# Law's Audiences

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*Abstract*

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This dissertation explores the concept of audience in contemporary theories of legal interpretation, examining the varied roles that *nonjudicial* legal actors play in interpreting, constructing, and applying statutes and the Constitution. So defined, legal audiences include both those who are actively engaged with, as well as those who are passively affected by, legal rules, in addition to those outside the formal legal system but who nevertheless assert claims about legal meaning. Orienting legal interpretation around nonjudicial legal audiences provides an important contrast to predominant approaches in American public law legal theory, which tend to situate acts of legal interpretation as practices primarily for *judges*. Prominent debates in both constitutional and statutory interpretation are often most concerned with providing accounts about the proper role of unelected and politically unaccountable judges when interpreting democratically promulgated constitutional and statutory texts. Instead, this dissertation focuses on how the content of the law is also developed as a collaborative endeavor between judges as authors about rules for legal interpretation, and the relevant legal audiences who bring the law to life, through their implementations, applications, and interpretations. In particular, the dissertation analyzes the distinctive *conversational*, *confrontational*, and *cooperative* dynamics that develop between courts and other legal audiences involved in making claims about the meaning of law.

*Interpretation as conversation*. One way to understand legal interpretation is as a conversation between courts and the law's nonjudicial audiences in developing rules for discovering and determining the meaning of legal texts. Exercises in legal reason-giving necessarily have conversational register, for interpretation is an act not only of explanation (articulating why the law means what it means), but also persuasion (convincing relevant audiences that the attributed meaning is the correct one). Understood in this way, an important consideration for a legitimate legal system is that law's audiences have some capacity to participate in conversations about legal meaning. If the law relies on methods or sources of interpretation not readily susceptible to public reason or evaluation, the legal

interpretations those methods and sources produce may lack broader legitimacy if relevant legal audiences lack the capacity to engage with those methods and sources of interpretation. In particular, several developments in American legal jurisprudence over the past century have had the effect of reducing the role of nonjudicial audiences in conversations about legal meaning, especially the role of the public at large, which may threaten the underlying legitimacy of the American legal system.

*Interpretation as confrontation*. Legal interpretation also contains a confrontational register, because the American legal system is inherently adversarial. Legal interpretation is often the product of disagreements between different legal audiences as to what the law means, prohibits, or requires. These disagreements are particularly fraught when they arise between the courts and the political branches in disputes about the meaning and application of the Constitution. Ordinarily, theories of separation of powers and judicial supremacy aid in demarcating the boundaries between the appropriate roles for the branches in constitutional interpretation and application. However, the Constitution does not always clearly demarcate which branch of government is responsible for fulfilling constitutional guarantees, as with the Republican Guarantee Clause of Article IV, section 4. The Constitution's silence concerning which branch should be responsible for enforcing and interpreting this provision raises novel and interesting questions about the role of politics and deference in constitutional interpretation. It also creates space for the possibility that multiple branches of government may each interpret and apply the Constitution without one branch laying a peremptory claim as to the authoritative interpretation of the Constitution.

*Interpretation as coordination*. Legal interpretation need not always be confrontational, for theories of interpretation often seek to further the goal of cooperative coordination among legal audiences. Most theories of jurisprudence understand the law in part as a means of implementing societal plans and coordinating social behavior, particularly statutory law. For statutes to coordinate social behavior, however, their meanings and effects must be able to be effectively communicated or transmitted to their relevant audiences. For that to be possible, either the relevant audience(s), or someone acting on their behalf, must be able to ascertain a given statute's meaning and appropriate application. One essential role of judicial statutory interpretation, then, is as a means of assisting law's audiences in the translation of often underspecified statutory enactments into specific and actionable rules that may be applied and followed. Yet judicial methods of interpretation often overlook important questions of audience, because not all legal audiences can draw on the same tools, resources, and methods in ascertaining what the law means or requires. This is especially problematic insofar as most problems of statutory interpretation cannot easily be resolved through judicial adjudication, which means that the law's audiences often must resolve questions of statutory interpretation on their own. Explicitly addressing audience considerations helps to clarify the normative stakes of statutory interpretation; enhances core rule-of-law values like notice, clarity, and predictability; and may even provide a flexible yet principled compromise for selecting between methods preferred by the leading approaches to statutory interpretation, textualism and purposivism.

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To LL and BG,
without whom this, like much else good in my life,
would not have been possible.

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The completion of this dissertation would not have been possible without the generous support, advocacy, and guidance of many people and several institutions. Just as I believe the content of law is best understood as a product of collaboration among its formal authors and various audiences, this project is itself the result of many fruitful and generative conversations between its author and various audiences. And just like the law itself, I view this dissertation not as a finished product but as one iteration of an evolving and never-finished project.

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# INTRODUCTION: LAW'S AUDIENCES



## INTRODUCTION

> "IDENTIFY THE AUDIENCE. — Decide who is supposed to get the message."[1]

So instructs the U.S. House of Representatives' legislative drafting manual. This advice is common to many statutory drafting guides, which emphasize that a statute's audience should influence a statute's structure, style, and terminology.[2] Different audiences have different vocabularies, levels of background knowledge, and modes of interacting with the statutory scheme.[3] It would be foolish to draft a playground ordinance in the same manner

[1] HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE, U.S. HOUSE OF REPRESENTATIVES, OFFICE OF THE LEGISLATIVE COUNSEL 5 (Nov. 1995).

[2] *See* F. Reed Dickerson, Legislative Drafting § 3.6, in THE REGULATORY STATE 159 (Lisa Schultz Bressman, Edward L. Rubin & Kevin M. Stack eds., 2010) ("[T]he legislative draftsman will do well to consider the persons to whom the law is primarily addressed," which will "bear on style and terminology" to ensure that "the writing [is] directed at the level of understanding shared by the bulk of that group.").

[3] *See id.* at 159–60.

as a multinational corporate tax provision.[4] For statutory drafting, at least, audience considerations are of central concern.

When it comes to the *interpretation* of law, however, important considerations of audience often go overlooked in debates about interpretive methods. In using the term audience, I mean the range of actors whose behavior may be altered as a result of a legal enactment. One reason I use the term audience is to acknowledge that although the law may formally *address* one audience (say, corporate executives), other audiences may be just as involved in constructing the law's meaning and implementation (say, corporate counsel and outside auditors). Moreover, one legal audience may mediate the interpretations of other audiences: a taxpayer, for example, could look up the Internal Revenue Code herself, *and* consult with her accountant, *and* call the IRS helpline for guidance, each of whom may have different understandings of what the law requires. And as any taxpayer who has prevailed against the IRS can attest, the agency is not always right about the meaning and application of the law.

As I will explain, not all legal audiences are equivalent—legal audiences may include those actively engaged with, as well as those passively affected by, legal rules, as well as those who try to influence or alter the law through interpretative claims and assertions.[5] Yet courts often interpret public law documents like statutes, regulations, and the Constitution in a rather homogeneous fashion. Judges generally deploy the same tools and rules of interpretation to decipher a firearms storage rule directed at members of the public as they do to decode technical statutory language directed at federal agencies implementing the Affordable Care Act.[6] While judges often nod to the relevance of audience when they express

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[4] *See, e.g.*, Shu-Yi Oei & Leigh Z. Osofsky, *Constituencies and Control in Statutory Drafting: Interviews with Government Tax Counsels*, 104 IOWA L. REV. 1291, 1295 (2019) (finding that most staffers involved in drafting the Tax Cuts and Jobs Act of 2017 viewed the audiences of the Code as experts such as the Treasury, professional preparers, and tax preparation software companies, rather than ordinary taxpayers—and drafted accordingly).

[5] Others writing in the philosophy of law have also used the term, although often more narrowly with respect only to those *directly* addressed by the law. *E.g.*, ANDREI MARMOR, THE LANGUAGE OF LAW 28 (2014); BRIAN G. SLOCUM, ORDINARY MEANING: A THEORY OF THE MOST FUNDAMENTAL PRINCIPLE OF LEGAL INTERPRETATION 71 (2016); Scott Soames, *Toward a Theory of Legal Interpretation*, 6 N.Y.U. J.L. & LIBERTY 231, 242 (2011).

[6] *Compare* Muscarello v. United States, 524 U.S. 125 (1998) (majority and dissent employing, among other methods and canons: consistent usage presumption, dictionary definitions, legislative history, legislative intent, ordinary meaning, plain meaning, rule against superfluity, statutory context, statutory purpose, statutory scheme/structure, whole act, whole code, and the legal significance of semantic ambiguity), *with* King v. Burwell, 135 S. Ct. 2480 (2015) (majority and dissent employing, among other methods and canons: dictionary definitions, legislative history, legislative intent, ordinary meaning, plain meaning, rule against superfluity, statutory context, statutory purpose, statutory scheme/structure, whole act, whole code, and the legal significance of semantic ambiguity).

abstract concerns about ambiguity and notice when it comes to statutory interpretation, or emphasize the importance of consistency and predictability, they generally tend not to complete the logical inference and inquire about whether a statute is too ambiguous or provides too little notice *for its intended audience*, nor whether selective and inconsistent application of methods raise rule-of-law concerns.

Instead, leading interpretive approaches largely draw on the same canons, look to the same sources, and prioritize the same methods, regardless of the relevant statutory audience(s) in question.[7] Too often, the drafters' imperatives—to identify the audience and deliver a comprehensible message to that audience—are lost in the interpretive enterprise. There is often insufficient concern about whether the prevailing judicial approaches to interpretation provide a reasonable account of how affected statutory audience(s) are expected to "get[] the message"—or, indeed, whether those approaches enhance or hinder the

[7] While the core theories of textualism and purposivism are not especially attentive to audience concerns, a number of scholars have assessed unique interpretive perspectives of first-order interpreters such as prosecutors, *see, e.g.,* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 625 (1984) (discussing the distinction between rules addressed to the general public and those addressed to officials); Dan M. Kahan, *Is "*Chevron*" Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 479 (1996) (arguing that federal prosecutors currently have a "significant share of delegated lawmaking authority"); and Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 406 (1994) [hereinafter Kahan, *Lenity and Federal Common Law Crimes*] (arguing that consistently applying the rule of lenity would minimize prosecutorial abuse of discretion), or federal administrative agencies, *see, e.g.*, Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 504 (2005) (arguing that "[f]ully legitimate judicial interpretation will conflict with fully legitimate agency interpretation); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 373 (1989) (discussing how administrative agencies are institutions that implement legislation); Peter L. Strauss, *When the Judge is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT. L. REV. 321 (1990) (discussing how administrative agencies, instead of judges, frequently act as the interpreters of statutes); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 477 (1989) (discussing the deference that courts give to administrative agencies' interpretations of statutes); and Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1018 (2015) (examining how administrative agencies interpret statutes). Other scholars have examined portions of this question over the years. *See, e.g.*, William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. REV. 629, 630 (2001) (observing different methods of interpretation for statutes regulating interpretive communities in labor law as compared to administrative law); Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 1040 (2017) (pressing for a "conversation model of interpretation" that considers the contexts in which interpreters encounter legislative text); and Drury Stevenson, *To Whom Is the Law Addressed?*, 21 YALE L. & POL. REV. 105, 139 (2003) (arguing the law is addressed to the state and its actors, not to the citizens in general nor the segment of the population to whom a text refers).

Nevertheless, the literature would benefit from a more comprehensive account of the relationship between particular kinds of statutory audiences and the interpretive theories, practices, and doctrines that tend to predominate in statutory interpretation theory.

process of transmission and implementation.

From a rule-of-law perspective, the frequent disconnect between legal audience and legal methods of interpretation is puzzling, for at least two reasons. First, most theories of jurisprudence understand the law as a means of implementing societal plans and coordinating social behavior.[8] For the law to achieve such aims, its meaning and effect must be able to be communicated or transmitted to its relevant audiences, and for this to happen, either the audience, or someone acting on its behalf, must be able to interpret the law and ascertain its meaning.[9] I will call these individuals and/or institutions the law's "first-order" audiences, because it is their behavior the law seeks to alter, and they are often the ones whom the law most directly affects.[10] They are also "first-order" audiences because they often must determine what the law permits or requires in the first instance, prior to any judicial adjudicative assistance in deciding the its meaning. Indeed, nearly all interpretive disputes arise from some kind of disagreement that begins outside of court (and most end there).[11] Yet legal theory often presents a picture of interpretation as an act whose relevance emerges only once a case comes before a judge.

A second puzzle is that a fundamental tenet of almost every account of the rule of law is that laws must be sufficiently accessible, intelligible, and predictable for those governed by them to follow them.[12] The law's accessibility and intelligibility necessarily depends on how

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[8] *See, e.g.*, Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165, 183–85 (1982) (describing how judges can use the "coordination theory" to determine how parties should have acted in a certain situation); SCOTT J. SHAPIRO, LEGALITY 394 (2011) (describing the "basic activity of law" as social planning). Legal philosopher Lon Fuller once argued that law functions both as an instrument of social control and as a means to facilitate human interaction. *See* Lon L. Fuller, *Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction*, 89 BYU L. REV. 89, 89 (1975). *See generally infra* Section I.B.

[9] Some might question whether most applications of a statute entail the act of interpretation. I share Justice Antonin Scalia and lexicographer Bryan Garner's view that "[e]very application of a text to particular circumstances entails interpretation." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 53 (2012). In similar fashion, Stanley Fish has argued that there can be no such thing as a literal "meaning that because it is prior to interpretation can serve as a constraint on interpretation." STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE IN LITERARY AND LEGAL STUDIES 4 (1989). *But see* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010) (arguing that most applications of statutory text are moments of construction—the process of giving a text legal effect—rather than moments of interpretation of linguistic meaning of semantic content).

[10] Or, in the case of the statute's implementers like administrative agencies, to alter the behavior of others.

[11] Article III's prohibition on advisory opinions all but assures it. *See* U.S. CONST. art. III, § 2, cl. 1; *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

[12] *See, e.g.*, TOM BINGHAM, THE RULE OF LAW 37 ("The law must be accessible and so far as possible intelligible, clear and predictable."); Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional*

easily and predictably law can be interpreted by its relevant audiences (and those who may assist them). The ease of that task will depend not only on the clarity of the text itself, but also on the prevailing interpretive methods the relevant audiences are expected to deploy, and whether those methods are themselves intelligible, predictable, and accessible. As I will argue, the content of the law must necessarily be developed as a collaborative endeavor between legislatures as authors of broad legal rules, and the relevant audiences who bring those rules to life, through implementation, application—and interpretation. Legal theory regularly recognizes the important role of interpreting and elaborating on legal meaning when the interpretive audience is thought to be *judges*. But a lot of law is "made" outside of courtrooms and never reviewed by judges at all, and judge-made rules and interpretations must be carried into practice by other legal audiences in conditions very different from those of judicial chambers and courtrooms. Judges often articulate interpretive rules that, as a matter of law, all other legal audiences must also follow, and yet judges often overlook whether such rules are likely to enhance or diminish nonjudicial audiences' capacity to "follow" the law.

When judges determine statutory meaning by applying a particular canon, source, or method, the effect is to narrow the statute's meaning by selecting from one of several—or sometimes *many*—plausible interpretations of an often-underspecified and ambiguous statutory text.[13] In this sense, judges often function as "second-order" interpreters: they not only decide which of several potential interpretations is the "correct" one, but they also establish the rules of interpretation that guide statutory audiences in determining why that meaning is "correct," signaling to those audiences how similar future statutory ambiguities should be resolved.

Prevailing approaches to *constitutional* interpretation also tend to overlook concerns about how the Constitution's audiences are likely to engage with understanding its meaning. While nearly every theory of constitutional law recognizes that the Constitution speaks to many audiences—most especially "We the People"—prevailing theories of constitutional interpretation tend to treat the Constitution as if it were a document that speaks only to judges, who are generally treated as the only authoritative interpreters of the document.[14] As

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*Discourse*, 97 COLUM. L. REV. 1, 8 (1997) (noting that nearly all modern accounts of the rule of law emphasize the capacity for legal rules to effectively and stably guide conduct); H.L.A. HART, THE CONCEPT OF LAW 124 (2d ed. 1994) ("If it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without further direction, . . . nothing that we now recognize as law could exist."). Other leading Anglo-American legal philosophers, including Lon Fuller, and, more recently, Scott Shapiro, have made similar claims. *See generally infra* Section I.B (discussing the need for statutory audiences to be able to develop meaning from statutes without resort to judicial adjudication).

[13] William Baude and Stephen Sachs have helpfully described this as "the law of interpretation." *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017).

[14] For a summary of adherents of judicial supremacy, and a critique of that doctrine, see Larry D. Kramer,

examples, both originalist and living constitutionalist theories of interpretation orient the interpretive task around courts. Not coincidentally, even when constitutionally-motivated legal doctrines accommodate a role for other audiences, they often do so by accommodating a judge's *notional* understanding of that audience that is accommodated, rather than the actual audience itself.[15] Moreover, prevailing theories of constitutional interpretation have not been fully attentive to how their prescribed methods of interpretation can have the effect of excluding particular audiences from conversations about constitutional meaning, because not all audiences have equal capacities to participate in debates about constitutional meaning using prescribed interpretive schemas.

Disregard for the importance of nonjudicial constitutional interpretation is in some sense in tension with the fundamental precept of American law: that popular sovereignty rests with the people. American courts reflexively invoke popular sovereignty and the idiom of "We the People" as a justification for particular interpretations of the Constitution. Indeed, the phrase recently appeared in three separate high-profile Supreme Court decisions issued within a single week; in each, otherwise ideologically diverse members of the Court invoked "We the People" as a kind of moral trump to emphasize why the majority decision had strayed from constitutional first principles.[16] Yet despite the rhetorical appeal of popular sovereignty, in recent years relatively little consideration has been given as to whether judicial approaches to legal interpretation might actually foreclose meaningful interpretive participation from "We the People." This trend is especially striking given the country's legal history. As I will discuss, the American common-law system traditionally recognized the important role that the law's audiences and communities played in contributing to the development of legal rules and doctrines that conformed to the needs and expectations of those audiences; audience was "baked into" the common law, notably in constructs like the "reasonable person" (not, significantly, the "reasonable judge"). More recent inattention to audience concerns, however,

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*Foreword: We the Court*, 115 HARV. L. REV. 5 (2001). This debate is also central to the discussion of constitutional confrontation in Chapter II.

[15] As I will discuss in Chapter I, among these fictional audiences are the "original public" for original public meaning theories of constitutional law. *See generally* Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NORTHWEST. UNIV. L. REV. 703, 704 (2009).

[16] *See, e.g.*, Gamble v. United States, 139 S. Ct. 1960, 1985 (2019) (Thomas, J., concurring) (invoking "We the People" as the basis for the Constitution's status as "higher law" warranting the rejection of stare decisis for "demonstrably erroneous" precedents); Gundy v. United States, No. 17-6086, 2019 WL 2527473, at *11 (U.S. June 20, 2019) (Gorsuch, J., dissenting) (invoking "We the People" as the basis for constitutional limits on legislative delegations to the executive because the "federal government's most dangerous power . . . [is] to enact laws restricting the people's liberty"); Rucho v. Common Cause, No. 18-422, 2019 WL 2619470, at *22 (U.S. June 27, 2019) (Kagan, J., dissenting) (invoking "We the People" to justify striking down partisan gerrymandering because the sovereign power "is in the people over the Government, and not in the Government over the people," and "[f]ree and fair and periodic elections are the key to that vision" (citation and internal quotation marks omitted)).

has diminished the capacity for non-legal audiences to participate in conversations about the Constitution and the other important legal rules that govern modern society. At risk is not only the perceived legitimacy of the courts who interpret the law, but the legal system itself. The issue is not to question judicial supremacy, but to ask whether judicial interpretations promote some of the values supremacy proposes to serve, such as clarity, predictability, and finality.

Conceived in this way, I will argue that judicial decisions should *themselves* be thought of as legal utterances that are directed not just at lawyers or the specific litigants, but at *all* relevant first-order audiences. When judges resolve a problem of legal interpretation, they rationalize their decision on the basis of particular legal canons, sources, or methods. Whatever reasons they give, the effect is to send signals to *subsequent* legal audiences about which methods of interpretation should be used (or at least considered) when resolving future questions of legal ambiguity. The effect of the judicial decision extends beyond resolution of the meaning of the particular legal phrase in question; it also influences the rules and considerations of interpretation for all other associated statutory provisions going forward.

In this sense, judges often function as "second-order" interpreters of law. I use the term "second-order" interpretation because judges are (with few exceptions) not directly affected by the statutes they interpret, but instead select from among competing first-order interpretations of law, and in so doing, they necessarily send signals about which canons, methods, and sources should be prioritized or ignored across cases by the first-order audiences who *are* affected by law. From a rule-of-law perspective, the choice to favor certain interpretive methods over others can function as a kind of methodological stare decisis,[17] which in its extreme form will mandate that the law be interpreted *only* according to a favored methodological approach. For example, when a judge concludes that *courts* should interpret the Constitution according to its "original public meaning," the legal effect is that other legal audiences—and first-order interpreters in future cases—should also derive meaning about the Constitution only from these sources of historical linguistic usage and prevailing practices, rather than, say, contemporary practices, reasonable expectations, or competing notions of justice.

To see how judicial reasoning can function to influence the *methodology* of interpretation in future cases, consider the act of the judicial concurrence, in which one or more judges join the majority opinion insofar as they agree with the resolution of the *issue*, but want to write separately to give different *reasons* for their shared conclusion of law. Consider legislative

[17] *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1822 (2010); *see also* Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1867 (2008). *But see* Evan J. Criddle & Glen Stazewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573, 1574 (2014) (arguing against the employment of methodological stare decisis).

history as a source of evidence of statutory meaning. Famously, Justice Antonin Scalia had a common practice of writing separately in statutory interpretation decisions even in cases when he agreed with the majority's resolution. Any time the majority discussed the legislative history of the statute in reaching that outcome, Scalia would write a separate concurrence to explain why he had arrived at that interpretation but *without* resort to the use of legislative history.[18] These concurrences cannot be explained as seeking to sway the outcome in the instant case, for the nature of a concurrence is that it agrees with the majority's outcome, if not its reasoning. Moreover, the *judicial audience* for a concurrence is less likely to be the litigants in the instant case, for the dispositive reason(s) why one part won, and another lost, will be elucidated in the (controlling) majority or plurality opinion.

Thus, the sole function of concurrences in the Scalia mold was to serve as a second-order interpretive warning to future interpreters against the use of legislative history as an appropriate source of legal meaning. After all, because Scalia agreed with the *outcome*, the audience of his opinions cannot be said to have been the parties in the instant case—for them, nothing changed either way. If effective, however, Scalia's campaign against the use of legislative history would constrain courts (and therefore other legal audiences) from extracting from legislative history contextual evidence of a statute's communicative meaning.[19] In other words, such evidence, in Scalia's view, should not have influenced our understanding of the statute's *legal* meaning, even when such contextual evidence might provide a *better* explanation of the statute's meaning than that derived from the semantic content of the statute alone.[20]

This is why I term judges "second-order" interpreters: their interpretations not only adjudicate and decide between competing first-order interpretations, but they can also have legal effects on subsequent interpretive question—certainly, at least, that was Justice Scalia's intention vis-à-vis legislative history. And his campaign seemed to work, at least more broadly, for it "had a profound effect on how litigants brief and argue cases to the court"[21] by

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[18] *E.g.*, Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) ("In my view, discussion of that point is where the remainder of the analysis should have ended. Instead, however, the Court feels compelled to demonstrate that its holding is consonant with legislative history . . . . That is not merely a waste of research time and ink; it is a false and disruptive lesson in the law.").

[19] See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29—37 (Amy Gutmann ed., 1997) (arguing that consulting legislative history is generally unhelpful, time-consuming, and expensive).

[20] Scalia was skeptical that legislative history ever provided a better explanation. *Id.* at 36 (arguing that legislative history had made "very little difference" in the outcome of any case outcome over his prior nine terms on the bench). As I will discuss in Chapter III, however, in at least a limited number of cases, the legislative history may be dispositive to determining the meaning of an ambiguous statutory term.

[21] Marty Lederman, *Supreme Court 2015: John Roberts' ruling in* King v. Burwell, SLATE, June 25, 2015, *available at* https://slate.com/news-and-politics/2015/06/supreme-court-2015-john-roberts-ruling-in-king-v-

repeatedly signaling which methods of interpretation and which evidence of semantic or contextual meaning would be prioritized by some members of the Court. Indeed, even his colleagues on the Court were careful to cabin off the portions of their opinions drawing on legislative history, lest they face a defection from Scalia, particularly in close votes.[22] More recently, Justice Sonia Sotomayor has in several recent cases concurred to issue a warning of the opposite effect,[23] and after Scalia's death, several of his colleagues have taken up his cause.[24]

This practice is also common to the Court's constitutional interpretation cases. Justice Clarence Thomas, in particular, has issued dozens of concurrences in constitutional law cases in which he arrives at the majority's conclusion but refuses to credit methods he believes are inappropriate sources of constitutional meaning.[25] Indeed, Thomas will even write separate *dissents* when he disagrees with other Justices about the basis of dissent from the majority's resolution of the constitutional-interpretive problem.[26] Again, the chief effect behind such concurrences and is to send a second-order signal about method to future first-order interpreters, not to change the outcome of the instant case. The point is to shape how *others* will understand the law; to adjust the heuristics not only of other judges, but of first-order legal audiences as well.

Thus, the crucial interpretive problem: despite the significance of the relationship between first-order interpreters and judicial acts of second-order interpretation, leading interpretive approaches often neglect to raise directly questions of audience intelligibility,

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burwell.html [http://perma.cc/SY3X-3YYE].

[22] *E.g.*, Tapia v. United States, 564 U.S. 319, 331 (2011) ("Finally, for those who consider legislative history useful, the key Senate Report concerning the SRA provides one last piece of corroborating evidence.").

[23] *E.g.*, Digital Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 782 (2018) (Sotomayor, J., concurring) ("I write separately only to note my disagreement with the suggestion in my colleague's concurrence that a Senate Report is not an appropriate source for this Court to consider when interpreting a statute. . . . I do not think it wise for judges to close their eyes to reliable legislative history—and the realities of how Members of Congress create and enact laws—when it is available.").

[24] *E.g.*, *id.* at 783–84 (Thomas, J., concurring in part and concurring in the judgment). Joined by Justices Alito and Gorsuch, Justice Thomas noted that because the statutory meaning was clear from the text itself, the majority should not have gone on to reference the Senate Report for additional evidence of statutory meaning.

[25] *E.g.*, McDonald v. City of Chicago, Ill., 561 U.S. 742, 805–858 (2010) (concurring in part and concurring in the judgment) (arguing that the Bill of Rights is better understood to have been incorporated against the states by way of the Privileges and Immunities Clause of the Fourteenth Amendment than the (substantive) Due Process Clause).

[26] *Compare* Fisher v. Univ. of Texas at Austin, 136 S. Ct. 2198, 2215 (2016) (Thomas, J., dissenting) (asserting that the Equal Protection Clause of the Fourteenth Amendment "categorically" prohibits the consideration of race in higher education admissions decisions), *with id.* at 2215–2243 (Alito, J., dissenting, joined by the Chief Justice and Justice Thomas) (dissenting on narrow grounds).

interpretive accessibility and predictability, nor fully consider the coherence of judicial approaches to understanding how other audiences *actually* engage with the law. Take, for instance, the use of legislative history. For all legislative history's well-discussed sins and virtues, leading judges and scholars less frequently ask an essential question from the standpoint of statutory audience: is it always reasonable to expect a statute's relevant audience(s) to search for applicable legislative history when seeking to resolve statutory ambiguity?

This problem by no means unique to legislative history. The same question could (and should) be asked about the application of specialist-sounding linguistic canons such as *expressio unius est exclusio alterius*,[27] the resort to out-of-print ninety-year-old dictionaries to clarify present-day interpretive disputes,[28] or the cognitively-demanding whole act and whole code canons.[29] An important consideration for any theory of statutory interpretation should be the potential rule-of-law implications of using particular sources, methods, or canons—an inquiry whose importance becomes clear when considered from the standpoint of the statutory audiences expected to conform their behavior to the statute.

A focus on statutory audiences therefore raises other critical considerations: if statutes have distinctive audiences, when and how should statutes drafted for one audience be interpreted differently from statutes drafted for another? Not all interpretive methods are equally suitable for all audiences. For example, as many administrative law scholars have long argued, agency officials preparing a proposed rule for notice and comment will very likely turn *first* to a statute's legislative history, which often contains more specific instructions from Congress to the agency than in the statute itself.[30] Given the technical and delegatory nature of many statutory provisions addressed to agencies, the notion that these statutes transmit in a narrow band of "ordinary" usage seems especially implausible. That notion may be much more appropriate for statutes directed at lay audiences and the public at large, however.[31] A Segway user hoping to ride through a park that prohibits vehicles will

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[27] Also known as the "negative implication canon," it instructs that "[t]he expression of one thing implies the exclusion of others." *See* SCALIA & GARNER, *supra* note 9, at 107.

[28] *See, e.g.*, Wisconsin Central Ltd. v. United States, 138 S. Ct. 2067, 2070–71 (2018) (drawing on the 1933 editions of Black's Law Dictionary and the Oxford English Dictionary and the 1942 edition of Webster's New International Dictionary to determine statutory meaning "at the time Congress enacted the statute" in 1937).

[29] I discuss some of the epistemic difficulties associate with the whole code and whole act canons in Chapter III, Section II.E.

[30] *See, e.g.*, Mashaw, *supra*, note 7, at 510–12 (arguing that in the legislative history Congress often provides agencies with more specific instructions than in the text of the statute itself); Strauss, *supra* note 7, at 346–47 (arguing that agencies are much closer to the legislative process than are courts and that legislative history materials enhance their capacity to fulfill the enacting Congress's legislative aims).

[31] And, as I will argue, even if statutes are rarely expected to put members of the public directly on notice,

almost certainly not think (or know) to consult arcane extra-textual legislative history to determine if their vehicle flouts the law.[32] In such a circumstance, the "plain text" of the statute may be all that will be considered by the relevant audience.

Yet once a problem of statutory ambiguity comes before a court, judges tend to approach second-order interpretation as if every method is equally suitable for every statute—and therefore for every statutory audience in every statutory context.[33] Conventional theories have often had much more to say about *judging* statutes than interpreting them, in large part because prevailing theories are often more focused on addressing legitimacy concerns related to the tensions of unelected judges giving meaning to the work product of democratically-accountable legislatures.[34] As I will discuss in Chapter III, statutory interpretation theory has generally not been attentive to questions about interpretive congruence between judicial and nonjudicial interpreters, nor whether various theories and methods of statutory interpretation have a tendency to encourage or discourage statutory compliance by various nonjudicial legal audiences.

Nor are debates about constitutional interpretation free from concerns about the interpretive capacity of the law's audiences. Consider, for example, the interpretive discourse in which all writing members of the Supreme Court engaged in *District of Columbia v. Heller*,[35] the landmark 2008 decision that held that the Second Amendment protects the individual right to own a firearm for self-defense. The case was brought by Dick Heller, a

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the fact that statutory prohibitions *sometimes* do is reason enough that a preliminary inquiry about statutory audience should always be an initial step in the interpretive enterprise.

[32] As the Chief Justice recently noted, this is a problem for law enforcement officers as well as members of the public. *See* Heien v. North Carolina, 135 S. Ct. 530, 539 (2014) ("A law prohibiting 'vehicles' in the park either covers Segways or not, but an officer will nevertheless have to make a quick decision on the law the first time one whizzes by." (citation omitted)).

[33] James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 97 (2005) (canvassing the use of canons in hundreds of Supreme Court decisions and concluding that the Justices' use of canons is so "case-specific and Justice-specific" that "reliance on the canons may be justified as situationally enlightening without in any meaningful sense promoting a more systematic predictability or consistency").

[34] Despite this, Abbe Gluck and Lisa Bressman have found that judicial rules and methods of interpretation often have little correspondence with how legislative drafters expect their work product will be interpreted. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside: An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 912–13 (2013) (noting the "intense discord [that] remains over the proper role of judges in statutory cases and which tools of interpretation support that role"); Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside: An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014) (examining the intersection of the process of legislative drafting, administrative law doctrine, and statutory interpretation).

[35] 554 U.S. 570.

District of Columbia special policeman who applied for a handgun to keep in his home.[36] At the time, D.C. prohibited the registration of handguns and made it a crime to carry one unregistered. When Heller applied for a registration certificate for the handgun, the District refused, citing the municipal law, and Heller sued, alleging that the prohibition was a violation of the Second Amendment.[37]

As a matter of policy, the dispute centered on whether D.C.'s law was a reasonable response to widespread gun-related violence, as the District emphasized in its briefing before the Supreme Court.[38] Yet the decision in *Heller* had much less to say about appropriate regulations for municipalities seeking to reduce crime in 2007 than it did about what a select handful of Americans thought the term "keep and bear arms" meant in the 1790s. Justice Scalia, writing for the majority, sought out the original public meaning of the text of the Amendment. Broadly speaking, this approach asks how ordinary citizens during the founding era would have understood the meaning of the term.[39] To determine that original public meaning, Scalia looked to founding-era sources of ordinary meaning and linguistic usage,[40] evidence of related popular constitutional movements in the states,[41] and citizens' views and practices related to firearm use and storage during the founding era, and even well into the mid-nineteenth century.[42] Scalia's approach was largely mirrored by Justice John Paul Stevens's dissent, which also drew on the same period sources.[43] Even Justice Stephen Breyer, widely considered to be the most pragmatic of the current bench,[44] focused at some length on everyday practices related to firearm storage and usage in the founding era.[45]

What is striking about this debate, which I will discuss more thoroughly in Chapter I, is that it plays out in a manner that seems far more appropriate for trained historians who specialize in eighteenth-century American history than for ordinary lawyers, let alone other

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[36] *Id.* at 575.

[37] *Id.* at 575–76.

[38] Brief for Petitioners, District of Columbia v. Heller, No. 07-290, 4 https://1.next.westlaw.com/Link/Document/Blob/I2253C0199AE84F6CBA355BD18C463476.pdf?originationContext=filings&transitionType=FilingsItem&contextData=%28sc.UserEnteredCitation%29 (noting that the law regulating firearms targeted handguns because they were disproportionately linked to violent and deadly crime, and were used in 88% of armed robberies and 91% of armed assaults).

[39] I will discuss this method in greater detail in Chapter I.

[40] *Heller*, 554 U.S. at 581–85.

[41] *Id.* at 600–03.

[42] *Id.* at 609, 614.

[43] *Id.* at 636–680 (Stevens, J., dissenting).

[44] Cass R. Sunstein, *There is Nothing That Interpretation Just Is*, 30 CONST. COMMENT. 193, 202 (2015).

[45] *Heller*, 554 U.S. at 683–87 (Breyer, J., dissenting).

audiences of the Constitution—such as "We the People." In this sense, the constitutional conversation among the Justices in *Heller* is one that requires substantial knowledge of historical materials and practices that would seem to far exceed not only what the average American might know, but even what all but the most specialized attorneys are trained to know about the law and the Constitution. In Chapter I, I will argue *Heller* is but one example of debates about constitutional meaning that implicate methodologies and approaches to constitutional interpretation that are seemingly at odds with the likely interpretive practices of the many audiences whom the document is supposed to serve and to whom it communicates meaning. I will examine the relationship between judges and law's audiences as one of conversation: how do legal rules, methods, and approaches to interpretation function to invite or to exclude particular audiences from participating in dialogue about the meaning of the law? And how do these rules regulate the terms of the conversation, who may speak, and what evidence may count?

This question is especially important when considering what role institutions other than the courts might play in giving meaning to the Constitution, and how, if at all, courts might defer to other branches of government when it comes to debates about constitutional meaning. I will explore this tension in Chapter II, examining the potential limits to judicial deference to the constitutional interpretations of the other branches of government, and the dynamic of confrontation between the courts and the law's other institutional audiences, the political branches.

Chapter II focuses on the Republican Guarantee Clause of Article IV, Section 4 of the Constitution, which provides that "*The United States* shall guarantee to every State in this Union a Republican Form of Government . . . ."[46] The Clause is the only portion of the Constitution which uses "The United States" in the nominative case as the subject of a sentence, and so it is not fully clear whom the clause addresses, and whom the audience or audiences of the Clause might be. Precisely because the Clause is so textually vague, it invites the possibility that any of the federal branches of government, as well as the states, and perhaps even the people, could make claims about how they may act as guarantors of the republican form of government. This chapter provides a case study on how the Constitution can sometimes enable different constitutional actors to interpret the same constitutional provision in different ways in accordance with each branch's unique institutional role. But such departmentalism often leads to confrontation when the branches disagree about what the Constitution means or permits. I explore whether it is possible for congressional interpretation of the Republican Guarantee Clause to differ from how *courts* might interpret the provision, without necessarily infringing on the concept of judicial supremacy.

Given how critical "audience participation" would seem to be for constitutional theory,

[46] U.S. CONST. art. IV, § 4 (emphasis added).

and for legal theory more generally, it seems odd that these considerations are so often overlooked. Why, then, have leading American theories of legal interpretation tended to ignore important considerations of legal audiences as participants in legal interpretation?[47] One major reason, which I discuss in Chapter I, is that leading theories of interpretation—both statutory and constitutional—generally frame interpretation as a problem for *judges*. We are told that the "fundamental question" for statutory interpretation is "whether *courts* should view themselves as faithful agents of the legislature or as independent cooperative partners."[48] And when it comes to assessing theories of constitutional interpretation, the primary criterion is "the proper role of courts as 'law followers'."[49] Again, what is important to note is that these questions are framed as a matter of *role*: where judges are agents or followers, this inquire tends to downplay the important (and integrated) position of judges as decisive legal *translators* for the actual first-order audiences expected to follow (and apply) the interpreted law.

In Chapter III, I examine approaches to judicial statutory interpretation on the basis of how they may tend to enhance or preclude compliance with the law. Bringing the concept of audience to the forefront of questions of statutory interpretation also helps to reveal the ways in which questions of audience already seem to play a role in judicial statutory interpretation, albeit tacitly and inconsistently. As I will argue in Chapter III, debates about statutory interpretation methodology often seem to be inflected with an undercurrent of disagreement about which of two or more competing statutory audiences should be privileged in the course of judicial statutory interpretation. In this sense, disagreements about textualist and purposivist approaches to statutory interpretation are themselves, in part, disagreements about whether to interpret texts as ordinary citizens might, or, alternatively, as reasonable agencies would. Focusing on audience helps to clarify what is at stake beyond seemingly technocratic questions about the use of dictionaries or committee reports—*i.e.,* the ability for law's audiences to follow the law.

The concept of legal audience thus provides a schematic to think systematically about the legal significance of acts of interpretation that develop outside of courts; the normative and practical conditions under which they take place; and how courts adjudicate, defer to, or reject those interpretations. The concept of audience also opens up new avenues to think about the conditions under which nonjudicial interpreters of law may be authoritative interpreters, and when, and under what circumstances, judges should defer to those interpretations. For example, courts have long struggled to determine when and how to credit

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[47] For some notable exceptions, see *supra* note 7.

[48] KENT GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION 20 (2013) (emphasis added).

[49] Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 10 (2006).

nonjudicial interpretations of law. Critiques of *Chevron*[50] and *Auer*[51] deference to administrative agencies highlight the tension between courts' role as the supreme interpreters of law and the recognition that for an effective legal system to function, the other branches have an essential role to play in the interpretation of law. For considerations of deference analysis to be comprehensive, the capacities and constraints of those being (or not being) deferred to must also be considered.

A final note: just as the interpretive theory of living constitutionalism recognizes that the meaning of the Constitution may change over time, and may develop from sources beyond the literal text of the document itself,[52] this document is deemed to derive its meaning from sources that exist beyond the four corners of the page, incorporating by reference portions of the final draft that have been vetted and approved by committee members but that are not included in the commercialized version of this document; certain materials have been withheld from the privately-owned entity that has, with the university's assent, claimed a right to the author's intellectual property.[53] From the perspective of facilitating appropriate academic discourse, it is essential that an author have rights of notice, final approval, and reasonable control over the form and dissemination of his works to ensure that any product published by third parties accurately represents author's actual work product and are consistent with author's legal and ethical obligations to other parties. Because this is not possible in the circumstances as the author has been required to submit his intellectual property as a condition for conferral of his degree without customary authorial rights or

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[50] *Chevron* deference is named for the case that stands for it, *Chevron U.S.A. Inc. v. Natural Res. Def. Counsel, Inc.*, 467 U.S. 837 (1984), in which the Supreme Court explained the circumstances under which courts will defer to agency interpretations of ambiguous statutes.

[51] *Auer* deference is named for the case that stands for it, *Auer v. Robbins*, 519 U.S. 452 (1997), in which the Court affirmed the practice of judicial deference to administrative agencies in the interpretation of agencies' own ambiguous regulations. *Auer* has been widely criticized from both the bench and the academy. *E.g.*, Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103 (2018) (reviewing arguments against *Auer* deference). Assessing these regulations from the standpoint of audience might provide an alternate basis for being skeptical of *Auer* deference, at least when the first-order audience of the regulation is likely to be ordinary citizens.

[52] *E.g.*, Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 260 (2002) ("I suggest only that courts ask certain consequence-related questions and not rely entirely upon logical deduction from text."); Stephen Breyer, Assoc. Justice, U.S. Sup. Ct., The Tanner Lectures on Human Values at Harvard University: Active Liberty: Interpreting Our Democratic Constitution 50 (Nov. 17-199, 2004), https://tannerlectures.utah.edu/_documents/a-to-z/b/Breyer_2006.pdf (describing contrasts between "a more literal text-based approach with an approach that places more emphasis on . . . purpose and . . . intent").

[53] *See* https://perma.cc/UX6E-QPJD (describing how the institution requires the holders of their intellectual property to make that intellectual property available in a database run by a commercial company that provides access for paying subscribers). In the recent past, some intellectual property has even appeared for sale in online stores—without the authors' permission. *See* https://perma.cc/ZBQ3-N9L5.

adequate notice of the adhesive contract of publication that significantly post-dated his enrollment, it is therefore necessary to incorporate certain materials only by reference to mitigate any damage to the integrity of the work that results from compulsory and unsupervised publication by third parties. All materials incorporated by reference have been made available to the reviewing committee.[54]

## I. THE CONCEPT OF "AUDIENCE" IN LAW

Before proceeding, I will outline what I mean by the concept of audience by briefly reviewing how conceptions of audience permeate both the philosophy of language and the philosophy of law. Despite the importance that the concept of audience plays in these philosophical disciplines, I will argue that attention to audience is often overlooked when it comes to theories of legal *interpretation*; in a sense, each of the three chapters manifests a different aspect of that central problem.

When I refer to law's audiences, I mean the concept of audience in its broadest and most inclusive sense: anyone who has a legal reason for seeking to derive meaning from a legal utterance, whether or not the law expressly provides a role for them as receivers of the legal utterance itself. That conception of audience is well developed in communication theory, and it often appears when legal philosophers draw on philosophy of language literatures to think about the distinct category of *legal* utterances. Broadly speaking, philosophers of language often depict a communicative utterance as an act between a speaker and audience, such that the meaning of an utterance depends not only on the speaker, but *also* on the particular audience who hears, listens, or reads the utterance.[55] Although the precise terminology referring to the party seeking to understand the utterance varies—the terms listener, hearer, reader are all employed—"audience" seems to best describe the range of recipients of communicative utterances who seek to attribute legal meaning to the utterance.

Thus, I prefer the term "audience" over other terms such as reader or addressee for this reason, as well as several others. For one, "audience" is generally employed to reference a broader range of actors who may interpret a communicative utterance in either written or oral contexts, and which gives the term broader applicability, as well as the capacity to capture a wide array of legal-interpretive acts.[56] Indeed, even those who tend to speak in

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[54] *Accord* 5 U.S.C. § 552(a)(1) (2012) ("[M]atter reasonably available to the class of persons affected thereby is deemed published . . . when incorporated by reference therein.").

[55] Paul Grice, for example, wrote at length about the role that the audience of a speaker's utterance plays in determining the meaning of the utterance, and the particular assumptions a speaker may make in deciding on the semantic content of her utterance in light of what she knows about her audience. *See* PAUL GRICE, STUDIES IN THE WAY OF WORDS ch. 5 (Utterer's Meaning and Intentions) (1989).

[56] Grice, for example, generally uses the term "audiences" for those seeking to understand the meaning of an utterance. *Id. See also* SOLAN & TIERSMA, SPEAKING OF CRIME: THE LANGUAGE OF CRIMINAL JUSTICE 27

terms of "hearers" or "readers" when referring to the recipients of a speaker's utterances *in general* tend to shift and employ the language of "audience" when the utterances in question are *legal* in nature, perhaps recognizing that legal communication tends to involve practices that are not exclusively written *or* oral.[57] Thus, Andrei Marmor, who tends to refer to the interpreter of a speaker's utterance as the "hearer" in *conversational* contexts,[58] switches and employs the term "audience" when referring specifically to *legal* communicative contexts, in part because "[l]aws are usually crafted carefully and formulated with the intention of addressing a wide and diverse *audience*."[59] For Marmor, this distinction between hearer and audience seems to stem in part from differences between the conditions of conversational communication and legal communication. For instance, the term audience also captures the difference between a known and specific hearer whom the speaker addresses by way of a conversational communicative utterance, and the diverse—and possibly unknown—set of legal audiences who may be both directly addressed by, but also overhear or witness, a legal communicative utterance.[60]

This being said, while there has been a trend in recent decades to draw on resources from the philosophy of language and from communication theory to aid in the resolution of problems in the interpretation of legal texts, I will largely, though not entirely, sidestep deep engagement with these literatures. This is in part because there are important differences in conditions and assumptions between ordinary, conversational communicative utterances and legal utterances, especially for textual communicative utterances enacted by legislatures. I will briefly summarize some of the key descriptive features related to the interpretation of conversational communication before explaining why many of these key features cannot always be assumed about the legal interpretation of enacted texts.

### *A. The Concept of Audience in Linguistic Theories of Interpretation*

It is worth briefly noting several important contrasts between how the philosophy of

("Linguists are generally accepted as experts when the document in question is a public notice or other document that is supposed to be understandable to a broad audience.").

[57] *Compare* Scott Soames, *Deferentialism: A Post-Originalist Theory of Legal Interpretation*, 82 FORDHAM L. REV.2 597, 598 (2013) ("In general, what a speaker uses a sentence S to assert or stipulate in a given context is, to a fair approximation, what a reasonable hearer or reader knows the linguistic meaning of S, . . . . would rationally take the speaker's use of S to be intended to convey. . . ."), *with* Soames, *supra* note 5, at 242 (describing *legally* relevant illocutionary intentions as ones that "say, assert, or stipulate that P, by enabling one's audience to recognize one's intention to do so").

[58] MARMOR, *supra* note 5, at 14.

[59] *Id.* at 28 (emphasis added).

[60] Marmor recognizes, for example, that some legislation may even seek "to convey different messages to different audiences." *Id.* at 50. (citing Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984)).

language conceptualizes the act of interpretation, and how legal theory does.

*1. Ordinary Conversations and Conversational Maxims*

In ordinary conversation, the general purpose of a conversation is to engage in a cooperative exchange of information. Grice long ago identified several conversational "maxims," assumptions made by individuals when they engage in ordinary conversations that are intended to function as cooperative exchanges.[61] In those circumstances, both parties assume the maxims are in play, and so they can draw on these assumptions, consciously or subconsciously, when forming their own communicative utterances and in interpreting the communicative utterances of the other. Grice called these assumptions "conversational implicatures:" implied content beyond what has been said in terms of pure semantics.[62] The ability to understand the content of expressions beyond what is literally—that is, *semantically*—communicated is the result both of the general norms of conversation that apply to conversational speech in general, as well as the contextual knowledge shared by the specific speaker and hearer in the circumstance of the utterance.[63]

Among the maxims Grice identified, for example, is the maxim *of quantity*, the assumption that in ordinary conversation, the speaker will neither withhold important information, nor provide excessive and unimportant information, to the extent that either choice would function to obscure the meaning of her utterance. This maxim makes possible certain general conversational implicatures. Such implicatures allow speakers to communicate much more than the pure semantic content of their speech alone would suggest. Certain British period dramas such as *Downton Abbey* exploited conversational maxims to particular effect. By portraying conversations in a historical setting in which social mores prevented more frank dialogue, *Downton* featured conversational participants heavily—and cleverly—relying on implicatures in conversation. Thus, for example, when the Countess Dowager said to her friend Mrs. Crawley that "Mary is dining alone with a gentleman this evening," the implication of the utterance was that the man she was meeting was not her husband but a potential love interest.[64] The Dowager could assume this because the quantity maxim instructs that a reasonable listener will assume the speaker seeks to provide the sufficient quantity of information necessary to convey the appropriate meaning. And if the man *were* Mary's husband, the Countess Dowager would have had no reason to withhold

[61] These maxims include maxims of (1) *quantity* (that the speaker neither says too little nor too much); (2) *quality* (that the speaker does not make false claims nor claims they have no evidence for); (3) *relevance* (that the speaker's contributions are relevant to the conversation); and (4) *manner* (that utterances strive to avoid obscurity and ambiguity, and are brief and orderly). GRICE, *supra* note 55, at 28.

[62] *Id.* at 28.

[63] *Id.* at 24–37.

[64] *Id.* at 37.

the additional relevant information, and would simply have said, "Mary is dining alone with her husband this evening." Thus, the Dowager employed the maxim of quantity to suggest the significance of the statement precisely *because* the she would otherwise have withheld seemingly useful information about the Mary's dining companion.

Thus, it is precisely because these conversational maxims are assumed but not expressly stated that it is critical to effective communication that both speaker and audience shares them. But for precisely this reason, we should be skeptical that either general norms of *conversation*, or contextual *conversational* knowledge, can be expected to inform how various legal audiences understand meaning of written legal utterances, as I will discuss momentarily. This is because those relationships are often separated by temporal and contextual gulfs, the participants are usually personally unknown to each other, and their relationships are sometimes and often necessarily adversarial. Of course, it is here sufficient to note that Grice's (much-debated) model, while often illuminating in *many* (but certainly not all) conversational contexts, cannot be wholly applicable to legal speech—and indeed, one way to view judicial interpretation is as an attempt to create "conversational" maxims where they either do not, or cannot be presumed, to pre-exist.

*2. Speech Acts*

A second clarifying theory of interpretation is J.L. Austin's theory of speech acts, which has also been highly influential in shedding light on the significance of the law's audience in legal interpretation and the function of language in law generally.[65] In particular, Austin's distinctions among the different aspects of speech acts, and their relationship to meaning, context, and intent, are especially useful as a preliminary schema. Austin distinguished among three aspects of a speech act—one's act *of* saying something, which he described as the *locutionary* act; what one does *in* saying it, which he described as the *illocutionary* act; and finally, what one does *by* saying it, which Austin termed the *perlocutionary* act.[66] Austin's distinctions help to clarify the different functions of language, and in particular, the

[65] *See generally* J. L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962). I set aside here the "performative," which arguably engulfs certain legal speech.

[66] Kent Bach, *Speech Acts and Pragmatic*, *in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LANGUAGE 150 (Michael Devitt & Richard Hanley eds., 2006). Perlocution is often understood as an effect, and its success is not always guaranteed. It has long been observed that the boundaries between the illocutionary and perlocutionary are in fact much more unstable and blurred than Austin's initial theory suggested, as several commentators have noted. In particular, John Searle elaborated on Austin's model by proposing five divisions (and at least twelve linguistically significant dimensions of differentials) within and between illocution, and specifically referenced the promulgation of the law as an illocutionary "directive." *See* John Searle, *A Classification of Illocutionary Acts*, 5 LANGUAGE IN SOC'Y 1, 2–8, 22 (1976). The debates between the Austinian school and the continental schools (famously embodied in Searle's debate with Jacques Derrida) are beyond the scope of this project, in part because scholars like Derrida invoke notions like "citationality" that create unnecessary confusion in legal scholarship.

relationship between an utterance itself and the audience's reaction to that utterance, which, I will argue, is raises particular difficulties for audience interpretation in the law.[67]

Austin's speech act theory made clear that the semantic content of an utterance alone far from captures the entirety of its meaning. After all, the *locutionary* act of language merely describes the act *of saying* something,[68] which in and of itself often does not reveal the speaker's intended meaning, for a locutionary act may have many plausible semantic meanings. For instance, to say "bear arms" may, depending on context, refer either to the act of self-defense, or to the ursine paws of a creature at the zoo. Analogizing to familiar legal texts, one might say that the Declaration of Independence's locutionary act of declaring, "That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it," does not, in itself, communicate which people, which government, or what ends. Without context, these words could describe any number of governments, or people, or ends.

An utterance thus functions not only as a locutionary act, but it can also perform an *illocutionary* act, which describes what the speaker *is doing* in uttering the locution. The content of the illocutionary act is not fully determined by the words the speaker uses alone, for its meaning is contingent on contextual content, the application of ordinary conversation maxims, and other communicative content familiar to the listener, who may attribute to the speaker's locutionary act a specific meaning.[69] Thus, for fellow colonists reading the Declaration of Independence in the weeks after July 4, 1776, the illocutionary act communicated that the American people (the People) were justified in declaring rebellion against the King George III of England (the Government) in furtherance of seeking the rights of life, liberty and the pursuit of happiness as an independent, self-governing political community (the ends).[70]

Perhaps most important for the concept of legal audience is what an utterer *produces by*

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[67] By "function," here I do not mean to reference Roman Jakobson's classic six functions of language. *See* Roman Jakobson, *Linguistics and Poetics*, *in* STYLE IN LANGUAGE 350–77 (Thomas A. Seboek ed., 1960) While Jakobson's corpus has been heavily critiqued, it is worth noting that several of his functions are missing from statutes and that statutory interpretation is, in some ways, an attempt to impose *versions* of Jakobson's phatic and metalinguistic functions on a discourse that might otherwise lack them. Concepts from mid-twentieth century linguistics may nonetheless provide a useful framework for evaluating aspects of statutory "speech acts," in part because comparing statutory to conversational speech reveals the gaps in the drafter-judge-listener/reader communicative process that are present in standard speaker-hearer *conversation*.

[68] AUSTIN, *supra* note 50, at 98.

[69] *Id.* at 98–100.

[70] Thus, Richard Beeman, in describing the motives behind the Declaration of Independence, notes that "the Declaration of Independence reminds its intended audience that the colonists had done everything possible to seek a peaceful resolution of their grievances, only to be rebuffed by further encroachments on their liberty." RICHARD BEEMAN, THE PENGUIN GUIDE TO THE UNITED STATES CONSTITUTION 30 (2010).

saying the utterance, the perlocutionary act of speech. Legal utterances, after all, exist largely to alter behavior. In the case of the Declaration of Independence, the signatories sought not just to express their own frustrations with the King, but to incite in fellow colonists the agreement to join up in rebellion against him and the British Government. Whereas the upshot of the illocutionary act is to generate *understanding* on the part of the audience, the (successful) perlocution *produces* a further effect as a result of having been spoken.[71]

*3. Mutual Contextual Beliefs and Implicitures*

A final clarifying term is what Kent Bach and Robert Harnish has described as "mutual contextual beliefs." Bach and Harnish subsequently refined Austin's distinctions, drawing on the work of Austin, Grice, and Searle among others, to emphasize that the inference the hearer takes from an utterance, and what she understands the speaker to have intended to her to take, is based not just on what the speaker says, but also on mutual contextual beliefs, or the salient contextual information surrounding the utterance. Bach and Harnish called them *beliefs* because they do not need to be true to ascertain the speaker's intention and the hearer's inference. They are contextual, because they are relevant to and activated by the content surrounding the utterance. And, finally, they are mutual, because the speaker and hearer both must have them, believe they both have them, and believe that the other believes they both have them.[72]

*B. The Concept of Audience in Legal Theory*

It should be obvious that many of the conditions assumed by these theories of conversational communication do not hold in the same manner in legal communication and interpretation. General conversational maxims and mutual contextual beliefs cannot be said to apply to written legal utterances, due in part to the difference between the process by which utterances are produced in conversation and in the form of written legal instructions. First, the mutual contextual beliefs that may be presumed to exist in conversational speech cannot be presumed to exist in the same way for written legal utterances, because the legislative body producing the legal utterance does so without certainty as to whether the hearer shares the contextual beliefs that the utterer does. As a result, contextual beliefs are at best one-sided, rather than mutual, and legal utterers cannot always presume the audience of the law will have the same contextual beliefs as the utterer expects. Nor can the subsequent audiences of the legal text be certain what the beliefs, if any, of the law's authors were.

A second difference is that legal utterances are often not produced as a result of cooperative or informational conversation. Rather, legal utterances are the product of

[71] Bach, *supra* note 66, at 150.

[72] KENT BACH & ROBERT M. HARNISH, LINGUISTIC COMMUNICATION AND SPEECH ACTS 5 (1979).

*strategic* speech conversations among legislators, where the level of cooperation varies, due to a misalignment of interests, rather than as a product of *cooperative* conversations among speaking partners, where the maxims of cooperative conversation are generally assumed to apply.[73] This means that legal utterances are not always—and perhaps are rarely—produced as part of a cooperative communicative exchange between speaker and audience in which conversational maxims and other contextual assumptions about communication can be presumed often to have normal relevance.

One upshot of the strategic rather than cooperative conditions of enacted legal utterances is that under-specification may be *more purposeful* than in genuinely cooperative conversation, and not a product purely of error, thus with no assumption that implicature alone will resolve the semantic ambiguity. This severely subverts what may be gleaned from under-specification in legal interpretation, especially in a system whose separated powers, litigation postures, and need to disclaim or delegate political and practical responsibility, presume a less cooperative posture than conventional conversational speech settings. Legal utterances that are the product of bargaining and negotiation among legislators may be vague and not fully informative *on purpose*, and so general conversational implicatures like the maxim of quantity cannot safely be drawn upon to complete the meaning of a seemingly underspecified legal utterance.[74]

A simple example demonstrates why. In ordinary conversation, if an adult sees a child riding a bicycle through the park and yells, "no vehicles in the park!," the child should fairly assume they are riding in violation of park rules, for the adult would have been unlikely to yell out if a bicycle were *not* a vehicle. For this reason, the adult need not specifically say "no *bikes* in the park" to communicate her message. By contrast, however, *a sign* at the entrance to the park that indicates "no vehicles in the park," would, without more, not clearly indicate either way whether the child's bicycle was prohibited. Without the implicature associated with the communicative act between adult and child, the same semantic content lacks a clear meaning. But the lack of specificity may be the result of strategic reasons. First, it is possible the city council could not agree in advance about precisely which devices count as vehicles, leaving it to park authorities to develop through specific enforcement. Alternatively, because listing some thirty-odd kinds of prohibited vehicles, as well as twenty plus devices that park authorities *do not* consider to be vehicles, would make for an unwieldy and uncommunicative sign, the council may have concluded that identifying the specific prohibited vehicles on the city's website would be a better division of labor. The strategic nature of legal discourse

[73] MARMOR, *supra* note 5, at 43–44, 48.

[74] Among other differences, an important distinction between conversational and statutory utterances is that emotional, emphatic, or nugatory linguistic content is not especially compatible with any coherent or non-disingenuous model of how written law communicates to its audiences.

therefore casts doubt on the reliability of much implicated content in statutory law.[75]

Some, like Mark Greenberg, have even gone so far as to question whether legislation can even be said to be a form of communication—at least as defined by communication theory. When philosophers of language examine statutes, he argues that the standard account tends to assume that "the goal of statutory interpretation is to figure out what the legislature communicated,"[76] drawing on tools of philosophy of language and understanding legislation as having communicative content.[77] Greenberg instead believes that "enacting a statute is a way of changing *our obligations*, rather than a way of *communicating them*, and moral or other normative considerations determine what difference to our obligations the enactment of a statute makes."[78]

This is in part because the locutionary act is the only speech act that a legislature can be sure of when enacting law. Because the potential audiences of the law are both speculative and likely to exist into the future, the legislature cannot be sure of precisely what the illocutionary force of the act will be, nor the perlocutionary result. Thus, Scott Soames has argued that the purpose of legal texts as speech acts is not to contribute to cooperative communicative exchanges, but to generate *behavior-modifying stipulations*, which must fit relatively smoothly into a complex set of pre-existing stipulations generated by other legal actors in the past.[79]

Nevertheless, the inapplicability of most forms of conversational implicature in legal communication, and the uncertainty as to the illocutionary force and perlocutionary effect of laws does not mean that the speaker-audience framework is wholly inapplicable, nor that the specific context of a law's audience(s) does not, and should not, generate other kinds of interpretive implicatures. If anything, the opposite is true: it's precisely *because* law's audiences are not instantly addressed by the legal utterance that a careful examination of audience is so important for a comprehensive account of legal interpretation. After all, even if we were to understand legal utterances as behavior-modifying stipulations, such stipulations still must function to communicate meaning in the course of bringing about changes in behavior and obligations, and that meaning will still depend on whose behavior is to be modified, and how relevant audiences determine the contours of such modification. In this sense, a legislative body's enactment of a law can still be said to be enacted with the

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[75] *Id.* at 35.

[76] *Id.* at 219.

[77] Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 219 (Andrei Marmor & Scott Soames eds., 2011).

[78] *Id.*

[79] Soames, *supra* note 5, at 232.

purpose of having illocutionary force, insofar as the utterance is made with the *intention* of modifying behavior in some respect, and can also be said to have some perlocutionary effect, insofar as behavior does change as a result of that speech act.[80] It's simply not the case, *contra* conversation communication, that most legal speech acts can be said to be completed at the time of their first utterance (not even a priest's "I pronounce you married," without the proper forms and other preconditions), or that the legal utterers can know much if anything about precisely how their audiences will respond to any utterance of more than de minimis complexity.

And the law already draws on forms of legal implication that are context- and audience-specific. As a baseline matter of interpretation, courts have had a longstanding practice of interpreting words differently depending on the audience of the statute.[81] As I will discuss in Chapter III, these practices are highly inconsistent and undertheorized. And courts not only interpret specific words or phrases differently depending on the audience of the statute, they also impose different rules of construction for the legal consequences of interpretation. The relationship between linguistic *interpretive* rules and substantive *legal* canons invoked by judges demonstrates why.[82] (Throughout, I will adopt William Baude's and Stephen Sachs's helpful distinction between substantive *legal* rules or canons, which judges apply *to* text, and *linguistic* interpretive rules or canons, which govern how judges determine the linguistic meaning *of* text.)

Consider, for example, the rule of lenity, the age-old axiom of federal criminal law that instructs that when there are two rational readings of a criminal statute, courts should choose the harsher one only when Congress "has spoken in clear and definite language."[83] The motivating norm behind construing an ambiguous statute in the manner more favorable to the criminal defendant is that the statute should be expected to give fair notice to its audience, which in the case of the lenity rule, is almost always assumed to be the ordinary citizen.[84] And

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[80] Scott Soames, *What Vagueness and Inconsistency Tell Us About Interpretation*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 43 (Andrei Marmor & Scott Soames eds., 2011).

[81] *E.g.*, Midland Funding L.L.C. v. Johnson, 137 S. Ct. 1407, 1409 (2017) ("[T]o determine whether a statement is misleading normally requires consideration of the legal sophistication of its audience." (citation and internal quotation marks omitted)); Jones v. Meehan, 175 U.S. 1, 11 (1899) (holding that "treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood *by the Indians*" (emphasis added)).

[82] *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1105–09 (2017). Others have employed a similar typology. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 319–36 (5th ed. 2014) (distinguishing between linguistic canons and substantive canons).

[83] McNally v. United States, 483 U.S. 350, 359 (1987).

[84] *See* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 345 (1994).

when courts draw on the lenity rule, they do so not because they seek to actually clarify what Congress *intended* to do, but rather to stipulate what the legal effect of Congress's actions *will be*.

Thus, when judges invoke the lenity rule and interpret the statute narrowly, they are not simply seeking to understand the meaning of the legislature's legal utterance on the basis of the bare semantic content of the utterance alone. Rather, they are deciding whether and how to narrow the possible range of behavior-modifying legal obligations that the statute will be understood to stipulate, and to do so on the basis of the relevant audiences subjected to it. In this sense, they are narrowing range of legally permissible perlocutionary effects attributable to the legislative enactment. The rationale for doing so, therefore, is not that the legislature *intended* for their enactment to have that particular illocutionary force, but rather that other legal and moral considerations warrant limiting what kinds of behavior modifications may be reasonably expected to result from it, and those legal and moral considerations will in part depend on the nature of statute's audience(s). Judges interpret statutory stipulations against a preexisting backdrop of many other legal rules and conditions, to ensure that the interpretive choice fits relatively seamlessly against that backdrop. The contours of that backdrop will, of course, very much depend on the statute's relevant audience(s).[85]

If enacted legal texts are understood as generating behavior-modifying stipulations, and interpretation is the act of fitting strategically vague stipulations into the background of pre-existing obligations and expectations of the relevant legal audiences in question, then a critical task of legal interpretation is to understand *whose* behavior is to be modified, and how the relevant background might influence how those audiences can be expected to conform their conduct to the law. In this sense, while the term "audience" may seem less appropriate than, say, addressee, the term captures the fact that different legal audiences will be subject to different pre-existing stipulations even when the law does not *directly* address them, and that a legal utterance can modify the expected conduct of different legal audiences in ways, even from the same legal utterance. For example, when the law instructs that police officers shall engage in searches and seizures in a particular manner, that stipulation does not literally address the citizens subject to searches and seizures, but citizens are surely an audience of the stipulation, for it will not only alter the behavior and expectations of the officers, but also the behavior and reasonable expectations of citizens.

Thus, a chief reason why I will employ the term audience is that legal utterances can take many forms and communicate in many direct and indirect ways, to different kinds of legal actors who will seek to understand their meanings. And even actors typically thought of as

[85] To my knowledge, courts have never invoked the lenity rule when interpreting criminal statutes directed at more sophisticated audiences, such as corporations or sophisticated tax evaders, presumably on the basis that more sophisticated audiences—and statutes—may not be presumed to give notice on the basis of the bare text alone.

passive listeners may nevertheless influence, and be influenced by, subsequent utterances, through the manner of their reception and interpretation of the law. Laws of broad applicability such as the Constitution may, through a single legal utterance, produce very different kinds of behavior modifications, depending on the different audiences' roles in the extant legal landscape. And if the same legal utterance can generate very different obligations for different audiences, then it necessarily follows that interpreting the meaning of the utterance may vary depending on which audience the law is understood to be addressing, directly or indirectly.

