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### Democratizing Interpretation

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## DEMOCRATIZING INTERPRETATION

ANYA BERNSTEIN\*

### ABSTRACT

*Judges interpreting statutes sometimes seem eager to outsource the work. They quote ordinary speakers to define a statutory term, point to how an audience understands it, or pin it down with interpretive canons. But sometimes conduct that appears to diminish someone's power instead sneakily enhances it. So it is with these forms of interpretive outsourcing. Each seems to constrain judges' authority by handing the reins to someone else, giving interpretation a democratized veneer. But in fact, each funnels power right back to the judge.*

*These outsourcing approaches show a disconnect between the questions judges pose and the methods they use to seek answers. That disconnect allows judges to avoid normative and empirical decisions that are central to interpretation. Rather than taking a stand on which community's speech matters in a democracy, judges pick quotations they like or use empirical techniques like corpus linguistics without acknowledging the underlying choices they entail. Rather than identifying whom statutes address and considering their attitudes, judges speak for an audience to whom they do not listen. Rather than articulating what purposes canons serve, judges choose a rule that appeals.*

*Outsourcing seems to alleviate countermajoritarian difficulties by democratizing interpretation and yielding interpretive certainty. But our common law adjudication system empowers judges to maintain*

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*indeterminacy, creating moments of provisional closure always subject to reinterpretation. Rather than evaluating how well judges resist the authority our system gives them, we should ask how well they justify the way they wield it. Really democratizing interpretation involves both considering methods to yield answers to judges' questions and recognizing any method's limitations. It also means acknowledging that interpretation remains presumptively open to contestation. Such openness and humility is implicit in the requirement of judicial reason-giving, and it democratizes interpretation more than outsourcing can.*

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## I. INTRODUCTION: OUTSOURCING TO DEMOCRATIZE

Judges interpreting statutes sometimes act uncomfortable with the power they wield. Commentators, too, have pushed judges to minimize their interpretive authority.<sup>1</sup> But sometimes an act that seems to diminish someone's power sneakily preserves or even enhances it instead. The sociologist Pierre Bourdieu presents a nice example: a newspaper praises a provincial French mayor for the "thoughtful gesture" of giving a speech in the local dialect.<sup>2</sup> Why is speaking to constituents in their own language so very thoughtful? Only because of an unspoken background hierarchy that ranks dialects lower than standard French.<sup>3</sup> Everyone concerned "tacitly recognize[s] the unwritten law which prescribes [standard] French as the only acceptable language for formal speeches."<sup>4</sup> By appearing to subvert existing power relations, the mayor actually "derive[s] *profit*" from them.<sup>5</sup>

I argue here that American judges (and legal theorists) often do something similar when discussing the interpretation of statutes.<sup>6</sup> They seem to outsource the authority to interpret while actually keeping power firmly in the judge's hands. Judges are subtly pushed to outsource in this way by a legal culture that is suspicious of their power, and that treats statutory interpretation as largely a quest for a single right answer. In contrast, the legal system judges operate

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1. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 22, 40-41 (Amy Gutmann ed., 1997).

2. PIERRE BOURDIEU, LANGUAGE AND SYMBOLIC POWER 68 (John B. Thompson ed., 1991). A recent *New York Times* column provides a quick introduction to Bourdieu's influential work. David Brooks, *Getting Radical About Inequality*, N.Y. TIMES (July 18, 2017), <https://www.nytimes.com/2017/07/18/opinion/inequality-pierre-bourdieu.html?smid-pl-share> [<https://perma.cc/L6Z5-GDJ7>].

3. BOURDIEU, *supra* note 2, at 68.

4. *Id.*

5. *Id.* Bourdieu's mayor thus gets praise for stooping to speak the language of the people precisely because he represents the power that enforces the linguistic hierarchy in the first place. *See id.*

6. I use Supreme Court opinions to exemplify judicial approaches because they are well known and because they set the tone for the judiciary. At the same time, it seems likely that the practices I describe here work differently in different courts. I do not aim to catalogue the full field of possibilities; rather, my goal is to illuminate some influential tendencies.

in facilitates, and even depends on, ambiguity and change. It also vests great power in judges, whether they like it or not.

