Introduction to the Regulatory State

William N. Eskridge Jr.
Abbe R. Gluck
Victoria F. Nourse

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INTRODUCTION

INTRODUCTION TO STATUTES AND THEIR IMPLEMENTATION

“No Vehicles in the Park”

This casebook is designed to introduce law students to the adoption and implementation of statutes in the modern regulatory state. Statutes, agency rules and regulations, and judicial precedents interpreting statutes are not just the primary source of law in this country, but the overwhelming source of law here.

Our introduction focuses on statutes and so forth as the foundation of our legal system, a body of rules and practices that can be applied through careful legal reasoning by legal actors performing their roles in particular institutional contexts. Contrast our focus with that of courses where most of the law is judge-made—either the common law courses such as torts, contracts, and property, or a constitutional law course, where judicial constructions trump statutes and regulations.

Although the common law and constitutional precedents will play a role in this course, it is fundamentally different from your common law and constitutional courses:

- There is a relatively recent and detailed text at the center of the course, namely, the text of the statute, as well as that of the agency regulation. Legal reasoning in this course will not involve as much reasoning by analogy as in your common law and constitutional law courses; legal reasoning will be much more text-centered.

- The key lawmaking players are legislators and agencies—not judges who apply common law thinking and insights to mundane real-world difficulties. The institutional players are important, because different players bring different skill-sets to the task of statutory application and because lawmaking involves the cooperation of all those officials. Judges play an important role in the modern administrative state, but they are not its primary governmental officials. On the other hand, because judges declare the law which must be followed by other institutional actors, judicial decisionmaking has a pervasive effect on decisions by other institutions.

- The characteristic form of legal argument is not reasoning by analogy, the form of argument associated with judicial opinions, but is instead reasoning by cost-benefit balancing, the form of argument associated with legislation and agency rulemaking. In our society, law is policy. The utilitarian premise of most policy arguments requires an evaluation of the consequences of different rules or standards.
In the hypothetical exercise that follows, we shall introduce you to the basic forms of legal reasoning that are the focus of this coursebook.

SECTION 1
HOW JUDGES THINK ABOUT STATUTES

The City of Halcyon is a thriving and peaceful community, but in 1980 it was disrupted by a series of accidents. In each instance, a motorcyclist or (in one case) a bicyclist was racing through a public park and ran over a pedestrian in the park; in one instance, an elderly person was killed by the racing motorcycle. Responding to these incidents, the City Council enacted the following statute in December 1980:

**THE PARKS SAFETY ACT OF 1980**

Sec. 1. The Council finds that vehicles create safety problems when they are operated in parks and further finds that the best solution is to ban any and all vehicles from all municipal parks.

Sec. 2. No vehicles of any kind shall be allowed in any municipal park. Any person who brings or drives a vehicle into one of these parks shall be guilty of a misdemeanor, which may be punished by a fine not exceeding $500 or by a two-day incarceration in the municipal jail, or both.

Sec. 3. “Vehicle” for purposes of this law means any mechanism for conveying a person from one place to another, including motorcycles, automobiles, trucks, and motor scooters. Provided that, bicycles shall be allowed in the park, so long as they are being pushed or carried and not ridden.

After adoption of the Parks Safety Act of 1980 (PSA), motorcycle traffic in and around municipal parks dries up, and there are no further accidents of that nature. But there are several accidents involving bicyclists zooming through parks at high rates of speed and running over elderly persons and children enjoying the parks.

A police officer observes Helen Ro pedaling her tricycle in the Hope Park, the city’s largest public park and a center for children’s activities. Ro pedals her tricycle down a steep hill at what the officer considers an alarming speed, and almost runs over an infant who has strayed from his inattentive father. After that near-miss, the officer arrests Ro and issues her a citation for violating the PSA. Because Ro is only six years old, the officer finds her parents and presents them with a copy of the citation.

The Ro parents are both lawyers—and are outraged that their daughter has been cited. So they fight the charge in court, arguing to the Judge that the PSA does not regulate tricycles. The City Attorney argues that the PSA does regulate tricycles. The Judge must interpret the PSA to determine whether its prohibition of vehicles in the park includes tricycles. Jot down your answer.
in the margin, and consider this brief introduction to how judges think when they interpret statutes.

As a general matter, judges think and operate in very predictable ways. Indeed, the judge is esteemed in our society in large part because she is supposed to apply pre-existing law in an objective and predictable manner. Thus, judges will focus on concrete legal criteria and will justify their decisions by reference to such neutral criteria. But judges are also concerned with the consistency of this concrete exercise with broader norms—including the purpose of the statute being construed, the noninterference of the statute (as interpreted) with other statutory schemes developed by the legislature, and the coherence of the statute and its application with constitutional and other fundamental norms of the polity.

Federal judges and many state judges are not elected. Their comparative advantage in our system of government is: Their predictable application of preexisting law to new facts plus their integration of new statutes and regulations with other legal and constitutional norms plus their neutrality in carrying out these roles.

A. What is the plain meaning of the statute, as applied to this case?

If the text of the statute admits no ambiguity, then judges will almost always apply that plain meaning. Is there a plain meaning of the PSA, as applied to Helen Ro? Consider some text-based considerations:

1. **Ordinary or Statutory Meaning.** The simplest approach is to apply ordinary rules of grammar and word usage to the phrase in question. Section 2 of the PSA says: “No vehicles of any kind shall be allowed in any municipal park.” Section 3 then defines “vehicle” as “any mechanism for conveying a person from one place to another, including motorcycles, automobiles, trucks, and motor scooters.” Does a tricycle fit within that definition? The inclusion phrase, however, lists only motor vehicles. Is that a clue to the proper application of § 2?

Another kind of inquiry would be this: Would a typical speaker of the English language think that a tricycle would be included in the prohibition of “vehicles” in § 2? Engage in some self-reflection: Do you use the term vehicle that broadly? Others whom you have observed?

You might want to do some research into the ordinary meaning of “vehicle.” Webster’s Third International Dictionary defines “vehicle” as a medium (such as syrup) for administering medicine and, more pertinently, as follows:

2. an agent of transmission: CARRIER

4. a means of carrying or transporting something <planes, trains, and other vehicles>: as

   a : MOTOR VEHICLE * * *

The only mechanisms Webster’s lists as examples of “vehicle” are motorized mechanisms. Other dictionaries define the term in a similar manner.
Another source might be Wikipedia, which includes this explanation of what “vehicle” might include:

A **vehicle** (from Latin: *vehiculum*) is a device that is designed or used to transport people or cargo. Most often vehicles are manufactured, such as bicycles, cars, motorcycles, trains, ships, boats, and aircraft.

Vehicles that do not travel on land often are called **craft**, such as watercraft, sailcraft, aircraft, hovercraft, and spacecraft.

Land vehicles are classified broadly by what is used to apply steering and drive forces against the ground: wheeled, tracked, railed, or skied.

Wikipedia provides a short history of vehicles, starting with ships and boats and highlighting the *draisnes*, early prototypes of the modern bicycle.

Can you think of other ways to research “ordinary meaning”? Are any of these sources relevant, however, in light of the PSA’s definition of the term in § 3?

2. **Specialized Meaning within the Legal System.** “Vehicle” might have a specialized legal meaning. Section 3’s definition of “vehicle” might be read to create a special legal meaning for purposes of the PSA, and that meaning does not have to be the same as the “ordinary” meaning the term would have to a speaker of English. Also, there may be a common law consensus among Bliss judges that “vehicle” as used in a regulatory statute is not limited to “motor vehicles.”

Most states have laws requiring vehicle registration and licensing to operate various kinds of vehicles. One might research the various state vehicle-registration laws to see how far they go. Indeed, Bliss has copied the California Vehicles Code, which mainly regulates motorized vehicles but does have a cluster of provisions regulating bicycles. Section 39000 defines “bicycle” for purposes of that portion of the Code:

“Bicycle,” for the purposes of this division, means any device upon which a person may ride, which is propelled by human power through a system of belts, chains, or gears having either two or three wheels (one of which is at least 20 inches in diameter) or having a frame size of at least 14 inches, or having four or more wheels.