### *1. The Performance Analogy*

To see why the term audience is more appropriate than addressee, listener, reader, hearer, observer, consider the phenomenon of live symphony orchestra performance. The symphony has a variety of audiences who function in these various capacities as readers, listeners, and observers, but they can all be said, in some sense, to be an audience. For instance, the primary reader of a composer's orchestral score is the conductor: she must interpret his notations and instructions about tempo, inflection, and musicality. And just as with a statute, different conductors may interpret the same score very differently, and these interpretations and implementations may change over time as tastes and standards change, and depend on whether the conductor seeks to understand the composer's original intentions for its performance or seeks to adapt it to contemporary styles and instruments.

Yet the orchestra members are themselves *also* a primary audience—of *both* the composer, and the conductor. The composer addresses them through the text: as readers, each musician has their own particular part to play and their own set of written instructions. Yet they are addressed visually, as an observer, by the conductor, whose interpretive cues signal when they should begin to play, when they should stop, how they should manage the tempo, and how they should perform together to produce harmony in unison. In this sense, then, it could be said that both the conductor and the musicians are primary audiences or addressees of the orchestral score, for neither could properly interpret and apply the score musically without the other. While the terms reader, addressee, or observer may in the particular case more accurately describe their specific role, I believe audience best captures the range of interpretive practices.

And indeed, there are several other audiences of the symphony, too, perhaps chiefly, the ticket-holding audience for the symphony itself. In the ordinary sense, it could be said that the term "audience" connotes a sense of passive listening. My view is that while every law may not formally address every member of society, every member of society may have occasion to attribute meaning to it—albeit with varying claims to priority. And even in its most ordinary sense of the term audience, *audiences* do have an active role to play: orchestral performances generate behavior-modifying stipulations for the audience members. The initial hum of tuning instruments signals to the audience when they should take their seats

and become quiet, the cessation of music indicates when they should applaud, and so on. And this is true for other audiences too: the conductor's actions, and the orchestra's responses, will trigger behavioral change from the ushers (who will open and close the doors at signaled moments), and the stage managers (who will dim and brighten the lights at the signaled moments), among others.

In certain circumstances, moreover, the audience does participate in the performance itself: in Handel's *Messiah*, for example, it is traditional for the audience to rise and participate in the Hallelujah chorus. The composer's score, then, generates a chain reaction of various forms of direct and indirect utterances from distinctive audiences, who will in turn react not only to the initial speaker's utterance, but those of the other audiences as well. Thus, the conception of audience helps to capture the ways that a single stipulation may produce in different actors a variety of different responses to the single utterance, and to each other's responses. The initial score-as-utterance can be understood to communicate both directly to specific addressees and indirectly via the utterances those addressees, in turn, produce:

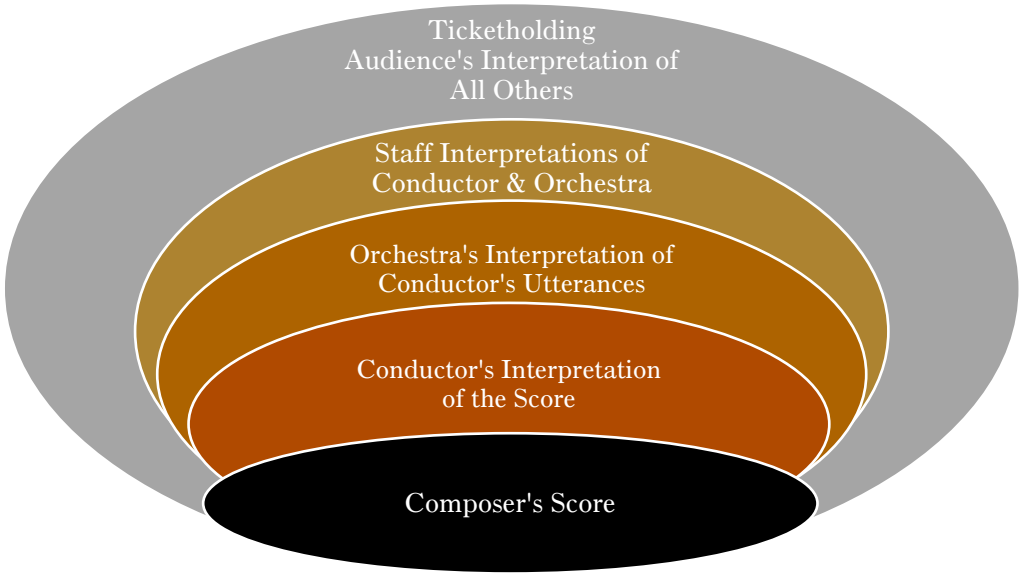


*Figure 1: Symphonic Audiences*

In similar fashion, legal utterances can function to communicate directly to particular audiences who are expected to generate legal utterances in response, and *also* indirectly to broader audiences whose behavior may be modified both by the initial legal utterance and the legal utterances produced by it. In addition, while audiences are often thought to be passive, even the act of responding to the utterance can alter subsequent utterances: for example, thunderous audience applause may generate a spontaneous encore performance, just as a strongly negative one may cause the performers to abscond from the stage.

Thus, my use of the term audience is intended to convey the broad range of individuals and institutions who ultimately react to, and respond to, the law. Used this way, the term can capture many kinds of legal interpreters: everyone from the non-drafting ratifiers of constitutions and non-drafting legislators of statutes; to the branches of government that must enforce and interpret the law; to the everyday government officials who put laws into action; to the states, the people, and their lawyers. (I will discuss these various audiences in more detail in Chapters I and III.)

The concept of audience is also important because legal documents can themselves *create* particular audiences in the first instance. That is precisely what is meant by the term "constitution"—to set out not only the rule of recognition for the legal system, but also to constitute the actors within that system (and the system itself), and the particular legal roles and responsibilities different actors may have. As a written legal utterance, the U.S. Constitution establishes who may make the laws (in Article I), who may execute them (in Article II), who may interpret them with authority (in Article III), and the legal relationships among the states as members of the union, as well as the relationship between the federal government and the states (Article IV).

In other ways, the Constitution functions as a prototypical form of a standard legal utterance, insofar as it is a written legal document that has the force of law and that directly addresses particular audiences, tasking them with unique mandates. Portions of the Constitution provide hortatory instructions to Congress ("Each House shall keep a journal of its proceedings"),[86] to the President ("[H]e shall take care that the laws be faithfully executed"),[87] and to the Courts ("The trial of all crimes, except in cases of impeachment, shall be by jury").[88] These instructions function as commands very much in the model of John Austin's command theory of law.[89]

And just as the various audiences of a musical performance may respond to the conductor's initial utterance—and the subsequent utterances they produce—in different ways, so too do different legal audiences engage in the interpretation of legal utterances differently. In Chapters I and III, I will develop this typology in greater detail, but it is worth briefly reciting the distinctive kinds of audiences who may engage in the interpretation and application of law, and the variety of contexts in which they do it.

For one, these include *official interpreters*, which are tasked with implementing general legal commands with specificity, such as administrative agencies that are given intelligible principles from which to develop specific legal rules and regulations through informal or

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[86] U.S. CONST. Art. I sec. 5.

[87] U.S. CONST. Art. II sec. 3.

[88] U.S. CONST. Art. III sec. 2.

[89] *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832).

formal rulemaking, or the Attorney General, when he or she issues, usually via the Office of Legal Counsel, guidance documents or memoranda that put forward interpretations of law that are treated as authoritative both for lower government lawyers and for the purposes of judicial review under the Administrative Procedure Act. Importantly, while the law designates such audiences as "official" interpreters of law, when their interpretations of law contradict judicial interpretations, the judicial interpretation will prevail.

But there are many other kinds of legal audiences whose interpretations of legal utterances have significance. Street-level, *bureaucratic interpreters*—government officials tasked with applying the law to individualized facts and circumstances—are, as a practical matter, perhaps the largest producers of first-order interpretations, on a volume basis. These officer-interpreters include a law enforcement officer conducting an arrest for a perceived violation of law; an administrative law judge deciding whether an applicant is eligible for disability benefits; or a prosecutor deciding whether to charge a given defendant with a violation of a particular offense of law. What these kinds of legal audiences share in common is that they engage with legal interpretation in a specific and applied context, rather than in the course of developing *a priori* rules or policies of broad applicability that will subsequently be applied to a range of social conduct, as when an administrative agency interprets a statute in the course of informal rulemaking under notice and comment, or when the Attorney General issues a memorandum of law that applies to all federal prosecutors.

Another kind of legal audience is what I call *influential interpreters* of law. Influential interpreters manifest in many different ways. At the most basic level, they might range from a firearms dealer who explains registration and carry requirements to a customer, to a contractor who ensures a homeowner's remodel is done in compliance with local building codes, to an accountant who guides her client in reporting requirements under the tax code. But such interpreters also include industry groups such as the Chamber of Commerce and unions, interest groups like AARP and the NRA, and bar, medical, and police officers' associations, all of which educate their members about statutory rules and rights relevant to them,[90] as well as advocate on their behalf when interpretive confusion arises. Influential interpreters also include employers, who have obligations to inform their employees about their legal rights and duties, and therefore serve as critical transmitters of legal knowledge.[91]

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[90] Many industry associations regularly update their members as to changes in the interpretation of laws relevant to them. *E.g.*, RESOURCES, CALIFORNIA PEACE OFFICERS' ASSOCIATION, https://cpoa.org/resources/ (last visited Aug. 9, 2018) (providing "client alerts" and "legal updates" to alert members of developments in the law relevant to their positions).

[91] For example, both federal and state laws require employers to provide notice of specific rights to their employees in the form of approved posters to be placed in conspicuous locations within the workplace, but most such notices are themselves provided to employers by third-party influential interpreters. Orly Lobel, *Enforceability TBD: From Status to Contract in Intellectual Property Law*, 96 B.U. L. REV. 869, 891–92 (2016).

These influential interpreters assist in what socio-legal scholars call "legal readings"—the practical, everyday signals and rules citizens internalize to understand what the law means and requires.[92]

And, at a very basic level, the citizen is a very general *ordinary interpreter* for most statutes, as well as the Constitution. The Bill of Rights, which sets out various rights to the people, constitutes a series of legal utterances that communicate to the people what they can expect of their lawmakers ("Congress shall make no law respecting an establishment of religion"),[93] what they can demand from government officers ("no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized"),[94] and even defines, at least negatively, the conditions under which they may participate in the selection of lawmakers themselves (the Fifteenth, Nineteenth, Twenty-Fourth and Twenty-Sixth Amendments, which describe various prohibitions on the denial of the right to vote).

The term audience is also helpful insofar as it can capture how even those who have been denied juridical personhood under the law can nevertheless be meaningful audiences of legal utterances who produce interpretive meanings of these utterances that have non-legal significance. For example, the original U.S. Constitution of 1789 might be said to have precluded African-Americans (at a minimum, at least, in the southern states) from being juridically recognized audiences of the document *at all*, insofar as they were deprived of standing to bring claims in court. (Juridical personhood in state courts depended on each state's Constitution, though many, like Virginia's, were interpreted such that the rights and privileges they guaranteed were not addressed to blacks.)[95] Because federal citizenship was denied to African-Americans until the 1860s, for the nation's first seven decades, as infamously declared by the Supreme Court in the anticanonical[96] case of *Dred Scott v. Sandford*,[97] African-Americans were not considered U.S. citizens under the Constitution.[98]

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[92] Sally Riggs Fuller, Lauren B. Edelman & Sharon F. Matusik, *Legal Readings: Employee Interpretation and Mobilization of Law*, 25 ACAD. MGMT. REV. 200, 201–02 (2000).

[93] U.S. CONST. amend. I.

[94] U.S. CONST. amend. IV

[95] *See* Aldridge v. Com., 4 Va. 447, 449 (Va. Gen. Ct. 1824) ("Can it be doubted, that it not only was not intended to apply to our slave population, but that the free blacks and mulattoes were also not comprehended in it? The leading and most prominent feature in that paper, is the equality of civil rights and liberty. And yet, nobody has ever questioned the power of the Legislature, to deny to free blacks and mulattoes, one of the first privileges of a citizen; that of voting at elections, although they might in every particular, except color, be in precisely the same condition as those qualified to vote.").

[96] Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

[97] 60 U.S. (19 How.) 393 (1857).

[98] *Dred Scott v. Sandford*, 60 U.S. 393, 404, 405 (1857) ("[T]they are not included, and were not intended to

And because African-Americans were not citizens, they could not establish the diversity of citizenship necessary to sue in federal courts, which meant they lacked the capacity to make legal claims altogether.[99]

Yet even if the law deprived them of having any *legally* relevant role in interpreting and constructing its meaning, they were still an audience of the document, capable of producing meaning and important interpretations of it. Thus, when Frederick Douglass pointedly highlighted in his famous Fifth of July speech that "This Fourth July is *yours*, not *mine*,"[100] his point was that what the Constitution and the Fourth of July communicated to slaves was *not* what it communicated to free white people. But the Constitution communicated something to him all the same, and he, in turn, offered an interpretation of it, in a complex process of "generic subversion and reconstitution."[101] In arguing that "interpreted, as it *ought* to be interpreted, the Constitution is a GLORIOUS LIBERTY DOCUMENT,"[102] Douglass was engaged in interpretation as an audience of the Constitution—however indirectly it might be said to have addressed him—and his interpretation of this document was arguably more important than nearly any other mid-nineteenth-century American, contributing to the literal and imagined transformation of the Constitution's meaning even as he lacked formal legal standing to assert such an interpretation in a court.

The term audience, then, captures the wide array of readers, listeners, and addressees of a legal utterance, as well as the significance that these different actors have in producing and shaping the behavior-modifying effects of that utterance.

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be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.")

[99] *Id.* at 406. They were also denied juridical personhood in many states prior to Reconstruction as well. *See generally* DYLAN C. PENNINGROTH, THE CLAIMS OF KINFOLK: AFRICAN AMERICAN PROPERTY AND COMMUNITY IN THE NINETEENTH-CENTURY SOUTH ch. 4 (2003) (describing advent of juridical rights for African-Americans in state courts after the Civil War).

[100] FREDERICK DOUGLASS, ORATION, DELIVERED IN CORINTHIAN HALL, ROCHESTER, JULY 5TH, 1852 15 (Rochester, NY: Lee, Mann & Co.).

[101] Robert E. Terrill, *Irony, Silence, and Time: Frederick Douglass on the Fifth of July*, 89 QUART. J. OF SPEECH 216, 219 (2003).

[102] DOUGLASS, *supra* note 100, at 36.

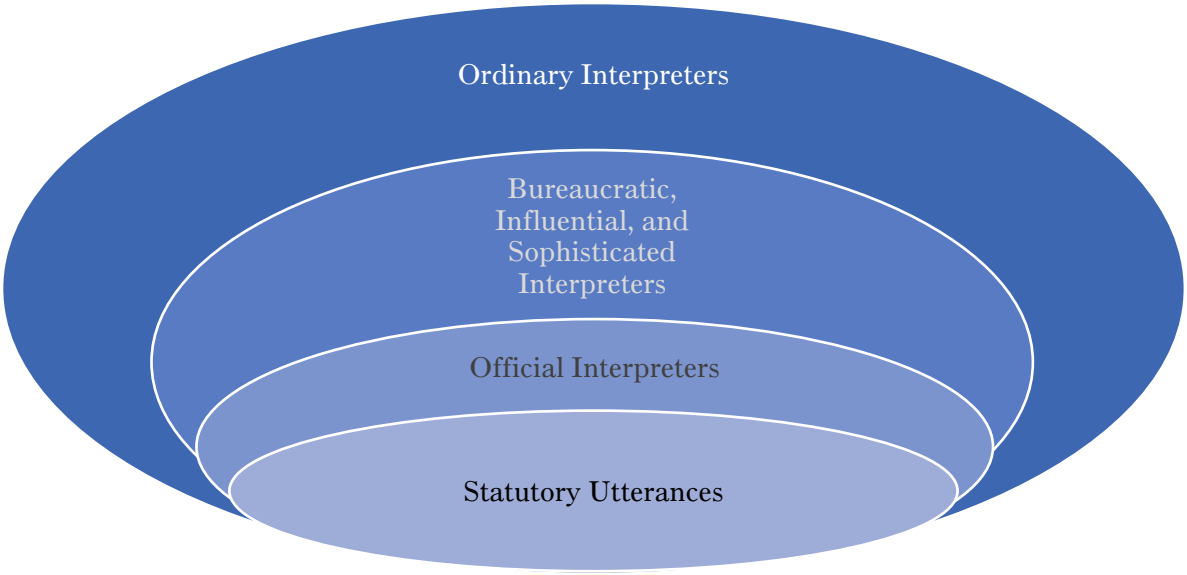


*Figure 2: Legal Audiences*

## II. First-Order and Second-Order Audiences and Interpretations

The concept of audience is also a useful referent, because it recognizes that the law's audiences can also be the audiences of judicial opinions and decisions, and the audience of these opinions is often far wider than just the parties in the dispute at hand. Thus, in addition to the concept of audience, in the next sections I will develop the concepts of "first-order" and "second-order" interpretation, and first-order and second-order audiences, as useful terms to identify specific features and conditions of interpretations made by judicial and non-judicial legal audiences.[103]

### *A. First-Order Interpretation*

As I will use the term, a first-order legal audience or interpreter is anyone who engages in

[103] My use of the terms "first-order" and "second-order" to conceptualize acts of statutory interpretation is broadly homologous to the use of those distinctions in legal philosophy, *see, e.g.*, H.L.A. Hart, The Concept of Law 98 (2d ed. 1994) (distinguishing between primary rules of obligation for citizens and secondary rules of recognition, change, and adjudication that determine the primary rules); Joseph Raz, The Authority of Law 16–17 (1983) (defining a first-order reason as a reason to act and a second-order reason as a reason to act for a reason), moral philosophy, *see, e.g.*, J.L. Mackie, Ethics: Inventing Right and Wrong 16 (1991) (defining a first-order moral view as a particular moral view about something being good or bad and a second-order moral view as a view about the status of moral values altogether), and in institutional design theory, *see, e.g.*, Heather K. Gerken, *Second-Order Diversity*, 118 Harv. L. Rev. 1099, 1102 (2005) (defining first-order diversity as decisionmaking bodies mirroring the statistical makeup of their underlying populations and second-order diversity as diversity among decisionmaking bodies). However, as explained below, the particular normative implications of the distinction play out differently for statutory interpretation than in those fields.

the process of attributing meaning to a legal stipulation, with a particular focus on those who seek to alter their behavior on the basis of the meaning they associate with the legal stipulation in question. This conception captures a range of interpretive practices, from notice and comment rulemaking by administrative agencies; to a police officer stopping a citizen for a perceived violation of the law; to a citizen deciding whether the city code permits them to park on a particular street at a particular time; to a corporate tax attorney determining how to calculate the tax treatment of a particular corporate transaction; and even a member of a legislative body who did not herself draft a bill pending a full house vote and who must understand what it means in order to decide whether to vote to enact it.

Several aspects of first-order interpretation are especially salient from the standpoint of the relationship between judicial and nonjudicial interpretations of law. *Temporally*, first-order interpretation takes place prior to judicial adjudication, which means that the act of interpretation takes place in the absence of official guidance from courts. *Legally*, first-order interpretations are speculative guesses about the meaning of law, insofar as they are susceptible to being subsequently overturned by judges, and therefore function more as assertions of legal meaning, rather than legal stipulations themselves. Indeed, even the first-order interpretations put forward by administrative agencies are not truly legally *binding*. Nevertheless, many first-order interpretations from official interpreters tend to function as the de facto final word on the matter; for a range of practical, doctrinal, and prudential reasons discussed in Chapter III, many authoritative first-order interpretations will function as if they are the law, especially if they are never challenged in court.

It is also worth noting the hermeneutic posture of most first-order interpreters. Many acts of first-order interpretation involve interpretive *actions*, not just interpretive *beliefs*. For example, if an officer believes a citizen's conduct is in violation of the law, she has two choices: arrest the citizen, or let him go. This means that questions of law and fact can often be entangled, and the moment of the interpretive act can be nearly instantaneous, so conditions for deliberation may be minimal. The officer may be uncertain about both the factual nature of the citizen's conduct, and also about whether that conduct, if understood correctly, violates the law.

Finally, the resources and interpretive conditions under which first-order audiences interpret the law may be very different than those of courts sitting as second-order interpreters. One reason courts often defer to the executive branch concerning questions of national security is the presumption that the executive branch has classified knowledge and a broader understanding of the security concerns than can any court in a given, individual case. As I will discuss in Chapter I, for this reason, courts will often defer to first-order interpretations made by legal audiences who are presumed to be drawing on resources unavailable to, or unavailing for, courts.

### *B. Second-Order Interpretation*

In contrast to the temporary and contingent nature of first-order interpretation, when judges authoritatively decide legal questions, they act as "second-order" interpreters. Whereas first-order interpretation is an act any member of society can engage in, acts of second-order interpretation are reserved for judges.[104] When a disagreement about the meaning of law between two or more first-order interpreters reaches a court, judges are called upon to adjudicate between the two (or more) competing assertions about the law's meaning. Indeed, before a question of law ever comes before a court, there *must* first be at least two competing and unresolved first-order interpretations of the legal stipulation in question—the case or controversy requirement in American law means that cases come before a judge only once parties are in disagreement about legal meaning. This also means that when different legal audiences disagree about what the law means, they must decide whether and how to elevate the dispute to one warranting judicial intervention.

Several important aspects of judicial interpretations function to make them "second-order" interpretations of law. First, judges often decide between competing first-order interpretations brought before them (and sometimes reject *both* proffered interpretations); in this sense, judges adjudicate in a disinterested fashion between competing motivated propositions about what the law means. Second, judicial interpretations are "second-order" interpretations of law because they are generally conclusive as to the particular question at hand (*i.e.*, no other legal interpreters, apart from higher courts, can override them). By contrast, even the official interpretations of administrative agencies acting in an adjudicative capacity are still first-order interpretations insofar as they are subject to subsequent review by Article III courts.

Third, and most significant for my questions about the role of nonjudicial audience in legal interpretation, judicial decisions have the capacity to have downstream effects for other future interpretive questions, in the form of *methodological* stare decisis. This is because when courts act as second-order interpreters, they not only resolve disputes between first-order interpreters, but in so doing, they provide reasons, rationales, and methodological rules of interpretation that, at least in theory, should guide the resolution not only of the case at hand, but of future interpretive ambiguities of a similar kind.[105] These downstream effects

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[104] Or those who act in a quasi-judicial, adjudicative capacity. This means, in limited circumstances, that administrative agency adjudicators can function as quasi-second order interpreters. That the agency itself is one of the first-order audiences of law is indicative of the reason that many question the legitimacy of agency adjudications involving disputes between agency regulators and regulated parties.

[105] From a rule-of-law perspective, the choice to favor certain interpretive methods over others constitutes at least a weak kind of methodological stare decisis, which at in its extreme form will mandate that statutes be interpreted according to particular methodological approaches. *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750,

have very important consequences for how the law's audiences may subsequently seek to interpret law—or at the very least be expected to do so—but such consequences have generally tended to be overlooked by the theories of legal interpretation.

In certain circumstances, judges can also act as *both* first- and second-order interpreters, particularly trial judges who confront questions about exercises of discretion reserved only for judges. In these circumstances, the first audience of the law is not the parties, but the judge herself. As I will discuss in Chapter III, judges can act as first-order interpreters when the law directs action to them, and them alone, such as when they are asked to decide in their discretion whether to shift attorney's fees to the prevailing party at the resolution of a lawsuit. In these circumstances, they act as both first- and second-order interpreters, because they are both the first *and* last audience whose behavior is modified by the legal stipulation in question.

## III. COURTS AND THE AUDIENCES OF LAW: LEGAL INTERPRETATION AS CONVERSATION, COORDINATION, AND CONFRONTATION

Having established the distinction between first-order and second-order audiences, I want to briefly note several core tensions in the doctrines of American judicial interpretation that the chapters of this dissertation will explore. First, when judges sit as second-order interpreters of law, they often employ doctrines that recognize and elevate the significance of certain first-order interpretations of law, specifically because of the nature of the particular legal audience asserting that interpretation. In essence, these doctrines instruct that courts defer to, privilege, or reject particular first-order interpretations of law over their own, precisely because of who the audience is that asserts that interpretation. Thus, for example, when judges defer to administrative agency interpretations of law; when they prioritize evidence of legislative intent over the plain text of the statute; or when they decline to interpret the Constitution because doing so raises a "political question" best left to the political branches, judges are crediting another legal audience's first-order interpretation over their own preferred interpretation.

The next several chapters, in part, seek to interrogate the reasons *why* judges do this, and to critically examine *how* they do it, both methodologically and doctrinally. One advantage to approaching doctrinal legal questions from the standpoint of audience is that it helps to reveal how the assumptions judges make about concepts like "ambiguity," "clarity," "notice," and "reasonableness," and "vagueness" depend, crucially, on who the posited audience interpreting the law is. Thus, I am interested in thinking about the methodology judges

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1822 (2010); *see also* Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1867 (2008). *But see* Evan J. Criddle & Glen Stazewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573, 1574 (2014) (arguing against the employment of methodological stare decisis).

employ in positing assertions about how *others* understand the law. Despite the significance of the relationship between first-order interpreters and judicial second-order interpretation, leading interpretive approaches such as textualism and purposivism often neglect to raise directly questions of audience intelligibility and interpretive predictability.

Understanding questions of audience in terms of interpretation also reveals the ways in which doctrines of judicial interpretation often involve decisions about when to credit certain interpreters' views of the law over others', precisely because of the particular first-order audience's interpretive *role*, not necessarily their interpretive *reasons*. Thus, when the Court reviewed the legality of the Trump Administration's travel ban in *Trump v. Hawaii*, the Chief Justice, writing for a majority of the Court, deferred to the Administration's claims about the national security necessity of the travel ban, expressly stating that the relevant legal scheme "*exudes* deference to the President in every clause" such that "a searching inquiry into the persuasiveness of the President's justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere."[106] In other words, exercises in judicial deference to certain privileged first-order interpretations of law are sometimes premised almost entirely on the basis of the first-order *audience*, not the persuasiveness of that audience's *interpretation* (per se). And, indeed, there are many circumstances where judges decline to fully exercise their second-order interpretive function by definitively resolving, on the merits, the *correct* interpretation of law. Any time judges defer to the executive branch *because* it is the executive branch, to a police officer's reasonable understanding of the law *because* he was a police officer, or an agency's interpretation of a statute because the *agency* put forward that interpretation, the judges are deciding on the basis of first-order *interpreters*, not first-order interpretations.

This dissertation also examines a related problem: certain interpretive methods are more appropriate for one kind of legal audience than another, and certain methods tend to preference one legal audience at the expense of another. For example, when judges credit difficult-to-access sources like legislative history, the effect is to prioritize sophisticated legal audiences at the expense of lay audiences, who might not easily access those resources when seeking to interpret a statute's meaning. Thus, a core argument that runs throughout this project is that by prioritizing particular interpretive methods or canons, courts necessarily implicitly privilege certain audience's capacity to engage with and assert meaning about the law—and possibly at the expense of other audiences' capacity to do so. Providing an account of the normative relationship between interpretive methods and legal audiences should be a fundamental task for any theory of interpretation that seeks to enhance rule of law norms such as accessibility, notice, and predictability.

My inquiry then, is descriptive as well as normative: to examine both *how* judges decide

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[106] *Trump v. Hawaii*, 138 S. Ct. 2392, 2408, 2409 (2018) (emphasis added).

when to credit the interpretations or legal meanings of particular first-order audiences, and question *when* judges should, or should not, determine legal meaning on the basis of the nature of first-order *interpretations*, the nature of first-order *interpreters*, and/or on the nature of first-order interpretive *methods*.

Having said this, in the following chapters, I will focus on three aspects of the relationship between questions of judicial interpretation and law's other audiences. Each of these three dynamics highlights aspects of the relationships between judicial interpreters and others who must engage in legal interpretation. Instead of approaching these questions from a single fixed paradigm used to assess all modes of legal interpretation, I instead try approach each of these concepts in legal interpretation somewhat differently. For the dynamic of interpretation as conversation in Chapter I, I focus on the communicative and expressive aspects of law and legal interpretation, examining how different actors and audiences participate in conversations around the development of law and legal meaning. For Chapter II's examination of interpretation as confrontation, I attend to more politically grounded confrontations among the federal branches in asserting and contesting meaning about the Constitution. Finally, for the dynamics of interpretation as coordination in Chapter III, I assess the technical and epistemological aspects of legal meaning, focusing on *how* one comes to determine what the law means, and the audience- and context-dependent resources that best deployed to do so. Thus, each chapter's tone and style is to some degree self-consciously reflective of the nature of the dynamic it seeks to describe.

*1. Chapter I: Interpretation as Conversation*

In Chapter I, I examine the place of nonjudicial legal audiences as participants in conversation about what the law means and should mean. I focus on the evolutionary role of audience across traditional common-law, statutory, and constitutional theories of interpretation. A largely unnoticed feature of developments in American law over the past century has been the declining role for nonjudicial audiences in the interpretation of law. Early American methods of judicial interpretation, largely based in common-law reasoning, invited (or at least considered) the relevance of law's audiences in debates about legal meaning, for these discussions often centered on concepts of reasonable beliefs, expectations, and actions, considerations accessible to all manner of legal audiences. Moreover, the common-law approach was community-centered, recognizing the legal rules were evolutionary of the legal communities from which they sprang. Over the course of the twentieth-century, however, statute law has come to replace much of the common law, placing common-law courts in the uncomfortable position of declaring the law made by others—legislators. Judicial anxiety about legislative supremacy meant that judges increasingly focused questions about interpretation not on the relationship between law and its audiences, but on the relationship between law and its judges. That conversation has tended to focus on aspects of interpretation that are less relevant for first-order interpreters,

and it often overlooks whether the methods of interpretation are ones that tend to invite nonjudicial audiences as first-order interpreters to participate in conversations about the desirability and meaning of the law.

This tendency is also reflected in the most prominent emergent method of constitutional interpretation in the last several decades: originalism. Because originalism looks to history to discover the original intent of the framers or the original meaning of their enacted text, as a method of interpretation it is primarily archaeological. As even its adherents admit, at times the work of "doing originalism" is work more suited to historians than lawyers or judges. In this sense, while originalism has been oft-criticized for prioritizing the dead hand of the past over the authority of the living, my argument in this chapter is that originalism has an even more pernicious effect. It prioritizes the dead *ear* of the past, and the only first-order audiences who matter are those who would have sought to understand the meaning of the Constitution at the time of its enactment. When methods of interpretation are examined on the basis of whether and how they promote constitutional conversation between courts and the Constitution's other audiences—especially citizens—the archaeological features of originalism raise urgent problems not just for the outcome of law, buts its justification. If originalist approaches to interpretation tend to exclude most members of the general popular audience from the conversation, legal interpretation can be assessed only on the basis of the personal desirability of the outcomes produced, rather than the basis of the legitimacy of its methods.

*2. Chapter II: Interpretation as Confrontation*

Chapter II examines the question of whom the Constitution addresses, and how to think about provisions in the Constitution that address multiple branches of government, with overlapping and potentially conflicting mandates. I focus on a particularly ambiguous clause of the Constitution: the Republican Guarantee Clause of Article IV, section 4, which provides that "The United States shall guarantee to every State in this Union a Republican Form of Government."[107] Although many commentators have focused on the meaning of a "republican form of government," and recent scholarship has examined the meaning of a "guarantee," the meaning of the *subject* of the Clause—"The United States"—has been less thoroughly examined. This despite the fact it is the only instance in which "The United States" appears as the nominative subject of a clause in the Constitution. This chapter examines precisely what it would mean for each of the three branches of government, as well as the States, to act as a guarantor of republican governance, a particularly timely constitutional question given that many state governments have begun to aggressively alter state political processes and to impose new restrictions on voting access, provoking renewed calls for federal protections to guarantee fairness in state political processes.

[107] U.S. CONST. art. IV, § 4.

Reexamining both case law and historical archives of non-judicial interpretations of the Clause, I argue that the logic, location, and history of the Clause suggest that the Clause empowers primarily Congress to act as the guarantor. Though often overlooked, the Clause's most prominent constitutional moments have occurred not in courtrooms, but in the halls of Congress. The Clause was central to mid-nineteenth century debates about voter enfranchisement in the states, and it played a pivotal role in providing the constitutional basis for Reconstruction in the southern states after the Civil War. The Clause also served as the constitutional basis for the congressional actions that paved the way for ratification of the Fourteenth and Fifteenth Amendments in the southern states. Subsequently, precisely because the enforcement clauses of the Reconstruction Amendments have served as a more straightforward textual basis for modern federal legislation furthering political participation and republican governance in the States, such as the Voting Rights Act, the Clause largely fell into quiet desuetude during the latter part of the twentieth century.

Examining the potential for Congress to act under the Republican Guarantee Clause has new urgency in the wake of *Shelby County, Ala v. Holder*[108] and other recent cases in which the Supreme Court struck down federal legislation as going beyond Congress's Reconstruction Amendment enforcement clause powers, as well as the Court's recent decision in *Rucho v. Common Cause*, which held that challenges to partisan gerrymandering are nonjusticiable by courts. These cases raise inherent tensions in understanding how the Constitution addresses both Congress and the courts protectors of citizens' voting rights, for on the one hand, the Court has suggested in *Rucho* that courts have no role to play in resolving certain questions, while in *Shelby County* it has not only played a role, but one which usurped *Congress's* traditional role in this area.

Thus, this chapter assesses how different constitutional audiences may interpret the Republican Guarantee Clause, and how they may respond to other actors' actions and interpretations under it. In particular, I examine what role the Republican Guarantee Clause might play as an alternative source for Congress to enact federal legislation to protect political processes in the states, and question whether the contemporary Supreme Court might second-guess Congress's determinations as to the Clause's meaning. It is arguable that the Clause grants the courts and the political branches different guarantor powers, with independent and complementary bases to guarantee republican governance. In this way, the Constitution can speak to different audiences who may reasonably understand and apply the same legal utterance in different ways. Yet it also possible that the Court could confront Congress and seek to assert its own interpretation of the Clause which might preclude Congress from acting independently under the Clause, which puts this Clause in the position of being an active and potentially important source of constitutional confrontation in the coming years.

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[108] 570 U.S. 529 (2013).

*3. Chapter III: Interpretation as Coordination*

Finally, in Chapter III, I turn to examining the conditions and circumstances of first-order interpreters as audience seeking to coordinate and comply with statutory legal rules. I frame the questions in this chapter around the concept of coordination, because in contrast to constitutional law, for statutory laws it is generally more accepted that the judiciary is the ultimate authority with regard to the resolution of questions about statutory meaning. Nevertheless, because most statutory interpretation problems cannot be resolved by courts, judicial rules of interpretation necessarily serve as grammars that guide how other interpreters of statutes ascertain their meaning. In this sense, judicial rules of interpretation serve a coordinative role in assisting first-order interpreters in deciding how to apply statutes to practical, everyday circumstances. Although a maxim of statutory drafting is to draft text in light of the statute's intended audience, conventional theories of statutory interpretation often overlook considerations of statutory audience when assessing appropriate canons, rules, and methods for interpreting that text. If judicial rules of statutory interpretation are difficult to apply, or the selection of the dispositive method of interpretation is hard to predict, then first-order statutory audiences may struggle to conform their conduct to the statute. This chapter seeks to provide an account of the relationship between statutory interpretation methodology and statutory audience as one that hinges on effective coordination.

The chapter's ambit is both jurisprudential and doctrinal. Jurisprudentially, it questions the prevailing assumption that all interpretive approaches are equally suitable for all statutory audiences and statutory texts. Doctrinally, it re-examines prominent statutory interpretation doctrines in administrative, criminal, and public law from the standpoint of audience. I identify the subtle ways in which courts already implicitly, if inconsistently, seem influenced by statutory audience considerations in their selection and prioritization of interpretive methods and sources. Such inconsistency often results in judicial statutory interpretation methodologies that undermine the stated rationale for substantive legal canons such as the rule of lenity, the plain meaning rule, and administrative deference. Moreover, because most statutes have multiple and distinct audiences, many canonical statutory interpretation debates that typically register as disputes about *method* can also be understood as disagreements about *audience* and the congruence between a given method and the posited audience. I argue that explicitly addressing audience considerations would help to clarify the normative stakes of statutory interpretation; enhance core rule-of-law values like notice, clarity, and predictability; and provide a flexible yet principled compromise between the choice of methods preferred by textualists and purposivists. Most importantly, doing so would also enhance the capacity for law to lead to effective coordination among the law's audiences.

# CHAPTER I: INTERPRETATION AS CONVERSATION



## INTRODUCTION

This chapter undertakes two related inquiries. The first is to trace the genealogy of several trends and developments in American interpretive jurisprudence. Each of them on their own, and all of them together, have functioned to diminish the role that nonjudicial audiences, and specifically the public at large, play not only the development of American law and jurisprudence, but also in participating in deliberative debate and conversation about the interpretation of law itself. To capture this transformation, I examine twentieth-century developments in American jurisprudence and legal interpretation from the standpoint of the role that the law provides for nonofficial legal audiences in interpreting and applying the law.

The paradigm through which I will approach questions of legal interpretation is as an ongoing conversation among law's relevant audiences, which primarily involves judges and other legal officials, but also must include, at a very basic level, the *nonofficial* audiences of law as well, and in particular citizens. Because judicial reasoning is the process by which

generalized legal rights and obligations are applied to particular circumstances, the methods, rules, and reasons judges deem appropriate to interpret the law function as a kind of grammar by which the law communicates meaning to those who must understand the law in order to alter their behavior accordingly. One tension this chapter raises is that the legitimacy of the legal system depends on its subjects having some capacity to understand how the legal system, and in particular, the reasons why certain arguments about law are *good* arguments, and therefore form the basis for the content of law. When courts rely on methods and sources of legal reasoning that tend to evade review by the law's broader audiences, legal decisions cannot easily be evaluated according to internal criteria for the validity of law. What is left is to assess legal outcomes according to their *desirability*, rather than their legal soundness. That, in turns, threatens the legitimacy of law, insofar as legal interpretation seems responsive not to the concerns of society, but to the concerns of judges.

The tendency for judges to overlook how other legal audiences must be able to engage with the law is also problematic because, as I will discuss in greater detail in Chapter III, legal conversations are ones in which nonofficial audiences of law—in addition to lawyers and judges—*must* participate. An efficient and effective legal system requires coordination among its participants, and for that to transpire, much interpretation and construction of law must take place outside of courts, and without judicial involvement. Moreover, the case or controversy requirement in American law means that even *judicial* declarations about common-law, statutory, and constitutional rules must develop through an iterative discourse among competing first- and second-order interpretations of law.

In this chapter, I will argue that contemporary debates in legal, statutory, and constitutional interpretation in recent decades have had an increasing tendency to overlook considerations of nonjudicial audiences, and in particular how non-legal audiences are expected to be able to engage in legal interpretation. The decline of the common-law lawmaking—a method which I will contend was more audience-oriented (and audience-friendly)—and the rise of statute law as the dominant form of lawmaking, has resulted in transformations in the interpretive project of American common-law judges. Whereas judges interpreting the common law often drew on norms of reasonableness and feasibility—principles that were inherently tied to the relevant audiences of the legal issue in question—judges interpreting statutes today tend to be motivated by legal norms of deference to legislatures and to the historical discovery of original intentions and understandings of law. This transformation is true not only of statutory interpretation theories like textualism, but also constitutional interpretation theories like originalism.

These interpretive theories can be said to be responsive more to the concerns of judges than the needs of other legal audiences. Of course, this interpretive transformation is somewhat understandable and justifiable. Laws enacted by democratically-accountable legislatures can be said to represent indirectly the will of the people. Given this, there are inherent tensions in a system of legislative supremacy where common-law judges are left to

declare what the law is and what it means–and to have precedential effect when doing so. This is a striking contrast from most civil law systems, where the judicial interpretation of statutes often has no precedential effect on how the statute may apply to future parties.[1] Moreover, many countries' legal systems provide avenues for judges (and other legal audiences) to seek advisory opinions from the legislature itself, obviating the need for judges to claim to know what the legislature was doing when it the enacted law. By contrast, the American common-law system gives much more weight to the interpretations of unelected judges, whose interpretations effectively shape, alter, and even trump the actions of elected lawmakers.

However well intentioned, I will argue that the effect of this interpretive transformation in American legal methods has been to weaken the legitimacy of the law as an institution, insofar as ordinary audiences of law are no longer presumed to participate fully in jurisprudential conversations about the meaning and application of law, and are often barely capable of doing so anyway. This is a striking contrast from the traditional common-law case method of legal rulemaking, where concerns about the capacities of nonjudicial audiences to comply with, and conform behavior to, the law were central to legal interpretation and construction. That approach to interpretation was iterative and dynamic, drawing on observed community practices and behaviors. The common law method was, at its core, "*practical*, because it [wa]s a matter of whether the rule [wa]s 'taken up', practiced, and used (by its subjects and by officials who must assess their actions in light of the law."[2]

In surveying common-law methods of legal interpretation, I will suggest that the common-law approach often kept audience concerns firmly rooted at the center of its interpretive methodology, by focusing many legal questions on the determinations about the appropriate actions of the legal "reasonable man," where reasonableness was context-specific and context-dependent—if sometimes problematic in its own right. (For one thing, it was always a reasonable *man*.[3]) Nevertheless, the common-law method recognized that any legal rule to be announced for the first time needed to be both plausibly related to *current* practices but also justified as being likely to improve *future* ones. Because this method was somewhat inherently sociological in nature, it was sensitive to the concerns of first-order legal audiences, who would be expected to conform their behavior to legal rules announced by judges. And because that method of legal interpretation assessed competing first-order applications of law

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[1] *See* JANE C. GINSBURG, LEGAL METHODS 67–70 (4th ed. 2014).

[2] Gerald J. Postema, *Classical Common Law Jurisprudence (Part I)*, 2 OXFORD U. COMMONW. L.J. 155, 174–75 (2002) (emphasis added).

[3] A. HERBERT, MISLEADING CASES IN THE COMMON LAW 10 (4th ed. 1928) ("[I]n all mass of authorities which [bear] upon this branch of the law there is no single mention of a reasonable woman."), *quoted in* Ronald K. L. Collins, *Language, History and the Legal Process: A Profile of the Reasonable Man*, 8 RUTGERS-CAM. L.J. 311, 312–13 (1977).

on the basis of *practical* reasoning, questions of reasonability and feasibility were central to deciding on the "better" interpretation of the law; considerations of legal uptake by the law's audiences were rarely far from the central inquiry.

Developments in federal law mirrored the decline in federal-commo-law lawmaking. Chief among them was Supreme Court's 1938 decision of *Erie v. Tompkins*.[4] *Erie* is largely taught as a civil procedure case, but it also had important consequences for American jurisprudence more generally. In declaring that the federal courts must follow the decisions of state courts in the interpretation of state common law, the Court in *Erie* also declared the nonexistence of what it called "federal common law," notwithstanding one-hundred and fifty years of contradictory practice and doctrine—not to mention continued reliance on it, more tacitly, going forward. This had important downstream consequences for American jurisprudence more generally. Federal judges were now formally (though not always effectively) precluded from participating in common-law lawmaking. Yet federal law and the federal judiciary have remained the chief source of American jurisprudence and doctrine, and so prevailing theories about legal interpretation have tended to derive primarily from federal doctrines and jurists. Because that doctrine now focused less explicitly on context-specific and pragmatic justifications for fitting statutes into preexisting common-law rules about law, and more on the archaeological question to discover what Congress "meant" in enacting the statute, the effect was that the ethos of the common law became uncommon.

Thus, the process of judicial interpretation of federal statutes was another source of the decline of audience-oriented, sociologically-based legal reasoning. Instead of seeking the reasonable expectations of the "reasonable man," judges increasingly were in quest of the intentions behind the "reasonable legislator." Given judicial recognition of legislative supremacy, emergent theories of statutory interpretation tended to emphasize methodological concerns related to ensuring that judges were sufficiently deferential to legislatures rather than concerns that the people for whom the law was made could continue to understand and act under it. The result of this fixation on legislative supremacy is that judicial methods of interpretation have tended to overlook considerations of statutory audiences, who had been central to common-law lawmaking inquiries. Instead, judicial methods of interpretation tended to focus on discovery and historiography, for efforts to divine legislative intent and purpose are exercises more akin to legal archaeology than to pragmatic reason-giving.

Finally, a third related trend has been the emergence of legal positivism as the dominant theory of law in Anglo-American jurisprudence, and original public meaning originalism in constitutional interpretation. In many essential respects, these theories are quite different, for they seek to describe distinct phenomena and answer to unique demands. But both theories

[4] 304 U.S. 64 (1938).

share three critical features, all of which tend to diminish concerns about audience-oriented interpretation. First, both approaches treat the interpretations of law made by contemporary, non-official legal audiences as being incapable of contributing to the *official* content of the law itself.[5] Second, both theories understand the content of law as rules derived from official sources and being of a sufficient pedigree in lineage, which means that rules that are justified on the basis of common practice or community expectations alone cannot properly be said to be *legal*.[6] Third, both approaches disclaim that independent moral considerations should be a basis to reject the legality of the rules of officials, considerations that go hand-in-hand with the common-law's focus on basic notions of fair play.

Leading Anglo-American positivists like Hart, and Raz, following Kelsen's civil law-model of positivism, have conceived of legal interpretation as the discovery of legal content posited by officials and drawn from pedigreed legal sources developed in compliance with the relevant rule(s) of recognition. Although Hart in particular acknowledged that the content of law depended on social facts, his criteria of legality included only the social "pedigree" or source of the rule, and not moral properties, nor claims derived from moral reasoning. One consequence of this orientation is that the actions of law's officials, rather than the practices of non-official audiences, are central to the determination of legal meaning, and questions of fairness and justice on terms appropriate to the particular audience of the rule could not properly be said to be *legal* considerations.

Alongside legal positivism, an analogue to the rule of recognition has emerged: historical legal enactments as compacts of historical (but not necessarily contemporary) popular sovereignty. This has been a central motivating feature in considerations around constitutional interpretation during the latter half of the twentieth century in the interpretive approaches of original intent originalism and original public meaning originalism. The stated

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[5] *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997). Alexander and Schauer emphasize that an important aspect of the Constitution "is its authority," which "provides content-independent reasons for action" such that "it is often right for officials to obey judicial interpretation they believe wrong." *Id.* at 1367. They write, "Some call this positivism. Others call it formalism. We call it the law." *Id.* at 1387.

[6] That these approaches share similar features can be shown by how a leading proponent of originalism demarcates what counts as law. *See* Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 10 (2006). ("[T]he only way the Constitution provides 'law' to be followed is if it is viewed as an authoritative command with a discernable public meaning at the time of its enactment."). Such a claim about the proper pedigree of law is not only at odds with the American legal system's custom-based, common-law origin, but it does not even describe how founding era jurists and Americans understood the content of constitutional law. *See* Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 5 (2001). Kramer contends that for the founding generation, "[t]heir Constitution was not ordinary law, not peculiarly the stuff of courts and judges," but rather was "law made by the people to bind their governors, and so subject to rules and considerations that made it qualitatively different from (and not just superior to) statutory or common law." *Id.* at 10.

motivation for these interpretive approaches is that unelected judges should not be in the position to "make" constitutional law. Rather, judges should interpret the Constitution according to either the historical intent of the framers, or else according to the historical understandings of meaning shared by ratifying-era publics. In a certain sense, it could be said that the only first-order interpreter who matters under this approach to constitutional interpretation is the reasonable public interpreter of the Constitution at and around the time of its ratification.

One important feature of the original meaning originalism approach to constitutional law is that, drawing on Dworkin's distinction between propositions of law and grounds of law,[7] the grounds of law tend to be historical in nature, and that approach is not one that the American public is likely to be able to scrutinize or understand well. This is in contrast to other approaches to constitutional interpretation that draw on the grounds of principles like reasonableness, fairness, or liberty. Thus, I will argue that an overlooked consequence of this method of constitutional interpretation is that it has a tendency to exclude most other legal audiences from conversations about constitutional meaning—including most lawyers—who are not trained in understandings about historical meaning and anachronistic usages of language. The effect is to render audiences not well versed in American history with very little to say about the content of the law, and little capacity to interpret it.

In this sense, it is not so much the dead *hand* of the past the dictates contemporary legal meaning as much as the dead *ear*. American historians,[8] and experts on "the history and origins of English in America,"[9] will likely be much more qualified to speak about the meaning of the linguistic phrase "to keep and bear arms" in 1791 than will contemporary lawyers or members of the public, even though the reason for behind the need to interpret that provision is to resolve urgent questions of law concerning permissible firearm uses and restrictions in contemporary society. As Justice William J. Brennan once observed, "[t]he Constitution is fundamentally a public text—the monumental charter of a government and a people—and a Justice of the Supreme Court must apply it to resolve public controversies."[10] And because few beyond constitutional historians, scholars, and judges will have ready capacity to engage in the essentially archaeological enterprise of discovering historical meaning and usage, this approach tends to demarcate for a small number of American

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[7] *See* RONALD DWORKIN, LAW'S EMPIRE 3–6 (1986).

[8] *E.g.*, Brief of Amici Curiae Jack N. Rakove et al. as in Support of Petitioners, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 157183.

[9] *E.g.*, Brief for Professors of Linguistics and English Dennis E. Baron, Richard W. Bailey, and Jeffrey P. Kaplan, Ph.D., in Support of Petitioners, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 157194.

[10] Jr. William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 433 (1986).

historians a near-monopoly over the permissible terms for conversation about certain forms of constitution meaning. Judicial inquiries about the behavior of the "reasonable man" and the "reasonable expectations of society" may have had their own flaws, but they were also more inviting for constitutional conversation among lawyers and the public at large.

This mode of interpretation may also produce mismatches between the basis for a disagreement about the meaning of the Constitution and the methods courts use to adjudicate them.[11] In this chapter, I will probe this tension further, by exploring whether all methods of constitutional interpretation are equally amenable to nonjudicial "audience participation"—and if not, whether a proper basis for deciding whether theories of interpretation are better suited to define the contours of constitutional meaning should be their susceptibility to public evaluation. I will explore the degree to which constitutional conversation between citizens and government officials, and particularly judges, is critical to popular adherence to the Constitution. Whether approaches to constitutional interpretation tend to enhance or diminish the possibilities of constitutional conversation may be a relevant desideratum when selecting from among different approaches to constitutional interpretation, and may have significant influence on the perceived legitimacy of the law by the public at large.

## I. THE CENTRALITY OF AUDIENCE IN COMMON-LAW INTERPRETATION

As every first-year law student learns, the United States inherited its legal system from England, and so at the nation's founding, common-law rules governed most aspects of the legal relationships among citizens, as well as between citizens and the state(s). Although the English common-law system was highly deferential to history and the traditional roles of the common-law courts vis-à-vis parliament and the Crown, American common-law after the revolution drew instead on the history and traditions of the *American* experience, which was one that emphasized experience, innovation, and deference to local variation inherent in a legal system that featured dozens of separate state common-law systems.

As a result, the American common-law legal tradition of the early nineteenth through early twentieth century was rich with considerations about the audiences of law, for the law was thought to "live[] in and evolve[] from the practical interactions of daily life as they surfaced in the common law courts."[12] Judicially crafted doctrines often recognized stark differences in the knowledge, resources, sophistication and circumstances among various kinds of legal audiences, which necessitated distinct legal rules appropriate to that audience. Indeed, judges acting in their common-law capacity were often explicit that their decisions were both responsive to, and responsible for, societal expectations and actions.[13] And because

[11] *See* Introduction, notes 52–54 and accompanying text.

[12] Postema, *supra* note 1, at 167.

[13] For a helpful primer on the broad differences in interpretive approach between the common law and

common-law rules were not codified, it was necessary that they sufficiently reflected the practices of the particular communities they sought to regulate. As Associate Justice Harlan Fiske Stone once commented, the common law could "perform[] its function adequately only when it is suited to the way of life of a people."[14]

This section will briefly identify some of the audience-oriented features of the common-law method of legal reasoning, in order to contrast this approach with what has supplanted it.

### *A. The Audience-Oriented Nature of Common-Law Reasoning*

> "[T]he reasonable man has gone on to forge a position of importance in almost every field of American law and jurisprudence. A general survey of the law reveals that he enjoys a virtual monopoly in many of its branches."[15]

If late-nineteenth and early-twentieth century American jurisprudence had a single protagonist, it was the "reasonable man." A chief aim of the common law method of legal reasoning was to ensure its suitability for those it would govern, which meant establishing legal expectations congruent with the capacities and beliefs of the community. The "reasonable man" served as a judicial construct for the community at large. As one mid-twentieth-century torts treatise depicted him, his virtues—foresight, caution, judgment, self-control, altruism and the like—were representative of, but did not exceed, "the general average of the community," and while he was capable of error, this was so "only to the extent that any such shortcoming embodies the normal standard of community behavior."[16] Of particular importance in the judicial construction of the "reasonable person" was the concession that there may at times exist a disjuncture between what judges thought was the *ideal* legal rule might be, and what rule was the best reflection of *reasonable* expectations courts could place on the relevant community the law would govern.[17]

Because the facts about the reasonable person depended on the particular legal dispute in question—and the parties implicated in it—the reasonable person construct tended to function as a touchstone for shaping legal rules with the law's relevant audience(s) in mind. The reasonable person construct was both a reminder to courts of real and commonplace

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statutory law, *see* JANE C. GINSBURG, LEGAL METHODS (4th ed. 2014).

[14] Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV.1 4, 11 (1936).

[15] Ronald K. L. Collins, *Language, History and the Legal Process: A Profile of the Reasonable Man*, 8 RUTGERS-CAM. L.J. 311, 312–13 (1977).

[16] F. HARPER & F. JAMES, JR., THE LAW OF TORTS 902 (1956).

[17] Peter L. Strauss, *The Courts and Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 265 & n.94 (1985).

human failings and an "ideal toward which ordinary folk ought to aspire."[18] In this sense, the concept of nonjudicial audience can be said to have influenced the interpretive choices of judges.

The notion that common-law rules must be mindful of nonjudicial legal audience is reflected in common-law reasoning in a variety of private law doctrines. For example, attention to how the legal rules communicated messages to relevant audiences is foundational to the common law of property, for many property rules needed to operate in a manner so as to communicate ownership to third-parties. Carol Rose has argued that the common law rule of possession conceived of the act of possession as a kind of communicative statement, a declaration by an owner to others that something is theirs.[19] And certain property rules turned in part on which behavior would more clearly communicate possession. Consider, for example, the classic first-year property law case of *Pierson v. Post*,[20] which concerned a question about which of two hunters in pursuit of a fox had obtained possession over it: the one who first initiated pursuit, or the one who ultimately obtained dominion over it. The rule announced in *Post* favored the hunter who had *certain* control of the fox over the hunter who had been in hot pursuit first; the stated rationale for this decision was that the first hunter had acted in a manner that most clearly informed the broader world of his claim of possession.[21] Rose understands this rationale for assigning possession as "requir[ing] a kind of communication" between the possessor and other potential possessors, such that the claim to property is "a kind of speech, with the audience composed of all others who might be interested in claiming the object in question."[22]

Many common-law property law rules functioned as instantiations of communicative ownership. For example, notice rules and clear title mechanics facilitated trade and minimized resource-wasting conflict by requiring clear communication to others.[23] Moreover, property law also recognized that different kinds of audiences may understand the same act differently, and therefore that certain common-law rules might favor one kind of audience over another. To this end, Henry Smith has suggested that while the "certain-control" rule announced in *Pierson* may have been useful to "a larger and more anonymous audience" able to more easily recognize a wounded animal than an animal being chased in hot pursuit, the

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[18] Collins, *supra* note 17, at 314.

[19] Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 77–78 (1985) (arguing that possession requires a kind of communication, and traditional property law doctrine establishes standards for rights of ownership on the basis the audience of various kinds of possessions).

[20] Pierson v. Post, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

[21] Rose, *supra* note 23, at 77.

[22] *Id.* at 78–79.

[23] *Id.* at 81.

"hot-pursuit" rule would have been more appropriate for an audience *of hunters* more knowledgeable in the rules of engagement in hunting;[24] as the dissent in *Pierson* suggested, the "certain-control" rule would discourage hunters and questions about possession would be better resolved by a panel of sportsmen than generalist judges less familiar with the norms in the hunting community.[25] Smith concludes that the *Pierson* majority prioritized achieving certainty "at a low cost to a wide audience, not all of whom are concerned with foxes"[26]—which might be especially appropriate if the court in *Pierson* anticipated that their announced rule might be applied in non-fox-hunting contexts to other questions concerning possession.

Smith has thus helpfully recognized that much of the common law of property can be described as a set of rules that vary "depend[ing] on what background knowledge we can assume" about the audience for that rule, such that the constraint on judicial resolution "may be on the processor's or receiver's end, rather than on the limited powers of a court to create a detailed rule."[27] What is striking about the debate in *Pierson*, and in many debates about common-law rules like the hot-pursuit question, was that audience, communication, and the capacity for the law to generate effective behavior-modifying stipulations in the relevant nonjudicial audiences was central to the inquiry. Many features of property law, then, can be said to be audience-specific: "much of what could come under the heading of the landowner as the cheapest cost avoider effectively limits the class of persons making up the audience for property interests such as easements."[28] Nor was the role of audience in traditional American common-law doctrines unique to property law. Considerations of audience also governed particular tort law liability standards, which, for example, have long imposed greater duties and a heightened assumption of risk for professionals than for laypeople, as the former are thought to be better able to understand the consequences for misbehavior.[29]

Interpretive rules in contract law were also developed to be attentive to the different audiences who may be in the position to interpret contracts. Thus, for example, contract common-law produced different default rules for the interpretation of contracts drafted

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[24] Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1118 (2003).

[25] Pierson v. Post, 3 Cai. R. 175, 180–81 (N.Y. Sup. Ct. 1805) (Livingston, J., dissenting).

[26] Smith, *supra* note 28, at 1118.

[27] *Id.*

[28] *Id.* at 1173.

[29] *E.g.*, Amelia H. Ashton, *Rescuing the Hero: The Ramifications of Expanding the Duty to Rescue on Society and the Law*, 59 DUKE L.J. 69, 91 (2009); Geoffrey Christopher Rapp, *The Wreckage of Recklessness*, 86 WASH. U. L. REV. 111, 116 (2008).

between merchants than for contracts drafted for merchants' customers, on the presumption that two merchant counterparties would have a shared understanding of prevailing terminology, norms, and practices in the particular industry in question, and those defaults have been incorporated into the Uniform Commercial Code.[30] Moreover, contract law has long accommodated deviations in interpretive approaches depending on prevailing trade practices.[31] Indeed, at the height of the common law era in the early twentieth century, American Association of Law Schools President Herman Oliphant noted how even seemingly conflicting holdings in contract law could be explained by contemporary guild regulations relevant to the particular audiences implicated by the kind of contract dispute in question.[32] Oliphant praised common-law judges' "intuition of experience [that] led them to follow it with amazing sureness and the law resulting fitted life."[33]

Tom Merrill and Henry Smith have also argued that consideration of the interpretive capacities of varying audiences helps to explain why, though the common law of *contract* recognized no inherent limit on the nature or duration of interests subject to a legally binding contract, the common law of *property*'s *numerus clausus* principle tended to restrict property interests to a limited number of standard forms.[34] The reason, they argue, is the distinction in audience between the two legal forms: whereas contracts are agreed upon by two individuals who may never require a wider audience to achieve performance of the contract terms, the *in rem* nature of property rights means that when these rights are formed under the law, the physical nature of property means that various third parties may also come into contact with the property in question, and therefore also the rules that govern it.[35] Third parties will therefore have to expend time and resources to determine the attributes of the owner's property rights, both to avoid their violation and also in the process of acquiring property

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[30] Much of Article 2 of the Uniform Commercial Code sets out a series of special rules for merchants. *See* Deborah Zalesne, *Enforcing the Contract at All (Social) Costs: The Boundary Between Private Contract Law and the Public Interest*, 11 TEX. WESLEYAN L. REV. 579, 593 (2005).

[31] *E.g.*, U.C.C. § 1-303 (recognizing that a "usage of trade in the vocation or trade in which [the parties] are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement"). *See generally* Alan Schwartz & Robert E. Scott, *The Common Law of Contract and the Default Rule Project*, 102 VA. L. REV. 1523, 1544 (2016); Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM L. REV. 1710, 1750, 1753–54 (1997).

[32] Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 159 (1928).

[33] *Id.* at 159.

[34] Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 3 (2000).

[35] *Id.* at 3.

from present owner.[36]

Because unusual property rights increase the cost of processing information about all property rights, they make it more difficult for third-party audiences to understand forms of legal ownership, and, therefore, are generally discouraged. Smith has therefore noted that the "ease of communication and cost of process by the relevant audience" affects how courts make interpretive choices in property law.[37] For rules of wide application such as possession, "heavy reliance on old writers and general common law rules . . . . will lead to less communication intensive rules that are, in turn, more appropriate for a larger, more anonymous audience," while "softening formalism in more personal contexts makes sense from an informational point of view."[38]

In short, the common-law method of lawmaking was especially amenable to concerns about integrating common law rules against the backdrop of expectations and social behaviors of the law's various audiences.

This feature of common-law reasoning may go a long way toward explaining why case-method-based common-law courses like Property, Contracts, and Torts remain required first-year courses in every American law school even though they are widely recognized for being largely archaic bodies of law relative to relevant contemporary legal practice questions and modes of inquiry. In a sense, they invite debates in which the "reasonable" but not overly sophisticated man (or woman) can participate—which more or less describes the average first-year law student. The questions raised in these cases are ones that practically *invite* audience participation. Indeed, Karl Llewelyn, in his famous lectures on American legal education, The Bramble Bush, described the value of the common-law case method:

> So of the cases. Put yourself into them; dig beneath the surface, . . . and you have dramatic tales that stir, . . . that weld your law into the whole of culture. There are parties. There are, as well, the judges: *working at shaping the law to human needs*. In every case the drama of society unrolls before you—in all its grandeur, in all its humor, in all its futility, in the eternal wonder of the coral reef. The clash of ideals, the courage of high hop—and man's purblind inadequacy with man's problems. This, for the seeing. Humanity and law- not two, but one. Not veneer-coating of a so-called culture, cracking, discolored as the body of you grows or shrinks. But culture that keeps pace with, that *is* your human sympathy and understanding; human sympathy and understanding which *are* your law.[39]

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[36] *Id.* at 3.

[37] Smith, *supra* note 26, at 1125.

[38] *Id.*

[39] KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 128 (Quid Pro Books 2012) (emphasis added).

In short, under the common-law approach to adjudication, courts were expected both to justify the rules they announced in a manner cognizable to law's audiences, and to keep those rules and their justifications for them up to date, carefully balancing the tension arising from requirements of change and stability.[40] By contrast, as I will discuss later in this chapter, contemporary approaches to statutory and constitutional interpretation are much less mindful of the significance of nonjudicial audiences in questions of interpretation.

### *B. Federal Common Law Courts*

Interestingly, in the first century and a half of American federal judicial practice, the federal courts also understood their role to be, in part, the common-law lawmaker. Because federal courts have jurisdiction over not only federal questions but also questions of state law that arise when federal courts sit in diversity, early American federal courts were faced with questions about whose law to apply when hearing state-law claims in federal courts—questions that, over time, produced a field all their own, conflict of laws. Because the federal courts heard very few cases in their early years, this problem was less common at the nation's founding. However, as the country—and the federal courts—grew, potential conflicts between state and federal common law expanded.

As the industrial revolution led to greater interconnectedness and the rise of national rather than local markets for commercial transactions, questions arose about how common-law commercial rules developed in dozens of different state courts would be recognized in federal courts. Since the Judiciary Act of 1789, federal courts had been instructed that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."[41] But that did not necessarily answer what "the laws of the several states" included, and whether they included the decisions of state courts deciding questions of common law.

In the 1842 case of *Swift v. Tyson*, the Supreme Court concluded that it would not make sense for federal courts to apply state court decisions concerning general common law questions that, in the case of commercial law, "differ[] from the principles established in the general commercial law."[42] Justice Story, writing for the Court, concluded that because general commercial law implicated national concerns and was derived from "general reasoning and legal analogies" rather than "local statutes or local usages of a fixed and permanent operation," the federal rule of decision recognizing the applicability of state laws

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[40] Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 235 (1973).

[41] 28 U.S.C.A. § 1652 (West).

[42] *Swift v. Tyson*, 41 U.S. 1, 18 (1842), *overruled by Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

should be "strictly limited to local statutes and local usages" and not extend to contracts and other instruments of a commercial nature.[43] Thus, because the audience for general questions of commercial law was thought to be national in scope, Justice Story concluded it reasonable for federal courts to announce general common-law commercial principles.

From *Swift* on, for the next century federal courts regularly engaged in not just the discovery of state law rules already in existence, but also in the development of common-law doctrines in the same manner that state courts did, and these doctrines, like most common-law rules, tended to feature reasoning and methodology that was attentive to concerns about the different kinds of legal audiences whose behavior was expected to be modified by the common-law rules.

## II. The Absence of Audience in Statutory Interpretation Theory and Legal Positivism

Common-law judges have long struggled in determining the appropriate method to interpret law derived from statutes. Because early English statutes were rare parliamentary interjections to correct perceived problems with the judge-made common law, early English courts approached statutory interpretation as an act of integrating the statute into the existing common-law rules. Thus, the foundational case known as *Heyden's Case* established the three questions English courts were to ask when interpreting a statutory intervention into the common-law:[44] First, "What was the common law before the making of the Act?" Second, "What was the mischief and defect for which the common law did not provide?" Third, "What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth?" Having asked these questions, courts were then to decide "[t]he 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 intentions of evasion for continuance of the mischief *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.*"[45]

Notice that the approach to interpretation evinced in *Heyden's Case* sought to weave the posited statute into the evolving common law such that judges were expressly instructed "to add force and life to the [statutory] cure and remedy." That approach, as I will discuss in the next section, looks almost nothing like contemporary statutory interpretation theory, which tends to treat statutes much more like stone tablets whose meanings require constant archaeological rediscovery.