Subject to these contradictory demands—to hold power but not to wield it, to find answers that are final, yet subject to reinterpretation—judges might understandably attempt to outsource interpretive responsibility to less controversial sources. It seems likely that judges often attempt to outsource in good faith. That does not, however, make these practices any more rational; the point is the effect, not the intent. As I explain below, both outsourcing interpretation and the impression of certainty it supports actually undermine whatever democratic impulses may give rise to them.<sup>7</sup> Asking judges to give up the discretion we thrust on them only promotes that internal contradiction.

Instead of asking judges to give up the authority we give them, we should demand that they exercise that authority well. That requires, first of all, responsible reason-giving. Reason-giving is a central requirement in our system—it is part of how our common-law adjudicative structure supports the rule of law instead of undermining it.<sup>8</sup> But reason-giving can only do its legitimating work if the reasons given are themselves reasonable. In this context, that involves acknowledging, and providing justification for, the ways judges arrive at interpretations. It also involves acknowledging the limits of those approaches and developing them to better suit the inquiry. I suggest that letting method take a central role and recognizing the inevitable limitations of any interpretive approach serves democracy better than imagining an external arbiter of meaning to provide an illusory certainty.

In previous work, I identified two structuring but usually invisible choices on which statutory interpretation depends.<sup>9</sup> First, judges must *select* what they will interpret, such as a statutory term, an entire phrase, or an idea the statute implicates.<sup>10</sup> Judges also have to *situate* the thing they will interpret within a context they themselves construct by drawing, for instance, on the statute,

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7. See *infra* Part V.

8. Mathilde Cohen, *The Rule of Law as the Rule of Reasons*, 96 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE [ARCHIVES PHIL. L. & SOC. PHIL.] 1, 3 (2010) (“[L]egal reason giving is one of the essential properties of the concept of the rule of law, if not *the* essential one.”).

9. See generally Anya Bernstein, *Before Interpretation*, 84 U. CHI. L. REV. 567 (2017).

10. See *id.* at 572-93.

other legal sources from different time periods, general legal principles, nonlegal sources, or their own understandings about how the world works.<sup>11</sup>

Selecting and situating statutory text form the infrastructure for any interpretation.<sup>12</sup> There is thus no way to avoid making crucial normative and methodological choices in legal interpretation. Yet, legal writers often avoid acknowledging such decisions by laying claim to objective, inevitable, or independently legitimate justifications.<sup>13</sup>

In this Article, I focus on three ways that judicial opinions situate statutory text: in ordinary language use, in audiences' understandings of linguistic expression, and in canons setting out interpretive rules. Each approach appears to outsource interpretive power to others—ordinary speakers, legal audiences, and generalized rules—but actually hands it right back to the judge. This process depends on not acknowledging the decisions underlying each approach. This Article illuminates those hidden choices and their implications for interpretation.

I first introduce three common ways judges outsource interpretation. In Part II, I explain how judges appear to hand the interpretive reins over to ordinary speakers. The sources they choose, however, are neither reliable nor relevant indicators of the language use they claim to present. Even more reliable methods such as corpus linguistics require judges to make hard decisions. Whose speech should count? How can we access it? What data helps interpret the nonordinary language of statutes? While appearing to give interpretation over to ordinary speakers, then, judges actually hand it right back to themselves.<sup>14</sup>

Part III considers how judges outsource interpretation to a statute's audience. Textualism instructs judges to interpret a statute as its addressees would understand it.<sup>15</sup> Yet, textualism also precludes identifying who comprises that audience and proscribes recourse to any actual audience's view. This odd mismatch of aspiration and

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11. *See id.* at 593-629.

12. *See supra* notes 10-11 and accompanying text.

13. *See infra* notes 327-28 and accompanying text.

14. *See infra* Part II.

15. *See infra* Part III.

technique rests on a formalist view of lawmaking that stands in considerable tension with our actual legal system.

Part IV considers how judges outsource to canons of interpretation laid down by other legal actors over time. Judges use canons in notoriously inconsistent ways, at least in part because there is no ordering principle for choosing among them. I argue that the real problem is deeper: we have little reflection on, much less agreement about, what ends canons do—or should—serve.<sup>16</sup> Thus, even judges who submit to binding rules must choose how to be bound.