Halcyon and other municipalities in the State of Bliss require bicycle riders to secure licenses to operate bicycles, a practice that is explicitly permitted by the Vehicle Code. Bliss (California) Vehicle Code § 39002. The Halcyon Licensing Bureau has licensed ten operators to operate bicycles since 1978. (There are, however, an estimated 120,000 Halcyon residents who ride bicycles each year in the city.)

3. **Reading the relevant text in the context of the whole statute.** Another convention of legal interpretation in our culture is that the provisions of §2, at stake in the tricycle case, should
be read in light of the whole statute. If one interpretation (vehicle includes tricycle) is more consistent with the whole statute than a rival interpretation (vehicles does not include tricycle), the consistency supports a conclusion that the statutory plain meaning is the first interpretation.

For example, §1 offers as a statutory premise for the PSA the concern that “vehicles create safety problems when they are operated in parks.” If the interpreter believes tricycles do not create safety problems, she might be reluctant to include tricycles as a “vehicle.” Also, does a child “operate” a tricycle, the term the statute uses for what one does with a vehicle in the park?

Some interesting structural arguments flow from the relationship of §3’s proviso (bicycles can be brought into the park but not ridden) to the potential interpretations of vehicle. Does §3, as a whole, contemplate that bicycles are “vehicles”? If so, that would suggest that §3’s definition does not limit the term to “motor vehicles.” If not, then the case for including tricycles in the statutory domain is much harder—unless one interprets the bicycle proviso to regulate tricycles. What are the arguments pro and con?

Finally, think about the regulatory regime created by the PSA. Is there a logical policy structure for that regime? Is the regulation of tricycles consistent with that logical policy structure (if such can be discerned)?

**B. Which potential meaning is most consistent with the law’s substantive commitments?**

Another kind of inquiry is substantive: Which meaning is most consistent with the legal system’s substantive commitments? This kind of inquiry can be built into the plain meaning inquiry: Would a typical speaker of the English language reasonably attribute this meaning to the statute, as applied to Helen Ro? Because the PSA announces its statutory purpose in §1, the purpose of the law—public safety—is both a textual and a substantive inquiry.

Either way, if the interpreter concludes that public safety in municipal parks would be advanced by banning tricycles, that is a powerful argument for concluding that tricycles are vehicles, especially if the interpreter finds that statutory term ambiguous (i.e., reasonably susceptible to either reading).

Broaden the interpreter’s field of vision. Consider not just the purpose of the PSA (i.e., safety), but also the purpose of municipal parks. (There may be a municipal ordinance along those lines.) In the abstract, what is the purpose of municipal parks? How should that cut in the Case of the Tricycle? Should it even be relevant?

Broaden the field of vision further. The PSA is not just a regulatory statute; it is a criminal statute. A misdemeanor is more serious than a traffic offense, the criminal law most of us know from first-hand experience, but it is less serious than a felony. Under the PSA, the offender can go to jail—just two days, but jail nonetheless.
American judges have long ruled that criminal statutes too “vague” to give citizens reasonable notice as to its applications, violates the Due Process Clause of the Fifth and Fourteenth Amendments. Today, judges rarely invalidate broad criminal laws as void-for-vagueness—but they enforce the norm through narrowing constructions of the statute. Under the rule of lenity, the burden of statutory clarity is on the legislature—so if the statute is ambiguous, the defendant ought to win; the government wins only when a defendant, like Helen Ro, would reasonably have thought that the “no vehicles in the park” signs included her tricycle.

The rule of lenity also is a mechanism for limiting the discretion of police and prosecutors. Has the park gendarmerie allowed rampant trike riding all summer—only to lower the boom against Ro?

Finally, ought the age of the youthful offender make a difference? Most states bar criminal prosecutions of six-year-olds for (at least some) “crimes,” but assume that the State of Bliss has no such restriction. Should a judge nonetheless be reluctant to apply such a statute to young Ro? What is the best legal justification for such reluctance?

One possible legal justification is the very old canon of statutory construction that judges ought to apply the “plain meaning” of a statute—unless the plain meaning yields an “absurd result.” Would the application of a misdemeanor vehicle statute to a six-year-old tricyclist be “absurd”? What criteria should determine absurdity?

C. Is there judicial precedent relevant to the interpretive question?

Our legal system is one where authoritative decisions by a court are considered legally binding, and must be followed by lower court judges and by the rendering court itself. Thus, if the Supreme Court of Bliss has interpreted a “no vehicles in the park” statute to exclude tricycles, that precedent is binding on our local Judge unless she can distinguish the precedent.

For example, the Court’s precedent might have construed a “no vehicles in the park” statute that simply barred vehicles from municipal parks, as §2 of the PSA does, but that had no analogue to §3 of the PSA. In that event, the City Attorney can argue that the two cases are different, and therefore that the precedent is distinguishable. Ro’s attorney will argue that the two statutes are not significantly different, and that the precedent’s reasoning would not have been affected by the existence of §3 in the earlier statute. Obviously, the Judge would have to decide who is right about this, for she would be reversed if she gets this wrong.

On the other hand, the applicability of the precedent might be beyond reasonable debate. Halcyon’s Council might have copied its PSA word-for-word from an ordinance adopted by another city in the State of Bliss. If the Bliss Supreme Court has construed the parent statute to exclude tricycles, it is very likely that that precedent cannot be meaningfully distinguished, and the Judge is obligated to follow it—even if she strongly believes that the PSA has a plain meaning that includes tricycles.

Indeed, the Bliss Supreme Court is obligated to follow its own precedent, unless the Justices are persuaded the precedent must be overruled. Assume that the Court interpreted an
ordinance exactly like the Halcyon PSA to exclude tricycles in a decision rendered in 2000. Defendant Helen Ro prevails with the trial Judge, who is bound by the Supreme Court decision—but the Supreme Court can overrule its own decision. If he wants to pursue the case, the City Attorney would have to argue that:

(1) the earlier precedent was wrongly decided, not only as a technical matter, but as a piece in the larger mosaic of the law; \textit{and}

(2) the erroneous decision has ongoing bad effects that can no longer be tolerated; \textit{and}

(3) the erroneous decision has not generated reliance interests

Conversely, Ro’s attorney would argue that (1) the earlier precedent was correctly (or at least defensibly) decided or that, even if erroneous, (2) the decision has had no bad effects and has, instead, (3) generated reliance by citizens, institutions, or the government itself.

Generally, the party arguing for an overruling has a steep uphill battle and must make a strongly persuasive case before a state supreme court will go that far. But it is much easier to distinguish a precedent than overrule it. Ironically, the two might be related: a series of decisions distinguishing a precedent, with positive professional or public feedback, will often be a prelude to an overruling.

Moreover, precedent is relevant even when it is not “on point” with the new case before the court. Even when a precedent is, concededly, distinguishable, it is all but binding nonetheless on lower court judges like Judge Lopez. Thus, if the Bliss Supreme Court has ruled that a statute like the PSA does not apply to roller skates, that precedent is relevant to Judge Lopez’s decision whether to exclude tricycles as well. How does she figure that out? She has to reason from the supreme court precedent.

The \textit{holding} of the precedent can be expressed at several levels of generality. Most narrowly, the holding of the foregoing precedent is that roller skates are not vehicles for purposes of the PSA. More broadly, the holding excludes roller skates and other mechanisms falling within the reasoning of the opinion. Assume the precedent reasoned that roller skates are excluded because the PSA is only aimed at \textit{motor} vehicles and roller skates are not motor vehicles. That reasoning would be binding on the lower court, and so our trial Judge would rule that tricycles are likewise excluded. But if the precedent reasoned that roller skates are excluded because they are not “operated” as §1 says, then the Judge is not bound very the precedent, unless she believed that tricycles are also not “operated.”

The Bliss Supreme Court is not as limited as the trial Judge in its discretion to refigure the reasoning of the earlier case. Thus, even if the roller skate precedent rested on the “operated” language of §1, the Court in the tricycle case has the freedom to expand the holding of the earlier case to exclude all mechanisms that are not motorized. This new holding respects the earlier precedent and expands upon it. It is harder (but not impossible) for the Court to go the other way: If the earlier precedent rested upon the notion that vehicles must be motorized, it would be possible for the later Court to recharacterize the holding as, more properly, resting upon the
“operated” requirement of §1. Such a recharacterization would preserve the core holding of the precedent but is much more likely to draw a dissenting opinion.