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[43] *Id.* at 18, 19.

[44] Heyden's Case, 3 Coke 7a, 76 Eng. Rep. 637 (Court of Exchequer 1584).

[45] *Id.* (emphasis added).

### *A. From Federal Common Law to Federal Legislation*

By the early twentieth-century, technological and social change in American society had begun to progress too quickly for the common-law method to keep pace in both state and federal courts. Those whom the law served—society—demanded a more involved role in the development of legal rules to coordinate, condone, and condemn social behavior. This was both because judge-made law, which "at its best must normally lag somewhat behind experience, was unable to keep pace with rapid change,"[46] and also because technological developments required more systematic modes of social ordering than could be provided by common-law rulemaking alone. It was inevitable, then, that society would seek "to supply [that] unsatisfied need by recourse to legislation."[47]

Nevertheless, common-law courts did not readily incorporate legislative rules into their common-law decisionmaking processes. Over a century ago, the future Dean of Harvard Law School, Roscoe Pound, examined a curious yet widespread phenomenon of his legal age: the seeming contradiction between "the excessive output of legislation in all our jurisdictions and the indifference, if not contempt, with which that output is regarded by courts and lawyers."[48] Pound noted that lawyers in legislatures were content "to make of a statute the barest outline, leaving the details of the most vital importance to be filled in by judicial law-making," and that among lawyers and judges alike, it was "fashionable to preach the superiority of judge-made law."[49] Nearly three decades later, then Associate Justice Harlan Fiske Stone noted that courts continued to narrowly construe the circumstances in which statutes displaced the extant common-law rule, and that "[t]he reception which the courts have accorded to statutes presents a curiously illogical chapter in the history of the common law."[50] Rather, Justice Stone noted, courts' attitudes toward statutes contrasted "to that of civilians who have been more ready to regard statutes" as "statements of general principles, to be used as guides to decision."[51]

This began to change, however, as statutes became the predominant source of legal rules, and judicial anxiety about the emerging "age of statutes"[52] inflected not only in debates about how federal judges should interpret statutes, but also whether they should be engaged in common-law rulemaking *at all*. The Court's decision in *Swift*—that federal courts could

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[46] Stone, *supra* note 16, at 12.

[47] *Id.* at 12.

[48] Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 383 (1908).

[49] *Id.* at 383–84.

[50] Stone, *supra* note 16, at 12.

[51] *Id.* at 14.

[52] *See generall* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

ignore state court pronouncements about common-law questions in favor of their own judgments—had come under increasing attack, for it prevented uniformity in common law decisions between state courts and federal courts said to be applying state law, and led to "mischievous results" insofar as parties could forum-shop their state law claims in the state or federal forum thought to be more favorable to the particular question at hand.[53] Finally, in 1938, the Court reversed itself in *Erie v. Tompkins*, the landmark civil procedure decision that concluded that federal courts must follow state court judgments of all kinds when deciding questions of law in diversity.[54] But *Erie* did more than that: it also declared, with seeming finality, that "[t]here is no general common law," no "transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute."[55]

Other trends hastened the change as well: Justice Scalia once argued that "[t]he common-law, discretion-conferring approach is ill suited . . . to a legal system in which the supreme court can review only an insignificant proportion of the decided cases."[56] And because lower courts—and jurists generally—take their cues from the Supreme Court, the diminishing role of common-law reasoning in Supreme Court decisions by the middle of the twentieth century led scholars and judges to look to other approaches to interpret the law.

### *B. Judging Statutes*

Established theories of statutory interpretation fail to provide clear interpretive signals to statutory audiences in large part because they also fail to provide clear interpretive signals *to judges*. American judges lack a principled method of interpreting statutes, something legal theorists[57] and members of the judiciary[58] alike have long recognized. Legendary jurist Karl Llewellyn famously (if somewhat facetiously) noted that for every canon, there is a counter-canon, for every interpretive parry, a countervailing thrust.[59] Almost seventy years later, we

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[53] Erie R. Co. v. Tompkins, 304 U.S. 64, 74–75 (1938).

[54] *Id.* at 79–80.

[55] *Id.* at 79.

[56] Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989).

[57] Professors Henry Hart & Albert Sacks long ago observed that "[t]he hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation." HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

[58] Justice Felix Frankfurter once lamented, "Unhappily, there is no table of logarithms for statutory construction." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, *in* JUDGING: VIEWS FROM THE BENCH 247, 255 (David M. O'Brien ed., 2d ed. 2004). More recently, Justice Scalia bemoaned that "American judges have no intelligible theory of what we do most." ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 14 (Amy Gutmann ed., 1997).

[59] Karl N. Llewellyn, *Remarks on a Theory of Appellate Decision and the Rules or Canons About How*

are no closer to settled rules of interpretation. Seventh Circuit Judge Frank Easterbrook recently lamented the absence of *method* in statutory interpretation.[60] And the current dialogue has seemed to offer no forward path: scholars have largely concluded that debates between textualism and purposivism have "taken us as far as they can go."[61]

An important reason that these debates have run aground, I argue, is that both textualism and purposivism are as much theories about *judging* statutes (i.e., how courts should behave vis-à-vis legislatures) as they are theories about *interpreting* them—and judges disagree as much about judging as they do about interpreting.[62] Thus, most debates about how to judge statutes—*i.e.*, when to invoke particular substantive legal rules or prioritize certain interpretive methods over others—are almost always assessed in terms of the relationship between the judiciary and the legislature,[63] not on the basis of other rule-of-law values such as clarity, predictability, or accessibility, let alone interpretive congruence between judges and other statutory audiences.

Consider purposivism's purpose-over-text approach, famously exemplified in cases such as *Church of the Holy Trinity v. United States*.[64] According to Justice Stephen Breyer, among the most prominent contemporary advocates of purposivism, a purposivist "judge will ask . . . how a (hypothetical) reasonable member of Congress, given the statutory language, structure, history, and purpose, *would have* answered the question, had it been presented."[65]

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*Statutes are to be Construed*, 3 VAND. L. REV. 395, 401 (1950).

[60] Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV. 81, 83 (2017).

[61] Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177, 191 (2017).

[62] *See* Adam M. Samaha, *Starting with the Text: On Sequencing Effects in Statutory Interpretation and Beyond*, 8 J. LEGAL ANALYSIS 439, 447 (2016) (noting that "[d]ebates about interpretive method and the proper judicial role have generated friction" concerning whether to prioritize statutory text versus evidence of legislative purpose or history).

[63] *See, e.g.* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside: An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 912–13 (2013) (noting the "intense discord [that] remains over the proper role of judges in statutory cases and which tools of interpretation support that role"); Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside: An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014) (examining the intersection of the process of legislative drafting, administrative law doctrine, and statutory interpretation).

[64] 143 U.S. 457 (1892). In *Holy Trinity*, the Supreme Court referenced the "familiar rule" that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Id.* at 459.

[65] Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 266 (2002).

Purposivism therefore situates judges as "cooperative partner[s]"[66] of the legislature, ensuring that the goals and purposes that motivated lawmakers' passage of the statute are reflected in its application to unforeseen circumstances.[67]

The textualist retort to purposivism also focuses on the propriety of judging, rather than on the act of interpretation alone. Textualists object that purposivism's less text-based, more open-ended inquiry is an "invitation to judicial lawmaking" that risks the "danger" of legislative "usurpation" by judges.[68] Justice Antonin Scalia, perhaps textualism's most well-known adherent, argued that any move away from a focus on the text "render[s] democratically adopted texts mere springboards for judicial lawmaking."[69] Notice that for textualists, like purposivists, the propriety of the judge-as-interpreter is central to their theory of interpretation: both approaches begin with an inquiry into the relationship between the legislature and the appropriate judicial role rather than the nature of statutes and their interpretation.[70] In a sense, these theories' proponents have contributed as much (or more) to understanding the relationship between the judicial and legislative branches[71] as to the development of a coherent and principled interpretive framework for selecting canons and prioritizing methods.[72]

The problem with these conventional approaches to statutory interpretation is that they are primarily directed at judges, so they are not especially useful in communicating to first-order audiences how *they* should interpret statutes. To see why, consider a layperson—or even a generalist lawyer—confronted with an ambiguous statute. If she were to ask a purposivist for advice, she would be told to approach interpretation from the standpoint of a "reasonable legislator" and select the interpretation more likely to promote the aims that this

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[66] Willian N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 991 (2001).

[67] William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 313, 332–33 (1990). Most modern purposivist theories also owe much to *The Legal Process* approach first articulated by Hart and Sacks, who advocated that because every statute must have an "intelligible purpose," interpretive ambiguity should be resolved by identifying the statute's purpose and deducing the interpretive approach most consistent with that purpose. HART & SACKS, *supra* note 57, at 1374, 1378.

[68] SCALIA, *supra* note 59, at 18, 21.

[69] *Id.* at 25.

[70] John F. Manning, *Textualism and the Equity of the Statute*, Colum. L. 101 1, 7 (2001).

[71] Of course, inquiries into judicial-legislative dynamics are also important to the study of statutory interpretation. For a clear and concise account of how the relationship between the judiciary and Congress informs judicial thinking about statutory interpretation problems, see ROBERT A. KATZMANN, JUDGING STATUTES (2014).

[72] *See* Gluck, *supra* note 62, at 183–84.

hypothetical legislator sought to accomplish.[73] Yet this response not only doesn't tell the layperson *how* to interpret the statute (*i.e.*, which aspects of its language, structure, history, or purpose to consult or prioritize); it also introduces a second and more vexing problem: what would the reasonable legislator have wanted?[74] This question is one that a layperson is arguably even *less* well equipped to answer than the underlying text-based interpretive problem itself; the same would seem almost as true for the generalist lawyer.[75]

By contrast, one of textualism's core appeals is its claim of providing a more straightforward and principled way to interpret statutes that leaves the act of interpretation less susceptible to subjective preference.[76] This formed the core of Justice Scalia's adherence to textualism and attacks on purposivism.[77] Scalia was the most prominent champion of methodological formalism in statutory interpretation, the aspiration that clear rules and methods of interpretation should be predictably applied across cases.[78] Yet under pressure, and as discussed below, textualism does not necessarily result in more coherent and predictable interpretation.[79] Justice Breyer has gone so far as to contend that "it is impossible to ask an ordinary citizen . . . to understand the operation of linguistic canons of interpretation."[80] This is in part for the reasons Llewellyn explained long ago: for every canon compelling one resolution, there is a counter-canon that demands another.[81] As former

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[73] Breyer, *supra* note 66, at 266.

[74] Technically, it introduces a third problem too: if the first-order interpreter wants to predict how a purposivist *judge* will ultimately interpret the statute, she must also determine how the *judge* would think the reasonable legislator would have answered the question.

[75] Justice Breyer has contended otherwise, arguing that ordinary citizens *can* "determine what general purpose a legislator sought to achieve in enacting a particular statute." Stephen Breyer, Assoc. Justice, U.S. Sup. Ct., The Tanner Lectures on Human Values at Harvard University: Active Liberty: Interpreting Our Democratic Constitution 59 (Nov. 17-199, 2004), https://tannerlectures.utah.edu/_documents/a-to-z/b/Breyer_2006.pdf

[76] *See* Willian N. Eskridge, *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1514–15 (1998).

[77] *See* SCALIA, *supra* note 54, at 17–18 ("[U]nder the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field.").

[78] Scalia famously declared in his essay, *A Matter of Interpretation*, "Of all the criticisms leveled against textualism, the most mindless is that it is 'formalistic.' The answer to that is, *of course it's formalistic*! The rule of law is *about* form. . . . Long live formalism. It is what makes a government a government of laws and not of men." *Id.* at 25.

[79] Eskridge, *supra* note 77, at 1547.

[80] STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION, THE TANNER LECTURES ON HUMAN VALUES 59 (2004).

[81] Llewellyn, *supra* note 60, at 401–06; *see also* Gluck, *supra* note 94, at 192–93 (observing that in *Lockhart v. United States*, 126 S. Ct. 958 (2016), both the majority (with the "rule of the last antecedent") and the dissent

Seventh Circuit Judge Richard Posner put it, "[T]here is no canon for ranking or choosing between canons; the code lacks a key."[82]

Such unpredictability was true even for Justice Scalia's own approach. As Professor Abbe Gluck has noted, Scalia was never fully committed to formalism,[83] and his extrajudicial magnum opus, *Reading Law*, does not attempt a coherent framework for the *prioritization* of canons, instead settling for the "fundamental principle" of interpretation that "[n]o canon of interpretation is absolute," and "[e]ach may be overcome by the strength of differing principles that point in other directions."[84] If so, then a lay citizen trying to follow the law *ex ante*, or her attorney trying to advocate on her behalf *ex post*, has little concrete guidance other than to throw every canon at an ambiguous sentence and prioritize whichever canons seem to justify the preferred outcome.

As I will discuss at length below, the same problem plagues the plain meaning rule, a particular favorite of textualist jurists,[85] a criticism others have also levied.[86] After all, if the plain meaning of a term is derived from its "ordinary meaning,"[87] then judges can derive different "ordinary" meanings from the same phrase depending on which dictionaries they use and which evidence of "ordinary usage" they prioritize.[88] It has thus been said that Scalia's formalist project of statutory interpretation "has been a failure."[89] Gluck has concluded that strict formalism in statutory interpretation does not yet exist, and may well

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(with the "series-qualifier canon") applied "timeworn textual canon[s]" to reach conflicting outcomes).

[82] RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 277 (1985).

[83] Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053, 2056–57 (2017).

[84] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 59 (2012).

[85] *See* James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 486 (2013).

[86] *See, e.g.*, Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 243 (noting disagreements in Supreme Court decisions where the debate over plain meaning was "not whether plain meaning would dominate, but just what the plain meaning was").

[87] *See* Chisom v. Roemer, 501 U.S. 380, 404 (Scalia, J., dissenting) (arguing that under the plain meaning rule court should first examine the ordinary meaning of the language in its textual context, and then apply that ordinary meaning unless there is some clear indication that some permissible meaning other than the ordinary one applies).

[88] *See, e.g.,* A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, HARV. J.L. & PUB. POL'Y 71, 73 (1994) (identifying instances where competing dictionaries yield contradictory definitions); *see generally* Brudney & Baum, *supra* note 85, at 489 (reviewing the use of dictionaries by the Rehnquist and Roberts Courts and concluding that "Justices use dictionaries primarily to buttress positions they have already reached rather than to try and establish the true or truly applicable meaning of a contested word").

[89] Gluck, *supra* note 62, at 178.

be impossible.[90] So much for Scalia's "long live[d] formalism."[91]

Neither textualism nor purposivism, then, is especially likely to be helpful to first-order interpreters seeking to predictably deduce meaning from statutory text. What, then, are they good for? As we have seen, one chief contribution has been as efforts to resolve the inherent tension of common-law judicial decisionmaking against a backdrop of legislative supremacy.[92] Indeed, anxiety about legislative supremacy has been called "a shibboleth in discourse about statutory interpretation."[93] At the core of many statutory interpretation disputes—including the core disagreement between textualists and purposivists—is a disagreement not only about interpreting the text but also about *judging* it:[94] textualism and purposivism *both* "seek to provide a superior way *for federal judges* to fulfill their presumed duty as Congress's faithful agents."[95] As a result, statutory interpretation debates can often seem circular and irresolvable, descending into important but orthogonal considerations about separation of powers, legislative supremacy, and inter-branch relations.[96]

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[90] Gluck, *supra* note 84, at 2058.

[91] SCALIA, *supra* note 59, at 25.

[92] *See* Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 226 (1999) ("In my judgment the common law responsibilities of judges in our political system are central to a thoughtful consideration of the problem of interpretation.").

[93] William N. Eskridge Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 319 (1989).

[94] For example, *compare* Eskridge, *supra* note 72 (arguing from historical evidence that the federal courts' role has always included the power to interpret statutes equitably as cooperative partners with the legislature), *with* Manning, *supra* note 66 (arguing from historical evidence that federal courts' role has always been as Congress's faithful agents, not cooperative partners).

[95] Manning, *supra* note 66, at 9 (emphasis added); *see also* Strauss, *supra* note 13, at 252–53 (arguing that a purposivist approach best enables courts to be effective agents of Congress).

[96] Paradoxically, this is also the field's great strength. Statutory interpretation scholarship's most important contributions have been to American jurisprudence more generally: statutory interpretation scholars have provided many of the best accounts of the relationship between the branches. *See generally* William N. Eskridge Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) (analyzing interactions between Congress, the Supreme Court, and the President); Rubin, *supra* note 57 (examining judicial constraints on the legislative process); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989) (discussing the deference that courts give to administrative interpretations of law). They have also provided some of the most enlightening accounts of the conditions associated with lawmaking and legislative drafting. *See generally* Gluck & Bressman, *supra* note 63 (examining the intersection of the process of legislative drafting, administrative law doctrine, and statutory interpretation); Bressman & Gluck, *supra* note 63 (concluding their examination of the intersection of the process of legislative drafting, administrative law doctrine, and statutory interpretation); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002) (presenting a case study of the legislative drafting process in the Senate Judiciary Committee). Perhaps least surprisingly, they have also provided some of the most persuasive accounts of the limitations inherent in lawmaking through legislation. *See generally* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994) (analyzing theories

Thus, judges (and scholars) disagree as much about the judiciary's proper role in interpreting statutory text as they do about the act of interpreting the text itself.[97] Making matters worse, both theories fall short in their quest to excavate evidence of the legislative will,[98] as scholars like Abbe Gluck and Lisa Bressman have shown empirically.[99] More troubling from the standpoint of the rule of law, this fixation with judicial fidelity has overshadowed the fact that individuals and institutions subject to statutes also must interpret them. As Professor Ryan Doerfler has recently argued, statutory interpretation scholarship has been too focused on what he calls the "eavesdropping" model of judicial interpretation that privileges the epistemic position of members of Congress, and which manifests in approach to interpretation that is motivated by "faithful agency" rather than other interpretive considerations.[100] That approach may be suitable for *judges*, but it has much less to say for those for whom the law exists to coordinate and control.

### *C. From Common-Law Reasons to Posited Rules*

In addition to the widespread emergence of state and federal legislation supplanting traditional common law questions, and the death knell for federal common-law lawmaking in *Erie*, a third trend, this one in Anglo-American jurisprudence, has also tended also to diminish concerns about nonjudicial audiences in legal interpretation. This trend began with the emergence of legal positivism, which, I will argue, has had the effect of displacing traditional judicial concerns about nonjudicial audiences in framing the enterprise of judicial interpretation around questions of law.

#### *1. Legal Positivism's Emphasis on Officials*

Although much has been said about legal positivism, what is important from the standpoint of questions about the role of audience in American legal interpretation is that leading mid-twentieth century positivist theories of the law, particularly the theories of positivists like Hans Kelsen, H.L.A. Hart, and Joseph Raz, all emphasized three important aspects in their theories of law that are at odds with the common-law legal system: first, that all legal rules or norms can be derived from an original constituting act (such as a

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of statutory interpretation); Frederick Schauer, *Formalism*, 97 YALE. L.J. 509 (1988) (examining different conceptions of formalism).

[97] *See* DWORKIN, *supra* note 6, at 87–88 (arguing that each judge's interpretive theories are grounded in his or her convictions about the proper role of a judge in the legal system).

[98] T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 22 (1988) (developing the metaphor of both textualism and purposivism as putting forward models whereby a judge engages in a "factual inquiry [to] uncover[] and describe[] an already fixed past")

[99] *See* Gluck & Bressman, *supra* note 63, at 908.

[100] Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 984 (2017).

constitution); second, that what can be described as law exists in relation to the acts of legal officials; and third, that a rule or norm be moral is not a necessary condition for its being legally valid. The net effect of these propositions, I will argue is that positivist theories of law tend to orient conceptions of legal interpretation around the acts of judges as the only actors in developing meaning about the law, to assess potential sources of legal reasoning and method on the basis of their suitability for judges. Moreover, even prominent critics of positivism, such as Ronald Dworkin, have also tended to respond with theories oriented around law and interpretation as an act for judges alone.

Although not well known in contemporary American jurisprudence, Hans Kelsen's general theory of the law was deeply influential for the Anglo-American positivists who followed him, and Kelsen was famous in part for asserting all three of these key features of the law. First, Kelsen argued that legal norms could not be said to be valid because they have self-evident binding force or inherent appeal, but only by virtue of the fact that they have been established according to the basic norm of the legal order, which establishes the legal authority and the norm-creating powers of that authority.[101]

Second, Kelsen argued that law is always *positive* law, and its positivity lies in the fact that it has been created or annulled by acts of human beings.[102] This means that law exists independent of *morality* or other normative systems, and on this basis Kelsen sought to distinguish positive law from, among other things, natural law.[103]

A third important feature of Kelsen's legal positivism is that he conceived of law as a form of conditional order, directed at courts and legal officials, to apply a particular sanction if a certain behavior was performed, or not performed, by individuals in society.[104] Kelsen used as an example the rule against stealing. This rule is really two norms in one, he argued: one which forbids theft, and a second that attaches a sanction to theft. But for Kelsen, because the first norm is contained in the second, "which is the only genuine legal norm," then the first norm is "certainly superfluous in an exact exposition of law."[105] Kelsen did believe that representations of the law were facilitated if we "assume also the existence of the first norm," but strictly speaking, only the sanction could be said to be a legal norm.

The upshot of these features of Kelsen's conception of the law is twofold. First, pre-judicial interpretations of law cannot be said to be valid legal norms, which means that they only become law once an official acts in response to them. In this sense, the law does not tell subjects what to do, it *tells officials* what to do under certain conditions when other actors

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[101] HANS KELSEN, GENERAL THEORY OF LAW AND STATE 112–13 (1945).

[102] *Id.* at 114.

[103] *Id.* at 114.

[104] *Id.* at 61–62.

[105] *Id.* at 61.

subject to law act in a particular manner. Under Kelsen's theory, the only significant audience who could *apply* the law were the official organs of the state—chiefly, judges.[106] The audiences of the law, then, are not subjects of interpretation, but *objects*, for they cannot be said to be "applying" law in any meaningful way. Rather, they are simply being obedient to it, as the object of the law; only legal officials could be said to *apply* the law. Kelsen did recognize that a connection existed between the factual obedience of legal audiences and the factual application of law by judges, but nevertheless contended that the "efficacy of law is primarily its being applied by the proper organ" rather than its being obeyed by loyal objects.[107]

Second, because the sole criterion for a valid legal norm is its origination in accordance with the basic norm, any norm that does not derive from a valid enactment in accordance with the basic norm cannot be said to be a *legal* norm. It is unsurprising why Kelsen's theory was hugely influential in the civil law jurisdictions of Europe. In civil law countries, after all, all law is derived from codification. But this account of law stands in contrast with the common law method, which perhaps explains why Kelsen's version of legal positivism had a relatively limited reception on this side of the Atlantic.[108] In part, this is probably because his depiction of law contrasts strikingly with the common-law legal method, which understands as a source of law the considered practices of law's audiences, which are later adopted by judges, and made to be law, precisely because those audiences have practiced them, rather than because of their formal enactment according to the basic norm. A noted nineteenth-century jurist described this system of lawmaking thusly:

> The inhabitants of this country always claimed the common law as their birth-right, and at an early period established it as the basis of their jurisprudence. Slight changes and modifications were found necessary, and consequently *adopted by common consent*, from time to time, to *adapt it to our peculiar institutions, and the habits and customs of the people*. These changes, modifications, and customs having, for a long course of years, been acquiesced in by the people, and sanctioned by the courts, *have acquired the force of law*, and become incorporated into and made part of the common law of the land.[109]

Perhaps for this reason, it was thus not Kelsen, but his Anglo-American interlocutor,

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[106] *Id.* at 62.

[107] *Id.* at 62.

[108] D.A. Jeremy Telman, *The Reception of Hans Kelsen's Legal Theory in the United States: A Sociological Model*, 24 L'OBSERVATEUR DES NATIONS UNIS 1, 7 (2008) (noting that "most legal scholars in the United States find his work . . . not worth the bother because his premises contradict fundamental tenets of the U.S. approach to the law").

[109] Penny v. Little, 4 Ill. 301, 305 (1841) (emphasis added).

H.L.A. Hart, whose theory of legal positivism had a much more significant influence on twenty-century American jurisprudence. Hart's theory of legal positivism recognizes that the authority of law is social, and that the criterion for the validity of the legal system is that legal rules are *actually practiced*.[110] Hart's legal positivism at least conditionally recognizes a role for the audiences of law in determining whether a social norm can be said to be a *legal* norm. Yet Hart's theory of law, like Kelsen's, identifies legal authority as that which exists in accordance to what he calls the rule of recognition, the ultimate rule of the legal system that specifies the criterion of validity for all other legal rules.[111] Like Kelsen, Hart understood the derivation of law as a top-down enterprise in which legal norms originate as a result of their enactment in accord with the rule of recognition.

And Hart, too, focused on the officials as the chief contributors to the content of the law and the legal system. For Hart, ordinary subjects' contributions to the existence of law may amount to no more than passive compliance with it. Perhaps because he came from a common-law tradition, Hart did recognize that in a developed legal system, one characteristic of legal rules could be "their long customary practice."[112] Yet on the whole, his theory of law was much more focused on legal rules enacted by a specific body in according with the rule of recognition, or deriving from judicial decisions. As Leslie Green has noted, Hart's account of the rule of recognition is an official custom, and not a standard necessarily shared by the broader community.[113]

A final and important aspect of Hart's legal positivism common to Kelsen's was the rejection of natural law's claim that what is law and what is moral are necessarily co-related inquiries. Rather, Hart asserted what is known as the separability thesis, the "simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so."[114] Subsequent legal positivists like Joseph Raz and Jules Coleman have expounded at length on the separability thesis, and it has important implications for American theories of constitutional interpretation.

Although I will discuss this in greater detail below, American constitutional law doctrines imported certain fundamental common-law principles related to liberty and morality. For instance, the Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects against *unreasonable* searches and seizures,"[115] and the

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[110] H.L.A. HART, THE CONCEPT OF LAW 59–60 (2d ed. 1994).

[111] *Id.* at 106–07.

[112] *Id.* at 94–95.

[113] Leslie Green, *Legal Positivism*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring 2018), *available at* https://plato.stanford.edu/archives/spr2018/entries/legal-positivism.

[114] HART, *supra* note 111, at 185–86.

[115] U.S. CONST. amend. IV.

due process clause of the Fourteenth Amendment guarantees citizens to be free from deprivations of "life, *liberty* or property, without *due* process of law."[116] These questions cannot be said to be wholly unrelated to deeper moral questions, seemingly making moral standards part of the condition for legal validity, and challenging positivism's claim that all law can be identified as social fact. This was in part the basis upon which Dworkin, in *Law's Empire*, derisively referred to Hart's theory as "plain-fact" positivism.[117]

Yet positivists have addressed this problem in one of two ways. Inclusive legal positivists, like Hart, have accepted that it is possible that the content of the rule of recognition could include essentially moral content. In a postscript to *The Concept of Law*, in response to Dworkin's "plain-fact" critique, Hart reemphasized "explicit acknowledgement that the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values."[118] This, he noted, led to his theory being called "'soft positivism' and not as in Dworkin's version of it 'plain-fact' positivism."[119]

Others, like Joseph Raz, have sought to clarify the nature of the separability thesis, arguing that while there may be a necessary connection between law and morality (insofar as a legal system may be said to be a morally good thing), that connection does not require that truth as a moral principle be a condition of legal validity.[120] And unlike Hart, Raz is an exclusive or "hard" legal positivist, for he contends that all law is source-based, which means it can be identified by reference to social facts alone, without resort to any evaluative argument, including morality.[121] This is because Raz's legal positivism is a theory about the nature of authority, and it does important work in reframing questions of legal meaning as questions for authorities, not for other audiences. Raz has contended that the nature of legal authority is that when, say, a judge decides which of two possible interpretations is correct, the only proper way to acknowledge the judge's authority "is to take it to be a reason for action which replaces the reasons on the basis of which he was meant to decide."[122] This means that, whatever dependent reasons the litigants or the judge may have weighed for one outcome versus another, those reasons are preempted once the legal authority renders a judgment as to the law.

This conception of the nature of legal interpretation has sweeping significance for the nature of legal authority generally, for Raz understands the legal authority as substituting its

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[116] *Id.* amend. XIV cl. 1

[117] DWORKIN, *supra* note 6, at 6–7.

[118] HART, *supra* note 111, at 250.

[119] *Id.* at 250.

[120] Joseph Raz, *Authority, Law and Morality*, 68 MONIST 295, 318 (1985).

[121] *Id.* at 296.

[122] *Id.* at 298.

judgment for that of other legal audiences. Under Raz's "service conception" of authority, an authority's decision is serviceable only if it can be identified by means other than the considerations the weight and outcome of which it was meant to settle.[123] Or, as Brian Leiter as summarized it, "a claim of authority is morally justified when the authority actually performs a service for its subjects, helping them really act better than they would without the benefit of the authority's intervention."[124] This account mirrors what social psychologists have reported about the determinants of perceived legitimacy in a legal system. Tom Tyler, a prominent psychologist who studies citizens' compliance with, and perceptions of, the legal system, has described legal legitimacy as "the belief that legal authorities are entitled to be obeyed and that the individual ought to defer to their judgments."[125]

Raz's position will both help to explain the rise of original intention and original meaning originalism, insofar as those methods can trace their source of meaning from the intended and original meanings of texts enacted in accordance with the rule of recognition. Thus, as I will discuss below, some have argued that originalism is a form of consent-based positivism that is grounded in an account of political authority that rests in the establishment of the Constitution by the founding members of society.[126] In this sense, most brands of originalism fit nicely with a positivist account of the law. However, the hard positivism of Raz also lays the trap for its own undoing, because the originalist methods have at best a weak claim to satisfying the conditions of the service conception of authority.

Nevertheless, for now it is sufficient to conclude that the rise of legal positivism in the twentieth-century helped to usher American jurisprudence into a post-common-law-method era. Brian Bix has stated that, in a sense, "[m]aybe 'we are all legal positivists now'," for the legal positivists' approach to law has "prevailed to so great an extent that their views have been coopted by the mainstream, leaving it hard to recall or discern what their distinctive point is or was."[127] And as I have contended, whereas the common-law approach was often oriented toward the audiences of law as a source of authority about law and legal meaning, the legal positivist approach to legal authority is more formal and institutional, making it easier to overlook the role that nonjudicial actors play in contributing to the meaning of the law.

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[123] *Id.* at 304.

[124] Brian Leiter, *The Radicalism of Legal Positivism*, 66 NAT'L LAW. GUILD REV. 165, 168–69 (2009).

[125] TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW xiv (2002).

[126] James A. Gardner, *Positivist Foundations of Originalism: An Account and Critique*, 71 B.U. L. REV. 1, 16 (1991). 16

[127] Brian H. Bix, *Legal Positivism*, *in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 31 (Martin P. Golding & William A. Edmundson eds., 2005).

## III. AUDIENCE PARTICIPATION IN CONSTITUTIONAL CONVERSATION

In Chapter III, I will turn to a thorough examination of the role of nonjudicial audiences in the interpretation of statutes. But here, for the remainder of this chapter, I want to probe the role nonjudicial audiences in the most foundational source of American law, the Constitution. Unlike the common law but like statutes, the Constitution exists as a series of textual legal stipulations; but like the common law, and unlike statutes, the judicial attributions of constitutional meaning have evolved considerably over time, even as the literal text of the Constitution has largely remained fixed. Indeed, whereas statutory interpretation theory has often struggled to articulate a clear order of operations or hierarchy of methods for the interpretation of statutes, American constitutional theorists have more readily identified particular modalities by which judges are to approach the interpretation of the Constitution.

### *A. Constitutional Culture and Constitutional Conversation*

My interest is in how these modalities of interpretation set out the acceptable grounds for legal interpretation of the Constitution, and therefore invite the participation and interpretation of other nonjudicial audiences of the Constitution. In contrast to statutes, whose audiences may be delimited by the specific subject matter of the legislation, a Constitution necessarily must address all citizens and governmental actors, insofar as the Constitution is the compact by which the citizenry collectively gave its consent to be governed.[128] Most of the rights it provides are guaranteed to all persons, and it structures the very foundational institutions that provide for self-government by the people. And as Akhil Amar has noted, while as modern legal positivists we tend to read the Bill of Rights as creating or conferring legal rights, the congressional resolution accompanying the Bill of Rights described some of their provisions as "declaratory," meaning that "the Bill was not simply an enactment of We the People as Sovereign Legislature bringing new legal rights into existence, but a declaratory judgment by We the People as the Sovereign High Court that certain natural and fundamental rights already existed."[129]

In many important respects, the founding era system featured a more robust form of "popular constitutionalism," in which government officials did their best to interpret the Constitution while governing, but their interpretations were not authoritative, and were instead subject to direct supervision and correction "by the superior authority of 'the people

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[128] AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 18 (2015); *see also* Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 J. LEGAL EDUC. 167, 168 (1987) (describing our Constitution more as "something we do than something we make: we (re)shape it all the time through our collective activity").

[129] Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1206 (1992).

themselves'."[130] Larry Kramer has famously criticized the ascent of judicial supremacy on both historical and normative grounds, arguing that the concept was foreign to the framers and the early generations of Americans, writing that "[n]either the Founding generation nor . . . right on down to our grandparents' generation, were so passive about their role as republican citizens. They would not have accepted—did not accept—being told that a lawyerly elite had charge of the Constitution, and they would have been incredulous if told (as we are often told today) that the main reason to worry about who becomes president is that the winner will control judicial appointments. Something would have gone terribly wrong, they believed, if an unelected judiciary were being given that kind of importance and deference."[131]

Nevertheless, nonjudicial audiences of the Constitution have continued to remain significant insofar as nonjudicial popular constitutional movements have played a significant role in shaping the meaning of the Constitution at many points in history. Because formal constitutional lawmaking—the Article V process of amending the Constitution—has always since the Bill of Rights played a restricted role in the American constitutional order (only seventeen amendments in over two-hundred years), some have argued that this system requires other forms of citizen participation in constitutional lawmaking so as to ensure its continuing legitimacy and authority. Reva Siegel has thus suggested that "[t]he authority of the federal constitution depends upon popular participation in collective deliberation."[132] Siegel identifies the space in which collective deliberation about constitutional meaning takes place as our "constitutional culture," and she has pointed to practices that "draw citizenry into engagement with questions of constitutional meaning" and that enable communication between engaged citizens and officials charged with enforcing the Constitution, including judges, so that "citizens can influence officials in the exercise of interpretive power."[133] For Siegel, constitutional culture explains how changes in constitutional understanding emerge from the interaction of citizens and officials, pointing to interactions that include lawmaking and adjudication, confirmation hearings, ordinary legislation, failed amendments, protests, and campaigns, among others.[134]

One important aspect of Siegel's concept of constitutional culture is that it identifies that for the Constitution to continue to retain its legitimacy, meaning, and currency, interpretive

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[130] Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 962 (2004).

[131] *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

[132] Reva B. Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323, 1342 (2006).

[133] *Id.* at 1342.

[134] *Id.* at 1324.

considerations about the Constitution must provide for the possibility of national constitutional conversations among citizens and other nonjudicial legal audiences, and these nonjudicial audiences must be reasonably able to take part in them. In examining prevailing theories of constitutional interpretation, then, my interest is in their capacity to promote and sustain the possibility of constitutional conversation among contemporary constitutional audiences. Whether or not citizens or nonjudicial audiences should *prevail* as to their preferred assertion about the law's meaning is secondary, however; what is critical is that they have the capacity to at least be conversant in that dialogue.

This conception draws on Dworkin's distinction between propositions of law and grounds of law, where propositions of law are the various statements and claims people make about what the law allows or prohibits or entitles, while grounds of law are the bases upon which a given proposition about the law, if true as a matter of fact, will therefore be true as a matter of law.[135] I will argue that while not every specific proposition of constitutional law must be generally susceptible to citizen scrutiny, the basic grounds of constitution law should be. In developing the concept of constitutional conversation, what I seek to identify is the discursive relationship between nonjudicial constitutional audiences and courts. When nonjudicial constitutional audiences act as first-order interpreters of the Constitution, they seek to ascertain and ascribe meaning to it according to a particular programmatic, or grounds of law. For their claims of constitutional meaning to have legitimacy, however, their interpretive programmatic must be one broadly shared by courts that sit as second-order interpreters. A first-order interpreter may claim the U.S. Constitution *should* encompass an affirmative right to healthcare (the proposition of law), and she might point to other nations' constitutions that do set forth such a right (the grounds of law). But if courts do not consider the constitutional practices of other jurisdictions to be relevant to ascribing meaning to the U.S. Constitution (*i.e.*, they reject those grounds), then the first-order audience's assertion about constitutional meaning will not be credible or persuasive.

An important criterion for deciding on the grounds of constitutional conversation, then, will be whether the grounds of constitutional interpretation that courts determine as second-order interpreters of the Constitution will tend to be congruent with the grounds of law ascertainable by the broader audiences of the Constitution such that they tend to promote the possibility of meaningful dialogue, discussion, and debate—in a sense, conversation. In particular, I am interested in whether prevailing judicial interpretive approaches to constitutional interpretation draw on methods, sources, and tools of interpretation and construction that tend to enhance or diminish the capacity for constitutional conversation. If the Constitution's authority rests in popular sovereignty, then whether future generations are directly involved in *formally* altering it, they should, at a minimum, be able to participate in constitutional conversation around its meaning and application to new societal problems.

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[135] DWORKIN, *supra* note 6, at 4–5.

It is difficult to say that the legitimacy of the Constitution derives from popular *sovereignty* when the grounds of constitutional law are not susceptible to popular *scrutiny*. Indeed, Siegel suggests that the practices of a robust constitutional culture will help to ensure the probability of tolerant dissent: when judges are *not* responsive to citizen influence, "the belief that it might be *possible* to persuade . . . the decisionmaker gives citizens reason to respect the authority of those decisionmakers with whom they disagree."[136] Yet if courts decline to draw on grounds of constitutional law appropriate for citizen audiences, citizens will lack the possibility of persuasion.

There are, of course, good arguments for why *legal* reasons and *legal* reasoning may not always be amenable to more generalizable conversations between judges and legal audiences. At one extreme, conversations in which all participants have equal standing threaten the distinction between law and politics by eliding the demarcation between *legal* reasons given by judges and *nonlegal* reasons that may be motivated by political or self-interested concerns.[137] It is obviously the case that what the Constitution guarantees by "due process" cannot simply be what any given citizens thinks is the process that should be due because they prefer it. And, at the other extreme, modern society is simply too complex to expect that every legal rule be so amenable to generalist explanation as early common-law doctrines were; statutes and regulations partially supplanted the common law for a reason. Moreover, judges are nominated to the bench precisely because they have the education, pedigree, knowledge, experience, and *judgment* to be well situated to unpack the oft-complex legal questions generated by a complex and plural society.

Nevertheless, one can imagine a middle position where at least some legal constitutional questions are amenable to popular dialogue, and I will argue that the distinction between propositions of law and grounds of law broadly captures this important difference. Thus, where meaning and applications of basic legal rights related to liberty, equality, and fairness are at stake, the grounds for those conversations should be broadly accessible to the public at large, even if the specific propositions—drawn from text, structure, precedent, etc., may be less so. It is thus safe to imagine that while the average citizen may have no substantive view about the precise time-frame under which Congress must, "from time to time," publish a journal of its proceedings,[138] but may have a much more informed view about questions concerning basic liberties like the right to "freedom of speech,"[139] what constitutes "cruel and unusual punishments,"[140] and so on.

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[136] Siegel, *supra* note 133, at 1342–43.

[137] *Id.* at 1327.

[138] U.S. CONST. art. I, sec. 5, cl. 3.

[139] U.S. CONST. amend. I.

[140] U.S. CONST. amend. VIII.

### *B. Second-Order Approaches to Constitutional Interpretation*

Even if perfect interpretive congruence between judges and other constitutional audiences is illusory, assessing prevailing approaches to constitutional interpretation from the vantage point of constitutional audiences helps to clarify an important criterion for a persuasive theory of constitutional interpretation: the degree to which its methodology can be assessed by, and drawn upon, by nonjudicial constitutional audiences. In this section, I will examine prevailing methods of constitutional interpretation on the basis of what those methods would expect of other constitutional audiences and what modes of critique they afford those audiences. What this reveals is that whatever other virtues each approach may have, not all are equally suitable for inviting the Constitutions' nonjudicial audiences to participate in contestation, interpretation, and conversation about the Constitution's meaning.

Broadly speaking, the state of constitutional interpretive theory today has largely settled into two camps: those who believe the Constitution should be interpreted on the narrow grounds according to which the Constitution's meaning is set at the time of the relevant provision's ratification, and those who believe the Constitution may be interpreted according to other, broader and textually ahistorical grounds, including present-day beliefs or practices, ethical or moral concerns, and precedent.

One way to understand these differences is to think about which first-order interpretations judges will accord preference to when sitting as second-order interpreters of the Constitution. To clarify what I mean by this, imagine that a judge is weighing three competing first-order interpretations of the Eighth Amendment prohibition on "cruel and unusual punishments." One proposed interpretation looks to the original public meaning of the term "cruel and unusual" in the founding era generally. A second interpretation puts forward a meaning according to what the *framers* of the Constitution intended the provision to mean. Finally, a third offered meaning turns to what contemporary society thinks the concept of unduly cruel and unusual punishment means today. In deciding which of these meanings is correct, that judge, sitting as a second-order interpreter, will decide not only the correct meaning of the term (the proposition), but they will also give reasons as to why that meaning is the correct one (the grounds), which will usually entail saying something about which *methods* of interpretation among those offered is most appropriate for resolving constitutional ambiguity of this kind.

When judges decide constitutional questions as second-order interpreters, then, the reasons they give for arriving at the meaning they choose also clarify the grounds of law, and they signal which of several possible first-order constitutional audience's *understandings* of the Amendment shall be legally credited: the meaning attributed by ordinary citizens during the founding era; the framers of the Constitution who understood their work product to

convey particular meanings;[141] or the beliefs and views of contemporary citizens and society at large. Reconceived in this way, debates between living constitutionalists and originalists are not just about which outcome is preferable, but which grounds of law tend to invite or exclude other constitutional audiences from participation in the conversation.

*1. Living Constitutionalism*

I will say less about living constitutionalism than originalism, in part because living constitutionalism tends to be a more pluralistic approach, which means that a variety of sources and methods of interpretation may be considered by living constitutionalist judges, and therefore almost no grounds of law are fully excluded, nor one particular ground of law always prioritized. While this tends to make living constitution's methodology harder to pin down (and is one reason why it has come under attacked), it also means that living constitutionalist conversations about constitutional meaning tend to be much more pluralistic in terms of both methods and reasons.

From the standpoint of audience, living constitutionalism's approach to interpretation broadly situates contemporary judges, citizens, and members of society as the most relevant first-order audience of constitutional meaning. In a famous speech at Georgetown University in 1985, Justice Brennan, a leading living constitutionalist, made clear whom he thought the Constitution spoke to: because the Constitution is "fundamentally a public text" and the Justices of the Court "must apply it to resolve public controversies," "[w]hen Justices interpreted the Constitution they speak for their community, not for themselves alone. The act of interpretation must be undertaken with full consciousness that it is, in a very real sense, the community's interpretation that is sought."[142] More recently, Justice Breyer, too, has emphasized that the Constitution's audience is the present-day people. Drawing on Benjamin Constant's conception of the "liberty of the ancients" as "'an active and constant participation in collective power,'" Breyer has argued that "when judges interpret the Constitution, they should place greater emphasis upon the "ancient liberty," i.e., the people's right to 'an active and constant participation in collective power.'"[143]

It almost goes without saying that the living constitutionalist approach orients audience-related inquiries at the center of its interpretation. Conceiving of the Constitution as "a public text," and understanding the act of constitutional interpretation as one in which it is "the

[141] Although it may seem paradoxical, the drafters of the Constitution may be thought of to be one audience of the document, for they continued to debate its meaning years after ratification and during which time they were themselves legal subject of it. Anyone who has written themselves a note and later struggled to understand what they had written will appreciate the way that the author of a text can later be that text's primary audience and interpreter.

[142] William J. Brennan, *supra* note 9, at 434.

[143] Breyer, *supra* note 66, at 246.

community's interpretation that is sought," situates the Constitution's broader public audience as central to the interpretive endeavors of judges.

*2. Originalism*

In contrast to living constitutionalists, most originalists have a very different idea of whom the legally relevant audience of the Constitution may be, one which is temporal and looks to the past. Almost all forms of originalism include three core ideas. The first is that the legitimacy of the Constitution stems from its having been enacted as an authoritative expression of the will of the people that judges are duty-bound to follow.[144] Prioritizing the original meaning of the Constitution's text is justified because "[w]hat makes the Constitution law is the consent of the ratifying public—We the People—who g[a]ve assent to the text presented to them."[145] In this sense, the reason for seeking an understanding of the Constitution at the time of its ratification is that the popular sovereignty that originally gave, and therefore continues to give, the Constitution its mandate as the supreme law, is tied to the act of consent by the people agreeing to be governed by the Constitution at the time of its ratification.

The enactment and ratification of the Constitution, then, sets forth the original rule of recognition for all subsequent lawmaking and interpretation.[146] This means that when judges interpret the law as originalists, they are duty-bound to ensure that any application of the law properly flows from the authority of the Constitution itself. For this reason, many have described originalism as relying on a "consent-based positivis[t]" theory of legal authority, and even non-originalists have described the Constitution as "our master rule of recognition."[147]

The second premise generally central to all forms is the *fixation thesis*: this "claims the original meaning ("communicative content") of the constitutional text is fixed at the time each provision is framed and ratified."[148] Lawrence Solum has been one of the most prominent

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[144] *E.g.*, Barnett, *supra* note 5, at 9. Others have argued that the Constitution itself prescribes the rules for its interpretation. Professor Michael Stokes Paulsen, for example, has pointed to language in Article VI of the Constitution, and in particular its instruction that "*This Constitution*, and the Laws of the United States which shall be made in Pursuance thereof; . . . *shall be the supreme Law of the Land*, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 865 (2009) (quoting U.S. CONST. art. VI).

[145] Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71, 74 (2016).

[146] *See* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 384 (1981).

[147] *E.g.*, Gardner, *supra* note 127, at 7–9.

[148] Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 6–7 (2015).

recent scholars to articulate in extended detail the justification for the fixation thesis. According to Solum, the fixation thesis is a claim about constitutional *interpretation*, which is to say, a thesis about the activity of discovering the *communicative* content of the constitutional text, rather than the *legal* content of the text.[149] In other scholarship, Solum has argued that what is typically called legal "interpretation" is in fact two distinct but related tasks: interpretation and construction.[150] Whereas *interpretation* is the act of attributing linguistic or semantic meaning to a given communicative text, *construction* is the process that gives that communicative text legal effect through application to particular circumstances.[151]

Because the focus of the fixation thesis is on communicative content rather than legal content, this thesis alone does not indicate whether the communicative content of the Constitution should be decisive in the construction of constitutional legal meaning to particular circumstances.[152] However, it does hold that the communicative content of the Constitution was fixed at the time of origination, and so it repudiates the idea that the communicative meaning of the Constitution could itself change over time.

The third core idea shared by most forms of originalism is what Solum calls the constraint principle. Those who hold this principle believe that "the content of constitutional doctrine and the decision of constitutional cases should be consistent with the original public meaning of the constitutional text."[153] This is not just a claim about how to interpret text, as the fixation thesis is, but a claim about the implications of interpretation when constructing the constitutional doctrines that emerge from the application of constitutional text to particular facts or conflicts. Combined, the fixation thesis and constraint principle require that constitutional practice should, at a minimum, be consistent with the original meaning (*i.e.*, the meaning at the time the provision was framed and ratified) of the constitutional text.[154]

Almost all forms of originalism ascribe, at a minimum, to the fixation thesis and the constraint principle. For my purposes, I will focus on the two broad approaches, which in part parallel debates between purposivism/intentionalism and textualism in statutory interpretation: *original intent* originalism and *original public meaning* originalism.

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[149] *Id.* at 15.

[150] Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 95–96 (2010).

[151] Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451, 96 (2018).

[152] Solum, *supra* note 150, at 15.

[153] LAWRENCE B. SOLUM, THE CONSTRAINT PRINCIPLE: ORIGINAL MEANING AND CONSTITUTIONAL PRACTICE 3 (2019).

[154] Solum, *supra* note 153, at 453.

*3. Original Intent Originalism*

Richard Kay has observed that "[t]he idea that judicial interpretation of the Constitution should be governed by the real subjective intentions of the human beings who established it as governing law was, for a long time, so natural as to require no name."[155] Kay argues that just as the intentions of lawmakers had been a paramount consideration in the interpretation of statutes at common law, judicial references to the drafters' intentions were references to "the real psychological intentions of flesh and blood lawmakers," including references to the psychological intentions of the "framers" and the "founders."[156] Indeed, the exercise in examining the psychological intentions of the framers is familiar even in *contemporary* constitutional interpretive debates, as a chief source of interpretive meaning remains *The Federalist* papers. Citations to *The Federalist* papers, written by three of the chief architects of the U.S. Constitution, Andrew Hamilton, James Madison, and John Jay, are said to reveal the framers' beliefs, assumptions, and intentions about the legal effects of the Constitution then under debate for ratification.[157]

In recent years the Court has sought to resolve seemingly conflicting views of Hamilton and Madison as manifest in their respective contributions to *The Federalist* papers;[158] cited as revelatory to the Constitution's meaning that "Madison *took the view* that the Treaty Power was inherently limited";[159] and emphasized that Madison "made [his] assumption absolutely clear" during debates about the Alien and Sedition Acts whether "the Framer intended to recognize a general federal jurisdiction to try common-law crimes."[160]

a. Conventional Critiques of Original Intent Originalism

Although once the prevailing form of originalism, original intent has been criticized both from those sympathetic to living constitutionalism and even by many originalists. Scholars from both camps criticized it for being impractical, insofar as it is nearly impossible to

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[155] Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NORTHWEST. UNIV. L. REV. 703, 704 (2009).

[156] *Id.* at 705.

[157] THE FEDERALIST PAPERS, X (Clinton Rossiter ed., 1961). "Hamilton and Madison, joined by John Jay, undertook the series of essays in order to expound the merits of the new Constitution and to answer the objections to it that had already begun to appear across newspaper columns . . . across the United States."

[158] Printz v. United States, 521 U.S. 898 (1997). Justice O'Connor, writing for the majority in *Printz*, observed that "[i]f it was indeed *Hamilton's view* that the Federal Government could direct the officers of the States, that view has *no clear support in Madison's writings*, or as far as we are aware, in text, history, or early commentary elsewhere." *Id.* at 915 (emphasis added).

[159] Bond v. United States, 572 U.S. 844, 887 (2014) (emphasis added).

[160] Seminole Tribe of Fla. v. Fla., 517 U.S. 44, 141 (1996).

discover and aggregate the various intentions held by numerous framers.[161] In this sense, the task of original intent originalism is epistemically difficult: how much evidence is sufficient to reveal the framers' intentions for the document? Where they disagreed, how should their disagreements be reconciled in order to articulate the "prevailing" intent? Moreover, some have argued that original intent originalism actually violates the intentions of the framers, who intended for the purpose and intent of the Constitution to be derived from the public words of the text, not from their revealed preferences in other settings.[162]

Original intent originalism also suffers from a sequencing problem. Although the framers drafted the Constitution, they cannot truly be said to have enacted it. After all, the Constitution, unlike an ordinary statute, wasn't made law simply because it was enacted by its drafters; it was also ratified by the states. And because it was the ratification process that made the Constitution *the Constitution*, and endowed it with the authority of popular sovereignty, surely the ratifiers' views must count too.[163]

While the arguments for and against original intent originalism have continued to evolve, what is important is that the perceived flaws of original intent originalism were sought to be shored up by reconstituting originalism as original meaning originalism.

*4. Original Public Meaning Originalism*

Thus, beginning in the 1980s, the focus among originalist constitutional interpreters on the original intent of the framers began to give way to the original meaning attributed to the *text* they enacted. This approach became especially prominent with the elevation of Justice Antonin Scalia to the Supreme Court, who, in both his judicial and extrajudicial writings, developed the argument that it was the original *meaning* of the Constitution text—not the framers' *intentions* about it—that dictated its legal meaning.[164] Although these approaches have much in common, they have important differences, including the role they invite for nonjudicial legal audiences.

Today, most prominent articulations of originalism are some form of original public meaning originalism. Like most other originalists, public meaning originalists assume both

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[161] Barnett, *supra* note 203, at 8; *see also* Paul Brest, *The Misconceived Question for Original Understanding*, 60 B.U. L. REV. 204 (1980).

[162] H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 887–88 (1985). But see Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intentions*, 68 OHIO ST. L.J. 1239 (2007) (arguing that English and American law during the founding period look to the intent of the lawmaker in defining the meaning of legislation, where "intent" meant the actual subjective psychological intentions of the flesh-and-blood legislators).

[163] Jack Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 444–45 (2007).

[164] Kay, *supra* note 157, at 706.

the fixation thesis and the constraint principle, and in addition, adhere to the *public meaning* thesis, which is the view that "the best understanding of 'original meaning' is the public meaning of the constitutional text at the time each provision was framed and ratified."[165] Public meaning originalists contend that this approach to constitutional interpretation best acquiesces to popular sovereignty by adhering to the meaning attributed to that document at and around the time of its enactment, by the people who enacted it. After all, it was only the *text* of the Constitution that acquired the status of legitimate law, not the unexpressed or informally communicated intentions of the drafters, nor subsequent commentaries about those drafting sessions. Original public meaning originalism thus functions similar to a textualist approach to statutory interpretation described above, for both seek to disclaim much of a role for original intentions in interpreting legal meaning.

As articulated by Solum, public meaning originalists understand the public meaning of the constitutional text to be "the content communicated to the public by the text and the publicly available context of constitutional communication. Thus, the original meaning is a function of both (1) semantics and (2) contextual enrichment."[166] Such originalists conceive of the semantic meaning of the constitutional text as the meaning produced by the conventional semantic meanings of the words and phrases as combined by syntax—the "literal meaning."[167] But they care about more than just the "literal meaning" of the text, because the theory also considers the full communicative content of the text, informed by pragmatics, or "contextual enrichment": the content generated from the implicatures and presuppositions related to the legal utterance made in the form of the constitutional text.[168] Thus, original public meaning originalists draw much more than other theories of constitutional interpretation on the aspects of communication theory discussed in the introductory chapter.

For original public meaning theorists, relevant contextual enrichment is confined to the public context of the framing and ratification of the relevant constitutional provision, "facts about the context of constitutional communication that were accessible to the members of the general public at the time the constitutional text was made public and subsequently ratified."[169] What facts about the context might constitute relevant contextual enrichment? For Solum, these are time-bound and related to what the public might have had access to in 1787, for example, facts about the American Revolution, the experience under the Articles of Confederation, and the general shape of the common law regime in effect throughout the

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[165] Solum, *supra* note 153, at 453.

[166] *Id.* at 453.

[167] *Id.* at 453–454.

[168] *Id.* at 454.

[169] Solum, *supra* note 150, at 28.

United States at the time.[170]

Original public meaning, then, can be restated as follows: the communicative meaning of the Constitution is (a) fixed at the time of each provision was communicated to the public; (b) derived from relevant semantic facts and communicative context at the time the constitutional text was communicated to the public at ratification; and (c) constraining on all relevant constitutional applications going forward, even where the contemporary public meaning of constitutional text may change or where other prudential, ethical, or doctrinal concerns might conflict with the original public meaning.[171]

a. Conventional Critiques of Original Public Meaning Originalism

Public meaning originalism has come under attack from both originalists and non-originalists alike. Externally, critiques to both original intent and original public meaning originalism have focused on how these approaches understand the Constitution as a document whose purpose is to subordinate present-day politics to the will of past super-majorities.[172] The normative basis for the original public meaning interpretive approach to the Constitution has been criticized by numerous scholars and jurists as prioritizing "the dead hand of the past" over the present.[173] Although originalists contend that constraining interpretation of the Constitution to the original intent or meaning is justified in part on the basis that it respects the popular sovereignty of the process by which it was enacted, others have reflected that this notion is odd insofar as "the people who made the Constitution's most important provisions are all dead."[174]

But public meaning originalism has also been criticized by other originalists. One prominent critique is that the interpretive move from original intent to original public meaning causes originalism to become detached from the legitimizing authority of the act of constitution-making itself.[175] This is because constitutional interpretation on the basis of public meaning requires the construction of a *hypothetical* reasonable person engaged in the act of interpretation at the time of the Constitution's ratification, and this fictional reasonable person's understanding of the Constitution's meaning will necessarily trump that of the Constitution's drafters themselves where the two conflict.[176] Since it is the drafters and

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[170] *Id.* at 28–29.

[171] *Id.* at 18–19.

[172] Christopher L. Eisgruber, *Fidelity Through History*, 65 FORDHAM L. REV. 1611, 1613 (1997).

[173] *See, e.g.*, RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 137–38 (1990); *see generally* Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. (2008).

[174] Eisgruber, *supra* note 174, at 1613.

[175] Kay, *supra* note 157, at 719.

[176] *Id.* at 718–19.

ratifiers themselves who gave the Constitution its legal authority—not some hypothetical reasonable person—where meanings produced by these two methods of originalism conflict, this argument goes, it is original intent, not original public meaning, that carries the imprimatur of constitutional *authority*.

Another prominent internal critique of public meaning originalism is that it will generate more cases of constitutional indeterminacy than will the originalism of original intentions.[177] This is because, unlike original intended meaning, for which there is a "fact of the matter" as to the intended meaning (if one can be so adduced), there is no *"real"* public meaning, for original public meaning is a construct.[178] This is because it is not "a theory of anyone-in-particular's understanding," but rather the understanding of "a hypothetical, objective, reasonably well-informed reader of those words and phrases, in context, at the time they were adopted, and within the political and linguistic community in which they were adopted."[179] Which is to say: an entirely *fictional* person[180]—and a complicated one, for this fictional person would be the "hypothetical, objective, reasonably well-informed reader," who, presumably, would be "fluent in language, conversant with the historical and constitutional discourse of the time."[181]

From the standpoint of audience and first-order interpretation, original intent originalism and original public meaning originalism depict two very different models of interpretation, and roles for first-order interpreters in each. Chief among the differences is *whose* interpretation counts under each approach. Original intent originalism, much like statutory interpretation purposivism, seeks to determine what the *drafters'* intentions were for the document subsequently enacted. That approach does not require deference to any given first-order interpreters' understanding of the law, for the understanding that counts is the one of the law's authors themselves, not any particular audience of the law. By contrast, original public meaning originalism prioritizes a particular posited first-order interpreter. For the meaning of constitutional text to be a function of the context of constitutional communication at the time of ratification, "it is important to determine the appropriate group *of readers*."[182]

Thus, public meaning originalism has a clear account of the role of constitutional *audience* in the second-order constitutional interpretive methodology of judges. It elevates the interpretations of a certain kind of nonjudicial first-order interpreter to the front and

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[177] *Id.* at 721.

[178] *Id.* at 719–720.

[179] Vesan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1132 (2003).

[180] Kay, *supra* note 157, at 718.

[181] *Id.* at 722.

[182] Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 274 (2017) (emphasis added).

center of constitutional interpretation discourse—the *original public* of first-order interpreters, and how *they* understood the Constitution's meaning. And again, this first-order interpreter is quite distinct, and quite anachronistic, for the question is how the Constitution "would have been understood by a hypothetical, objective, reasonably well-informed reader of those words and phrases, in context, at the time they were adopted, and within the political and linguistic community in which they were adopted."[183]

### *C. First-Order Original Interpretation*

In this next section, I want to think about what it means for constitutional conversation to hinge on the posited participation of a constitutional audience that is well over two hundred years' dead. And in particular, I want to ask whether contemporary citizens are likely to ably participate in a conversation whose chief purpose is *archaeological*, to discover past meaning drawing on tools from history, literary and linguistic analysis, and the political and legal theory literatures of that era. What I want to suggest is that the proper concern with original public meaning originalism is not that it raise dead *hand* problems, but rather that it raises dead *ear* problems, by displacing contemporary constitutional audiences from the conversation in favor of hypothetical historical ones. And I will contend that doing so raises serious methodological and normative concerns for the robust constitutional conversation I believe is necessary to legitimate not only the Constitution generally, but the interpretations of courts that are expected to be treated as legitimate and authoritative constitutional content to be followed.

#### *1. The Dead Ear of the Constitution?*

As I have said, that original public meaning originalism provides a clearer conception of constitutional audience than original intent does not necessarily ensure that it furthers the capacity for constitutional conversation among nonjudicial audiences—-quite the opposite. An important contrast between the fictionalized "reasonable person" of the common-law method—a person whom any member of the relevant legal community could potentially identify as—and the fictionalized "reasonable person" of the founding era is that from the standpoint of contemporary constitutional audiences, the founding era reasonable person is not one to whom most Americans can relate. This is not just because he would have been male, white, and in many cases, a slave-owner—criticisms raised by others.

Rather, when I say that the Constitution's contemporary audiences cannot relate to the fictionalized founding-era person, what I mean is that the tools and methods necessary to discover who this person was, what they believed, and how they thought about the Constitution's meaning, will likely place access to understanding this person beyond the reach of most members of the contemporary public. It is highly unlikely most citizens today

[183] Kesavan & Paulsen, *supra* note 181, at 1132.

could approach, or be reasonably expected to approach, the act of constitutional interpretation from the vantage point of the founding-era reasonable person. But when courts reconstruct this hypothetical constitutional audience from over two-hundred years ago, they change the terms upon which constitutional conversations are permitted to be conducted, for constitutional debates about issues such as abortion and the death penalty are waged on *historical* rather than contemporary terms.[184]

The distinction between first-order and second-order interpretation highlights this problem, for the implications of elevating the "original public meaning" as the second-order, judicially valid approach to constitutional interpretation has significant downstream consequences for subsequent acts of first-order interpretation among nonjudicial constitutional audiences. When Courts define interpretation in an historically reconstructed past, today's audiences will be expected to understand constitutional meaning that bears little resemblance to contemporary understanding and use. Instead, courts are in essence privileging the perspective of the original public as the Constitution's audience: they seek to hear what the Constitution communicated to members of the original public the way *they* understood it. But the legal effect of these second-order methodological choices is that *other* contemporary constitutional audiences will *also* be expected to participate in conversation and debate about constitutional meaning on those terms.

For this reason, I believe it is more incisive to say that original public meaning originalism elevates not the dead hand of the Constitution, but the dead *ear*. And critically, the first-order methods, sources, and rules of interpretation that are necessary to understand what a particular constitutional provision "meant" to the founding-era reasonable person are *not* methods and sources that are especially availing to contemporary constitutional audiences other than courts and historians. Here is how one scholar has described the interpreter-historian's task in discovering the original public meaning of the Constitution: "The interpreter's task as historian . . . [is to] immerse herself in the world of the adopters to try to understand constitutional concepts and values from their perspective.[185]

This is no easy task. Justice Scalia himself acknowledged that "it is often exceedingly difficult to plumb the original understanding of an ancient text," which, properly done, "requires the consideration of an enormous mass of material," such as the ratifying debates in all the states, as well as the "political and intellectual atmosphere of the time."[186] Justice Scalia noted that this is "a task sometimes better suited to the historian than the lawyer."[187] From the standpoint of *contemporary* first-order constitutional audience, then, the original

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[184] *See* Introduction, notes 52–54 and accompanying text.

[185] Brest, *supra* note 163, at 218.

[186] Antonin Scalia, *Originalism: The Lesser Evil*, 57 UNIVESITY CINCINNATI LAW REV. 849, 856 (1989).

[187] *Id.* at 857.

public meaning originalist method of interpretation elevates an imagined, hypothetical audience over contemporary citizens, judges, and lawyers, and requires an interpretive toolkit better suited to historians than lawyers, let alone the public at large.[188]

From the standpoint of constitutional audience, original public meaning originalism raises two concerns.[189] The first is that it draws almost exclusively from sources and methods with which contemporary constitutional audiences are likely to be unfamiliar. This means that few nonjudicial constitutional audiences will be able to assess the validity and soundness of what are essentially historical and empirical claims about prevailing practices and beliefs during that particular historical era. Originalism, then, is as much a species of intellectual history as it is a species of judicial lawmaking.[190] Intellectual historians like Quentin Skinner have long cautioned against interpreting and attributing meaning to selected bits of historical texts and sources from the contemporary vantagepoint. As Skinner has warned, "[t]he perpetual danger, in our attempts to enlarge our historical understanding, is that our expectations about what someone must be saying or doing will themselves determine that we understand the agent to be doing something which he would not—or even could not—himself have accepted as an account of what he was doing."[191] Skinner and other intellectual historians working in the "Cambridge School" approach to intellectual history have devoted decades of careful practice and study to avoid the traps of intellectual history such as "the danger of converting some scattered or quite incidental remarks by a classic theorist into his 'doctrine' on one of the mandatory themes."[192] In this sense, whereas an intellectual historian seeks simply to *understand* history, an originalist's use of history is "goal-directed," "to understand past thought . . . to address present concerns."[193] And as others have shown, there is no guarantee the originalist approach—or any judicial approach—will understand past thought in a reasonable and even-handed, let alone correct, way.[194]

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[188] *See* Introduction, notes 52–54 and accompanying text.

[189] *Id.*

[190] Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1755 (2015).

[191] Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HIST. & THEORY 3, 6 (1969).

[192] *Id.*

[193] H. Jefferson Powell, *Rules for Originalists*, 73 VIRGINIA L. REV. 659, 669 (1987). By contrast, "[a]n intellectual historian does not, or at least need not, claim that his interpretation of, say, Hobbes's Leviathan is the correct, normative meaning of the text, but only that his interest in Leviathan is what Hobbes thought he was saying." *Id.* at 663.

[194] Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 525 (1995) ("[C]onstitutional discourse is replete with historical assertions that are at best deeply problematic and at worst, howlers.").

