Preface

While the most controversial judicial decisions typically involve interpretation of the U.S. Constitution, statutory interpretation is more practically significant. Statutory commands dominate the work of the federal courts today. The thousands of statutes governing our nation are rife with ambiguities. This book examines how the courts should interpret those statutes in the presence of these uncertainties. To the conventional theoretical analysis of these questions, I add empirical research on the practice of different theories of statutory interpretation.

The significance, and difficulty, of statutory interpretation is commonly illustrated by a chestnut of a hypothetical. Suppose a legislative body passes a law banning "vehicles in public parks," in the wake of an auto accident. While the core meaning of this law is pretty clear—private citizens should not drive their cars or trucks through public parks—its periphery can be quite murky. While the law may be phrased in absolute language ("no" vehicles), should it be interpreted to make illegal an ambulance or fire truck responding to an emergency within the park? Other disputes may arise over the definition of "vehicle." Should snowmobiles be prohibited? Bicycles? Baby strollers? Wheelchairs? There is no simple and obvious answer to any of these questions, which is why rules or standards of statutory interpretation are essential.

The difficulties attendant to statutory interpretation are not limited to creative law school hypothetical problems. Congress passed a law imposing a five-year mandatory prison term on a person who "uses or carries a firearm during and in relation to a drug trafficking crime." The core of the statute seems fairly clear, but numerous disputes have arisen on its periphery. In one

case that reached the U.S. Supreme Court, a person transported marijuana for illegal sale in his truck and had a handgun locked in the truck's glove compartment. A bare majority of the Court held that the mandatory sentence applied, because the defendant was carrying a firearm in connection with a drug crime.[1] Four justices dissented from the ruling, though, and urged that the statute meant that the firearm be borne "in such a manner as to be ready for use as a weapon," before the mandatory sentence should be applied.[2] In another case, a defendant offered to trade his firearm to an agent posing as a dealer, in exchange for cocaine. A majority of the court again applied the statute, finding that bartering a gun was using a gun, but again multiple justices dissented from the majority's statutory interpretation.[3] Plainly, reasonable-minded justices may disagree over the proper interpretation of this criminal statute.

The presence of such persistent disagreement over statutory meaning is troublesome. If the meaning of statutes, especially criminal statutes, is indeterminate, the very rule of law is called into question. The law seems to be merely a function of the predilections of particular judges, whose decisions may be unpredictable. Legal scholars have struggled for decades to bring some systematic structure to statutory interpretation, but this effort has largely failed. This book does not purport to solve this longstanding problem, but it does attempt to shed light on the facts that must underlie any solution.

Judges in the United States were historically accustomed to employing the common law, which is judge-made and hence easily judge-interpreted, or even judge-changed. As statutory law has grown in importance, judges have struggled somewhat to find the proper interpretive approach. The judiciary obviously feels less free to alter the law created by the elected legislature. Consequently, judges require different theories when resolving statutory disputes than they do for their conventional common law decisions. Unfortunately, the courts have struggled with the process of creating a coherent system for their interpretation of statutes. On this background, I present a review of the theoretical disputes and empirical evidence that informs the discussion.

The first chapter provides an overarching construct for judicial statutory interpretation. While judges have the constitutional authority to interpret statutes, this authority is best viewed as that of an agent of the legislature. The legislative authority itself is constitutionally dedicated to Congress, and

statutory interpretation derives from that authority. The court should follow congressional clarity and, in the presence of ambiguity or gaps in the law, adopt the decision that Congress would prefer. However, this latter position is often misunderstood. It may be that Congress would prefer to leave the courts with discretion to "do what is best," rather than prefer a specific outcome. Because Congress cannot anticipate all possible future circumstances, it cannot possibly have substantive preferences for all such outcomes. This delegation theory does not resolve all statutory interpretation disputes, because Congress has not been clear about its interpretive preferences. Understanding the delegation, though, informs the understanding of statutory interpretation. Theories of interpretation must be held up against the delegation construct.

The next four chapters analyze the leading methods and theories of statutory interpretation—textualism, legislative intent, interpretive canons, and pragmatism. Here I review the extensively discussed theoretical arguments underlying each approach. In the process, I dismiss claims that a theory, such as textualism, is constitutionally compelled. Judges have legally authorized choice in interpretation, and the issue is what choice should be made. Central to the analysis, and to this book, is the concern that judges will be willful and outcome oriented in their decisions. This means that they choose the result they prefer and then manipulate the legal materials to support that result. Some theories, especially legislative intent and pragmatism, have been criticized as unduly amenable to this sort of willful judging.

Chapter 6 examines the practice of the Supreme Court justices in over one hundred cases decided during the recent Rehnquist Court. This is commonly considered the age of textualism, but the Court still uses legislative history and other sources with frequency. Although individual justices show different preferences, pluralism plainly prevails at the Court, with the justices using different interpretive methods in different cases. Nor does there appear to be a great conflict between different approaches. This finding might be a sign of effective legal analysis, adapting the interpretive tools to the facts, but it alternatively might be viewed as evidence of dishonesty, adapting legal standards however necessary to reach the justices' preferred ends.

The latter possibility is tested in Chapter 7. Political scientists have conclusively established that the justices are sometimes influenced in their votes by their ideologies. One might think that the invocation of the statute's

"plain meaning" could be exempt from this effect, but the data show that this standard is applied in a very ideological fashion. While no theory escapes ideological influence, it was pragmatism that appeared most neutral in its application. The research also finds that use of legislative intent and pragmatism tend to produce more liberal outcomes, regardless of the ideological preferences of the particular justice.

The final chapter briefly considers lower court statutory interpretation. While lower courts must obey Supreme Court directions, the Supreme Court has given no clear orders on the appropriate method of statutory interpretation. A study of recent history reveals that legislative history use in the circuit courts has declined dramatically (much more than at the Supreme Court level), while textualism and pragmatism have boomed. I considered the precedential effect of the Supreme Court opinions studied in the prior two chapters and found that reliance on textualism produced far more citations than for other theories, though pragmatic interpretation also had more citations. The greatest statistical effect of textualism, though, was found in negative citations, which distinguish or decline to apply the Supreme Court's holding. This casts some doubt on the clarity and value of textualist interpretive methods.

The book is ambitiously titled the theory and practice of statutory interpretation because both are important to addressing disputes over statutory interpretation. In typical social scientific study, one begins with a theory and then tests it against practice. The statutory interpretation debate has been consumed with competing theories, with relatively little examination of how those theories operate in practice. Yet the latter examination is crucial in order to evaluate the theories. My research shows that at least some presumptions of the theoreticians appear to be wrong. No theory is exempt from the risk of ideological willful judging, and pragmatism is the theory that was associated with the least outcome orientation.