear. ALASKA STAT. § 01.10.090 (2008); ARIZ. REV. STAT. ANN. § 1-244 (2002); CAL. CIV. CODE § 3 (West 2007); HAW. REV. STAT. § 1-3 (1993); IDAHO CODE ANN. § 73-101 (2006); IOWA CODE § 4.5 (1999); KY. REV. STAT. ANN. § 446.080(3) (West 2006); LA. REV. STAT. ANN. § 1:2 (2003 & Supp. 2009); MINN. STAT. § 645.21 (2008); MONT. CODE ANN. § 1-2-109 (2007); N.M. STAT. § 12-2A-8 (2005) (This statute requires an express statement of retroactivity or that retroactive effect be required from context. Because many of the other retroactivity rules are subject to context, this is not an aberration.); N.D. CENT. CODE § 1-02-10 (2008 & Supp. 2009); OHIO REV. CODE ANN. § 1.48 (LexisNexis 1990); 1 PA. CONS. STAT. § 1926 (2006); S.D. CODIFIED LAWS § 2-14-21 (2004 & Supp. 2009); TEX. GOV'T CODE ANN. § 311.022 (Vernon 2005); UTAH CODE ANN. § 68-3-3 (2008); W. VA. CODE ANN. § 2-2-10(bb) (LexisNexis 2006).

270. COLO. REV. STAT. § 2-4-202 (2008). New Mexico, Ohio, and Pennsylvania link the corollary to the root proposition. N.M. STAT. § 12-2A-8 (2005) ("A statute or rule operates prospectively only unless the statute or rule expressly provides otherwise or its context requires that it operate retrospectively."); OHIO REV. CODE ANN. § 1.48 (LexisNexis 1990) ("A statute is presumed to be prospective in

ture to expressly declare a different effective date to depart from the default rule.²⁷¹ Some legislatures place slightly less emphasis on requiring an express statement of retroactivity before their laws may be interpreted to be retroactive. But the bar is not lowered a great amount. For example, in the absence of an express provision of retroactivity, Hawaii's legislature directs that laws should not be interpreted retroactively unless "obviously intended."²⁷² Yet again, Congress lags well behind the states, having not codified the retroactivity rule in the United States Code's Rules of Construction chapter.

At the same time that legislatures adopt the retroactivity rule, they reject portions of the interpretive common law. The high bar required for retroactive effect recalibrates the common law interpretive rule and rejects the common law's wide exception to the express requirement—that interpreters can find retroactivity "if the statutory language creates something new, in respect to the transactions or the considerations already past."²⁷³ Many codified versions create a less flexible interpretive rule that is, on its face, more constraining on legislatures than the common law rule. Perhaps the express or near-express ("obvious") requirement of a retroactivity provision makes budget calculations easier or facilitates better information for bargaining about a bill. The high bar of the codified rule has the virtue of being clear, but it sacrifices giving greater effect to laws by expanding the time frame on which it exerts its influence. The express/obvious rule requires less reliance on the judiciary's ability to apply the rule to particular circumstances and determine when unfairness results from allowing a statute to operate on the past. Whether or not the express/obvious codified version of the rule is a positive development can be debated; the prevalence of the express/obvious version, however, is not subject to dispute.

3. Statute-Based Canons

Other common law canons focus on the imperfections in the legislative process and address unforeseen consequences common to the enactment of a wide variety of statutes.²⁷⁴ The courts have developed many common law

its operation unless expressly made retrospective."); 1 PA. CONS. STAT. § 1926 (2006) ("No statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly.").

271. *See, e.g.*, WYO. STAT. ANN. § 8-1-108 (2009) ("Every law takes effect ninety (90) days after the adjournment of the session of the legislature at which it was enacted, unless a different effective date is specified therein.").

272. HAW. REV. STAT. § 1-3 (1993); *see also* GA. CODE ANN. § 1-3-5 (2000) (providing that laws do not "ordinarily . . . have a retrospective operation"); MINN. STAT. § 645.21 (2008) ("No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature."); S.D. CODIFIED LAWS § 2-14-21 (2004) (providing that, in the absence of an express retroactivity provision, laws can only be construed as retroactive if "such intention plainly appears").

273. 2 SUTHERLAND, *supra* note 24, § 41:2, at 388 (7th ed. 2009).

274. Because other, more specific canons were not included in code-wide interpretive rule sections and were more likely to be found in subject-matter specific sections, I did not include them. These canons also respond to deficiencies in the legislative process and the onerous task of adding provisions to account for the legal effects of a statute. They include the following: the presumption that a court will not apply a sanction for failure to follow timing provisions where the statute specifies no sanctions;

Table 9. Due Process Canons

CANON	CODIFIED	REJECTED BY CODE
Intent: Rule against imposition of criminal penalties absent a showing of specific intent.	0	0
Jury trial: Rule against interpreting statutes to deny jury trial right.	0	0
Judicial review: Presumption in favor of judicial review, especially for constitutional questions, but not for agency decisions not to prosecute.	0	0
Pre-enforcement challenge: Presumption against pre-enforcement challenges to implementation.	0	0
Exhaustion: Presumption against an exhaustion of remedies requirement as a condition precedent to a lawsuit enforcing constitutional rights.	0	0
Parties: Presumption that judgments will not be binding upon persons not party to an adjudication.	0	0
Private enforcement of rights: Presumption against foreclosure of private enforcement of important rights.	0	0
Preponderance of the evidence: Presumption that a preponderance of the evidence standard applies in civil cases.	0	0
Retroactivity: Presumption against interpreting statutes to be retroactive.	24	0

canons to address deficiencies in the legislative process, especially when the legislature enacts new laws bearing on the same subject matter as a prior provision. The rule against implied repeals disfavors, but does not prohibit, interpreting a later enactment to impliedly repeal previous legislation.²⁷⁵ The

narrow interpretation of exemptions from taxation (this is a more specific iteration of the “narrow exceptions” codified canon described previously, *supra* Table 3 and text accompanying notes 133–35); the strong presumption in favor of enforcing arbitration agreements and the rule favoring arbitration of statutory claims (which are both more likely to be addressed in more specific chapter sections rather than codified as interpretive rules applying to the whole code); and the common law canon favoring strict construction of statutes authorizing appeals (which is a more specific iteration of the strict construction canon, which many legislatures have rejected, *see supra* Table 1 and text accompanying notes 69–73).

275. 1A SUTHERLAND, *supra* note 24, § 23:9 (6th ed. 2002); 2 *id.* § 34:3 (7th ed. 2009). In *United States v. Borden Co.*, 308 U.S. 188, 198 (1939), the Supreme Court stated that “[i]t is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible.”

common law doctrine, however, is hesitant to recognize implied repeals. It will only do so when “the earlier and later statutes are irreconcilable or if the later act covers the whole subject of the earlier one and is clearly intended as a substitute.”²⁷⁶ Proving irreconcilability is extraordinarily difficult, and the common law doctrine discourages findings of irreconcilability even if “the later statute is not entirely harmonious with the earlier one.”²⁷⁷

Canons also guide the interpretation of subsequent acts that might revive dead law or make changes in previously existing law. The common law canon regarding the revival of dead law models logical formalism: the repeal of a repealing statute revives the original enactment.²⁷⁸ Another common law canon provides that clerical corrections do not make substantive changes to the law.²⁷⁹

Other canons take notice of limited resources and relieve legislatures of the onerous burden of anticipating and providing for every legal effect a statute can cause. These canons allow the legislature to be more concise. One canon warns that ambiguous statutes should not be interpreted to limit or enlarge any provision in treaties or agreements between states (or between the United States and other powers).²⁸⁰ Another presumes that a private right of action (express or implied) carries with it all traditional remedies.²⁸¹ The feasible execution canon avoids interpretations that produce unworkable statutory results.²⁸² This canon is vulnerable to the criticism that it allows judges to perform functions properly exercised by the legislature.

Finally, courts look to the purpose or object of the statute because the legislature cannot foresee all of the eventualities to which the statute may be applied.²⁸³ Legislatures generally aim statutes at broad concepts and do not resolve all the questions that arise when that concept is applied to the real world. This canon permits judges to divine the broad purpose of the statute and apply it to a particular set of facts, choosing the interpretation that best carries out the statute’s purpose.²⁸⁴

Where implied repeal is concerned, legislative codifications largely track the

276. 1A SUTHERLAND, *supra* note 24, § 23:9, at 469 (6th ed. 2002).

277. *Id.* at 462–64.

278. *Id.* § 23:32.

279. *Id.* § 28:13 (“[A]s a general rule, statutes enacted as mere code revision are presumed not to contain substantive changes amounting to a repeal, unless the intent to make such changes is clearly manifested.”).

280. *See* 2 *id.* § 36:7, at 73 (7th ed. 2009).

281. *Cf.* 2A *id.* § 48A:7, at 755–59 (7th ed. 2007).

282. *See* *City of Lancaster v. Fairfield County Budget Comm’n*, 699 N.E.2d 473, 477 (Ohio 1998) (Lundberg Stretton, J., dissenting) (dissenting because the majority’s construction “ignores a more practical, common-sense interpretation” and does not permit “feasible execution” of the statutes at issue).

283. 2A SUTHERLAND, *supra* note 24, § 45:9 (7th ed. 2007); *see also* *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 201–02 (1979).

284. “Every proposition of positive law, whether contained in a statute or a judicial precedent, is to be interpreted reasonably, in the light of its evident purpose.” Lon Fuller, *The Case of the Spelucean Explorers: In the Supreme Court of Newgarth*, 4300, 62 HARV. L. REV. 616, 624 (1949).

common law. Colorado has a typical formulation that basically restates the common law rule: “If statutes enacted at the same or different sessions of the general assembly are irreconcilable, the statute prevails which is latest in its effective date. If the irreconcilable statutes have the same effective date, the statute prevails which is latest in its date of passage.”²⁸⁵ Many legislatures also have provisions relating to irreconcilable amendments and have rules describing the presumption against implied repeals as applied to amendments.²⁸⁶ No codification, however, discourages finding irreconcilability where statutes are not harmonious. Contrary to the common law canon’s reluctance to finding statutes irreconcilable, widespread legislative codifications of the presumption against implied repeal may indicate that legislatures prefer a lower bar for finding an implied repeal than the nearly impossible standard for irreconcilability that judges generally follow. This preference may be a departure from the common law rule, which has an additional requirement that judges heavily manipulate statutes to reconcile them rather than find irreconcilability and effectively repeal statutes without legislative intervention.²⁸⁷ The widespread presence of these provisions may transform into a legislatively sanctioned feature of the judicial process an interpretive maneuver that would otherwise constitute unauthorized judicial tinkering to impliedly repeal statutes.

In addition to doing little or nothing to bar findings of irreconcilability, many legislatures affirmatively provide that subsequent statutes implicitly supersede former law: “[I]n all cases provided for by the subsequent statute, the statutes, laws and rules theretofore in force, whether consistent or not with the provisions of the subsequent statute, unless expressly continued in force by it, shall be deemed repealed and abrogated.”²⁸⁸ In fact, some states have codified that there is no irreconcilability bar where a new statute covers the whole subject matter of earlier statutes. New Mexico’s legislature declares that “[i]f a statute is a

285. COLO. REV. STAT. § 2-4-206 (2008).

286. *See, e.g.*, MD. CODE ANN. art. 1, § 17 (LexisNexis 2005) (“If two or more amendments to the same section or subsection of the Code are enacted at the same or different sessions of the General Assembly, and one of them makes no reference to and takes no account of the other or others, the amendments shall be construed together, and each shall be given effect, if possible and with due regard to the wording of their titles. If the amendments are irreconcilable and it is not possible to construe them together, the latest in date of final enactment shall prevail.”); IOWA CODE § 4.11 (1999) (“If amendments to the same statute are enacted at the same or different sessions of the general assembly, one amendment without reference to another, the amendments are to be harmonized, if possible, so that effect may be given to each. If the amendments are irreconcilable, the latest in date of enactment by the general assembly prevails.”); OHIO REV. CODE ANN. § 1.52(B) (LexisNexis 1990) (“If amendments to the same statute are enacted at the same or different sessions of the legislature, one amendment without reference to another, the amendments are to be harmonized, if possible, so that effect may be given to each. If the amendments are substantively irreconcilable, the latest in date of enactment prevails. The fact that a later amendment restates language deleted by an earlier amendment, or fails to include language inserted by an earlier amendment, does not of itself make the amendments irreconcilable. Amendments are irreconcilable only when changes made by each cannot reasonably be put into simultaneous operation.”).

287. *See, e.g.*, *Branch v. Smith*, 538 U.S. 254, 273 (2003).

288. ARIZ. REV. STAT. ANN. § 1-245 (2002).

comprehensive revision of the law on a subject, it prevails over previous statutes on the subject, whether or not the revision and the previous statutes conflict irreconcilably.”²⁸⁹ These codifications suggest that legislatures reject the irreconcilability requirement as applied to specific provisions of disparate statutes but do not view irreconcilability as a bar to implied repeal where general statutes are concerned.

If reflecting legislative interpretive preferences is the goal, the common law rule permitting the revival of repealed statutes is dead wrong. Every legislature that has considered implied revival has emphatically rejected it; the rule against implied revival is even in the United States Code.²⁹⁰ In the face of interpretive common law that the repeal of a repealing statute revives the original enactment, Colorado’s legislature declares: “The repeal of a repealing statute does not revive the statute originally repealed.”²⁹¹ There is some variation in the form of the codified canon, with some legislatures enacting more elaborate rejections²⁹² or providing an exception where the legislature explicitly exhumes the older statute.²⁹³ Implied revival is a dead letter. Only a foolish interpreter would follow the common law rule.

Only one state has codified the rule that clerical legislative correction does not make substantive changes to the law. The Ohio General Assembly warns that “[i]n enacting any legislation with the stated purpose of correcting nonsubstantive errors in the Revised Code, it is the intent of the general assembly not to make substantive changes in the law in effect on the date of such enact-

289. N.M. STAT. § 12-2A-10(C) (2005); *see also* 1 PA. CONS. STAT. § 1971(b) (2006) (“Whenever a general statute purports to establish a uniform and mandatory system covering a class of subjects, such statute shall be construed to supply and therefore to repeal pre-existing local or special statutes on the same class of subjects.”).

290. 1 U.S.C. § 108 (2006) (“Whenever an Act is repealed, which repealed a former Act, such former Act shall not thereby be revived, unless it shall be expressly so provided.”).