## IV. CONCLUSION: CONSTITUTIONAL CONVERSATION AND CONSTITUTIONAL LEGITIMACY

As the prior section has shown, privileging the first-order interpretations of posited original interpreters of the Constitution has important downstream consequences for the shape and contours of constitutional conversations outside of courts. Were a strict version of original public meaning originalism to be the prevailing approach to all constitutional interpretation, most debates about constitutional meaning would be grounded more in empirical debates about prevailing eighteenth century linguistic uses of language, historical practices among the people and the framers, and the applicability of pre-American English common law doctrines. Supreme Court decisions that turn on debates about what can be gleaned from original public meaning sources often look as much like debates between intellectual historians as debates about the resolution of difficult contemporary legal questions in a pluralistic society of competing rights-claimants.

It is worth asking whether these historical interpreters should be privileged over all others, including a judge's *own* best interpretations of the Constitution, let alone other first-order interpreters'. For this approach to be preferable to all others, there must be a way in which it can provide an account of legitimacy that outweighs the costs to the capacity for constitutional conversation. In this section, I will argue that original public meaning originalism is a theory of constitutional interpretation that speaks *to judges*. As others have noted, originalism's attractiveness lies in the possibility that it seems to offer judicial interpreters an escape from personal responsibility for their decisions, by providing them with apparent "neutrality" in judicial-decisionmaking.[195] It is worth reflecting on what the benefits of this supposed neutrality are *for judges*, as well as for other constitutional audiences.[196]

Conceptualizing constitutional debates in terms of the capacity for the Constitution's audiences to participate in constitutional conversation reveals how source and method can have a tendency either to include or exclude. Returning to the metaphor of symphonic audience, the methodology of original meaning originalism may function much like a Puccini opera performed at Lincoln Center but without subtitles. A few members of the audience may be fluent in Italian, or already familiar with the libretto, but most audience members can at best glean a very crude sense of the plot, and appreciate little about that cast's specific interpretation and application of an opera whose meaning cannot be apprehended.[197]

Interestingly, even legal positivists have recognized that the Constitution depends on a kind of sociological legitimacy derived not just from the fact of judges adhering to sources that contain a certain kind of constitutional pedigree. As self-described legal positivist

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[195] Gardner, *supra* note 127, at 38.

[196] *See* Introduction, notes 52–54 and accompanying text.

[197] *Id.*

Richard Fallon has noted, "[i]f constitutional meanings could not be experienced in diverse ways, then the fabric of acceptance that surrounds the Constitution might unravel."[198] In this way, the legitimacy of the Constitution derives not just from its ratification, but from the ongoing constitutional practices that are perceived as having legal legitimacy, or the belief that officials' decisions ought to be followed because they are lawful. But as Fallon notes, American constitutional law invites and sometimes *requires* appeal to moral values as an element of constitutional analysis, and so "sociological legitimacy is also likely to depend partly on the public's moral views. A judicial decision that diverged too far from the public's sense of justice would lack substantive sociological legitimacy."[199]

Moreover, there is no reason to think sociological legitimacy necessarily follows from legal legitimacy, or vice versa. As Fallon notes, it seems quite likely that the ratification of the U.S. Constitution was in direct violation of the Articles of Confederation.[200] But once the Articles of Confederation had lost their sociological legitimacy, whether the Constitution was adopted as required by the Articles became, for all practical purposes, moot. The Constitution may very well be legally invalid as per the terms of the Articles of Confederation, but because few today believe this, and even fewer are concerned by it, the shaky original legal legitimacy of the Constitution is bolstered by its sociological legitimacy.

That the Constitution is considered legitimate because it is regarded as deserving our respect and obedience is a central descriptive feature of most forms of legal positivism. Recall that for Raz, an authority's decision is serviceable only if it can be identified as having a pedigree of authority, not because it can be justified on the basis of the considerations which it was meant to settle.[201] In other words, the decision is justified only when it performs a service for its subjects by helping them to act better than they would without the benefit of the authority's intervention, without having to second-guess that intervention.[202] It is unclear what kind of criteria a strict original public meaning originalist methodology would provide for the public to assess the correctness of the Court's decisions, let alone whether it leaves them better off than deciding on their own. Original public meaning originalism provides citizens with little serviceable grounds upon which to assess, on a non-consequential basis, whether a court's propositions about the Constitution's meaning warrant respect or obedience.

The irony, then, is that unelected judges have resorted to ancient history to disclaim criticisms of judicial hubris, and in doing so, have adopted a methodological approach to

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[198] Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1811 (2005).

[199] *Id.* at 1849.

[200] *Id.* at 1805.

[201] Raz, *supra* note 121, at 304.

[202] Leiter, *supra* note 125, at 168–69.

interpretation that—at least in its stricter forms—tends to exclude most contemporary members of the public from having a meaningful role in understanding their rights. It also tends to box out other methods and considerations of interpretation—including considerations of reasonableness, contemporary expectations, role of tradition, and evolving mores—that would invite a more robust constitutional conversation. And by privileging largely inaccessible sources as the methodology of constitutional interpretation, this approach makes much of constitutional interpretation unsusceptible to reasonable public critique.[203]

One alternative would be to retain the *judiciary's* quest for the original public meaning of constitutional conceptions, but then expand the possibility for the other branches of government to contest these interpretations as institutions more responsive to "the People." It is also worth considering what it would mean for the political branches to enforce the Constitution in a manner different from those of courts. After all, one avenue by which the popular constitutional will would most readily manifest itself is through the political branches themselves.

This approach has been described as "departmentalism," and it gives weight and expression to the practices of constitutional construction by the representative branches.[204] One of the clearest accounts of how this approach was put forward in a speech by Edwin Meese of the Reagan Justice Department in 1987, a time during which conservatives perceived liberals to have a monopoly on the federal courts. In arguing for a robust role for the political branches in constitutional interpretation, Meese distinguished between "constitutional law," which consists of judicial interpretations of the Constitution that bind only courts and the parties before them, with "the Constitution."[205] Meese contended that under the Supreme Court is "not the only interpreter of the Constitution"; rather, each of the coordinate branches was created and empowered by the Constitution to have a duty to interpret the Constitution in the performance of its official functions, and so the Constitution cannot be reduced to the constitutional law of the Supreme Court.[206] As a result, a decision of the Supreme Court "does not establish a supreme law of the land that is binding on all persons and parts of government henceforth and forevermore."[207]

In a subsequent article clarifying what Meese meant by his speech, Meese asked an important rhetorical question that applies just as much to concerns about the capacity for constitutional conversation as to the interpretation of any given provision of the Constitution:

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[203] *See* Introduction, notes 52–54 and accompanying text.

[204] Reva B. Siegel, *Heller & Originalism's Dead Hand–In Theory and Practice*, 56 UCLA L. REV. 1399, 1410–11 (2009).

[205] Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 981–89 (1987).

[206] *Id.* at 985–86.

[207] *Id.* at 983.

"what does one do when one believes the Supreme Court is wrong?"[208] Meese suggested that in addition to lawsuits and adjudication that can force the Supreme Court to reconsider prior decisions, legislation could also play a role, even in enacting laws that had previously been struck down. Meese suggested, "legislators are acting properly when they seek to enact new law of sufficient difference that it might pass constitutional muster in the Supreme Court."[209]

Meese closed his clarifying remarks with an observation that is perhaps even more striking read today, at a time when conservatives are perceived to control the federal courts and when original meaning originalism has perhaps never been more widely adhered to as the appropriate approach to constitutional interpretation: "[t]he process of debating, litigating, and legislating in response to a constitutional decision one thinks wrong has been an important part of our legal tradition. . . This process demonstrates that dialogue among our political institutions and among the American people helps us follow our supreme law, the Constitution."[210]

Meese's account of American law and constitutional dialogue is one in which contestation, disagreement, and protest are inherent in the constitutional process, and one which expressly envisions a robust role for both the political branches and citizens as audiences and interpreters of the Constitution. It is worth questioning, however, whether the departmentalism advocated for by Meese would be likely to enhance or hurt the legitimacy of the Constitution and the Supreme Court as the chief interpreter of it; it is just as easy to imagine a process by which all branches of governments are felt by large segments of the population to be illegitimate, insofar as each is seen as simply expressing a constitutional politics favorable to some citizens and abhorrent to others.

Others, like Michael Stokes Paulsen, have put forward a more pragmatic originalist account. This retains some role for departmentalism, whereby courts should not substitute their interpretations of the Constitution for that of the political branches any time "more than one interpretation is possible[;] there is not one principled rule supplied by text, history, structure, and precedent that privileges one reading over the other[;] and the political branches have acted pursuant to one such reading."[211] Indeed, Paulsen concludes that "an act consistent with a reasonable interpretation of the law cannot be said to be *contrary* to law."[212] This account of departmentalism functions more akin to a kind of division of constitutional interpretation labor, in which each branch may take the lead in interpreting and applying

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[208] Edwin Meese III, *The Tulane Speech: What I Meant*, 61 61 TUL. L. REV. 1003, 1006 (1987).

[209] *Id.* at 1006.

[210] *Id.* at 1006–07.

[211] Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 333 (1994).

[212] Paulsen, *supra* note 146, at 334.

particular portions of the Constitution.

The question is whether such an approach could work in practice, especially in an underdeveloped area of constitutional law of particularly high political stakes. As the next chapter will reveal, just such an issue exists, and may well be pressing in the immediate future: whether Congress possesses the constitutional power to guarantee fair political process and fair access to voting in the states, as well as to curtail partisan gerrymandering, under the Republican Guarantee Clause of Article IV, section 4 of the Constitution. And as I will describe in the next chapter, there are good reasons to think this constitutional provision is inviting of multiple audiences to participate in constitutional conversation and interpretation, and so the question is in part whether the form of departmentalism entailed by the Republican Guarantee Clause might look more like that imagined by Meese, or by Paulsen.

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In this chapter, I have sought to trace the genealogy of several important trends in American jurisprudence and interpretive theory over the past century, emphasizing the ways in which contemporary American law has diminished the role for nonofficial and nonjudicial interpreters to participate in legal interpretation and constitutional conversation.

In the next two chapters I will explore two potential responses to these developments. One approach, examined in Chapter II, is one of contestation and confrontation, in which one could contest the judiciary's predominance as an interpreter of the Constitution, especially over matters involving the basic conditions of the democratic polity itself. That chapter can be read a sort of case study in exploring the dynamics Edwin Meese described in 1987: how might the political branches assert competing approaches to constitutional interpretation vis-à-vis the Court, and what might happen if they do?

The other approach, examined in Chapter III, is to seek alterations to predominant theories of judicial interpretation so as to provide a greater role for nonjudicial audiences in the interpretive process, and to enhance the coordinative capacity of legal interpretation between judges and the law's audiences. Chapter III focuses on the ways that courts often tacitly and inconsistently recognize the roles of nonjudicial audiences in statutory interpretation—sometimes even in conflict with their own jurisprudential principles. The chapter strives to provide an account of how judicial methods of statutory interpretation could better do so going forward.

# CHAPTER II: INTERPRETATION AS CONFRONTATION



> "*The United States* shall guarantee to every State in this Union a Republican Form of Government . . . ."[1]

## INTRODUCTION

In the prior chapter, I described how modern theories of statutory and constitutional interpretation have tended to overlook important concerns related to the legal audiences of statutory and constitutional texts, as well as the relationship between the audiences of the law and the methods and sources courts employ to decide on the legal meaning of these texts. In conceptualizing the act of interpretation as constructing a conversation about the meaning of law, I explored the theory of departmentalism—that the political branches have an important and independent role to play in interpreting the Constitution even vis-à-vis courts. Might this approach resolve concerns about the judicial monopolization of constitutional

[1] U.S. CONST. art. IV, § 4 (emphasis added).

interpretation methodology, to say nothing of claims about constitutional meaning? If parts of the Constitution are understood as addressing all three federal branches equally—and inviting all three branches to have an independent role in interpreting and applying it—then the methodological preference of courts would not necessarily always prevail in determinations about the Constitution's meaning.

Questions about divisions of labor in constitutional interpretation, construction, and application are also related to important legal doctrines of standing, justiciability, and political questions. These doctrines guide courts in determining which parties may bring claims under the U.S. Constitution in federal courts, but also which branch(es) of government may best address particular kinds of complaints about unconstitutional conduct by government and/or private actors. Questions about constitutional audiences implicated in constitutional interpretation are in some respects thornier than in statutory or common-law interpretation. This is because these questions often raise background questions about *who* decides, and under what circumstances. For statutory interpretation questions, courts are clearly the only second-order interpreters of statutes—judicial interpretations of statutes are always definitive vis-à-vis other actors.

In the case of many constitutional claims, however, courts are not the only institutional audiences of the Constitution, and therefore not the only institution capable of rendering decisive claims about constitutional meaning. Courts therefore often function both as the interpreter of the constitutional text and also as the adjudicator of which interpreter is authoritative. In one sense, courts serve as both the first- and second-order interpreters in one, putting forward their own assertions about constitutional meaning and also deciding whether their assertions should prevail vis-à-vis other branches. Courts thus decide both whether the particular constitutional question is a question properly adjudicated by courts (the *forum* question), and, if so, the substantive question itself (the *merits* question).

But what happens if we can't figure out who the authoritative constitutional audience is? The civics textbook account of the U.S. Constitution is that it sets out a separation of powers by allocating particular roles and functions to each of the three branches of government.[2] Article I specifies the powers and responsibilities of Congress, Article II sets forth those of the President, and Article III describes the authority of the Supreme Court and lower federal courts. Yet the Constitution is not always so straightforward. In Article IV, for instance, the Constitution provides for an affirmative guarantee by "The United States," but then fails to

[2] *E.g.*, WE THE PEOPLE: AN INTRODUCTION TO AMERICAN POLITICS 43 (Benjamin Ginsberg et al. eds., 11th ed. 2017) ("To prevent the new government from abusing its power, the framers incorporated principles such as the separation of powers (the division of governmental power among several institutions that must cooperate in decision making).").

clarify who the guarantor is. Who may act as "The United States," and what actions may they take to fulfill the guarantee?

The Republican Guarantee Clause of Article IV, Section 4, thereby raises a captivating interpretive problem. The Clause's textual ambiguity, location within Article IV of the Constitution,[3] and seemingly broad potential have combined to render the Clause something of an alluring constitutional lacuna. Scholars have generally explored possible meanings of the term "republican form of government,"[4] and a few have examined what might it might mean to make or enforce a "guarantee."[5] Yet the puzzle of what the Constitution means by "The United States" has remained underexplored,[6] despite posing perhaps the most critical question of all. After all, determining who may serve as the guarantor, whether that be

[3] *See* Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1472–74 (2007). (noting that Article IV of the U.S. Constitution is generally textually vague as to whether it limits or empowers the federal government's ability to structure interstate relations).

[4] Most scholars have concluded that the Clause at minimum guarantees some form of majority rule in the governance of the states. *E.g.*, WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE CONSTITUTION 67–68 (1972) ("The guarantee clause emerged from the pages of *The Federalist* with its assurance of popular control of government, rule by majorities in the states with safeguards for the rights of minorities, and emphasis on the substance as well as the form of republican government."); Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Problem of the Denominator*, 65 U. COLO. L. REV. 749, 749 (1994) (concluding that what the Clause does "require is that the structure of day-to-day government—the Constitution—be derived from "the People" and be legally alterable by a majority of them); Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 560 (1962) ("Among such eternal requisites of republican government might be some sort of effective elections with a fairly large group of society participating therein."); Gabriel J. Chin, *Justifying a Revised Voting Rights Act: The Guarantee Clause and the Problem of Minority Rule*, 94 B.U. L. REV. 1551, 1562 (2014) ("the Guarantee Clause was designed to protect majority rule"); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J. L. PUB. POL'Y 103, 114 (2000) ("at a minimum, the Clause must mean that a majority of the whole body of the people ultimately governs"); Jacob M. Heller, Note, *Death by a Thousand Cuts: The Guarantee Clause Regulation of State Constitutions*, 62 STAN. L. REV. 1711, 1178 (2010) ("In short, republican governments rule (1) by the majority (and not a monarch), (2) through elected representatives, (3) in separate, coequal branches."). *But see* Erwin Chemerinsky, *Cases Under the Guarantee Clause Should be Justiciable*, 65 U. COLO. L. REV. 849, 851 (1994) ("[T]he Guarantee Clause should be regarded as a protector of basic individual rights."); Deborah Jones Merritt, *The Guarantee Clause and State Authority: Federalism for a Third Century*, 88 COLUM. L. REV 1 (1988) (arguing that the Clause exists to protect the states from federal over-interference); Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 TEX. L. REV. 807, 810 (2002).

[5] *E.g.*, Ryan C. Williams, *The "Guarantee" Clause*, 132 HARV. L. REV. 602 (2019).

[6] Several scholars have considered this question with respect to Congress. *See* Chin, *supra* note 4, at 1577–83; Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 204–05 (2007).

Congress, the President, the courts, or the States—or even some combination thereof—will necessarily also shape the meaning and form such a guarantee might take. This could include an executive order, or an injunction. It is one thing to create and assign distinct constitutional powers to each of the three branches. It is quite another to create a constitutional power and fail to clearly assign it at all: the Clause marks the *only* place in the original Constitution where "[t]he United States" appears in the nominative form.

In part due to this ambiguity, the predominant modern understanding of the Republican Guarantee Clause is that the Clause is a scholastically attractive, yet largely inert, portion of the Constitution.[7] This is in large part because the Clause remains one of the few provisions of the Constitution to which the Supreme Court has never provided a clear and affirmative meaning. Despite this, at different points in the country's history, scholars, citizens, and politicians have attributed to the Clause a range of powerful guarantees concerning the rights and freedoms provided by the Clause itself. These have included an individual guarantee of the right to vote;[8] the right to be free of segregation;[9] the prohibition on any form of plebiscite that sidesteps representative governance;[10] and the right of the state electoral processes to be free from federal interference.[11]

Despite these claims, in several high-profile cases, including in 2019's *Rucho v. Common Cause*, the Court has seemed to suggest that the Clause raises nonjusticiable political questions.[12] The Court's claims about the Clause could be read broadly, and several scholars have suggested that the Court has said the Clause is nonjusticiable altogether.[13] If so, that

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[7] The Clause was once famously referred to as a "sleeping giant." *See* CONG. GLOBE, 40th Cong., 1st Sess. 614 (1867) (Statement of Sen. Charles Sumner).

[8] *See infra* Part IIIC.

[9] *Id.*

[10] *See infra* Section III.B.

[11] *See infra* Section III.A.

[12] Rucho v. Common Cause, 139 S. Ct. 2484, 2506 (2019) ("This Court has several times concluded . . . that the Guarantee Clause does not provide the basis for a justiciable claim.")

[13] *E.g.*, Bonfield, *supra* note 4, at 554 & nn.180, 560. (noting courts that have maintained the nonjusticiability of the Clause and that "since 1912 the Court has denominated all issues raised under the guarantee clause nonjusticiable"); J. Andrew Heaton, *The Guarantee Clause: A Role for the Courts*, 16 CUMB. L. REV. 477, 478 (1986) ("[I]t is the only clause which the Court holds to be completely nonjusticiable."); John R. Vile, *John C. Calhoun on the Guarantee Clause*, 40 S.C. L. REV. 667, 675 (1989) (concluding that the Court has found the Clause as speaking "solely to Congress and the President" and "construing the guarantee clause as a nonjusticiable provision"); Williams, *supra* note 6, at 681–82 (arguing that an "international law interpretation" of the Clause would "tend[] to buttress the judiciary's longstanding practice of refusing to adjudicate Guarantee Clause claims"). *But see* Chemerinsky, *supra* note 5, at 861 (concluding that it is a "common myth about [the

would mean that the Clause does not include the courts among its potential guarantors, for if the Clause is always nonjusticiable, then the Court would have no occasion to interpret it. Such a reading of the Clause would suggest that the courts simply aren't an audience of the Clause. (As I will discuss, I believe this view is incorrect, the result of a misunderstanding about the Court's justiciability jurisprudence.)

But if the Clause is not directed primarily at the courts, then who may be the guarantor, and what, specifically, may they guarantee? If "The United States" refers to the political branches, and if the Clause truly is nonjusticiable, then it would seem to invite the possibility of robust "legislative constitutionalism," a strong form of constitutional departmentalism where "both Congress and the Court should be regarded as having independent authority to ascertain constitutional meaning."[14] Such a reading of the Clause would suggest that Congress (or also the President) could claim independent authority to interpret the Clause's meaning in the course of taking action to fulfill the guarantee. Yet from a twenty-first century vantage point, a claim of authoritative extrajudicial constitutional interpretation seems at odds with the now well-settled doctrine of judicial supremacy, whereby the courts—and not the political branches—are the ultimate arbiters of the Constitution's meaning.[15]

This inquiry arises at an especially relevant time. Historically, debates about the Clause's meaning have been closely linked to disputes about the role of the federal government in ensuring enfranchisement, voting rights, and fair political participation in the states. Those debates, which peaked during the mid-nineteenth century, fell into dormancy after the Civil War, in large part, I will argue, because the Fourteenth and Fifteenth Amendments—whose ratifications during Reconstruction were substantially aided by the Republican Guarantee Clause[16]—provided the federal government with far more specific enforcement powers to ensure republican governance in the states.[17]

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Clause] that it was deemed to be nonjusticiable in 1849 in *Luther v. Borden*").

[14] Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2022–23 (2003). [hereinafter Post & Siegel, *Legislative Constitutionalism*]; *see also* Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003). [hereinafter Post & Siegel, *Juricentric Restrictions*].

[15] Cooper v. Aaron, 358 U.S. 1, 18 (1958) (declaring "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution").

[16] *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 79–88 (2012); David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 384 (2008). *See generally infra* Section II.B.

[17] *See* U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriation legislation."); *id.* amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); *id.* amend. XV, § 2 ("The Congress shall have power to enforce this article by

Yet the promise of those amendments went largely unfilled in the era of Jim Crow, and by the early 1960s, a renewed scholarly movement grew for the Republican Guarantee Clause to be made constitutionally relevant again.[18] It is perhaps not coincidental that this transpired just as the civil rights movements of the early 1960s began to crest, shortly before Congress drew on its alternative constitutional powers under the enforcement clauses of the Fourteenth and Fifteenth Amendments to enact the Civil Rights Act of 1964[19] and the Voting Rights Act of 1965.[20] These Reconstruction Amendments largely obviated the need for Congress to contemplate action under the Clause, essentially mooting scholarly urgings for Congress to breathe new life into it.

Yet the scope of the Congress's power to regulate matters of political participation in the states is again at the forefront of the national constitutional dialogue. In a series of decisions beginning midway through the Rehnquist Court and continuing into the Roberts Court, the Supreme Court has increasingly second-guessed Congress's determinations about the scope of its legislative enforcement powers under the Reconstruction Amendments in cases like *City of Boerne v. Flores*[21] and *Board of Trustees of University of Alabama v. Garrett*,[22] culminating in 2013 with the invalidation of section 4(b) of the Voting Rights Act in *Shelby County, Ala. v. Holder* as exceeding Congress's Fifteenth Amendment enforcement clause power.[23] In *Shelby County*, the Court for the first time second-guessed the adequacy of congressional findings that justified the continued preclearance coverage formula requiring certain states and localities to preclear any changes to their electoral processes with the Department of Justice.[24] As framed by the dissent, the "ultimate question" the Court faced in *Shelby County* was which branch of government should decide whether the Voting Rights

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appropriate legislation."). Although the precise semantic text varies among each of the three enforcement clauses, they have long been treated as granting the same kind of enforcement power to Congress.

[18] Exemplary of this interpretive movement was Professor Arthur Bonfield's seminal 1961 law review article, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, *see* Bonfield, *supra* note 4, as well as Professor William M. Wiecek's 1972 book on the Clause, *see* WIECEK, *supra* note 4, both of which remain seminal works on the history of the Clause and which reviewed a range of emerging assertations about the Clause's meaning.

[19] Pub. L. 88-352, 78 Stat. 241 (1964).

[20] Pub. L. 89-110, 79 Stat. 437 (1965).

[21] 521 U.S. 507 (1997).

[22] 531 U.S. 356 (2001).

[23] 570 U.S. 529 (2013).

[24] In *Shelby County*, the Court found section(4)(b)'s coverage formula unconstitutional in part because it was "based on decades-old data and eradicated practices" and was not "grounded in current conditions," "having no logical relation to the present day." *Id.* at 551, 554.

Act's preclearance coverage formula should remain operative: "the Court, or a Congress charged with the obligation to enforce the post-Civil War Amendments 'by appropriate legislation'?"[25]

Voting rights activists were dealt a fresh setback in 2019 in *Rucho v. Common Cause*.[26] After repeatedly suggesting in prior decisions that the Court might hold partisan gerrymandering to be unconstitutional if presented with the right set of facts,[27] the Court in *Rucho* conclusively shut the door to judicial remedies for partisan gerrymandering, concluding that "partisan gerrymandering claims present political questions beyond the reach of the federal courts."[28]

In a very real sense, the past has become the future, and mid-nineteenth-century debates about voting rights and the constitutional scope of federal intervention in state political processes have become politically and constitutionally salient again today. Numerous states have taken actions whose effect has been to restrict or narrow access to voting and participation in state political processes that affect local, state, and federal elections.[29] At the same time, advances in computer technology, and the assembly of datasets with wide-ranging and fine-grained voter information down to the individual-voter level, have enabled state lawmakers and mapmakers to "put that information to use with unprecedented efficiency and precision," making gerrymanders, as Justice Kagan explained in dissent in *Rucho*, "far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides."[30]

In the wake of *Shelby County* and *Rucho*, those concerned with protecting voting rights and ensuring robust and fair political participation have explored new potential actions that the federal government could and should take in overseeing the states' electoral apparatuses.[31] These concerns recently culminated in the United States House of

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[25] *Id.* at 559 (Ginsburg, J., dissenting) (quoting U.S. CONST. amend. XV, § 2).

[26] 139 S. Ct. 2484 (2019).

[27] *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 270 (2004) ("That a workable standard for measuring a gerrymander's burden on representational rights has not yet emerged does not mean that none will emerge in the future. The Court should adjudicate only what is in the case before it.").

[28] *Rucho*, 139 S. Ct. at 2506–07.

[29] *See generally* NEW VOTING RESTRICTIONS IN AMERICA, BRENNAN CENTER https://www.brennancenter.org/new-voting-restrictions-america (identifying changes to state electoral laws since 2010).

[30] *Rucho*, 139 S. Ct. at 2513 (Kagan, J., dissenting).

[31] *E.g.*, CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY (2018).

Representatives' passage of H.R. 1, *The For the People Act of 2019*,[32] which seeks through federal legislation to address a wide array of electoral problems among the states, including state gerrymandering, whose constitutionality under Congress's Commerce Clause and enforcement clause powers commentators have questioned.[33]

Given these recent events, the present moment is an appropriate one to re-examine the text, structure, and history of the Republican Guarantee Clause, and its role in historical constitutional confrontations about enfranchisement and political participation among the political branches, the courts, and the States, confrontations in which the Clause has played an often overlooked but central role. Moreover, many scholarly examinations of the Clause's meaning have tended to overlook, or ignore entirely, the Reconstruction-era congressional interpretations of the Clause. These congressional precedents bear significantly on how the Clause might be interpreted in the future, but they tend to be overlooked by a profession that tends to focus on the constitutional interpretations of courts, not the political branches.

By contrast, in this chapter I will argue that the history of constitutionalism concerning enfranchisement, including the history of the Reconstruction Amendments, the Civil Rights Act of 1964, and the Voting Rights Act of 1965, *cannot* be understood without recognizing the role the Republican Guarantee Clause has played in past conflicts, and might very well play in future ones. I will suggest that the Clause could very well play a prominent role in future confrontations between Congress and the Court. This is because the best reading of the Clause's text, structure, and constitutional history indicates that the Clause is directed primarily at Congress, and there are strong arguments that the Clause may provide a basis for federal intervention in state elections procedures to ensure republican governance.

However, situated against the Court's recent "juricentric"[34] turn in second-guessing congressional actions under the Commerce Clause and the Reconstruction Amendments, it seems unlikely the Court would permit Congress to take any and all actions it wanted under

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[32] For the People Act of 2019, H.R. 1, 116th Cong. (2019).

[33] *See, e.g.*, Kate Ruane & Sonia Gill, *Congress, Let's Fix the Problems in H.R. 1 So We Can Enact the Bill's Much-Needed Reforms*, ACLU (March 5, 2019), https://www.aclu.org/blog/free-speech/campaign-finance-reform/congress-lets-fix-problems-hr-1-so-we-can-enact-bills-much; Ilya Shapiro & Nathan Harvey, *What Left-Wing Populism Looks Like*, THE NATIONAL REVIEW (Mar. 7, 2019), https://www.nationalreview.com/2019/03/democrats-for-the-people-act-unconstitutional-left-wing-populism/; THE FACTS ABOUT H.R. 1—THE FOR THE PEOPLE ACT OF 2019, THE HERITAGE FOUNDATION (Feb. 1, 2019), https://www.heritage.org/election-integrity/report/the-facts-about-hr-1-the-the-people-act-2019 (arguing that H.R. 1 "federalizes and micromanages the election process administered by the states, imposing unnecessary, unwise, and unconstitutional mandates on the states").

[34] Robert Post and Reva Siegel have described the Court's approach in cases like *Boerne* and *Garrett* as evincing a "juricentric constitutionalism," a view of constitutional interpretation that sees "the Constitution as a document that speaks only to courts." Post & Siegel, *Juricentric Restrictions*, *supra* note 14, at 2.

the Clause. The question, then, is what actions Congress might take, and what the Court might do, if anything, in response. Thus, this chapter also contributes to the literature by providing the first serious consideration of the several distinctive approaches courts might take in reviewing challenges to Congress's Republican Guarantee Clause powers. After reviewing each, the chapter ultimately concludes that judicial scrutiny of congressional actions taken under the Clause should be heightened when congressional efforts could be more readily achieved by the States or by the courts, and diminished when Congress alone can be said to effectively serve as the guarantor. Given the Court's recent holding in *Rucho v. Common Cause* that partisan gerrymandering claims are essentially nonjusticiable in federal courts, this would seem to suggest that Congress might have substantial latitude to intervene in state electoral processes that cannot easily be fixed by voters themselves.

This chapter proceeds in four parts. Part I begins by briefly reviewing the history of Republican Guarantee Clause jurisprudence, situating it alongside the jurisprudence of the Reconstruction Amendments. This Part explains why, given the Court's recent juricentric turn in reviewing congressional interpretations of the Reconstruction Amendments, it seems unlikely that it would find challenges to federal legislation enacted under the Clause fully nonjusticiable. But it also explains why these constitutional provisions are more deeply interrelated than has generally been appreciated, notwithstanding the very different treatment they have received by the Court.

Parts II and III then assess arguments related to whether the political branches or the courts are the primary audiences of the Republican Guarantee Clause. In Part II, I review historical arguments that the Clause is addressed primarily to the *political branches*, particularly Congress, and that it functions to empower those branches to intervene in the states under circumstances in which a state's government has become *insufficiently* republican in form. American history supports such a claim: the Clause figured prominently in Civil War- and Reconstruction-era efforts to ensure political participation for African-Americans in the southern states after the Civil War. Indeed, both Congress and Presidents Lincoln and Johnson drew directly on the Clause as a constitutional source of authority to pursue federal Reconstruction in the southern states, actions which the Court declined to second-guess in subsequent legal challenges to Reconstruction. Indeed, the Court all but blessed Congress's constitutional capacity to pursue Reconstruction under the Clause, and later stated bluntly that the Clause is primarily for Congress, not the courts, to enforce. At a minimum, then, the Court seems to have sanctioned *some* constitutional authority for the political branches to act under the Clause—at least in circumstances as extreme as those the country found itself in after the Civil War.

Those same cases would seem to suggest that the Court has implicitly rejected a second and competing meaning of "the United States" explored in Part III: that the Clause as is addressed to Courts to guarantee to *the States* that they are free of federal interference in

their self-governance. This "states' negative liberty" argument was prominently raised by defenders of slavery like Senator John C. Calhoun prior to and during the Civil War as the basis for states' rights. Despite the Court's nineteenth-century Reconstruction-era precedents suggesting precisely the opposite meaning, the states' negative liberty interpretation was briefly reconsidered again during the 1990s, and the Court flirted with it in dicta in several federalism decisions written by the pro-federalism Justice Sandra Day O'Connor. Nevertheless, this interpretation is at odds with the Court's prior jurisprudence concerning the Clause, as well as the history of Reconstruction and the ratification of the Reconstruction Amendments—constitutional precedents those who push for the states' negative liberty interpretation of the Clause seem strangely inclined to overlook.

Part III also considers several other ways in which the Clause is addressed to the courts as guarantors, but that also treats individuals as a relevant audience for the Clause's protections. In particular, arguments have been raised that the Clause (a) protects state citizens and their elected representatives from anti-republican actions taken by their state governments and/or the delegation of lawmaking authority to unelected bureaucrats; and (b) that it prevents the deprivation of individual rights inherent in a republican form of government. Such claims have generally been unsuccessful, but the problem with these suits has generally been that the remedies sought have been beyond those courts are generally able to provide. And, as I will explain, recent litigation in the Tenth Circuit suggests that such claims may indeed be justiciable in limited circumstances. (Table 1 identifies these three potential audiences for the Clause, the potential meaning implicated by each audience, and the role courts are likely to play, if any, in reviewing claims related to these asserted meanings.)

| Table 1: Possible Audiences and Meanings of the Republican Guarantee Clause | | |
|---|---|---|
| **Possible Audience** | **Meaning of the Clause** | **Justiciability of Related Claims** |
| *Political Branches* | To ensure sufficiently republican forms of government in the states. | More probable for challenges to ordinary legislation, improbable for challenges to federal responses to extraordinary circumstances (*i.e.*, Reconstruction). |
| *The Courts* | To protect minimally republican *state governments* from federal interference. | Possible though improbable given other structural constitutional protections and Reconstruction-era precedents. |
| | To protect *citizens and state reps* from insufficiently republican state governments. | Narrowly available given existing judicial precedents, pending ongoing Tenth Circuit litigation. |
| | To protect *citizens* from denials of individual rights inherent in to a republican government. | Unlikely for many challenges, likely to lose on the merits for challenges deemed justiciable. |

The question, then, is whether legal contests as to the meaning of the Clause would be justiciable if Congress, rather than courts, were to attribute meaning to the Clause. Thus, Part IV briefly explores the relationship between Congress and the Court, and whether and how the Court might review congressional interpretations and applications of the Clause.[35] Given the increasingly politically high-profile nature of debates about enfranchisement and access to political participation in the states,[36] it is probably only a matter of time before a historic constitutional confrontation between the Court and the political branches emerges as to the role the federal government may play in guaranteeing republican governance in the twenty-first century.

## I. CONTROLLING CONSTITUTIONAL INTERPRETATION: THE COURT AND CONGRESS AS CONSTITUTIONAL INTERPRETERS

Although easily overlooked today, the constitutional histories of the Reconstruction Amendments and the Republican Guarantee Clause are deeply intertwined, for they share several important features. The first is that both have been implicated in historical debates

[35] *See* Introduction, notes 52–54 and accompanying text.

[36] *E.g.*, Michael Wines, *With 2020 Looming, Parties Fight State by State Over Voting Access*, N.Y. TIMES, (June 3, 2019), https://www.nytimes.com/2019/06/03/us/voting-rights-states.html.

about political participation, voting rights, and the structure of republican governance in the United States. Indeed, until the Reconstruction Amendments were enacted in the wake of the Civil War, most constitutional claims that we associate with them today—and especially claims about political enfranchisement—were largely associated with the guarantee provided by the Republican Guarantee Clause. Second, it was precisely *because* the Reconstruction Amendments were enacted after the Civil War that the Republican Guarantee Clause assumed its status as a largely dormant constitutional provision for most of the twentieth century. Congress drew directly on the Clause as a source of constitutional power to help ensure the ratification of the Reconstruction Amendments, each of which contain more specific and direct delegations of legislative power to Congress to enforce the substantive rights each guarantees.

The third and perhaps most important commonality among the constitutional provisions is that each raises important questions about which branch of government may act to enforce the guarantees provided by them—and which branches of government have authority to define precisely what those guarantees entail. Here, a contrast between the Republican Guarantee Clause and the Reconstruction Amendments emerges: whereas justiciability concerns have traditionally left courts at the sidelines of defining the meaning of the republican guarantee, the Supreme Court has in recent decades articulated an increasingly expansive role for courts in policing the scope and nature of congressional actions to enforce and protect the rights guaranteed by the Reconstruction Amendments.

This Part highlights the contrasting constitutional histories of these surprisingly related provisions. In the case of the Republican Guarantee Clause, it has largely been understood to be nonjusticiable, which raises the possibility that the Clause is addressed at the political branches or the states, rather than the courts. The Clause is a rare provision of the Constitution that the Court has gone out of its way to avoid interpreting, refraining on the basis of the political question doctrine and justiciability concerns.[37]

Since *Marbury v. Madison*,[38] the Court has on occasion chosen to "abstain from resolving constitutional issues that are better left to other departments of government."[39] Chief among the portions of the Constitution to which the Court has abstained from interpretation is the Republican Guarantee Clause. As a result, authoritative interpretations of the Clause's meaning are nowhere to be found in the U.S. Reports. Perhaps for this reason, scholars and jurists have tended to overlook the very important role the Clause *has* played in past debates and about enfranchisement and political participation in American constitutional history.

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[37] *E.g.*, Baker v. Carr, 369 U.S. 186 (1962).

[38] 1 Cranch 137 (1803).

[39] Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1458 (2005).

Those debates have played out in Congress, in the States, and in acts of popular constitutionalism—not the conventional places lawyers look to locate constitutional precedents.

The interpretation of the enforcement clauses of the Reconstruction Amendments, by contrast, has repeatedly raised questions about judicial supremacy and the power of courts to second-guess both what guarantees Congress believes the Constitution provides and what actions those amendments empower Congress to take to fulfill those guarantees.

This Part explains why these constitutional provisions must be understood together, notwithstanding the contrasting approaches the Court has taken when asked to interpret them.

### *A. The Co-Equal Interpreters Account: The Republican Guarantee Clause, the Political Question Doctrine, and Legislative Constitutionalism*

The conventional account of the Republican Guarantee Clause goes something like this: from 1849, when the Court first had occasion to interpret the Clause in *Luther v. Borden*,[40] up to the present day, the Court has repeatedly disclaimed opportunities to give the Clause meaning on the basis of the Clause's nonjusticiability.[41] As the Court in *Baker v. Carr* later explained, claims arising under the Republican Guarantee Clause "involve those elements which define a 'political question,' and for that reason and no other, they are nonjusticiable."[42] Such nonjusticiable political questions, the Court has stated, are more appropriately resolved by the political branches than the courts. Such logic may seem appropriate in the case of the Republican Guarantee Clause, for just what a republican form of government is, and what it means to guarantee to a State that it has one, would seem to be an inextricably political inquiry, one courts are not well situated to resolve.[43] The Court has recently seemed to repeat this mantra in *Rucho*, stating bluntly that the Clause "does not provide the basis for a justiciable claim."[44]

If this account is correct, it suggests that the political branches may sometimes be co-equal interpreters of the Constitution, at least insofar as they, rather than courts, have been

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[40] 48 U.S. 1, 3 (1849).

[41] *E.g.*, Zachary M. Vaughan, Note, *The Reach of the Writ:* Boumediene v. Bush *and the Political Question Doctrine*, 99 GEO. L.J. 869, 872 (2011) ("The *Luther* Court's declaration that the [Republican] Gurantee Clause [raises] a nonjusticiable political question has been consistently followed.").

[42] 369 U.S. 186, 218 (1962).

[43] *Id.* at 222. (noting "the lack of criteria by which a court could determine which form of government was republican").

[44] Rucho v. Common Cause, 139 S. Ct. 2484, 2506 (2019).

tasked with deciding what constitutes a republican form of government, a question which necessarily requires interpretation of the Constitution itself. From our contemporary vantage point, that notion seems at odds with the well-accepted principle of judicial supremacy. Yet as critics of judicial supremacy on both the left and the right have pointed out—among them former Stanford Law School Dean Larry Kramer[45] and former Reagan Administration Attorney General Edwin Meese[46] and former Tenth Circuit Judge Michael McConnell[47]—neither the framers nor early Americans jurists understood the Constitution as a document whose meaning was to be decided only by courts. After all, for Congress to enact legislation to fulfill constitutional guarantees, or for the executive branch to act enforce such protections, the political branches necessarily must engage in some amount of constitutional interpretation to determine the basis for legislative or executive authority.[48] Such an approach would seem to contemplate what Robert Post and Reva Siegel described as "legislative" or "policentric" constitutionalism—"the distribution of constitutional interpretation in our legal system across multiple institutions, many of which are political in character."[49]

Even if one accepts the doctrine of judicial supremacy, however, the concept is not without its own internal tensions, especially when situated alongside the political question doctrine. This tension is central to understanding how the Court has dealt with interpretive questions arising under not only the Republican Guarantee Clause, but also the Reconstruction Amendments. Whereas judicial supremacy stands for the peremptory role of courts, the political question doctrine cautions their restraint. Under that doctrine, since *Marbury v. Madison*[50] the Court has on occasion chosen to "abstain from resolving constitutional issues that are better left to other departments of government."[51] Some, such as

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[45] *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 228 (2004) ("Neither the Founding generation nor . . . right on down to our grandparents' generation, were so passive about their role as republican citizens. They would not have accepted—did not accept—being told that a lawyerly elite had charge of the Constitution, and . . . . [s]omething would have gone terribly wrong, they believed, if an unelected judiciary were being given that kind of importance and deference.").

[46] *See* Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 986 (1987) ("The Supreme Court, then, is not the only interpreter of the Constitution. Each of the three coordinate branches of government created and empowered by the Constitution—the executive and legislative no less than the judicial—has a duty to interpret the Constitution in the performance of its official functions.").

[47] *See* Michael W. McConnell, *Comment- Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997).

[48] *See* Edwin Meese III, *The Tulane Speech: What I Meant*, 61 61 TUL. L. REV. 1003, 1005–06 (1987).

[49] Post & Siegel, *Legislative Constitutionalism*, *supra* note 14, at 2022–23.

[50] 1 Cranch 137 (1803).

[51] Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1458 (2005).

Herbert Wechsler, have sought to reconcile the political question with judicial supremacy by concluding that the political question must have limited application only in instances where the Court understands the Constitution *itself* to delegate decision-making authority to another agency of government.[52] Rachel Barkow has described this as the "classical" articulation of the political question doctrine, where "[t]he Constitution [itself] carves out certain categories of issues that will be resolved as a matter of total legislative or executive discretion."[53] On this view, it is the Constitution *itself* that commands judicial abstinence. Instances of classical political questions would seem to be most amenable to

A second view of the political question doctrine is more pragmatic. Emphasizing the passive virtues of the Court, those such as Alexander Bickel have long argued that the political question doctrine should arise not from a mandate under the Constitution itself, but rather from an exercise of case-specific pragmatic judicial discretion.[54] On this view, the political question doctrine emerges from a coupling of both "guiding principle and expedient compromise."[55] Barkow has described Bickel's articulation as the "prudential" form of the political question doctrine. In contrast to classical political questions, prudential political questions are those which raise constitutional questions the Court has the general authority to interpret, but which for reasons related to the particular dispute at hand it declines to do so.[56]

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[52] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7–8 (1959).

[53] Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV 237, 247 (2002) (describing the "'classical formulation of the doctrine" as one that recognizes that "[t]he Constitution carves out certain categories of issues that will be resolved as a matter of total legislative or executive discretion").

[54] *See* Alexander M. Bickel, *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 46 (1961). Wechsler's strict constructionist position, Bickel argued, is hard to reconcile with the Court's recurring decisions to decline jurisdiction in denials of certiorari or dismissals of appeals for want of a substantial federal question. *Id.*

[55] *Id.* at 49.

[56] Barkow, *supra* note 53, at 253. Barkow has described this as a "judge-made overlay that courts have used at their discretion to protect their legitimacy and avoid conflict with the political branches." *Id.* According to Barkow, prudential political questions implicate as many as five of the six factors identified by Justice Brennan in *Baker v. Carr* in his account of the type of cases that warrant application of the political question doctrine. These include: (1) a lack of judicially discoverable or manageable standards for resolving it; (2) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (3) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (4) an unusual need for unquestioning adherence to a political decision already made; or (5) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *See* 369 U.S. 186, 217 (1962). Notice that none of these considerations are inherently tied to the constitutional provision in question before the Court, but rather the circumstances of the

Recognizing the distinction between classical and prudential political questions is particularly important when seeking to understand the audience(s) to whom the Republican Guarantee Clause is addressed. It is true that the Supreme Court has long abstained from interpreting the Clause's meaning, in part on the basis of the political question doctrine. Yet from the standpoint of determining whom the Clause addresses—and therefore who may claim to act under it—a great deal rests on whether the Court has claimed that the Clause raises classical or prudential political questions. If the Clause raises classical political questions because the Clause tasks the legislative or executive branches with deciding what constitutes a republican guarantee, then it could present a genuine opportunity for legislative or executive constitutionalism. By contrast, if the Court's invocations of the political question doctrine in cases concerning the Clause have been of the *prudential* form, there is no reason to think that, under different circumstances, the Court would remain disinclined to give the Clause affirmative meaning.

Such skepticism is especially warranted insofar as the Court has in recent years both narrowed its application of the political question doctrine,[57] and shown increasing interest in second-guessing the political branches' understanding of the scope of their constitutional powers.[58] There is perhaps no better example of the Court's evolving views about the reach of judicial supremacy than in its interpretation of the enforcement clauses of the Reconstruction Amendments.

### *B. The Judicial Supremacy Account: The Reconstruction Amendments & Juricentric Constitutionalism*

The Reconstruction Amendments have had "a strange career."[59] Despite these Amendments' initial promise to guarantee equality, individual rights, and robust political participation—especially among African-Americans—it took nearly a century after their ratification for their promise to be *begin* to be fulfilled. This was due to factors both political

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particular claims brought, and relief sought. Application of the prudential political question doctrine thus turns as much on the particular nature of the claim raised and remedy sought as on the provision of the Constitution in interpretive question.

[57] *See e.g.*, Gwynne Skinner, *Misunderstood, Misconstrued, and Now Clearly Dead: The Political Question Doctrine as a Justiciability Doctrine*, 29 J.L. POL. 427, 428 (2014) (noting that the Court in *Zivotofsky v. Clinton*, 566 U.S. 189 (2012), "once and for all rung the death knell for the application of the 'political question doctrine' as a justiciability doctrine").

[58] *See, e.g.*, Lawrence H. Tribe, *Transcending the* Youngstown *Triptych: A Multidimensional Reappraisal of Separation of Powers Doctrine*, 126 YALE L.J. F. 86, 91 (2016) (noting "the Roberts Court's recent turn away from the political question doctrine and the Court's juricentric focus").

[59] Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 YALE L.J. 2003 (1999).

and judicial. As to the political, Congress's will to supervise southern institutions directly, including federal elections in the southern states, had begun to wane by the early 1870s. This culminated in the Hayes-Tilden compromise of 1877 that is largely understood to have ended federal Reconstruction in the south and ushered in the era of Jim Crow.[60]

Coinciding with the federal government's retreat, the Supreme Court narrowed the meaning of the both the Reconstruction Amendments and the Reconstruction-era laws enacted under them, in a series of cases in the 1870s and 1880s.[61] In the *Slaughterhouse Cases*,[62] *United States v. Reese*,[63] *United States v. Cruikshank*,[64] and the *Civil Rights Cases* of 1883,[65] the Court set in motion the capacity for the South to implement Jim Crow and the continued widespread racial inequality and voter disenfranchisement that the Reconstruction Congress had sought to end through the ratification of the Reconstruction Amendments.

Between the lack of congressional efforts to enforce the Amendments and the judicial narrowing of their meaning, it is perhaps not surprising that by the mid-twentieth century, scholars began to search for other sources of constitutional protection for voting rights, and they turned back once again to Republican Guarantee Clause. As I will discuss in Part II, the Clause had played a central role to nineteenth century debates about political participation and voting rights, debates which had largely trailed off with the ratification of the Fourteenth and Fifteenth Amendments. In the years leading up to the civil rights movement of the 1950s and 1960s, scholars and activists argued anew that the Clause directly addressed the rights of individual citizens, who could derive from the Clause claims of constitutionally protected individual rights vis-à-vis their insufficiently republican state governments.

This "activist view" of the Clause was said to be "dominant among scholars and

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[60] *See, e.g.*, C.V. WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION 3–14 (1951) (depicting the Hayes-Tilden compromise of 1877 as bringing the end of Reconstruction in the South).

[61] *See* Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 133–40 (1994).

[62] 83 U.S. (16 Wall.) 36 (1873) (construing the "privileges and immunities" guaranteed by the Fourteenth Amendment to those provided under federal rather than state law).

[63] 92 U.S. 214 (1876) (invalidating a federal law enacted under the Fifteenth Amendment that criminalized sanctions on local officials who denied the right to vote to citizens).

[64] 92 U.S. 542 (1876) (holding that private individuals could not be held liable for violating the Fourteenth Amendment rights of other individuals).

[65] 109 U.S. 3 (1883).

commentators" by the early 1960s.[66] Exemplary of this interpretive movement was William W. Crosskey, whose "monumental" 1953 multi-volume originalist examination of the Constitution was called by some "the most fertile commentary on the Constitution since *The Federalist* papers."[67] In it, Crosskey contended that the Clause was the "chief source" of congressional authority over the states, particularly in matters related to implementing and ensuring the right to vote.[68] Another astute scholar of that era cautioned that while "[a]t present time there is no particular movement under way to give the guarantee an effective content," it was easy to imagine possible issues that could bring it open, with "a South recalcitrant over civil rights [being] one that spring immediately to mind."[69] He warned that the Clause "is a tremendous storehouse of power to reshape our federal system and only the good sense of American people would be strong enough to keep it within bounds if it were once invoked."[70] Others were less cautious: one argued that the Clause served as a broad source of individual rights claims that *should* be justiciable by courts,[71] and several suggested that the Clause provided *Congress* with the power to ensure access to the right to vote in the states.[72]

There was at least some evidence that courts were beginning to agree: often overlooked by scholars is the 1956 decision *Hoxie School Dist. No. 46 v. Brewer*,[73] in which a federal court which enjoined a number of individuals and organizations including the Arkansas

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[66] WIECEK, *supra* note 4, at 300.

[67] Clinton Rossiter, *Review: Politics and the Constitution*, 16 REV. POL. 237, 238 (1954).

[68] WILLIAM W. CROSSKEY, 1 POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 522–24 (1953).

[69] Charles O. Lerche, *The Guarantee of a Republican Form of Government and the Admission of New States*, 11 J. POLIT. 578, 604 (1949).

[70] *Id.* at 604.

[71] Bonfield, *supra* note 4, at 513 (arguing that the Clause's "appropriate use would cure the deficiencies of the fourteenth amendment and thus insure the fuller realization for all Americans of those basic precepts upon which our society rests").

[72] Professor Arthur Bonfield, writing shortly before the passage of the Voting Rights Act in 1961, advocated for Congress to "liberalize state voting requirements" under the Clause in ways similar to those ultimately accomplished by the VRA just several years later. *Id.* at 576. In contrast to Congress's eventual passage and subsequent amendment of the VRA, which relied on its enforcement powers under the Fourteenth and Fifteenth Amendments, Bonfield argued that the Fourteenth Amendment was an inadequate basis for the "fuller realization of our society's democratic goals." *Id.* at 514. Wiecek similarly argued that the Clause provided Congress with the authority to legislative proactively. *See* WIECEK, *supra* note 4, at 301.

[73] Hoxie Sch. Dist. No. 46 of Lawrence Cty., Ark. v. Brewer, 137 F. Supp. 364 (E.D. Ark.), *aff'd*, 238 F.2d 91 (8th Cir. 1956).

White Citizens Council and "White America, Inc." from harassing school district officials seeking to implement school desegregation in the wake of the Supreme Court's decision in *Brown v. Board of Education*.[74] When the jurisdiction of the federal courts was questioned by defendants, the court in *Brewer* concluded that plaintiff school officials could invoke the Republican Guarantee Clause insofar as it "was their sacred right to function their offices, and to live as citizens under a government of laws and not to men" so they "logically appealed to the national courts for protection under the federal law."[75] That decision was affirmed by the Eighth Circuit, and the Clause's potential was not lost on scholars like William Wiecek, who noted that "[i]f the anti-integrationist actions of the respondent individuals and organizations were not restrained, the petitioners would be deprived of representative government in violation of the guarantee clause."[76]

Just as early 1960s scholars and activists began renewed calls for the Republican Guarantee Clause to play a role as both a broad source of individual rights claims and a basis for federal intervention to expand voting rights in the states, Congress enacted the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Both statutes drew on Congress's enforcement clause powers under the Reconstruction Amendments to prophylactically and affirmatively enforce the specific rights guaranteed by those amendments. These remedial statutes sought to preemptively enforce the rights and protections provided by these Amendments through legislation that provided far more specific and prophylactic legal remedies. Congress's exercise of its enforcement powers to shape the scope of the rights provided by the Reconstruction Amendments exemplifies what Post and Siegel have called "policentric constitutionalism," the understanding that courts are not the only institutions to make legal interpretive claims about the Constitution,[77] and that in seeking to enforce these rights, Congress must have some latitude to substantiate the meaning of the broad principles established by these Amendments.

Such an undertaking was not without controversy or opposition—which has continued to this day. The States and localities regulated by these laws have repeatedly challenged Congress's authority to wield broad enforcement power, arguing that Congress has impermissibly interpreted these Amendments in enacting legislation that has improperly altered the substantive meaning of the underlying rights protected. Shortly after the passage

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[74] 347 U.S. 483 (1954).

[75] Brewer, 137 F. Supp. at 366–67.

[76] WIECEK, *supra* note 4, at 298.

[77] Post & Siegel, *Legislative Constitutionalism*, *supra* note 14, at 2022–23. In contrast to juricentric constitutionalism, policentric constitutionalism "refer[s] to the distribution of constitutional interpretation in our legal system across multiple institutions, many of which are political in character."

of the VRA, in *State of South Carolina v. Katzenbach*[78] [hereinafter *Katzenbach*] and *Katzenbach v. Morgan* [hereinafter *Morgan*],[79] the Supreme Court heard challenges to the scope of Congress's enforcement clause powers to enact the Voting Rights Act under the Fourteenth and Fifteenth Amendments. Both decisions are instructive for understanding the framework under which the Warren-era courts assessed congressional claims about constitutional meaning.

In both cases, the Court upheld Congress's broad enforcement actions under the VRA as "appropriate legislation" under the enforcement clauses. In *Katzenbach*, the Court rejected South Carolina's assertion that Congress's exercise of its Fifteenth Amendment section 2 authority to strike down state voting statutes and procedures would serve to "rob the courts of their rightful constitutional role."[80] Instead, the Court pointed to section 2's explicit instruction to Congress as evidence that *Congress*, not the courts, would be chiefly responsible for implementing assurances of the rights created by section 1.[81] In *Katzenbach*, Chief Justice Warren, writing for the majority, granted Congress a wide berth.[82] Drawing on *Ex parte Virginia*,[83] which upheld Congressional acts to enforce the Reconstruction amendments shortly after the end of the Civil War, Chief Justice Warren drew on Chief Justice Marshall's famous description of Congress's authority to act under the Necessary and Proper Clause in conjunction with its Commerce Clause power.[84]

On that basis, Chief Justice concluded that Congress could do more than merely forbid violations of the Fifteenth Amendment;[85] instead, he affirmed Congress's capacity to fashion inventive and prescriptive remedies, recognizing the insufficiency of case-by-case litigation to address the widespread problems of voting discrimination within the relevant covered jurisdictions.[86] "As against the reserved powers of the States," the Chief Justice concluded,

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[78] State of South Carolina v. Katzenbach, 383 U.S. 301, 301 (1966).

[79] Katzenbach v. Morgan, 384 U.S. 641 (1966).

[80] *Katzenbach*, 383 U.S. at 325.

[81] *Id.*

[83] 100 U.S. 339 (1880).

[84] *Katzenbach*, 383 U.S. at 326-27 ("The basic test to be applied in a case involving section 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States."). The Chief Justice also pointed to the Court's similar findings with regard to the enforcement clause (section 2) of the Eighteenth Amendment, in *James Everard's Breweries v. Day*, 265 U.S. 545 (1924). *Id.* at 328.

[85] *Id.* at 327.

[86] *Id.* at 328.

"Congress may use *any rational means* to effectuate the constitutional prohibition of racial discrimination in voting."[87]

The Court elaborated on this test a few months later in *Morgan*, where Justice Brennan, this time writing for the unanimous Court, equated Congress's Fourteenth Amendment's enforcement clause power to the Necessary and Proper Clause, authorizing "Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[88] *Morgan* concerned a challenge by New York elections officials to section 4(e) off the VRA, which prohibited literary tests for voter eligibility for any citizens who which, in New York, had resulted in several hundred thousand Puerto Rican residents of New York City being found ineligible to vote because they had been educated in Spanish-speaking American schools in Puerto Rico.[89]

The Court assessed the constitutionality of section 4(e) of the VRA, which legislatively *prohibited* literacy tests for voter eligibility that had already been found *constitutional* by the Supreme Court in *Lassiter v. Northampton Election Board*,[90] a case decided just seven years prior to the VRA's enactment. Applying the three-part Necessary-and-Proper-Clause analysis classically announced in *McCulloch v. Maryland*, the Court concluded that section 4(e)'s prohibition was (1) "appropriate legislation" to enforce the Amendment; (2) "plainly adapted to that end"; and (3) was in accord with "the letter and spirit of the Constitution."[91] This rational means test became a cornerstone of constitutional litigation related to the VRA, and for several decades thereafter, the Court continued uphold Congressional enforcement actions under the clauses.[92]

The Court's toleration for legislative constitutionalism came to an abrupt halt in *City of*

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[87] South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966) (emphasis added).

[88] *Morgan*, 384 U.S. at 651.

[89] *Id.* at 644–45.

[90] 360 U.S. 45 (1959).

[91] *Morgan*, 384 U.S. at 651 (citing McCulloch, 17 U.S. (4 Wheat.) at 321). For a helpful discussion of the Court's internal debates while drafting these opinions, see Luis Fuentes-Rohwer, *Legislative Findings, Congressional Powers, and the Future of the Voting Rights Act*, 82 IND. L.J. 99 (2007).

[92] *See, e.g.,* Oregon v. Mitchell, 400 U.S. 112, 128-29 (1970) (upholding amendments to the VRA enfranchising 18-year-olds in federal elections, abolishing literacy tests as requisite to vote, and abolishing state durational residency requirements in presidential elections as within Congress's power to enact); United States v. Bd. of Com'rs of Sheffield, Ala., 435 U.S. 110, 118-23 (1978) (holding that preclearance requirements applied to political subdivisions of covered jurisdictions even when these subdivisions are not responsible for registering voters); City of Rome v. U.S., 446 U.S. 156, 174–75 (1980) (invoking the comparison to the Necessary and Proper Clause once more to uphold the Attorney General's denial of bailout to a city in covered jurisdiction).

*Boerne v. Flores*,[93] which concerned a challenge to the Religious Freedom Restoration Act of 1993 (RFRA),[94] passed by Congress in direct response to the Court's perceived narrowing of Free Exercise Clause in *Employment Division v. Smith*.[95] Congress had claimed during RFRA's passage that it was an appropriate exercise of its Fourteenth Amendment section 5 enforcement authority insofar as that amendment has been understood to incorporate most First Amendment protections against the States.[96] Nevertheless, the Court invalidated RFRA, finding that "the design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the *substance* of the Fourteenth Amendment's restrictions on the States."[97]

Justice Kennedy, writing for a divided Court, curbed the extent of Congress's enforcement—and *interpretive*—powers by reinterpreting *Katzenbach*: "There is language in our opinion in *[Morgan]* . . . which *could be* interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment. This is not a necessary interpretation, however, or even the best one."[98] Kennedy disclaimed the idea that Congress could do anything but enforce the substantive provisions of the amendment, arguing that "[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause."[99] He went on to issue a new standard for determining whether Congress has acted in accordance with its enforcement powers: "There must be a *congruence and proportionality* between the injury to be prevented or remedied and the means adopted to that end."[100]

*Boerne* signaled that the Court was on a new path of juricentric constitutionalism, under which it has since invalidated other federal laws as being beyond Congress's Reconstruction Amendments enforcement powers. In *Board of Trustees of University of Alabama v. Garrett*, a divided Court outlined an exacting new standard by which Congress must justify its

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[93] 521 U.S. 507 (1997).

[94] Religious Freedom Restoration Act, 107 Stat. 1488, codified at 42 U.S.C. § 2000 *et seq*. (2012).

[95] 494 U.S. 872 (1990). In *Smith*, the Court held that generally applicable laws which were not motivated to target a religious belief or practice are constitutional, even when these laws have the effect of inhibiting religious practice, and declined to use the balancing test utilized by prior courts in cases such as *Sherbert v. Verner*, 374 U.S. 398 (1963). 494 U.S. 872 (1990).

[96] *See* S. REP. NO. 103-111, at 13-14 (1993); H.R. REP. NO. 103-88, at 9 (1993).

[97] City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (emphasis added).

[98] *Id.* at 527-28 (emphasis added).

[99] *Id.* at 519.

[100] *Id.* at 520 (emphasis added).

proactive enforcement of the Reconstruction Amendments.[101] Writing for the five-member majority, Chief Justice Rehnquist elaborated that *Boerne* "confirmed . . . the long-settled principle that it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees."[102] Two years later, in *Nevada Dept. of Human Res. v. Hibbs*,[103] the Court elaborated further, noting that while Congress's enforcement powers include the ability to "enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct," "it falls to this Court, not Congress, to define the substance of constitutional guarantees."[104]

Most recently, and relevant to the Republican Guarantee Clause, in *Shelby County, Ala. v. Holder* the Court expressly overturned *Katzenbach I* and *II* and held that the VRA's section 5 pre-clearance formulas had been an unconstitutional exercise of Congress's enforcement clause powers.[105] Writing for a five-member majority, Chief Justice Roberts emphasized that when reenacting the VRA in 2006, Congress had not altered the formula that determined which states and districts were covered by pre-clearance requirements, and had instead "reenacted" the same formula derived from by-then-forty-year-old facts and so had "reverse-engineered" its formula by first identifying covered jurisdictions and then developing criteria to justify their inclusion.[106] Concluding that Congress had acted beyond its Enforcement Clause powers through such an "irrational" approach,[107] the Chief Justice employed a standard similar to *Boerne*'s "congruence and proportionality" test and held that "Congress must ensure that the legislation it passes to remedy [a] problem speaks to current conditions" of that problem rather than outdated ones.[108] *Shelby County* suggests that the contemporary Court will preserve for itself not only the role of interpreting the Constitution's guarantees, as in *Boerne*, but also (contra *Hibbs*) the permissible enforcement mechanisms that Congress may determine are appropriate to protect those guarantees.

The Court's decision has faced strong pushback from commentators who argued that it raises "legislative record view to new, dispositive significance,"[109] and "misunderstands the

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[101] Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001).

[102] *Id.* at 365.

[103] 538 U.S. 721 (2003).

[104] *Id.* at 727–28.

[105] 570 U.S. 529 (2013).

[106] *Id.* at 551.

[107] *Id.* at 556.

[108] *Id.* at 557.

[109] William W. Buzbee and Robert A. Schapiro have argued that, first with *Boerne* and then *Garrett*, the

framers' intentions behind the Reconstruction Amendments."[110] More broadly, Robert Post and Reva Siegel have argued that post-*Boerne* and *Garrett*, the departure from the standard established in the *Katzenbach I* and *II* cases has turned the Constitution into "a document that speaks only to courts."[111] Post and Siegel have criticized the Court for departing from a constitutional culture in which the Court has often looked to Congress to anchor and orient its judgments regarding the scope of the Constitution's meaning.[112]

The Court's recent juricentric turn, then, would seem to be in tension with its Republican Guarantee Clause jurisprudence, at least insofar as the Court seems increasingly disinclined to view the Constitution as document that invites the political branches to independently articulate the scope of its meaning. The questions, as the next Parts address, are precisely which actors the Republican Guarantee Clause refers to by "the United States," and what actions, if any, those actors may take in which it has repeatedly invoked the political question doctrine to defer interpretive questions about the Clause to other branches. The question then, is whether the other branches may act under the Clause, and if so, what they might do under it.

## II. The Political Branches as Primary Constitutional Audience

> "[T]he power to carry into effect the clause of guaranty is primarily a legislative power, and it resides in Congress."[113]

Although most scholars have focused primarily on the mysterious meaning of a "republican form of government," the subject of the Clause, "The United States," is equally textually ambiguous. A reading that any of the three branches could act as guarantor under

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Supreme Court has "raised legislative record review to new, dispositive significance." William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 Stan. L. Rev. 87, 89 (2001).

[110] McConnell, *supra* note 47. Michael McConnell has argued that the Court misunderstands the framers' intentions behind the Reconstruction Amendments; the historical record clearly suggests Congress, not the Courts, was expected to be the primary agent of enforcement of these Amendments, and to do so without being bound by the Court's constraining precedents. Douglas Laycock, who argued *Boerne* on behalf of supporters of RFRA, has argued that the Court in *Boerne* fundamentally misunderstood the significance of the Reconstruction Amendments, which evince a fundamental structural change in the wake of the Civil War which has delegated to Congress the primary responsibility for protecting liberty in the states, *see* Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 Wm. Mary L. Rev. 743, 759 (1997)., a view echoed also by Robert J. Kaczorowski, Robert J. Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 Fordham L. Rev. 153 (2004).

[111] Post & Siegel, *Juricentric Restrictions*, *supra* note 14, at 2.

[112] *Id.*

[113] Texas v. White, 74 U.S. 700, 730 (1868).

it is not textually foreclosed, for the Clause's operative subject is "the United States." And because it is located in Article IV, which largely contains the inter-state relations provisions of the Constitution,[114] it is possible that the Clause may be directed not only to Congress, the President, or the courts, but also to the (united) States themselves. These next parts explore arguments that the Clause therefore addresses the political branches or the states as the relevant guarantors.

What is especially fascinating about the Republican Guarantee Clause is that the history of constitutional practices related to the Clause seems to indicate that the political branches may take actions that attribute interpretive meaning to the Clause that will not be second-guessed by courts, a striking contrast to the "congruence and proportionality" review the Court has imposed on the Reconstruction Amendment enforcement clauses in recent years. Although the Clause has often been depicted as a "sleeping giant,"[115] popular constitutionalists—and members of Congress—were very much awake to its possibilities during the middle of the nineteenth century.