As you can see, precedent is critical to the rule of law. Specifically, precedent as a matter of aspiration renders the law more *predictable*, more *objective* (by limiting the *discretion* of judges, prosecutors, and police officers), and more *neutral*. A judge who had a bad experience with tricycles and believes them to be a menace to public safety will nonetheless acquit the youthful defendant in the Helen Ro case if the Bliss Supreme Court has already ruled that tricycles are excluded or that roller skates are excluded because they are not motorized.

As we have said, precedent is less a constraint on the Bliss Supreme Court than on the trial Judge, because the Supreme Court can overrule a precedent and probably is more likely to distinguish or narrow a precedent. But *stare decisis* is a constraint on the Bliss Supreme Court in a way that is more deeply meaningful. The discussion thus far involves the way *stare decisis* constrains judges *ex post*, namely, after the precedent has been handed down. But it can also constrain judges *ex ante*, namely, before any precedent is handed down.

Assume that the Case of the Tricycle is the Court’s first encounter with a statute like the PSA; there is no previous roller skate decision. When the Justices decide the tricycle case, they realize that anything they write will then be binding on lower courts and on their own subsequent decisions. At the very least, this will force the judges to settle on a principle for deciding the case that they think will “hold up” well over time. If the Court is uncertain how broadly to read § 3’s definition of vehicle, the Justices are more likely to write a narrow opinion, focusing on the “operating” language of § 1. If the Court is certain that the purpose of the PSA is public safety and wants to head off overenforcement of the law, then the Justices will write a broader opinion, one that would head off tricycle arrests like that of Helen Ro.

Consider this point from another angle. Because of *stare decisis*, the Bliss Supreme Court in its first encounter with the PSA might consider that its analysis of the statute will not only revolve the tricycles issue, but will also provide guidance for lower courts, police, prosecutors, and park users for other cases as well. So the Justices probably ought to be attentive *not only* to getting the Tricycles Case right, *but also* to providing an analytical framework that gets future cases right.

Under this approach, a Justice might usefully start with a continuum of applications, from most obvious to least obvious applications of the statute:

1. *Motorcycles*
2. *Motorscooters*
3. *Bicycles*
4. *Tricycles*
5. *Roller Skates*
(6) Baby Carriages

Applications (1) and (2) are gimmes: § 3 clearly includes these mechanisms as vehicles; they fall within the core, prototypical meaning of “vehicle”; and they strongly violate the safety purpose announced in § 1. Application (3) is also pretty clear, as it is squarely covered by the proviso to § 3. The question, for the judge, is where to draw the line between coverage and noncoverage: Is it between (3) and (4)? (4) and (5)? Right before (6)?

In thinking through the various hypotheticals, as well as the real case before the Court, the Justices can clarify their thinking as to the principle that they should be applying. Which principle best fits the ordinary meaning? The structure and purpose of the statute? The rule against absurd results?

PROBLEM 0-1
Judicial Opinion in the Case of the Tricycle

You are a law clerk for our Judge, to whom the Case of the Tricycle has been assigned. The Judge asks you for a bench memorandum to help her rule on the defendant’s motion to dismiss the indictment, on the ground that the law does not cover tricycles. (Assume that there is no Bliss Supreme Court precedent guiding you.)

So where would you draw the line? You do not know anything else about the PSA, but you may do outside research on matters not related to the City of Halcyon or the State of Bliss. Jot down your answer in the margin. Your Instructor might give you other possible applications of the “no vehicles in the park” rule, so be ready to address other situations.

Assume, for the remainder of this chapter, that the Judge rules that tricycles are covered by the PSA. The Judge lectures the defendant on the importance of following the law; the defendant dissolves in tears; remember, the defendant is only six years old. In the end, the Judge imposes a fine of 50 cents and no jail time for the defendant, who responds with relief and promises to pay the fine the next time she receives her allowance.
SECTION 2
HOW LEGISLATORS THINK ABOUT STATUTES

Legislators think about statutes much differently than judges do. First, and most important, legislators are more openly instrumental in their approach to statutes: What problem are we trying to solve? How can we solve the problem at a reasonable cost? What bad (or good) political feedback will I get in response to different approaches?

Second, legislators tend to be more ad hoc and openly strategic in their approach to statutes. Because statutes are very hard to enact, legislators are open to compromises, logrolls, and other moves that pick up key support needed to secure their goals. Because interest groups will apply pressure, pro or con, legislators are sensitive to compromises and logrolls that temper opposition and attract fence-sitters, without alienating core supporters.

Third, legislators are more openly partisan. Like judges, legislators of all stripes support the “public interest,” but unlike judges, legislators are more likely to insist that the public interest is reliably identified with their party platforms.

In short, because of their electoral connection and the structure of the legislative process, legislators behave very differently from judges, especially those judges who are not elected and do not have to run for reelection. Consider these features in greater detail, which we shall illustrate by reference to the process by which our “no vehicles in the park” statute was debated and enacted.

A. The Process of Legislation and the Importance of Compromises and Logrolls

In our hypothetical city council, the legislative process involves a number of steps, each of which might kill a proposal. Although the U.S. Congress and state legislatures have more veto points, our little Council, with just 15 members, has most of the major ones:

- **Committee deliberation:** the chair or a committee majority can bottle up a bill indefinitely.

- **Scheduling:** even if a bill is reported favorably by a committee, it still needs to be placed on the legislative calendar and, usually, needs to be expedited ahead of low-interest bills (in our little legislature, the Council Chair does the scheduling, based on consensus within the Council).

- **Filibuster:** somewhat unusual in city councils but a central feature of the U.S. Senate, the filibuster allows a determined legislative minority to block a bill that does not have supermajority support (60 votes in the U.S. Senate, 10 votes in the Halcyon Council).

- **Amendment and Voting:** even if a bill gets out of committee, is scheduled so that it gets fair consideration, and does not generate an unbreakable filibuster, a bill is still
subject to amendments that might weaken it and, ultimately, an up-or-down vote that might kill it.

- **Bicameral Approval:** The U.S. Congress and all but one state legislature require that any legislation be passed in the same form by both chambers of a bicameral legislature; this process produces several more choke points but is rarely replicated in city councils. Halcyon’s Council is unicameral.

- **Executive Veto:** If the chief executive (President, Governor, Mayor) vetoes a bill, it can only become law if the legislature passes it again by a two-thirds supermajority; if supporters cannot muster such a supermajority (10 of 15 Council members in our case), they can change the bill to meet the chief executive’s objections and then repass the bill.

This is the process followed by the Halcyon Council in the abstract—now see how it plays out in connection with the regulation of vehicles in municipal parks.

The impetus for the PSA was a serious accident in Halcyon’s primary municipal park: a youth driving a motorcycle while high on LSD ran over an elderly citizen; although the victim was taken to a hospital and treated, he died of his injuries two days later. This was the tenth accident involving a motorcycle or a motorscooter in one of the municipal parks in the last five years, but it was the first fatality. (In that same time period, there were one serious accident involving the collision of a bicycle and an elderly park user, and one other minor accident where a child on roller skates knocked over an elderly park user.)

In the immediate wake of the accident, Council Member Mia Kim, the chair of the Council’s Judiciary Committee, introduced a proposed Park Safety Act in the Council. The Kim Bill was very simple, having just one provision:

No vehicles of any kind shall be allowed in any municipal park. Any person who brings or drives a vehicle into one of these parks shall be guilty of a misdemeanor, which may be punished by a fine not exceeding $500.

The bill was referred to Kim’s Judiciary Committee, which immediately held a public hearing, where several officials and experts were called to testify; several dozen citizens attended, with fifteen of them delivering public statements. One member of the committee and a few witnesses objected that the bill was not “strong” enough to deal with the escalating public problem. In response, Kim agreed to strengthen the penalties; the bill reported by the committee read:

No vehicles of any kind shall be allowed in any municipal park. Any person who brings or drives a vehicle into one of these parks shall be guilty of a misdemeanor, which may be punished by a fine not exceeding $500 or by a two-day incarceration in the municipal jail, or both.
The committee members unanimously voted for it, and reported the bill to the Council. The two-page Committee Report said this: “The Park Safety Act is needed to eliminate the danger that motorcycles and other vehicles pose to public safety, especially to children and the elderly.”