291. COLO. REV. STAT. § 2-4-302 (2008).

292. *See, e.g.*, FLA. STAT. ANN. § 2.04 (West 2004) (“No statute of this state which has been repealed shall ever be revived by implication; that is to say, if a statute be passed repealing a former statute, and a third statute be passed repealing the second, the repeal of the second statute shall in no case be construed to revive the first, unless there be express words in the said third statute for this purpose.”); KY. REV. STAT. ANN. § 446.100 (West 2006) (“(1) A repealed section without a delayed effective date is revived when the section or act that repealed it is repealed by another statute enacted at the same session of the General Assembly. (2) A repealed section with a delayed effective date is revived by the enactment of a repealer of the section or act that repealed it at the same or any subsequent session of the General Assembly as long as it takes effect prior to the effective date of the original repealer. . . . (5) No other action of the General Assembly repealing a repealer or an amendment shall have the effect of reviving the original language of the repealer or amendment as the case may be.”).

293. *See, e.g.*, 1 U.S.C. § 108 (2006) (“Whenever an Act is repealed, which repealed a former Act, such former Act shall not thereby be revived, unless it shall be expressly so provided.”); D.C. CODE § 45-501 (2001) (“As a rule of statutory interpretation, in enacting a statute which includes among its provisions the repeal of a previously enacted repeal (including the repeal of a proviso or an exception), it is not the intention of the Council of the District of Columbia to revive the statute or part thereof which was previously repealed unless such intention to revive the previously repealed statute is specifically included in the language of the statute repealing the previous repealer.”); HAW. REV. STAT. § 1-8 (1993) (“The repeal of any law shall not revive any other law which has been repealed, unless it is clearly expressed.”).

ment.”²⁹⁴ No legislatures reject this canon.

Codifications are even sparser where subject-matter-specific canons are concerned because they may not fit naturally in code-wide interpretive rules. Only New Jersey’s code recognizes the importance of isolating the effects of statutory language from interstate agreements or treaties. Oddly, however, that recognition is limited to “[d]efinitions of words and phrases” that “shall not be so construed as either to limit or enlarge any provision in any treaty, compact or agreement between this state and any other state or the United States, including treaties, compacts or agreements created by, embodied in or resulting from concurrent, complementary or reciprocal legislation.”²⁹⁵ Only Montana has an interpretive statute tracking the presumption that every private right of action carries a traditional remedy.²⁹⁶ But the statute is somewhere between opaque and aphoristic, stating that “[f]or every wrong there is a remedy.”²⁹⁷

Surprisingly, many legislatures want judges to limit statutes where their application would be unworkable. Although commentators may criticize this canon because it results in some measure of judicially exercised policymaking authority, no one can call a judge who uses this canon a usurper of legislative authority (at least in jurisdictions with such a rule). Ten legislatures are comfortable with judges making policy choices in this regard. The common codification declares that “[i]n enacting a statute, it is presumed that: . . . A result feasible of execution is intended.”²⁹⁸ Thus, interpreters faced with ambiguous statutes are on notice to steer away from impossibly onerous or burdensome interpretations unless that presumption can be overcome. Another state codifies this canon implicitly, allowing interpreters faced with “unworkable results” to consult “extratextual evidence of the meaning of the statute” to illuminate the statute.²⁹⁹ Montana’s legislature advises that “[t]he law never requires impossibilities.”³⁰⁰ No legislature rejects this canon—even a legislature that stresses plain meaning builds in unworkable results as an exception to the plain meaning rule.³⁰¹

Resort to legislative purpose is a popular (and broad) common law canon, and this generally requires looking to legislative history or even to non-

294. OHIO REV. CODE ANN. § 1.30(A) (LexisNexis 1990).

295. N.J. STAT. ANN. § 1:1-3 (West 1992).

296. Constitutional provisions may also bear on interpretive rules. For example, one provision in the Massachusetts Constitution states that “[e]very subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character.” MASS. CONST. art. XI. However, constitutional provisions were not the subject of this study. See *supra* note 35.

297. MONT. CODE ANN. § 1-3-214 (2007).

298. COLO. REV. STAT. § 2-4-201 (2008).

299. CONN. GEN. STAT. § 1-2z (2007) (“The meaning of the statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.”).

300. MONT. CODE ANN. § 1-3-222.

301. See CONN. GEN. STAT. § 1-2z.

legislative source materials.³⁰² Legislatures repeatedly direct interpreters to consider legislative purpose. That purpose “may itself be the subject of controversy”³⁰³ has not deterred the many legislatures that have codified this canon.

Many jurisdictions elevate purpose above other interpretive methods. Usually the entire Rules of Construction chapter is subordinate to the purpose of the statute. In New York, for instance, the “General Construction Law” is “applicable to every statute unless its general object . . . indicate[s] that a different meaning or application was intended from that required to be given by this chapter.”³⁰⁴ When legislatures do not expressly place purpose above other interpretive tools, they still direct interpreters to consider “[t]he object sought to be attained.”³⁰⁵ Other states want their statutes to be broadly construed “with a view to effect their objects”³⁰⁶ or to consider the “cause which induced the legislature to enact [the statute].”³⁰⁷ Some legislatures require recourse to purpose by focusing on the mischief the legislature intended to correct. For instance, Georgia’s general assembly directs that “[i]n all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy.”³⁰⁸ No states reject considering purpose where a statute is ambiguous (in Texas, a statute need not even be ambiguous before an interpreter may consider its purpose).³⁰⁹

4. Common Law-Based Canons

Other interpretive maxims emerged as a result of the interaction between statutes and their common law background. Judges developed the presumption in favor of following the common law usage of words and phrases having established common law meanings.³¹⁰ Another presumption developed at common law is the super-strong presumption against waivers of sovereign immunity.³¹¹ Yet another classic maxim is the rule that statutes in derogation of the common law must be strictly construed.³¹² However, the prevalence of statutes today has undercut this rule because, in the modern regulatory state, “statutes

302. 2A SUTHERLAND, *supra* note 24, § 45:9, at 62 (7th ed. 2007) (“Where legislative source materials fail to supply a clearly dispositive answer about how an issue should be decided, the principle of legislative sovereignty allows a court to take extra-legislative as well as legislative source materials into account in deciding what disposition conforms best to public policy.”).

303. *Id.* at 59.

304. N.Y. GEN. CONSTR. LAW § 110 (McKinney 2003).

305. COLO. REV. STAT. § 2-4-203 (2008).

306. IDAHO CODE ANN. § 73-102 (2006).

307. HAW. REV. STAT. § 1-15 (1993).

308. GA. CODE ANN. § 1-3-1 (2000 & Supp. 2009).

309. TEX. GOV’T CODE ANN. § 311.023 (Vernon 2005).

310. ESKRIDGE, FRICKEY & GARRETT, *supra* note 8, at 921.

311. 3 SUTHERLAND, *supra* note 24, § 62:1 (7th ed. 2008).

312. 2A SUTHERLAND, *supra* note 24, § 45:12 (7th ed. 2007).

Table 10. Statute-Based Canons

CANON	CODIFIED	REJECTED BY CODE
Rule Against Implied Repeals: No repeals by implication unless laws are irreconcilable.	15	0
Effect of repeal: Repeal of a repealing statute revives the original enactment.	0	44
Clerical revision: Legislation with the intent of a clerical correction does not make substantive changes to the law.	1	0
No effect on extrastate agreements: Statutes should not be construed to limit or enlarge any provision in any treaty, compact, or agreement between states or concerning the United States.	1	0
Remedies: Presumption that a private right of action (express or implied) carries with it all traditional remedies.	1	0
Feasible Execution Rule: A result feasible of execution is intended.	10	0
Purpose/Object Rule: Interpret ambiguous statutes so as best to carry out their statutory purposes.	22	0

are the rule and common law the exception.”³¹³ Other judge-made interpretive rules respond to the prevalence of statutes. One maxim advises that remedial laws should be liberally construed,³¹⁴ while another responds to the ascendancy of the statute by encouraging interpreters to liberally construe all laws.

Many canons with origins in the common law have robust normative components from the days when judges played a greater role in developing the substantive law. Where public and private interests conflicted, public interests were to be favored over private interests.³¹⁵ Judges were supposed to promote justice, and the law was to be reasonable in its application. Additionally, a judge’s equitable powers were always supposed to prevail over rules of common law.³¹⁶ Finally, where they could, judges were to adopt interpretations favoring natural rights.³¹⁷

313. ESKRIDGE, FRICKEY & GARRETT, *supra* note 8, at 921. One should take care not to overemphasize this point, however, with respect to the states, because state judiciaries remain active in the development of the common law.

314. 2A SUTHERLAND, *supra* note 24, § 48A:8, at 765 (7th ed. 2007).

315. This canon is reflected in the public/private act distinction, and in the tradition of construing public acts liberally and private acts strictly. 2 SUTHERLAND, *supra* note 24, § 43:4 (7th ed. 2009).

316. This was the result of the conflict between law and equity in the English legal system.

317. 3 SUTHERLAND, *supra* note 24, § 61:1, at 334 (7th ed. 2008).

Legislative enactments show that common law usage remains an important interpretive source. Many legislatures have codified that interpreters may consider “[t]he common law.”³¹⁸ As usual, Texas is the only state that does not require ambiguity before interpreters may consult the common law.³¹⁹ There is some variability in other codified forms of this canon. California declares that provisions that “are substantially the same as . . . the common law, must be construed as continuations thereof.”³²⁰ Other codes incorporate common law (and therefore common law usage) until it is overturned by statute:

The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state.³²¹

No legislatures reject recourse to the common law when faced with an ambiguous statute.

Several legislatures have codified versions of the sovereign immunity canon; none have rejected it. The most common form warns that “[t]he state is not bound by the passage of a law unless it is named therein or unless the words of the law are so plain, clear, and unmistakable as to leave no doubt as to the intention of the General Assembly.”³²² Another statute provides a fuller explanation with reference to government coffers: “In order to preserve the legislature’s interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language.”³²³ These codifications precisely track the common law canon’s super-strong presumption against waivers of sovereign immunity. The codes only allow

318. COLO. REV. STAT. § 2-4-203 (2008) (courts “may consider . . . [t]he common law or former statutory provisions, including laws upon the same or similar subjects”); *see also* N.D. CENT. CODE § 1-02-39 (2008) (courts “may consider . . . [t]he common law or former statutory provisions, including laws upon the same or similar subjects”); OHIO REV. CODE ANN. § 1.49 (LexisNexis 1990) (courts “may consider . . . [t]he common law or former statutory provisions, including laws upon the same or similar subjects”).

319. TEX. GOV’T CODE ANN. § 311.023(4) (Vernon 2005) (“In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the . . . common law . . .”).

320. CAL. CIV. CODE § 5 (West 2007).

321. FLA. STAT. ANN. § 2.01 (West 2004); *see also* HAW. REV. STAT. § 1-1 (1993) (“The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.”); IDAHO CODE ANN. § 73-116 (2006) (“The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state.”).

322. GA. CODE ANN. § 1-3-8 (2000); *see also* MINN. STAT. § 645.27 (2008) (“The state is not bound by the passage of a law unless named therein, or unless the words of the act are so plain, clear, and unmistakable as to leave no doubt as to the intention of the legislature.”).

323. TEX. GOV’T CODE ANN. § 311.034 (Vernon 2005 & Supp. 2008).

waiver if it is express and unambiguous and, therefore, waivers of sovereign immunity cannot be found by implication.

Legislatures generally link their preferred manner for construing statutes (with respect to remedial or all statutes) together with codifications relating to statutes in derogation of the common law. Legislatures emphatically reject the canon that statutes in derogation of the common law are to be strictly construed. They do so either explicitly or implicitly. Explicitly, states will declare that “[t]he common law rule requiring strict construction of statutes in derogation of the common law does not apply to the Revised Statutes.”³²⁴ Implicitly, many states adopt liberal construction for all statutes and thereby eliminate the prospect of strict constructionism: “All general provisions, terms, phrases, and expressions used in any statute shall be liberally construed in order that the true intent and meaning of the General Assembly may be fully carried out.”³²⁵

Leaping from adopting a rule of liberal construction to implied rejection of strict construction of statutes in derogation of common law does not require delicate logic. Most legislatures reject strict construction of statutes in derogation of common law in the same provision where they adopt liberal construction for their entire code. For example, the Kentucky legislature states that “[a]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature, and the rule that statutes in derogation of the common law are to be strictly construed shall not apply to the statutes of this state.”³²⁶ One state is more limited in its rejection of strict construction: “The presumption that a civil statute in derogation of the common law is construed strictly does not apply to a statute of this state.”³²⁷

Interpreters should take notice that a surprising number of legislatures have codified that liberal construction is the rule of interpretation for their code.³²⁸ No legislatures have an enthusiastic appreciation of strict construction. Pennsylvania does have general strict construction provisions, but those provisions can hardly be considered enthusiastic towards strict construction. Pennsylvania names a very limited number of subject matter areas that must be strictly

324. *Id.* § 312.006; *see, e.g.*, CAL. CIV. CODE § 4 (“The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code.”); IDAHO CODE ANN. § 73-102 (“The rule of the common law that statutes in derogation thereof are to be strictly construed, has no application to these compiled laws.”).

325. ARK. CODE ANN. § 1-2-202 (2008); *see, e.g.*, COLO. REV. STAT. § 2-4-212 (2008) (“All general provisions, terms, phrases, and expressions, used in any statute, shall be liberally construed, in order that the true intent and meaning of the general assembly may be fully carried out.”); 5 ILL. COMP. STAT. 70/1.01 (2008) (“All general provisions, terms, phrases and expressions shall be liberally construed in order that the true intent and meaning of the General Assembly may be fully carried out.”).

326. KY. REV. STAT. ANN. § 446.080 (West 2006).

327. N.M. STAT. § 12-2A-18(C) (2005).

328. *See infra* Table 11 and Appendix A. The New Mexico statute, which has all the hallmarks of liberal construction—a statute is to be construed to “give effect to its objective and purpose” and “give effect to its entire text”—with the exception of the word “liberal,” is classified as having codified this canon. N.M. STAT. § 12-2A-18.

construed (and the rest of the code is to be liberally construed).³²⁹ With the exceptions of Pennsylvania and Ohio, every state adopting liberal construction adopts liberal construction for its entire code. Ohio adopts liberal construction only for remedial laws, stating that “[r]emedial laws and all proceedings under them shall be liberally construed.”³³⁰

Despite the handwringing caused by judicial exercise of “fuzzy” value-based discretion, legislatures display a surprising degree of comfort and explicitly allow judges to consider abstract norms as they interpret statutes. Legislatures regularly allow judges to distinguish between public and private interests, and privilege public interests over private ones. One version of the codification states directly that “[i]n enacting a statute, it is presumed that: . . . Public interest is favored over any private interest.”³³¹ In other states, this presumption is implicitly reflected in statutes that limit the abrogation of public interests by private agreement and rely on judicial sense of “the public good”:

Private agreements shall have no effect to contravene any law which concerns public order or good morals. But individuals may, in all cases in which it is not expressly or impliedly prohibited, renounce what the law has established in their favor, when such renunciation does not affect the rights of others, and is not contrary to the public good.³³²

Many legislatures also direct interpreters to construe statutes in other norm-laden ways, among them, to promote justice and achieve reasonable results.³³³ Justice codifications are generally attached to directives to liberally

329. 1 PA. CONS. STAT. § 1928 (2006) (“(1) Penal provisions. (2) Retroactive provisions. (3) Provisions imposing taxes. (4) Provisions conferring the power of eminent domain. (5) Provisions exempting persons and property from taxation. (6) Provisions exempting property from the power of eminent domain. (7) Provisions decreasing the jurisdiction of a court of record. (8) Provisions enacted finally prior to September 1, 1937 which are in derogation of the common law.”).