As this part will discuss, the political branches' capacity to act under the Clause was first seriously considered as a result of a constitutional crisis in the State of Rhode Island known as the Dorr Rebellion. While the federal government largely stood aside during that crisis, the Clause played a far more prominent role during and immediately after the Civil War, for the Clause was a chief constitutional basis for Reconstruction in the post-civil war South.[116] If anything, the debate was not *whether* the Clause granted power to the political branches, but rather *how much*, and to which branch: *both* Congress and the President drew on the Clause as a constitutional source for legislative and executive authority. The historical record from this period casts the Clause as central to debates about democratic governance and enfranchisement, and its meaning was extensively contested in both the halls of Congress and in popular discourses. Equally tellingly, when these actions were challenged in court, the Supreme Court declined to adjudicate them, concluding that the challenges to federal intervention in state governance to guarantee fair political participation raised nonjusticiable political questions better resolved by the political branches. Also supportive of this interpretation was Hamilton's comments in Federalist No. 83. In aiding other readers of the Constitution, Hamilton explained that "The United States, in their united or collective capacity, are the OBJECT to which all general provisions in the Constitution must necessarily be construed to refer."[117] Such an understanding would seem to suggest the Clause

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[114] *See* Metzger, *supra* note 3, at 1472. (noting that Article IV generally governs the states' interstate relations as well as Congress's ability to regulate them).

[115] CONG. GLOBE, 40th Cong., 1st Sess. 614 (1867) (Statement of Sen. Charles Sumner).

[116] *See infra* Section II.1.C.

[117] THE FEDERALIST No. 21, at 503 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

refers not to the individual states or even the states in their capacities *as states*, but rather that "[t]he United States" refers to the federal government itself.

### *A. Presidential Action to Guarantee Republican Governance in Rhode Island*

From its earliest invocations, the Republican Guarantee Clause has always been closely linked to questions of voting, enfranchisement, political participation. A chief irony of the Declaration of Independence's proclaimed "self-evident" truth that "all men are created equal"—slavery notwithstanding—and that government can derive its powers only "from the consent of the governed,"[118] is that when the federal Constitution was ratified in 1788, nearly every state required some form of landed property ownership to qualify for the vote, usually ownership of a freehold estate.[119] Known as "freehold suffrage," such requirements were usually justified on the basis that land ownership demonstrated both that the owner had vested and permanent interest in the community,[120] and that he was financially independent from any form of state aid[121]—conditions for full citizenship rights that are strikingly at odds with our contemporary understandings. And because only free white males could engage in freehold ownership as a matter of state law, franchise was practically limited to white males, only a fraction of whom owned property. The net effect was that even among this narrowly defined understanding of citizenship, many citizens could not in fact exercise the franchise.[122]

Then as now, immigration patterns, demographic changes, and evolving conceptions of citizenship put increasing tension on the states' rules of political process. The industrial revolution of the early nineteenth century and the mass migration of European immigrants to the United States put increasing pressure on freehold suffrage restrictions,[123] for a growing share of new white male citizens were wage-earning non-freeholders, which meant that in many states, the percentage of full citizens eligible to vote was rapidly plummeting. To

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[118] THE DECLARATION OF INDEPENDENCE para 2 (U.S. 1776).

[119] Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 339–40 (1989). (describing the process by which every colony but South Carolina had adopted election laws which denied the colony franchise to those who owned no property).

[120] Jacob Katz Cogan, *The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America*, 107 YALE L.J. 473, 476–77 (1997).

[121] *E.g.*, Steinfeld, *supra* note 119, at 335. (describing the many states that amended their constitutions during the early nineteenth century to exclude "paupers," meaning persons in receipt of poor relief, from the suffrage).

[122] Cogan, *supra* note 120, at 477.

[123] *Id.* at 477. (describing how the conception of property transformed during this period from connoting qualities that "made it synonymous with virtue and independence" to being "prizes for its malleability and productivity").

prevent their governments from beginning to resemble the aristocratic English form they had cast off just decades earlier, nearly every state underwent a constitutional convention to remove freehold ownership as a requirement for voting eligibility during the early nineteenth century.[124] By 1840, only North Carolina and Rhode Island retained anything resembling freehold suffrage.[125]

The government of Rhode Island clung stubbornly to the system, and it subsequently led to the earliest instance in which the Supreme Court was confronted with a claim about the meaning of the Republican Guarantee Clause. The Clause's meaning had become a hotly contested issue as citizens in Rhode Island grew increasingly discontented with their government in the late 1830s and searched for constitutional bases to overturn it. In the wake of the American Revolution, Rhode Island had never adopted a new constitution, instead retaining the Charter established under the reign of Charles II in 1663.[126] The effective result was that Rhode Island had an unwritten constitution well into the nineteenth century,[127] inheriting the Charter's system of freehold suffrage that, as of 1724, extended the franchise only as far as the eldest sons of freeholders and no further.[128] By a century later, the population of non-landholding free males in Rhode Island had grown such that a majority of Rhode Island's free white men could not vote, and the state was effectively governed by minority rule even among the narrowly defined category of free white male citizens.[129]

Although the state's General Assembly had the power to amend the Charter by statute, calls to extend the franchise—either to all taxpaying male citizens or all members of the militia—went unheeded, in part because apportionment in its lower house was set by city rather than by population, effectively ensuring minority rule by the landed gentry even

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[124] *Id.* at 478.

[125] Wiliam C. Wiecek, *"A Peculiar Conservatism" and the Dorr Rebellion: Constitutional Clash in Jacksonian America,* 22 AM. J. L. HIST. 237, 240 (1978).

[126] *Id.*

[127] The U.S. Supreme Court approvingly recognized the state of Rhode Island's unwritten constitution in *Wilkinson v. Leland*, 27 U.S. 627, 656 (1829). ("Rhode Island is the only state in the union which has not a written constitution of government. . . . [The colonial] charter has ever since continued in its general provisions to regulate the exercise and distribution of the powers of government. It has never been formally abrogated by the people; and, except so far as it has been modified to meet the exigences of the revolution, may be considered as now a fundamental law.")

[128] Amasa M. Eaton, *Thomas Wilson Dorr and the Dorr War: a paper read before the Pennsylvania Bar Association, Tuesday, June 29, 1909*, *in* AMERICAN LAW: POLITICS & GOVERNMENT 5 (1909).

[129] Luther v. Borden, 48 U.S. 1, 3 (1849).

among the already narrowly defined class of eligible voters.[130] These conditions spurred an insurgence among the non-freeholders.[131] With the Charter government steadfastly refusing either to alter the Charter or to hold a constitutional convention, discontented citizens convened in 1841 and held their own constitutional convention open to all free white males, electing their own government and officers in contravention of the Charter government.[132] This revolutionary effort was led by Thomas Dorr, a celebrated lawyer and former member of the General Assembly until his objections to preferential treatment of banks in foreclosure procedures against indebted landowners led to his removal.[133] Dorr was elected governor at the people's constitutional convention, and the movement associated with the cause came to be known as the Dorr Rebellion.[134]

Out of the suffragists' constitutional convention came a constitution submitted for ratification to the people of Rhode Island. In response, the Charter government also held a constitutional convention to reapportion representative districts across the state, and submitted its constitution as well. However, while all free white male citizens of Rhode Island could vote to ratify the suffragists' own constitution, only landholding white males could ratify the Charter government's constitution, and while the people's constitution was ratified, the Charter constitution was rejected.[135] The suffragists promptly notified President John Tyler, recently elevated to the presidency after the sudden death of President William Henry Harrison only one month into his office,[136] arguing that a people's constitution had been adopted by a majority of the people of the State, and a government duly organized under it, and so the federal government should recognize this government as the official government for the state of Rhode Island.[137] With the suffragists' constitution ratified and the Charter government's rejected, there was now confusion as to the legitimate source of popular sovereignty in Rhode Island, and Rhode Island "careened on to crisis."[138]

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[130] *See* Wiliam C. Wiecek, *"A Peculiar Conservatism" and the Dorr Rebellion: Constitutional Clash in Jacksonian America*, 22 AM. J. L. HIST. 237, 241–42 (1978).

[131] WIECEK, *supra* note 4, at 88.

[132] *Id.* at 88–91.

[133] Eaton, *supra* note 128, at 3.

[134] Wiecek, *supra* note 130, at 238.

[135] WIECEK, *supra* note 4, at 91.

[136] Jordan T. Cash, *The Isolated Presidency: John Tyler and Unilateral Presidential Power*, 7 AM. POL. THOUGHT 26, 34 (2018).

[137] H.R. REP. NO. 28-546, at 52 (1844).

[138] WIECEK, *supra* note 4, at 95.

The Republican Guarantee Clause played an important role in conveying constitutional legitimacy on the suffragists' claims to popular sovereignty.[139] One of the rallying cries behind the convention was the claim that the exclusive suffrage coupled with the malapportionment effectively rendered the government "unrepublican."[140] Rhode Island abolitionist and publisher William Goodell argued that since the Constitution guaranteed to every state a republican form of government, neither the Rhode Island Charter nor the General Assembly "exhibit any thing deserving the name of a republican form of government."[141] Dorr himself argued that Rhode Island flunked the test of republicanism: "It is one of the essential parts of the definition of a republican government . . . that it is a government resulting from the will of the majority, ascertained by a just and equal representation."[142]

In response to the convention and subsequent Rebellion, the Charter government declared martial law, seeking to force the suffragists' proto-government into dissolution, and some in the Charter government suspected the leaders of the Rebellion to be recruiting arms and militiamen from Massachusetts to enforce the people's constitution against the Charter government.[143] As tensions heightened, both the Charter government and the leaders of the Dorr Rebellion appealed to Congress and the President to intervene. Thus, the Dorr Rebellion raised more than just the question of what a republican form of government entailed: for even if the Clause did guarantee some form of majoritarian state governance, who did the Clause identify as the guarantor, and what actions could be taken in fulfilling the guarantee?

### *1. The Political Branches' Power to Act (or Not Act) under the Clause*

Although today most debates about the Republican Guarantee Clause concern what actions courts may take, early constitutional conflicts over the Clause concerned what the political branches might do under the Clause. When Goodell invoked the Clause in support of the Dorr Rebellion, he not only sought to assert what the Clause's "republican form of

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[139] For an extensive discussion of the philosophical principles at stake in the rebellion, see GEORGE M. DENNISON, DORR WAR: REPUBLICANISM ON TRIAL, 1831-1861 (1976), and Eaton, *supra* note 128.

[140] WIECEK, *supra* note 4, at 90.

[141] William Goodell, *The Right and the Wrongs of Rhode Island*, 8 CHRISTIAN INVESTIGATOR 10 (Sept. 1842), *available at* http://babel.hathitrust.org/cgi/pt?id=loc.ark:/13960/t9959pz6x;view=1up;seq=9.

[142] ELISHA R. POTTER, CONSIDERATIONS ON THE QUESTIONS OF THE ADOPTION OF A CONSTITUTION, AND EXTENSION OF SUFFRAGE IN RHODE ISLAND 41 (1842).

[143] Affidavit of Samuel Currey as to proceedings and arming of suffragement (Feb. 5, 1842), *in* H.R. REP. NO. 28-546, at 655–66 (1844).

government" guarantee required, but also that the federal government was required to intervene to act as the guarantor. Goodell exhorted the federal government in Washington to consider validating the constitutional merits of the Dorr Rebellion suffragists' claim that theirs was the lawful and republican constitution in the State of Rhode Island.[144] Both sides appealed to President Tyler for the federal government to intervene on their behalf, and both sides invoked the Republican Guarantee Clause as among possible justifications for the President's intervention.[145]

In responding to an appeal from the Charter governor for the President to intervene by force,[146] President Tyler explained that while the Invasion and Domestic Violence Clauses of Article 4, Section 4 might trigger *obligations* for the federal government to intervene under certain circumstances,[147] such circumstances had not yet actually taken place, and that "no power is vested in the Executive of the United States to anticipate insurrectionary movements . . . there must be an *actual* insurrection."[148] Nevertheless, he assured the governor that "should the time arrive . . . when an insurrection shall exist against the government of Rhode Island, . . . I should not be found to shrink from the performance of a duty."[149] The President also seemed to disclaim the authority to intervene with force on the basis of the Republican Guarantee Clause in order to decide from among competing claims to governmental authority in a given state.[150]

President Tyler resisted calls to bring in federal forces to suppress the rebellion, but he nevertheless released a statement supporting the Charter government, and moved federal

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[144] POTTER, *supra* note 142, at 52.

[145] *Id.* at 96.

[146] *See* Letter from Samuel W. King, Governor of Rhode Island, to President Tyler (April 4, 1842), in H.R. REP. NO. 28-546, app. 656–57 (1844).

[147] Section 4 of Article IV reads in its entirety: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. CONST. Art. IV, § 4.

[148] *See* Letter from President Tyler to Samuel W. King, Governor of Rhode Island (April 11, 1842), in H.R. REP. NO. 28-546, app. 658–59 (1844) (emphasis added).

[149] *Id.* at 659.

[150] *Id.* ("[I]n such a contingency, the Executive could not look into real or supposed defects of the existing government, in order to ascertain whether some other plan of government proposed for adoption was better suited to the wants, and more in accordance with the wishes, of any portion of her citizens. To throw the executive power of this Government into any such controversy, would be to make the President the armed arbitrator between the people of the different States and their constituted authorities, and might lead to a usurped power.").

troops to Fort Adams in Newport, Rhode Island, which undermined the legitimacy of the rebellion and, scholars have concluded, effectively ended the political will for it in Rhode Island.[151] Tyler's response was perhaps not surprising, for his notions of political and constitutional theory were "deeply rooted in the Jeffersonian tradition of strict construction [and] states' rights."[152] Indeed, as a Senator from Virginia, Tyler had been one the most vocal critics of presidential interference in South Carolina during the Nullification Crisis, "not only for infringing on states' rights but also for enlarging executive power."[153]

While the Rebellion ultimately failed in its mission to overturn the Charter government, that Charter itself would not last for long. The following year the Charter government itself called for a constitutional convention, out of which sprang a new constitution that abandoned freehold suffrage and permitted all free white males not on the poverty rolls to vote.[154]

Although the Dorr Rebellion was now over, contestation over the meaning of the Republican Guarantee Clause was not. At the behest of a minority faction of the Rhode Island General Assembly that was sympathetic to the Rebellion, the U.S. House of Representatives appointed a select committee to explore the President's potential to act under the Clause, as well as to assess his actions in response to the rebellion.[155] In the Committee Report summarizing the select committee's findings, the committee rejected the President's interpretation of the Clause as potentially permitting him to interpose federal power in favor of the seated government seeking assistance without *also* inquiring into whether that state government itself was legitimate or usurpating.[156] The Committee Report further contended that had President Tyler not issued a statement in support of the Charter government, the suffragists' constitution "would have gone into effect, and the government organized under it would not have been the government of Rhode Island."[157]

The Committee then considered what powers *Congress* might be vested with under the Clause. It concluded that the Clause vests Congress with the power of "supervision" over the State constitutions, at least so far as the "ascertainment of their republican character is

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[151] Vile, *supra* note 13, at 671.

[152] *See* Cash, *supra* note 136, at 31.

[153] *Id.* at 32.

[154] WIECEK, *supra* note 4, at 99.

[155] *Id.* at 108–09. The select committee comprised five members of the U.S. House of Representatives, three Democrats, and two Whigs. *See* H.R. REP. NO. 28-546, at 87 (1844).

[156] *See* H.R. REP. NO. 28-546, at 60 (1844).

[157] *Id.* at 60.

concerned."[158] More controversially, the Committee argued that "when those constitutions do not provide for a republican form of government . . . it is the duty *of Congress* to set [them] aside, and to recognize and enforce one[s] which possesses a republican character."[159] While Congress could not "prescribe to the people of a State the details of their constitution," the Committee did define a republican form of government as "one which exists in the consent of the people, and over which they have control."[160] There could be little question that the Committee felt the popular sovereignty in Rhode Island had rested with the suffragists, and therefore the rightful claim of republican governance, and the Committee called on the federal government "to take notice of this sovereign act of the people, whenever it is done, and to protect the people in the exercise of it."[161] Insofar as the suffrage crisis that had precipitated the Dorr Rebellion had by then abated in Rhode Island, these calls to action were merely notional, but they presaged actions Congress *would* take in response to the Civil War and the disenfranchisement of African Americans in the South after the War.

### *2. The Court's Apparent Deference to the Political Branches*

Congress and the President were not the only federal actors to question their capacity to determine what the Clause meant and what they could do as a guarantor of it: so too did the Supreme Court, albeit years after the Dorr crisis had abated. The case was *Luther v. Borden*,[162] and the claim at issue radically undersold its potential significance. The precise legal question was rather mundane: whether the defendants had illegally trespassed by entering a Dorr rebel's residence without lawful permission during the period in which the Charter government had declared martial law.[163] In response to the Dorr Rebellion, citizens serving in the Charter militia searched the homes of many members of the rebellion, including one Martin Luther, whose house they entered as part of his arrest for activities related to the rebellion.[164] Luther subsequently sued, claiming that the search and seizure was an illegal trespass, since the charter government had not been the legitimate government in Rhode Island once the people's constitutional convention had formed the "true" state government and had elected Dorr as governor; Luther thus rested this tort claim on the illegitimacy of the Charter government's imposition of martial law as in violation of the

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[158] *Id.* at 63.

[159] *Id.* at 63 (emphasis added).

[160] *Id.* at 63.

[161] *Id.* at 64.

[162] Luther v. Borden, 48 U.S. 1 (1849).

[163] *Id.* at 17.

[164] *Id.*

republican government guarantee.[165]

The trial court refused to instruct the jury as to the question of the legitimacy of the Charter government, the jury returned a verdict for the defendant, and Luther appealed.[166] Although of relatively little significance on its own, the success of Luther's claim had potentially wide-reaching implications; for the Supreme Court to side with him, it would have had to nullify *any* Charter government actions subsequent to the people's constitutional convention, including the prosecutions of many other rebels and Dorr himself, who had already been tried, convicted, and sentenced to hard labor.[167] Further complicating Luther's legal remedy was that by the time his case reached its way to the Court, the Charter government had ceded to the rebels' demands and had the abolished the freehold suffrage that was the chief source of the rebellion,[168] and so the constitutional crisis had long since passed within Rhode Island.

Given the minor nature of the tort claim at issue and the magnitude of what the Court was being asked to hold, it is perhaps unsurprising that the Supreme Court ducked the issue. The Court declined to render an outcome on the meaning of the Clause, concluding instead that federal interference in the domestic concerns of a State was a power delegated by the Constitution to the political branches, not the courts.[169] Given the highly political and contentious nature of the confrontation between the Charter government and rebel government's claims to sovereignty, it is little wonder the Supreme Court sought to avoid rendering a verdict as to the rightful bearer of state sovereignty, and with it, the legitimacy of the subsequent acts of state.

Writing for the Court, Chief Justice Taney held that "[f]or as the United States guarantee to each State a republican government, *Congress* must necessarily decide what government is established in the State before it can determine whether it is republican or not."[170] Once the decision is made by Congress to sit a State's senators and representative, it "could not be questioned *in a judicial tribunal*."[171] Because the Charter government was the one to have been admitted to the Union, the Court reasoned that this government had continued to be the lawful government for the purposes of any subsequent claim that came before a court,

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[165] *Id.* at 18.

[166] *Id.* at 18–19.

[167] *Id.* at 18.

[168] *Id.* at 19.

[169] *Id.* at 42.

[170] *Id.* (emphasis added).

[171] *Id.* (emphasis added).

and it affirmed the lower court's dismissal of Luther's tort claim.[172] Moreover, Taney recognized that it would be the political branches, not the courts, that would act in the event of a crisis in state governance. Taney noted that while the Rhode Island government's imposition of martial law was temporary, were a military government "established as the permanent government of the State, [it] would not be a Republican government, and it would be the duty of Congress to overthrow it."[173]

Taney thus seemed to endorse the notion that the Republican Guarantee Clause is addressed at least in part to the political branches, and that they are not only permitted to act under the Clause, but perhaps required—at least in circumstances where a state government became insufficiently republican in form. Taney's opinion suggests that at least at the outer bounds of disputes about republican governance—which government is properly established in a state, and whether that government is under anti-democratic rule—these questions raise classical political questions that the Constitution delegates to the political branches to resolve. Per Taney, only Congress can decide whether a particular State government's composition is sufficiently republican to merit admission, so *that* question seems to be one which the Constitution delegates to Congress to decide as a classical political question.

But Taney's opinion said nothing about what other circumstances, if any, might Congress take action under the Republican Guarantee Clause, nor whether any of those actions may be reviewable by courts. Importantly, he did not clearly conclude that the judiciary could *never* render a verdict as to the meaning of the Republican Guarantee Clause—only that it was inappropriate to exercise the judicial power to second-guess political determinations related to federal congressional recognition of legitimate state governments.

If my reading is correct, the Court's invocation of the political question doctrine in *Luther* was both prudential and classical in form. After all, the Court's ultimate basis for declining subject matter jurisdiction was that vindicating Luther's claim would require a remedy well beyond its power—the invalidation of a sitting state government. That remedy, Taney concluded, was beyond the Court's power to provide. However, it is a mistake to understand *Luther* as holding the Clause to be wholly nonjusticiable.[174] Rather, the important takeaway from *Luther* is that while neither Congress nor the President took express enforcement actions under the Clause during the Dorr Rebellion, the Court nevertheless endorsed the possibility that either branch *could* have acted under the Clause, and both Congress and the President did debate taking such action during this period.

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[172] *Id.* at 47.

[173] *Id.* at 45.

[174] Others have observed this as well. *E.g.*, Chemerinsky, *supra* note 4, at 861.

*B. Congressional Restoration of Republican Governance After the Civil War*

The extent to which the political branches might permissibly intervene in the state political processes on the basis of the Republican Guarantee Clause was tested during and in the year after the Civil War, as Presidents Lincoln and Johnson and the Republican-controlled Congress debated how to go about reincorporating the ex-confederate states into the Union. In marked contrast to the circumstances in Rhode Island during the Dorr Rebellion, in which both sides in the conflict had eagerly sought federal intervention on their behalf, the southern states resisted federal Reconstruction policies tooth and claw. Although the slaves had been declared free by President Lincoln in his Emancipation Proclamation in 1863, and slavery itself had been formally outlawed as an institution with the ratification of the Thirteenth Amendment in late 1865, even as early as the end of 1865, just months after the Civil War had technically ended, unrepentant southern state governments were already seeking to resurrect a *de facto* system of slavery through the implementation of Black Codes.[175]

In debates about how the federal government should ensure that the southern states being reincorporated into the Union would adequately protect the rights of newly freed African-Americans, the Republican Guarantee Clause played a central role. The Clause was an especially important source of constitutional authority for Republicans seeking a constitutionally legitimate basis for achieving the aims of Reconstruction. In particular, the Clause served as a basis for ensuring that the southern states must guarantee the privileges and immunities of citizenship to recently freed former slaves, including the right to vote and to participate in the state political processes.[176] Indeed, the Republican Guarantee Clause provided the legal foundation for many of the federal government's actions taken at the behest of the Reconstruction Congress between the end of the war and the early 1870s, including, most controversially, guaranteeing the ratification of the Fourteenth and Fifteenth Amendments.[177]

Congress's efforts during this period show the important ways that constitutional interpretation can evolve and develop outside of the courts. The Clause was invoked as early as 1862, when Senator Charles Sumner of Massachusetts introduced a series of resolutions

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[175] Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1217 (1992).

[176] *See generally* Charles O. Lerche, *Congressional Interpretations of the Guarantee of a Republican Form of Government during Reconstruction*, 15 J. SOUTH. HIST. 192 (2007) (recounting a range of interpretations asserted by Republicans in Congress during the early years of Reconstruction).

[177] *See* Akhil Reed Amar, *The Lawfulness of Section 5 – and thus of Section 5*, 126 HARV. L. REV. F. 109, 112 (2013).

guiding the federal government's relations with the seceded states,[178] including that Congress could assume complete jurisdiction over the Confederate states to "proceed to establish therein republican forms of government under the Constitution."[179] Days later, Senator Ira Harris of New York introduced a bill that would organize provisional governments in the southern states on the basis of the Clause,[180] which never reached a vote.[181]

On this understanding, the southern states had ceased to have republican governance during the war, and so the Republican Guarantee Clause granted the federal government the duty—and power—to reestablish such governments in republican form.[182] Such an approach would not only grant Congress the power to enact its Reconstruction agenda, but would be a sustained source of authority to supervise the states even after they were readmitted, to ensure they would not go back on their promises.[183] In this way, the supervision of the state governments was akin to the conditions imposed on territories seeking statehood admission to the union.[184] Initially, support for this approach was limited even among the "radical" Republicans in Congress. As the war dragged on, however, support for drawing on the Clause as a source of federal power grew among Republicans in Congress.

Beginning in 1864, Congress began to pass a series of bills justifying federal intervention in the southern states on the basis of the Clause. The first of these attempted Reconstructions acts, known as the Wade-Davis bill of 1864 for its co-sponsors, passed in both the House and Senate a full year before the North had prevailed over the South, proposed to "guarant[ee] to certain States whose Governments have been usurped or overthrown a Republican Form of Government."[185] The contents of the bill foreshadowed later successful federal Reconstruction legislation. The Wade-Davis bill proposed establish provisional governments in the states controlled by presidentially appointed provisional governors, set out qualifications for voters that would exclude high-ranking confederate officials from running for statewide office, and ensure the rights of all free people to vote, requiring that any state constitutional convention

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[178] *See* Lerche, *supra* note 176, at 194–95.

[179] CONG. GLOBE, 37th Cong., 2d Sess. 737 (1862).

[180] *Id.* at 815.

[181] *See* Lerche, *supra* note 176, at 195.

[182] *See* Michael Les Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, 61 J. AM. HIST. 65, 74 (1974).

[183] *Id.* at 75.

[184] *See* Amar, *supra* note 177, at 113.

[185] CONG. GLOBE, 38th Cong., 1st Sess. 3448 (1864)

include a permanent prohibition on involuntary servitude in any ratified constitution.[186]

While President Abraham Lincoln declined to sign the bill, his reasons for doing so were *not* because he disagreed with Congress's interpretation of the Clause. Rather, he explained that he was not prepared "by a formal approval of this bill, to be inflexibly committed to any single plan of restoration."[187] Lincoln sought the widest available scope in which to act, but he did not reject Congress's assertion that he could draw on the republican guarantee as the basis for intervention.[188]

Indeed, neither President Lincoln nor President Andrew Johnson hesitated to draw on the Republican Guarantee Clause as a source of authority for the *executive* to act. Both during and after the Civil War, first President Lincoln and then President Johnson, as well as the provisional governors under their command, repeatedly cited the Clause as a source of constitutional executive power authorizing their Reconstruction agendas.[189] In particular, in the months after the Civil War ended, President Andrew Johnson expressly invoked the Republican Guarantee Clause in every one of his presidential proclamations setting out the provisional government for each of the vanquished southern states.

The first of these proclamations, concerning the reentry of North Carolina, exemplified how each of the proclamations invoked the Clause. Specifically, Johnson's proclamation concluded that it had become "necessary and proper to carry out and enforce the obligations of the United States to the people of North Carolina, in securing them in the enjoyment of a republican form of government" and to "present such a republican form of state government as will entitle the state to the guarantee of the United States therefor."[190]

Under the terms of each proclamation, Johnson appointed a provisional governor to "prescribe such rules and regulations as may be necessary and proper for convening a convention" of "the people of said state who are loyal to the United States" to "present such a republican form of state government as will entitle the state to the guarantee of the United States therefor."[191] While the Domestic Violence and Invasion Clauses of Article IV, section

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[186] *Id.* at 3448–3449.

[187] Proclamation No. 115 (July 8, 1964), *reprinted in* 13 Stat. 744–45 (1864).

[188] *Id.*

[189] *See* THE USE OF THE ARMY IN THE AID OF THE CIVIL POWER 7, G. NORMAN LIEBER, JUDGE ADVOCATE GENERAL, U.S. ARMY, WAR DEPARTMENT (1898).

[190] *See* Proclamation No. 135 (May 29, 1865), reprinted in 14 Stat. 760–61 (1865). Johnson invoked the Clause in every one of these presidential proclamations setting out the provisional governments of each of the southern states. Others included Nos. 136 (Mississippi), and 138 (Georgia), 139 (Texas), 140 (Alabama), and 144 (Florida).

[191] Proclamation No. 135 (May 29, 1865), reprinted in 14 Stat. 760–61 (1865).

4 may have provided the basis for intervention, it was the Republican Guarantee Clause that Johnson cited for the basis of regulating state elections and overseeing the reconstitution of the southern states' constitutions, including the guarantees of rights to be provided to newly emancipated citizens. If anything, what is striking about the constitutionalism of the Republican Guarantee Clause during this period is that Congress and the President were engaged in a "bitter battle" over which branch would be the primary guarantor of republican government in the defeated southern states.[192]

*1. Guaranteeing Ratification of the Reconstruction Amendments*

The Clause may have played an important role for the President, but it was central to the constitutionalism of Congress's Reconstruction actions in the southern states, as well as in the ratification process of the Reconstruction Amendments. The Republican-controlled Congress had been uncertain of the precise legal criteria for assessing the readmission of the southern states, but they were committed to ensuring, at a minimum, the end of slavery and the guarantee of rights for newly emancipated African Americans in the southern states, including the right to vote and to participate in the political processes of the states. Because many in Congress sought to avoid a permanent expansion of the federal government in *directly* supervising the states, many Republicans in Congress sought a constitutional basis to condition the readmission of the southern states to the Union on the permanent abolition of slavery and the guarantee of political rights for newly-freed African-Americans.[193]

The so-called Reconstruction Acts of 1867 accomplished this through two acts.[194] The First Reconstruction Act of 1867—passed over President Johnson's veto[195]—forcefully invoked the Clause as a basis for its legality, premising federal intervention on the "necess[ity] that peace and good order should be enforced in said States until loyal and republican State governments can be legally established."[196] The First Reconstruction Act recognized the absence of legitimate governance in the southern states and so authorized the President to subdivide them into five military districts to be under the control of appointed officers of the army.[197] Chief among the aims of the Act was to assign military officers "to protect all persons in their rights of person and property," and to oversee state constitutional conventions that

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[192] *See* Lerche, *supra* note 176, at 196–97.

[193] *See* Benedict, *supra* note 182, at 74.

[194] State of Georgia v. Stanton, 73 U.S. 50, 50-52 (1867).

[195] *See* CONG. GLOBE, 40th Cong., 1st Sess. 1729–32 (1867) (Veto Message of President Andrew Johnson, March. 2, 1867).

[196] First Reconstruction Act, ch. 153, 14 Stat. 428, 428 (1867).

[197] *Id.* at 428.

selected constitutions that "shall provide that the elective franchise shall be enjoyed by all such persons as have the qualifications herein stated for electors of delegates," which included "the male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition."[198] The Act provided for a similarly wide franchise for all elections to offices in the provisional southern state governments.[199]

The Second Reconstruction Act, also passed over President Johnson's veto,[200] set forth more guarantees related to all citizens' voting rights that were required conditions for states seeking readmission, ensuring the privileges and immunities of citizenship for the former slaves as well as the guarantee of voting rights for all former ex-confederates who took an oath to the Union.[201] More specifically, the Second Reconstruction Act also established federally-operated boards of registration that would ensure state officials would not thwart voter registration in the states and that would directly oversee all relevant aspects of state elections.[202] The Third Reconstruction Act, which followed later in the summer of 1867, provided the district commanders with the power to suspend or remove from office any state officer or person, and provided the boards of registration with broader powers.[203] While Congress rested its constitutional authority for these Acts on the Republican Guarantee Clause, federal intervention in state electoral procedures would subsequently be bolstered by the ratification of the Fourteenth and Fifteenth Amendments.

Invocations of the Clause as the basis for federal government intervention in the southern states extended well into Reconstruction. One way the Clause was invoked was to authorize congressional investigations into the progress of the southern state's integration of African Americans into state political processes prior to reseating representatives elected from those states. In 1867, for example, the House of Representatives passed a resolution instructing the House Judiciary Committee to investigate "whether the States of Kentucky, Maryland, and Delaware now have State governments republican in form."[204] This was an especially striking action because although each state had permitted slavery leading up to the Civil War, none had been a member of the Confederacy, and so the basis for such inquiries could not be

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[198] *Id.* at 428–429.

[199] *Id.* at 429.

[200] *See* CONG. GLOBE, 40th Cong., 2nd Sess. 313–14 (1867) (Veto Message of President Andrew Johnson, March 23, 1867).

[201] Second Reconstruction Act, ch. 5, 15 Stat. 2 (1867); *see generally* Georgia v. Stanton, 73 U.S. 50, 52 (1867).

[202] Second Reconstruction Act, ch. 5, 15 Stat. 2, 3 (1867).

[203] Third Reconstruction Act, ch. 30, 15 Stat. 14 (1867).

[204] Cong. Globe 40th Cong., 1st Sess. 656–57 (1867).

justified on questions of readmission alone.

Congress also explored enacting legislation under the Clause that would provide a *direct* federal guarantee of universal male suffrage, anticipating rights guaranteed under the Fourteenth Amendment (which concretely established the citizenship of all African-Americans born in the United States) and Fifteenth Amendment (which prohibited the denial of the right to vote on the basis of race to any citizen). Several bills were introduced in Congress to guarantee universal male suffrage among citizens of the States, and the bills located Congressional power to enact such legislation in the Clause.[205]

However, as Elisha R. Potter, a representative from Rhode Island and future Justice of the Rhode Island Supreme Court, had argued, one of the strongest arguments *against* Congress's power to enforce the Clause against the states rested on the same historical origins-based interpretation that opponents of the Dorr Rebellion had used several decades prior: that at the country's founding, nearly every state permitted slavery, and yet each state had apparently been considered sufficiently republican in form so as to be admitted into the Union.[206] Unless it was admitted that nearly *every* state had been in violation of the Clause—including nearly all of the Northern, Republican-controlled states—it was difficult to make the case that the republican guarantee included the guarantee of emancipation for all citizens.

Senator Charles Sumner, a Republican from Massachusetts and sponsor of one such bill that would directly impose conditions on the southern states' political structures in exchange for readmission to the Union, countered this position by suggesting that whether or not the guarantee promised by the Clause had been perfectly *enforced*, it *had* always been there: "Before the extinction of Slavery, State Rights were successful against this guarantee."[207] Sumner portrayed southern states as having "played the turtle, drawing head, legs, and tail all within an impenetrable shell."[208] Rather, the "mighty power" of the Clause had been

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[205] Benedict, *supra* note 182, at 75 & n.24.

[206] See POTTER, *supra* note 142. Potter had argued at length that the suffragists' Republican Guarantee Clause claims were unsupported by the historical and constitutional practices of both Rhode Island and of the Nation. Potter argued that under the Dorr Rebellion's definition of republican government, Rhode Island *itself* must be considered illegitimate, for if Rhode Island's *present* government was illegitimate for flouting the republican guarantee of majority rule, then so too was the state's General Assembly that ratified the U.S. Constitution in the first place. If so, this would mean that Rhode Island had never properly ratified the Constitution at all. *Id.* at 39. Moreover, since most founding era State governments had similar freehold suffrage requirements, Potter reasoned, by the Dorr Rebellion's definition, "few of the States had republican governments at that time," a paradox that Potter thought defeated the rebels' asserted definition of Republicanism. *See Id.* at 39–40.

[207] CONG. GLOBE 41st Cong., 2d Sess. 2423 (1870) (debating readmission of the State of Georgia).

[208] *Id.* (emphasis omitted).

"[a]sleep" while slavery prevailed; henceforth, Congress's duty to guarantee a republican government under the Clause would be "constant and everpresent," "reinforced by all needful powers" and "executed at all hazards."[209] He argued that allowing the post-Reconstruction southern states to continue in the same course would "dishonor the Constitution and . . . abandon the crowning victory over the Rebellion."[210] In this sense, Sumner's argument parallels with the constitutional history of congressional legislation enacted under the Reconstruction Amendments: it took nearly a century after those Amendments' ratification before Congress sought to meaningfully enforce their promises through remedial legislation in the forms of the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

Despite the broad claims of congressional power that some members of Congress sought to derive from the Clause, in the end, congressional Republicans would only rely on the Clause as a "vague guide in setting the conditions that southern states had to meet before Congress would recognize them as entitled to normal state rights."[211] Part of the problem was just as the Court in *Luther v. Borden* had concluded: settling on a precise definition of republicanism was a difficult political question—not just for the courts, but *for Congress too*—and Congressional Republicans also struggled to articulate a workable definition to guide federal intervention. For example, during Senate debates over the conditions for readmission of the State of Mississippi to the Union, Senator George F. Edmunds of Vermont recognized that "we might change either one of these [proposed] provisions in the constitution of Mississippi, and the constitution would be republican still."[212] Certainly, Congress unquestionably had the broad power to interfere and restore republican institutions to any state which "fail[ed] within the fair spirit of the Constitution to maintain republican government within its borders."[213] But to Senator Edmunds, the Clause seemed an underspecified basis for more specific action given the other tools in Congress's constitutional arsenal.

This was because, in addition to serving as a free-standing basis for legislative action, the Clause could also be understood to work in tandem with Congress's *Article I* powers. Alongside the broad Reconstruction supervisory powers Congress had invoked on the basis of the Republican Guarantee Clause, Congress also drew on other constitutional powers to enforce Reconstruction conditions on the southern states. Under its Article I, sec. 5 power to judge the qualifications of its members, the Reconstruction Congress repeatedly refused to

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[209] *Id.*

[210] *Id.*

[211] Benedict, *supra* note 182, at 75.

[212] CONG. GLOBE, 42nd Cong., 1st Sess., 1333 (1870).

[213] *Id.*

seat southern Democrats elected to serve as representatives in the House where Congress was of the view that the elections through which they had been selected had been conducted under circumstances that failed to meet the requirements of the Reconstruction Acts.[214]

Most importantly, the Republican Guarantee Clause also served as a chief basis for the process that would ensure the ratification of the Fourteenth Amendment. In addition to mandating reforms of the southern state constitutions and guaranteeing the political rights of African Americans, the First Reconstruction Act of 1867 also required the southern states to ratify the Fourteenth Amendment as a precondition for readmission.[215] And because Congress had predicated its power to enact the First Reconstruction Act on the Republican Guarantee Clause, the Clause can very much be understood to be the basis upon which the Fourteenth Amendment itself was assured of coming into being.[216]

Akhil Amar has been perhaps the most forceful advocate for this understanding of the constitutional meaning of the Clause.[217] Amar has argued that "the Reconstruction Act's additional directive that ex-Confederate states ratify the Fourteenth Amendment was also an appropriate instrument to further the republican-government ideal," because the Amendment's requirements in incorporating many of the Bill of Rights protections—among them, that every state guarantee equal citizenship, free speech, free assembly, free religious exercise, and fair trials—were concrete elements of a "proper republican government."[218] Nor Amar argues, was such a requirement necessary to ensure the ratification of the Amendment, for third-quarters of the Union states had already ratified the Amendment by early 1867 before Congress required the southern states to ratify it as a condition of readmission under the First Reconstruction Act.[219]

Similar congressional legislation helped to ensure the ratification of the Fifteenth

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[214] *E.g.*, Morton Stavis, *A Century of Struggle for Black Enfranchisement in Mississippi: From the Civil War to the Congressional Challenge of 1965 - And Beyond*, 57 MISS. L.J. 591, 593–95 & nn.8–9 (1987).

[215] First Reconstruction Act, ch. 153, 14 Stat. 428, 429 (1867) ("[W]hen said State, by a vote of its legislature elected under said constitution, shall have adopted the amendment to the Constitution of the United States, proposed by the Thirty-ninth Congress, and known as article fourteen, and when such article shall have become a part of the Constitution of the United States, said State shall be declared entitled to representation in Congress, and senators and representatives shall be admitted therefrom."); *see also* An Act to Admit the State of Arkansas to Representation in Congress, ch. 69, 15 Stat. 72 (1868); An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 70, 15 Stat. 73 (1868).

[216] Amar, *supra* note 177, at 111–12.

[217] *See* AMAR, *supra* note 16, at 84–88.

[218] *Id.* at 86–87.

[219] *Id.* at 87.

Amendment two years later among those recalcitrant southern states that had refused to ratify the Fourteenth Amendment as a precondition for readmission.[220] Because the Republican Guarantee Clause served as the basis for both the legislative enactments of the Fourteenth and Fifteenth Amendments and their ensured ratification among the southern states, the enforcement clauses of the Reconstruction Amendments can in one sense be understood as specific and detailed manifestations of the broad legislative guarantee provided by the Republican Guarantee Clause. And what is especially striking about this period is that while the Court has never given an affirmative meaning to the Clause, it has tacitly endorsed Congress's actions during Reconstruction.

*2. Judicial Deference to Republican Reconstruction*

Just as political debates about the permissibility of federal intervention in the Dorr Rebellion in Rhode Island eventually led to the meaning of the Clause being contested in court, so too were the Republicans' reconstruction plans challenged on these grounds by the southern states. Unsurprisingly, the southern states resisted this reorganization of their state governments, and one, Georgia, sued Edwin M. Stanton, the army officer overseeing its military district, under the Supreme Court's original jurisdiction, alleging that Congress had sought to "overthrow and to annul" the existing government and erect another one in its place without authority under the Constitution and in violation of its republican guarantee.[221] In *Georgia v. Stanton*, the Court was confronted with a direct constitutional challenge to Reconstruction itself.

Often overlooked is precisely how the Court in *Stanton* resolved the claim, which turned as much on the *remedy* sought as on constitutional interpretation. Justice Nelson, writing for a unanimous Court, noted that while Article III federal courts had jurisdiction to entertain cases claiming violations of private rights or property, they lacked judicial power to remedy "merely political rights," which the Court said did not belong to the jurisdiction of courts.[222] The Court held that the relief sought by Georgia—for the Court to enjoin the army from carrying forward the Reconstruction Acts, annulling the state government of Georgia, and reestablishing it in compliance with the Acts—was not something the Court could grant.[223]

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[220] *See* An Act to Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62 (1870); An Act to Admit the State of Mississippi to Representation in the Congress of the United States, ch. 16, 16 Stat. 67 (1870); An Act to Admit the State of Texas to Representation in the Congress of the United States, ch. 39, 16 Stat. 80 (1870).

[221] Georgia v. Stanton, 73 U.S. 50, 52 (1867).

[222] *Id.* at 75–76.

[223] *Id.* at 76.

Thus, because the challenge in *Stanton* was to the political rights stripped from Georgia under Reconstruction itself, the Court concluded it had no jurisdiction to review such a challenge to the constitutionality of Reconstruction.[224]

This was due to the political questions implicated in providing any sort of relief for the rights invoked: "rights of sovereignty, of political jurisdiction, of government, [and] of corporate existence as a State."[225] That relief was as much at issue in Stanton as the constitutional claim was made even clearer by Nelson's clarification that, had the plaintiff's brought a claim only for "protection of the title and possession of [the State's] property" that had been confiscated by the provisional government, "[s]uch relief would have called for a very different bill from the one before us."[226] Because the Court could not grant relief over the claim sought, it declined subject matter jurisdiction over the case and dismissed it without ever adjudicating whether the Republican Guarantee Clause authorized Congress to take action under the Reconstruction Acts or could be claimed by the States to protect them from such invasion. Thus, once more, the Court did not expressly disclaim its interpretive authority over the Clause, but instead declined jurisdiction over the claims raised by Georgia that would require it to second-guess Congress over its core political prerogatives.

*Stanton* cannot be understood to simply be a one-off escape hatch for a Court eager to avoid a conflict with the political branches. A second, less familiar post-Reconstruction dispute that drew on the Republican Guarantee Clause also came before the Court two terms later, with seemingly lower stakes and yet a similar outcome. That was case of *Texas v. White*.[227] After the state of Texas had seceded from the Union at the start of the Civil War, it had sold off many of the U.S. bonds the state government possessed to finance the confederacy, including to the parties in the case, White and Chiles.[228] After the war was over and the federal government had temporarily taken control of the Texas state government, the installed governor of Texas sought to reclaim the U.S. bonds from White and Chiles, arguing that they had been seized by the unlawful secessionist state government and improperly sold by the secessionist government's military board without proper authorization.[229]

*White* is often overlooked among those seeking to understand what the Republican

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[224] *Id.* at 77.

[225] *Id.*

[226] *Id.*

[227] Texas v. White, 74 U.S. 700 (1868).

[228] *Id.* at 706.

[229] *Id.* at 709.

Guarantee Clause may mean, despite providing perhaps the most lucid judicial explanation of what the federal government's power under the Clause. In *White*, the Court reasoned that, because the secessionist government had been unlawful in the first place, and because the military board that had sold the bonds had been organized for the purposes of "levying war on the United States," any acts of that board were illegal and thus invalid.[230] As a result, the exchange with White and Chiles was "treasonable and void," and the rightful owner of the bonds was the reconstructionist state government seeking them back from White and Chiles.[231]

In considering whether the federal government's reestablishment of the Texas state government had been proper, the Court once again drew expressly on the Clause as the constitutional basis for Reconstruction.[232] The Court bluntly stated that "the power to carry into effect the clause of guaranty is primarily a legislative power, and it resides in Congress."[233] More specifically, the Court recognized that when the federal government exercises power under the Clause, "as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential *only that the means must be necessary and proper* for carrying into execution the power conferred."[234]

What is perhaps most interesting, and what suggests the Clause does not necessarily raise classical political questions in all circumstances, is that the Court expressly linked Congress's powers to act under the Clause with the Necessary and Proper clause of Article I, section 8.[235] Understood this way, the Clause would confer on Congress the power to act in ways necessary and proper to fulfilling the guarantee, but whose specific actions might be reviewable to determine whether they were in fact necessary and proper—a process strikingly similar to the Court's review of Congress's Reconstruction Amendment

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[230] *Id.* at 733.

[231] *Id.*

[232] *Id.* at 729.

[233] *Id.* at 730.

[234] *Id.* (emphasis added). The Court's full statement was as follows: "In the exercise of the power conferred by the guaranty [sic] clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be *necessary and proper* for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution." *Id.*

[235] The Necessary and Proper Clause reads in relevant part: "The Congress shall have Power . . . To make all Laws which shall be *necessary and proper* for carrying into Execution the foregoing Powers, and *all other Powers vested by this Constitution in the Government of the United States*, or in any Department or Officer thereof." U.S. CONST. Art. I, § 8 (emphasis added).

enforcement clause powers in *Katzenbach* and *Morgan*.

Thus *White*, like *Stanton*, seems to validate at a minimum that Congress's Reconstruction Acts were constitutionally premised, in part, on the Clause, and that, as a result, the subsequent acts stemming from federal intervention in the southern states were legally valid too. White also suggests that in reviewing federal legislation enacted under the Clause, the proper interpretive framework is one similar to the necessary-and-proper analysis the Court employed in case such as *Katzenbach* and *Morgan*, but which it has seemed to abandon in *Boerne* and other subsequent and more juricentric decisions.

## III. THE COURTS AS PRIMARY CONSTITUTIONAL AUDIENCE

> "[T]he authority of the people of the States to determine the qualifications of their most important government officials. . . . is a power . . . guaranteed them by that provision of the Constitution under which the United States 'guarantee[s] to every State in this Union a Republican Form of Government.'"[236]

In addition to the political branches, the Republican Guarantee Clause may also speak to the federal courts as guarantors. Indeed, this has historically been how most cases raised under the Clause have understood it. This Part examines three different ways the courts may serve as guarantors under the Clause: to protect the starts from undue federal interference; to protect state citizens and lawmakers from unduly unrepublican forms of state lawmaking and governance; or to protect citizens' individual rights inherent to any government said to be republican in form. As I will explain, while there are reasons to be skeptical of each of these three interpretations of the Clause, this does not foreclose the courts from serving as guarantors vis-à-vis *Congress*.

### *A. A Guarantee of Federal Non-Interference in Minimally Republican State Sovereigns*

One alternative understanding of the Clause is one for whom the States are the beneficiaries, and some branch—presumably the Courts—are the guarantor. This understanding of the Clause would suggest a sort of interstate compact, a mutual guarantee among separate sovereigns. Because many anti-federalists were wary of the possibility of the federal government accumulating too much power, this interpretation of the Clause was promoted even as the Constitution was being debated and ratified.[237] Such an interpretation also seems to lead to a diametrically opposing conclusion of the meaning contemplated in the prior Part: that the Clause protects the States *from* the unwanted interference of the federal

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[236] Gregory v. Ashcroft, 501 U.S. 452, 463 (1991) (citation and internal quotation marks omitted).

[237] Williams, *supra* note 5.

government in matters of state sovereignty.

This interpretation was popular among property- and slave-owners resisting expansion of the franchise in the early nineteenth century. Almost as soon as suffragists began to make claims of enfranchisement rights that could be derived from the Clause, others, especially southern slaveholders, pushed back against such interpretations, for they recognized that such an understanding of the Clause's meaning would almost certainly lead to a prohibition on slavery as well. Writing during the time of the Dorr Rebellion, South Carolina Senator John C. Calhoun—former Vice President to both Presidents John Quincy Adams and Andrew Jackson, and future Secretary of State to President Tyler—was among those who vocally opposed the Rebellion's proposed understanding of the Clause's meaning.

Echoing the view of Elisha Potter in Rhode Island, as well as statements attributed to James Madison in *The Federalist*,[238] Calhoun's argument rested on the belief that if the States at the founding had been admitted to the Union, they presumably were considered to have been republican in form, and if so, whatever form that was had been deemed sufficient. Given the widespread conditions of slavery and citizen disenfranchisement among the states at the time of admission to the Union, Calhoun argued that "no infirmity that existed in any of the original thirteen states could be challenged as a violation of the guarantee clause."[239] This echoed a statement written by James Madison in Federalist 39, in which Publius contended that because the guaranty "supposes a pre-existing government of the form which is to be guaranteed," as long as "the existing republican forms continued by the States, they are guaranteed by the federal Constitution."[240]

Calhoun went even further, however, arguing that properly understood, the Clause actually *limited* federal power to intervene in the States' internal affairs, not enhance it. He drew on the Clause's placement next to the Invasion and Domestic Violence Clauses to argue

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[238] *See* THE FEDERALIST No. 43, at 275 (James Madison) (Clinton Rossiter ed., 2003) (writing that because the guarantee "supposes a pre-existing government of the form which is to be guaranteed," as long as "the existing republican forms continued by the States, they are guaranteed by the federal Constitution").

[239] Vile, *supra* note 13, at 678.

[240] THE FEDERALIST NO. 51 (James Madison) (Clinton Rossiter ed., 2003). Madison's explained: "[I]f the general government should interpose by virtue of this constitutional authority, it will be, of course, bound to pursue the authority. But the authority extends no further than to a guaranty of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so and to claim the federal guaranty for the latter. The only restriction imposed on them is that they shall not exchange republican for anti-republican Constitutions; a restriction which, it is presumed, will hardly be considered as a grievance."

that the three clauses combined to guarantee "the peace, safety, and liberty of the States."[241] Properly understood in this context, Calhoun argued that the domestic violence provision protected the states from internal conflict, the invasion provision from external invasion, and the republican guarantee "from the ambition and usurpation of . . . governments, or . . . rulers."[242]

Calhoun's views are echoed by several contemporary constitutional law scholars, among them Deborah Jones Merritt[243] and Ryan Williams,[244] who have each put forward interpretations of the Clause as one that primarily is addressed to the States, and exists for their benefit vis-à-vis the federal government. And, indeed, at least during Justice Sandra Day O'Connor's tenure on the Supreme Court, this argument also seemed to gain at least some traction in the judiciary.

The modern scholarly version of this argument takes two forms. The first is that the Clause, read alongside the Tenth Amendment, bolsters the federalist structure of the U.S. Constitution, limiting the extent to which the federal government can intrude into the sovereignty of the States. Merritt has argued that as a matter of political theory, states cannot enjoy republican governments unless they retain sufficient autonomy so as to establish and maintain their own forms of government; as a result, the Clause is best understood as implying a modest restraint on the federal power to interfere with state autonomy.[245] Merritt has advanced a reading of the Clause such that it exists to ensure limits on federal interference in state and local franchise[246] and in the structure and mechanics of state government,[247] among other areas of state sovereignty. Merritt has cautioned that "some exercises of national power also shatter the republican bond between state voters and their state representatives."[248] She has suggested that where the federal government intrudes upon state autonomy, the Clause may in fact be justiciable, and courts should take up challenges under the Clause when states believe the federal government has interfered in an unwarranted—

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[241] *Id.* (quoting Letter from John C. Calhoun to William Smith (July 3, 1843), *reprinted in* 17 THE PAPERS OF JOHN C. CALHOUN 270 (C. Wilson ed. 1986)).

[242] *Id.*

[243] *See* Merritt, *supra* note 4.

[244] *See* Williams, *supra* note 5.

[245] Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815 (1994).

[246] Merritt, *supra* note 4, at 36–40.

[247] *Id.* at 40–50.

[248] Merritt, *supra* note 250, at 816.

and unconstitutional—fashion.[249]

Merritt found some support for this interpretation in Justice Sandra Day O'Connor's brief consideration of the Clause in two federalism challenges that came before the Court in the early 1990s. In the first, *Gregory v. Ashcroft*, O'Connor, writing for the majority, stated that the authority of the people of the States to determine the qualifications "of their most important government officials" lies "at the heart of representative government,"[250] a power reserved to the States not only under the Tenth Amendment, but also "guaranteed them" by the Republican Guarantee Clause.[251]

For the latter proposition—that the Clause guarantees to the people of the States authority to determine government official qualifications—O'Connor cited only Merritt's law review article and a single case, *Sugarman v. Dougall*, which itself cited to *Luther v. Borden* for that proposition.[252] Curiously, *Luther* says nothing whatsoever about congressional power to prescribe rules concerning the selection of state government officials. Rather, in *Luther* Justice Taney observed in dicta that "it is not part of the judicial functions of any court of the United States to prescribe the qualification of voters in a State . . . unless there is an established constitution or law to govern its decision."[253] Moreover, despite O'Connor's abbreviated claim concerning the Republican Guarantee Clause, O'Connor went on to acknowledge that the authority is not without limits; citizenship requirements to hold state public office, for example, are carefully scrutinized by courts for potential violations of the Equal Protection Clause of the Fourteenth Amendment.[254]

In the second case, *New York v. United States,* the State of New York challenged a federal low-level waste statute that required the State either to implement regulations addressing low-level radioactive waste disposal within the State, or else take title to and possess low-level radioactive waste generated within the State, including the assumption of liability for all damages in-state waste generators would suffer as a result of the State's failure to take title promptly.[255] Before the Court, New York argued that the requirement was inconsistent with both the Tenth Amendment's reservation of all non-enumerated federal powers to the

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[249] *See* Merritt, *supra* note 4, at 70–71.

[250] 501 U.S. 452, 455, 463 (1991) (internal quotation marks omitted).

[251] *Id.*

[252] 413 U.S. 634, 648 (1973).

[253] 48 U.S. 1, 41 (1849).

[254] *Id.* at 463–64.

[255] 505 U.S. 144, 175–76 (1992).

states, as well as the Republican Guarantee Clause.[256]

Because the Court concluded that Congress had legislated beyond its enumerated powers in violation of the Tenth Amendment, it did not directly rule on New York's Republican Guarantee Clause claim.[257] However, while Justice O'Connor, writing for the majority, expressed "some trepidation" in addressing the Guarantee Clause claim insofar as it "has been an infrequent basis for litigation throughout our history," she nevertheless entertained the possibility, in dicta, that the states could invoke the clause as a limitation against overreach by the federal government.[258] O'Connor suggested that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions," including, potentially, the claim here.[259] Because the low-level waste disposal provision in question could not "reasonably be said to deny any State a republican form of government," however, O'Connor declined to explore the justiciability question in greater detail.[260] Notably, in neither case did O'Connor actually premise the Court's decision on the Clause. In *New York*, she instead derived the "anti-commandeering" rule from the vertical separation of powers between the states and the federal government recognized by the Tenth Amendment.

Most recently, Ryan Williams put forward an argument that the Clause's chief beneficiary is the States on the basis of an originalist examination of the meaning of the term "guarantee," and whether the framers of the Constitution intended for the Clause to function akin to treaty guarantees common in international law during and before the founding period.[261] According to Williams, such guarantees signified a diplomatic commitment whereby one nation-state pledged its support to the preexisting right or entitlement possessed by another.[262] To support this "international law" interpretation of the Clause, Williams points to support in both the Federalist Papers, as well as in early commentaries in the years after the Constitution's ratification.[263] Williams also points to several judicial opinions in the states that suggested that the provision would apply "only if a nonrepublican government were 'imposed on' a state by 'external force,' in which case 'the arms of the Union' would

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[256] *Id.* at 154.

[257] *Id.* at 184–85.

[258] 505 U.S. 144, 185-86 (1992).

[259] *Id.* at 185.

[260] *Id.* at 185–86.

[261] *See* Williams, *supra* note 5, at 671–74.

[262] *Id.* at 615–20.

[263] *Id.* at 661–66.

be 'employed to repel that force.'"[264]

The upshot of Williams's international law interpretation is twofold. First, if the Clause was to function like a treaty guarantee, this would suggest that the individual (though united) *States*, rather than the federal government collectively, would be the proper subject of the Clause, and the only parties who could properly invoke it.[265] This would serve as a safeguard of state autonomy and independence, "empowering a guaranteed state to call upon the assistance" of the federal government if necessary.[266]

The second consequence of William's international law interpretation is that it suggests that any time the Clause "is invoked as a direct source of federal power," the exercise of such power "will always involve a threshold question regarding whether the existing republican government within the state has, in fact, requested such assistance."[267] If not, Williams argues, the federal government would "lack[] authority to invoke the Clause as a source of power, no matter how dissatisfied individual state residents may be with a state's existing governmental arrangements or how inconsistent such arrangements may be with federal authorities' shared conception of republican ideals."[268]

The problem with the state sovereignty interpretation of the Republican Guarantee Clause is that it is so strongly in tension with the actions the federal government took during Reconstruction, and with the express references made to the Clause by Congress, the President, and the Court in both *Stanton* and *White*, in sanctioning the federal government's Reconstruction effort, as discussed in Part II.B. Because Williams' international law account of the Clause focuses only on potential eighteenth century original meaning interpretations of the Clause, his approach sidesteps grappling with the serious and significant nineteenth century precedents that radically restructure our understanding of the Clause.

The only way to reconcile this would be to suggest that the Clause would permit unsolicited federal intervention in a State only in times of extraordinary exigency. But even then, the international law interpretation of the Clause cannot reconcile the Clause's significant role in ensuring the ratification of the Fourteenth and Fifteenth Amendments by

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[264] *Id.* at 668. (quoting State *ex rel.* M'Cready v. Hunt, 20 S.C.L. (2 Hill) 1, 265 (S.C. 1834) (opinion of Harper, J.).

[265] *Id.* at 657. This would seem to be in conflict with comments attributed to Alexander Hamilton in Federalist No. 83, in which he explained that "The United States, *in their united or collective capacity*, are the OBJECT to which all general provisions in the Constitution must necessarily be construed to refer." THE FEDERALIST No. 21, at 503 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

[266] *Id.* at 660–61.

[267] *Id.* at 679.

[268] *Id.* at 679.

the southern states during Reconstruction; those provisions still apply long after the Reconstruction-era emergency exigency ended.[269]

As a matter of textual scrutiny, moreover, the international law interpretation of the Clause also seems to render superfluous the invasion and domestic violence clauses of Article IV, section 4. After all, if the Republican Guarantee Clause exists only for invocation by States seeking federal assistance, when would such assistance be required outside of circumstances of foreign invasion or domestic violence? Moreover, if the upshot of Williams's interpretation is correct—that federal intervention under the Clause may only be invoked by the existing republican government of the given state, no matter how many individual residents are dissatisfied with its form—then what purpose would a *republican* guarantee have as opposed to a more generic guarantee of assistance to preserve governmental integrity altogether?

The only circumstances in which a specifically *republican* guarantee would have significance would be in circumstances in which the reigning government was arguably *not* republican in form. But even then, presumably it would be the citizens *out of power*, rather than those wielding it, who would need assistance. Otherwise, it is difficult to imagine circumstances in which concerns of about neither domestic violence nor invasion would require a majoritarian state government to require federal intervention on republican guarantee grounds.

Most importantly, the state sovereignty and international law interpretations of the Clause cannot resolve the question of how to determine when a once-republican government is republican no longer, a state of existence Amar argues had developed in the southern states by the 1860s.[270] After all, he notes, in the election of 1860 "Lincoln received not one popular vote—not one!—south of Virginia. One does not find such perfectly one-sided election returns or such savagely skewed public debates in true republics."[271]

It must surely be the case, as the Court repeatedly countenanced in *Luther*, *Stanton*, and *White*, that if and when a state government becomes sufficiently anti-republican in form, the federal government can intervene unilaterally. After all, as Madison wrote in *The Federalist* No. 43 in explaining the purpose of the republican guarantee, "[T]here are certain parts of the State constitutions which are so interwoven with the federal Constitution that a violent blow cannot be given to the one without communicating the wound to the other. . . ."[272] And

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[269] *See* Amar, *supra* note 177.

[270] AMAR, *supra* note 16, at 84–86.

[271] *Id.* at 85.

[272] THE FEDERALIST No. 43, at 276 (James Madison) (Clinton Rossiter ed., 2003).

earlier, in *The Federalist* No. 21, Alexander Hamilton argued that "[t]he natural cure for an ill administration in a popular or representative constitution is for a change of men. A guaranty by the national authority would be as much leveled against the usurpations of rulers as against the ferments and outrages of faction and sedition in the community."[273]

As Amar has concluded, while the Clause does guarantee a measure of governmental autonomy to the states, this is only one side of the coin, and the "federal government may (or perhaps must) intervene and restructure state government under the invitation (or mandate)" of the Clause.[274]

### *B. A Guarantee Against Plebiscites and Delegations of Lawful State Authority*

A related alternative interpretation is that the Clause functions as an *internal* state guarantee to both state lawmakers and citizens that state lawmaking will be republican in character. Under this theory, the Clause would prohibit the states from passing laws through means that supersede lawmaking done through the republican form, such as popular initiatives that can override laws passed by state legislatures, and could also prohibit means of governance not directly operated by elected officials. This interpretation had long seemed to be foreclosed by the Court, but has been recently revived by the Tenth Circuit in still-ongoing litigation.

This argument traces its roots in the objection to popular lawmaking that arose in response to the progressive movement in the early years of the early twentieth century. More recently, this argument has been promulgated most forcefully by Hans A. Linde, former Justice of the Oregon Supreme Court, who has argued that the framers understood republican government to mean *representative* government.[275] Reacting to the appearance of Measure 9 on the 1992 Oregon ballot, which, among other things, equated homosexuality to pedophilia, sadism, and masochism, Linde argued that such an initiative should not be understood to be valid under the state's federal obligation to maintain a republican form of government.[276] Drawing on Madison's writings in the Federalist Papers, as well as other sources that elucidate the ideas of the framers, Linde argued that it was clear they understood a republican form of government to be representative, not directly democratic.[277]

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[273] THE FEDERALIST No. 21, at 140 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

[274] Amar, *supra* note 4, at 754.

[275] Hans A. Linde, *When Initiative Lawmaking Is Not Republican Government: The Campaign against Homosexuality*, 72 OR. L. REV. 19 (1993).

[276] *Id.* at 19.

[277] Linde points especially to Madison's definition of a republic as a government based on a system of delegation and representation in Federalist No. 10, and repeated in Federalist No. 14, and to Madison's claim

Linde's position has numerous detractors. Robert Natelson, drawing on the framers' understandings of republicanism during the constitutional debates of 1787-89, contends that the Republican Guarantee Clause argument against citizen lawmaking is "profoundly unhistorical."[278] Citing not only the framers' own writings but also their sources of influence—largely classical Greek and Roman writers—Natelson concludes the framers understood republican government to consist of three components, none of which relate to representative lawmaking *per se*: (a) ultimate control by the citizenry (majority or plurality rule); (b) the absence of a king; and (c) adherence to the rule of law.[279] Natelson leans especially heavily on the fact that the framers rejected an earlier draft of the Clause that might have been interpreted to lock the States into existing forms of governance, as well as language from Madison in the Federalist Papers suggesting the States were free to substitute one republican form for another.[280]

Natelson is not alone in his skepticism of the argument against direct democracy. Akhil Amar, who contends that the central meaning of the Republican Guarantee Clause is to guarantee popular sovereignty in the form of majority rule, has also argued that the textual evidence against citizen lawmaking and direct democracy is relatively slim, confined to a few phrases scattered in the Federalist Papers, as opposed to widespread evidence that framers thought popular sovereignty was inextricably part of any form of republican government.[281]

Perhaps the largest obstacle to the anti-direct democracy interpretation is that the Court is unlikely to find the Clause grants direct relief for citizens seeking to invalidate state laws or forms of governance operated by unelected officials. These issues came before the Court repeatedly in the early twentieth century as direct democratic forms of legislation became prominent during the Progressive Era. The 1912 case of *Pacific States v. Oregon*[282] raised the question as to whether a state has ceased to be republican in form when it has adopted a law by popular initiative. In *Pacific States*, the plaintiff challenged the constitutionality of a state law passed by popular initiative which taxed telephone and telegraph companies, arguing that such actions violated the Clause's guarantee of a republican form of state government, for ballot initiatives passed by plebiscite could not be said to be republican lawmaking in

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that a republic is a government which is administered by persons holding the offices for a limited period of time in Federalist No. 39. *Id.* at 23–24.

[278] Natelson, *supra* note 5, at 856.

[279] *Id.* at 814.

[280] *Id.* at 830 & n.121 (quoting THE FEDERALIST PAPERS NO. 43, at 275 (Clinton Rossiter ed., 1961) (James Madison)).

[281] Amar, *supra* note 5, at 756–59.