The Council Chair scheduled the Kim Bill for an expeditious floor debate. During the debate, Council Member Meir Feder raised a series of objections to the bill. One objection yielded the following colloquy:

FEDER: It is a good idea to stop the havoc that motorcyclists have been wrecking on our city’s citizens as they pass time in our parks—but this bill sweeps too far. As everyone knows, I sell and fix bicycles at a store just minutes from Metzger Park. Many of my customers pedal their bikes through the park right after they purchase them from me. Will this bill subject these excellent citizens to arrest because they are operating a “vehicle” in the park? I’d say that’s a fair reading of the bill’s language—and for that reason I am opposed to the bill.

KIM: May I interrupt the Member’s most excellent speech with a clarification?

FEDER: Sure.

KIM: The proposed bill only covers “vehicles,” which everyone knows are limited to “motor vehicles.” So my bill says nothing about bicycles.

FEDER: I am not so sure. My wife is a language maven; she speaks more than a dozen languages and knows more than anyone else about words. She told me: Meir, if this lady’s bill gets through this will ruin our business. I tell you, Meir, “vehicle” can be anything that conveys things from one place to another. Look it up if you don’t believe me, Meir, look it up.

So I did look it up, and—no surprise to me—my wife with the brains of Chomsky was right. That word can mean a lot of different mechanisms, and it sure includes bicycles.

KIM: Alright, I get your point. We should make this clear. I shall offer an amendment. * * *

Feder’s was the only serious objection to the bill. The next day, CM Kim offered to amend the committee’s bill by designating the previous language as § 1 of the bill and adding a new § 2:

Vehicle” for purposes of this law means any motorized mechanism for conveying a person from one place to another, including motorcycles, automobiles, trucks, and motor scooters.

By voice vote, the Council agreed to this amendment. CM Feder pronounced himself satisfied, and the Kim Bill itself passed by a voice vote, with no recorded dissent.
Mayor Don Patron, however, vetoed the Kim measure. In his veto message, the Mayor thundered:

The city is faced with a major safety problem, and this bill simply does not go far enough to address it. For one thing, it needs stiffer penalties—at least 30 days in jail ought to be the maximum, rather than just two days—and for another thing it needs to cover more vehicles. Motor vehicles are not the only vehicular threat in our city’s parks. What about non-motorized vehicles that can hurt people because they can go fast? So a youth on a skateboard is just as dangerous as one on a motorscooter. Why should the skateboard kid get off—he is probably a bigger threat to public safety than the cyclist.

[The Mayor had several smaller objections, and a suggestion that the proposed law include a preamble forthrightly stating its purpose.]

I VETO the proposed Park Safety Act and RETURN it to the Council to revise in light of my objections.

The Mayor’s veto created quite a stir in Halcyon. In an editorial, the New Halcyon Times archly pronounced the original bill just fine. The editorial argued: “If the Mayor had his way, kids riding their tricycles and parents pushing baby carriages could be hauled into criminal court. This is ridiculous. The Council should override the Mayor’s wrongheaded veto.”

Council Member Mia Kim and her committee did not try to override the veto, however. Instead, they put forth a revised PSA, which provided as follows:

Sec. 1. The Council finds that vehicles create safety problems when they are operated in parks and further finds that the best solution is to ban any and all vehicles from all municipal parks.

Sec. 2. No vehicles of any kind shall be allowed in any municipal park. Any person who brings or drives a vehicle into one of these parks shall be guilty of a misdemeanor, which may be punished by a fine not exceeding $500 or by a two-day incarceration in the municipal jail, or both.

Sec. 3. “Vehicle” for purposes of this law means any mechanism for conveying a person from one place to another, including motorcycles, automobiles, trucks, and motor scooters.

In an op-ed in the New Halcyon Times, the Mayor opined that the revised bill is “much better, more comprehensive” and that he would consider signing it.

Not everyone was happy, however. Council Member Meir Feder opposed the revised bill during floor debate, on the ground that it might cover bicycles. He felt so strongly that he announced he would filibuster the bill, namely, by talking it to death. Under the Council’s standing rules, a filibuster could only be terminated upon a vote of ten of the fifteen Council
Members. Upon motion of CM Kim, only nine Members voted to cut off Feder’s talkathon; Feder and three other Members voted against the motion, and two Members were absent.

After further consultation with CM Feder and other colleagues, CM Kim revised the bill once again, adding the following proviso at the end of §3: “Provided that, bicycles shall be allowed in the park, so long as they are being pushed or carried and not ridden.” She did not explain the point of the proviso, but CM Feder announced on the floor that he was satisfied: “I would prefer a complete exclusion for bicycles, but I can live with this.” Feder withdrew his objections, and the bill was passed by a voice vote, with no recorded dissent.

The drama had not quite ended, however, for Mayor Patron had announced his opposition to the revised bill:

My legal advisers assure me that the revised bill, with the new proviso protecting bicycles, will have the effect of exempting almost any non-motorized vehicle from the coverage of this statute. For the reasons stated in my earlier veto statement, I find this unacceptable. The City needs the strongest possible response to the problem of speedy vehicles that injure pedestrians in our parks.

The bill might have been doomed by this opposition, but CM Kim’s committee immediately reported a separate bill to create another new misdemeanor for “creating a danger to the public” in any municipal space. The proposed the Municipal Safety Act was passed two days after the Council passed the Park Safety Act. With no further comment, Mayor Patron signed both the MSA and the PSA into law.

Consider some of the lessons of the foregoing thought experiment, the legislative history behind our hypothetic Park Safety Act of 1980. First, unlike the judges discussed in Section 1, the legislators in this section are openly instrumental: they have policy goals, and they defend their stances regarding the “vehicles in the park” issue by reference to the policy consequences of different versions of the bill. Please note that many scholars and citizens believe that judges are instrumental as well, but our point is that legislators are openly instrumental: a judge who issued an opinion exempting tricycles on the ground that the judge thought it unwise to include them in a criminal sanction would be criticized as “injudicious,” but a legislator who proposed a statutory exemption for the same reason would be praised as “solomonic.”

Second, legislators are more openly strategic than judges tend to be. Strategic actors have preferences about what policy or result they prefer, but in seeking to optimize their preferences strategic actors take into account the preferences of others who might block or undermine their results. Thus, CM Kim preferred a simple bill that set a broad standard (“no vehicles in the park”) and left a lot of discretion to police, prosecutors, and judges to fill in the details. But to secure the support of CM Feder, she was willing to specify “motorized vehicles” as the sole object of her bill—and then to head off a mayoral veto she was willing to add the Bicycle Proviso and to sponsor the Municipal Safety Act.
Even more clearly, CM Feder was acting strategically; once it became clear that some kind of law was likely to be enacted, he faced three possible outcomes, in order of his preference:

#1. PSA covers only “motorized vehicles,” and so not bicycles at all.

#2. PSA covers all “vehicles” but has the Bicycle Proviso that allows bikes to be carried or walked across the parks.

#3. PSA covers all “vehicles,” as defined in § 3.

Although Feder preferred #1, he ought, rationally, to be willing to settle for #2 if he believed that #3 would pass instead. Option #2 was not Feder’s preferred option, but under these strategic conditions it was preference-maximizing for him to support the bill with the proviso.

As these examples illustrate, strategic behavior often results in compromises and logrolls. A “compromise” is collective action where each side gives up some part of what it would optimally like to have, in return for securing collective action such as the enactment of a statute. The legislative history of the PSA contains a number of compromises, including CM Kim’s willingness to strengthen the initial bill in an effort to assuage citizen concerns, to add language narrowing the bill to end CM Feder’s filibuster, and to revise the bill to avoid a mayoral veto. Note our third lesson: the more veto points in the legislative process, the more compromises sponsors would expect to make, especially if veto points allow a determined minority (Feder and the Mayor) to stop legislation that the majority clearly wants. So a governance structure where there is no filibuster ought to yield fewer compromises than a structure like the Halcyon Council or the U.S. Senate.