330. OHIO REV. CODE ANN. § 1.11 (LexisNexis 1990).

331. COLO. REV. STAT. § 2-4-201 (2008); *see, e.g.*, IOWA CODE § 4.4 (1999) (“In enacting a statute, it is presumed that . . . [p]ublic interest is favored over any private interest.”); MINN. STAT. § 645.17(5) (2008) (“In ascertaining the intention of the legislature the courts may be guided by the . . . presumption[] . . . [that] the legislature intends to favor the public interest as against any private interest.”); 1 PA. CONS. STAT. § 1922(5) (2006) (“In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used: . . . That the General Assembly intends to favor the public interest as against any private interest.”); TEX. GOV’T CODE ANN. § 311.021(5) (Vernon 2005) (“In enacting a statute, it is presumed that . . . public interest is favored over any private interest.”).

332. HAW. REV. STAT. § 1-5 (1993); *see, e.g.*, GA. CODE ANN. § 1-3-7 (2000) (“Laws made for the preservation of public order or good morals may not be dispensed with or abrogated by any agreement. However, a person may waive or renounce what the law has established in his favor when he does not thereby injure others or affect the public interest.”); MONT. CODE ANN. § 1-3-204 (2007) (“Any person may waive the advantage of a law intended solely for that person’s benefit. A law established for a public reason cannot be contravened by a private agreement.”).

333. These codifications may represent yet another way that legislatures can say to interpreters “don’t reach absurd results,” reinforcing the absurd results exception to the plain meaning rule. *See supra* note 47.

construe statutes “with a view to effect their objects and to promote justice.”³³⁴ Appeals to justice may also be attached to presumptions of reasonableness: “[I]n enacting a statute . . . [a] just and reasonable result is intended.”³³⁵ Other legislatures implicitly codify reasonable results by rejecting unreasonable results—“[e]very construction which leads to an absurdity shall be rejected”³³⁶—or by implying reasonability by telling interpreters to consider “[t]he consequences of a particular construction.”³³⁷

One state subordinates the common law to equity and its dictates of fairness and conscience. Utah requires that “[w]hen there is any variance between the rules of equity and the rules of common law in reference to the same matter the rules of equity shall prevail.”³³⁸

Two states have codified recourse to natural rights. Montana’s legislature adopts the natural rights doctrine to a limited extent, codifying (twice) that when a statute or instrument “is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to be adopted.”³³⁹ Oregon’s legislature also adopts the natural rights doctrine.³⁴⁰ Although Sutherland asserts that “the ‘natural rights’ doctrine has been repudiated both in England and the United States”³⁴¹—and there may be good reasons to criticize the natural rights doctrine (to name just one criticism, “natural right” is unclear and affords judges too much discretion)—the doctrine has certainly not been uniformly repudiated. Interpretive recourse to natural rights has, in fact, been codified in some jurisdictions.

III. LEGISLATED INTERPRETATION AND THE THREE THEORIES

There is remarkable consensus about how legislatures generally wish their statutes to be interpreted. There are surprisingly few disagreements among them. In fact, the legislatures that have taken positions on common law canons tended to line up uniformly on the same side for the vast majority of these canons. The few differences that exist indicate that interpretive methodology ought to be contextual to the jurisdiction in which it occurs.

Interpreters in jurisdictions without codification of a particular canon should pause to consider the codification patterns. Sources and methods that have been

334. IDAHO CODE ANN. § 73-102 (2006); *see, e.g.*, CAL. CIV. CODE § 4 (West 2007) (“[P]rovisions are to be liberally construed with a view to effect its objects and to promote justice.”); IOWA CODE § 4.2 (“[P]rovisions and all proceedings under [this Code] shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice.”).

335. COLO. REV. STAT. § 2-4-201.

336. HAW. REV. STAT. § 1-15; *see also* MINN. STAT. § 645.17 (2008) (“[T]he legislature does not intend a result that is absurd, impossible of execution, or unreasonable.”).

337. OHIO REV. CODE ANN. § 1.49 (LexisNexis 1990).

338. UTAH CODE ANN. § 68-3-2 (2008).

339. MONT. CODE ANN. §§ 1-2-104, -4-104 (2007).

340. OR. REV. STAT. ANN. § 174.030 (West 2007) (“Where a statute is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to prevail.”).

341. 3 SUTHERLAND, *supra* note 24, § 61:1, at 334 (7th ed. 2008).

Table 11. Common Law-Based Canons

CANON	CODIFIED	REJECTED BY CODE
Common law usage: Presumption in favor of following common law usage where the legislature has employed words or concepts with well-settled common law traditions.	11	0
Sovereign immunity: Strong presumption against waivers of sovereign immunity.	3	0
Derogation of common law: Statutes in derogation of the common law should be strictly construed.	0	20
Liberal construction of remedial laws: Remedial statutes should be liberally construed.	19	0
Liberal construction: All statutes should be liberally construed.	17	0
Public interest: Public interest is favored over private interest.	9	0
Justice: Construe statutes to promote justice.	13	0
Reasonable results: Follow presumption that the legislature intends reasonable results.	11	0
Equity over common law: Rules of equity prevail over rules of common law.	1	0
Natural right: When a statute is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to be adopted.	2	0

uniformly validated or rejected in other jurisdictions support or undermine a basic justification for the common law canons: that an interpreter is construing a statute the way the legislature wanted. Every statute, after all, was created with specific interpretive expectations in mind. Patterns across jurisdictions may generally suggest how legislatures expect their statutes to be understood. Interpreters should resist interpreting statutes in ways that have been widely rejected by legislatures (such as strict constructionism). They must do more work to justify the use of interpretive tools that have been uniformly rejected by a few legislatures (such as *expressio unius*). Judges should take extra care when construing statutes using canons on which there is disagreement (such as drawing meaning from the distinction (or not!) between “and” and “or”). Additionally, interpreters should more confidently use sources and methods vindicated by legislative codification elsewhere (such as the presumption of consistency between statutes, or recourse to legislative history to illuminate an

ambiguous statute). Finally, because the three dominant theories of statutory interpretation are comprised of particular rules (and in some cases a hierarchy of those rules), these specific codification patterns permit conclusions to be drawn about the extent to which each of the three major theories can vindicate their claim of being the most appropriate interpretive method for democratically enacted statutes.

A. INTENTIONALISM

Legislative preferences validate intentionalism despite critical anxiety about what constitutes dispositive legislative intent. Legislatures elevate intent over almost any other interpretive method. Many states provide that an interpretation's correctness is measured by whether it produces "a construction inconsistent with the manifest intent of the General Assembly."³⁴² Although legislatures generally endorse "intent" as the proper criterion of the law, they also endorse new textualism's critique of intentionalism. One prominent new textualist announces emphatically that "[w]e look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."³⁴³ New textualists do not disclaim a search for intent generally, they only reject searches for the kinds of indeterminate and subjective intent that intentionalism permits.³⁴⁴ This method is consistent with the codified canons, which generally phrase references to intent as "manifest intent." Imaginative reconstruction is found nowhere in the statutes.

342. 1 PA. CONS. STAT. § 1901 (2006); *see, e.g.*, ALASKA STAT. § 01.10.020 (2008) (codified interpretive rules "shall be observed in the construction of the laws of the state unless the construction would be inconsistent with the manifest intent of the legislature"); ARIZ. REV. STAT. ANN. § 1-211 (2002) ("[R]ules and the definitions set forth in this chapter shall be observed in the construction of the laws of the state unless such construction would be inconsistent with the manifest intent of the legislature."); DEL. CODE ANN. tit. 1, § 301 (2001) ("[R]ules of construction and the definitions set forth in this chapter shall be observed in the construction of this Code and all other statutes, unless such construction would be inconsistent with the manifest intent of the General Assembly . . ."); KAN. STAT. ANN. § 77-201 (Supp. 2008) ("In the construction of the statutes of this state the following rules shall be observed, unless the construction would be inconsistent with the manifest intent of the legislature . . ."); MASS. GEN. LAWS ANN. ch. 4, § 6 (West 2006) ("In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the law-making body . . ."); MICH. COMP. LAWS ANN. § 8.3 (West 2004) (codified rules "shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature"); MINN. STAT. § 645.08 (2008) (codified "canons of interpretation are to govern, unless their observance would involve a construction inconsistent with the manifest intent of the legislature"); NEB. REV. STAT. § 49-802 (2004) (codified rules shall be followed "[u]nless such construction would be inconsistent with the manifest intent of the Legislature"); N.H. REV. STAT. ANN. § 21:1 (LexisNexis 2008) (codified canons "shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature"); N.C. GEN. STAT. § 12-3 (2007) (codified canons "shall be observed, unless such construction would be inconsistent with the manifest intent of the General Assembly").

343. SCALIA, *supra* note 49, at 17.

344. Justice Scalia's rejection of "intent of the legislature as the proper criterion of the law," *id.* at 31, is not as absolute as it appears in light of his focus on "'objectified' intent," *id.* at 17. His rejection of "intent" should be read more accurately as rejecting more specifically subjective and unmanifested versions of intent.

Though legislatures say that an interpreter's role is to give a statute the meaning most consistent with their intention, legislatures know there are problems with ascertaining the meaning that a speaker (particularly a collective speaker) intends to convey when speaking. The legislatures immediately pivot and point to some objective correlative of their (usually "manifest") intent: text, structure, purpose, or history (intent need not be registered in the statute itself to be "manifest"). Intentionalism, therefore, is very much alive insofar as there is manifest evidence of intent, but legislatures have moved away from Roscoe Pound's sense of "genuine interpretation" (which is "to discover the rule which the lawmaker intended to establish").³⁴⁵ If a statutory author actually conveyed an intent different from the intent it wanted to convey, the interpreter should follow the intent that was actually manifested, unless it would lead to an absurd result or fall into another recognized exception to plain meaning. For example, if Prince Hamlet intended to take action, but actually manifested indecision, then interpreters should rely on his indecision (though if Hamlet's diary showed an intention to act, the interpreter might need to reconsider his or her conclusion).

B. NEW TEXTUALISM

New textualists adroitly defend their theory against other competing interpretive methodologies. Providing a window into new textualism's underlying commitments, one prominent new textualist, Justice Scalia, criticizes the "rule, used to equally devastating effect in the liberal courts of more recent years, that 'remedial statutes' are to be liberally construed to achieve their 'purposes'" as a "dice-loading rule."³⁴⁶ The rule is troublesome to textualists because it is unclear: How much flexibility is there, really, in liberally construing a statute? True enough, though Justice Scalia finds lukewarm redeeming qualities in such dice-loading rules, he can imagine "worse things than unpredictability and occasional arbitrariness."³⁴⁷

But then Justice Scalia sidesteps whether arbitrariness and unpredictability are worth the price of liberal construction. He declares:

[W]hether these dice-loading rules are bad or good, there is also the question of where the courts get the authority to impose them. Can we really just decree that we will interpret the laws that Congress passes to mean less or more than what they fairly say? I doubt it.³⁴⁸

So there are two questions, the answers to which determine whether textualism's exclusion of normative interpretive rules and extratextual sources is a

345. Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907).

346. SCALIA, *supra* note 49, at 27–28.

347. *Id.* at 28.

348. *Id.* at 28–29.

valid interpretive move: (1) Is the price of value-laden rules and extrastatutory searches for meaning worth it? (2) Do judges have the power to answer this question in the affirmative and impose these rules? If an interpreter answers (1) “I don’t know” or “probably not,” and (2) “regardless, judges can’t impose these rules,” the interpreter must commit to new textualism.

This project allows us to come closer to resolving, if not answering, these questions. I take the second question first. New textualists need not be doubtful or worry whether courts have the authority to impose these rules. Legislatures have codified extratextual rules and the prevailing rule many legislatures have codified is not only that remedial statutes should be liberally construed to achieve their purposes, but that “*all* statutes . . . shall be liberally construed with a view to promote their objects.”³⁴⁹ This dynamic changes the question from whether courts have the authority to impose these interpretive rules to whether legislatures have the authority to impose these rules.

This power struggle is a live issue.³⁵⁰ The answer is located somewhere in the separation of powers—either the legislatures can codify these rules, or they cannot because it would infringe on the judicial power. But, in either case, some institution can create interpretive rules. The power to craft interpretive rules is hydraulic: if not entirely controlled by the constitution, it is either housed in the legislature, or the judiciary, or both. If new textualists doubt that the courts have the authority to impose these rules, then they must agree that legislatures possess such authority. Courts have the power to create common law rules of interpretation (they have), and legislatures have the power to ratify, reject, or displace them (they do).

The answer to the first question has now been answered by legislatures. In codifying value-laden rules and recourse to extratextual sources of meaning, legislatures answer affirmatively that such interpretive rules are worth unpredictability and occasional arbitrariness. New textualism’s core argument against extratextual sources is that they are democratically illegitimate. But it is hard to say that interpreters can ignore legislative history or values where that permission has been democratically granted.

New textualism’s commitments to plain meaning, context, integrity, and coherence are objectively correct in the eyes of the legislature. But when compared against legislative preferences, new textualist methods are also objectively incomplete. Legislatures do not forbid consultation of extrinsic sources and values. Rather, they explicitly allow it, usually providing first that the statute must be ambiguous, and formally write statutes with their acceptance of external sources as the background. Even when legislatures state the plain meaning rule, it is often to emphasize the absurd results exception (another new

349. See, e.g., KY. REV. STAT. ANN. § 446.080 (West 2006) (emphasis added).

350. See Abbe R. Gluck, *Statutory Interpretation Beyond the Supreme Court: State Courts, Interpretive Clarity, and the Emerging “Modified Textualism,”* 119 YALE L.J. (forthcoming Apr. 2010) (describing interpretive methodological developments in five states and state court responses to legislated interpretive directives).

textualist tool that the codification patterns reinforce). New textualism may be the method that most constrains judicial discretion, but maximally constraining judicial discretion is not the value that legislatures themselves elevate when they map out how to read their own statutes.