[282] 223 U.S. 118 (1912).

form.[283]

Commentators generally focus on the fact that the Court rejected this argument by citing *Luther v. Borden* as establishing the nonjusticiability of the Clause.[284] Yet I believe more important than the citation to *Luther* was the kind of relief that had been sought,[285] for the Court in *Pacific States* declined to say it raised a classical political question in all circumstances. Rather, the Court emphasized the remedy sought: the plaintiff sought the invalidation of a state law solely on the basis that it had been enacted by popular initiative. Such relief, the Court argued, "would necessarily affect the validity, *not only of the particular statute which is before us*, but of every other statute passed in Oregon since the adoption of the initiative and referendum."[286]

Such relief would in turn require the Court to render a verdict on the constitutionality of *every* statutory and constitutional provision enacted via popular initiative or referendum, which in Oregon was a substantial portion of its state law. It was this act—"to examine as a justiciable issue the contention as to the illegal existence of a state"[287]—which the Court held to be nonjusticiable, for it would imply the power to "control the legislative department . . . in the recognition of such new government and the admission of representative therefrom," which in turn would "obliterate the division between judicial authority and legislative power upon which the Constitution rests."[288] In this sense, the claim in Pacific States also raised prudential political questions better left to the political branches.

Strangely, although *Pacific States* has been understood to firmly establish the nonjusticiability of the Clause, the Court was careful to reserve some possibility that it could take up Republican Guarantee Clause challenges in the future, provided they were "in a controversy properly submitted, to enforce and uphold the applicable provisions of the Constitution *as to each and every exercise of governmental power*."[289] Several additional challenges made their way to the Court in subsequent years, and each time it cited to *Pacific States* in rejecting challenges to the creation and taxation of parks districts by probate judges

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[283] *Id.* at 135.

[284] *Id.* at 149 ("It was long ago settled that the enforcement of this guaranty belonged to the political department.").

[285] *Id.* at 149 ("It was long ago settled that the enforcement of this guaranty belonged to the political department.").

[286] *Id.* at 141 (emphasis added).

[287] *Id.* at 142.

[288] *Id.*

[289] *Id.* at 150.

and appoint commissioners;[290] the operation of a drainage district by a public corporation;[291] a state worker's compensation board;[292] and, perhaps most relevant to present controversies, a state referendum vetoing redistricting legislation passed by the state general assembly.[293] In each, the Court denied that the Clause permitted federal legal challenges to non-representative forms of lawmaking in the states.

That the Clause may not always raise classical political questions is evidence from recent litigation in the Tenth Circuit, which has held that anti-direct democracy claims arising under the Republican Guarantee Clause *may* be justiciable in certain circumstances, in *Kerr v. Polis*.[294] *Kerr* has had a meandering procedural history, and began as a challenge by a coalition of citizens' groups and state legislators to a Colorado constitutional amendment (the Colorado Taxpayer's Bill of Rights, or "TABOR") passed by popular initiative that requires a plebiscitary vote to affirm new tax increases passed by the state legislature, and also establishes a flat cap on how much additional revenue the state government may spend from one year to the next.

Among the plaintiffs' initial claims in *Kerr* were that TABOR violated the Republican Guarantee Clause because it not only bypassed the state's representative bodies and enacted a law through direct democracy (the interpretation rejected in *Pacific States*), *but also* that curbed the state representatives' abilities to fulfill their constitutionally mandated obligations under the Colorado Constitution. In *Kerr*, the Tenth Circuit took note of Justice O'Connor's dicta in *New York v. United States* as an invitation to determine whether the specific case before it fully satisfied any of the six factors identified in *Baker* as requiring a finding of nonjusticiability.[295]

Noting that the Clause "does not mention any branch of the federal government," but instead commits the United States generally, the Tenth Circuit construed the absence of any mention of Congress and the Clause's placement in Article IV to determine that the Clause does not itself contain a textual commitment to the coordinate political branches alone,[296] meaning it did not raise a *classical* political question. Drawing analogy from *District of Columbia v. Heller*, which itself confronted a "similarly sparse judicial interpretation" of a

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[290] *See* State of Ohio ex rel. Bryant v. Akron Metro. Park Dist. for Summit Cty., 281 U.S. 74, 78–79 (1930).

[291] *See* O'Neill v. Leamer, 239 U.S. 244, 247–48 (1915).

[292] *See* Mountain Timber Co. v. State of Washington, 243 U.S. 219, 234 (1917).

[293] *See* State of Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565, 569 (1916).

[294] No. 17-1192, 2019 WL 3281328, at *1 (10th Cir. July 22, 2019).

[295] *See* Kerr v. Hickenlooper, 744 F.3d 1156, 1175–76 (2014).

[296] *Id.* at 1176–77.

constitutional provision, the Tenth Circuit dismissed any arguments that it lacked judicially discoverable and manageable standards for interpreting the provision, noting it could rely on the same sources the Court relied on in *Heller*, including the study by historians and law professors, dictionaries, ratification history, contemporary treatises, as well as relevant state and local enactments.[297]

The Circuit declined to interpret the Clause as raising a classical political question for the Clause does not obviously contain a textual commitment to the coordinate political branches alone.[298] The court instead contended that because "[t]he case before us requires that we determine the meaning of a piece of constitutional text and then decide whether a state constitutional provision contravenes the federal command,"[299] a claim raised under the Clause was not automatically nonjusticiable.[300]

Moreover, in addition to a claim arising under the Clause, plaintiffs also brought a claim that TABOR violated the Colorado Enabling Act, the federal statute under which Colorado was admitted to the Union as a state in 1875, and which requires that "the constitution [of Colorado] shall be republican in form."[301] The district court had initially concluded that even if the Republican Guarantee Clause claim was found nonjusticiable, the plaintiffs could proceed on the statutory Enabling Act claim, alleging that TABOR violated the supremacy clause of the Constitution by violating the Enabling Act.[302] The Tenth Circuit affirmed the district court and concluded that the Enabling Act claim was independently justiciable for reasons that did not apply to the Republican Guarantee Clause claim.[303]

On appeal, the Supreme Court vacated the judgment and remanded the case to the Tenth Circuit for further consideration in light of *Arizona State Legislature v. Arizona Independent Redistricting Commission*,[304] which explained the circumstances under which state representatives have standing to bring constitutional claims in federal court; two of the plaintiffs in *Kerr* were state legislators.[305] On remand, the Tenth Circuit dismissed the state

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[297] *Id.* at 1178–79.

[298] *Id.* at 1176–77.

[299] *Id.*

[300] *Id.*

[301] *Id.* at 1181–82.

[302] *Id.* at 1182.

[303] *Id.*

[304] Miscellaneous Order (June 30, 2015), *available at* http://www.supremecourt.gov/orders/courtorders/063015zr_pnk0.pdf.

[305] 135 S. Ct. 2652 (2015).

legislators from the case, arguing that they lacked both institutional and individual standing to bring the claim.[306]

After the case was remanded to the district court, the district court dismissed the case entirely on the grounds that the political subdivision plaintiffs had since added to the case could not have standing to bring their claim.[307] The case was once again appealed, however, and in late July 2019, the Tenth Circuit reversed, concluding that those plaintiffs *did* have standing at the motion-to-dismiss stage.[308] The Tenth Circuit reiterated that the claims brought by plaintiffs were not *clearly* nonjusticiable under the Clause, for while the district court declared that it "'d[id] not believe' that the requirement of a Constitution 'republican in form' stretches to the political-subdivision plaintiffs," that question was the merits question at issue that could not be properly dismissed at this stage.[309]

On the one hand, given the Court's jurisprudence in *Pacific States* and, more recently, *Rucho v. Common Cause*, it seems unlikely that the Court would suddenly find the Clause to grant the plaintiffs judicial relief for their claim. On the other hand, the relief sought in *Kerr* might be considerably narrower than that in *Pacific States*: invalidating just the TABOR, and only on the narrow grounds that it puts a total cap on annual expenditures that the Colorado legislature may appropriate. It remains to be seen how this litigation will ultimately resolve.

### *C. A Guarantee of Individual Rights Inherent in Any Republican Form of Government*

> "[B]y sinister legislation, . . . to regulate civil rights, common to all citizens, upon the basis of race, and to place in a condition of legal inferiority a large body of American citizens, now constituting a part of the political community, called the 'People of the United States,' for whom, and by whom through representatives, our government is administered. . . . is inconsistent with the guaranty given by the constitution to each state of a republican form of government, and may be stricken down . . . by the courts in the discharge of their solemn duty to maintain the supreme law of the land."[310]

In addition to arguments that the Republican Guarantee Clause empowers either the federal government or the states, the Clause has also played a prominent role alongside the Privileges and Immunities Clause of the Fourteenth Amendment in early constitutional

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[306] Kerr v. Hickenlooper, 824 F.3d 1207 (10th Cir. 2016).

[307] Kerr v. Hickenlooper, 259 F. Supp. 3d 1178 (D. Colo. 2017).

[308] Kerr v. Polis, No. 17-1192, 2019 WL 3281328, at *1 (10th Cir. July 22, 2019).

[309] *Id.* at *5.

[310] Plessy v. Ferguson, 163 U.S. 537, 563–64 (1896) (Harlan, J., dissenting).

challenges from the women's suffrage movement to state laws restricting the franchise to men.

At the outset, the Clause served as an important bulwark for suffragists concerned that the enactment of the Fourteenth Amendment could simultaneously enfranchise African-American males while simultaneously impairing the cause of franchise for women. Early drafts of the Amendment promised rights and privileges to "males," and advocates Susan B. Anthony and Elizabeth Cady Stanton "at once sounded the alarm, and sent out petitions" to Congress that pushed for an amendment to prohibit discrimination on the ground of sex and argued that doing so would "thus fulfill [Congress's] constitutional obligation" to guarantee a republican form of government to the States.[311] Suffragist Virginia L. Minor, who would later rise to fame for challenging Missouri's male-only suffrage rule before the Supreme Court, pointed to inconsistencies between the Clause's promise and current conditions in the States when she addressed a women's suffrage convention in St. Louis in 1869: "How can that form of government be republican, when one-half the people are forever deprived of all participation in its affairs?"[312]

Newspaper editors also decried the proposed version of the Fourteenth Amendment that limited its guarantees to males. Theodore Tilton, editor of the *New York Independent*, argued that the proposed amendment would make the Constitution "walk backward," "for [w]hatever denials of rights it formerly made to our slaves, it denied nothing to our wives and daughters."[313] Tilton was resolute: having prevailed in the effort to rid the country of slavery, "Americans now live who shall not go down into the grave till they have left behind them a Republican Government; and no republic is Republican which denies to half its citizens those rights which the Declaration of Independence . . . make equal to all."[314] Nevertheless, the women's suffrage advocates were unable to prevail upon Republicans in Congress, who enacted the amendment implementing consequences only for states who denied the right to vote to any "male inhabitants" in Section 2 of the amendment.[315]

Advocates soon turned to the courts to advance their cause. Virginia Minor, who had previously advocated for the Fourteenth Amendment's explicit application to women, sought

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[311] 2 HISTORY OF WOMAN SUFFRAGE 91 & n.* (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage, eds., 1887).

[312] *Id.* at 412. For a general discussion of the role of popular constitutionalism in the women's suffrage movement, see Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 945 (2002).

[313] *See* 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 311, at 83.

[314] *Id.*

[315] U.S. CONST. amend. XIV sec. 2.

to persuade the courts that the rights guaranteed by section 1 of the Fourteenth Amendment nevertheless applied to women, including the right to vote. Minor was a citizen of Missouri who was otherwise qualified to register to vote but for her gender, and she turned to her local registrar of voters seeking the right to register herself as a lawful voter.[316] When denied this right because she was not a "male citizen of the United States," Minor sued in Missouri state court, and eventually appealed the denial of her claim to the U.S. Supreme Court. In *Minor v. Happersett*, Minor argued that the Fourteenth Amendment's privileges and immunities clause barred Missouri from prohibiting her the right to vote as a lawful citizen.[317]

The Court famously rejected Minor's argument. Chief Justice Morrison Waite, writing for a unanimous Court, concluded that because the Constitution does not define the privileges and immunities of citizens, federal citizenship status alone did not convey the right to vote as set forth under state law.[318] Moreover, historical state practices at the time of the founding revealed that many full citizens—among them, women—were historically denied the right to vote. This suggested that voting was not an inherent privilege of citizenship in any of the original thirteen ratifying states.[319] Because women were denied suffrage at the time of the nation's founding and admission of the states to the Union, the Court reasoned, the "privileges and immunities" possessed by citizens could not be understood to include the right to vote.[320]

But the Court also considered her argument that the Republican Guarantee Clause might provide a separate and independent basis to overturn the Missouri registrar's refusal to enter Minor into the state's voter roll. Echoing the earlier arguments women's suffrage advocates had made during congressional debates over the language of the Fourteenth Amendment, Minor asserted that the State of Missouri could not be said to be republican in form if it did not permit women to vote, because no state could be said to be a republic in which half its citizens lacked the franchise.[321] The Court rejected this argument, too, once again turning to history, and the "unmistakable evidence of what was republican in form" at the nation's founding.[322] Since "all the citizens of the States were not invested with the right of suffrage," and since each state had been admitted to the Union with suffrage limitations in their state

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[316] 88 U.S. 162, 163–64 (1874).

[317] *Id.* at 162.

[318] *Id.* at 170–71.

[319] *Id.* at 171–72.

[320] *Id.* at 173–75.

[321] *Id.* at 175.

[322] *Id.* at 176.

constitutions, the Court held that "it is certainly now too late to contend that a government is not republican, within the meaning of this guaranty in the Constitution, because women are not made voters."[323]

*Minor* is often overlooked in scholarship concerning the Clause, and yet the decision is among the most relevant to lingering questions about the Clause's meaning and justiciability. After all, in contrast to *Luther v. Borden*, *Georgia v. Stanton*, and *Texas v. White*, the Court in *Minor v. Happersett* was asked to adjudicate whether the Clause granted rights to individuals—and it provided a substantive answer. While it failed to provide an affirmative definition of what individuals rights, if any, the Clause might grant, it *did* render a verdict on whether the Clause conveyed an individual right to suffrage, concluding it did not. Thus, as Erwin Chemerinsky notes, "what is notable is that the Court ruled on the merits of the issue."[324] This understanding of *Minor* suggests that the Court has not always understood the Clause to be *categorically* off limits to the judiciary for the resolution of justiciable claims. If so, it would seem to refute the classical political question view of the Republican Guarantee Clause as one which speaks fully and only to the political branches. After all, had the Court thought that assigning any meaning to the Clause was beyond its purview, it could just as easily have resolved the case by declaring that questions about fundamental rights conveyed by the Clause were for the political branches to decide instead.

Despite Minor's failure to persuade the Court in *Happersett*, her claim that the Clause guarantees citizens' rights against their state governments did have a receptive audience from one Justice on the Supreme Court several decades later. In the anti-canonical[325] case of *Plessy v. Ferguson*, an eight-member majority declared that the doctrine of "separate but equal" permitted state legislation that enforced racial segregation of train cars despite the Fourteenth Amendment's express textual prohibition on racial discrimination by the States.[326] Justice Harlan, alone in dissent, vehemently disagreed with the majority's resolution of the case, arguing that they had misinterpreted the Fourteenth Amendment.[327] In closing his dissent, Justice Harlan also invoked the Republican Guarantee Clause as an additional source of constitutional support to overturn the law. Strikingly, he noted that either the courts *or* Congress could take action enforce the Clause, arguing that a state law that mandated "separate but equal" treatment of the races "is inconsistent with the guaranty given by the constitution to each state of a republican form of government, and may be

[323] *Id.*

[324] Chemerinsky, *supra* note 4, at 862.

[325] Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

[326] 163 U.S. 537 (1896).

[327] *Id.* at 552–64 (Harlan, J., dissenting).

stricken down by congressional action."[328] (Of course, this is precisely what Congress had intended to do in the first place by enacting the Fourteenth Amendment assisted by, and in order to fulfill, the Republican Guarantee Clause.)[329]

## IV. CONCLUSION: INTERPRETATION AS CONFRONTATION—THE COURT, CONGRESS, AND THE MEANING OF THE REPUBLICAN GUARANTEE CLAUSE

> "It is the policy of the United States that . . . the integrity, security, and accountability of the voting process must be vigilantly protected, maintained, and enhanced in order to protect and preserve electoral and participatory democracy in the United States."[330]

As the previous Parts have shown, the text, history, and constitutional jurisprudence of the Clause together suggest that there is a strong argument that the Clause *primarily* addresses the political branches, and particularly Congress, and that it conveys to Congress the power to take legislative action to ensure the States have and maintain a republican form of government. If this understanding is correct, then the question turns to what actions Congress might permissibly take to guarantee republican governance, and how courts might review Congress's interpretation of the Clause, and actions taken under it.

The Republican Guarantee Clause is a somewhat unorthodox constitutional vehicle for legislation. After all, implementing a "guarantee" of a "republican form of government" is not the standard activity of Congress. How would Congress define the indicia of a minimally republican form of government, and how might it identify government forms or practices that fall beneath that minimal floor? And what kinds of actions might Congress take to remediate insufficiently republican forms of government in its guarantor capacity? At the outer pole, the Reconstruction era suggests that conditions such as slavery and the denial of the right to vote are permissible bases for intervention, which the Court declined to second-guess in *Stanton*. Moreover, the Clause was an essential basis for the Reconstruction-era legislation that helped to ensure the ratification of the Fourteenth and Fifteenth Amendments, and therefore all that has been enacted under them. Yet short of constitutional amendments and the reintegration of ex-confederate states, it is unclear whether and what kinds of more mundane legislation might be passed under the Clause.

Equally critically, it is unclear how the Court would assess legislation enacted directly under the Republican Guarantee Clause, and which of several frameworks it might use to ascertain the constitutionality of Congress's actions. This is because the Court would not only

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[328] *Id.* at 564.

[329] *See infra* Section II.B.

[330] For the People Act of 2019, H.R. 1, 116th Cong. § 1000 (2019).

have to scrutinize the *meaning* that Congress associates with a "republican form of government," but also the *means* Congress might use to guarantee it, and the fit between the definition and the Congress's legislative remedy to fulfill the guarantee. After all, as *Shelby County* makes clear, even if the Court accepts Congress's constitutional basis for legislation, it may still second-guess whether Congress's legislative choices are sufficiently justified. Such scrutiny seems all the more probable in the case of the Republican Guarantee Clause.

While the theory of departmentalism articulated at the end of Chapter I suggests that there may be room for the courts and the political branches to interpret the Constitution in complementary ways, in practice that approach has generally not been smoothly defined. Disagreements between the branches in the interpretation and application of the Constitution are not only a necessary aspect of our constitutional order, but ones that are especially fraught when the Constitution does not clearly demarcate who may act, and what actions they may take. These questions are not easily answered in advance, for they concern what would be a genuinely new problem for American constitutional interpretation: a Clause that seems to have multiple guarantors, and offers very little in the way of textual guidance as to how each branch may interpret and enforce its guarantee. Moreover, the most helpful precedents are the Reconstruction-era cases in which the Court evinced great deference to Congress, but like much about the Civil War and Reconstruction, those precedents may be exceptional.

How the Court might review contemporary legislation enacted under the Clause also highlights the deep and ongoing tensions about the power of courts to second-guess the political branches in matters that raise inherently political questions. Nevertheless, given the Court's increasingly juricentric view of constitutional interpretation, and popular agitation for Congress to take action toward reforming election procedures in the states, it seems likely it is only a matter of time—a question of when, not if—the Court will be confronted with the task of at last clarifying what the Republican Guarantee Clause means, and what it understands Congress to be able to do under the Clause. While the precise contours of this conflict remain to be seen, this Article has sought to explain why there is a strong argument that both Congress and the Court have a role to play in interpreting and enforcing the Clause, destabilizing contemporary assumptions that the Constitution speaks primarily to the Courts.

# CHAPTER III: INTERPRETATION AS COORDINATION

## INTRODUCTION

In Chapter I, I evaluated the dynamic of the relationship between how judges interpret law, and how other audiences engage with it, as one of conversation. Yet legal interpretation must do much more than simply generate the terms upon which to discuss and debate its meaning: the chief aim of law is to generate obligations, alter behavior, and enhance the coordination of society's many actors. In contrast to constitutional interpretation, which tends to focus on debates about the meaning of a smaller number of foundational first principles constitutive of a desirable legal system, statutory interpretation problems are often far more prosaic. Nevertheless, statutory rules regulate the vast majority of everyday conduct, and so concerns about notice, consistency, and compliance will be of elevated importance. After all, the capacity for the law's audiences to coordinate and conform their conduct according to legal rules depends on their ability to understand what the law requires, and how it works. And here, the rules that judges set out as second-order interpreters of statutes will function as a kind of legal grammar guide for first-order audience interpreters.

Despite this, statutory interpretation theory, as briefly discussed in Chapter I, has often tended not to assess the interpretive concerns of law's very different audiences when developing rules for interpretation. Yet recognition that the law has very different audiences raises a number of important questions about the relationship between statutory interpretation and statutory audiences. For instance, if statutes have distinctive audiences, then when should provisions drafted for one audience be interpreted differently from provisions drafted for another audience, let alone provisions that simultaneously address multiple and distinct audiences? After all, it seems likely that not all interpretive methods may be equally suitable for all audiences. For example, as many administrative law scholars have long argued, agency officials preparing a proposed rule for notice and comment will very likely turn *first* to a statute's legislative history, which often contains specific instructions from Congress to the agency.[1] But such an approach may be much less appropriate for other statutes with different first-order audiences: a cyclist seeking to

[1] *See, e.g.*, Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 510–12 (2005) (arguing that in the legislative history Congress often provides agencies with more specific instructions than in the text of the statute itself); Peter L. Strauss, *When the Judge is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT. L. REV. 321, 346–47 (1990) (arguing that agencies are much closer to the legislative process than are courts and that legislative history materials enhance their capacity to fulfill the enacting Congress's legislative aims).

determine if it is lawful to bike through a park that prohibits "vehicles" will almost certainly not think to (*let alone know how to*) consult the legislative history of the ordinance to determine if their bicycle flouts the law. Yet once a problem of statutory ambiguity comes before a court, judges tend to approach interpretation as if every method is equally suitable for every statute—and therefore for every statutory audience.[2]

Developing the concept of legal audience helps to reframe debates about legal interpretation that have focused primarily on the concerns of *judges* as legal interpreters, and instead frames these debates in terms of how other legal audiences understand, interpret, and engage with the law. Doing so reveals that judicial interpretive methodology is not, and cannot, be a "neutral principle of law."[3] Quite apart from the immediate winner or loser of the given case or controversy, judicial choices about interpretive methodology have important downstream consequences not just for the immediate parties, but for any future legal audiences who will be expected to engage with legal texts and legal interpretation in a similar manner. In describing the judicial-interpretive dynamic as an act of second-order interpretation—which I will explain in more detail, *infra*—I seek to identify the ways in which judicial interpretive methods are *themselves* legal utterances.

In this Chapter, I examine statutory interpretation theory from the standpoint of statutory audience, seeking to construct a novel framework for situating and embedding questions of audience within established theories of statutory interpretation. As I will show, reframing the task of statutory interpretation in terms of statutory audience reveals several important and yet underexamined considerations for the field.

The Chapter proceeds in four parts. Part I explores the essential role first-order statutory audiences play for both the rule of law and the interpretation of statutes, drawing on both the philosophy of law and language and the empirical realities of modern American law. I identify reasons why conventional theories of statutory interpretation have neglected a systematic consideration of the relationship between interpretive methods and statutory audiences, largely because most statutory interpretation debates focus on the propriety of the judicial role, rather than on the act of interpretation itself.

Part II then explores the very different kinds of statutory audiences and statutory interpreters, including *ordinary* interpreters (laypeople and the general public), *influential* interpreters (such as industry experts, lawyers, advocacy groups and others who help laypeople comply with the law, as well as low-level government officers like law enforcement

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[2] James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 97 (2005) (canvassing the use of canons in hundreds of Supreme Court decisions and concluding that the Justices' use of canons is so "case-specific and Justice-specific" that "reliance on the canons may be justified as situationally enlightening without in any meaningful sense promoting a more systematic predictability or consistency").

[3] *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

officers), and *official* interpreters (such as administrative agencies, whose interpretations carry the force of law in the absence of judicial review). This part also demonstrates how an audience-oriented approach to interpretation highlights a disjuncture between how courts deploy *substantive* legal canons as compared to *interpretive* methods, sources and rules[4] by drawing on canonical cases in criminal, tax, administrative and civil rights law. Courts often seem to express awareness that statutory audience should help guide interpretive outcomes, invoking substantive canons that are audience-oriented, such as the rule of lenity (for lay audiences), the mistake-of-law doctrine (for both lay and sophisticated audiences), administrative deference (for agency audiences), and clear notices rules (for the states).

Yet too often courts then overlook whether they employ interpretive *methods* congruent with the same audience that influenced the selection of the substantive interpretive paradigm in the first place. For example, when a criminal statute is directed at laypeople, is consideration of legislative history materials or obscure sources of meaning likely to enhance the notice function of law? By contrast, when a statute delegates lawmaking authority to an administrative agency, does emphasizing a word's "ordinary" meaning over extratextual evidence of Congress's direct instructions to the agency tend to advance or diminish the agency's ability to fulfill Congress's mandate?

These observations are especially important because, as I explain in Part III, many statutes have multiple and distinct statutory audiences, and judges' choice of methods and interpretive rules often seems to relate to which statutory audience they have in mind (albeit tacitly, and often inconsistently). I will argue that the concept of statutory audience helps to reveal how debates about *methods* in statutory interpretation often seem to function as proxy wars for unsurfaced (or unspoken) normative disagreements about statutory *audience*. Arguments about whether to prioritize legislative history or ordinary usage can just as easily be understood as disputes about whether to preference methods of interpretation more suitable to administrative agencies, laypeople, or other statutory audiences. And as I will suggest, often the choice of *method* seems to determine the *outcome*.

Recognizing that in some circumstances the choice of interpretive method will not be value-neutral helps to clarify what is at stake in many important statutory interpretation disagreements: which audience to prioritize. It also suggests that courts should be more

[4] Here, I adopt Baude and Sachs's clarifying distinction between substantive *legal* rules or canons, which judges apply *to* text, and *linguistic* interpretive rules or canons, which govern how judges determine the linguistic meaning *of* text. *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1105–09 (2017). Others have employed a similar typology. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 319–36 (5th ed. 2014) (distinguishing between linguistic canons and substantive canons); James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 12–14 (2005) (also distinguishing between linguistic and substantive canons).

explicit in stating their assumptions about statutory audience. Criteria might include the audiences to which the statute is primarily addressed; the presumed level of sophistication of the audience(s); and whether the statute seeks to communicate directly, or indirectly, via rulemaking notice-and-comment or through audience-reliance on influential interpreters like lawyers and compliance officers. Making explicit the audience-oriented nature of many judicial disagreements enhances the possibility of confronting relevant issues with greater clarity and precision.

Part IV concludes by briefly exploring the ramifications of a statutory interpretation methodology that is audience-centered, both for judges and for legislative drafters. Such an approach to interpretation may suggest a way to move beyond now-tired textualism-versus-purposivism debates that have come to dominate (and exhaust) much of the field in recent years.[5] A theory of interpretation that assesses questions of statutory audience and interpretive method together may help reveal why (and when) each approach has its merits, depending on the statute and its audience(s). Such a methodology might contribute to a principled compromise between judges' apparent preference for pragmatic freedom in interpretation[6] and (at least some) judges' stated aspirations for greater predictability and consistency.[7] It may also provide lessons for statutory drafting best practices.

## I. STATUTORY MEANING AND AUDIENCE

During his confirmation hearing to become Chief Justice, John Roberts famously compared the job of a judge interpreting a law to that of an umpire: "to call balls and strikes."[8] While Roberts was both praised and scorned for his metaphor,[9] less attention was given to

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[5] *See* Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177, 191 (2017) (arguing that those earlier "debates have taken us as far as they can go") [hereinafter Gluck, *The Failure of Formalism*].

[6] *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1324 (2018) (identifying pragmatism as an important theme in federal appellate judges' statutory interpretation methodology and recognizing the absence of legal doctrines that can guide interpretive pragmatism).

[7] *E.g.*, Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) ("To make judges more neutral and impartial in statutory interpretation cases, we should carefully examine the interpretive rules of the road and try to settle as many of them *in advance* as we can. Doing so would make the rules more predictable in application.").

[8] Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 56 (2005) [hereinafter *Roberts Hearing*] (statement of John G. Roberts, Jr., J., D.C. Circuit).

[9] *See* Charles Fried, *Balls and Strikes*, 61 EMORY L.J. 641, 641 (2012).

his accompanying remark: "Nobody ever went to a ball game to see the umpire."[10] Notwithstanding Roberts's observation, the literature has long framed statutory interpretation problems primarily as problems for judges—rather than the many other primary audiences of statutes.

And just as nobody goes to the ball game to see the umpire, no theory of statutory interpretation should exist only for judges. Statutory interpretation theories tend to focus on *judging* statutes—*i.e.*, deciding on the proper role of courts vis-à-vis legislatures. But to enhance law's efficacy and legitimacy, those theories should also account for how to *interpret* statutes. To do so, any theory of interpretation should address not only the capacities and constraints related to how judges interpret statutes, but also the interpretive capacities and constraints related to how law's other audiences are to derive meaning from statutory text. For both rule-of-law reasons and integrity-of-statutes reasons, I will argue in this Part that it is critical that there be sufficient congruence between how judges derive meaning from statutes and how the law's other audiences can and do.

### *A. Judging Statutes*

Established theories of statutory interpretation often fail to provide clear interpretive signals to statutory audiences in large part because they also fail to provide clear interpretive signals *to judges*. This is because American judges lack a principled method of interpreting statutes, something legal theorists[11] and members of the judiciary[12] alike have long recognized. Noted jurist Karl Llewellyn famously (if somewhat facetiously) observed in 1950 that for every canon, there is a counter-canon, for every interpretive parry, a countervailing thrust.[13] Nor have stable criteria emerged to evaluate or select among these interpretive tools; Seventh Circuit Judge Frank Easterbrook has recently lamented the continuing absence of method in statutory interpretation nearly seventy years after the publication of Llewellyn's

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[10] *Roberts Hearing*, *supra* note 8, at 55.

[11] Henry Hart & Albert Sacks long ago observed that "[t]he hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation." HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

[12] Justice Felix Frankfurter once lamented, "Unhappily, there is no table of logarithms for statutory construction." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, *in* JUDGING: VIEWS FROM THE BENCH 247, 255 (David M. O'Brien ed., 2d ed. 2004). More recently, Justice Scalia bemoaned that "American judges have no intelligible theory of what we do most." ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 14 (Amy Gutmann ed., 1997).

[13] Karl N. Llewellyn, *Remarks on a Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401 (1950).

parody.[14] And the current dialogue has seemed to offer no forward path: scholars have largely concluded that debates between textualism and purposivism have "taken us as far as they can go."[15]

An important reason that these debates have run aground, I argue, is that leading theories of statutory interpretation, textualism and purposivism,[16] are as much theories about *judging* statutes as they are theories about the mechanics of *interpreting* them.[17] Both approaches are efforts to resolve the inherent tension of common-law judicial decisionmaking set against a backdrop of legislative supremacy.[18] Anxiety about legislative supremacy has been called "a shibboleth in discourse about statutory interpretation."[19] At the core of many statutory interpretation disputes—including the core disagreement between textualists and purposivists—is a disagreement not only (or sometimes, not even primarily) about the meaning and interpretation of text so much as a debate about how to *judge* it:[20] textualism and purposivism *both* "seek to provide a superior way for federal judges to fulfill their presumed duty as Congress's faithful agents."[21] Indeed, it has been said that the "fundamental question" for statutory interpretation is "whether courts should view themselves as faithful agents of the legislature or as independent cooperative partners."[22]

Judges tend to disagree just as much about theories of judging as they do about theories

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[14] Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV. 81, 83 (2017).

[15] Gluck, *The Failure of Formalism*, *supra* note 5, at 191.

[16] *See* Richard H. Fallon, *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation–and the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685, 686–87 (2014). For the purposes of this Article, I follow Fallon's approach of subsuming intentionalism under the broader rubric of purposivism. *Id.* at 686 n.3.

[17] It is perhaps no coincidence that one of the field's most recent and prominent texts, by Chief Judge Robert A. Katzmann of the Second Circuit, is called *Judging Statutes*. *See generally* ROBERT A. KATZMANN, JUDGING STATUTES (2014).

[18] *See* Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 226 (1999) ("In my judgment the common law responsibilities of judges in our political system are central to a thoughtful consideration of the problem of interpretation.")

[19] William N. Eskridge Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 319 (1989).

[20] For example, *compare* Willian N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001) (arguing from historical evidence that the federal courts' role has always included the power to interpret statutes equitably as cooperative partners with the legislature), *with* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 7 (2001) (arguing from historical evidence that federal courts' role has always been as Congress's faithful agents, not cooperative partners).

[21] Manning, *supra* note 20, at 9.

[22] KENT GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION 20 (2013).

of interpretation.[23] Thus, most debates about how to *judge* statutes (*i.e.*, when to invoke particular substantive legal rules or prioritize certain interpretive methods over others) are almost always assessed in terms of separation-of-powers concerns about the proper rule of the courts vis-à-vis legislatures. This detracts from what *should* be the primary goal of statutory interpretation theory: the understanding of how statutes best communicate meaning to their relevant audiences, and the role judges should play in enhancing a statute's capacity to ensure its relevant audiences "get the message."

That prevailing theories of interpretation provide an insufficient basis for understanding how to interpret statutory text is not just a problem for lay statutory audiences. *Lawyers* armed with considerable expertise and experience cannot easily predict which interpretive canons or methods a court will select, and accordingly face uncertainty when framing arguments in briefs.[24] This suggests that even seasoned lawyers are unsure of which interpretive methods or canons should be prioritized,[25] which often yields scattershot briefings that toss out any conceivably relevant canons of interpretation in the hopes that at least a few of them "stick." Neither lay audiences nor sophisticated lawyers, then, seem to receive clear interpretive guidance from courts.

### *B. Applying and Following Statutes*

When even trained lawyers cannot know how best to apply judicially-crafted rules for statutory interpretation, a statute's legitimacy and capacity to communicate meaning effectively may be significantly undermined. This is a crucial consideration, for a central feature for any persuasive theory of statutory interpretation must be that it tends to enhance the communicative function of statutes and the process by which specific meaning can be derived from often underspecified and ambiguous statutory enactments. To enhance the law's efficacy and legitimacy, any interpretive theory should assess the prescribed methods

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[23] *See* Adam M. Samaha, *Starting with the Text: On Sequencing Effects in Statutory Interpretation and Beyond*, 8 J. LEGAL ANALYSIS 439, 447 (2016) (noting that "[d]ebates about interpretive method and the proper judicial role have generated friction" concerning whether to prioritize statutory text versus evidence of legislative purpose or history, among other disagreements).

[24] Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 97 (2018) (finding that parties before the Supreme Court regularly briefed canons that go unmentioned by the Court, and the Court regularly relies on canons that go unmentioned in parties' briefs).

[25] The same is true for dictionaries as sources of ordinary meaning: James Brudney and Lawrence Baum have found only a "limited match" between the use of dictionaries in litigants' briefs' before the Supreme Court and in the Court's ultimate use of dictionaries in its majority opinions. James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 532–33 (2013). In nearly every instance, the briefs cited a dictionary that the opinion did not. *Id.* at 533.

of interpretation on the basis of whether those methods tend to enhance coordination and compliance with law.

This is because a critical starting point for any theory of a functional legal system is that those susceptible to the law must be able to follow it. While the concept of law is itself a contested and heavily debated concept,[26] I start from the generally accepted premise that the law is "the enterprise of subjecting human conduct to the governance of rules."[27] If so, then a statutory rule must specify the conduct that is permitted, enabled, or prohibited. Scott Shapiro has helpfully described statutes as specific social plans, and the individuals and/or entities subject to them—the law's audiences—give functional meaning to these statutory plans through out-of-court implementation and practice.[28] This, of course, is why many legislative drafters are mindful of the intended audience when they draft statutes—for the social plan to be effective, the audience must be able to get the message.

Statutory enactments alone will inevitably be incomplete social plans, however. Written communication is finite, imprecise, contextual, and ambiguous, and "it is impossible for finite beings to guide conduct in ways that resolve every conceivable question."[29] Statutory law must be both general enough to be practicable and specific enough to communicate clearly,[30] providing "general rules, standards, and principles [as] the main instrument[s] of social control [rather than] particular directions given to each individual separately."[31] The inherently underspecified nature of statutory text creates the need for interpretation.

For statutes to function in their essential capacity as means to implement social plans and coordinate societal behavior,[32] much of the uncertainty about statutory meaning must be resolvable by the first-order statutory audiences themselves (including the government officers who oversee and implement them). After all, the rule of law is necessarily grounded in the presumed capacity for *all* individuals to adopt plans,[33] and courts cannot supervise every instance of interpretation. Audience accessibility, then, should be a critical

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[26] *See* Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 L. & PHIL. 137, 148–49 (2002); *see generally* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997) (arguing that the rule of law should be understood as a concept of multiple, complexly interwoven strands).

[27] LON L. FULLER, THE MORALITY OF LAW 106 (1969).

[28] *See* SCOTT J. SHAPIRO, LEGALITY 394 (2011).

[29] *Id.* at 251.

[30] *E.g.*, H.L.A. HART, THE CONCEPT OF LAW 128 (2d ed. 1994)

[31] *Id.* at 124.

[32] *See* Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165, 183–85 (1982).

[33] SHAPIRO, *supra* note 28, at 119.

consideration for any persuasive theory of statutory interpretation—at least for any statutory provisions that apply directly to wider audiences. (Statutory delegations to administrative agencies are a different matter, but they raise their own audience-specific interpretive problems.)[34]

Some may object that lay audiences rarely interpret statutes directly, even statutes that apply to them directly. There are several reasons why this rebuttal does not fully excuse statutes from needing to have the capacity to communicate to the larger public, nor absolves statutory interpretation theories from the expectation that they enhance how non-judicial audiences understand their legal obligations. First, *the law itself* often requires that lay audiences engage directly with statutory text,[35] or requires that government officials provide laypeople with a direct notice of statutory rights by furnishing them with copies of relevant portions of statutory text.[36] Some states even legislate audience- and trade-specific interpretive rules in their act interpretation acts.[37] Presumably, this suggests that at least some of the time, lay audiences are expected to be put on notice of certain statutory requirements, and to engage with them directly.

Moreover, whether or not the public at large regularly engages directly with statutes, a primary condition of legality is that law generally be minimally legible for its audiences, at least in certain circumstances.[38]

As I will discuss in Part II, many statutory schemes ensure that law is legible to the public at

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[34] *See infra* Section II.D.

[35] *See* United States v. Boyle 469 U.S. 241, 249, 250 (1985) (upholding late payment penalty against taxpayer because "Congress has placed the burden of prompt filing on the executor," "the duty is fixed and clear," and "one does not have to be a tax expert to know that tax returns have fixed filing dates"). Laypersons are expected to engage with statutory text in numerous aspects of their daily lives, including statutory text that directly impacts their contracts, legal releases, and workplace rights. *See, e.g.*, CA. LABOR CODE § 2872 (employment agreements that require employee to assign invention rights to employer must include written notification of rights under § 2870, which typically appears in employee invention assignment agreements); CA. CIVIL CODE § 1542 (requiring that any severance, settlement or release agreement include the text of § 1542 in order for a party agreeing to waive unknown claims).

[36] *See, e.g.*, *infra* note 115 and accompanying text.

[37] *E.g.*, GA. CODE ANN. § 1-3-1 (West) ("In all interpretations of statutes, the ordinary signification shall be applied to all words, except words of art or words connected with a particular trade or subject matter, which shall have the signification attached to them by experts in such trade or with reference to such subject matter."); *See generally* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1824–29 (2010

[38] Legal philosopher Lon Fuller identified among his eight principles of legality that citizens must know the standards to which they are being held (second principle), that law should in general be understandable (fourth principle), and that laws should not require conduct beyond the abilities of those affected by them (sixth principle). FULLER, *supra* note 27, at 39.

large through reliance on various interpretive intermediaries like accountants, lawyers, and bureaucrats. Nevertheless, interpretive intermediaries are not a complete answer. For example, prevailing "mistake-of-law" doctrines often prohibit members of the public from legal reliance on anything other than the text of the statute itself.[39] Both statutory interpretation generally, and the application of specific methods to particular statutes, should be evaluated on the basis of whether those methods tend to enhance or diminish the relevant statutory audience's capacity to "get the message."

Last, judges themselves concede that legal legibility is a central tenet of statutory interpretation. A prevailing assumption (or "necessary fiction")[40] among both judicial interpreters and legislative drafters is that statutes must communicate in a manner in which their audiences will be able to understand them, and this notice concern is especially heightened for statutes directed at the general public. In recent years, the Supreme Court has repeatedly shown it will strike down "a criminal law so vague that it fails to give *ordinary people fair notice* of the conduct it punishes."[41] As Justice Oliver Wendell Holmes, Jr. famously declared in *McBoyle v. United States*,[42] even if it were unlikely that a criminal were to "consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in *language that the common world will understand*, of what the law intends to do if a certain line is passed."[43] Notably, Holmes said this even of *malum in se* prohibitions where statutory notice to the public might be thought to be derived as much from ordinary moral notions of right and wrong as from the statutory text.[44]

### *C. Interpreting Statutes*

Holmes's invocation raises an additional important concern: if statutes are to communicate in "a language the common world will understand," then statutory interpretation theory must also address how to *interpret* statutes in a manner "the common world will understand." This is because courts play a crucial function in helping statutory audiences translate and derive meaning from underspecified and often-ambiguous statutory enactments. Statutory interpretation theory must therefore address not only the capacities

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[39] *See infra* Section II.C.1.

[40] United States v. R.L.C., 503 U.S. 291, 309 (1992) (Scalia, J., concurring in part and concurring in the judgment).

[41] Johnson v. United States, 135 S. Ct. 2551, 2556 (2015) (finding residual clause of Armed Career Criminal Act unconstitutionally void for vagueness) (emphasis).

[42] 283 U.S. 25 (1931).

[43] *Id.* at 27.

[44] Indeed, it is probable, though problematic, that legal moralism plays a role in how courts interpret criminal statutes. *See infra* Section II.B.4.

and constraints related to how *judges* interpret statutes, but also the interpretive capacities and constraints of the law's other audiences, as well as the manner in which statutes seek to ensure their relevant audiences will understand.

And how a judge chooses to interpret a legal text will affect that text's *legal* meaning just as much as the text itself. This is because the semantic meaning derived from "bare" text is not always synonymous with legal meaning the a judge may attribute to it.[45] Judges not only apply substantive rules of interpretation like the rule of lenity and clear notice rules that alter the legally permissible meaning of text, they also draw on sources of meaning like legislative history and related statutory usage that are wholly independent of the statutory text itself. Judicial interpretation thus provides an overlay on the statutory text, framing and shaping the meaning that may be permissibly derived from that text.

Understood this way, judicial rules of interpretation function as a kind of legal grammar: they provide guidance for deriving legal meaning from oft-underspecified statutory text. This is one reason why I call judges "second-order" interpreters: their opinions not only resolve particular first-order interpretive disputes, but the interpretive rules and reasons they cite will have secondary effects for future cases, because they will alter how future audiences are expected to understand and interpret related legal texts.

Questions about statutory audience and statutory form are often deeply entwined. This is because, as Ed Rubin has noted, not all statutes function in the same manner. Rubin has helpfully distinguished between what he calls "transitive" and "intransitive" statutes.[46] Transitive statutes state the precise rule to be applied, which means that the relevant statutory audiences might be put on notice by the rule itself. These kinds of statutes often raise concerns about notice and vagueness, given their direct and unmediated application to their frequently lay-audience targets. By contrast, intransitive statutes merely instruct the mechanism by which subsequent rules shall be developed—usually by an administrative agency—and, as a practical matter, "the ultimate target of the statute cannot know what behavior the statute will require."[47]

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[45] As Lawrence Solum has helpfully explained, the communicative content of any legal text will stem not only from its *semantic content* (the meaning of words and phrases that result from rules of syntax and grammar), but will also be *contextually enriched* by additional contextual content that contributes to the meaning of the legal utterance. *See* Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 487–88 (2013). Nevertheless, the *legal* content and effect of a statutory utterance will not necessarily be synonymous with its bare semantic meaning, nor even its contextually enriched content. *Id.* at 481–82. *But see* Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217–220 (Andrei A. Marmor & Scott Soames eds., 2011) (questioning whether communication theory provides the appropriate resources to determine a statute's legal meaning).

[46] Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 381 (1989).

[47] *Id.* at 381.

Because these statutes communicate in distinct ways, different tools of interpretation may well be more appropriate for transitive statutes than intransitive ones, and vice versa. As I will argue in Part II, the plain meaning rule is much more attractive when applied to transitive statutes criminalizing citizen conduct than for intransitive statutes providing agencies with an "intelligible principle" for rulemaking.[48] Complicating matters further is the fact that statutory transitivity can vary even at the sentence-level: some statutory provisions have both transitive and intransitive properties, because they provide one set of instructions to lay audiences and *another* to agency promulgators in the very same section.[49]

A key implication is therefore that statutory audiences (and their agents, when applicable) must not only have a basis upon which to predict how a judge would interpret a given statute, but the manner in which they do so must be appropriate to both the statute in question and the audience(s) of that statute.[50] In part, this is because courts cannot be relied upon to address and resolve every problem of statutory ambiguity—most interpretation takes place outside of courts, and much of it is never reviewed by judges at all. And if statutory audiences (or their interpretive agents) are expected to have even minimal engagement with deriving specific meaning from ambiguous statutory texts, then prevailing rules of interpretation for that text must reasonably conform to methods appropriate for both audience and statute alike.[51]

If so, then an important inquiry is whether any given approach to interpretation allows for at least *some* (and ideally much) interpretive congruence between how statutory audiences may be reasonably expected to derive meaning from the statutory text in question, and how judges use interpretive canons and methods to do the same task. Many different kinds of statutory audiences must engage with, interpret, and follow the law, and do so in very different ways. If second-order judicial methods of interpretation differ significantly from those of the first-order statutory audiences, or differ from one case to another, then the efficacy and predictability of law are diminished. Such "[f]ailures of congruence undermine the confidence with which citizens can look to the written law to determine what officials expect of them."[52]

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[48] *See* Whitman v. Am. Trucking Associations, 531 U.S. 457, 472 (2001).

[49] For a discussion of the concomitant interpretive tensions such statutes raise, see *infra* Section III.A.

[50] *See* Colleen Murphy, *Lon Fuller and the Moral Value of the Rule of Law*, 24 L. & PHIL. 239, 241 (2005); *see also* TOM BINGHAM, THE RULE OF LAW 37 (2011) (arguing that the law must be "intelligible, clear and predictable").

[51] Lon Fuller argued that interpretive congruence is critical, for a "lack of congruence between judicial action and statutory law" can result in "damaging departures from other principles of legality: a failure to articulate reasonably clear general rules and an inconsistency in decision manifesting itself in contradictory rulings, frequent changes of direction, and retrospective changes in the law." FULLER, *supra* note 27, at 82.

[52] *See* Murphy, *supra* note 50, at 242.

### *D. The Topology of Statutory Interpretation Methodology*

It is worth briefly pausing to consider how language is used in statutes, and how it seeks to communicate to its audiences. Importantly, how judges choose to interpret legal texts will affect their meaning, often in ways that may run contrary to what might seem to be the "plain" meaning of the text. A famous example from Constitutional law demonstrates the difference between semantic and legal meaning: the First Amendment states that "Congress shall make no law . . . abridging the freedom of speech."[53] Thus, as Lawrence Solum has shown by way of example, while the *semantic* meaning of the First Amendment might seem to prohibit only *Congress* from making such laws, and to prohibit Congress from making any law abridging the freedom speech,[54] the Supreme Court, drawing on the constitutional context and the ratification history of the First Amendment, has long declared that the *legal* meaning of the amendment contains many exceptions from the prohibition, including for incitement to violence, commercial speech, defamatory and libelous speech, and false and dangerous speech.[55] Moreover, the Court has interpreted the Fourteenth Amendment's Due Process Clause as incorporating First Amendment free speech rights against the states as well,[56] meaning that the First Amendment prohibition is both not limited to Congress and not a total prohibition on laws abridging the freedom of speech. In this sense, the *legal meaning* of a legal text will not necessarily be synonymous with its bare *semantic meaning* (*i.e.*, the semantic meaning conveyed by the bare words of the statute).[57]

This is because the *legal* meaning of a text depends not just on its semantic content alone, but also from other kinds of communicative content that give meaning to the text.[58] As Lawrence Solum has helpfully explained, the communicative content of any legal text is a product of both its *semantic* content (the meaning of words and phrases that result from rules of syntax and grammar), as well as *contextual* content (additional content provided by the available context of the legal utterance).[59] When interpreting statutes, then, judicial choice of

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[53] U.S. CONST. amend. I.

[54] *See* Solum, *supra* note 45, at 487–88.

[55] *See* KATHLEEN ANN RUANE, CONG. RESEARCH SERV., 95-815, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT (2014).

[56] *See* Gitlow v. People of State of New York, 268 U.S. 652, 666 (1925).

[57] *See* Solum, *supra* note 45, at 480–81.

[58] Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217 (Andrei A. Marmor & Scott Soames eds., 2011). Greenberg, however, argues that communication theory lacks the resources to resolve what a statute's legal meaning is, *id.* at 220, a position I also share, and develop in this section.

[59] *See* Solum, *supra* note 45, at 488. Solum rightly notes that contextual enrichment is closely related to the

interpretive methods and sources will be of critical importance for first-order interpreters seeking to understand statutory meaning. This is because the interpretive methods and rules judges permit, prioritize, or exclude will necessarily have a legal effect on how others may be expected to determine a statute's legal meaning.[60]

Judicial rules of interpretation, then, will affect whether statutory audiences should glean statutory meaning from semantic content, contextual content, or from other sources. Consider legislative history. The value of legislative history is that it may help to reveal a legislature's perlocutionary intentions in instances when the statutory text alone is unyielding.[61] The goal of Justice Scalia's famous campaign against the use of legislative history, then, was to deny courts—and, necessarily, other legal audiences—from deciding on a statute's *legal* meaning on the basis of evidence of the statute's *contextual* meaning as revealed from the legislature's perlocutionary intentions.[62] In other words, according to what I will call the "Scalia Rule," legislative history should not play a role in a court's determination of a statute's *legal* meaning, even if that contextual evidence might provide a *better* explanation of the statute's meaning than that derived from the semantic content of the statute alone.[63] (As I will discuss, my view is that, however persuasive one finds the Scalia Rule, it is *more* defensible as an audience canon than as a means of tempering judicial "interpretive jiggery-pokery.")[64]

Other substantive legal rules have a similar effect. Any time a court imposes a "clear statement" rule for Congress, for example, the court is in effect refusing to attribute Congress's intended legal meaning to a statute because its semantic content alone is not deemed to have sufficiently communicated the statute's intended legal meaning. This would

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concept of pragmatic enrichment in linguistics. Because pragmatism means something very different in legal contexts than in linguistic ones, however, Solum prefers the term "contextual" enrichment, a move I will follow, albeit by use of the term "contextual content" instead.

[60] *Id.* at 511 (arguing that the legal content associated with a particular legal text is not necessarily identical with the communicative content of that text); *see also* Greenberg, *supra* note 58, at 236 (arguing that a statute's contribution need not be exclusively its communicative content, and so a source of law other than an authoritative legal text can determine the statute's legal impact).

[61] *See* Scott Soames, *Toward a Theory of Legal Interpretation*, 6 N.Y.U. J.L. & LIBERTY 231, 243 (2011).

[62] See SCALIA, *supra* note 12, at 29–37 (arguing that consulting legislative history is generally unhelpful, time-consuming, and expensive); *see also infra* notes 166–167 and accompanying text.

[63] Scalia was skeptical that legislative history ever provided a better explanation. *Id.* at 36 (arguing that legislative history had made "very little difference" in the outcome of any case outcome over his prior nine terms on the bench). As I will discuss *infra* in Part III.B, however, in at least a few cases, the legislative history may have been dispositive to determining the meaning of an ambiguous statutory term.

[64] *See* King v. Burwell, 135 S. Ct. 2480, 2500 (2015) (Scalia, J., dissenting) (describing the majority's "subordinat[ing] the express words of the section" in favor of meaning derived from the legislative structure and history as "interpretive jiggery-pokery").

be so even when contextual content (such as from the legislative history) makes perfectly clear what Congress intended the statute to mean. In these circumstances, the legal rule prioritizes semantic content, and excludes certain kinds of contextual content, even if the result is to attribute to the statute a legal meaning that its drafters did not intend.[65]

In short, judicially-imposed interpretive rules, methods, and sources will all necessarily shape how the common world is expected to understand what the statute *legally* means—whatever the bare semantic content may communicate—because the rules imposed by judges will necessarily influence the *legal* content and meaning attributed to statutes.[66] (*See* Table 1 for examples of each source of meaning as drawn from the unanimous majority opinion in *McBoyle*.)

And this is why I describe judges as having the capacity to act as "second-order" interpreters: their interpretations not only adjudicate and decide between competing first-order interpretations, but they can also have legal effects on subsequent interpretive questions—certainly, at least, that was Justice Scalia's intention vis-à-vis legislative history. And some have suggested that his campaign seemed to have some success, for it "had a profound effect on how litigants brief and argue cases to the court"[67] by repeatedly signaling which methods of interpretation and which evidence of semantic or contextual meaning would be legally prioritized or rejected by some members of the Court.

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[65] Indeed, these considerations are precisely what determine the outcome of *Murphy v. Arlington Central School District,* as I will explain in Part III.

[66] *See* Solum, *supra* note 45, at 511.

[67] Marty Lederman, *Supreme Court 2015: John Roberts' ruling in King v. Burwell*, SLATE, June 25, 2015, *available at* https://slate.com/news-and-politics/2015/06/supreme-court-2015-john-roberts-ruling-in-king-v-burwell.html [http://perma.cc/SY3X-3YYE].

**Table 1: Role of *Semantic*, *Communicative/Contextual*, and *Legal* Content in the Interpretation of Statutes**

**Relevant Statutory Text (from *McBoyle v. U.S.*)**[68]**:** *"The term 'motor vehicle' shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails."*[69]

| ***Sources of Statutory Meaning*** | ***Method, Source, or Rule of Interpretation*** | ***Implications for Legal Meaning:*** |
|---|---|---|
| Evidence of Semantic Meaning (Semantic Content) | Linguistic Canons (*e.g.*, *ejusdem generis*) | List of examples "calls up the picture of a thing moving on land."[70] |
| | Permissible Ordinary Usage (*e.g.*, dictionary definitions) | "No doubt etymologically it is possible to use the word to signify a conveyance working on land, water or air."[71] |
| | Prototypical Ordinary Usage | "[I]n everyday speech 'vehicle' calls up the picture of a thing moving on land."[72] |
| Evidence of Contextual Meaning (Contextual Content) | Statutory Purpose (*e.g.*, legislative history) | ("Airplanes were well known in 1919, when this statute was passed; but it is admitted that they were not mentioned in the reports or in the debates in Congress.")[73] |
| Substantive Legal Rules (Legal Content) | Clear Statement Rule | "[A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. . . . When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies."[74] |

If this is true, then any theory of statutory interpretation must account not only for how *judges* interpret laws, but also how *first-order* interpreters should. This means that statutory audiences must not only have a basis upon which to predict how a judge would interpret a given statute, but also have the *capacity* to do so in a similar manner.[75] Whenever the first-

[68] 283 U.S. 25 (1931).

[69] *Id.* (quoting Act of October 29, 1919, ch. 89, 41 Stat. 324).

[70] *Id.* at 26.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.* at 27.

[75] Indeed, the law must ensure that "[c]itizens can take legal requirements and prohibitions into consideration when deliberating about how to act" and "can predict how judges will interpret and apply rules, enabling them

order interpreter guesses wrong, or hesitates at length due to uncertainty, the legal system becomes less effective and efficient, falling short in its essential role of coordinating and facilitating socially productive behavior.

A theory of statutory interpretation that prioritizes interpretive congruence, then, will emphasize not only the accessibility of its methodology, but also the reliability of its application. Methodological predictability matters, because when a judge provides reasons for her interpretation of a specific statute—why certain arguments were or were not plausible, which resources she drew upon to understand the statute's meaning, and, most importantly, the decisive reason(s) for reaching her decision—these reasons also function as signals for the future.[76] It is perhaps a commonplace that "[o]nce interpretations acquire the force of precedent, the statute changes with the act of interpretation."[77] But so too does the choice of interpretive method(s), because judges are also necessarily communicating preferences about meta-rules that should guide subsequent first-order interpreters.

Questions about the proper techniques for statutory interpretation and questions about the proper role for judges in interpretation are not necessarily one and the same.[78] The former set of questions concerns not only judges, but all audiences of statutes: to comply with the law, a statute's audiences must first be able to interpret it. Yet as the next section explains, prominent theories of statutory interpretation largely focus on how courts should *judge* statutes that come before them (largely as a matter of interbranch comity), while saying relatively little about how statutory audiences should *interpret* them outside of court.

These concerns are exacerbated by relative scarcity in the supply of precedential judicial interpretations of statutes. It would be one thing if first-order interpreters had weak self-help signals but could cheaply and easily obtain an authoritative interpretation from a court—for example, an advisory opinion prior to taking action (something administrative agencies often provide for the audiences of the statutes and regulations they administer).[79] But as the next

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to form reliable expectations." Murphy, *supra* note 50, at 241; FULLER, *supra* note 27, at 39.

[76] Nevertheless, judges sometimes have good reasons for *not* giving reasons. These include seeking to avoid inflaming the public's disagreement with the grounds for a given decision; that reason-giving can often be motivated by *ex post* justifications made after deciding on the outcome; and that limited judicial capacity all but precludes thorough reason-giving in every case. *See* Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 514–25 (2015).

[77] Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 244 (1999).

[78] *Id.* at 244.

[79] For example, the SEC has long provided advice and guidance to those seeking assistance in complying with securities laws and regulations, including "informal advice and guidance to specific transactions," including in the form of advisory no-action letters. Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 934 (1998).

section shows, in American legal practice, obtaining an authoritative judicial interpretation of a statute is far from guaranteed, and is generally only obtained at great time, cost, and risk.

### *E. The Scarcity of Judicial Statutory Interpretations*

That an effective legal system heavily depends on first-order statutory interpreters is not merely a matter of theory. If one thinks of judicial interpretations of statutes as a resource to assist statutory audiences in determining the law's meaning, then such interpretations are a scarce and costly resource. As this Section identifies, given (1) the jurisdictional limitations on authoritative second-order interpretations; (2) the significant costs associated with retaining counsel and pursuing litigation to resolve interpretive ambiguity; (3) and the limited judicial resources available to resolve such disputes, our legal system heavily depends on statutory audiences being able to resolve ambiguity outside of the courtroom.

#### *1. Article III's Prohibition on Advisory Opinions*

Perhaps the most fundamental reason that first-order interpreters must be able to resort to interpretive self-help is our legal system's prohibition on advisory opinions. Article III's "case-or-controversy requirement"[80] limits federal courts only to the adjudication of disputes between directly adverse parties, at least one of whom can claim a tangible and concrete legal injury.[81] There is a limited exception for permissible facial pre-enforcement challenges to statutes, but these are "discouraged" insofar as they risk the "'premature interpretatio[n] of statutes' on the basis of factually barebones records"—never mind that *first-order interpreters* must engage in such "premature" interpretation all the time.[82] Thus, in the vast majority of cases, first-order audiences must interpret and act under the law without the prior assistance of a judge. Since ignorance of the law is (generally) no excuse for its violation,[83] the consequences of incorrect first-order interpretation can be significant: a lawsuit, criminal prosecution, civil penalties, possible bankruptcy, or jail time. In a sense, our constitutional system generally insists that first-order interpreters act first and (file suit to) ask questions later.

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[80] Article III of the U.S. Constitution extends the federal "judicial Power" only to certain "Cases" or "Controversies" involving particular legal issues or disputes. U.S. CONST. art. III, § 2, cl. 1. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

[81] Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 447 (1993).

[82] Sabri v. United States, 541 U.S. 600, 609 (2004) (quoting United States v. Raines, 362 U.S. 17, 22 (1960)).

[83] *E.g.*, Screws v. United States, 325 U.S. 91, 129 (1945); *but see* Dan M. Kahan, *Ignorance of the Law is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 131 (1997) (arguing that ignorance of the law is only ever an excuse for "the virtuous").

*2. Costs of Acquiring Judicial Interpretations*

Even when the judicial system is accessible as a matter of law, it may not be as a matter of practice, for the cost of obtaining interpretive finality can be very high for both civil and criminal statutory questions. Begin with the costs of retaining a lawyer. Even for routine legal questions, many citizens cannot afford to hire counsel: the ABA has found that roughly half of all households indicate they have experienced one or more unmet legal needs in the prior year.[84]

Should an interpretive problem develop into a live dispute between parties, the costs of representation are even more significant. The National Center for State Courts has estimated that the median cost for individual plaintiffs of proceeding to trial in state litigation ranges from $43,000 to $122,000, depending on the nature of the suit.[85] Nor is it easy to obtain the assistance of a lawyer: when lawyers were asked to specify the amount-in-controversy necessary for a legal case to be worth bringing, they identified $100,000 or more as the estimated threshold amount.[86] Notably, the more complex the issues are, the more access to counsel appears to raise the likelihood of a successful disposition.[87]

The circumstances are even more dire for a criminal defendant who questions the state's interpretation of a criminal law. For indigent criminal defendants, overworked public defenders often cannot afford to provide meaningful assistance to all defendants on their dockets, a phenomenon that results in what has been dismayingly referred to as "meet 'em and plead 'em lawyering."[88] On appeal, defendants have the constitutional right to an effective appellate attorney only for their first direct appeal,[89] and in practice, the majority of jurisdictions limit the issues appellate attorneys may raise on direct appeal, including trial attorney performance.[90] Thus, the argument that first-order statutory audiences need not be able to interpret statutes themselves because their lawyers can do it for them will come as cold comfort to many.

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[84] Emily A. Spieler, *The Paradox of Access to Civil Justice: The "Glut" of New Lawyers and the Persistence of Unmet Need*, 44 U. TOL. L. REV. 365, 373 (2013).

[85] PAULA HANNAFORD-AGOR & NICOLE L. WATERS, NATIONAL CENTER FOR STATE COURTS, ESTIMATING THE COST OF CIVIL LITIGATION 6 (2013). http://www.courtstatistics.org/~/media/Microsites/Files/CSP/DATA%20PDF/CSPH_online2.ashx [http://perma.cc/9UM4-3QWH].

[86] INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, CREATING THE JUST, SPEEDY, AND INEXPENSIVE COURTS OF TOMORROW (2016), *available at* http://iaals.du.edu/sites/default/files/documents/publications/ideas_for_impact_post-summit_report.pdf [http://perma.cc/46LC-5HGT].

[87] Spieler, *supra* note 84, at 376.

[88] Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043, 1069 (2013).

[89] *See* Douglas v. California, 372 U.S. 353, 357–58 (1963).

[90] *See* Eve Brensike Primus, *The Illusory Right to Counsel*, 37 OHIO N.U. L. REV. 597, 605–07 (2011).

*3. Rarity of Precedential Statutory Interpretations*

Nor does access to counsel ensure authoritative resolution of the interpretive problem. This is because obtaining an authoritative judgment as to a question of statutory interpretation is neither straightforward nor guaranteed, for American judicial resources are also constrained.

Part of this is a question of efficiency. On the civil side, the median interval between the filing of a complaint and the disposition of a civil case in U.S. district courts is 11.7 months for a case resolved prior to pretrial motions and 26 months for a case resolved at or after trial.[91] And because most cases settle, in the lion's share of federal cases, no judicial interpretation may be provided at all.[92] Moreover, with the rise of mandatory arbitration in consumer and employment contracts, even if a first-order interpreter is *certain* a counterparty has misapprehended a statute's meaning, she will rarely have success obtaining an interpretive decision from a judge.[93] In addition, because trial courts are not required to provide written opinions when denying dispositive motions,[94] potential statutory questions may linger until appeal, and many federal cases are not appealed, meaning that any availing judicial interpretation will not create precedent for other litigants.[95]

On the criminal side, access to second-order interpretations is even more constrained, and often at even higher costs. At the outset, few suspects would be likely to succeed in resisting arrest by arguing to the arresting officer that she is misapprehending the relevant statute.[96] Once charged, a defendant may seek dismissal of an indictment on the grounds that the statute in question does not cover the alleged behavior, but if her motion is denied, she cannot directly appeal the denial.[97]

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[91] *See* U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl.C-5, http://www.uscourts.gov/sites/default/files/data_tables/stfj_c5_630.2017.pdf [https://perma.cc/2CEQ-RL6K].

[92] Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL L. STUD. 111, 115–25 (2009).

[93] *See generally* J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3072–74 (2015) (arguing that the rise of arbitration agreements threatens the development of substantive law); Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 161–68 (2011) (same).

[94] Cohen, *supra* note 76, at 526; *see also* FED. R. CIV. P. 52(a)(3).

[95] *But see* Gerard E. Lynch, *What Judges Do, Part I*, *in* CASES AND MATERIALS ON LEGAL METHODS 870 (Peter L. Strauss ed., 2008) (arguing that once three or more district courts have adopted a particular interpretation of a statute, "at some point it would almost certainly be 'the law'").

[96] Indeed, a number of states have overridden the traditional common-law rule permitting the right to resist an unlawful arrest if made by a peace officer. *See* 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 126 & n.62 (15th ed. 2017).

[97] *See* DiBella v. United States, 369 U.S. 121, 126 (1962); 28 U.S.C. § 1291 (2012).

Moreover, if her motion to dismiss is denied, the criminal defendant must then decide whether to plead guilty (thus ceding the interpretive ground), or else go to trial—both come at great costs. Individuals who accept a plea bargain cannot later litigate whether the underlying criminal statute actually prohibited their behavior in question,[98] unless they can negotiate a conditional plea, something no prosecutor is obligated to provide and which is prohibited by law in some states.[99] These conditions exist against a background in which the criminal justice system strongly promotes and encourages plea agreements. The Supreme Court has described plea bargaining as an "essential component of the administration of justice,"[100] and it has approvingly noted that 95 percent of criminal convictions result from guilty pleas, with only 5 percent resulting from trials.[101]

If a defendant declines to plea and press her interpretive case, she must then go to trial, likely risking exposure to a harsher sentence should the judge side with the prosecutions' view of the appropriate jury instructions concerning the violation of law.[102] Under circumstances where the *conduct* itself is not in dispute, but rather its *legality* under the statute is, obtaining a second-order appellate interpretation thus comes at an incredibly high price, for a defendant must go through an entire trial just to preserve her right to appeal the underlying statutory interpretation question if convicted.