Part V considers what outsourcing accomplishes and what it elides. Judges' claims to neutral, objective sources that yield interpretive certainty obscure the normative and methodological decisions that inevitably go into interpretation, as well as the way that legal pronouncements are inherently subject to reinterpretation.<sup>17</sup> That can be distressing; outsourcing may address that distress by giving judges recourse to something larger than themselves. Yet, our system vests great power in judges to exercise judgment. Insisting that judges abdicate the very authority we also insist they wield makes for a quixotic quest. Though it may be more difficult, facing indeterminacy head on serves our democratic aspirations better.<sup>18</sup>

Part V also suggests that rather than accepting specious claims to certainty, we should assume that interpretation will be subject to

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16. See *infra* Part IV.

17. Utterances with social effects, such as laws, are generally subject to reinterpretation over time. See, e.g., HANNAH ARENDT, *THE HUMAN CONDITION* 25, 197-99 (1958) (describing efficacious, yet contingent, action and speech as that “out of which rises the realm of human affairs”).

18. Critical Legal Studies (CLS) scholars have written extensively on the indeterminacy of legal language, which I take as relatively uncontroversial. See, e.g., DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 133-34 (1997). My exploration of indeterminacy takes a different direction. I focus on those practices I call outsourcing, which others have not discussed. Rather than critiquing ideology, I analyze legal practice, drawing on empirical approaches to communication. Most importantly, CLS scholars generally present the contestable nature of legal language as undermining the law's legitimacy. See, e.g., Kenneth Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283, 283 (1989) (noting that the CLS position that “law is radically indeterminate ... may raise serious doubts about the possibility of legitimate, non-arbitrary legal systems”). In contrast, I see indeterminacy as a condition of possibility for the ongoing work of legitimation that democratic governance involves. See generally Anya Bernstein, *Bureaucratic Speech: Language Choice and Democratic Identity in the Taipei Bureaucracy*, 40 POLAR: POL. & LEGAL ANTHROPOLOGY REV. 28 (2017) (analyzing micropractices of democratic legitimation in a particular cultural context).



debate and scrutinize interpreters' methods. Democratizing interpretation might require judges to more explicitly make and defend the hard decisions that outsourcing obscures. That is just what the requirement of judicial reason-giving implies.<sup>19</sup>

Finally, my critique suggests that the audiences and evaluators of legal interpretation—that is, all of us—should avoid asking how well a given approach fixes a meaning.<sup>20</sup> Instead, we might consider how it affects interpretive power and legal authority in practice. In this, we would only be acknowledging the obvious: that judges are not strangers to the system of legal power in our democracy, but rather form an integral part of it. Since there is no denying that power, it makes sense to evaluate how judges wield and distribute it. Bourdieu calls his mayor's dip into dialect a "strategy of condescension."<sup>21</sup> We should not stand for being condescended to.

## II. THE USES OF LANGUAGE USE

Judges sometimes base assertions about what statutory terms mean on evidence of how others use those terms.<sup>22</sup> They might quote instances of language use to demonstrate what a term means to speakers<sup>23</sup> or cite a dictionary that describes the term's contours.<sup>24</sup> This seems to fix meaning through a normative appeal that itself is based on an empirical claim. The empirical claim is that people—some people—use the term in some particular way. The normative appeal suggests that those people are, in some democratically appropriate way, the relevant ones for determining the meaning in the statute.

Opinions generally leave this claim about factually accurate democratic propriety implicit. But that assumption—that the quotation presents an accurate depiction of democratically relevant language use—is important. It is what renders an opinion's reliance on the

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19. See generally Cohen, *supra* note 8.

20. See *infra* Part VI.

21. BOURDIEU, *supra* note 2, at 68.

22. See *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989).

23. *Id.*

24. See *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 225-26 (1994); *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988); *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610-11 (1987).

language use of others legitimate. Without that assumption, the language use of others would be extraneous to the legal interpretation. Of course, not all opinions that quote the language use of others take it as dispositive evidence of meaning. Opinions sometimes use others' language use to get a sense of what a word might mean, or even to show the absence of a clear answer. In this Article, I am particularly interested in situations where judges present information about language use as though it solved the problem of meaning-making. But even more moderated deployments of language use necessarily posit that a quotation accurately represents relevant language use. Otherwise, why use it?