Legislatures vindicate new textualism's strengths but not its weaknesses; they prefer its focus on the written word but not its limited view of what the law is. At best, new textualism's exclusion of extratextual sources is tenuous and inadvisable in light of legislative preferences favoring the consideration of extratextual sources where statutes are ambiguous.³⁵¹ At worst, new textualism's embargo on extratextual sources runs contrary to the law of many jurisdictions.³⁵² New textualist anxieties about the worthiness of legislative history and extratextual values as sources of interpretive meaning are incisive and persuasive. But as a matter of positive law, judges may consider legislative history, purpose, feasibility, and justice as they interpret statutes.

C. PRAGMATISM

The pattern of codifications provides some empirical support for pragmatism's primary model for practical interpretive reasoning: Professors Eskridge and Frickey's "Funnel of Abstraction." The Funnel prefers concrete methods of reasoning to abstract methods and organizes sources of law in a hierarchical fashion (statutory text, specific and general legislative history, legislative purpose, the evolution of the statute, and finally, current policy).³⁵³ It would be overreaching to divine from the codifications a finely variegated list of which canons trump others. But some general interpretive preferences emerge.

The following is an (crude) aggregation of the national law of interpretation. Statutory text is the primary and essential source of statutory meaning.³⁵⁴ Then come purpose and context (which can both defeat the canons).³⁵⁵ After that,

351. Or, in Texas, regardless of whether the statute is ambiguous.

352. Formally speaking, a flat embargo would be lawless, but a permissive presumption against extratextual sources would not be. No legislature says "must consider"—they generally say "may consider." Even the champions of new textualism are not pure new textualists. Justice Scalia, for instance, does not entirely write off legislative history. He takes issue with how legislative history is used and would, therefore, not permit historical or legislative material to lead him away from the meaning that is (1) most in accord with context and ordinary usage and (2) most compatible with the surrounding body of law into which the provision must be integrated. *See* SCALIA, *supra* note 49, at 28. If you added "(3) is consistent with legislative purpose, and (4) produces a just and feasible result" to this recipe, it would be more or less consistent with the prevailing codifications of American legislatures.

353. Eskridge & Frickey, *supra* note 3, at 321, 345–54.

354. *See, e.g.*, N.D. CENT. CODE § 1-02-05 (2008) ("When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.").

355. Purpose and context are privileged tools of statutory interpretation (if the statute is ambiguous): "This chapter is applicable to every statute unless its general object, or the context of the language construed, or other provisions of law indicate that a different meaning or application was intended from that required to be given by this chapter." N.Y. GEN. CONSTR. LAW § 110 (McKinney 2003). Context is usually privileged above purpose—some of the interpretive chapters are contingent on the context of the statutes but do not mention purpose (these types of statutes do not mention purpose while excluding

legislatures do not register a preference for one canon over another. As with the Funnel, there is no rigid hierarchy and the interpretive methods are recursive: plain meaning is preferred, but values, justice, and absurdity can trump plain meaning.³⁵⁶ The general hierarchy that emerges is quite rudimentary and largely tracks the Funnel with the exceptions of legislative purpose and values. If anything, given the degree to which values (for example, justice, feasibility, and the public interest) are codified, the Funnel underweighs their significance in the interpretive process. Norms should not be a primary tool in the interpretive toolbox, but legislatures keep them alive and well. The codifications indicate that legislatures see judges as cooperative partners who are making substantive, value-laden judgments. Legislatures have ratified that function.

Note that this sketch is general and that different jurisdictions may (and do) express different local preferences.³⁵⁷ Interpretive method is jurisdictional; it depends on how the jurisdiction's particular legislature wants its statutes to be understood. But in the absence of legislative directives, interpretive methodology should be informed by prevailing legislative preferences.

The wide variety of codified canons, and the lack of a rigid and finely textured hierarchy of expressed preferences between them, essentially codifies eclecticism (the shorthand for pragmatic theory). Because no codified interpretive tool can trump all others, interpreters must weigh all the arguments and choose the one that best fits all the different factors. For instance, legislative history may be considered, but it is not determinative. When directing interpreters to "consider" legislative history, legislatures declare a preference for interpretations that fit and explain legislative history, not a preference for interpretations where legislative history trumps plain text.

As a result, the codifications support pragmatism's "braided cable" approach.³⁵⁸ The best legal arguments are "cables" (which weave individual arguments together), not linear "chains" (which are as weak as any individual link). Interpretation turns on the strongest combination of legal arguments. The codifications therefore affirm pragmatic theory's sense of the interpretive endeavor as multidimensional, recursive, and nonlinear. Interpreters should consider many sources of authority, re-evaluate them in light of other sources, and

context): "In the construction of all statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the General Assembly, or repugnant to the context of the same statute." N.C. GEN. STAT. § 12-3 (2007); *see also supra* text accompanying notes 142, 304–09. But New Mexico, the state with the most detailed and rigid interpretive hierarchy, places purpose at the bottom of its list of other aids to construction. N.M. STAT. § 12-2A-20 (2005).

356. *See, e.g.*, HAW. REV. STAT. § 1-15(3) (1993) ("Every construction that leads to an absurdity shall be rejected.").

357. *See* Appendix B for a chart showing codifications for each legislature in the United States.

358. *See* ESKRIDGE, FRICKEY & GARRETT, *supra* note 26, at 249 ("Problem-solving ought to 'trust rather to the multitude and variety of its arguments than to the conclusiveness of any one. Its reasoning should not form a chain which is no stronger than its weakest link, but a cable whose fibers may be ever so slender, provided they are sufficiently numerous and intimately connected.'" (quoting Charles Pierce, *Collected Papers* ¶ 264 (Charles Hartshorne & Paul Weiss eds., 1960))).

weigh all arguments against each other.³⁵⁹ That legislatures have codified interpretive rules at all indicates that statutory interpretation must be hermeneutic (also a tenet of pragmatism)—statutes must be understood from the point of view of the legislature, and judges must take notice of the sources that influenced legislative outlook in all its disorganized splendor.

Legislatures do not seem to worry so much (at least not in their codes) that pragmatism or eclecticism allows judges to use a vast array of interpretive tools. Legislatures have codified the interpretive method, and the result largely mirrors the common law, with a few dramatic exceptions. The pattern of codifications and the common law of interpretation may constrain judges more than is immediately apparent. Interpretive methodology is disciplined by excluding sources and methods that are not accepted, and preferring widely accepted sources and methods over those that are less widely accepted. Legislatures constrain judges by providing “safe” methods of interpretation. Because statutes matter more than the interpretive common law, interpreters should be comfortable using interpretive tools that have been vindicated by the democratic process.³⁶⁰ Judges are constrained as horses are constrained by blinders: the codifications simply restrict or expand the interpretive panorama. The legislatures (and pragmatic theory) recognize that sometimes there is not an instant result because an ambiguous statute does not illuminate its best reading. Legislatures do not want interpreters to guess in the dark—they do not want the law to run out³⁶¹—so legislators have inserted recourse to legislative history and other extratextual sources into the law.

CONCLUSION

Canons of interpretation are nothing more than methodological common law, and are, therefore, subject to the evolutionary processes of the common law until they are displaced by statute. Because the canons are part of the common law, statutes that repudiate or validate particular canons should be considered important and controlling.

Interpreters are on notice. Legislatively expressed preferences call into question the use of canons, even in jurisdictions that have not codified them. Interpretive method is jurisdictional; it depends on how the jurisdiction’s legislature wants its statutes to be understood. In jurisdictions where there are no codified canons and no relevant constitutional provisions, the common law

359. *See, e.g.*, OR. REV. STAT. ANN. § 174.020 (West 2007) (“A court shall give the weight to the legislative history that the court considers to be appropriate.”).

360. *See, e.g.*, NEB. REV. STAT. § 49-802(II) (2004) (“The enumeration of the rules of construction set out in this section is not intended to be exclusive, but is intended to set forth the common situations which arise in the preparation of legislative bills where a general statement by the Legislature of its purpose may aid and assist in ascertaining the legislative intent.”).

361. *Cf.* Frederick Liu, Comment, *The Supreme Court Appointments Process and the Real Divide Between Liberals and Conservatives*, 117 YALE L.J. 1947, 1950–51 (2008) (suggesting that where “the law runs out” may be “a common language in which to discuss the law”).

canons—insofar as those baseline rules can be identified—prevail. But in the absence of legislative or constitutional directives, the common law of interpretation should at least be informed by prevailing legislative preferences. In the development of the common law generally, courts will look to other jurisdictions for new developments. As a result, when a judge approaches the common law of interpretation, the interpretive rules of similar jurisdictions should matter to some degree. Even though “such legislative expressions may not be directly applicable or binding,” in the exercise of their common law jurisdiction “courts should be responsive” to canons codified elsewhere as expressive of legislative interpretive preferences, which “can serve to shape and add content to the common law.”³⁶² This is especially so where some codification patterns shake the underlying assumption of common law canons: that they reflect legislative interpretive preferences. Each time a judge deploys a common law canon, the selected interpretive method should be carefully scrutinized to determine whether it is sound. The common law judge can either dismiss a canon codified elsewhere as foolish or ill-advised—legislatures, after all, can be wrong—or conclude that the codified canon is a sensible aid to statutory interpretation.³⁶³ But legislative preferences in this area should not simply be ignored or ruled out of bounds.

Therefore, interpreters in jurisdictions where common law canons have not been displaced by interpretive statutes or constitutional directives should note the pattern of codifications. They should resist interpreting statutes in ways that have been widely rejected by legislatures (such as strict constructionism). Where a canon has been uniformly rejected, even if by only a few legislatures (such as the last antecedent rule or *expressio unius*), or is fraught by disagreement between jurisdictions that have spoken on the issue (such as the difference between “and” and “or”), an interpreter must do more work to justify its use.

Conversely, interpreters in jurisdictions without interpretive codifications should more freely rely on common law canons that have been vindicated by legislative preferences (such as reference to context, construing statutes liberally, interpreting ambiguous statutes so as to best carry out their purposes, and using legislative history). Reliance, however, does not mean blind and dispositive acceptance. The eclecticism reflected in the codifications demands that interpreters evaluate many sources of statutory meaning before settling on the most plausible interpretation. A legislature should get the type of interpretation

362. *E.g.*, 15A C.J.S. *Common Law* § 11 (2002); *see also* 15A AM. JUR. 2D *Common Law* § 13 (2000) (“[I]t is the duty of the courts to bring the law into accordance with present-day standards of wisdom and justice, and to keep it responsive to the demands of a changing scene.”).

363. 15A AM. JUR. 2D *Common Law* § 13 (2000) (“[A] court should not be bound by an early common-law rule unless it is supported by reason and logic. The nature of the common law requires that each time a rule of law is applied, it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice. . . . Whenever an old rule is found unsuited to present conditions or unsound, it should be set aside and a rule declared which is in harmony with those conditions and meets the demands of justice.”)

it wants, subject to constitutional limitations. The particular interpretive philosophy of individual judges may matter less where legislatures have codified the methodology they prefer.

EPILOGUE: THE WEDGE BETWEEN TEXTUALISM AND THE POSITIVE LAW

Textualism no longer has the positive law on its side. Textualism was able to safely refuse to recognize sources outside of the words of the statute, but the positive law now allows interpreters to consult extratextual sources of meaning. Textualism's aversion to legislative history and norms, which was formerly rooted in arguments of democratic illegitimacy, is contradicted by democratically legitimate endorsement of those sources of meaning.

I end with a methodological puzzle:

What is the disciplined textualist to do in the face of a statute permitting interpreters to consider extratextual sources of meaning?

Until this question is satisfactorily answered, textualism's exclusion of legislative history and values is theoretically hollow.

I can see two ways to answer this question in favor of excluding those sources. The first focuses on the codifications' directives being in permissive, not mandatory, forms. Because most of these directives are permissive, judges need not use extratextual sources and can entirely exclude them. But this is an unprincipled retreat: one cannot acknowledge the legislature's supremacy in resolving cost-benefit analyses and claim simultaneously that the benefits of extrastatutory searches for meaning are not worth the cost. In enacting such interpretive rules, legislatures have recognized that there are occasions where extrastatutory ventures add value to the interpretive process. A flat out ban is inconsistent with legislative recognition of this value.

The second way to answer this question argues that legislative control over judicial interpretive methodology is unconstitutional. The claim here would be that statutory interpretive rules impermissibly intrude on the judicial power³⁶⁴

364. Elhauge discusses opting out of the rule of lenity and suggests that this violates the vesting of interpretive authority in courts. See Elhauge, *supra* note 5, at 2203; see also Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2108–12 (2002) (discussing possible constitutional limitations on legislative adoption of interpretive rules opting out of default rules and designed to maximize political satisfaction). Moreover, Alexander Hamilton implied that separation of powers would prevent legislatures from infringing on interpretive methods. See THE FEDERALIST NO. 78, at 492 (Alexander Hamilton) (Benjamin E. Wright ed., 1961) (“The interpretation of the laws is the proper and peculiar province of the courts.”). Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”). The judiciary, therefore, may possess the authority to construe legislative enactments in a matter that judges decide. On the other hand, Rosenkranz has argued that it would be constitutionally permissible for Congress to codify rules of statutory interpretation. See Rosenkranz, *supra* note 32, at 2156.

or that constitutional provisions, such as the Bicameralism and Presentment Clause in the United States Constitution, should be conceptualized as interpretive rules that do not merely trump the codified canons, but actually preclude any consideration of them.³⁶⁵ The high degree of legislative activity seeking to control both interpretive method and sources of meaning exposes these lurking constitutional questions.

Lurking questions, however, are not authoritative holdings. Unless and until courts say otherwise, the codified canons show that the positive law is larger than it has previously appeared. In many jurisdictions, the positive law incorporates extratextual sources and values. Though those sources may not have the same force as the text, their legitimacy cannot be questioned without ignoring the rule of recognition that now marks them. As a positive matter, the law does not run out where the text ends. Many legislatures have expanded the positive law to include resort to justice, legislative history, and feasibility. Ironically, textualism—with its focus on construing a statute within the entire code, including any codified canons (indeed, the method of this study)—should be more supportive of following a codified canon than any other approach to statutory interpretation. Where legislatures recognize various sources of meaning by statute, those sources become, in the absence of viable constitutional objections, indisputably legitimate interpretive tools.

APPENDIX

A. STATUTORY SOURCES OF INTERPRETIVE RULES

This portion of the Appendix provides citations for the various tables in the Article.