What makes matters worse is that even if a first-order interpreter is able to put her interpretive problem before an appellate panel, there is still no guarantee the panel will authoritatively resolve the interpretive question. Federal circuit courts have demonstrated a growing proclivity for resolving merits decisions by means of what are variously known as unpublished decisions, non-precedential opinions, or summary orders, a practice whose constitutionality remains debatable.[103] As a result, even appellate merits decisions are often unlikely to result in a precedential statutory interpretation decision. Today, nearly 90 percent of U.S. Court of Appeals cases resolved on the merits are disposed of by unpublished, non-precedential opinions.[104] Moreover, the Supreme Court in recent years has issued far fewer

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[98] *See* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 219 (2005).

[99] Marjorie Whalen, *"A Pious Fraud": The Prohibition of Conditional Guilty Pleas in Rhode Island*, 17 ROGER WILLIAMS U. L. REV. 480, 481 (2012).

[100] Santobello v. New York, 404 U.S. 257, 260 (1971).

[101] Padilla v. Kentucky, 559 U.S. 356, 372 (2010).

[102] *See* Susie Cho, *Capital Confusion: The Effect of Jury Instructions on the Decision to Impose Death*, 85 J. OF CRIM. L. & CRIMINOLOGY 532, 548 (explaining that "[i]nstructions proposed by attorneys tend to be biased toward their respective parties").

[103] *See* Brian Soucek, *Copy-Paste Precedent*, 13 J. APP. PRAC. & PROCESS 153, 156 & n.12 (2012) (collecting cases and articles questioning the constitutionality of the practice).

[104] U.S. COURTS, JUDICIAL BUSINESS 2017 tbl.B-12, http://www.uscourts.gov/sites/default/

than 100 written merits opinions per term,[105] only some of which involve questions of statutory interpretation. By my count, during the Court's October Term 2017, at most 45 of the Court's 69 cases decided after oral argument implicated a question of statutory interpretation.[106] The net effect of this is that very few second-order federal statutory interpretation decisions—fewer than 50 a year in most years—will ever have clear, nationwide effect. In their absence, first-order interpreters often must resolve statutory ambiguity on their own.

All of these aspects of our legal system reach well beyond problems in statutory interpretation, and interpretive theory alone neither can, nor should, be primarily accountable for them. Nevertheless, when assessing statutory interpretation with these background conditions in mind, it becomes clear why any complete theory of statutory interpretation must also account for the interpretive role of law's other audiences. In chapter two, I will turn my attention to this question.

## II. THE AUDIENCES OF STATUTES

> [A] legal scholar is able to research the principles of statutory construction and in the quiet of the library indulge himself in an act of ratiocination to conclude that one provision must yield to the other . . . . Where a defendant is threatened by a loss of his liberty, . . . we do not find that the law requires his fate should hang on a statute so drawn that it would exculpate him in one provision, inculpate him in another, and then leave it to an exercise in legal research to determine which should prevail.[107]

In this Part, I will develop an approach to statutory interpretation oriented around the audiences of statutes, and which considers the relationships between (i) the rule-of-law norms relevant to particular statutory audiences—*e.g.*, notice and clarity, predictability, accessibility, and expertise—and (ii) the reasons and justifications judges give for their use of various interpretive rules and methods.

Courts have generally been much more attentive to the relationship between audience norms and (a) *substantive legal rules* (*e.g.*, the rule of lenity, the absurdity doctrine, and

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files/data_tables/jb_b12_0930.2016.pdf [https://perma.cc/6RHB-6JNF].

[105] *See* Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1228 & fig. 1 (2012).

[106] *See October Term 2017*, SCOTUSBLOG, https://www.scotusblog.com/case-files/terms/ot2017/ [https://perma.cc/9V4S-ST5A] (last visited Mar. 5, 2019).

[107] People v. Marrero, 422 N.Y.S.2d 384, 388 (App. Div. 1979) (Lynch, J., dissenting).

*Chevron* deference), than to the relationship between audience norms and (b) *interpretive methods* (*e.g.*, canons of construction like *ejusdem generis*, the use of dictionaries, and the resort to legislative history). Indeed, courts often exhibit an inclination to select substantive legal rules that are audience attentive. The rule of lenity, mistake-of-law rule, and administrative deference are all examples of substantive canons that are warranted when statutes are directed at a particular audience. Yet courts then do not follow through, failing to select and prioritize interpretive methods, canons, and sources that are most appropriate for the statutory audience and audience-oriented substantive canon.

This Part begins by identifying the different kinds of first-order statutory audiences, then proceeds to explore the relationship between first-order audiences, audience norms, substantive legal rules, and interpretive methods.

### *A. The Different Audiences of a Statute*

Statutes have distinct and varied audiences, and these audiences may diverge in normatively and communicatively important ways—a view apparently shared by most legislative drafters, but often overlooked by statutory interpretation theory as employed by courts. Broad variation necessarily exists in the knowledge, training, sophistication, resources, and interpretive context of different first-order statutory audiences and the agents who assist them in ascertaining their legal rights and obligations.[108]

To see why, it is worth briefly examining just how many different audiences a statute can have, and the distinct and dynamic ways each audience may engage with the statute's rules and stipulations. The Individuals with Disabilities Education Act ("IDEA")[109] provides a useful preliminary overview of the many kinds of audiences a statute may have.[110] The IDEA, like many federal statutes, has multiple (and often-conflicting) audiences. A chief aim of the IDEA is to use federal special education grants to induce states to enhance opportunities for children with disabilities.[111] The IDEA does so in part by tying federal funding to state compliance with administrative procedures that ensure children are properly evaluated for their learning needs and then receive a public education suitable to those needs.[112] To do so,

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[108] *E.g.*, Brudney & Baum, *supra* note 25, at 541 (noting that "criminal statutes tend to affect a less educated population than laws regulating employers and businesses in general").

[109] Individuals with Disabilities Act, Pub. L. 101–406, 104 Stat. 1142, codified as amended at 20 U.S.C. § 1400 *et seq.* (2012).

[110] I will return to the statute later to examine how the Court handled questions of audience in *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006), in Part III.C.

[111] *See* 20 U.S.C. § 1411(a) (2012).

[112] *See generally id.* § 1414 (setting out required evaluation process). As of 2006, the year *Murphy* was decided, all 50 states received special education grants. U.S. DEP'T OF ED., SPECIAL EDUCATION—GRANTS TO

the IDEA is addressed to both the Department of Education and state-level education officials in each state, who together cooperatively implement these statutorily-required procedures.[113]

But the IDEA also directly addresses its on-the-ground audiences, for it establishes rights and sets out procedures that govern the resolution of individual disagreements between a child's parent or guardian and the child's school district concerning the appropriate educational accommodations for that child.[114] The IDEA stipulates that eligible parents and guardians are entitled to be furnished by their state with annual notices of their statutory rights, typically through a notice document that replicates much of the statutory language itself.[115]

For a parent or guardian to bring an effective claim of inadequate accommodation, they often must hire both an attorney to press their case and a qualified professional expert to evaluate the child's needs and offer evidence that the child's provided education is not adequate.[116] The IDEA accommodates these needs by providing a formal role for both attorneys and qualified professional experts under the statute.[117] If the parent feels an administrative hearing did not adequately resolve her concerns, she is eligible to bring her case before a federal judge by filing suit.[118] Given the often-considerable costs associated with challenging a local district's determination,[119] Congress amended the IDEA in 1986 to enable judges, in their discretion, to shift fees to cover reasonable attorneys' fees in circumstances

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STATES, https://www2.ed.gov/fund/grant/apply/osep/b06611table.html [https://perma.cc/UUR8-2EPA ] (last visited June 2, 2019).

[113] *E.g.*, 20 U.S.C. § 1416 (2012) (establishing federal role in monitoring, technical assistance, and enforcement of state IDEA compliance).

[114] 20 U.S.C. § 1415 (2012) (setting out procedural safeguards).

[115] The IDEA requires that parents receive annually a copy of a procedural safeguards notice. 20 U.S.C. § 1415(d)(2) (2012). As promulgated by the Department of Education, this form replicates much of the statutory text directly in the notice document; given that the law instructs that the notice be "written in an easily understandable manner," one must presume the Department felt parents should be able to understand the statutory text itself. IDEA 2004 MODEL FORMS: PROCEDURAL SAFEGUARDS NOTICE, U.S. DEP'T OF ED., *available at* https://www2.ed.gov/policy/speced/guid/idea/modelform-safeguards.doc [http://perma.cc/XK3T-2LHC]

[116] PETER L. STRAUSS, CONGRESS AT WORK: A DOCUMENTARY SUPPLEMENT FOR COURSES IN LEGISLATION 65 (2016) (noting that expenses for psychologists are central to any disputes over a child's special education needs).

[117] 20 U.S.C. § 1414(b)(4)(A) (2012).

[118] *Id.* § 1415(i)(2) (2012).

[119] *See* Smith v. Robinson, 468 U.S. 992, 1031 (1984) (Brennan, J., dissenting) (noting the burden of litigation costs on children with disabilities).

where parents prevails on the merits.[120]

It is worth identifying just how many distinct audiences this statute has. They include, among others (*see* Table 2): (1) the Department of Education; (2) state-level education officials; (3) local school officials; (4) the parent or guardian (and their child); (5) the qualified professional experts; (6) the federal judge; and (7) the parent or guardian's attorney.

**Table 2: Audiences of the Individuals with Disabilities Education Act**

| *Audience* | *Illustrative Provision* | *Illustrative statutory text* |
|---|---|---|
| (1) U.S. Department of Education | 20 U.S.C. § 1416(a) | "*The Secretary* shall . . . monitor implementation [through] oversight of the exercise of general supervision by the States." |
| (2) State Education Officials | *Id.* § 1416(b)(1) | "*[E]ach State* shall have in place a performance plan . . . ." |
| (3) Local Education Officials | *Id.* § 1415(a) | "Any . . . *local educational agency* that receives assistance under [the IDEA] shall establish and maintain procedures . . . to ensure that children with disabilities and their parents are guaranteed procedural safeguards." |
| (4) Parents | *Id.* § 1414(d)(1)–(2) | "A copy of the procedural safeguards *shall be given to the parents* . . . [and] shall include a full explanation of the procedural safeguards, . . . written in an easily understandable manner, . . . related to . . . the opportunity to present and resolve complaints . . . ; civil actions . . .; and . . . attorneys' fees." |
| (5) Qualified Professionals | *Id.* § 1414(b)(4)(A) | "[T]he determination of whether the child is a child with a disability . . . and the educational needs of the child shall be made by a team of *qualified professionals* and the parent of the child." |
| (6) Federal Judges (as first-order audiences) | *Id.* § 1415(h)(i)(3)(B) | "*[T]he court*, in its discretion, may award reasonable attorneys' fees as part of the costs . . . to a prevailing party who is the parent of a child with a disability." |
| (7) Attorneys | *Id.* § 1415(b)(7)(A) | "[R]requir[ing] . . . *the attorney representing a party* . . . to provide due process complaint notice in accordance with [the statute]." |

Arguably, in a very real sense, another important audience for the statute is (8) the non-drafting members of Congress, perhaps the real-life stand-in for Justice Breyer's "(hypothetical) reasonable member of Congress."[121] After all, for any given bill, most members of Congress have essentially no role in the drafting the legislation they voted on, and because they often vote on up to 1,000 bills per congressional term, many rely more on accompanying reports and floor statements that summarize the bill's aims and legal effects rather than on the text of the statute itself.[122] In this sense, the non-drafting legislators function as the first

[120] Handicapped Children's Protection Act of 1986, Pub. L. No. 99–372, § 2, 100 Stat. 796, 796.

[121] *See* Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 266 (2002).

[122] KATZMANN, *supra* note 17, at 18–22.

important audience for of the draft legislation, as they must understand what the statute will do to decide whether to support it.

The IDEA demonstrates just how distinctive a statute's various audiences may be, and the dynamically distinct ways these audiences may be expected to engage with the statute and the rights, obligations, and procedures it sets out. The next sections topologize these different audiences, examine how the law might expect different audiences to engage with statutory rules in different ways, and considers how substantive and interpretive legal rules employed by courts may alter expectations about first-order statutory interpretation.

### *B. Ordinary Audiences*

It is something of a truism to say that laypeople are a primary audience of many statutes, just as parents are a primary audience of the IDEA. Numerous federal, state, and local statutes regulate nearly every aspect of daily life, from local ordinances that affect parking, transportation, and housing, to statutes that regulate schools, workplaces, information privacy, and consumer and civil rights, and the environment. While not all of those statutes seek to communicate directly to laypeople in the manner that some of the parental rights provisions of the IDEA do, many statutes function to put members of the public on notice of particular rights, responsibilities, and obligations. How, if at all, does judicial statutory interpretation methodology address how lay audiences are expected to ascertain their obligations under the law?

In part, courts do so by invoking several important interpretive rules and norms in circumstances where the relevant audience of statute is thought to be the public at large, and the consequences of misinterpretation are sufficiently high. These interpretive rules include, among others, (1) the prioritization of so-called "plain" or "ordinary meaning" canons;[123] (2) the application of the rule of lenity in cases of sufficient criminal statutory ambiguity;[124] and, potentially, (3) limiting the resort to extra-textual methods or sources of interpretation that may be especially unlikely to put ordinary individuals on notice.[125]

In addition, criminal law scholars such as Dan Kahan have suggested that (4) broadly held moral conceptions of right and wrong—what Kahan calls "legal moralism"—can also influence how judges assign meaning to statutes directed at lay audiences, on the assumption

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[123] *See* Stefan Th. Gries & Brian G. Slocum, *Ordinary Meaning and Corpus Linguistics*, 2017 B.Y.U. L. Rev. 1417, 1424.

[124] *See* Daniel Ortner, *The Merciful Corpus: The Rule of Lenity, Ambiguity, and Corpus Linguistics*, 25 B.U. PUB. INT. L.J. 101, 101 (2016).

[125] *See, e.g.*, Robert H. Jackson, *Meaning of Statutes: What Congress Says or What the Court Says*, 34 A.B.A. J. 535, 538 (1948) (arguing against the use of legislative history because most people, and even many lawyers, do not have easy access to legislative history).

that the *textual* notice expectation of law is less demanding when the proscription in question also conforms to the public's broad conceptions about right and wrong conduct.[126]

This section examines each of these concepts as related to ordinary interpreters by drawing the canonical statutory interpretation case of *Muscarello v. United States*.[127]

### *1. Ordinary Meanings for Ordinary Interpreters*

For statutes directed at lay audiences, courts frequently seek to ascertain a statutory provision's "ordinary meaning," which is to say, the general semantic meaning attributed to a term or phrase as ordinarily used in the English language.[128] Of course, ascertaining even the "ordinary" meaning of a term or phrase is not always easy, as demonstrated by the debate in *Muscarello v. United States*.[129] *Muscarello* concerned the interpretation of a mandatory five-year prison term for any individual who "carries a firearm" "during and in relation to" a "drug trafficking crime."[130] In *Muscarello*, the Court was asked to decide whether two separate defendants who kept firearms located in, respectively, the locked glove compartment and the trunk of their cars driven to the scene of a drug trafficking crime, violated the statutory prohibition on "carry[ing] a firearm," even if the firearm was in the car, not on the person, during the drug trafficking crime.[131] Justice Breyer, writing for the majority began by recognizing that that "Congress intended the phrase ["carries a firearm"] to convey its ordinary, and not some special legal, meaning,"[132] a view of the statute's communicative enterprise shared by the four-member dissent penned by Justice Ruth Bader Ginsburg.[133]

To ascertain the "ordinary meaning" of statutory texts, courts—and especially the contemporary Supreme Court—often refer to dictionary definitions of the relevant word or words in question.[134] This is especially so when the statute in question is directed at an

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[126] *See* Dan M. Kahan, *Ignorance of the Law is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 128 (1997).

[127] 524 U.S. 125 (1998).

[128] *See* Gries & Slocum, *supra* note 123, at 1424 (noting that the basic premise of the ordinary meaning doctrine is that a legal text is a form of communication that uses natural language, and thus, for reasons including rule of law and notice concerns, "textual language should be interpreted in light of the accepted and typical standards of communication that apply outside of the law").

[129] 524 U.S. 125 (1998).

[130] *Id.* at 126 (quoting 18 U.S.C. § 924(c)(1)).

[131] *Id.*

[132] *Id.* at 128.

[133] *Id.* at 139–40.

[134] *See* Brudney & Baum, *supra* note 25, at 486.

ordinary or lay audience, as in the case of most general criminal prohibitions.[135] In theory, contemporary dictionaries encapsulate commonly shared semantic meanings and therefore will reflect ordinary usages of words.[136] The difficulty with this approach is that individual dictionaries can disagree just as much about ordinary meaning as laypeople or judges do—as essayist David Foster Wallace once famously described, dictionary "wars" over usage are often just as heated as judicial disagreements about statutory meaning.[137]

This confusion was compounded by the selection of other sources of evidence of ordinary meaning deployed in *Muscarello*. Drawing on additional sources of ordinary meaning can just as easily unsettle a shared belief about semantic meaning as confirm one, because the more sources of ordinary usage considered, the more distinct and plausible "meanings" might emerge.[138] And *Muscarello* is also indicative of how ordinary and judicial interpreters may not necessarily seek out the same resources to determine the phrase's "ordinary meaning."

In addition to several contemporary dictionaries and four dictionaries of etymology, the *Muscarello* majority also drew on works by "the greatest of writers," including the King James Bible, Daniel Defoe's *Robinson Crusoe*, and Herman Melville's *Moby Dick*.[139] From the standpoint of a lay audience, the majority's sources purporting to reveal a term's "ordinary meaning" are rather odd. After all, the firearm carriage prohibition was originally passed as part of the Gun Control Act of 1968,[140] had been amended in relevant ways by both the 1984 omnibus spending act[141] and the 1986 Firearm Owners' Protection Act,[142] and was

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[135] James Brudney and Lawrence Baum have identified that dictionary use by the Supreme Court is significantly greater in criminal law cases than in commercial law cases, *id.* at 520, and they speculate that this can be justified because such laws "affect a less educated population" that is "less likely to receive legal counsel about how to comply with statutory prohibitions, [and so] the unfiltered ordinary meaning of text may assume greater importance," *id.* at 541.

[136] Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 283 (1998) ("Modern lexicographers see their task as describing how speakers of English use words.").

[137] *See* David Foster Wallace, *Tense Present: Democracy, English, and the Wars over Usage*, HARPER'S MAGAZINE, April 2001, at 40 (discussing the "ideological strife and controversy" between "notoriously liberal" dictionaries and the "notoriously conservative" dictionaries designed as "corrective responses" to overly "'permissive'" liberal ones).

[138] Aprill, *supra* note 136, at 285 (noting that modern lexicographers "do not expect their definition to give the absolute meaning of the word" but rather to give the reader enough information "to surmise, at least approximately, its meaning in context" (internal quotation marks omitted)).

[139] *Muscarello*, 524 U.S. at 129.

[140] Gun Control Act of 1968, Pub. L. 90–618, § 924(c), 82 Stat. 1213, 1224.

[141] Pub. L. 98–473 § 1005, 98 Stat. 1837, 2138 (1984), codified as amended at 18 U.S.C. § 924(c) (amending statute to present "uses or carries a firearm" prohibition for crimes of violence).

[142] Firearm Owners' Protection Act, Pub. L. 99–308, § 104, 100 Stat. 449, 456–57 (1986), codified as amended at 18 U.S.C. § 924(c) (amending statute to include mandatory sentencing enhancement for use or carriage of a

being interpreted in 1998. It is unclear precisely what an English novel published in 1719, or even an American novel published in 1851, revealed about the term's "generally accepted *contemporary meaning*" in 1998, the meaning the majority purported to be seeking.[143]

Given all these sources of meaning, the majority in *Muscarello* seemed to have a rather *extra*ordinary audience in mind. Laypeople (let alone their lawyers) would almost surely not consult dictionaries of etymology, let alone centuries-old classics of literature, to understand the meaning of a statute enacted in the 1960s, amended in the 1980s, and litigated in the 1990s.[144] Viewed from the standpoint of a lay audience, the majority's sources of ordinary meaning are not especially "plain" at all, and could be susceptible to accusations of cherry-picking to support a preferred outcome.[145] *Muscarello* exemplifies the minimal effort judges often make to justify their selection of sources of ordinary meaning. A study of Supreme Court statutory interpretation opinions identified "a casual form of opportunistic conduct" not only in the Justices' choice of which dictionaries to cite but also in whether to use historical dictionaries dating from the time of statutory enactment, or contemporary ones dating to the time of the legal filing.[146]

In addition, the majority also surveyed the use of the term "carries a firearm" in hundreds of American newspaper articles in a manner akin to the then obscure, now-burgeoning subfield of statutory interpretation known as corpus linguistics.[147] This approach to the study of ordinary meaning draws on patterns of word usage across numerous popular sources in an effort to provide a large-*n* account of how language is ordinarily used in contemporary society.[148] In similar fashion, the majority in *Muscarello* noted that according to its survey of newspapers, in "perhaps more than one third" of instances the term "carry a gun" was used to convey the majority's preferred meaning of transporting a gun.[149]

The problem with such sources of ordinary usage, as noted by the dissent, is that neither "dictionaries, surveys of press reports, [n]or the Bible tell us, *dispositively*, what 'carries'

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firearm in "a drug trafficking crime" in addition to a "crime of violence")

[143] *Muscarello*, 524 U.S. at 139 (emphasis added).

[144] *See id.* at 129.

[145] *See* Adam M. Samaha, *Looking Over a Crowd: Do More Interpretive Sources Mean More Discretion?*, 92 N.Y.U. L. REV. 554, 615–16 (2018) (arguing that if judges follow rules against cherry-picking sources, then increasing the number of sources will reduce discretion, but if cherry-picking sources is not constrained, judicial discretion will increase as the number of sources increases).

[146] *See* Brudney & Baum, *supra* note 25, at 490, 511–12.

[147] *See Muscarello*, 524 U.S. at 129–30.

[148] *See* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 795 (2018).

[149] *Muscarello*, 524 U.S. at 129.

means embedded *in [the statute]*."[150] To demonstrate the ease with which evidence of ordinary meaning can be cherry-picked, the dissent cited its own "lessons from literature" and newspaper usages to show how "highly selective" the majority's choices were,[151] lamenting that if "carries a firearm" connotes transportation in a vehicle in one-third of searched articles, "[o]ne is left to wonder what meaning showed up some two-thirds of the time."[152] This suspicion appears to be well supported: a recent study employing a prominent corpus linguistics database found 104 instances where "carries a firearm" and related firearm synonyms "indicated a sense of *carry a firearm on one's person*, while only five instances suggested a *carry a firearm in a car* sense."[153]

Instead, the dissent concluded that the verb "carries" may be susceptible to either meaning, but that the everyday usage of the term "carries a firearm" connoted an element of immediacy or active employment.[154] If anything, this suggested that the statutory prohibition should *not* reach transporting a firearm in a locked trunk or glove compartment.

Much of the disagreement between the majority and dissent in *Muscarello* turned in part on what, precisely, the idea of an "ordinary meaning" *means*. As Thomas Lee and Stephen Mouritsen have helpfully identified, when judges speak of ordinary meaning, they seem to be "speaking to a question of relative frequency as in a point on the spectrum" from (1) a *possible* meaning, to (2) a *common* meaning, to (3) the *most frequent* meaning, to (4) the *exclusive* meaning.[155] Yet courts are rarely clear about which of these possibilities they have in mind when they speak of "ordinary" meaning.

Courts also sometimes seem to have yet another distinct kind of meaning in mind: (5) the *prototypical* meaning, which is the meaning most strongly associated with a given term in a given context. Thus, the ordinary sense of the term "vehicle" would be the vehicle that is most "vehicle-like."[156] Lawrence Solan has similarly noted that judicial disagreements over ordinary meaning "can be seen as battles among the justices over definitions versus prototypes."[157] Thus in *Muscarello*, the disagreement seemed to stem in part from a disagreement between whether the ordinary meaning of "carries a gun" should be determined on the basis of its *possible* or *common* meaning (which would include transporting a firearm,

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[150] *Id.* at 142–43 (Ginsburg, J., dissenting) (emphasis added).

[151] *Id.* at 142–44.

[152] *Id.* at 143.

[153] Lee & Mouritsen, *supra* note 148, at 847.

[154] *Muscarello*, 524 U.S. at 150.

[155] Lee & Mouritsen, *supra* note 148, at 800.

[156] *Id.* at 801–02.

[157] Lawrence M. Solan, *Why Laws Work Pretty Well, but Not Great: Words and Rules in Legal Interpretation*, 26 L. & SOC. INQUIRY 243, 258 (2001).

per the majority), or according to its *prototypical* (or, potentially, its *most frequent*) meaning (which was to "pack heat," per the dissent).[158]

### 2. *Extra-textual Sources for Ordinary Interpreters*

*Muscarello* also illustrates why the thoughtful use of interpretive conventions and sources is essential to any theory of statutory interpretation that conforms to basic principles of legality. When a statute's first-order audience is ordinary individuals, it is one thing to draw heavily on dictionary definitions and other evidence of semantic meaning or ordinary usage; it is another to decide what to do once those sources yield competing plausible interpretations. The majority did not stop after considering evidence of plain or ordinary meaning. Instead, the opinion proceeded to apply the whole statute canon[159] and engage in a lengthy examination of Congress's intent as manifested in the legislative history.[160] These methods of interpretation would seem much less amenable to ordinary citizen first-order interpreters—especially when set against the backdrop in which the rule of lenity might apply (which, as I will discuss in the next section, both the majority and dissent considered in *Muscarello*).

Depending on the context, reliance on evidence of contextual meaning like legislative history may be natural, especially for intransitive statutory provisions. Yet legislative history can be a particularly obscure and inaccessible source of legal knowledge for laypeople, and even some ordinary *lawyers*.[161] This concern was first prominently raised by Justice Jackson—the most recently appointed Supreme Court justice to have become a lawyer by way of apprenticeship rather than by law degree.[162] In a concurrence to a decision in which the majority drew on legislative history at length, Jackson wrote that there were "practical reasons" to accept the "meaning which an enactment reveals on its face" rather than turning to legislative history:

> Laws are intended for all of our people to live by . . . . [T]he materials of legislative history are not available to the lawyer who can afford neither the cost of acquisition, the cost of housing, or the cost of repeatedly examining the whole congressional history. . . . To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the

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[158] *Id.* at 258–59.

[159] *Muscarello*, 524 U.S. at 135–36.

[160] *Id.* at 133–34, 137.

[161] Jackson, *supra* note 125, at 538.

[162] Kashmir Hill & David Lat, *You Don't Need No Stinkin' Law Degree to be on the Supreme Court*, ABOVE THE LAW (May 14, 2010), https://abovethelaw.com/2010/05/you-dont-need-no-stinkin-law-degree-to-be-on-the-supreme-court/ [https://perma.cc/HUB6-7DMQ].

country.[163]

While legislative history is far more readily available to lawyers today,[164] those without Westlaw, Lexis, and/or ProQuest Congressional accounts may not think so, and any citizen without legal training is unlikely to know where to begin.[165]

Nevertheless, Jackson's concern about accessibility does remain for statutes whose audiences are ordinary individuals who are expected to be on notice of the law's requirements whether or not they have, or can even afford, access to counsel. Indeed, this critique was central to one of Justice Scalia's recurring criticisms of legislative history. In his concurrence in *Conroy v. Aniskoff*,[166] Scalia argued that legislative history "undermines the clarity of law, and condemns litigants (who, unlike us, must pay for it out of their own pockets) to subsidizing historical research by lawyers."[167] More recently, Adrian Vermeule has argued that the costs associated with legislative history research for litigants is high, while the benefits are at best difficulty to specify.[168] Jackson, Scalia, and Vermeule were all correct to recognize that statutory interpretation theory should conform to the realistic expectations of statutory audiences, and this critique is most pressing when those audiences are laypeople. As I explain below in Section II.E.1, however, these arguments carry far less weight when the relevant statutory audiences are as sophisticated and well-resourced as judges, while they are most trenchant with respect to criminal statutes directed at the public at large.

### *3. Ambiguity and the Rule of Lenity*

*Muscarello* also nicely illustrates underlying tensions in the applicability and application of the rule of lenity, a substantive legal rule. The lenity rule instructs that when there are two

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[163] Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 396–97 (1951) (Jackson, J., concurring).

[164] It is somewhat ironic that the textualist-inspired judicial backlash to legislative history has emerged precisely as technology has considerably reduced accessibility concerns for most practicing lawyers. Nevertheless, even modern-day Justices often seem unaware of the finer points of identifying relevant evidence in the legislative history. *See infra* Section II.D.2.

[165] *See* Lawrence Solum, *Legal Theory Lexicon: Textualism*, LEGAL THEORY BLOG (Jan. 21, 2018, 9 A.M.), http://lsolum.typepad.com/legaltheory/2018/01/legal-theory-lexicon-textualism.html [https://perma.cc/7XKK-H6YZ ] ("One of the important rule of law values is publicity: the law should be accessible to ordinary citizens. Ordinary citizens are likely to interpret statutes to have their plain meaning, because ordinary folks rarely have the training to understand legislative history and even if they did have such training, it would simply be too costly to analyze the legislative history of statutes to determine their meaning."); *see also* Note, *Textualism As Fair Notice*, 123 HARV. L. REV. 542, 560–61 (2009) (questioning whether legislative history diminishes the fair notice of laws).

[166] 507 U.S. 511 (1993).

[167] *Id.* at 519 (Scalia, J., concurring in the judgment).

[168] ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 192 (2006).

rational readings of a criminal statute, courts should choose the harsher one only when Congress "has spoken in clear and definite language."[169] The lenity doctrine is a pragmatic and necessarily audience-oriented canon, for it is invoked by courts only when the statutory audience is laypeople.[170] Courts rarely seem to invoke when interpreting white collar criminal statutes regulating sophisticated financial professionals, but invoke it much more frequently when interpreting criminal statutes directed at ordinary individuals. Here, the stated concern is fair notice—an audience norm especially important when a statute is directed at the public at large.[171]

The lenity doctrine does not clarify two issues essential for the rule to achieve its pragmatic purpose. The first concerns how *much* ambiguity must be present to invoke the rule, for statutory ambiguity is in some sense a legal construct. Across their jurisprudence, the Justices on the Supreme Court have in recent years articulated what commentators have described as *four* different versions of the lenity test: these range from invoking lenity unless the government's interpretation is "unambiguously correct"; to invoking lenity when there is "reasonable doubt" about the term's meaning; to invoking it only when the government's proposed interpretation seem to be "no more than a guess."[172] The fourth and most stringent version, which calls for the invocation of lenity only in the case of "*grievous* ambiguity," is the version articulated by Justice Breyer and which he applied in *Muscarello*.[173]

As Dan Kahan has suggested, pushing the rule of lenity to the bottom of the lexical ordering hierarchy,[174] after exhaustively canvassing sources of interpretive meaning, may make it "impossible" for lenity to perform its function for ordinary citizen interpreters.[175]

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[169] McNally v. United States, 483 U.S. 350, 359 (1987).

[170] *See, e.g.*, Liparota v. United States, 471 U.S. 419, 427, 433–34 (1985) (applying the rule of lenity when determining what mental state the government had to prove in a case involving illegally acquiring or possessing food stamps); *see also* Yates v. United States, 135 S. Ct. 1074, 1099 n.6 (Kagan, J., dissenting) (considering "when an ordinary citizen seeks notice of a statute's scope" in deciding whether the rule of lenity should be invoked)

[171] *See, e.g.*, United States v. Kozminski, 487 U.S. 931, 952 (1988) (explaining that one of the purposes of the rule of lenity is to provide fair notice).

[172] Daniel Ortner, *The Merciful Corpus: The Rule of Lenity, Ambiguity, and Corpus Linguistics*, 25 B.U. PUB. INT. L.J. 101, 103–04 (2016).

[173] *Muscarello*, 524 U.S. at 138–39 (emphasis added).

[174] For an incisive discussion of lexical ordering in statutory interpretation, see Adam M. Samaha, *If the Text is Clear—Lexical Ordering in Statutory Interpretation*, 94 NOTRE DAME L. REV. 155 (2018).

[175] Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 386 (1994) [hereinafter Kahan, *Lenity and Federal Common Law Crimes*] Kahan argues that this incoherence suggests that the rule of lenity instead functions as a non-delegation doctrine more ideologically compatible with conservative Justices like Scalia and Thomas. *Id.* at 393. Yet lenity had long been invoked prior to the Scalia-led revival of arguments for textualism as the basis of non-delegation. *E.g.*, Bell v. United States, 349 U.S. 81, 83 (1955). Moreover, it neither explains why Justices Scalia and Thomas sometimes rejected the rule's applicability in a case where

*Muscarello* thus suggests that ambiguity and meaning ultimately depend on which (and how many) dictionaries one consults, newspapers one subscribes to, authors one reads,[176] and canons one considers,[177] and when one stops seeking additional evidence of usage altogether. And as Justice Scalia himself once noted, "[m]ost cases of verbal ambiguity in statutes involve . . . a selection between accepted alternative meanings shown as such by many dictionaries."[178]

Indeterminacy as to how much ambiguity must be present to invoke the lenity rule is exacerbated by a second problem. Because the Court has provided no coherent account of how to prioritize or exhaust sources and canons before invoking the rule,[179] neither first-order interpreters nor even *litigants* can know when they have adequately fulfilled their interpretive burden to ascertain an ambiguous term's meaning. It also thwarts the rule's purpose. And resolving ambiguity by resorting to additional sources comes at a cost: the time, resources, and effort necessary to consult those sources.[180] From the standpoint of statutory audience, heightening interpretive expectations may reduce capacity to understand the law. Neither the standard textualist account, nor the standard purposivist account, has much to say about limiting evidence of semantic *or* contextual meaning. As Ryan Doerfler has argued, democratic and fair notice norms may be just as appropriate in guiding choices of interpretive method over criminal statutes, since they "minimize the epistemic burden for involved parties."[181]

This is not to say that courts should always limit the evidence about semantic content to a single preferred grammar canon, or sources of ordinary meaning to a single dictionary, nor to categorically exclude contextual sources of meaning that extend beyond the text itself, as a strict lexical ordering rule might require.[182] Rather, my point is that for the rule of lenity to

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their colleagues invoked it, *see* Yates v. United States, 135 S. Ct. 1074, 1098–99 (2015) (Kagan, J., dissenting), nor why more purposivist and delegation-friendly Justices such as Justices Breyer and Sotomayor have invoked lenity to *narrow* their own discretion and Congress's tendency to punt the issue, *see id.* at 1088.

[176] *See Muscarello*, 524 U.S. at 129–30.

[177] Kahan, *Lenity and Federal Common Law Crimes*, *supra* note 175, at 386 (noting that the rule of lenity becomes dispositive only when a court gives the rule priority over other interpretive conventions that create or resolve statutory ambiguities).

[178] MCI Telecommunications Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 227 (1994).

[179] Kahan, *Lenity and Federal Common Law Crimes*, *supra* note 175, at 390–91 (noting that some Justices rank the rule of lenity lexically subsequent to all other interpretive conventions, while others advocate "pushing lenity up to the top of the interpretive hierarchy").

[180] *E.g.*, ADRIAN VERMUELE, JUDGING UNDER UNCERTAINTY 189 (2006) ("The only definite effect of adding further sources is to increase the costs of decisionmaking.").

[181] Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 1040 (2017).

[182] *See* Samaha, *supra* note 174, at 162 ("Lexical ordering[] . . . is the prioritization of one set of considerations

be coherent, it must be applied in a principled fashion, which requires consistent prioritization of interpretive methods and sources, including ordinary meaning and usage sources, be they dictionaries, corpus linguistics, or other such evidence. The lenity doctrine may be premised on the fiction that statutory text must give members of the public notice, but Justice Scalia was not wrong in lamenting that this "necessary fiction descends to needless farce when the public is charged even with knowledge of Committee Reports."[183]

Statutory audience thus provides one such rule of decision: an interpretive framework that conceptualizes first-order audiences helps to explain circumstances under which the plain meaning rule's "less is more" approach gains particular normative purchase. For the ordinary citizen first-order interpreter, ordinary usage and meaning, dictionary definitions, and canons reflecting common linguistic practices may be more reasonable guides to meaning than more obscure contextual sources such as legislative history or whole code analysis. If the rule of lenity is to accomplish its aim—to relieve defendants of culpability for conduct whose criminality is textually ambiguous—then it would only seem appropriate to apply the rule *before* consulting sources of interpretation that it may be reasonable to expect such defendants to consider, let alone ones that are unlikely to be reflective of so-called "plain" meaning.

### *4. Legal Moralism as Contextual Evidence*

In addition to semantic and contextual sources of statutory meaning, members of the public also probably discover or intuit criminal statutory prohibitions through a process that Dan Kahan has called "legal moralism,"[184] the idea that criminal prohibitions largely condemn conduct already widely believed to be immoral.[185] Although legal moralism was not explicitly invoked by the majority in *Muscarello*—likely because the idea is hard to justify on faithful agency grounds—the concept might support the broader interpretations of the statutes in each of those cases. Thus, one might argue that the need for clear *textual* notice is diminished where legal moralism alone can identify conduct that is morally, and therefore legally, prohibited.[186]

Thus, in *Muscarello*, the majority noted that the statute's basic purpose was to combat the "'dangerous combination' of 'drugs and guns'" by "persuading a criminal 'to leave his

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such that others might or might not be ruled out.").

[183] United States v. R.L.C., 503 U.S. 291, 309 (1992) (Scalia, J., concurring in part and concurring in the judgment).

[184] *See* Kahan, *see supra* note 126, at 140.

[185] *Id.* at 140–42.

[186] *Id.* at 137–43. *But see* Justice Holmes' admonition in *McBoyle*, *supra* notes 42–43 & accompanying text.

gun at home.'"[187] One might say it should be intuitive, for ordinary individuals to know that carrying a gun in the course of a drug trafficking transaction warrants moral approbation, whether the statutory prohibition alone provides clear notice. If so, then the rule of lenity might have less normative purchase in requiring clear *textual* notice of criminality, because the public may be assumed to be on *moral* notice.

The problem with relying on legal moralism to salvage textual notice problems is that members of the public may reasonably disagree about both the immorality or relative dangerousness of some kinds of conduct, and whether certain conduct warrants *additional* penalties (at present, this is especially evident in the states' and the federal government's varied and in-flux decriminalization of marijuana use). In this sense, the role of criminal statutes is to serve as a clear articulation of society's deliberative consensus about whether certain kinds of conduct should be discouraged. In cases of reasonable disagreement, legal moralism may not necessarily obviate problems with criminal statutory ambiguity. In *Muscarello*, for instance, reasonable individuals might disagree that regularly storing a legally obtained firearm in a vehicle is an inherently morally wrongful activity—many, for example, may consider doing so to be a reasonable approach to personal safety, even if they might, on certain occasions, also engage in criminal conduct.

Moreover, what the majority in *Muscarello* seemed to perceive as obviously immoral conduct (keeping a firearm anywhere near a drug dealing transaction) might, for another reasonable citizen, be an obviously *moral* one (exercising a citizen's Second Amendment right to store a firearm in their vehicle for self-defense, even if that citizen on certain occasions engages in criminal conduct). Nor is this answer likely to be uniform across all communities. Particularly in rural areas, firearm possession is significantly more common,[188] and a positive association with gun culture in general is more prevalent,[189] so any incidental carriage of a firearm in a vehicle may not, in fact, carry with it the taint of immorality that the *Muscarello* majority seems to assume. Given these considerations, a further sentence of incarceration may not seem so morally righteous.

In at least some circumstances, then, deciding which moral intuitions should form the basis of the criminal law may be just as contentious as which methods of interpretation to rely upon. When it comes to rescuing statutory ambiguity, legal moralism may raise as many questions as it resolves, or allow judges to import their own beliefs about the moral blameworthiness of particular conduct.

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[187] *Muscarello*, 524 U.S. at 132.

[188] Rich Morin, *The Demographics and Politics of Gun-owning Households*, PEW RESEARCH CENTER (July 15, 2014), http://www.pewresearch.org/fact-tank/2014/07/15/the-demographics-and-politics-of-gun-owning-households/ [https://perma.cc/GN8K-SYM3].

[189] *See* Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 93–96 (2013).

### *C. Influential and Sophisticated Audiences*

The significance of audience in statutory interpretation is also evinced by distinctions the law draws in how lay audiences may rely on sophisticated or influential interpreters of law. These interpreters have no formal legal authority to pronounce the law's meaning, but their daily practices and institutional roles nevertheless position them to influence how members of the public understand the law. Often influential interpreters assist lay audiences in complying with everyday activities, such as firearms dealers legally responsible for communicating registration and carry requirements to customers,[190] contractors who ensure a homeowner's remodel is done in compliance with local building codes,[191] and accountants who guide their clients through filing requirements under the tax code.

But influential interpreters also include industry groups such as the Chamber of Commerce and unions, interest groups like AARP and the NRA, interested third-parties like insurers and indemnifiers;[192] and bar, medical, and police officers' associations, all of which educate their members about statutory and regulatory rules relevant to them,[193] as well as advocate on their behalf when interpretive confusion arises. Influential interpreters also include employers, who have obligations to inform their employees about their legal rights and duties, and therefore serve as critical transmitters of legal knowledge.[194] These influential interpreters assist in what socio-legal scholars call "legal readings"—the practical, everyday signals and rules laypeople internalize to understand what the law means and requires.[195]

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[190] *See, e.g.*, CAL. PEN. CODE §§ 26835–26885 (describing notification and training obligations of licensed firearms retailers in selling firearms to customers).

[191] *See, e.g.*, *Why Are Building Permits Required?*, Building in California, http://buildingincalifornia.com/building-department/ (last visited Apr. 4, 2019) (noting that if a property owner does not hire a licensed contractor, they assume the same responsibilities and are assumed to have the same level of knowledge of code compliance as a licensed contractor).

[192] *See* John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539 (2017) (describing the role that private insurers play in interpreting and communicating changes in the law to the police departments they indemnify).

[193] Many industry associations regularly update their members as to changes in the interpretation of laws relevant to them. *E.g.*, RESOURCES, CALIFORNIA PEACE OFFICERS' ASSOCIATION, https://cpoa.org/resources/ [https://perma.cc/52B6-QLAM] (last visited Aug. 9, 2018) (providing "client alerts" and "legal updates" to alert members of developments in the law relevant to their positions).

[194] For example, both federal and state laws require employers to provide notice of specific rights to their employees in the form of approved posters to be placed in conspicuous locations within the workplace, but most such notices are themselves provided to employers by third-party influential interpreters. Orly Lobel, *Enforceability TBD: From Status to Contract in Intellectual Property Law*, 96 B.U. L. REV. 869, 891–92 (2016).

[195] Sally Riggs Fuller, Lauren B. Edelman & Sharon F. Matusik, *Legal Readings: Employee Interpretation and Mobilization of Law*, 25 ACAD. MGMT. REV. 200, 201–02 (2000).

### *1. Relying on Mistakes of Law Made by Influential Interpreters*

The importance of influential interpreters can be recognized by the fact that certain specialized statutes are often addressed primarily at these influential interpreters, rather than the lay audiences they assist in compliance, who are *legally* responsible for understanding and following the law.[196] This can be shown by the way the law sometimes forgives ordinary first-order interpreters for mistakes of legal interpretation. Consider the differential treatment between mistakes of *tax* law and mistakes of *criminal* law. Tax law presumes that the primary audience of first-order interpreters is sophisticated and influential interpreters, and so is forgiving of lay interpreters' mistakes, provided they reasonably *rely* on influential interpreters. In contrast, the criminal law generally presumes that the primary audience is laypeople, and rarely forgives mistakes of law, no matter how well intentioned.

#### a. Mistakes of *Criminal* Law

In the criminal law, following Section 2.04 of the Model Penal Code (MPC),[197] most states have implemented so-called "mistake of law" doctrines that permit criminal defendants to raise a mistake of law defense only when they acted in reliance on an *official* statement of the law.[198] The MPC's definition of official interpreters excludes many likely sources of lay legal knowledge. Under the MPC, "official statements" generally include only the interpretations of courts or the "official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense."[199] Thus, regardless of both influential interpreters' expertise and practical experience, as well as the likelihood that laypeople rely on them, ordinary individuals may not defend their good faith non-compliance on the basis that they were misinformed by these seeming authorities,[200] no matter how detrimental the consequences may be.

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[196] Indeed, legislative drafters have admitted as much. *See* Shu-Yi Oei & Leigh Z. Osofsky, *Constituencies and Control in Statutory Drafting: Interviews with Government Tax Counsels*, 104 IOWA L. REV. 1291, 1295 (2019) (finding that most staffers involved in drafting the Tax Cuts and Jobs Act of 2017 viewed the audiences of the Code as experts such as the Treasury, professional preparers, and tax preparation software companies, rather than ordinary taxpayers—and drafted accordingly).

[197] MODEL PENAL CODE § 2.04 (2009).

[198] Athy Poulos-Mobilia, *Ignorance or Mistake of Law—Will the Memory Ever Fade:* People v. Marrero, 62 ST. JOHN'S L. REV. 114, 115 (1987).

[199] MODEL PENAL CODE § 2.04(3)(b) (2009).

[200] A notable exception is tax law: taxpayers can sometimes avoid an accuracy-related tax penalty by arguing that they reasonably relied upon advice of a "competent professional" tax adviser. *See* Neonatology Assocs., P.A. v. C.I.R., 115 T.C. 43, 99 (2000), *aff'd*, 299 F.3d 221 (3d Cir. 2002).

The case of *People v. Marrero* exemplifies the tensions raised when judicial statutory interpretation is inattentive to audience considerations and the ways laypeople are likely to engage with the law.[201] *Marrero* concerned a New York resident who was a corrections officer at a federal prison in Connecticut and was arrested and charged with the unlicensed possession of a handgun in New York City.[202] Marrero argued that as a federal corrections officer, he qualified as a "peace officer" exempt from the registration requirements under New York law,[203] which defined a peace officer as including "[a]n attendant, or an official, or guard of any state prison *or of any penal correctional institution*."[204]

The trial court concluded that the statute was ambiguously drawn as to whether the word "state" modified only "prison" or also "any penal correctional institution,"[205] so it dismissed the charge on lenity grounds, reasoning that any basis for excluding state corrections officers would seem to apply equally to federal corrections officers. Despite this, a divided the appellate court reversed the dismissal, with the majority drawing on the whole statute canon as well as the legislative history of a related provision in the same statute to determine that the statute was insufficiently ambiguous to apply the rule of lenity.[206] Several dissenters objected to the heightened interpretive requirement that methods like legislative history impose on ordinary interpreters like Marrero.[207] As in *Muscarello*, the court in *Marrero* relied on interpretive methods that few laypeople would be likely to draw on, and did so to decide whether to invoke the rule of lenity, effectively undermining the notice-function that that substantive canon stands for.

But *Marrero* also shows why the criminal law often expects *laypeople* to be legally responsible for the interpretation of statutes that apply to them, rather than outsource that obligation to the influential interpreters who might assist them. For once Marrero's charge was reinstated, he sought to assert a reasonable mistake-of-law defense, asserting his mistaken but reasonable prior belief that he had been exempt because of advice given from several influential interpreters, all of whom indicated that he did not need to register his firearm.[208] These included the professor of two of his criminal justice courses at community college, who was himself both a police officer and an attorney; the dealer from whom Marrero had purchased his firearm, who said it was routine for dealers in the city to sell weapons to

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[201] 422 N.Y.S.2d 384 (1979).

[202] David De Gregorio, People v. Marrero *and Mistake of Law*, 54 BROOK. L. REV. 229, 233 (1988).

[203] People v. Marrero, 404 N.Y.S.2d 832, 832 (Sup. Ct. 1978).

[204] *Id.* (quoting N.Y. CRIM. PROC. LAW §2.10(26) (Consol. 2019) (emphasis added).

[205] *Id.* at 833.

[206] People v. Marrero, 422 N.Y.S.2d 384, 386–87 (App. Div. 1979).

[207] *Id.* at 388 (Lynch, J., dissenting); *see* epigraph, *supra* note 107.

[208] De Gregorio, *supra* note 202, at 240.

federal corrections officers without imposing the registration requirement on them; and both the personnel director of Marrero's prison and the president of the Manhattan facility's union, each whom was prepared to testify to the widespread belief that federal corrections officers did not need to register their firearms in the city.[209]

Because none of these interpreters were deemed "official" interpreters under New York law, the trial court ruled that Marrero could not raise a reasonable mistake of law defense and excluded most of the evidence proffered in connection with it at trial.[210] Most glaringly, the court also excluded evidence also included a memorandum *from the New York City Police Department* addressed to employees of the Metropolitan Corrections Center in Manhattan stating that federal corrections officers living in New York were peace officers exempt from the permit requirement; because that precinct was not the *official* state agency responsible for New York's penal code, however, even that interpretation, however influential in practice, could not be relied upon.[211]

Marrero was subsequently convicted, and on appeal, a majority of the Court of Appeals held that the statutory mistake-of-law defense was not available to Marrero because his mistake was based on his "*personal* misreading or misunderstanding" of the law,[212] rather than the official "agency, or body legally charged or empowered with the responsibility or privilege of administering, enforcing or interpreting such statute or law."[213]

b. Mistakes of *Tax* Law

In contrast to the criminal law, tax law often expects laypeople to rely on influential interpreters when determining how to comply with the law, presumably because tax statutes are often considered to be especially difficult to interpret and follow. And because tax laws are often drafted for sophisticated and influential audiences like tax preparers and tax software companies,[214] the law is much more forgiving of mistakes of law in the tax context than in the criminal.

Consider, for example, the case of *United States v. Boyle*, in which the executor of his mother's will relied on an attorney to assist in filing a federal estate tax return.[215] When the executor failed to file by the statutory deadline, he was assessed a penalty, which he appealed

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[209] *Id.* at 240–41 n.52, 241 n.54.

[210] *Id.* at 241.

[211] *Id.* at 241 & n.54.

[212] People v. Marrero, 507 N.E.2d 1068, 1069 (N.Y. 1987) (emphasis added).

[213] *Id.* at 1070 (quoting N.Y. PENAL LAW § 15.20(2)).

[214] *See* Oei & Osofsky, *supra* note 196.

[215] 469 U.S. 241, 242 (1985)

on the basis that his failure to file on time was due to a reasonable cause, *i.e.*, reliance on his tax attorney.[216] The Supreme Court rejected that argument, concluding that "Congress has placed the burden of prompt filing on the executor, . . . [and] the duty is fixed and *clear*."[217] In a sense, the Court's conclusion was that the primary audience for the prompt filing burden was the taxpayer, and because it was clearly indicated, it was no excuse that the taxpayer expected his attorney would do it for him.

But the Court *also* clarified that in other circumstances, "reliance on the opinion of a tax adviser may constitute reasonable cause for failure to file a return," because when an accountant or tax attorney "advises a taxpayer on a matter of tax law," it would be reasonable for the taxpayer to rely on such advice.[218] The Court concluded that "[m]ost taxpayers are not competent to discern error in the substantive advice of an accountant or [tax] attorney," whereas "one does not have to be a tax expert to know that tax returns have fixed filing dates" and must be filed when they are due.[219]

The distinction the Court seemed to draw in *Boyle* was that while taxpayers may be the audience for certain portions of the tax code drafted with sufficiently clarity to provide direct notice to taxpayers, *most* tax provisions are sufficiently complex that the *effective* audiences are tax professionals and certified preparers. This means that where taxpayers place good faith reliance on the advice of such influential interpreters, their subsequent mistakes of law are generally forgiven.[220]

This, of course, stands in stark contrast with the interpretation of most criminal laws—as in *Marrero*—where mistaken but good-faith reliance on influential interpreters was no excuse for noncompliance. Without a nuanced understanding of statutory audience, the distinction between the treatment of generally applicable tax and criminal laws seems somewhat arbitrary, for statutory compliance obligations would seem to fall on members of the public in both instances, and yet the consequences for mistaken reliance and noncompliance are quite different.

My argument is that the distinction in treatment may be justified in part by the different first-order audiences of these statutes. The primary audience for most criminal statutes is the public at large, and many criminal statutes are drafted such that their provisions apply

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[216] *Id.* at 244.

[217] *Id.* at 249.

[218] *Id.* at 250–51.

[219] *Id.* at 251.

[220] The U.S. Tax Court has identified a three-part test for the tax adviser exception, requiring that the taxpayer (1) turn to a competent professional with sufficient expertise; (2) provided necessary and accurate information to the adviser; and (3) actually relied in good faith on the advisor's judgment. *See* Neonatology Assocs., P.A. v. Comm'r, 115 T.C. 43, 99 (2000), *aff'd*, 299 F.3d 221 (3d Cir. 2002).

directly to the conduct of ordinary individuals. By contrast, most portions of the Internal Revenue Code are intransitive provisions drafted primarily for official interpreters such as the Internal Revenue Service, whom drafters expect will implement vague statutory text by way of more textually specific and clear regulatory guidance. The interpretive dynamics of intransitive regulatory statutes like tax code operate very differently, as I will explain in the next section. And given this more dynamic statutory realm, it may be more reasonable to expect that lay audiences can rely on influential first-order interpreters like accountants and tax attorneys.

c. Mistakes of *Law Enforcement Officers*

In a sense, any statutes criminalizing behavior has a first-order audience not only of citizens conforming their behavior to law, but also of law enforcement officers tasked with interpreting such laws in the course of enforcing them. Law enforcement officers occupy an uneasy space between influential and official interpreters. Their interpretations of law are indisputably influential, for they can detain and arrest citizens based on their understandings of the law. The paradox is that while *Marrero* shows, citizens cannot take an individual officer's statement about the law to be authoritative,[221] the stakes of first-order interpretive disagreements between officers and ordinary citizens can be especially high. On the one hand, law enforcement officers in the field need to be able to act decisively. Officers can hardly carry Scalia and Garner's *Reading Law* with them on patrol and apply its canons of construction to decide whether an observed behavior violates the criminal code; they simply have to make a reasonable guess. On the other hand, the consequences for a citizen wrongly arrested for behavior that turns out not to be illegal can be exceptionally high: he could face years of prosecution, if not jail time, before his interpretation ultimately prevails in a court of law. Apart from trial judges carefully examining indictments and appellate courts expediting appeals, this is an unavoidable flaw of the system.

However, there is another, more complicated difficulty with law enforcement first-order interpretations of statutes. Reasonable suspicion that arises solely from an erroneous first-order interpretation of law is also problematic for another reason: it can result in searches incident to a stop or arrest that yield evidence of unrelated but possibly criminal activity. The Supreme Court has long recognized that searches and seizures based on reasonable mistakes of fact can lead to evidence admissible in a subsequent prosecution.[222] Until recently, however, the Court had never clarified whether evidence found from a search and seizure

[221] Several witnesses at Marrero's trial were willing to testify that Manhattan P.D. officers had indicated to them that federal corrections officers were peace officers, but this evidence was excluded by the trial court in support of Marrero's reasonable mistake of law defense. *See* De Gregorio, *supra* note 202, at 233.

[222] Hill v. California, 401 U.S. 797, 802–04 (1971).

based on a mistake of *law* was similarly admissible.

Recognizing the multiple first-order audiences for criminal statutes helps both to explain the Court's curious doctrinal solution to this issue in *Heien v. North Carolina*, but also why an understanding of how first-order interpreters *actually* interpret law is critical knowledge for courts to have.[223] In *Heien*, the Court recognized that the Court considered a police officer's stop of a vehicle with a single faulty brake light and which led to a search of the vehicle and the seizure of a bag of cocaine.[224] The defendant challenged the stop as an unlawful search, and when the trial court rejected his suppression motion, he appealed to the state court of appeals; the appellate court reversed, concluding that driving with only one working light was not actually a violation of North Carolina law, and so the officer had no reasonable basis to initiate the stop.[225] That decision was then reversed by the state supreme court on the basis that the officer in question "could have reasonably, even if mistakenly, read the vehicle code to require that both brake lights be in good working order."[226] The U.S. Supreme Court affirmed this conclusion in *Heien*, stating it had "little difficulty concluding that the officer's error of law was reasonable."[227] It observed that the officer's interpretation of the vague provision in question was reasonable given that the state appellate court had itself noted the reasonableness of the officer's mistake; that the inference that all brake lights must be in working condition could be drawn from a related subsection of the same statute; and that this provision "*had never been previously construed by North Carolina's appellate courts*."[228]

*Heien's* description of what constitutes an objectively reasonable mistake carries considerable real-world consequences. Because courts decide whether a mistake is objectively reasonable, they are naturally drawn toward the interpretive resources *courts themselves* (as opposed to officers or citizens) rely on to determine the reasonable interpretive boundaries of any ambiguous law. By leaning on interpretive inferences from related subsections of the same statute that promoted multiple plausible interpretations, *Heien* therefore seems to expect that a reasonable and objective law enforcement interpreter will consider the "whole act" canon that draws meaning from one ambiguous provision by resort to related usages in other places. By emphasizing that the ambiguous provision had not previously been construed by an appellate court, *Heien* seems to expect that officers should be aware of any relevant judicial decisions interpreting a relevant law, and that, if there are

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[223] 135 S. Ct. 530 (2014).

[224] *Id.* at 534.

[225] *Id.* at 535.

[226] *Id.*

[227] *Id.* at 540.

[228] *Id.* (emphasis added).

none, the plausible scope for a "reasonable" mistake may thus be wider. *Heien* thus makes particular, perhaps implausible, methodological demands of law enforcement interpretation: that officers are apprised of relevant case law, consider how ambiguous terms are used in related subsections of the same statute; and generally resort to the same interpretive methods as courts. Taken at face value, *Heien* would seem to presume every cop car is a courthouse, furnished with law clerks, a Westlaw subscription, and the luxury of juridical contemplation.

### *D. Official and (Un)official Audiences*

The law often designates to regulatory agencies like the IRS an "official" interpreter status, for both state and federal laws deem certain officials to be the authoritative interpreters of relevant bodies of law that fall under their jurisdiction. In the criminal law domain, these may include law enforcement agencies who for prosecutorial purposes decide whether particular conduct falls within statutory prohibitions, as well as state and federal prosecutors, who will sometimes clarify how criminal prohibitions are to be understood and broadly applied.[229] More commonly, official interpreters abound in federal administrative law. They include agencies entitled to "*Chevron*" deference[230] because they have been delegated law-making authority by Congress to engage in legislative rulemaking with the effect of law.[231] Peter Strauss has called this the "*Chevron* space": the area within which Congress has statutorily empowered the agency to act in a manner that creates obligations or constraints that carry legal force derived from the statute.[232]

Agency deference questions are often thought about in terms of tensions related to separation of powers and the non-delegation of lawmaking power.[233] Yet I will argue they also raise interesting questions of statutory audience, in part because agencies interpret statutes in many kinds of actions beyond the rulemaking and binding adjudications that *formally* warrant *Chevron* deference: these include interpretative rules, enforcement guidelines, policy manuals, opinion letters, no-action letters, and agency guidance, among others.[234] In theory, where Congress has *not* delegated lawmaking authority to the agency,

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[229] *See* DEFINING FEDERAL CRIMES, ch. 12 (Delegating Criminal Lawmaking) (Daniel C. Richman, Kate Stith & William J. Stuntz eds., 2d ed. 2014).

[230] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Counsel, Inc., 467 U.S. 837 (1984).

[231] United States v. Mead, 533 U.S. 218, 229–230 (2001). For an excellent overview of the domains for which first-order official interpretations warrant *Chevron* deference, and when they should not, see Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833 (2001).

[232] Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight"*, 112 COLUM. L. REV. 1143, 1145 (2012).

[233] *E.g.*, Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187 (2016).

[234] Christensen v. Harris County, 529 U.S. 576, 587 (2000); Merrill & Hickman, *supra* note 231, at 886.

less deferential "*Skidmore* weight" applies,[235] and so agency interpretations rendered in these more informal documents are not entitled to *Chevron* deference.[236]

In practice, informal or (un)official interpretations such as agency guidance nevertheless have a significant effect on how other first-order statutory audiences act to conform their conduct to law,[237] particularly given that such official interpretive positions may effectively govern the field for years or even decades unless and until a court is called upon to review a legal challenge to the agency's interpretation. Such (un)official interpretive authority sometimes even extends to self-regulatory organizations, to whom federal agencies delegate enforcement powers. These SROs have enforcement power over their own members' statutory and regulatory compliance, a practice Emily Hammond has described as leading to "double deference," because the agency itself often defers to the interpretations of the SRO.[238] Framed in terms of statutory audience, such practices may be defensible in circumstances in which the non-agency primary audiences of the statute really do understand the regulatory terrain as well as, or better than, the agency itself.

### *1. Unique Interpretive Concerns for Official and (Un)official Audiences*

Framing questions of administrative law and interpretation in terms of statutory audience also helps to reveal the important linkages between statutory audience and interpretive method. First, as Rubin has explained, legislative delegations to administrative agencies are often purposefully broad and intransitive statutory instructions to *develop* clear and concrete rules, rather than concrete rules themselves.[239] Most statutes delegating rulemaking authority to an administrative agency are instructions to develop rules rather than precise rules themselves. Indeed, this intransitivity is one of the primary reasons for *Chevron* deference in the first place.[240] Within this "*Chevron* space," Elizabeth Magill and

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[235] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 552 (2000) ("[A]n interpretative rule is only a statement of the agency's present interpretation of the statute . . . . [and] the Supreme Court made it clear that an interpretative rule has no 'power to control.'"); *see also* Strauss, *supra* note 232, at 1145–46 (describing *Skidmore* "weight" as the weight that an agency's view on a statutory question should have on the courts, which retain ultimate interpretive authority).

[236] *Mead*, 533 U.S. at 229–230; *see also* Merrill & Hickman, *supra* note 231, at 901.

[237] *See* NICHOLAS PARRILLO, "FEDERAL AGENCY GUIDANCE: AN INSTITUTIONAL PERSPECTIVE," FINAL REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (2017) at 35, *available at* https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-final-report.pdf. [perma.cc/GRK7-4WJM].

[238] *See* Emily Hammond, *Double Deference in Administrative Law*, 116 COLUM. L. REV. 1705, 1711 (2016).

[239] Rubin, *supra* note 46, at 381.

[240] Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 206 (2006) (arguing that *Chevron* deference

Adrian Vermeule have described how broad authorizing statutes often do not have "a single best interpretation"; instead, interpretation typically involves agency choice within a policy space defined by the range of the statute's reasonable interpretations.[241]

Second, Congress often gives important signals to an agency through the legislative drafting process itself, and so extra-textual evidence provided in the legislative history of the statute may be especially useful for the agency tasked with implementing and interpreting the law. The intransitivity of administrative statutes directed primarily at administrative agencies alters the normative calculus for statutory interpretation methodology. For these kinds of statutes, it is much rarer for agencies to make regulatory choices on the basis of an interpretation of the semantic meaning of the text alone. In determining Congress's ambition behind a vague prohibition, the agency would almost certainly begin by examining sources of contextual meaning such as the legislative history[242]; as Peter Strauss has noted, "[l]egislative history has a centrality and importance for agency lawyers that might not readily be conceived by persons who are outside government."[243] Congressional drafters often interface directly with agencies in the course of drafting the laws the agencies will be authorized to enforce,[244] including the production of materials that constitute the statute's legislative history.[245] Post-enactment, agencies are staffed with both legal and policy experts who have the time and expertise to undergo such research before acting.[246]

Moreover, both the Department of Justice and regulatory agencies are "repeat player[s] in interpretive litigation involving regulatory statutes," and these audiences generally "have the resources and incentives to compile similar information on all of the major statutes they implement."[247] As a result, cross-referencing other statutory schemes, or relying on related

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recognizes that "interpretation of unclear terms cannot operate without some judgments by the interpreter," as well as the need for "discretionary judgments to be made by appropriate institutions"—the agencies).

[241] *See* Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1045 (2010).

[242] *See* Strauss, *supra* note 1, at 329.

[243] *Id.*

[244] *See generally* Bressman & Gluck, *Statutory Interpretation from the Inside: Part II*, *supra* note Error! B ookmark not defined. (describing how legislative drafters are primarily in interpretive conversations with agencies, not courts).

[245] *See* Strauss, *supra* note 1, at 347; Jarrod Shobe, *Agency Legislative History*, 68 EMORY L.J. 283, 296–87 (2018).

[246] *See, e.g.*, Laurence H. Silberman, Chevron—*The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 823 (1990) ("*Chevron*'s importance is its recognition that, expertise aside, the agencies, nevertheless, maintain a comparative institutional advantage over the judiciary in interpreting ambiguous legislation that the agencies are charged with applying.").

[247] Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209, 273 (2015).

administrative guidance and precedents may be more appropriate in enforcing implementing a broad delegation as part of the larger regulatory landscape. Unlike most other statutory audiences, then, agency official interpreters have "a direct relationship with Congress," which provides them with "insights into legislative purposes and meaning that are likely to be much more surefooted than those available to courts in episodic litigation."[248]

Thus, when courts review the interpretations of such official interpreters, it would seem especially appropriate that they draw on the same resources as the agencies themselves do and that Congress expects. This is one rationale for *Chevron* deference,[249] and it is also borne out in judicial practice. Bill Eskridge and Lauren Baer have identified that the Supreme Court relies on legislative history more often in *Chevron* cases than in non-*Chevron* cases, which is not surprising given the relatively greater weight agencies place on legislative history in developing their own interpretations and understandings of statutory meaning.[250]

Nevertheless, legislative history's methodological genealogy cautions against its unvarnished application in all circumstances, for its initial development as an interpretive method was motivated by its strategic advantage for particular government litigants. Nick Parrillo has documented how legislative history as a method of interpretation arose in the wake of the newly expanded New Deal administrative state, which was "vested with unprecedented capability to process and analyze congressional discourse and translate it into legal argument."[251] Given federal agencies' unequalled access and resources, Parrillo has concluded that "[l]egislative history was therefore a statist tool of interpretation, in the sense that the administrative state enjoyed privileged access to such material and was a privileged provider of it to the Court, more than was true of other interpretive sources, such as statutory text."[252]

However, agency insiders did not long remain the sole beneficiaries of legislative history. Because of the "peculiar openness of the legislative process in America," Parrillo has noted that judicial reliance on legislative history also privileged "lawyer-lobbyists above the general population of lawyers" (let alone other first-order interpreters).[253] These lawyers entered and exited the "revolving door" between law firms, lobbying firms, and government, and after World War II "created a new kind of law firm—the 'Washington law firm'—staffed by

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[248] Mashaw, *supra* note 1, at 511.