A “logroll” is collective action where one person or group exchanges its support for a proposal in return for another person or group’s agreement to support its own preferred proposal. In the foregoing legislative history, Mayor Patron and Council Member Kim were engaged in a logroll: Patron got a broad misdemeanor law he and his law-and-order administration could use to enhance public safety, and Kim got a “no vehicles in the park” law that left room for kids and parents to bring at least some non-motorized mechanisms into the park.

Or did she? If there is a legislative compromise, there is always a danger that judges will not enforce it. Consider the next problem.

**PROBLEM 0-2**

**Return to the Case of the Tricycle**

Revisit the Case of the Tricycle. Specifically, consider the foregoing legislative history of the ordinance and revisit your own opinion as to whether or not, as a matter of law, Helen Ro should have been convicted of violating the PSA. Does the new context confirm your earlier interpretation or undermine it? If the latter, would you change your result? Revise your reasoning in any way?
Now assume that you are Helen Ro’s attorney. As we posited at the end of Problem 1-1, the judge interprets the PSA to include tricycles. You, as the defendant’s counsel, have text-based arguments for your appeal of this judgment against the youthful offender, but you also want to integrate the legislative history into your argument: What are your best arguments, based on the legislative history?

Step back further. Assume that there are good arguments for the proposition that the ultimate legislative compromise entailed the exclusion of tricycles from regulated “vehicles.” Is this a compromise that judges should be enforcing if they do not detect it from the plain language of the statute? Say the PSA is ambiguous: Should the legislative history demonstrating a compromise be admissible to break the tie, and decide the case for the defendant?

B. The Role of Interest Groups and the Importance of Deals

There is more to the background of the PSA, namely, the role of groups and institutions outside the Council and Mayor’s office. We use the term “interest groups” broadly, to include organized groups or institutions that try to influence the legislature to take action consistent with their perceived interests. Interest groups can be ad hoc (formed around a particular piece of legislation) or ongoing. They may consist of private citizens or of public officials (or both of course). Consider some of the groups that played a major role in the PSA’s legislative history. The public record reveals some but not nearly all interest group involvement.

Parents 4 Parks (P4P). The P4P was an ad hoc group of many families who lived near public parks and whose children played in those parks. Some families had children who were afraid to use the park because of the occasional motorscooter traffic through the park—and the fatality to an older park user triggered the formation of this group. Its main agenda was to secure a “no vehicles in the park” rule that barred motor vehicles but allowed tricycles, roller skates, baby carriages, and other kid-friendly mechanisms. CM Mia Kim was this group’s close ally; Kim’s district contained the central municipal park, where the fatal accident occurred, and P4P contained many families who knew Kim and her family socially (play dates and such). The P4P supported all of Kim’s proposals; the group was neutral on CM Feder’s efforts to allow bikes but authored and supported the Bicycle Proviso. The P4P supported the final compromise and was sure that it allowed tricycles, roller skates, and baby carriages in the parks.

The Police Union. The Police Union was a longstanding union of all of Halcyon’s police officers. The Union was reluctant to add new criminal provisions to the municipal code; in CM Kim’s committee hearings, the Union testified that existing “disorderly conduct” and “creating a public nuisance” ordinances gave the police authority to keep motor vehicles out of the municipal parks. CM Feder and a couple of other members were sympathetic to the Union’s perspective, but CM Kim and the Mayor pretty much ignored it.

American Civil Liberties Union (ACLU). The local chapter of the ACLU opposed the original Kim Bill because it was too broad and too vague. A member of the ACLU, CM Kim was responsive to the ACLU’s concerns and asked the ACLU to draft the definitional section that she added to the bill in response to CM Feder’s objections. The ACLU drafted the provision with the belief that vehicles would only include motorized ones. Because it supported Mayor
Patron on a host of other issues, the ACLU took no position on Patron’s demands for a stronger bill.

The Roman Catholic Church. The largest denomination in the City of Halcyon is the Catholic Church; six members of the Council are Catholics. The Halcyon Diocese is headed by Bishop David Devout. Early on, the Church publicized concerns about the safety of children and older people in the municipal parks; based upon Church pressure, the Halcyon Police Department had increased police presence in the parks, and thefts and muggings had fallen off markedly. After the fatal accident that triggered concern with vehicles in particular, Bishop Devout made this issue a priority, and the Church worked closely with P4P and CM Kim. Bishop Devout testified strongly in support of the bill at CM Kim’s committee hearings. The Church did not have a public position on the bicycle issue or the various amendments to the Kim Bill, but internally the Church leadership agreed with the positions taken by P4P.

American Association of Retired Persons (AARP). The local chapter of the AARP was the leading group pushing for a really strong version of the PSA. Most of the victims of vehicular accidents in Halcyon parks were citizens over the age of 65. Hence, the AARP was adamant that parks be cleansed of threatening vehicles, which the organization defined very broadly to include skateboards, bicycles, and even roller skates. Internally, the AARP had thought about the issue of tricycles, and its leadership wanted them included in the PSA, because some kids zoomed down hills very fast on their little tricycles and there had been near-misses for several elderly park users. But the AARP representative at CM Kim’s committee hearings did not mention tricycles, though she did mention skateboards as mechanisms that the AARP argued ought to be included in the initial bill. A close ally of the AARP, Mayor Patron’s margin of victory came from older voters; the AARP promised him contributions and positive publicity in his campaign for reelection if he supported strong parks legislation, which he did very effectively. Patron went along with the final logroll because the AARP was okay with it.

As you can see from this supplemental history of the PSA, interest groups play an important, albeit often behind the scenes, role in statutory drafting, deliberation, and compromise. Interest groups play a big role because (1) they offer ideas, perspectives, and often research that can advance the ball in the creation of public policy; (2) they represent the views of citizens who might be counted on to support or oppose a representative based on her response to the group’s concerns; and (3) they can help raise money for or against representatives based on their responsiveness to interest group concerns.

Additionally, interest groups are often at odds over important issues of public law. Based upon the interests of their own constituents, their own political calculations, and their own policy inclinations, legislators will respond to interest group pressure. But legislators are much more inclined to accommodate interest groups than to defy them. While Council Member Mia Kim was closely aligned with the P4P and the Catholic Church, she was loathe to alienate the AARP or even the ACLU; in the case of the former, she would not want to alienate older voters. Because she wants to work with both groups in the future, she will want to accommodate their reasonable demands and arguments. Ditto for Mayor Patron and Council Member Feder.
The press and many politicians decry “interest group pressure” as a terrible thing, and surely it is in many cases—especially where a powerful group extracts goodies from allied legislators without public or media attention. But, in most instances, interest group activity is more neutral or may be positively healthy. A major way that citizens—like the members of P4P—are involved in politics is through groups like these. When a policy or governance issue attracts the attention of a variety of differently situated groups and the groups jockey openly in the public and legislators engage in open-minded deliberation where they are open to the views of groups they are not already aligned with, then interest group involvement can actually make the final legislative product “better” in the sense that it accommodates the legitimate needs of more citizens and, hopefully, without leaving a large chunk of citizens feeling they have been disrespected. The history of the PSA probably meets that requirement.

PROBLEM 0-3
Legislative Sequel to the Case of the Tricycle

Recall from Problem 1-1 that our hypothetical trial court interpreted the PSA to cover tricycles, and Helen Ro was convicted of a misdemeanor. Assume that the Bliss Supreme Court affirms. Because this is a matter of pure statutory interpretation, the Halcyon Council can of course revise the ordinance to reflect the preferences of the Council.

All the officials and interest groups are the same as before. Most of them do not want to make tricycle riding in the park a misdemeanor. The P4P parents group, the Catholic Church, and their ally CM Kim are unpleasantly surprised by the judicial rulings and would very much like to override them through an amendment to the ordinance. The Police Union would surely support them, and so would the ACLU, in all likelihood. CM Feder would go along, especially if he could loosen up or repeal the Bicycle Proviso.