Table 1. Linguistic Inference Canons

Expressio unius: Expression of one thing suggests the exclusion of others.

Rejected by Code: ALASKA STAT. § 01.10.040 (2008); MD. CODE ANN. art. 1, § 30 (LexisNexis 2005); VA. CODE ANN. § 1-218 (2008).

Noscitur a sociis: Interpret a general term to be similar to more specific terms in a series.

Codified: MINN. STAT. § 645.08(3) (2008); N.M. STAT. § 12-2A-20 (2005).

365. In this sense, the argument would be that judges are infringing on the legislature by using unconstitutional sources of meaning, rather than that the legislature is infringing on judges by unconstitutionally interfering with the judicial power to develop methods of statutory interpretation. *See Zedner v. United States*, 547 U.S. 489, 509–10 (2006) (Scalia, J., concurring) (“For reasons I have expressed elsewhere, I believe that the only language that constitutes ‘a Law’ within the meaning of the Bicameralism and Presentment Clause of Article I, § 7, and hence the only language adopted in a fashion that entitles it to our attention, is the text of the enacted statute.” (citation omitted)).

Ejusdem generis: Interpret a general term to reflect a class of objects described in more specific terms accompanying it.

Codified: MINN. STAT. § 645.08(3) (2008); N.M. STAT. § 12-2A-20 (2005).

Ordinary usage: Follow ordinary usage of terms, unless the legislature gives them a specified or technical meaning.

Codified: ALASKA STAT. § 01.10.040 (2008); ARIZ. REV. STAT. ANN. § 1-213 (2002); CAL. CIV. CODE § 13 (West 2007); COLO. REV. STAT. § 2-4-101 (2008); CONN. GEN. STAT. § 1-1 (2007); DEL. CODE. ANN. tit. 1, § 303 (2001); GA. CODE ANN. § 1-3-1 (2000 & Supp. 2009); HAW. REV. STAT. § 1-14 (1993); IDAHO CODE ANN. § 73-113 (2006); IND. CODE § 1-1-4-1 (1998); IOWA CODE § 4.1(38) (1999); KAN. STAT. ANN. § 77-201 (Supp. 2008); KY. REV. STAT. ANN. §§ 446.015, .080 (West 2006); LA. REV. STAT. ANN. § 1:3 (2003); ME. REV. STAT. ANN. tit. 1, § 72(3) (1989); MASS. GEN. LAWS ANN. ch. 4, § 6 (West 2006); MICH. COMP. LAWS ANN. § 8.3a (West 2004); MINN. STAT. § 645.08 (2008); MISS. CODE ANN. § 1-3-65 (2005); MO. REV. STAT. § 1.090 (2000); MONT. CODE ANN. § 1-2-106 (2007); NEB. REV. STAT. ANN. § 49-802 (2004); N.H. REV. STAT. ANN. § 21:2 (LexisNexis 2008); N.J. STAT. ANN. § 1:1-1 (West 1992); N.M. STAT. § 12-2A-2 (2005); N.D. CENT. CODE §§ 1-02-02 to -03 (2008); OHIO REV. CODE ANN. § 1.42 (LexisNexis 1990); OKLA. STAT. ANN. tit. 25, § 1 (West 2008); 1 PA. CONS. STAT. § 1903 (2006); S.D. CODIFIED LAWS § 2-14-1 (2004); TEX. GOV'T CODE ANN. § 311.011 (Vernon 2005); UTAH CODE ANN. § 68-3-11 (2008); WIS. STAT. ANN. § 990.01 (West 2007 & Supp. 2008); WYO. STAT. ANN. § 8-1-103 (2009).

Dictionary definition: Follow dictionary definitions of terms, unless the legislature has provided a specific definition.

Codified: ALASKA STAT. § 01.10.040 (2008); ARIZ. REV. STAT. ANN. § 1-213 (2002); CAL. CIV. CODE § 13 (West 2007); COLO. REV. STAT. § 2-4-101 (2008); CONN. GEN. STAT. § 1-1 (2007); DEL. CODE. ANN. tit. 1, § 303 (2001); GA. CODE ANN. § 1-3-1 (2000 & Supp. 2009); HAW. REV. STAT. § 1-14 (1993); IDAHO CODE ANN. § 73-113 (2006); IND. CODE § 1-1-4-1 (1998); IOWA CODE § 4.1(38) (1999); KAN. STAT. ANN. § 77-201 (Supp. 2008); KY. REV. STAT. ANN. §§ 446.015, .080 (West 2006); LA. REV. STAT. ANN. § 1:3 (2003); ME. REV. STAT. ANN. tit. 1, § 72(3) (1989); MASS. GEN. LAWS ANN. ch. 4, § 6 (West 2006); MICH. COMP. LAWS ANN. § 8.3a (West 2004); MINN. STAT. § 645.08 (2008); MISS. CODE ANN. § 1-3-65 (2005); MO. REV. STAT. § 1.090 (2000); MONT. CODE ANN. § 1-2-106 (2007); NEB. REV. STAT. ANN. § 49-802 (2004); N.H. REV. STAT. ANN. § 21:2 (LexisNexis 2008); N.J. STAT. ANN. § 1:1-1 (West 1992); N.M. STAT. § 12-2A-2 (2005); N.D. CENT. CODE §§ 1-02-02 to -03 (2008); OHIO REV. CODE ANN. § 1.42 (LexisNexis 1990); OKLA. STAT. ANN. tit. 25, § 1 (West 2008); 1 PA. CONS. STAT. § 1903 (2006); S.D. CODIFIED LAWS § 2-14-1 (2004); TEX. GOV'T CODE ANN. § 311.011 (Vernon 2005); UTAH CODE ANN. § 68-3-11 (2008); WIS. STAT. ANN. § 990.01 (West 2007 & Supp. 2008); WYO. STAT. ANN. § 8-1-103 (2009).

Plain Meaning Rule/absurd result exception: Follow the plain meaning of the statutory text, except when the text suggests an absurd result or a scrivener's error.

Codified: COLO. REV. STAT. §§ 2-4-201, -203 (2008); CONN. GEN. STAT. § 1-2z (2007); HAW. REV. STAT. § 1-15 (1993); IND. CODE § 1-1-4-1 (1998); IOWA CODE §§ 4.4, 4.6 (1999); LA. REV. STAT. ANN. § 1:4 (2003); ME. REV. STAT. ANN. tit. 1, § 71 (Supp. 2008); MINN. STAT. §§ 645.16–.17 (2008); MONT. CODE ANN. §§ 1-2-101, -3-233 (2007); N.M. STAT. §§ 12-2A-18 to -19 (2005); N.D. CENT. CODE §§ 1-02-05, -39 (2008); OHIO REV. CODE ANN. § 1.49 (LexisNexis 1990); OKLA. STAT. ANN. tit. 25, § 1 (West 2008); OR. REV. STAT. ANN. § 174.010 (West 2007); 1 PA. CONS. STAT. §§ 1921–1922 (2006).

Strict construction: Statutes should be strictly construed.

Rejected by Code: ARIZ. REV. STAT. ANN. § 1-211(B) (2002); ARK. CODE ANN. § 1-2-202 (2008); CAL. CIV. CODE § 4 (West 2007); COLO. REV. STAT. § 2-4-212 (2008); IDAHO CODE ANN. § 73-102 (2006); 5 ILL. COMP. STAT. 70/1.01 (2008); IOWA CODE § 4.2 (1999); KAN. STAT. ANN. § 77-109 (1997); KY. REV. STAT. ANN. §§ 446.015, .080 (West 2006); MO. REV. STAT. § 1.010 (2000); MONT. CODE ANN. § 1-2-103 (2007); N.M. STAT. § 12-2A-18 (2005); N.D. CENT. CODE § 1-02-01 (2008); OKLA. STAT. ANN. tit. 25, § 29 (West 2008); S.D. CODIFIED LAWS § 2-14-12 (2004); UTAH CODE ANN. § 68-3-2 (2008); WASH. REV. CODE § 1.12.010 (2008).

Table 2. Grammar and Syntax Canons

And/Or: “Or” means in the alternative, “and” does not.

Codified: LA. REV. STAT. ANN. § 1:9 (2003).

Rejected by Code: HAW. REV. STAT. § 1-18 (1993); ME. REV. STAT. ANN. tit. 1, § 71 (Supp. 2008).

May/Shall: “May” is permissive, while “shall” is mandatory.

Codified: IOWA CODE § 4.1(30) (1999); KY. REV. STAT. ANN. § 446.010 (West 2006); LA. REV. STAT. ANN. § 1:3 (2003); ME. REV. STAT. ANN. tit. 1, § 71 (Supp. 2008); MINN. STAT. § 645.44 (2008); NEB. REV. STAT. § 49-802 (2004); NEV. REV. STAT. § 0.025 (2007); N.M. STAT. § 12-2A-4 (2005); S.D. CODIFIED LAWS § 2-14-2.1 (2004); TEX. GOV'T CODE ANN. § 311.016 (Vernon 2005).

Punctuation Rule: The legislature is presumed to follow accepted punctuation standards, so placements of commas and other punctuation are meaningful, but not controlling.

Codified: 1 PA. CONS. STAT. § 1923 (2006); S.D. CODIFIED LAWS § 2-14-8 (2004).

Rejected by Code: TEX. GOV'T CODE ANN. § 312.012 (Vernon 2005).

Last Antecedent Rule: Apply the “rule of the last antecedent,” if practical.

Rejected by Code: COLO. REV. STAT. § 2-4-214 (2008).

Errors: Grammar errors do not vitiate a statute.

Codified: GA. CODE ANN. § 1-3-1(a) (2000 & Supp. 2009); HAW. REV. STAT. § 1-14 (1993); MINN. STAT. § 645.18 (2008); 1 PA. CONS. STAT. § 1923 (2006); TEX. GOV'T CODE ANN. § 312.012 (Vernon 2005).

Table 3. Textual Integrity Canons

Whole Act Rule (context): Each statutory provision should be read by reference to the whole act. Statutory interpretation is a “holistic” endeavor.

Codified: ARK. CODE ANN. § 1-2-201 (2008); CAL. CIV. CODE § 13 (West 2007); COLO. REV. STAT. § 2-4-101 (2008); CONN. GEN. STAT. § 1-2z (2007); DEL. CODE ANN. tit. 1, § 303 (2001); HAW. REV. STAT. §§ 1-15, -24 (1993); IDAHO CODE ANN. § 73-113 (2006); 5 ILL. COMP. STAT. 70/1 (2008); IND. CODE § 1-1-4-1 (1998); IOWA CODE §§ 4.1, 4.4 (1999); KAN. STAT. ANN. § 77-201 (Supp. 2008); LA. REV. STAT. ANN. § 1:3 (2003); ME. REV. STAT. ANN. tit. 1, § 72 (1989); MASS. GEN. LAWS ANN. ch. 4, § 6 (West 2006); MINN. STAT. §§ 645.08, .17 (2008); MISS. CODE ANN. § 1-3-1 (2005); MONT. CODE ANN. §§ 1-2-101, -106 (2007); N.H. REV. STAT. ANN. § 21:1 (LexisNexis 2008); N.J. STAT. ANN. §§ 1:1-1 to -2 (West 1992); N.M. STAT. § 12-2A-2 (2005); N.Y. GEN. CONSTR. LAW § 110 (McKinney 2003); N.C. GEN. STAT. § 12-3 (2007); N.D. CENT. CODE §§ 1-02-03, -38 (2008); OHIO REV. CODE ANN. § 1.42 (LexisNexis 1990); 1 PA. CONS. STAT. § 1932 (2006); R.I. GEN. LAWS § 43-3-2 (2005); TEX. GOV'T CODE ANN. § 311.011, .021 (Vernon 2005); UTAH CODE ANN. §§ 68-3-11 to -12 (2008); VT. STAT. ANN. tit. 1, § 101 (2003); W. VA. CODE ANN. § 2-2-10 (LexisNexis 2006).

Presumption of consistent usage/meaningful variation (context): Interpret the same or similar terms in a statute or statutes the same way.

Codified: ARK. CODE ANN. § 1-2-201 (2008); CAL. CIV. CODE § 13 (West 2007); COLO. REV. STAT. § 2-4-101 (2008); CONN. GEN. STAT. § 1-2z (2007); DEL. CODE ANN. tit. 1, § 303 (2001); HAW. REV. STAT. §§ 1-15 to -16 (1993); IDAHO CODE ANN. § 73-113 (2006); 5 ILL. COMP. STAT. 70/1 (2008); IND. CODE § 1-1-4-1 (1998); IOWA CODE §§ 4.1, 4.4 (1999); KAN. STAT. ANN. § 77-201 (Supp. 2008); LA. REV. STAT. ANN. § 1:3 (2003); ME. REV. STAT. ANN. tit. 1, § 72 (1989); MASS. GEN. LAWS ANN. ch. 4, § 6 (West 2006); MINN. STAT. § 645.16 (2008); MISS. CODE ANN. § 1-3-1 (2005); MONT. CODE ANN. §§ 1-2-101, -106 (2007); N.H. REV. STAT. ANN. § 21:1 (LexisNexis 2008); N.J. STAT. ANN. §§ 1:1-1 to -2 (West 1992); N.M. STAT. § 12-2A-20 (2005); N.Y. GEN. CONSTR. LAW § 110 (McKinney 2003); N.C. GEN. STAT. § 12-3 (2007); N.D. CENT. CODE §§ 1-02-03, -38 to -39 (2008); OHIO REV. CODE ANN. § 1.42 (LexisNexis 1990); 1 PA. CONS. STAT. § 1932 (2006); R.I. GEN. LAWS § 43-3-2 (2005); TEX. GOV'T CODE ANN. § 311.011, .021 (Vernon 2005); UTAH CODE ANN. §§ 68-3-11 to -12 (2008); VT. STAT. ANN. tit. 1, § 101 (2003); W. VA. CODE ANN. § 2-2-10 (LexisNexis 2006).

Inconsistent policy: Avoid interpreting a provision in a way inconsistent with the policy of another provision.

No codifications identified.

Inconsistent assumption: Avoid interpreting a provision in a way inconsistent with a necessary assumption of another provision.

No codifications identified.

Inconsistent structure (context): Avoid interpreting a provision in a way inconsistent with the structure of the statute.