Looking closer, though, reveals that both the empirical and the normative assumptions are often weak, if not absurd. Opinions routinely do not offer empirically valid presentations of how a given community of speakers uses a legal term: what poses as evidence turns out to be merely instances that comport with judges' intuitions. Contrary to what one would think reading the materials in legislation classes, many opinions do not bother with much evidence at all, simply making assertions about what words mean as a way of interpreting those very words.

The sources judges use, moreover, are often difficult to square with the idea of democratic relevance. Opinions turn to the speech of people who lived long before the relevant statute was enacted, or in places it does not reach; or they show great concern for the speech habits of some groups affected by some statutes, but ignore others affected by other statutes.

If judicial quotation represents the ordinary speech habits of any democratically relevant community, it turns out to be the community of federal judges. This group emerges as independent decision-makers who base judgments on their intuitions about the meaning of linguistic terms. That is certainly one version of democratic legitimacy; in fact, it seems to be one our legal system favors.<sup>25</sup> But it conflicts with the implicit claims of interpretive outsourcing, with much judicial self-presentation, and with a lot of commentary. For all the countermajoritarian hand-wringing, though, judges seem pretty comfortable saying what the law means.<sup>26</sup>

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25. See *infra* Part V.

26. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Some have suggested that more empirical evidence about language use could get us out of this fix.<sup>27</sup> In particular, legal scholars and practitioners have recently become interested in corpus linguistics, a method of linguistic analysis that uses large data sets of language use in speech and print.<sup>28</sup> Such analysis is certainly interesting, and might be productive, in the legal context. But empiricism cannot resolve normative questions. How should we draw the boundaries of the speech community that determines what a word means? How should we understand the relationship between the ordinary speech habits of that community and the quite extraordinary utterances embodied in federal statutes? What is it, exactly, that we look for in the empirical record? As long as they avoid these normative and methodological issues, legal writers basing interpretations in the language use of others will be stuck in the circular logic this Part describes.

#### *A. Quotation, Relevance, and Reliability*

Any reference to how language is used points to a communicative community—the group of users who use language that way. It also presents an empirical claim: an assertion about a fact in the world. So opinions that base interpretations on evidence of how language is used outside the statute make at least implicit claims to both *relevance* and *reliability*. That is, they imply that the speech they draw on represents the community of speakers most relevant to determining the meaning of the statute. And they imply that their assertions about how those speakers use language are accurate in some empirically falsifiable way.

The classic opinions that use this strategy, however, fail pitifully on both counts. Take *Muscarello v. United States*, in which a federal statute mandated prison time for a person who “‘carrie[d] a firearm’ ‘during and in relation to’ a ‘drug trafficking crime.’”<sup>29</sup> Did a defendant who had a gun locked in his glove compartment while selling marijuana “carry” the gun for the purposes of the mandatory

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27. See *infra* notes 74-76.

28. See *infra* notes 74-76.

29. 524 U.S. 125, 126 (1998) (quoting 18 U.S.C. § 924(c)(1) (1994)).

minimum?<sup>30</sup> In concluding that he did, the majority famously quoted, among others, the *King James Bible* and *Moby-Dick* to elucidate how the word “carry” was used in the statute.<sup>31</sup>

Why would the *King James Bible* and *Moby-Dick* be relevant to interpreting the statute? The implication was that the writers of these texts represented ordinary speech when the statute was passed in the 1960s.<sup>32</sup> But just stating that implication indicates how absurd it is.<sup>33</sup> It suggests that the speech communities relevant to understanding a 1960s American statute applied in the 1990s are 1600s Britain and 1850s America. The opinion does not even try to explain why either of these quite different speech communities—much less both—would be democratically relevant to the task. We have enough problems with “dead hand” issues in our own Constitution without making the literati of King James’s court our guides to twentieth-century American statutes.

Nor does *Muscarello* address the fact that these works of literature are, by any measure, not ordinary.<sup>34</sup> They are life changing, genre changing, even language changing. Why, then, would they demonstrate ordinary language use?<sup>35</sup> This is beautiful evidence, but it is not evidence of how normal people spoke.

Classic works that are less glaring in their originality share these evidentiary limitations. In *Whitfield v. United States*, for instance, the Court considered whether “enhanced penalties for anyone who ‘forces any person to accompany him’ in the course of ... fleeing from a bank robbery” applied to a “bank robber [who] forces someone to move with him” only over “substantial” distances, or whether

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30. *Id.* at 127.