But the AARP and the Mayor want the ordinance to be broadly construed and are okay with including non-motorized vehicles, given the bad experience some older people have had with skateboarders and even speedy trike riders. If the Mayor vetoes override legislation, CM Kim needs ten votes to override the veto—but more than five council members are in districts where the AARP influence is very strong, and it is not clear that those members would openly defy the AARP on this issue.

You are CM Kim’s law student intern, and she asks you to draft a memorandum with a strategy for overriding the tricycle decision she and her allies strongly oppose. Include in your (short) memo a political strategy to head off AARP opposition, a legal strategy for revising the PSA, and a draft bill that Kim can show other members and introduce in the Council.

C. The Role of Political Parties and Symbolic Politics

There is another, often neglected, feature of how legislators think about statutes instrumentally. Legislators consider not only the policy effects and the political (electoral and interest group) consequences of statutes they might support, oppose, or seek to amend, but also how their political party expects them to vote. American politics is increasingly polarized.
between red (conservative) values associated with the Republican Party and blue (liberal) values associated with the Democratic Party.

In the state and federal legislatures, party identification provides the strongest cues as to how legislators will evaluate policy proposals. Policies that protect the environment but at a significant cost to business usually generate Democrat support and Republican opposition. Abortion restrictions and anti-gay marriage statutes find overwhelming Republican support and near-total Democrat opposition in most states. Tax cuts for corporations and wealthy taxpayers are favored by Republicans, while Democrats favor tax increases for the wealthiest taxpayers. Traditionally, municipal politics has been nonpartisan, but larger cities like Halcyon follow a partisan electoral framework.

This partisan divide has some explanatory power for our “no vehicles in the park” ordinance. As with most of our largest cities, the Halcyon City Council is overwhelmingly Democratic—an alignment that helps explain by Council Member Mia Kim is so responsive to ACLU concerns and why she is so accommodating to CM Meir Feder, a fellow Democrat. The partisan divide also helps explain the conflict between the Council and Mayor Don Patron, who is a Republican elected on an efficient government, cut crime platform. (This is a pattern followed by some large cities, like New York, where three of the last six mayors were Republican; all three of the GOP mayors served more than one term.) As a Republican, Patron wants to seize the park safety issue as his own, and take away much of Democrat Kim’s thunder on that issue, and he does so in a manner that had strong support from the powerful AARP group (and its members, who turn out in large numbers and usually vote Republican).

To be sure, party affiliation does not explain all the dynamics of evolving legislative proposals. Indeed, ad hoc community groups such as P4P and some established groups like the Roman Catholic Church transcended partisan political alignments and rendered the vehicles in the park issue one ripe for legislative resolution. Both Kim and Patron want to align their parties with parental concerns for child safety.

PROBLEM 0-4
Revisiting the Legislative Sequel to the Case of the Tricycle

Return to Problem 1-3 and the Halcyon Council’s consideration of a legislative override of the Bliss Supreme Court’s decision in the Case of the Tricycle. Knowing that Mayor Patron is the chief spokesperson for the Republican Party in the City of Halcyon and that Council Member Kim is the chief spokesperson for the Democratic Party might affect your strategy for crafting an override statute. Specifically, the party interests that seem so divisive (red state vs. blue state wars) can also be the basis for deals. Thus, the party leaders (Patron and Kim) and their associates might meet in a “summit” where they work out a mega-deal that then slides through all the legislative veto points without much dissent.

So what is the motivation for each political party to reach a deal on the override of the Case of the Tricycle? Why should Mayor Patron be willing to override a decision that he rather likes, personally? What might CM Kim offer as a proposal that Mayor Patron might accept?
Like the first chapter in a novel or the mouth of a river, the enactment of a statute is just a beginning—and for landmark statutes the beginning of a long story (like a Tolstoy novel or the Mississippi River). Most of the story is worked out not by judges, but by those implementing the statute. The implementers of the PSA, like most criminal statutes, are law enforcement officials, prosecutors, juries, sentencing judges, jailers, and parole and probation officers. For most civil statutes and some criminal ones, implementation occurs under the auspices of a special administrative agency or commission to which the legislature delegates lawmaking as well as law-enforcing authority.

The modern administrative state features a wide array of statutory implementers; these officials are vastly more numerous than judges and their staffs, as well as legislators and their staffs, put together. For most of us, what these administrators tell is to do is the operative law of the land. So how do implementers think about statutes?

First, like legislators and unlike judges, implementers are openly instrumental in their approach to statutes. But like judges and unlike legislators, administrative implementers do not create the public policy or statutory purpose they are implementing; instead, they start with the policy or purpose chosen by legislators, as well as the limits those legislators have placed on how far our polity is willing to go to implement the policy or purpose. For example, the legislature identifies public safety as the purpose of the PSA—but various compromises in the legislation left room for further accidents. If you believe tricycles are not “vehicles” for purposes of the ordinance, that is a compromise allowing children recreational opportunities, but at some risk to elderly users of the parks. Like judges, administrative officials are supposed to enforce the compromises and deals reached in the legislature.

Unlike judges, administrative implementers, especially agencies, usually have a lot of discretion and resources to mold the statutory scheme, within the parameters set by the legislature. For the most obvious example, administrators have a lot of room to under-enforce statutory schemes. Even if the Halexon City Council included tricycles in the PSA’s regulatory scheme, the police or the prosecutors might choose, for policy reasons, not to enforce that prohibition or to enforce it rarely. They have less discretion to over-enforce the PSA, so if tricycles are not vehicles for purposes of the PSA, the police and prosecutors do not have discretion to apply the statute to tricycles.

On the other hand, administrators, within budget constraints, have the discretion to give high priority to certain statutory schemes. If the Halexon Police Department wanted to give motor vehicle abatement high priority, it has many options at its disposal—postings in the park, public education campaigns, a report-violators hotline, increased police surveillance, immediate police response to reported incidents, and swift prosecution and sentencing of offenders. If within the limits of the law, the police can be even more creative, for example, impounding an offender’s motorscooter as “evidence” pending trial in the case and, perhaps, bargaining with the offender’s parents to forfeit the motorscooter in return for no jail time.
Second, like legislators and unlike judges, administrators tend to be openly strategic in their approach to statutes. Judges have a more limited array of options for dealing with statutory issues than administrators do. Thus, to implement the PSA, police might follow a “broken windows” policy of jumping on every infraction and subjecting citizens to the embarrassment of a misdemeanor—or the police might follow a “sliding scale” policy, enforcing the PSA against repeat offenders or park users who are being “disruptive”—or the police might just escort violators and their “vehicles” out of the park, without arresting anyone. As you can imagine, these are radically different strategies for implementing the PSA, yet they are all available to the police. Which mix of policies the administrators choose depends on a number of soft variables, such as how pressing the vehicles problem is compared to other problems, how many officers are available and how much time they have for this, and their judgment as to the efficacy of different strategies in their community.

Like legislators, and less like judges, strategic administrators are highly attuned to “political” reactions to their implementation priorities. Thus, you can be sure that the Halcyon Police Department will not arrest another six-year-old minor for riding her tricycle through the park if the department took a lot of community heat for the Case of Helen Ro. Even if the Council were unable to amend the PSA, the Police Department would be sensitive to community revulsion at the Case of the Tricycle, and would not want to antagonize powerful legislators like Council Member Mia Kim, who also serves on the Appropriations Committee of the Council. Moreover, the District Attorney is an elected official—and even if the police were gung-ho against tricycles, the DA would be loathe to prosecute youthful “offenders” given the public relations disaster such prosecutions would bring. And so on.

Third, administrators are sometimes openly partisan, like legislators, but for the most part administrators want to appear nonpartisan. If the legitimacy of legislative action flows from the democratic accountability of legislators to the citizenry, the legitimacy of administrative action flows from its fidelity to those democratically chosen policies, applied in a neutral professional manner by officials who have developed expertise.

Even administrators who operate in an office headed by an elected official, such as the District Attorney, do not primarily consider themselves partisan officials. Like judges and legislators, administrators believe themselves to be enforcing the “public interest,” but unlike judges and legislators, administrators are likely to define the public interest in terms of is reliably identified with their party platforms.