Codified: ARK. CODE ANN. § 1-2-201 (2008); CAL. CIV. CODE § 13 (West 2007); COLO. REV. STAT. § 2-4-101 (2008); CONN. GEN. STAT. § 1-2z (2007); DEL. CODE ANN. tit. 1, § 303 (2001); HAW. REV. STAT. §§ 1-15, -24 (1993); IDAHO CODE ANN. § 73-113 (2006); 5 ILL. COMP. STAT. 70/1 (2008); IND. CODE § 1-1-4-1 (1998); IOWA CODE §§ 4.1, 4.4 (1999); KAN. STAT. ANN. § 77-201 (Supp. 2008); LA. REV. STAT. ANN. § 1:3 (2003); ME. REV. STAT. ANN. tit. 1, § 72 (1989); MASS. GEN. LAWS ANN. ch. 4, § 6 (West 2006); MINN. STAT. §§ 645.08, .17 (2008); MISS. CODE ANN. § 1-3-1 (2005); MONT. CODE ANN. §§ 1-2-101, -106 (2007); N.H. REV. STAT. ANN. § 21:1 (LexisNexis 2008); N.J. STAT. ANN. §§ 1:1-1 to -2 (West 1992); N.M. STAT. § 12-2A-20 (2005); N.Y. GEN. CONSTR. LAW § 110 (McKinney 2003); N.C. GEN. STAT. § 12-3 (2007); N.D. CENT. CODE §§ 1-02-03, -38 (2008); OHIO REV. CODE ANN. § 1.42 (LexisNexis 1990); 1 PA. CONS. STAT. § 1932 (2006); R.I. GEN. LAWS § 43-3-2 (2005); S.D. CODIFIED LAWS § 2-14-11 (2004); TEX. GOV'T CODE ANN. §§ 311.011, .021 (Vernon 2005); UTAH CODE ANN. §§ 68-3-11 to -12 (2008); VT. STAT. ANN. tit. 1, § 101 (2003); W. VA. CODE ANN. § 2-2-10 (LexisNexis 2006).

Rule Against Surplusage: Avoid interpreting a provision in a way that would render other provisions of the act superfluous or unnecessary.

Codified: COLO. REV. STAT. § 2-4-201 (2008); IOWA CODE § 4.4 (1999); MINN. STAT. §§ 645.16–.17 (2008); MONT. CODE ANN. §§ 1-2-101, 1-3-232 (2007); N.M. STAT. § 12-2A-18 (2005); N.D. CENT. CODE § 1-2-38(2) (2008); OHIO REV. CODE ANN. § 1.47(B) (LexisNexis 1990); OR. REV. STAT. ANN. § 174.010 (West 2007); 1 PA. CONS. STAT. §§ 1921–1922 (2006); TEX. GOV'T CODE ANN. § 311.021 (Vernon 2005).

Specific/General: Specific provisions targeting a particular issue apply instead of provisions more generally covering the issue.

Codified: COLO. REV. STAT. § 2-4-205 (2008); IOWA CODE § 4.7 (1999); MINN. STAT. §§ 645.08, .26 (2008); MONT. CODE ANN. §§ 1-2-102, 1-3-225 (2007); N.D. CENT. CODE § 1-02-07 (2008); OHIO REV. CODE ANN. §§ 1.12, 1.51 (LexisNexis 1990); OR. REV. STAT. ANN. § 174.020 (West 2007); 1 PA. CONS. STAT. §§ 1903, 1933 (2006); R.I. GEN. LAWS § 43-3-26 (2005); TENN. CODE ANN. § 1-3-103 (2003); TEX. GOV'T CODE ANN. § 311.026 (Vernon 2005).

Narrow exceptions: Provisos and statutory exceptions should be read narrowly.

Codified: MINN. STAT. § 645.19 (2008); 1 PA. CONS. STAT. § 1924 (2006).

No exceptions created: Do not create exceptions in addition to those specified by the legislature.

Codified: MINN. STAT. § 645.19 (2008); 1 PA. CONS. STAT. § 1924 (2006).

Section headings: Section headings may be considered in the construction of a statute.

Codified: 1 PA. CONS. STAT. § 1924 (2006); TEX. GOV'T CODE ANN. § 311.024 (Vernon 2005).

Rejected by Code: ALA. CODE § 1-1-14 (LexisNexis 1999); ARIZ. REV. STAT. ANN. § 1-212 (2002); ARK. CODE ANN. § 1-2-115 (2008); DEL. CODE ANN. tit. 1, §§ 305-306 (2001); GA. CODE ANN. § 1-1-7 (2000); KY. REV. STAT. ANN. § 446.140 (West 2006); LA. REV. STAT. ANN. § 1:13 (2003); ME. REV. STAT. ANN. tit. 1, § 71(10) (Supp. 2008); MD. CODE ANN. art. 1, § 18 (LexisNexis 2005); MICH. COMP. LAWS ANN. § 8.4b (West 2004); MINN. STAT. § 645.49 (2008); NEB. REV. STAT. § 49-802(8) (2004); N.J. STAT. ANN. § 1:1-6 (West 1992); N.M. STAT. § 12-2A-13 (2005); N.D. CENT. CODE § 1-2-12 (2008); S.D. CODIFIED LAWS § 2-14-9 (2004); TENN. CODE ANN. § 1-3-109 (2003); UTAH CODE ANN. § 68-3-13 (2008); VA. CODE ANN. §§ 1-217, -244 (2008); W. VA. CODE ANN. §§ 2-2-10(z), -12 (LexisNexis 2006); WIS. STAT. ANN. § 990.001 (West 2007); WYO. STAT. ANN. § 8-1-105(c) (2009).

Table 4. Technical Changes

Gender neutrality: Gender is neutral unless implicitly or expressly referring to one sex.

Codified: 1 U.S.C. § 1 (2006); ALA. CODE § 1-1-2 (LexisNexis 1999); ALASKA STAT. § 01.10.050 (2008); ARIZ. REV. STAT. ANN. § 1-214 (2002); ARK. CODE ANN. § 1-2-203 (2008); CAL. CIV. CODE § 14 (West 2007); COLO. REV. STAT. § 2-4-103 (2008); CONN. GEN. STAT. § 1-1 (2007); 1 DEL. CODE ANN. tit. 1, § 304 (2001); D.C. CODE § 45-603 (2001); FLA. STAT. ANN. § 1.01 (West 2004); GA. CODE ANN. § 1-3-1 (2000); HAW. REV. STAT. § 1-17 (1993); IDAHO CODE ANN. § 73-114 (2006); 5 ILL. COMP. STAT. 70/1.04 (2008); IND. CODE § 1-1-4-1 (1998); IOWA CODE § 4.1 (1999); KAN. STAT. ANN. § 77-136 (1997); KY. REV. STAT. ANN. § 446.020 (West 2006); LA. REV. STAT. ANN. § 1:8 (2003); ME. REV. STAT. ANN. tit. 1, § 71 (1989); MD. CODE ANN. art. 1, § 7 (LexisNexis 2005); MASS. GEN. LAWS ANN. ch. 4, § 6 (West 2006); MICH. COMP. LAWS ANN. § 8.3b (West 2004); MINN. STAT. § 645.08 (2008); MISS. CODE ANN. § 1-3-17 (2005); MO. REV. STAT. § 1.030 (2000); MONT. CODE ANN. § 1-2-105 (2007); NEB. REV. STAT. § 49-802 (2004); NEV. REV. STAT. § 0.030 (2007); N.H. REV. STAT. ANN. § 21:3 (LexisNexis 2008); N.J. STAT. ANN. § 1:1-2 (West 1992); N.M. STAT. § 12-2A-5 (2005); N.Y. GEN. CONSTR. LAW § 22 (McKinney 2003); N.C. GEN. STAT. § 12-3 (2007); N.D. CENT. CODE § 1-01-34 (2008); OHIO REV. CODE ANN. § 1.43 (LexisNexis 1990); OKLA. STAT. ANN. tit. 25, § 24 (West 2008); OR. REV. STAT. ANN. § 174.127 (West 2007); 1 PA. CONS. STAT. § 1902 (2006); R.I. GEN. LAWS §§ 43-3-3 to -3.2 (2005); S.C. CODE ANN. § 2-7-30 (2005); S.D. CODIFIED LAWS § 2-14-5 (2004); TENN. CODE ANN. § 1-3-104 (2003); TEX. GOV'T CODE ANN. § 311.012 (Vernon 2005); UTAH CODE ANN. § 68-3-12 (2008); VT. STAT. ANN. tit. 1, § 175 (2003); VA. CODE ANN. § 1-216 (2008); WASH. REV. CODE § 1.12.050 (2008); W. VA. CODE ANN. § 2-2-10 (LexisNexis 2006); WIS. STAT. ANN. § 990.001 (West 2007); WYO. STAT. ANN. § 8-1-103 (2009).

Singular/Plural: Singular includes plural.

Codified: 1 U.S.C. § 1 (2006); ALA. CODE § 1-1-2 (LexisNexis 1999); ALASKA STAT. § 01.10.050 (2008); ARIZ. REV. STAT. ANN. § 1-214 (2002); ARK. CODE ANN. § 1-2-203 (2008); CAL. CIV. CODE § 14 (West 2007); COLO. REV. STAT. § 2-4-102 (2008); CONN. GEN. STAT. § 1-1 (2007); DEL. CODE ANN. tit. 1, § 304 (2001); D.C. CODE § 45-602 (2001); FLA. STAT. ANN. § 1.01 (West 2004); GA. CODE ANN. § 1-3-1 (2000 & Supp. 2009); HAW. REV. STAT. § 1-17 (1993); IDAHO CODE ANN. § 73-114 (2006); 5 ILL. COMP. STAT. 70/1.03 (2008); IND. CODE § 1-1-4-1 (1998); IOWA CODE § 4.1 (1999); KAN. STAT. ANN. § 77-201 (Supp. 2008); KY. REV. STAT. ANN. § 446.020 (West 2006); LA. REV. STAT. ANN. § 1:7 (2003); ME. REV. STAT. ANN. tit. 1, § 71 (Supp. 2008); MD. CODE ANN. art. 1, § 8 (LexisNexis 2005); MASS. GEN. LAWS ANN. ch. 4, § 6 (West 2006); MICH. COMP. LAWS ANN. § 8.3b (West 2004); MINN. STAT. § 645.08 (2008); MISS. CODE ANN. § 1-3-33 (2005); MO. REV. STAT. § 1.030 (2000); MONT. CODE ANN. § 1-2-105 (2007); NEB. REV. STAT. § 49-802 (2004); NEV. REV. STAT. § 0.030 (2007); N.H. REV. STAT. ANN. § 21:3 (LexisNexis 2008); N.J. STAT. ANN. § 1:1-2 (West 1992); N.M. STAT. § 12-2A-5 (2005); N.Y. GEN. CONSTR. LAW § 35 (McKinney 2003); N.C. GEN. STAT. § 12-3 (2007); N.D. CENT. CODE § 1-01-35 (2008); OHIO REV. CODE ANN. § 1.43 (LexisNexis 1990); OKLA. STAT. ANN. tit. 25, § 25 (West 2008); OR. REV. STAT. ANN. § 174.127 (West 2007); 1 PA. CONS. STAT. § 1902 (2006); R.I. GEN. LAWS § 43-3-4 (2005); S.C. CODE ANN. § 2-7-30 (2005); S.D. CODIFIED LAWS § 2-14-6 (2004); TENN. CODE ANN. § 1-3-104 (2003); TEX. GOV'T CODE ANN. § 311.012 (Vernon 2005); UTAH CODE ANN. § 68-3-12 (2008); VT. STAT. ANN. tit. 1, § 175 (2003); VA. CODE ANN. § 1-227 (2008); WASH. REV. CODE § 1.12.050 (2008); W. VA. CODE ANN. § 2-2-10 (LexisNexis 2006); WIS. STAT. ANN. § 990.001 (West 2007); WYO. STAT. ANN. § 8-1-103 (2009).

Tense: Tenses are generally interchangeable, with some important exceptions.

Codified: 1 U.S.C. § 1 (2006); ALA. CODE § 1-1-2 (LexisNexis 1999); ALASKA STAT. § 01.10.050 (2008); ARIZ. REV. STAT. ANN. § 1-214 (2002); CAL. CIV. CODE § 14 (West 2007); COLO. REV. STAT. § 2-4-104 (2008); GA. CODE ANN. § 1-3-1 (2000 & Supp. 2009); IDAHO CODE ANN. § 73-114 (2006); 5 ILL. COMP. STAT. 70/1.02 (2008); IOWA CODE § 4.1 (1999); MINN. STAT. § 645.08 (2008); MONT. CODE ANN. § 1-2-105 (2007); NEB. REV. STAT. § 49-802 (2004); NEV. REV. STAT. § 0.030 (2007); N.M. STAT. § 12-2A-5 (2005); N.Y. GEN. CONSTR. LAW § 48 (McKinney 2003); N.D. CENT. CODE § 1-01-35.1 (2008); OHIO REV. CODE ANN. § 1.43 (LexisNexis 1990); OKLA. STAT. ANN. tit. 25, § 26 (West 2008); 1 PA. CONS. STAT. § 1902 (2006); S.C. CODE ANN. § 2-7-30 (2005); S.D. CODIFIED LAWS § 2-14-7 (2004); TENN. CODE ANN. § 1-3-104 (2003); TEX. GOV'T CODE ANN. § 311.012 (Vernon 2005); UTAH CODE ANN. § 68-3-12 (2008); WIS. STAT. ANN. § 990.001 (West 2007); WYO. STAT. ANN. § 8-1-103 (2009).

Written numbers: Words govern expression of numbers.

Codified: COLO. REV. STAT. § 2-4-112 (2008); LA. REV. STAT. ANN. § 1:6 (2003); N.D. CENT. CODE § 1-02-04 (2008); OHIO REV. CODE ANN. § 1.46 (LexisNexis 1990).

Table 5. Agency Interpretations

Generic (Skidmore) deference to agencies: If a statute is ambiguous, courts may consider an agency's interpretation of it.

Codified: COLO. REV. STAT. § 2-4-203(f) (2008); IOWA CODE § 4.6(6) (1999); MINN. STAT. § 645.16(8) (2008); N.M. STAT. § 12-2A-20(B)(5) (2005 & Supp. 2008); N.D. CENT. CODE § 1-02-39(6) (2008 & Supp. 2009); OHIO REV. CODE ANN. § 1.49(F) (LexisNexis 1990); 1 PA. CONS. STAT. § 1921(5) (2006); TEX. GOV'T CODE ANN. § 311.023(6) (Vernon 2005).

Agency's own regulations: Presume that an agency interpretation of its own regulations is correct.

No codifications identified.

Rule of Extreme Deference: Courts should be highly deferential to agency interpretations when the legislature has expressly delegated lawmaking duties to it.

No codifications identified.

Table 6. Continuity in Law

Consistency between statutes/in pari materia (context): Presume that the legislature uses the same term consistently in different statutes.