31. *See id.* at 129.

32. *See id.*

33. *See* Stephen C. Mouritsen, Note, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 BYU L. REV. 1915, 1940 (“Imagine that I were able to mimic perfectly the English of ... the Bible .... In what context would such speech be considered *ordinary*?”).

34. *See Muscarello*, 524 U.S. at 129.

35. On the unusual qualities of *Moby-Dick*, for example, see Ta-Nehisi Coates, *And Now for a Much Deserved Moment of Insanity*, ATLANTIC (May 26, 2011), <https://www.theatlantic.com/entertainment/archive/2011/05/and-now-for-a-much-deserved-moment-of-insanity/239536/> [<https://perma.cc/LM26-NX5N>] (“This is the greatest paragraph in any work of fiction, at any point, in all of history. And not just human history, but galactic and extra-terrestrial history too.”).

moving from a hallway to an adjoining room would suffice.<sup>36</sup> A short unanimous opinion by Justice Scalia held that the meaning of “accompany” did not depend on the distance covered.<sup>37</sup> The opinion quoted Jane Austen’s *Pride and Prejudice* and Charles Dickens’s *David Copperfield*, noting that “English literature is replete with examples.”<sup>38</sup>

It may well be. But do novels written by British English speakers in 1813 and 1850, respectively, exemplify ordinary American English usage in 1934, when the statute was enacted, or in the 2000s, when it was applied? Just think of the scene where another Austen heroine endures an unwelcome suitor “making violent love to her.”<sup>39</sup> In eighteenth-century England, that phrase meant to “profess[ ] ... love for” someone.<sup>40</sup> You would read a quite different *Emma* if you thought that phrase involved sexual intercourse—a meaning the phrase acquired in America around the time Congress enacted the statute at issue in *Whitfield*.<sup>41</sup> This outsourcing neither picks out a democratically relevant speech community, nor provides a reliable indication of how even irrelevant people spoke.

Opinions thus seek to render legal terms determinate by situating them in the mouths of other speakers, but present evidence that simply cannot demonstrate how relevant speakers spoke. A similar problem pervades citation to dictionaries.<sup>42</sup> The Oxford English

36. 135 S. Ct. 785, 787-88 (2015).

37. *Id.* at 788 (“[D]efining ‘accompany’ as: ‘To go in company with, to go along with.’” (citing *Accompany*, OXFORD ENGLISH DICTIONARY (1st ed. 1933))).

38. *Id.*

39. JANE AUSTEN, *THE ANNOTATED EMMA* 226-29 (David M. Shapard ed., 2012).

40. *Id.* (explaining that at the time Austen wrote, “making violent love to” meant “professing or demonstrating passionate love for,” and that “‘making love’ had no further meaning then”).

41. See *Love*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/110566?redirectedFrom=make+love#eid%201220598243> [<https://perma.cc/539Q-87KA>] (dating the first attestation of “make love” meaning “have sex” to an American text from 1927).

42. James Brudney and Lawrence Baum found that opinions using dictionaries were nonchalant on the question of historical era. 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, 512 (2013). No Justice has “articulate[d] a principled preference between” dictionaries from the time of a statute’s enactment, as opposed to the time of litigation. *Id.* Brudney and Baum note, “the dictionaries they cite often are not contemporaneous with either the enactment date or filing date. This suggests a larger lack of interest by the Court in aligning its dictionary use with factors relevant to individual cases.” *Id.* Stephen Mouritsen has catalogued incorrect assumptions about dictionaries that Supreme Court

Dictionary (OED), for instance, is an enduring favorite.<sup>43</sup> First published in 1928, it started including American usage in its 1972 edition.<sup>44</sup> However, opinions do not distinguish entries drawn from OED editions that include American usage from those that do not.<sup>45</sup> Opinions do not even differentiate American from other uses in a given edition.<sup>46</sup> Why should the language habits of Britons dictate our understanding of an American statute?