A. Diversity in Institutional Implementation of Statutes

One of the most striking contrasts among the judicial, legislative, and executive branches of government (even local government such as that of Halcyon) is that the administrative branch can assume a wide array of institutional forms, while the judicial and legislative branches at all levels of American governance are structurally very similar. Thus, it is virtually impossible to present a stylized, and easily generalizable, picture of administration in this country. The structure of implementation differs from statute to statute—and structure makes a huge difference.
Consider how the implementational structure is distinctive for criminal statutes such as the “no vehicles in the park” ordinance. The Police Department dominates implementation. Notwithstanding many tensions, especially in the past, between police departments and some segments of the law-abiding community, today’s police department is likely to reflect the community, in all its diversity. (Gone are the days when police departments were typically all-white and excluded women and gay people from service.) Police work with the community—as they must, given limited resources, which during budget crunches are severe.

Police spend only a small portion of their time arresting people or even investigating murders and such (the dramatic activities that dominate media and entertainment images of the police). Most of what the police do to enforce the law is to educate the community, warn people, break up private disputes, answer calls for help, and so forth. By now, you understand that the arrest of Helen Ro, tricycular offender, is the sort of event that would only occur in a law professor’s hypothetical or a poorly written television show. If the police really thought tricycles were excluded from parks under the PSA, they would, at most, post signs to that effect, hold community meetings to educate parents, and politely escort youngsters and their babysitters to nearby playgrounds or other spots where trike riding is permitted.

If a zealous officer had actually arrested Helen Ro for trike riding, it is highly doubtful that the local District Attorney would press the matter. Most arrests are settled informally, and often there are no charges actually pressed by the prosecutor (as would very probably be the case for Ro). Even more than the Police Department, the District Attorney performs a triage function: her office has resources to prosecute only a handful of offenders, and the DA will let the police know that kids riding their toys will not be prosecuted, period. Knowing that the DA will not prosecute, police will not arrest trike riders unless the arrest-without-prosecution would serve some law enforcement purpose, such as educating the Ro parents that they cannot allow Helen to ride her tricycle in the park and should opt for the school playground instead.

Even when cases are prosecuted, they are usually plea-bargained. In the Case of the Tricycle, the prosecutor would probably be willing to dismiss charges against Helen Ro if the the Ro family agreed to refrain from further infractions and, perhaps, participate in a community-awareness program to publicize the new statutory rules.

If an oddball prosecutor actually pursued the misdemeanor charges against the youthful offender, Ro’s final line of defense would be a jury. For any offense for which she can go to jail, Ro has a Sixth Amendment right to a jury trial. (The smart prosecutor would find an offense for which she could not go to jail; then, there is no federal constitutional jury trial right.) A jury drawn from the community is most unlikely to convict her. Even if the judge told the jury that, as a matter of law, riding a tricycle in the park falls within the PSA’s prohibition, the jury would probably nullify the law in this case, because at least some jurors would be unwilling to apply the criminal sanction to such behavior by a child.

Jury nullification, by the way, works only in favor of the defendant, at least in theory. Juries have no authority to convict an innocent defendant if the prosecutor does not present evidence that leaves “reasonable” doubt as to guilt, and judges are sometimes willing to overturn guilty verdicts not supported by the evidence. But juries do have discretion to refuse to apply the
law (though the judge rarely tells juries they have this power). Prosecutors cannot even appeal a not guilty verdict of that sort.

In a nutshell, the foregoing narrative describes the structure of implementation for criminal laws, but not most other kinds of statutes. The obvious implication of this structure is libertarian: the many layers of procedural protection protect the criminal defendant against hasty or erroneous determinations of culpability. Stated another way, the criminal sanction cannot formally be imposed upon Helen Ro or any other defendant unless three different kinds of implementers exercise their discretion to condemn her conduct criminally—the trained police officers, lawyers serving in the prosecutor’s office, and ordinary community members serving on the jury. Informally, of course, the police and the prosecutors have other ways of exercising power, but the criminal sanction in our society is one that is not lightly imposed.

The larger lesson is that the design of the implementational structure makes a big difference for the success or precise implementational biases for a statutory purpose. One might argue that the criminal law and its accompanying structure (much of which is constitutionally required) are best suited for regulating conduct that is dangerous to the community and enjoys the moral condemnation of citizens. Conduct that is reckless in its disregard for other people’s safety and that risks grave harm to third parties is easiest to condemn and might be the best candidate for application of the criminal sanction. Driving a motorcycle through a park filled with children and elderly persons is the kind of reckless conduct that might successfully be criminalized. (There are other sanctions, by the way. Someone injured by the motorcycle might sue the cyclist for tortious behavior. The compensatory and deterrent goals of the tort system might complement the punitive and deterrent goals of the criminal law system.)

In contrast, riding a tricycle in a park filled with other children is not the kind of inherently reckless and risky behavior that is sensibly regulated through the structure of the criminal justice system. This intuition is one justification for the rule of lenity: especially when conduct is not malum in se (conduct the community considers inherently “bad” as in reprehensible and burdensome for the public), judges and therefore other legal actors should interpret the words of a criminal statute narrowly. Another lesson of this intuition returns us to the Halcyon City Council that designed and passed the PSA.

PROBLEM 0-5
Legislative Design of an Optimal Administrative Structure

Return to the very beginning—the date of the fatal motorcycle accident but before the Council responded with the Kim Bill and ultimately the PSA. According to our earlier account, Council Member Mia Kim and her allies in Parents 4 Park Safety immediately seized upon the criminal law to structure their legislative response to the vehicles-in-the-park problem. In retrospect, that might not have been the best approach, as defensible as it might be for motorcycles.

Kim and the Halcyon Council could have chosen other regulatory structures for their governmental response to park safety. Consider a few.
First, the Council could easily have opted for a regime modeled on that for traffic offenses, which are, technically, criminal offenses, but very minor ones without jury trial rights. Police officers could issue citations to offenders, who would be required to pay a standard fine, with no jail time and little of the drama that accompanied Helen Ro’s arrest and trial. If the recipient disputed the citation, she or he could show up at traffic court and secure a ruling by the traffic judge. (Reckless driving on a motorcycle would, under this scheme, be subject to the misdemeanor and felony provisions of the state criminal code, which cover reckless endangerment and so forth.)

Second, the Council could have created a new civil standard, “no vehicles in the parks,” that could then be applied by existing regulatory bodies, including the Bliss Department of Motor Vehicles (e.g., the driver’s license of an offending motorist could be suspended or revoked) and the state judges administering the common law system of tort liability (e.g., violation of the no-vehicles-in-the-park standard would be culpable per se for any injuries caused by operation of vehicles in parks).

Third, the Council could have created a new regulatory body, like a Recreation & Parks Commission, to devise a set of standards to improve park safety, at a reasonable cost to the community. (Cost includes opportunity costs, such as the loss of recreational opportunities by youth such as Helen Ro.)

You are a member of the Council’s Judiciary Committee, and an ally of its Chair, Mia Kim. She asks you for your views on what institutional design ought to be the starting point for the committee’s deliberations? How would you respond to her? You are certainly not limited to the various options described above. Think creatively.

B. Delegation of Lawmaking Authority to Agencies and Commissions

Pick up where Problem 0-5 left off and think about how the statutory scheme could have been implemented with administrative law. Unless state law says otherwise, the Council has discretion to enact a law that substantively just says that “no vehicles of any kind shall be allowed in any municipal park” and that delegates both legislative standard-setting and judicial adjudication to an agency or commission.

You might be surprised to know that American legislatures at the federal, state, and local level can delegate lawmaking authority to agencies and commissions, subject to a loosely enforced constitutional requirement that the delegation be accompanied by a legislatively announced policy, purpose, or standard (such as park safety, the standard announced by the PSA). In the modern administrative state, most of the rules and decisions affecting people’s rights are handed down by agencies and not by courts.

Take federal income tax law, for example. When you fill out your tax forms each year, you probably do not consult the Internal Revenue Code, enacted by Congress. And it is highly unlikely that you do a search for judicial opinions construing the tax code. Instead, what guides you the most are the instructions issued by the Internal Revenue Service (IRS). If there are ambiguities in the form and the instructions, you are much more likely to call the IRS Hotline or
consult the IRS’s regulations than read the statute or search for judicial opinions. Congress has
delegated authority to make law and interpret the law (including the IRS’s own regulations as
well as the statute). From the taxpayer’s perspective, income tax “law” is primarily text written
and promulgated by the IRS, not by Congress, and certainly not by the courts.