Codified: ARK. CODE ANN. § 1-2-201 (2008); CAL. CIV. CODE § 13 (West 2007); COLO. REV. STAT. §§ 2-4-101, -203(d) (2008); CONN. GEN. STAT. § 1-2z (2007); DEL. CODE ANN. tit. 1, § 303 (2001); FLA. STAT. ANN. § 1.04 (West 2004); HAW. REV. STAT. § 1-16 (1993); IDAHO CODE ANN. § 73-113 (2006 & Supp. 2008); 5 ILL. COMP. STAT. 70/1 (2008); IND. CODE § 1-1-4-1 (1998); IOWA CODE §§ 4.1, 4.6(4) (1999); KAN. STAT. ANN. § 77-201 (Supp. 2008); LA. REV. STAT. ANN. § 1:3 (2003); ME. REV. STAT. ANN. tit. 1, § 72 (1989); MINN. STAT. §§ 645.08, .17 (2008); MISS. CODE ANN. § 1-3-1 (2005); MONT. CODE ANN. §§ 1-2-101, -106 (2007); N.J. STAT. ANN. §§ 1:1-1 to -2 (West 1992); N.M. STAT. § 12-2A-20(A) (2005); N.Y. GEN. CONSTR. LAW § 110 (McKinney 2003); N.D. CENT. CODE §§ 1-02-03, -39(4) (2008 & Supp. 2009); OHIO REV. CODE ANN. §§ 1.42, 1.49 (LexisNexis 1990); 1 PA. CONS. STAT. §§ 1921(5), 1932 (2006); TEX. GOV'T CODE ANN. §§ 311.011(a), .023(4) (Vernon 2005); UTAH CODE ANN. §§ 68-3-11 to -12 (2008); W. VA. CODE ANN. § 2-2-10 (LexisNexis 2006).

Reenactment Rule: When the legislature reenacts a statute, it incorporates settled interpretations of the reenacted statute.

Codified: MINN. STAT. § 645.17(4) (2008); N.M. STAT. § 12-2A-20(B)(7) (2005 & Supp. 2008); 1 PA. CONS. STAT. § 1922(4) (2006).

Acquiescence Rule: Presume that the legislature approves of an agency or a judicial interpretation where the legislature is aware of the interpretation and does not amend the statute.

No codifications identified.

Obsolete reason, obsolete rule (desuetude): When the reason of a rule ceases, so should the rule itself.

Codified: MONT. CODE ANN. § 1-3-201 (2007).

Rejected by Code: MINN. STAT. § 645.40 (2008); 1 PA. CONS. STAT. § 1972 (2006).

Same reason, same rule: Where the reason is the same, the rule should be the same.

Codified: MONT. CODE ANN. § 1-3-202 (2007).

Borrowed Statute Rule: When the legislature borrows a statute, it adopts by implication interpretations placed on that statute, absent an express statement to the contrary.

Codified: HAW. REV. STAT. § 1-24 (1993); MINN. STAT. § 645.22 (2008); N.M. STAT. §§ 12-2A-18(B), -20(B)(1) (2005 & Supp. 2008); N.D. CENT. CODE § 1-2-13 (2008); 1 PA. CONS. STAT. § 1927 (2006); S.D. CODIFIED LAWS § 2-14-13 (2004); TEX. GOV'T CODE ANN. § 311.028 (Vernon 2005); WYO. STAT. ANN. § 8-1-103(a)(vii) (2009).

Table 7. Extrinsic Legislative Sources

Consider legislative history: Legislative history may be considered under various circumstances.

Codified: COLO. REV. STAT. § 2-4-203(c) (2008); CONN. GEN. STAT. § 1-2z (2007); HAW. REV. STAT. § 1-15(2) (1993); IOWA CODE § 4.6(3) (1999); MINN. STAT. § 645.16(7) (2008); N.M. STAT. § 12-2A-20(C)(2) (2005 & Supp. 2008); N.D. CENT. CODE § 1-02-39(3) (2008 & Supp. 2009); OHIO REV. CODE ANN. § 1.49(C) (LexisNexis 1990); OR. REV. STAT. ANN. § 174.020(1)(b) (West 2007 & Supp. 2009); 1 PA. CONS. STAT. §§ 1921(c)(7), 1939 (2006); TEX. GOV'T CODE ANN. § 311.023(3) (Vernon 2005).

Contemporaneous circumstances: The circumstances under which a statute was enacted may be considered.

Codified: COLO. REV. STAT. § 2-4-203(b) (2008); GA. CODE ANN. § 1-3-1(a) (2000 & Supp. 2009); HAW. REV. STAT. § 1-15(2) (1993); IOWA CODE § 4.6(2) (1999); MINN. STAT. § 645.16(2) (2008); N.M. STAT. § 12-2A-20(C)(1) (2005 & Supp. 2008); N.D. CENT. CODE § 1-02-39(2) (2008 & Supp. 2009); OHIO REV. CODE ANN. § 1.49(B) (LexisNexis 1990); 1 PA. CONS. STAT. § 1921(c)(2) (2006); TEX. GOV'T CODE ANN. § 311.023(2) (Vernon 2005).

Contemporaneous understandings: Contemporaneous understandings of a statutory scheme may be considered.

Codified: COLO. REV. STAT. § 2-4-203 (2008); HAW. REV. STAT. § 1-15(2) (1993); IOWA CODE § 4.6 (1999); MINN. STAT. § 645.16(7) (2008); MONT. CODE ANN. § 1-3-226 (2007); N.M. STAT. § 12-2A-20(C)(2) (2005 & Supp. 2008); N.D. CENT. CODE § 1-02-39 (2008 & Supp. 2009); OHIO REV. CODE ANN. § 1.49(B) (West 1990); 1 PA. CONS. STAT. §§ 1921(c), 1939 (2006); TEX. GOV'T CODE ANN. § 311.023(5) (Vernon 2005).

Commentary prior to passage: Official commentary published and available before the enactment or adoption of a statute or rule may be considered.

Codified: COLO. REV. STAT. § 2-4-203 (2008); IOWA CODE § 4.6(7) (1999); MINN. STAT. § 645.16(4) (2008); N.M. STAT. § 12-2A-20(B)(3) (2005 & Supp. 2008); N.D. CENT. CODE § 1-02-39(7) (2008 & Supp. 2009); 1 PA. CONS. STAT. § 1939 (2006); TEX. GOV'T CODE ANN. § 311.023(7) (Vernon 2005).

Table 8. Separation-of-Powers Canons

Avoidance/Unconstitutionality: Avoid interpretations that would render a statute unconstitutional.

Codified: MINN. STAT. § 645.17(3) (2008); N.M. STAT. § 12-2A-18 (2005); N.D. CENT. CODE § 1-02-38 (2008); 1 PA. CONS. STAT. § 1922 (2006); TEX. GOV'T CODE ANN. § 311.021 (Vernon 2005).

Core executive powers: Rule against legislative invasion of core executive powers.

No codifications identified.

Executive abuse of discretion: Rule against review of core executive actions for "abuse of discretion."

No codifications identified.

Judiciary's equity or "inherent" powers: Rule against legislative curtailment of the judiciary's "inherent powers" or its "equity" powers.

No codifications identified.

Injury in fact: Rule against legislative expansion of injury in fact to include intangible and procedural injuries.

No codifications identified.

Nondelegation: Presumption that the legislature does not delegate authority without sufficient guidelines.

No codifications identified.

Implied cause of action: Presumption against "implying" causes of action into statutes.

No codifications identified.

Severability: Presumption favoring severability of unconstitutional provisions.

Codified: ALA. CODE § 1-1-16 (LexisNexis 1999); ALASKA STAT. § 01.10.030 (2008); ARK. CODE ANN. § 1-2-205 (2008); COLO. REV. STAT. § 2-4-204 (2008); CONN. GEN. STAT. § 1-3 (2007); DEL. CODE ANN. tit. 1, § 308 (2001); D.C. CODE § 45-201 (2001); GA. CODE ANN. § 1-1-3 (2000); HAW. REV. STAT. § 1-23 (1993); 5 ILL. COMP. STAT. 70/1.31 (2008); IOWA CODE § 4.12 (1999); KY. REV. STAT. ANN. § 446.090, .160 (West 2006); ME. REV. STAT. ANN. tit. 1, § 71 (1989 & Supp. 2008); MD. CODE ANN. art. 1, § 23 (LexisNexis 2005); MASS. GEN. LAWS ANN. ch. 4, § 6 (West 2006 & Supp. 2009); MICH. COMP. LAWS ANN. § 8.5 (West 2004); MINN. STAT. § 645.20

(2008); MISS. CODE ANN. § 1-3-77 (2005); MO. REV. STAT. § 1.140 (2000); NEV. REV. STAT. § 0.020 (2007); N.J. STAT. ANN. § 1:1-10 (West 1992); N.M. STAT. § 12-2A-9 (2005); N.D. CENT. CODE § 1-02-20 (2008); OHIO REV. CODE ANN. § 1.50 (LexisNexis 1990); OKLA. STAT. ANN. tit. 75, § 11a (West 2008); OR. REV. STAT. ANN. § 174.040 (West 2007); 1 PA. CONS. STAT. § 1925 (2006); R.I. GEN. LAWS § 43-3-31 (2005); TENN. CODE ANN. § 1-3-110 (2003); TEX. GOV'T CODE ANN. § 311.032 (Vernon 2005); VT. STAT. ANN. tit. 1, § 215 (2003); VA. CODE ANN. § 1-243 (2008); W. VA. CODE ANN. § 2-2-10 (LexisNexis 2006); WIS. STAT. ANN. § 990.001 (West 2007); WYO. STAT. ANN. § 8-1-103 (2009).

Table 9. Due Process Canons

Intent: Rule against imposition of criminal penalties absent a showing of specific intent.

No codifications identified.

Jury trial: Rule against interpreting statutes to deny jury trial right.

No codifications identified.

Judicial review: Presumption in favor of judicial review, especially for constitutional questions, but not for agency decisions not to prosecute.

No codifications identified.

Pre-enforcement challenge: Presumption against pre-enforcement challenges to implementation.

No codifications identified.

Exhaustion: Presumption against an exhaustion of remedies requirement as a condition precedent to a lawsuit enforcing constitutional rights.

No codifications identified.

Parties: Presumption that judgments will not be binding upon persons not party to an adjudication.

No codifications identified.

Private enforcement of rights: Presumption against foreclosure of private enforcement of important rights.

No codifications identified.

Preponderance of the evidence: Presumption that a preponderance of the evidence standard applies in civil cases.

No codifications identified.

Retroactivity: Presumption against interpreting statutes to be retroactive.

Codified: ALASKA STAT. § 01.10.090 (2008); ARIZ. REV. STAT. § 1-244 (2002); CAL. CIV. CODE § 3 (West 2007); COLO. REV. STAT. § 2-4-202 (2008); GA. CODE ANN. § 1-3-5 (2000); HAW. REV. STAT. § 1-3 (1993); IDAHO CODE ANN. § 73-101 (2006); IOWA CODE § 4.5 (1999); KY. REV. STAT. ANN. § 446.080 (West 2006); LA. REV. STAT. ANN. § 1:2 (2003 &

Supp. 2009); MINN. STAT. § 645.21 (2008); MONT. CODE ANN. § 1-2-109 (2007); N.M. STAT. § 12-2A-8 (2005); N.D. CENT. CODE § 1-02-10 (2008 & Supp. 2009); OHIO REV. CODE ANN. § 1.48 (LexisNexis 1990); 1 PA. CONS. STAT. § 1926 (2006); S.C. CODE ANN. § 2-7-10 (2005); S.D. CODIFIED LAWS § 2-14-21 (2004); TEX. GOV'T CODE ANN. § 311.022 (Vernon 2005); UTAH CODE ANN. § 68-3-3 (2008); VT. STAT. ANN. tit. 1, § 212 (2003); VA. CODE ANN. § 1-214 (2008); W. VA. CODE ANN. § 2-2-10 (LexisNexis 2006); WYO. STAT. ANN. § 8-1-108 (2009).

Table 10. Statute-Based Canons

Rule Against Implied Repeals: No repeals by implication unless laws are irreconcilable.

Codified: ARIZ. REV. STAT. ANN. § 1-245 (2002); ARK. CODE ANN. § 1-2-207 (2008); COLO. REV. STAT. §§ 2-4-206, -301 (2008); HAW. REV. STAT. § 1-9 (2003); 5 ILL. COMP. STAT. 70/6 (2008); IOWA CODE §§ 4.8, 4.11 (1999); KY. REV. STAT. ANN. §§ 446.130, .260 (West 2006); MD. CODE ANN. art. 1, § 17 (LexisNexis 2005); MINN. STAT. §§ 645.26, .39, .41 (2008); N.M. STAT. ANN. § 12-2A-10 (2005); N.D. CENT. CODE §§ 1-02-07 to -09.1 (2008); OHIO REV. CODE ANN. §§ 1.51 to .52 (LexisNexis 1990 & Supp. 2009); OKLA. STAT. ANN. tit. 75, § 22 (West 2008 & Supp. 2009); 1 PA. CONS. STAT. §§ 1933–1936, 1971 (2006); TEX. GOV'T CODE ANN. § 311.025 (Vernon 2005).

Effect of repeal: Repeal of a repealing statute revives the original enactment.

Rejected by Code: 1 U.S.C. § 108 (2006); ALA. CODE § 1-1-111 (LexisNexis 1999); ARIZ. REV. STAT. ANN. § 1-252 (2002); ARK. CODE ANN. § 1-2-107 (2008); CAL. CIV. CODE § 20 (West 2007); COLO. REV. STAT. § 2-4-302 (2008); CONN. GEN. STAT. § 1-1(s) (2007); D.C. CODE § 45-501 (2001); FLA. STAT. ANN. § 2.04 (West 2004); HAW. REV. STAT. § 1-8 (2003); IDAHO CODE ANN. § 73-115 (2006 & Supp. 2008); 5 ILL. COMP. STAT. 70/3 (2008); IND. CODE § 1-1-5-1 (1998); IOWA CODE § 4.1(26) (1999); KAN. STAT. ANN. § 77-201 (Supp. 2008); KY. REV. STAT. ANN. § 446.100 (West 2006); LA. REV. STAT. ANN. § 1:15 (2003); ME. REV. STAT. ANN. tit. 1, § 302 (1989); MASS. GEN. LAWS ANN. ch. 4, § 6 (West 2006); MICH. COMP. LAWS § 8.4 (2004); MINN. STAT. § 645.36 (2008); MISS. CODE ANN. § 1-1-25 (2005); MO. REV. STAT. § 1.150 (2000); MONT. CODE ANN. § 1-2-207 (2007); NEB. REV. STAT. §§ 49-302, -802 (2004); N.H. REV. STAT. ANN. § 21:39 (LexisNexis 2008); N.J. STAT. ANN. § 1: 1-3.2 (West 1992); N.M. STAT. ANN. § 12-2A-15 (2005); N.Y. GEN. CONSTR. LAW § 90 (McKinney 2003 & Supp. 2009); N.D. CENT. CODE § 1-02-16 (2008); OHIO REV. CODE ANN. § 1.57 (LexisNexis 1990); OKLA. STAT. tit. 25, § 32 (West 2008); OR. REV. STAT. ANN. § 174.080 (West 2007 & Supp. 2009); 1 PA. CONS. STAT. § 1977 (2006); R.I. GEN. LAWS § 43-3-24 (2005); S.C. CODE ANN. § 2-7-20 (2005); S.D. CODIFIED LAWS § 2-14-19 (2004); TEX. GOV'T CODE § 311.030 (Vernon 2005); UTAH CODE ANN. § 68-3-5 (2008); VT. STAT. ANN. tit. 1, § 214 (2003 & Supp. 2008); VA. CODE ANN. § 1-240 (2008); W. VA. CODE ANN. § 2-2-9 (LexisNexis 2006); WIS. STAT. ANN. § 990.03 (West 2007); WYO. STAT. ANN. § 8-1-106 (2009).