[249] Magill & Vermuele, *supra* note 241, at 1045.

[250] 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, 1135–36 (2008).

[251] Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 YALE L.J. 266, 315 (2013).

[252] *Id.* at 367.

[253] *Id.* at 368.

veterans of the administrative state and dedicated to constant lobbying of that state and of Congress."[254] Unsurprisingly, industry and trade associations and the Washington law firms they hire are the chief antagonists of the agencies and their frequent sparring partners in litigation. While the playing field has since become more (though not entirely) level, this history demonstrates precisely why normative question of statutory audience and interpretive methods questions must be evaluated side by side, for some methods of interpretation may be more advantageous for some audiences at the expense of others.

*2. Notice from (and Comment on) Regulatory Statutes*

A third reason to consider questions of audience and interpretive method together when interpreting statutes whose audiences are official and (un)official interpreters—and the audiences they regulate—is that the normative significance of textual-notice canons and methods such as evidence of ordinary usage, the plain meaning rule, and basic grammar canons, may be of lesser importance. This is because concerns about notice, accessibility, and predictability are often more appropriately evaluated as part of the administrative rulemaking *process*, rather than on the basis of the statutory text alone. For many administrative statutes whose primary audiences include both federal agencies and the industries they regulate, all parties may be reasonably expected to draw on more obscure extra-textual sources of interpretation such as inferences from legislative history and related statutory usages, and they will be likely to do so over the course of the more dynamic rulemaking and guidance-development interpretive process.

Recognition of these audience-specific interpretive conditions might provide courts with a more principled rationale for prioritizing legislative history over evidence of ordinary meaning, a practice the Court has often struggled to justify even in circumstances where imposing the meaning of a term derived from ordinary usage would lead to bizarre results. The Court confronted just such a problem in *Public Citizen v. United States Department of Justice*,[255] in which the Court addressed whether, for the purposes of the Federal Advisory Committee Act (FACA), the ABA's Standing Committee on Federal Judiciary had been an advisory committee "utilized" by the Reagan White House when the committee provided the White House advice concerning potential judicial nominees.[256]

Congress passed FACA to ensure both Congress and the public could remain appraised of the existence and activities of numerous groups that served to advise officers and agencies

[254] *Id.*

[255] 491 U.S. 440 (1989).

[256] *Id.* at 443.

in the executive branch.[257] To this end, FACA mandates reporting requirements for any "advisory committee" "established or utilized by the President."[258] FACA's statutory audience is predominantly sophisticated executive branch agencies and interest group organizations, and even the plaintiffs in the case were well-funded D.C. watchdog groups.[259]

Given these more sophisticated statutory audiences, as well as the lack of severe consequences for violating the statute, there is no reason to think the plain meaning rule or an emphasis on ordinary usage would be more appropriate as compared to contextual sources of meaning such as legislative history. Yet lacking an audience-oriented rationale for prioritizing sources, the Court was instead left to bend over backwards to justify its disinclination to give "utilize" the word's ordinary meaning. In the case of FACA, the consequences would have been that the ABA committee—and countless other organizations—would be required to comply with open meeting requirements, which would subject the President's Article II process of selecting and nominating judges to unusual, and possibly unconstitutional, transparency.

The Court, in an opinion penned by Justice William Brennan, was forced to acknowledge that while there was "no doubt" that the Executive "utilizes" the ABA Committee "in one common sense of the term,"[260] "reliance on the plain language of FACA alone [wa]s not entirely satisfactory," since a "literal reading" of the term would compel the "odd result"[261] that FACA would regulate the President's Article II power to nominate federal judges in a manner that raised significant constitutional concerns.[262] Instead, Brennan "search[ed] for other evidence" "beyond the naked text" and considered the purpose and legislative history of FACA,[263] concluding that Congress had intended FACA to cover only advisory groups *established* by the Executive Branch and not groups simply utilized by it.[264] Interpreted in this narrower fashion, Brennan concluded that FACA did not apply to the ABA committee.[265]

However, as Justice Anthony Kennedy noted in a concurrence, the "odd result" of FACA's broader application was hardly akin to the usual settings in which the absurd results

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[257] *Id.* at 445–46 (citations and internal quotation marks omitted).

[258] 5 U.S.C.A. § APP. 2 § 3 (West).

[259] *Public Citizen*, 491 U.S. at 447–48 (describing plaintiff-appellants Washington Legal Foundation and Public Citizen).

[260] *Id.* at 452 (internal quotations omitted).

[261] *Id.* at 454 (internal quotations omitted).

[262] *Id.* at 466.

[263] *Id.* at 454–55 (internal quotation marks omitted).

[264] *Id.* at 461–63.

[265] *Id.* at 464–65.

canon is applied.[266] The "absurd results" canon is most appropriately used[267]—and in practice *is* most often used[268]—where the ordinary meaning of a criminal prohibition directed at lay audiences would lead to an egregiously punitive result. In a sense, the absurd results canon functions as a textual corollary of the rule of lenity in cases where the plain meaning rule might result in a significant disadvantage for the ordinary citizen, and so courts should consider contextual content beyond the plain text. For FACA, Kennedy contended that the plain language of the statute was the "ready starting point, which ought to serve also as a sufficient stopping point," because nothing more was needed to be known than the plain meaning of "utilize."[269]

Recognition of particular statutory audiences provides a more defensible justification for Brennan's decision to look beyond the ordinary meaning. Where statutes are directed at agencies and sophisticated interest groups, objections to reliance on contextual evidence of meaning like legislative history are especially weak, even if the contextual evidence would seem to suggest a meaning that contradicts the ordinary usage of the term. In *Public Citizen*, the legislative history of FACA concretely demonstrated that Congress did not intend such a broad meaning of "utilize." Victoria Nourse has subsequently and persuasively shown that Congress's *own* rules all but conclusively required rejection of the broad application of FACA, given that "utilize" had been added to the bill at a point at which substantive legislative changes were no longer permitted under congressional rules.[270]

Nourse is right in suggesting that recognition of Congress's rules would "simplify the process of analyzing and identifying relevant legislative history"[271]—but only when the first-order audiences *are themselves* able readers of legislative history. And *Public Citizen* shows how even second-order *judicial* audiences can get it wrong: if even nine Justices on the Supreme Court were unaware of how Congress's own rules could signal the importance of particular aspects of the legislative history, one might reasonably question whether such legislative history would "simplify interpretation" for less sophisticated first-order statutory audiences.

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[266] *Id.* at 470–71 (Kennedy, J., concurring in the judgment).

[267] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 234–39 ("Absurdity Doctrine") (2012).

[268] Every one of Justice Kennedy's examples of appropriate applications of the "absurd results" canon involves criminal prohibitions or penalties applied to ordinary audiences. *See Public Citizen*, 491 U.S. at 470–71 (Kennedy, J., concurring in the judgment).

[269] *Id.* at 469.

[270] Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 92–97 (2012).

[271] *Id.* at 75.

### *E. Judicial* First-Order *Audiences*

In addition to ordinary, influential, and official interpreters, judges are themselves sometimes first-order statutory interpreters. How might this be? Many statutory rules regulate court-related activity such as the admissibility of evidence and the exercise of judicial discretion in case management. Such statutes are often addressed directly to judges, and unique audience considerations apply, for judges are sophisticated, repeat players in case management and judicial decision-making.

Because judges are repeat players in interpreting these kinds of provisions, certain interpretive considerations may be of particular concern. Among these are the presumption of consistent usage.[272] When applied as the "whole code" (or "record of statutory usage") canon,[273] it instructs that the use and meaning of an ambiguous term in one statute should be examined as it appears elsewhere in the federal code. The rationale behind this is that "statutory terms should bear consistent meaning across the U.S. Code as a whole."[274] A weaker but more prominent version of this presumption is the "whole-text" canon that assumes a term used in multiple places in the same statute should be given the same meaning.[275]

The problem with the usage canon is that it is rarely justified as an accurate way to determine congressional meaning. For one thing, the presumption is empirically questionable, at best: interviews with numerous legislative drafters have revealed that few find "whole code" analysis to be a useful way of discerning the legislative purpose behind a particular term or phrase.[276] Indeed, even the more modest "whole act" canon often reflects neither actual drafting practices nor legislative expectations for a given statute's meaning, especially for omnibus legislation drafted in part by different subcommittees.[277] As others

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[272] *See* SCALIA & GARNER, *supra* note 267, at 170–73 ("Presumption of Consistent Usage"). Although this presumption generally applies within statutes and "can hardly be said to apply across the whole *corpus juris*," Scalia and Garner acknowledge that "the more connection the cited statute has with the statute under consideration, the more plausible the argument becomes." Moreover, if it "deal[s] with the same subject, the argument could even be persuasive." *Id* at 172–73.

[273] West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83, 88 (1991).

[274] Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 874 (2012).

[275] *See* SCALIA & GARNER, *supra* note 267, at 167–69.

[276] Gluck & Bressman, *Statutory Interpretation from the Inside: Part I*, *supra* note Error! Bookmark not d efined., at 936 ("Only 9% of [legislative drafter] respondents told us that drafters often or always intend for terms to apply consistently across statutes that are unrelated by subject matter.").

[277] Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 858–59 (2014) (noting that omnibus bills in particular are often the result of a

have noted, imposing rules of consistency on text—a mode of interpretation more prominent among textualists—"shapes and changes the [U.S.] Code as much as the [purposivist] judges-as-legislative-partner model."[278] Consistent usage canons are difficult to justify on the grounds of faithful judicial agency.

The consistent usage canon is also difficult to justify on the basis of upholding rule-of-law norms like notice, especially for statutory audiences such as the general public. It is difficult to imagine an ordinary citizen—or her lawyer—easily performing a systematic search of linguistic usage across the entirety of the U.S. Code, let alone knowing *when* to do so. How many members of the public (or lawyers) are likely to begin their quest to understand § 1988's fee-shifting provision by comparing the term's meaning across 34 other statutes? Short of legislating an imposed and uniform U.S. Code definition of a common term in the Dictionary Act[279]—a task for Congress, not the courts—it seems improbable that the consistent usage canon would help lay first-order interpreters seeking to resolve statutory ambiguity.

Instead, the consistent usage canon is better explained as a way to impose uniformity of meaning for a recurring provision that appears across many different statutes. In such circumstances, the statutory audience who benefits most is judges. Consider, for example, the attorney's fee-shifting provisions contained in many substantively distinct federal statutes, including the Individuals with Disabilities Education Act, as described in Section II.A above, and discussed in Section III.C below. These fee-shifting provisions alter the "American Rule" default that attorneys' fees cannot ordinarily be recovered by the prevailing party in litigation,[280] and instead grant trial courts the discretion to award such fees at the close of litigation. A primary (though not singular) audience for such provisions is judges, for they have the sole discretion to act under the statute and shift attorneys' fees. An interpretive consideration especially relevant for a statute whose audience is judges, then, is that these provisions operate consistently across the many substantively varied statutory contexts in which judges are likely to encounter them.

This approach seems to explain, at least in part, why judges will sometimes prioritize the consistent usage canon over other interpretive sources or canons.[281] In *West Virginia*

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"conglomeration" of bills drafted by different legislative staffs and committees and then combined together).

[278] Gluck, *The Failure of Formalism*, *supra* note 5, at 187.

[279] *See* 1 U.S.C. § 1 *et seq.*

[280] *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 245 (1975).

[281] This approach is exemplified in Justice Scalia's majority opinion in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), in which he counted no fewer than 34 statutes enacted before, simultaneously to, or after the fee-shifting provision in question in 42 U.S.C. § 1988, each of which explicitly granted judges the discretion to award expert witness fees *in addition to* a reasonable attorney's fee. *Id.* at 84. On this basis, Scalia inferred that the default legal meaning of the term "attorney's fee" *did not* include expert witness fees, for

*University Hospitals, Inc. v. Casey*,[282] the Supreme Court was tasked with deciding whether "a reasonable attorney's fee" award permitted under the Civil Rights Attorney's Fees Award Act of 1976, codified at 42 U.S.C. § 1988, could include expert witness fees as part of the reasonable attorney's fee.[283] Writing for the majority, Justice Scalia counted no fewer than 34 statutes enacted before, simultaneously to, or after the fee-shifting provision in § 1988 that explicitly granted judges the discretion to award expert witness fees *in addition to* a reasonable attorney's fee. On this basis, Scalia inferred that the default legal meaning of the term "attorney's fee" *did not* include expert witness fees, for reading § 1988's fee-shifting provision to include expert fees would render "dozens of statutes referring to the two separately . . . an inexplicable exercise in redundancy."[284] Scalia reached this conclusion despite evidence in the legislative history, identified by the dissent, that strongly suggested Congress intended for the attorney's fee award to include expert witness fees.[285]

For textualists, *Casey* serves as a canonical example of how Justice Scalia's textualism favored "coherent congressional usage over coherent congressional policy in determining which elements of context to treat as determinative."[286] Yet that explanation does not provide an account of *why* judges should care more about coherent usage over coherent policy generally, let alone in any particular case. *Most* statutory interpretation cases concern an ambiguous term, after all, and yet *no* member of the Court—Scalia included[287]—has regularly and systematically subjected every ambiguous term in a statute to whole code analysis. Indeed, years prior to deciding *Casey*, Scalia himself had deemed it a "fiction" that "the enacting legislature was aware of [terminological meaning in] all those other laws."[288]

The better justification for Scalia's interpretive choice in *Casey* is the congruence between his interpretive approach and the audience of the statutory provision he sought to prioritize—judges. Courts' (concededly unrealistic) demand for coherent congressional usage over coherent congressional policy may be most justified where a particular audience is a repeat

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reading § 1988's fee-shifting provision to include expert fees would render "dozens of statutes referring to the two separately . . . an inexplicable exercise in redundancy." *Id.* at 92. Scalia reached this conclusion despite evidence in the legislative history, identified by the dissent, that strongly suggested Congress intended for the attorney's fee award to include expert witness fees. *See id.* at 108–111 (Stevens, J., dissenting).

[282] 499 U.S. 83 (1991).

[283] *Id.* at 84.

[284] *Id.* at 92.

[285] *See id.* at 108–111 (Stevens, J., dissenting).

[286] John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 94 (2006).

[287] *See* Gluck, *The Failure of Formalism*, *supra* note 5, at 185–86 (noting Scalia's abandonment of the presumption of consistent usage in *Utility Air Regulatory Group v. Environmental Protection Agency*, 134 S. Ct. 2427, 2441 (2014)).

[288] SCALIA, *supra* note 12, at 16.

players, engaging with the same term of art across many different substantive statutes. Thus, over time, they may reasonably expect that a common term of art like "attorney's fee" will convey the same meaning from one statute to the next, absent a clear and obvious departure, even if this may occasionally flout fidelity to congressional intent.[289] Judicial audience concerns therefore help to explain *why* the consistency canon—ignored in so many statutory interpretation cases—was given such singular prominence in *Casey*, and is perhaps the best justification for its (limited) application.

## III. THE MULTIPLE AUDIENCES OF STATUTES

As the prior Part has demonstrated, examining statutory interpretation decision-making from the standpoint of statutory audiences not only helps to explain why judges invoke different substantive or legal canons, but also sheds light on the relationship between substantive legal norms and particular interpretive methods or canons. Thus far, this Chapter has only addressed statutes whose relevant audiences did not seem to vary significantly in their sophistication, resources, or modes of engagement with a given statute. Yet many statutes have multiple and very differently situated first-order audiences, particularly those statutes that contain both broad regulatory mandates directed to the relevant agency as well as specific prohibitions and instructions directed at the audiences to be regulated.

### *A. Identifying the Primary Audience(s)*

Being attentive to the nature of the relevant statutory audience can help to clarify when a term should be interpreted in light of its semantic or ordinary meaning, or a more specific meaning on the basis of contextual content related to the statute. Where the statutory audience is a more sophisticated subset of the general population, the *ordinary* or *prototypical* usage of a term might give way to a more specific meaning appropriate to that statutory audience and context.

Consider *Yates v. United States*,[290] a recent statutory interpretation instant classic. In

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[289] Of course, one reasonably disagree that this is the preferable way to impose meaning on statutes. Indeed, one could counter that judicial statutory audiences are *best* situated to apply the full range of interpretive methods to a statute, including considerations of the legislative history and statutory purpose. On the other hand, it is arguable that where the fee-shifting question often arises in the form of a brief motion at the end of often-lengthy litigation battles, requiring busy trial judges with crowded dockets to undergo an extensive examination of unique statutory meaning for every individual fee-shifting provision would be inefficient, at best. Whichever position one takes, my argument is simply that raising considerations of statutory audience alongside choice of interpretive methods will only help to clarify the normative stakes at issue.

[290] 135 S. Ct. 1074 (2015).

*Yates*, the Court examined whether a fish was a "tangible object" for the purposes of the Sarbanes-Oxley Act's prohibition on the destruction of evidence intended to "impede, obstruct, or influence" a federal investigation.[291] The defendant in *Yates*, a commercial fisherman, had caught several dozen slightly undersized deep-sea fish in violation of federal fisheries law; having been caught off-shore, he dumped the fish before returning to harbor so as to avoid the risk of a penalty.[292] Yates was subsequently convicted of knowingly impeding a federal investigation by destroying the fish, in violation of Sarbanes-Oxley's prohibition on the destruction of tangible objects.

At trial and on appeal, the defendant argued that the tangible object destruction prohibition should be read in light of its passage as part of the Sarbanes-Oxley Act.[293] Sarbanes-Oxley was passed in the wake of the Enron Corporation's corporate accounting scandal, which included systematic fraud and the destruction of numerous incriminating documents. The defendant, Yates, pressed that Sarbanes-Oxley set forth a "documents offense," and so "tangible object[s]" subject to the statute were document-related objects such as computer hard drives and logbooks—not every kind of tangible object.[294] Both the trial and appellate courts disagreed, and gave the term its "ordinary or natural meaning," as in an object "[h]aving or possessing physical form."[295]

In *Yates*, a majority of the Court sided with the defendant, reversing his conviction.[296] Justice Ginsburg, writing for the plurality, acknowledged that while the term "tangible object" as a matter of pure signification could encompass an object such as a fish, the *legal* meaning of the term was cabined both by the linguistic context of the words surrounding it,[297] as well as the legislative context, given its passage as part of Sarbanes-Oxley.[298] Writing for four dissenting justices, Justice Elena Kagan countered that the term should mean the same thing in Sarbanes-Oxley "as it means in everyday language—any object capable of being touched."[299]

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[291] *Id.* at 1078; Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 802(a), 116 Stat. 745, 800 (codified as amended at 18 U.S.C. § 1519).

[292] *Yates*, 135 S. Ct. at 1079–80.

[293] *Id.* at 1079–80.

[294] *Id.* at 1080.

[295] *Id.* at 1081.

[296] *Id.* at 1088–89.

[297] Applying the *ejusdem generis* and *noscitur et sociis* canons, the plurality noted that the words immediately surrounding "tangible object" ("falsifies, or makes a false entry in any record [or] document") narrowed its meaning. *Id.* at 1085–87.

[298] *Id.* at 1081.

[299] *Id.* at 1091 (Kagan, J., dissenting).

In a sense, the disagreement between the majority and the dissent turned on whether the primary target of the statute was narrow (financial professionals involved in document management and retention), or broad (every member of society). The plurality noted that Sarbanes-Oxley was passed specifically to address financial crimes, and so the actors that the statute seemed most clearly intended to reach were corporate and financial professionals,[300] not commercial fishermen. Moreover, the plurality noted that contextual clues throughout the statute supported this narrower reading. The section containing the prohibition was entitled, "Criminal Penalties for *Altering Documents*,"[301] and the prohibition's heading indicated an audience of *corporate* and *financial* professionals involved in criminal fraud by means of the "[d]estruction, alteration, or falsification *of records*."[302] Moreover, not mentioned by the Court, but in support of its conclusion, is the fact that the tangible object provision was actually part of a separate act ultimately incorporated into the passage of Sarbanes-Oxley and separately subtitled as the "Corporate and Criminal Fraud Accountability Act," further suggesting that the tangible object provision was aimed primarily at corporate fraud.[303]

*Yates* also reflects how contemporary lawyers' focus on the U.S. Code can sometimes obscure evidence of distinctive statutory audiences. Today, once a federal statute is enacted into law, the Office of the Law Revision Counsel transforms Congress's enacted laws by situating them within extant provisions of the U.S. Code, often with important portions of the bill, such as the legislative findings and purposes—which may help to clarify whom the law seeks to address—left out altogether.[304] As Sarbanes-Oxley was subsumed within the U.S. Code,[305] both the heading and the short title noted above disappeared, along with the indication that the tangible-evidence-destruction prohibition was directed primarily at corporate executives and financial professionals.

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[300] *See* Howard Rockness & Joanne Rockness, *Legislated Ethics: From Enron to Sarbanes-Oxley, the Impact on Corporate America*, 57 J. BUS. ETHICS 31, 42, 45 (2005) (noting the primary focus of Sarbanes-Oxley was "regulating corporate conduct in an attempt to promote ethical behavior and prevent the fraudulent financial reporting" and that "[m]uch of the legislation is aimed directly at senior management").

[301] *Yates*, 135 S. Ct. at 1083; *see* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 802, 116 Stat. 745, 800 (emphasis added).

[302] Corporate and Criminal Fraud Accountability Act of 2002, Pub. L. No. 107-204, § 802(a), 116 Stat. 745, 800 (emphasis added).

[303] *Id.*

[304] *See* Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. CHI. L. REV. 1, 18–19 (forthcoming 2019) (noting that "it is common practice for a bill to be stripped of its findings and purposes before the rest of the statute is placed in the main text of the US Code" and that "findings and purposes are sometimes left out of the Code altogether").

[305] *See* 18 U.S.C. § 1519.

While most law students, lawyers, and even *judges* generally focus on the U.S. Code, when members of Congress vote to enact a statute, they vote on the session law,[306] the *real*, operative law. In the case of *Yates*, in the relevant bill, the tangible evidence provision was not presented alongside its future neighboring sections of the U.S. Code governing other acts that tend to thwart government investigations.[307] Thus, while the dissent correctly noted that the tangible objects provision was nestled among several other federal evidence tampering prohibitions, the provision in question was enacted by Congress in a bill directed chiefly at reducing corporate fraud by elevating the regulatory and compliance requirements for corporate executives and financial professionals, not at enhancing law enforcement investigative techniques.

Evidence of a more specific and sophisticated statutory audience can also be revealed in how the statute operates. Sarbanes-Oxley requires regulated audiences to undergo compliance training,[308] with an entire cottage industry emerging to support corporate and financial professionals' annual compliance obligations.[309] The Act also established a new agency, the Public Company Accounting Oversight Board (PCAOB), which "enlists auditors to enforce existing laws against theft and fraud by corporate officers,"[310] and oversees corporate compliance with Sarbanes-Oxley, issuing disciplinary or remedial sanctions for parties who fail to conform to relevant storage and disclosure requirements.[311] PCAOB's Compliance training modules and certifications function to provide notice to the statute's audience of the relevant document retention requirements under the statute.[312] From the standpoint of the rule-of-law norm of statutory notice, it is probable that these professionals are made well aware of Sarbanes-Oxley's document retention requirements in a way that fishermen and other members of the general public are not.

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[306] *See* Shobe, *supra* note 304, at 18 (explaining that once a bill is enacted, it is codified in the U.S. Code).

[307] *See* Tobias A. Dorsey, *Some Reflections on Not Reading the Statutes*, 10 GREEN BAG 2d 283, 283–84 (Spring 2007).

[308] Rockness & Rockness, *supra* note 300, at 45.

[309] *See, e.g.*, SARBANES OXLEY 101, https://www.sarbanes-oxley-101.com/ [https://perma.cc/Y9FN-2MR6 ] (last visited Feb. 2, 2019) (providing links to Sarbanes-Oxley organizational compliance checklists, certifications and audit materials, and downloads for compliance software).

[310] John C. Coates IV, *The Goals and Promise of the Sarbanes-Oxley Act*, 21 J. ECON. PERSP. 91, 91 (2007).

[311] *See* Larry Cata Backer, *Surveillance and Control: Privatizing and Nationalizing Corporate Monitoring After Sarbanes-Oxley*, 2004 MICH. ST. L. REV. 327, 397–402.

[312] *See* Ashoke S. Talukdar, *The Voice of Reason: The Corporate Compliance Officer and the Regulated Corporate Environment*, 6 U.C. DAVIS BUS. L.J. 3 (2005) (noting that "the importance of education and training programs in compliance awareness is often reflected in the laws itself").

### *B. When Audiences (and Audience Norms) Conflict*

Interpretive tensions are especially likely to arise from statutes that address multiple and distinct statutory audiences *in the same provision*. One such example is the Endangered Species Act (ESA) of 1973. Section 9(a)(1)(B) of the Act makes it an offense for "any person subject to the jurisdiction of the United States" to "take any [endangered or threatened] species within the United States or the territorial sea of the United States."[313] Thus, one first-order audience for this provision of the ESA is quite literally *any person*. The penalties provision of the ESA sets out a scheme of escalating civil and criminal penalties from $500 to $50,000 depending on the nature of the violation of the statutory provision (or any further regulation issued under it), and up to a year's imprisonment.[314]

Yet the provision addresses another first-order audience: the several federal agencies delegated lawmaking authority by Congress to promulgate regulations to effectuate the prohibition on, among other things, the taking of endangered species. For the ESA expressly delegates to the Secretary the authority to promulgate regulations pertaining to threatened species, and makes violations of those regulations equally susceptible to civil and criminal penalties,[315] including designations regarding both endangered and threatened species and the habitats critical to their survival.[316] The statute therefore includes both a transitive criminal prohibition directed at "any person" as well as an intransitive instruction to the agency to promulgate regulations furthering those prohibitions.[317]

But the statute was also amended in 1982 to establish a permitting scheme that would exempt covered parties from the regulatorily-defined incidental takings prohibition provided they put in place a conservation plan to mitigate potential harm resulting from the transformation of lands that contained critical habitat. That permitting scheme, drawing on several regulations—including the regulation in question defining harm——established its own transitive rules for parties seeking a permit to engage in activities resulting in incidental takings.[318] The amended version of the statute was thus not only directed at the public at large, but also at a more specific subset of the public, landowners seeking to obtain affirmative permission from the agency to transform property designated as critical habitat.

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[313] 16 U.S.C. § 1538(a)(1)(B) (2012).

[314] *Id.* § 1540(a)(1), (b)(1) (2012).

[315] *Id.* § 1538(a)(1)(G) (2012).

[316] *Id.* § 1533(a)(1)–(3) (2012).

[317] *See supra* notes 46–49 and accompanying text.

[318] 16 U.S.C. § 1539(a)(2)(A).

**Table 3: Competing Audiences of the Amended Endangered Species Act (post 1982)**[319]

| *Audience* | *Relevant Provision* | *Relevant statutory text* |
|---|---|---|
| (1) Any person | Sec. 9(a)(1)(B), codified at 16 U.S.C § 1538(a)(1)(B) ("Prohibited Acts") | "[I]t is unlawful for *any person* subject to the jurisdiction of the United States to . . . *take any [endangered] species* within the United States or the territorial sea of the United States." |
| (2) The Secretary of the Department of the Interior | Sec. 10(a)(B), codified at ("Exceptions") | "*The Secretary* may permit, under such terms and conditions as he shall prescribe, . . . any taking otherwise prohibited by section 9(a)(1)(B) if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." |
| (3) Permit applicants seeking exceptions from takings prohibition | Sec. 10(B)(2)(A), codified at 16 U.S.C. § 1539(a)(2)(A) ("Permits") | "No permit may be issued . . . unless *the applicant* therefor submit to the Secretary a conservation plan that specifies . . . the impact which will likely result from such a taking; what steps the applicant will take to minimize or mitigate such impacts . . . [and] what alternative actions to such taking the applicant considered and the reasons why such alternatives are not to be utilized." |

These provisions of the ESA nicely capture how statutory provisions contain both transitive and intransitive components that may lead to interpretive confusion, because they often address very different statutory audiences at once, and expect very different audience reactions using identical language. This tension was a central though unappreciated feature in *Babbitt v. Sweet Home Chapter of Communities For A Great Oregon*.[320] *Sweet Home* concerned a challenged regulation promulgated under the ESA that defined significant habitat modification or degradation that killed or injured endangered species, including on private land, as a violation of the takings prohibition under the ESA.[321]

The regulation sparked controversy because the statute itself lacked any direct prohibition on habitat modification or degradation, and so to justify the agency's authority to regulate private lands, the Secretary relied on a logical syllogism that seemed to reach beyond the mere ordinary meaning of the term "take."[322] Because the Act elsewhere defines "take" to "mean[] to harass, *harm*, pursue, hunt, shoot, wound, kill, trap, capture, or collect,"[323] the agency's regulation was promulgated in furtherance of the prohibition on harming endangered species. And since the definition of "take" includes "harm," the agency

[319] Pub. L. 92–205, 87 Stat. 884 (1973), as amended.

[320] 515 U.S. 687 (1995).

[321] *See* 50 C.F.R. § 17.3 ("Harm in the definition of 'take' in the . . . may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.").

[322] *Sweet Home*, 515 U.S. at 690.

[323] *Id.* at 691 (quoting 16 U.S.C. §§ 1538(a)(1), 1532(9)) (emphasis added).

determined that substantial habitat modification or degradation that significantly impaired breeding, feeding, or sheltering any of the covered species caused them significant harm, and therefore constituted a "tak[ing]."[324]

Plaintiffs in *Sweet Home* were concerned that the regulation could be applied to their private lands, which several threatened and endangered species of birds used for habitation and breeding, the legal consequences of which was that landowners would be prevented from cutting down forest land on their own private property, unless they either risked civil and criminal penalties for violating the harm prohibition as defined by the regulation, or received a permit in accordance with the regulatory scheme that would exempt them from the prohibition (more on that momentarily).[325] Landowners, logging companies, and "families dependent on the forest products industries" challenged the rule broadly defining harm.[326] The landowners contended that the agency lacked the authority to promulgate the rule on the basis of the statutory take prohibition, for logging privately own forest land could not constitute a "taking" of endangered species where the trees in question did not, at the time of the logging activity, contain any such species.[327]

### *1. Judicial Disagreement About the Relevant Audience*

What is striking about the written opinions in *Sweet Home* is just how differently the majority and dissent seem to conceive of the primary audiences of the ESA, a difference apparent from the opening sentences of each opinion. Writing for the majority, Justice John Paul Stevens commenced his discussion by focusing on the Department and the agency secretary: "[t]his case presents the question [of] whether the Secretary exceeded his authority under the Act by promulgating that regulation."[328] Stevens's opinion repeatedly invokes the framework of *Chevron* deference: because Congress did not unambiguously manifest its intent in legislating the term "take," the majority determined that at *Chevron* Step Two, the Court "owe[d] some degree of deference to the Secretary's reasonable interpretation" and upheld the regulation.[329] For Stevens, the audience was the Secretary, and the question was whether Congress's directions to the agency were sufficiently ambiguous and, if so, whether the audience of the statute, the Secretary, had reasonably interpreted the statutory

[324] *Id.* (quoting 50 C.F.R. § 17.3 (1994)).

[325] *Id.* at 692.

[326] *Id.*

[327] *Id.* at 696.

[328] *Id.* at 690.

[329] *Id.* at 692.

instruction.[330]

It seems rather clear not all justices were focused on the same statutory audience as Stevens was. Indeed, Justice Scalia, writing on behalf of three dissenting Justices, seemed to emphasize his disagreement about the relevant statutory audience in the opening paragraph of his dissent: for him, the issue was the effect the department's interpretation had on "the simplest farmer who finds his land conscripted to national zoological use."[331] Indeed, Scalia's dissent emphasized in its second paragraph the very broad audience of ESA's take prohibition: "*any person* subject to the jurisdiction of the United States."[332] He also observed that the agency's definition of take could sweep up a vast range of daily practices for those involved: "farming, ranching, roadbuilding, construction and logging" would all be prohibited conduct under the regulation "no matter how remote the chain of causation and no matter how difficult to foresee (or to disprove) the 'injury'."[333]

Framed in this way, Scalia's dissent is most powerful in emphasizing how difficult it might be for members of the public to understand or foresee how their daily practices could be implicated by the ESA, calling to the fore considerations of notice and intent usually more relevant for the interpretation of criminal statutes directed at laypeople than complex environmental statutes directed at administrative agencies. And that's just the rub: the ESA provision in question was *both*—a transitive and direct criminal prohibition applicable to ordinary people *and* an intransitive and broad delegation of rulemaking to the department. (Stevens acknowledged as much in a buried, but important footnote on the rule of lenity's potential application to administrative regulations.)[334] Given the seeming disagreement between the majority and dissent about which audience to focus on, it is not surprising that each opinion also emphasized different methods of statutory interpretation, each more appropriate for the relevant audience in question.

The Justices' competing visions of the first-order audience seemed to carry over into their methods of interpretation as well. Scalia's focus appeared to be on how the statute might be understood by a "simple farmer," and his methods largely seem congruent with such an audience. While Scalia briefly engaged with the legislative history (only in an effort to refute the majority's use of it, and with his usual disclaimers),[335] Scalia's opinion relied much more

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[330] *Id.* at 691–92 (quoting 16 U.S.C. § 1536(a)(2)).

[331] *Id.* at 714 (Scalia, J., dissenting).

[332] *Id.* at 715 (emphasis added).

[333] *Id.* at 721 (Scalia, J., dissenting).

[334] *Id.* at 691 (majority opinion).

[335] *Id.* at 726 (Scalia, J., dissenting) ("Even if legislative history were a legitimate and reliable tool of interpretation (which I shall assume in order to rebut the Court's claim) . . .").

heavily on straightforward linguistic canons like *noscitur a sociis*[336] and the ordinary meaning and dictionary definitions of "take"[337] and "harm."[338] Emphasizing the importance of attributing an ordinary meaning to the term "take"—especially significant where the statutory audience is laypeople—Scalia criticized the majority's "tempting fallacy" of concluding that 'take' means 'harm' means 'impair breeding' such "that *once defined*, 'take' loses any significance, and it is only the [cross-]definition that matters."[339]

By contrast, Stevens largely drew on methods of interpretation especially appropriate for an administrative agency audience. Stevens' majority opinion did not *once* consult a dictionary definition for the ordinary usage of the term "take": it was enough that Congress provided a specific statutory cross-definition of the term.[340] Because the ESA's opening section directs the Secretary to enforce the statute, Stevens concluded that if the term "take" was sufficiently ambiguous at *Chevron* Step One, then at Step Two the agency should be granted deference after consulting the legislative history of the ESA and employing the "whole text" and "presumption against ineffectiveness" canons, canons which are much more appropriate for administrative audiences seeking tools of interpretation that assist them in implementing relatively open-ended and intransitive legislative instructions. Thus, much as the agency would, Stevens focused on the legislative intent and purpose of the ESA, derived from both a careful reading of other provisions in the statutory scheme,[341] and an extensive discussion of the legislative history of the ESA and its subsequent amendments.[342]

### *2. Judicial Confusion About the Relevant Audience*

Indeed, Stevens's discussion of the legislative history is critical to understanding the audience dynamics at work in *Sweet Home*. As Victoria Nourse has explained, the version of the statute enacted in 1982 was much more decisive as far as the statutory interpretation question was concerned, for fairly strong evidence suggested that Congress hardwired the Secretary's definition of "harm" into its 1982 amendments.[343] Indeed, although Stevens did not focus on the 1982 legislative history, it did not go unnoticed in his opinion that these

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[336] *Id.* at 720–21.

[337] *Id.* at 717.

[338] *Id.* at 719.

[339] *Id.* at 718.

[340] *Id.* at 704 n.18 (majority opinion).

[341] *Id.* at 702–04.

[342] *Id.* at 704–08.

[343] Victoria F. Nourse, *Decision Theory and* Babbitt v. Sweet Home*: Skepticism about Norms, Discretion and the Virtues of Purposivism*, 57 ST. LOUIS U. L.J. 909, 917 (2013).

amendments to the ESA indicated congressional support for the agency's definition of harm.[344]

Nevertheless, what *was* overlooked was that the 1982 amendments to the statute also introduced *a new and distinct audience*: applicants seeking permits to be exempted from the take prohibition which, by 1982, had been well established to include habitat degradation, if "such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."[345] Congress amended the ESA in 1982 in recognition of the fact that the Secretary's broad interpretation of harm-as-habitat-degradation covered a substantial number of everyday activities that could inadvertently result in "harm" to endangered species through the transformation and destruction of critical breeding and migratory habitats.[346] Indeed, potential applications of the broad regulatory interpretation had "provoked great concern among property owners, developers, and state and local government officials" prior to the 1982 amendment.[347] Thus, the statute is directed not only at the public at large and the relevant administrative agencies, but also at the class of applicants who may seek permits to modify land that constitutes the breeding and migratory habitat of endangered species.

The plaintiffs in *Sweet Home*, however, were *not* the ordinary-farmer audience as Scalia had envisioned, but civil society organizations who had been aware of the by-then twenty-year-old regulation for many years. Had plaintiffs actually sought a permit that would have exempted them from the reach of the statute, or been denied one, then on an as-applied basis, concerns might have arisen about how the agency had constructed the statute in those particular circumstances. But that was not the case in *Sweet Home*, which raised a facial challenge to the regulatory definition altogether.[348]

Thus, the proper question *in Sweet Home* was not whether the statutory definition had failed to give unsuspecting farmers notice: as of 1995, the year the case was decided, there had been few reported criminal prosecutions for violations of the regulation in question. Rather, the pertinent question was whether the agency's refusal to allow a landowner

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[344] *Sweet Home*, 515 U.S. at 704 ("[The Committee Report] make[s] clear that Congress intended 'take' to apply broadly to cover indirect as well as purposeful actions.").

[345] 15 U.S.C. § 1539(a)(1)(B) (2012).

[346] Doug Williams, *A Harder "Hard Case,"* 57 ST. LOUIS U. L.J. 931, 951 (2013).

[347] *Id.* at 953.

[348] The procedural history on this question is a bit unclear, as the agency did not raise the facial challenge point until it petitioned for cert before the Supreme Court. Below, the district court summarized only that Fish and Wildlife Service had "placed restrictions on timber harvesting." Sweet Home Chapter of Communities for a Great Oregon v. Lujan, 806 F. Supp. 279, 282 (D.D.C. 1992). However, at no stage in the litigation did the plaintiffs contend either that they had been threatened with a civil or criminal penalty for logging conduct or that they submitted a conservation plan in seeking a permit from the harm prohibition and had been denied one by the agency.

permission to alter or transform his land was so categorically unreasonable under the statute as to render the agency's interpretation of harm altogether unreasonable. Recast in this light, Justice Stevens's invocation of *Chevron* deference to the agency becomes more justifiable, and in that context, Justice Scalia's concern about effective statutory notice for ordinary farmer audiences seems misplaced, however legitimate that concern may be for other statutory applications, including other potential applications of the ESA. (As I will discuss in Part IV.B, such interpretive confusion may be avoided by more carefully separating transitive and intransitive statutory instructions.)

### *C. (Mis)identifying the Audience*

How the concept of notice operates in statutory interpretation cases also seems to depend in part on whom a court perceives to be the relevant audience of a given statute. This may sometimes explain why courts emphasize one interpretive method in a statute directed at one audience, only to emphasize another source or method when interpreting an almost identical statute directed at a different audience. If a judicial interpreter takes audience considerations seriously, a methodological departure from one statute to another may very well be acceptable; indeed, this approach can enhance rule-of-law norms by tailoring interpretive methods appropriate to the statutory audience.

However, *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*[349] demonstrates the care courts must take when considering questions of statutory audience. Recall that in *Murphy*,[350] the Court was asked to determine whether the IDEA's attorney's fee-shifting provision included awards for expert witness fees,[351] a question similar to the question in *Casey* discussed above in Section II.F. *Murphy* is an interesting instance of the Court explicitly addressing the interpretive concerns of a first-order audience. Yet the majority almost surely misconstrued the appropriate first-order audience to prioritize, and therefore the basis on which to determine whether the statutory text provided adequate notice to that audience. (*See* Table 1, *supra* Section II.A, identifying the distinct audiences of the IDEA.) *Murphy* demonstrates why the choice of which first-order audience to prioritize can often be dispositive to the outcome of the decision, and why statutory interpretation theory must take questions of statutory audience more seriously.

Statutory audience seems to help explain the contrasting outcomes of *Casey* and *Murphy*. In *Casey*, although Justice Scalia looked primarily at "the record of statutory usage" of fee-shifting provisions across multiple sections of the U.S. Code, in dicta he also pointed to the

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[349] 548 U.S. 291 (2006).

[350] *Id.* at 294–95.

[351] 20 U.S.C. § 1415(i)(3)(B).

contrasting evidence in the legislative histories of § 1988 and the IDEA to conclude that while Congress expressly intended for the IDEA to include expert witness fees, it did not state as much with respect to § 1988.[352] Scalia highlighted a joint explanatory statement of the Committee of the House and Senate Conference indicating that "[t]he conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses."[353] Legislative history rarely so directly answers an interpretive question, and Scalia reasoned that this statement supported the Court's conclusion that § 1988's fee-shifting provision *excluded* expert witness fees because "[t]he specification [in the legislative history of the IDEA] would have been quite unnecessary if the ordinary meaning of the term included those elements. The statement is an apparent effort to *depart* from ordinary meaning and to define a term of art" as used in § 1988.[354]

Given Scalia's dicta in *Casey*, a lower court might reasonably conclude that the IDEA's fee-shifting provision included expert witness fees, and several lower courts did, including in *Murphy*.[355] Yet when *Murphy* came before the Court, a majority diminished the importance of the legislative history,[356] largely on the basis of the statute's audience. Notwithstanding Scalia's own dicta in *Casey*, moreover, the Justice joined the majority in holding that the IDEA did *not* permit expert witness fees to be included in shifted attorney's fees.[357] In a dissent joined by two others, Justice Breyer largely emphasized the same legislative history Scalia had cited in *Casey*, recognizing that "[m]embers of both Houses of Congress voted to adopt *both* the statutory text before us and the Conference Report that made clear that the statute's words include the expert costs here in question."[358]

First-order audience may partially explain the departure, but it also reveals the importance of being attentive about which first-order statutory audience to prioritize, as well as the interpretive implications that might be drawn from this choice of audience. Writing for the majority, Justice Samuel Alito posited that the IDEA's primary statutory audience was state education officials who had to decide whether to accept federal IDEA grants.[359] Because Congress had enacted the IDEA under its Spending Clause power,[360] the majority

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[352] W. Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 88–92 (1991).

[353] *Id.* at 91–92 n.5 (quoting H.R. Conf. Rep. No. 99–687, p. 5 (1986)).

[354] *Id.*

[355] *See* Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 402 F.3d 332, 336–37 (2d Cir. 2005), *rev'd and remanded*, 548 U.S. 291 (2006) (discussing dicta in *Casey*).

[356] Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 304 (2006).

[357] *Id.* at 293–94.

[358] *Id.* at 313 (Breyer, J. dissenting) (emphasis added).

[359] *Id.* at 296 (majority opinion).

[360] The majority noted that the Court had previously imposed a "clear notice" rule for statutes passed under

framed the question not as one of legislative purpose, but as one of notice to the relevant statutory audience:

> [W]e must view the IDEA *from the perspective of a state official* who is engaged in the process of deciding whether the State should accept IDEA funds and the obligations that go with those funds. We must ask whether such a state official would clearly understand that one of the obligations of the Act is the obligation to compensate prevailing parents for expert fees.[361]

Interpreting the statute from the standpoint of the first-order state official statutory interpreter, the majority concluded that the legislative history (however clear itself) was insufficient "to provide the clear notice required under the Spending Clause."[362]

Statutory audience, then, would seem to help explain the disjuncture between *Casey* and *Murphy*. In *Casey*, the Court seemed to focus on how judges routinely encounter attorney's fees provisions and drew on the whole code canon as well as legislative history to prioritize consistency in meaning across statutes. In *Murphy*, by contrast, the Court dismissed that same legislative history suggesting clear congressional intent in favor of a clear notice rule for the IDEA's primary audience of state and local officials.

*Murphy* also demonstrates the importance of taking care when interrogating questions of notice and statutory audience. The majority justified its imposition of a "clear notice" requirement because Congress enacted the IDEA under its Spending Clause power. Yet as Justice Ginsburg recognized in her concurrence, the IDEA was *also* enacted pursuant to Section 5 of the Fourteenth Amendment, for which the Court does *not* presume such a "clear notice" rule of interpretation.[363] The Spending Clause invocation alone, then, could not justify the departure in interpretive method from the same legislative history relied upon in *Casey*.

Further, Justice Ginsburg emphasized that the concept of notice, regardless of the enumerated power Congress used to pass legislation, must be carefully considered. Ginsburg argued that the "'clear notice' requirement should not be unmoored from its context."[364] Unlike, for example, a past case that considered "an unexpected condition for compliance—a new [programmatic] obligation for participating States," the Justice noted that "the controversy here is lower key."[365] It concerned "not the educational programs IDEA directs

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Congress's Spending Clause power when the provision in question attaches conditions on the states in exchange for accepting federal funds. *Id.* at 295–96 (citing Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981)).

[361] *Id.* at 296 (emphasis added).

[362] *Id.* at 303.

[363] *Id.* at 305 (Ginsburg, J., concurring in part and concurring in the judgment).

[364] *Id.*

[365] *Id.* (brackets in original).

school districts to provide, but 'the remedies available against a noncomplying [district]'"[366]—in other words, a subsidiary issue unlikely to be dispositive in deciding whether to accept hundreds of millions of dollars a year in federal funding.[367]

A further complication is that it is far from clear that the majority correctly identified the first-order statutory audience likely to engage directly with the IDEA's statutory requirements when deciding whether to accept federal funds. This is because the majority's posited state education official was rather underspecified. For a statute as wide-reaching as the IDEA, audiences that engage *generally* with the IDEA could vary from state education agencies that regularly interact directly with the U.S. Department of Education over IDEA compliance, to local school boards, to individual school officials who sometimes apply for personnel grants themselves. The majority did not take care to specify which of these audiences it had in mind, nor provide any empirical basis for what that audience might have known, or be able to learn about, the IDEA's requirements.

In actuality, the majority perhaps underestimated the knowledge and sophistication of the most plausible audience: state officials who engage directly with the IDEA's requirements when deciding whether to continue to accept federal funds. Local educators are *not* the state officials directly involved in the states' decision to consent to IDEA requirements; rather, since at least 1970, the IDEA has mandated that states establish advisory councils that advise both local officials and state education agencies as to requirements under the IDEA.[368] Moreover, the Department of Education has long allocated recurring annual IDEA formula grants to *every* state to support special education and related services,[369] and these grants are awarded on the basis of mechanical calculations about each state's relative population of children with disabilities.[370] Acceptance of these annual awards is conditional on IDEA compliance, which means every state had consented to the IDEA's requirement well before the dispute that arose in *Murphy*. Given all this, the majority's posited audience notice concerns in *Murphy* seem to touch on only part of the issue.[371]

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[366] *Id.* (citation omitted) (brackets in original).

[367] KYRIE E. DRAGOO, CONG. RESEARCH SERV., R44624, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) FUNDING: A PRIMER 17–18 tbl.2 (Oct. 1, 2018).

[368] Pub. L. 91-230, § 305, 84 Stat. 121, 135 (1970); *see also* 20 U.S.C.A. § 1441 (2012).

[369] U.S. DEP'T OF ED., STATE FORMULA GRANTS, IDEA, https://sites.ed.gov/idea/state-formula-grants/ (last visited June 4, 2019).

[370] *See* 20 U.S.C. § 1411(d)(A) (2012).

[371] As the respondents in *Murphy* emphasized, the IDEA fee-shifting provision had been the law for twenty years, and *no* prior state litigant had made the Spending Clause argument about defective notice: "courts overwhelmingly interpreted [the provision] as imposing an obligation on school boards to pay parents their costs." Brief for Respondents at 48–49, *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006) (No. 05-18), 2006 WL 838890, at *48–49.

Recall that state officials were not the only important audience of the statute. One might equally wonder whether *the parents* in *Murphy* had reason to believe they would be reimbursed for the nearly $30,000 they spent to obtain the expert assessment necessary to vindicate their child's special education needs. After all, the IDEA guarantees an appropriate education *at no cost to the parents*.[372] If so, then the parents might reasonably have felt the IDEA gave clear notice that they would not be responsible for any fees associated with vindicating their child's needs.

Being attentive statutory audience would likely have improved the interpretive inquiry. An explicit debate about the relevant statutory audience to prioritize, how they were likely to encounter the statute's requirements, and the circumstances under which a clear notice presumption should trump clarifying legislative history, would have enhanced the interpretive inquiry.[373]

In the absence of such analysis, the majority's disinclination to credit the legislative history in *Murphy* is perhaps best justified by considering a third audience of the IDEA, judges, and a norm especially important to them, consistency. This appears to be the standpoint from which Justice Ginsburg approached the statute in her concurrence. Citing the default rule described above in *Casey*, Ginsburg observed that whatever Congress's intended meaning, "Congress did not compose [the fee-shifting provision's] text, as it did the text of other statutes too numerous and varied to ignore, to alter the common import of the terms 'attorneys' fees' and 'costs' in the context of expense-allocation legislation."[374] On this basis, Ginsburg was disinclined to "rewrite" the statutory text actually passed by Congress, and concluded that the ball was "properly left in Congress' court to provide" the appropriately articulated provision.[375]

### *D. Same Language, Different Audience*

Attention to statutory audiences can also reveal how the same statutory language may be read to mean different things depending on whom the audience is presumed to be, including whether the a given statutory provision is thought to be unconstitutionally vague. Take, for example, the so-called "residual clause" of the Armed Career Criminal Act 1984 (ACCA) that

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[372] *Murphy*, 548 U.S. at 313 (Breyer, J., dissenting) (noting that the IDEA guarantees appropriate special education "at *no cost* to the parents" (emphasis in original)).

[373] For example, administrative law scholar Peter Strauss has suggested the probable audience of the IDEA was the "affected public—particularly those well-advised by lawyers" who would have known about the legislative history and the IDEA's inclusion of expert witness fees in shifting the fees and costs of litigation. Peter Strauss, *Judging Statutes*, 65 J. LEGAL EDUC. 443, 447–48 (2015) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

[374] *Murphy*, 548 U.S. at 306–07 (Ginsburg, J., concurring in part and concurring in the judgment).

[375] *Id.* at 307.

was examined in *Johnson v. United States*.[376] The clause imposed on a defendant convicted of being a felon in possession of a firearm a more severe punishment if the defendant also had three or more prior "violent felony" convictions. The residual clause defined a "violent felony" as "any felony that 'involves conduct that presents a serious potential risk of physical injury to another.'"[377] Given the clause's troubling ambiguity, the Court found it unconstitutionally vague on the basis that the Due Process Clause of the Fifth Amendment prohibits the government from prosecuting an individual "under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes."[378] Justice Scalia, writing for the majority, aptly recognized the two audiences of the statutory provision: "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to *defendants* and invites arbitrary enforcement by *judges*."[379] Given the fair notice concerns that arose for the audience of ordinary citizens, the measure was deemed unconstitutionally vague.

The importance of statutory audience explains, in part, why the Court did not deem an identical residual clause definition contained in the United States Sentencing Guidelines unconstitutionally vague two terms later in *Beckles v. United States*.[380] Justice Thomas, writing the unanimous decision joined by several concurrences, emphasized the distinction between the mandatory application of the residual clause in ACCA and its inherently discretionary application under the Guidelines.[381] Yet the majority's determination also relied on the difference in primary audiences between the two clauses: whereas the ACCA is a criminal statute that necessarily speaks directly to ordinary citizens in communicating prohibited conduct, the Sentencing Guidelines speak primarily to judges exercising their discretionary power to sentence under the Guidelines. In Justice Thomas's view, "even perfectly clear Guidelines could not provide notice to a person who seeks to regulate his conduct so as to avoid particular penalties . . . . because even if a person behaves so as to avoid an enhanced sentence under the . . . guideline, the sentencing court retains discretion to impose the enhanced sentence."[382] The thrust of Thomas's reasoning here was that while it is a necessary fiction that ordinary citizens be able to understand their obligations from

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[376] 135 S. Ct. 2551 (2015).

[377] *Id.* at 2555 (quoting 18 U.S.C. § 924(e)(2)(B) (2012)).

[378] *Id.* at 2556.

[379] *Id.* at 2557 (emphases added).

[380] 137 S. Ct. 886 (2017).

[381] The majority noted that while "ACCA's residual clause, where applicable, required sentencing courts to increase a defendant's prison term from a statutory maximum of 10 years to a minimum of 15 years[,] . . . . the advisory Guidelines . . . . merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range." *Id.* at 892.

[382] *Id.* at 894.

statutory text alone, such a fiction is not necessary for the Guidelines, which are substantially more detailed, harder to access, and applied by judges in part at their discretion. It thus could be argued that *ex ante* notice concerns for citizens are of lesser importance.[383]

Of course, while the majority is correct that the Guidelines are directed *primarily* at judges, this does not entirely eliminate potential notice concerns for citizens, who are necessarily *also* an audience of the Guidelines. After all, a prohibition on citizen conduct that risks an enhanced sentence also merits clear notice, even if there is no *guarantee* that the conduct will yield an enhanced sentence, a point made by Justice Sotomayor in her concurrence in the judgment.[384]

## IV. CONCLUSION

In the preceding sections, I have sought to show why considerations of statutory audience are essential for any comprehensive theory of statutory interpretation. Statutes seek to alter the behavior of very different audiences in quite distinctive ways. Judicial rules for interpretation will necessarily affect how various statutory audiences are expected to conform their behavior to statutes, yet not all methods and sources of interpretation may be equally suitable for all statutes and all statutory audiences. Failure to recognize this dynamic may risk undermining not only substantive judicial canons that are themselves audience-motivated—such as the rule of lenity, the mistake-of-law defense, and administrative deference—but also the rule of law values like notice, deference, and consent. Being attentive to the distinctive conditions and considerations for different statutory audience interpreters clarifies the normative and jurisprudential stakes of statutory interpretation.

A focus on statutory audience also contributes to understanding legal doctrine, for it helps to explain judicial disagreements about which methods of interpretation are most germane. Because most statutes are directed at multiple audiences, many methodological disputes may be linked to deeper more normative disputes about how to prioritize competing audience concerns in statutory interpretation. And a focus on audience in selecting canons and methods of interpretation might itself help to provide a more principled way of prioritizing methods and canons in close cases, serving as a sort of compromise between the preferred methods of textualists and purposivists. Of course, divergent views about statutory audience do not fully explain the disagreements in the canonical statutory interpretation cases I have revisited. Nevertheless, raising questions about statutory audience and nonjudicial interpretation does shed light on core tensions in theories of statutory interpretation

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[383] The majority's reasoning has been echoed by legal philosophers like Lon Fuller, who long ago argued that it is more important that citizens have clear warning of their legal duties than that they should "know precisely what unpleasantness will attend a breach." FULLER, *supra* note 27, at 93.

[384] *Beckles*, 137 S. Ct. at 900–03 (Sotomayor, J., concurring in the judgment).

methodology.

In this section, I consider several lessons that the examination of statutory audience may yield for statutory interpretation theory.

### *A. Audience-Oriented Statutory Interpretation*

As the preceding sections have shown, audience norms, substantive legal rules, and statutory interpretation methods are inextricably and undeniably related. Despite this, judges often disregard the relationship between norms, substantive legal rules, and methods. Often, the methods chosen tend to undermine the very audience norms judges seek to enforce. This is especially true when judges seek to ensure adequate notice is provided for statutes directed at the public at large, or when judges are tasked with interpreting statutes delegating enforcement and lawmaking authority to administrative agency audiences.

#### *1. Ordinary Audience Statutes, Notice, and the Rule of Lenity*

*When invoking notice canons like the rule of lenity, clarify what is meant by "ordinary meaning," and for whom.*

Audience considerations are particularly important when interpreting statutes directed at the public at large, for rule-of-law norms like notice and predictability often arise via substantive legal doctrines like the rule of lenity. Yet if the lenity rule is invoked because the audience of the statute is laypeople whom the statute must give adequate notice, then interpretive methods should be prioritized that would tend to *enhance* the statute's tendency to provide fair notice.

In such circumstances, a judge might hesitate before relying on the whole code or whole act canons, specialized technical definitions, and legislative history, as these methods undeniably have the effect of making statutory law less accessible to lay audiences. Reliance on those methods cannot help but weaken due process and clear notice, while also undermining the normative force of interpretive canons like the rule of lenity or the reasonable mistake of law defense. Of course, legal moralism should be considered as well: for statutes whose prohibitions cover obviously immoral conduct, textual notice may be of diminished relevance.

Judges should also strive to be clearer about the precise threshold of ambiguity sufficient for the rule of lenity to apply, and develop a more principled basis for selecting evidence of ordinary usage and semantic meaning. They should address whether the meaning sought is the *prototypical* meaning, the *most common* meaning, or merely a *frequent* meaning. They should also be explicit about whether contemporary or enacting-era dictionaries are more appropriate, and why they conclude that one dictionary's definition better reflects ordinary usage than another's.

Finally, the careful use of corpus linguistics may sometimes enhance inquiries into ordinary usage of phrases, because sophisticated analysis of large databases of ordinary usage may be less prone to cherry-picking and better at capturing the meaning of English words as used in phrases rather as isolated words. As *Muscarello* demonstrated, and judges like Justice Kavanaugh have criticized, when ambiguity seems to emerge or disappear depending on which sources a court chooses to prioritize and which sources it chooses to ignore, there is no principled basis for resolving whether sufficient ambiguity exists to invoke the rule of lenity or move to step two of the *Chevron* deference inquiry.[385]

### 2. *Regulatory Statutes and Administrative Deference*

*When interpreting administrative statutes, identify whether the provision in question is transitive or intransitive, prioritize evidence of meaning appropriate for the statute's non-official audiences.*

The interpretive dynamics for intransitive statutes directed at administrative agency audiences can be quite different from statutes directed at ordinary audiences, regardless of whether formal administrative deference regimes like *Chevron* apply. In particular, where an ambiguous statutory term is part of a broad delegation to an agency seeking to regulate more sophisticated audiences like corporations or interest groups, more complex and contextual methods of interpretation seem entirely appropriate. In these circumstances, judges should interpret such delegations differently than statutes that have direct and transitive applications to non-agency audiences.

Some judicial approaches have made strides in this direction, but could still be enhanced from the standpoint of audience norms. The Seventh Circuit, for example, has long declared that it will rely primarily on the semantic content of the statute in its approach to interpreting an administrative statute at *Chevron* Step One; only at Step Two, once the statute is determined to be sufficiently ambiguous on the basis of semantic content alone, will it draw on the statute's contextual content (such as the legislative history) in assessing the reasonableness of the agency's asserted meaning.[386] While such an approach rightly reflects the comparatively weaker arguments for textualist methods where the legislative delegation exists within "*Chevron* space," this interpretive approach could be even more nuanced. After all, the benefit of focusing on semantic content and evidence of ordinary usage in *Chevron* Step One will depend in large part on whether the audience of the agency delegation is primarily laypeople, as in the Endangered Species Act, or only more sophisticated institutional entities, as in *Public Citizen*.

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[385] *See* Kavanaugh, *supra* note 7, at 2118.

[386] *See* Bankers Life & Cas. Co. v. United States, 142 F.3d 973, 983 (7th Cir. 1998).

### *B. Single Statutory Provisions with Multiple Audience Instructions*

*Avoid drafting statutory provisions that direct different audiences to take different actions with the same text.*

The possibility of distinct and competing audiences for administrative statutes raises a related lesson for statutory *drafters*. Whenever possible, legislation should be drafted so as to avoid speaking in multiple registers to two (or more) audiences at once. The interpretive confusion in *Sweet Home* arose because the ESA provision in question contained both (i) a direct, transitive criminal conduct rule for ordinary individuals (*i.e.*, "don't take endangered species") as well as (ii) an indirect, intransitive administrative delegation to the agency to promulgate a rules furthering protections for such species (*i.e.*, "prevent harm to endangered species").

Focus on statutory audience dynamics can also hone relevant questions about whether the statutory text itself or the administrative law rule developed from that text should serve as the relevant notice document communicating legal meaning. One could reasonably argue that the adequate notice question should apply only to the operative legal text actually regulating the behavior of the statute's intended targets. In *Sweet Home*, this was the challenged regulation coupled with statutory provisions setting out the permitting scheme, rather than the criminal prohibition on taking endangered species that was ostensibly at issue.

In this sense, Scalia's argument that a "simple" logger who cut down uninhabited trees on his own land should never have been convicted of "tak[ing]" an endangered species may be both normatively persuasive and yet legally beside the point[387]: the litigants in *Sweet Home* were not indicted criminal defendants but aggrieved interest groups alleging federal overreach and overregulation on private land. Nevertheless, when the same statutory provision serves as both the basis for a criminal indictment and for notice-and-comment rulemaking and a complex permitting scheme, confusion and disagreement over which methods to prioritize is especially likely to arise—the ESA is no one's idea of a model statute.

A related takeaway is that where fair notice concerns are less relevant for authorizing statutes and more relevant for the rules and regulations that are promulgated under them, then the *Auer* deference[388] courts sometimes accord administrative agency when interpreting

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[387] *Sweet Home*, 515 U.S. at 719.

[388] *Auer* deference is named for the case that stands for it, *Auer v. Robbins*, 519 U.S. 452 (1997), in which the Court affirmed the practice of judicial deference to administrative agencies in the interpretation of agencies' own ambiguous regulations. *Auer* has been widely criticized from both the bench and the academy. *E.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2425 (2019) (Gorsuch, J., concurring in the judgment) ("A legion of academics, lower court judges, and Members of this Court—even *Auer*'s author—has called on us to abandon *Auer*.");

agencies' own ambiguous rules and regulations may be of questionable merit, especially where those regulations are to serve as the notice document for the regulated audiences of the underlying statutes. I hope to explore this question, and the role of regulatory notice more generally, in future work.

### *C. Reconsidering Textualism vs. Purposivism*

*In addition to judicial considerations, theories of interpretation like textualism and purposivism should be assessed on the basis of their expectations for statutory audiences.* Examining statutory interpretation methodology in light of statutory audience may also have the effect of reconciling aspects of the disagreement between textualism and purposivism. A focus on statutory audience in interpretation might provide those not fully wedded to either approach with a more flexible yet principled method of selecting between the interpretive methods advocated for under either theory on the basis of the relevant audience of the statutory provision in question. Among textualism's most appealing features is that it engages in common-sense approaches and resorts to tools of interpretation readily available to lay audiences.[389] Purposivism, by contrast, rightly identifies that for the interpretation of a complex statute, limiting interpretive sources to a term's semantic content may be inapt when the statute is considered in light of the broader statutory ambit, context, and enactment history. An audience-oriented approach to statutory interpretation provides a fresh basis to consider each approach's merits and weaknesses, while providing some guiding *ex ante* principles for the selection of methods in close cases, an approach that judges apparently continue to seek.[390]

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In conceptualizing the relationship between judicial legal interpretation and legal audience as one of coordination, I have sought to demonstrate the ways that statutory interpretation theory could better recognize the significant of competing audiences in developing an account of why judges should draw on particular interpretive methods and sources in a given instance of interpretation. Because courts acting as second-order interpreters are themselves always sitting in the position of a disinterested third-party to the

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Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103 (2018) (reviewing arguments against *Auer* deference). Assessing these regulations from the standpoint of audience might provide an alternate basis for skepticism of *Auer* deference, at least when the first-order audience of the regulation is likely to be the public at large, and the regulation serves as the effect notice document.

[389] See *Textualism As Fair Notice*, *supra* note 165.

[390] *See* Kavanaugh, *supra* note 7, at 2121.

adjudication, it seems both probable and laudable that judges should prioritize concerns about coordination, congruence, and compliance when interpreting the law.

While this Chapter has laid out a conceptual framework for important questions about statutory audience, knowledge about first-order audience understanding and application of law is uneven, and work remains to enhance our understanding how nonjudicial audiences engage with statutes and regulations. This will assist in continue to contribute to making statutory interpretation more consistent, principled, and systematic. That research might include surveying members of the public as to discover folk understandings of legal terms and concepts, examining how police officers internalize and enforce criminal laws while on patrol, or providing a case study on how regulators and compliance officers cooperate to develop regulatory compliance regimes.[391] A few scholars in the emerging field of experimental jurisprudence have recently begun to conduct such undertakings, examining approaches that ordinary individuals take when interpreting or identifying common legal terms and concepts.[392]

This Chapter aims to provide a conceptual framework for a larger investigation into how law is interpreted outside of courts, to better understand how first order-interpreters give meaning to law, and to learn more about the scope of lay reliance on the interpretations of influential and official first-order interpreters. Having put forward a theory of statutory audience and first-order statutory interpretation, in future work I hope to shed greater light on how that interpretation works in practice.

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[391] Nick Parrillo's recent empirical examination of the federal agency guidance process is an especially useful example of such a scholarly inquiry. *See* PARRILLO, *supra* note 237.

[392] *See, e.g.*, Ward Farnsworth, Dustin F. Guzior & Anup Malani, *Ambiguity About Ambiguity: An Empirical Inquiry Into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257 (2010) (presenting national survey data on how law students would interpret ambiguous statutes); James A. Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L.J. 957 (2019) (presenting experimental survey data suggesting that the ordinary meaning attributed to common causal phrases by citizen jurors is not the but-for causation attributed by courts); Roseanna Sommers, Commonsense Consent, 129 YALE L.J. ___ (forthcoming 2020) (on file with author).

*References*

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