Why so much delegation of lawmaking authority to agencies? First, it is practically
necessary. Not only are expert-filled agencies capable of filling in the details of legislation, but a
rational legislature needs for agencies to do this. Any important statute, such as the PSA or the
IRC, will be called upon to address facts and issues that did not occur to legislators drafting the
statute. The process by which judges, in case-by-case elaboration, identify which mechanisms
are vehicles and which are not takes too long and provides citizens with too little guidance—
while agencies can announce a comprehensive list soon after the statute is adopted, and they can
update that list as administrators learn more about the operation of the statutory scheme in the
world.

Second, delegation takes some heat off of legislators. Legislators hate making hard
choices, because hard choices tend to anger one or more groups that legislators want to have on
their side. Indeed, delegation might be useful to keep the enacting coalition from fracturing in the
short term. It is for this reason that Council Member Kim would be attracted to a delegation
solution to the problem of vehicles in the park. There was a deep tension within her coalition:
the AARP wanted much more aggressive regulation than P4P, the parents’ group: old people are
vulnerable to injuries from bikes and trikes as well as motorscooters and motorcycles, while
children are vulnerable to injuries from the latter but would like to operate bikes and trikes in the
park. Rather than openly disappoint the AARP by siding with P4P, Kim can seek to avoid
conflict by leaving issues of detail to the administrative process. Each group will probably be
sufficiently confident about the wisdom of its own position that this maneuver has a good chance
of satisfying these divergent interests. As a general matter, delegation can make legislation easier
to secure, because it allows the hardest, most politically divisive issues to be postponed until
after the statute has been enacted.

Third, delegation can yield better and more legitimate legislation. We make this point
more tentatively; many learned scholars believe that delegation of lawmaking authority
undermines the legitimacy of statutes, because it creates a greater gulf between the electoral
accountability of legislators and the law that citizens must obey. But while legislators are more
directly accountable to voters for their general positions and policies they support, they are rarely
accountable for specific details contained in statutes they support. Agencies making rules
through notice and comment procedures are accountable for specific details of statutory policy;
although the voters do not directly enforce such accountability, it is enforced indirectly, through
public and legislative reaction as well as through judicial review.

Notwithstanding this last point, agencies do enjoy a fair amount of discretion when they
promulgate rules to implement broadly phrased statutes such as the Parks Safety Act of 1980.
Think about how that process works.

PROBLEM 0-6
Interpretation of Statutes by Administrators
The Halcyon City Council adopts the PSA in the form reproduced at the beginning of this chapter, with the three sections (and including the Bicycle Proviso). But the Council also includes a fourth section that (1) creates a Recreation & Parks Commission (RPC) whose members are appointed in staggered terms by the Mayor, with confirmation by the Council; (2) delegates to the RPC the authority to adopt “legislative rules” identifying “vehicles” that violate the PSA and a recommended schedule of penalties for different kinds of violation; and (3) specifies the procedures the RPC must follow before promulgating rules that have the force of law. Thus, the RPC starts by issuing a public notice of proposed rulemaking, with the text of the proposed rule(s) and a detailed justification for such rule(s); the public has an opportunity to submit comments which are publicly available for anyone’s examination; and the RPC must consider all comments and decide whether to issue rule, either as proposed or with revisions. If the RPC does decide to issue the rule in final form, it must explain why it rejected serious criticisms or alternatives propounded by objectors.

Now think about how the rulemaking process might work with regard to the issue we have been exploring: What is a “vehicle” barred from municipal parks by § 2 of the PSA? Consider this exercise in three analytical steps.

First, you are the Chair of the Commission charged with developing a rule telling the public what is allowed and what is not. Motorized vehicles are, for the most part, easy calls, because the statute clearly includes them as vehicles, and they represent clear safety risks that the statute was enacted to minimize. Automobiles, motorcycles, and motorscooters are clearly covered by the PSA. And bicycles are covered by the proviso in § 3. But how about tricycles? Skateboards? Roller skates? Baby carriages? Think through the statutory scheme and draft a short Proposed Rule Defining “Vehicles” for Purposes of the Parks Safety Act of 1980.

Second, you are the leader of each of two groups that present public comments on the Proposed Rule, namely, the Parents 4 Parks and the American Association of Retired People. How would each group respond to the Proposed Rule? What kind of factual material might each group present to the Commission to persuade it to amend the Proposed Rule?

Third, you are the Chair of the Commission. The AARP has presented the following evidence. In a survey of fifteen American cities about the size of Halcyon, the AARP tabulates the number of minor, significant, and fatal accidents reported for users of public parks involving mechanisms that might be considered “vehicles.” Fatal accidents all involved motor vehicles, as did most of the significant accidents. Bicycles caused more accidents than any other motorized vehicle, but tricycles were next highest for minor accidents. According to the report, 180 persons, most of them over the age of 65, were hospitalized because of accidents involving tricycles in parks found in those fifteen cities in the last five years. The AARP urges the Commission to include tricycles in its list of “vehicles.”

How does the AARP Report affect your thinking about the tricycle issue? How should the Commission respond in its Report on the Final Rule? As you answer this question, do not forget that there may be judicial review of your answer. Does that make a difference? Continue thinking about this Problem as you read the final section of this chapter.
C. Judicial Review of Administrative Interpretation and Implementation

Most statutes are implemented by agencies—and agencies either formally make legal rules or implement statutes so creatively that they are making law in effect. But agencies make or implement law in the shadow of judicial review. That is, agencies realize that their discretion to make law is limited by the ability and willingness of judges not to veto their decisions. Hence, agencies need to understand “how judges think about statutes,” the rules explored in Section 1.

Section 5 of our newest version of the Parks safety Act of 1980 provides for judicial review of final agency rules. The statute directs judges to reject any commission rule where (a) the RPC does not follow the procedures mandated by §4; (b) the RPC’s rule is not supported by “substantial evidence” in the record, including evidence placed in the record by the RPC; or (c) the RPC’s rule is “contrary to law,” namely, it reflects an incorrect legal interpretation of the PSA.

So in the end, is it judges who ultimately call all the shots? No, for this reason: federal, state, and local judges usually defer to statutory interpretations by the agency charged with enforcing the statute. “Deference” means that judges will sometimes go along with agency-based interpretations that are different from those that judges would have reached on their own. Why would judges defer?

Judges are particularly prone to defer to agency interpretations, including ones informally developed, when the analytical tools in the judge’s interpretive toolkit (Section 1) do not yield clear answers to the judge. If the statute is “ambiguous,” there is no clear “law” to apply, and any answer is going to have to rest upon a policy or even a political judgment. Agencies or commissions are in a better position to make such policy judgments, for reasons of either legitimacy or expertise. Agency interpretations of ambiguous statutes might be entitled to greater respect when the agency is more responsive to democratic pressures than judges are, or when the agency’s expertise renders it a more reliable institution to make the consequentialist judgments needed to carry out the statutory purpose(s).

Additionally, judges will be more willing to defer to agency interpretations that have generated reliance interests on the part of the regulated public. If an agency has long interpreted the statute in a certain way, without disruption, courts are loathe to disturb that rule, especially when private parties have structured transactions or invested resources based upon that understanding of what the law requires. For example, if the RPC issues a Final Rule allowing tricycles to be operated in the parks, and then creates special “trike paths” for youngsters, a judge years later will be a little bit more reluctant to reverse the agency’s interpretation.

Are there other reasons judges might defer to agency statutory interpretations? Is there a danger that too much deference will undermine the judicial role of announcing what “the law” requires?

Following up on Problem 1-6, assume that the RPC’s Final Rule includes tricycles as regulated “vehicles,” primarily because the AARP study persuades the RPC that tricycles are a
sufficiently serious threat to public safety. If you were a judge, would you agree with the RPC interpretation? Would you defer to it? Or would you disagree and overrule the agency interpretation? Compare your answer to this question, with the answer you gave at the beginning of the chapter, in response to Problem 0-1.