Clerical revision: Legislation with the intent of a clerical correction does not make substantive changes to the law.

Codified: OHIO REV. CODE ANN. §§ 1.30–31 (LexisNexis 1990).

No effect on extrastate agreements: Statutes should not be construed to limit or enlarge any provision in any treaty, compact, or agreement between states or concerning the United States.

Codified: N.J. STAT. ANN. § 1:1-3 (West 1992).

Remedies: Presumption that a private right of action (express or implied) carries with it all traditional remedies.

Codified: MONT. CODE ANN. § 1-3-214 (2007).

Feasible Execution Rule: A result feasible of execution is intended.

Codified: COLO. REV. STAT. § 2-4-201(d) (2008); CONN. GEN. STAT. § 1-2z (2007); IOWA CODE § 4.4 (1999); MINN. STAT. § 645.17(1) (2008); MONT. CODE ANN. § 1-3-222 (2007); N.M. STAT. § 12-2A-18(A)(3) (2005); N.D. CENT. CODE § 1-02-38(4) (2008); OHIO REV. CODE ANN. § 1.47(D) (LexisNexis 1990); 1 PA. CONST. STAT § 1922(1) (2006); TEX. GOV'T CODE ANN. § 311.021(4) (Vernon 2005).

Purpose/Object Rule: Interpret ambiguous statutes so as best to carry out their statutory purposes.

Codified: ARIZ. REV. STAT. ANN. § 1-211(B) (2002); CAL. CIV. CODE § 4 (West 2007); COLO. REV. STAT. §§ 2-4-203, -212 (2008); GA. CODE ANN. § 1-3-1(a) (2000 & Supp. 2009); HAW. REV. STAT § 1-15(2) (1993); IDAHO CODE ANN. § 73-102(1) (2006); IOWA CODE §§ 4.2, 4.6 (1999); KAN. STAT. ANN. § 77-109 (1997); KY. REV. STAT. ANN. § 446.080 (West 2006); MINN. STAT. §§ 645.08, .16, .18 (2008); MISS. CODE ANN. § 1-3-1 (2005); MONT. CODE ANN. §§ 1-2-102 to -103 (2007); NEB. REV. STAT. § 49-802 (2004); N.M. STAT. § 12-2A-18(A)(1) (2005); N.Y. GEN. CONSTR. LAW § 110 (McKinney 2003); N.D. CENT. CODE §§ 1-02-01, -13, -39 (2008); OHIO REV. CODE ANN. §§ 1.11, 1.49 (LexisNexis 1990); OKLA. STAT. ANN. tit. 25, §§ 1 to 2, 29 (West 2008); 1 PA. CONS. STAT. §§ 1901, 1921, 1928(c) (2006 & Supp. 2008); S.D. CODIFIED LAWS §§ 2-14-4, -12 (2004); TEX. GOV'T CODE ANN. §§ 311.021, 311.023, 312.006 (Vernon 2005); UTAH CODE ANN. §§ 68-3-2, -12 (2008).

Table 11. Common Law-Based Canons

Common law usage: Presumption in favor of following common law usage where the legislature has employed words or concepts with well-settled common law traditions.

Codified: CAL. CIV. CODE § 5 (West 2007); COLO. REV. STAT. §§ 2-4-203(d), -211 (2008); D.C. CODE § 45-401(a) (2001); FLA. STAT. ANN. § 2.01 (West 2004); HAW. REV. STAT. § 1-1 (1993); IDAHO CODE ANN. § 73-116 (2006); IOWA CODE § 4.6(4) (1999); N.M. STAT. § 12-2A-

20(B)(5) (2003); N.D. CENT. CODE § 1-02-39(4) (2008); OHIO REV. CODE ANN. § 1.49(D) (LexisNexis 1990); TEX. GOV'T CODE ANN. § 311.023(4) (Vernon 2005).

Sovereign immunity: Strong presumption against waivers of sovereign immunity.

Codified: GA. CODE ANN. § 1-3-8 (2000); MINN. STAT. § 645.27 (2008); TEX. GOV'T CODE ANN. § 311.034 (Vernon 2005 & Supp. 2008).

Derogation of common law: Statutes in derogation of the common law should be strictly construed.

Rejected by Code: ARIZ. REV. STAT. ANN. § 1-211(B) (2002); ARK. CODE ANN. § 1-2-202 (2008); CAL. CIV. CODE § 4 (West 2007); COLO. REV. STAT. § 2-4-212 (2008); IDAHO CODE ANN. § 73-102(1) (2006); 5 ILL. COMP. STAT. 70/1.01 (2008); IOWA CODE § 4.2 (1999); KAN. STAT. ANN. § 77-109 (1997); KY. REV. STAT. § 446.080(1) (West 2006); MO. REV. STAT. § 1.010 (2000); MONT. CODE ANN. § 1-2-103 (2007); N.M. STAT. § 12-2A-18(C) (2005); N.D. CENT. CODE § 1-02-01 (2008); OHIO REV. CODE ANN. § 1.11 (LexisNexis 1990); OKLA. STAT. ANN. tit. 25, § 29 (West 2008); 1 PA. CONS. STAT. § 1928 (2006); S.D. CODIFIED LAWS § 2-14-12 (2004); TEX. GOV'T CODE ANN. § 312.006(b) (Vernon 2005); UTAH CODE ANN. § 68-3-2 (2008); WASH. REV. CODE § 1.12.010 (2008).

Liberal construction of remedial laws: Remedial statutes should be liberally construed.

Codified: ARIZ. REV. STAT. ANN. § 1-211(B) (2002); ARK. CODE ANN. § 1-2-202 (2008); CAL. CIV. CODE § 4 (West 2007); COLO. REV. STAT. § 2-4-212 (2008); IDAHO CODE ANN. § 73-102 (2006); 5 ILL. COMP. STAT. 70/1.01 (2008); IOWA CODE § 4.2 (1999); KAN. STAT. ANN. § 77-109 (1997); KY. REV. STAT. ANN. § 446.080 (West 2006); MO. REV. STAT. § 1.010 (2000); MONT. CODE ANN. § 1-2-103 (2007); N.M. STAT. § 12-2A-18(C) (2005); N.D. CENT. CODE § 1-02-01 (2008); OHIO REV. CODE ANN. § 1.11 (LexisNexis 1990); OKLA. STAT. ANN. tit. 25, § 29 (West 2008); 1 PA. CONS. STAT. § 1928 (2006); S.D. CODIFIED LAWS § 2-14-12 (2004); UTAH CODE ANN. § 68-3-2 (2008); WASH. REV. CODE § 1.12.010 (2008).

Liberal construction: All laws should be liberally construed.

Codified: ARIZ. REV. STAT. ANN. § 1-211(B) (2002); ARK. CODE ANN. § 1-2-202 (2008); CAL. CIV. CODE § 4 (West 2007); COLO. REV. STAT. § 2-4-212 (2008); IDAHO CODE ANN. § 73-102 (2006); 5 ILL. COMP. STAT. 70/1.01 (2008); IOWA CODE § 4.2 (1999); KAN. STAT. ANN. § 77-109 (1997); KY. REV. STAT. § 446.080 (West 2006); MO. REV. STAT. § 1.010 (2000); MONT. CODE ANN. § 1-2-103 (2007); N.M. STAT. § 12-2A-18 (2005); N.D. CENT. CODE § 1-02-01 (2008); OKLA. STAT. ANN. tit. 25, § 29 (West 2008); S.D. CODIFIED LAWS § 2-14-12 (2004); UTAH CODE ANN. § 68-3-2 (2008); WASH. REV. CODE § 1.12.010 (2008).

Public interest: Public interest is favored over private interest.

Codified: COLO. REV. STAT. § 2-4-201(e) (2008); GA. CODE ANN. § 1-3-7(a) (Supp. 2009); HAW. REV. STAT. § 1-5 (1993); IOWA CODE § 4.4 (1999); MINN. STAT. § 645.17(5) (2008); MONT. CODE ANN. § 1-3-204 (2007); N.D. CENT. CODE §§ 1-02-28, -38(5) (2008); 1 PA. CONS. STAT. § 1922 (2006); TEX. GOV'T CODE ANN. § 311.021(5) (Vernon 2005).

Justice: Construe statutes to promote justice.

Codified: ARIZ. REV. STAT. ANN. § 1-211(B) (2002); CAL. CIV. CODE § 4 (West 2007); COLO. REV. STAT. § 2-4-203 (2008); IDAHO CODE ANN. § 73-102 (2006); IOWA CODE § 4.2 (1999); MONT. CODE ANN. § 1-2-103 (2007); N.D. CENT. CODE § 1-02-01 (2008); OHIO REV. CODE ANN. § 1.11 (LexisNexis 1990); OKLA. STAT. ANN. tit. 25, § 29 (West 2008); 1 PA. CONS. STAT. § 1928(c) (2006); S.D. CODIFIED LAWS § 2-14-12 (2004); TEX. GOV'T CODE ANN. §§ 311.021(5), 312.006(a) (Vernon 2005); UTAH CODE ANN. § 68-3-2 (2008).

Reasonable results: Follow presumption that the legislature intends reasonable results.

Codified: COLO. REV. STAT. § 2-4-203(e) (2008); CONN. GEN. STAT. § 1-2z (2007); HAW. REV. STAT. § 1-15 (1993); IOWA CODE § 4.4 (1999); MINN. STAT. § 645.17(1) (2008); MONT. CODE ANN. § 1-3-233 (2007); N.M. STAT. §§ 12-2A-18(3), -19 (2005); N.D. CENT. CODE § 1-02-38(3) (2008); OHIO REV. CODE ANN. § 1.49(E) (LexisNexis 1990); 1 PA. CONS. STAT. § 1922(1) (2006); TEX. GOV'T CODE ANN. § 311.021(3) (Vernon 2005).

Equity over common law: Rules of equity prevail over rules of common law.

Codified: UTAH CODE ANN. § 68-3-2 (2008).

Natural right: When a statute is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to be adopted.

Codified: MONT. CODE ANN. §§ 1-2-104, 1-4-104 (2007); OR. REV. STAT. ANN. § 174.030 (West 2007 & Supp. 2009).

B. CODIFIED CANONS BY LEGISLATURE

The following charts indicate which states have codified particular canons.³⁶⁶

Apart from providing an overview of the codified canons, this chart might be useful to federal courts interpreting state provisions and state courts construing another state's code. The symbol ● indicates that a canon has

366. The California Code has no code-wide statutes governing interpretation. Rather, “[t]he general rules for the construction of statutes are contained in the preliminary provisions of the different codes.” CAL. GOV'T CODE § 9603 (West 2007). Classifications for California relate to those interpretive provisions from the California Civil Code that are more or less typical of the entire code. *See supra* note 35.

been codified, and the symbol \otimes indicates that a canon has been rejected. A printable version of this Appendix is available at http://www.georgetownlawjournal.org/issues/pdf/98-2/Scott_AppendixB_Charts.pdf, and a full version of the chart is available at http://www.georgetownlawjournal.org/issues/pdf/98-2/Scott_AppendixB_FullColor.pdf.

SUBSTANTIVE POLICY CANONS			
DUE PROCESS CANONS	SEPARATION OF POWERS CANONS		
Avoidance/Unconstitutionality: Avoid interpretations that would render a statute unconstitutional.	Core executive powers: Rule against legislative invasion of core executive powers.		
Executive abuse of discretion: Rule against review of core executive actions for "abuse of discretion."	Judiciary's equity or "inherent" powers: Rule against legislative curtailment of the judiciary's "inherent powers" or its "equity" powers.		
Injury in fact: Rule against legislative expansion of injury in fact to include intangible and procedural injuries.	Nondelegation: Presumption that the legislature does not delegate authority without sufficient guidelines.		
Implied cause of action: Presumption against "implying" causes of action into statutes.	Severability: Presumption favoring severability of unconstitutional provisions.		
Intent: Rule against imposition of criminal penalties absent a showing of specific intent.	Jury trial: Rule against interpreting statutes to deny jury trial right.		
Judicial review: Presumption in favor of judicial review, especially for constitutional questions, but not for agency decisions not to prosecute.	Pre-enforcement challenge: Presumption against pre-enforcement challenges to implementation.		
Exhaustion: Presumption against an exhaustion of remedies requirement as a condition precedent to a lawsuit enforcing constitutional rights.	Parties: Presumption that judgments will not be binding upon persons not party to an adjudication.		
Private enforcement of rights: Presumption against (over)suore of private enforcement of important rights.	Preponderance of the evidence: Presumption that a preponderance of the evidence standard applies in civil cases.		
Retroactivity: Presumption against interpreting statutes to be retroactive.			
			U.S.
			ALASKA
			ARIZ.
			ARK.
			CAL.
			COLO.
			CONN.
			DEL.
			FLA.
			GA.
			HAW.
			IDAHO
			ILL.
			IND.
			IOWA
			KAN.
			KY.
			LA.
			ME.
			MD.
			MASS.
			MICH.
			MINN.
			MISS.
			MO.
			MONT.
			NEB.
			NEV.
			N.H.
			N.J.
			N.M.
			N.Y.
			N.C.
			N.D.
			OHIO
			OKLA.
			OR.
			PA.
			R.I.
			S.C.
			S.D.
			TENN.
			TEX.
			UTAH
			VT.
			VA.
			WASH.
			W. VA.
			WIS.
			WYO.
			D.C.