Odder still, Supreme Court Justices sometimes claim to demonstrate *ordinary* language use by quoting dictionaries that instruct readers on *correct* use.<sup>47</sup> Indeed, Justice Scalia's well-known antipathy to Webster's Third International Dictionary rests on his preference for prescriptive over descriptive approaches.<sup>48</sup> But *ought* is not *is*. The prescriptions of a few dictionary editors can hardly support an empirical claim about the ordinary usage of a term in

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opinions commonly express or imply, such as that the order of entries indicates frequency of use, and that entries rest on empirically validated research about ordinary speech. See Mouritsen, *supra* note 33, at 1921-41.

43. The Court cited the OED in 20 percent of the cases in Brudney and Baum's sample of 695 majority opinions from the 1986-2010 Supreme Court terms. See Brudney & Baum, *supra* note 42, at 516-17, 529.

44. See *History of the OED*, OXFORD ENGLISH DICTIONARY, <https://public.oed.com/history/> [<https://perma.cc/CEJ4-AXVY>] (explaining that information about English-speaking regions outside Britain, such as "North America, Australia, New Zealand, South Africa, South Asia, and the Caribbean," was not added until 1972).

45. See, e.g., *Bullock v. BankChampaign*, N. A., 569 U.S. 267, 271-73 (2013).

46. See *id.* at 272.

47. See David Foster Wallace, *Tense Present: Democracy, English, and the Wars over Usage*, HARPER'S MAG., Apr. 2001, at 39, 40-58 (discussing the distinction between prescriptive and descriptive dictionaries).

48. Webster's Third New International Dictionary was the first in America to adamantly take the position that "the dictionary's purpose was to report the language, not to prescribe what belonged in it." Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 242 (1999) (footnote omitted). Justice Scalia repeatedly expressed his displeasure with this edition. See, e.g., *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 227 (1994) (discussing a definition given in Webster's Third and concluding, "[i]t is hard to see how that can be"); Antonin Scalia & Bryan A. Garner, *A Note on the Use of Dictionaries*, 16 GREEN BAG 419, 427 (2013) (cautioning readers that Webster's Third should be "used cautiously because of its frequent inclusion of doubtful, slipshod meanings without adequate usage notes"); Transcript of Oral Argument at 13, *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560 (2012) (No. 10-1472), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2011/10-1472.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2011/10-1472.pdf) [<https://perma.cc/D8GS-XKTE>] (saying about Webster's Third, "It's not a very good dictionary").

any speech community—not even the community of dictionary editors.<sup>49</sup>

This kind of outsourcing ignores the way that language use occurs, and changes, through practice in social context. There is no Platonic form to which language use comports. Yet Supreme Court Justices sometimes express an almost touching faith in the realism and accuracy of linguistic terms.<sup>50</sup> In *Rapanos v. United States*, for instance, dredged and fill material in wetlands would fall under the statutory purview of the Clean Water Act if the material flowed downstream to “navigable waters.”<sup>51</sup> Justice Stevens, writing in dissent joined by four Justices, proceeded logically: “the very existence of words like ‘alluvium’ and ‘silt’ in our language ... suggests that at least some fill makes its way downstream.”<sup>52</sup> Nouns, that is, must refer to actual things. Justice Scalia’s plurality opinion snidely rejected this “philological approach,”<sup>53</sup> proposing its own linguistic deduction: “the deposit of *mobile* pollutants,” such as chemicals, into wetlands was “naturally described as an ‘addition ... to’” downstream waters, “while the deposit of *stationary* fill material generally is not.”<sup>54</sup> If we call it *stationary*, in other words, we can rely on it to stay put. The plurality and dissent thus both find words reliable indicators of reality. In contrast, the disenchantments of everyday life teach most of us that not all nouns refer to things that actually exist, and that adjectives sometimes fail to accurately describe their objects.<sup>55</sup>

Justice Scalia’s discussion in *MCI Telecommunications Corp. v. AT&T Co.* displays a related faith in the logical consistency of

49. Even stranger, Justice Scalia apparently had no quarrel with the OED, which has been proudly descriptive from the start. SIMON WINCHESTER, *THE MEANING OF EVERYTHING: THE STORY OF THE OXFORD ENGLISH DICTIONARY* xxiii (2003) (explaining how the first OED drew on millions of “illustrative quotations” submitted by private individuals). Furthermore, “most contemporary dictionaries are characterized as descriptive rather than prescriptive.” Thumma & Kirchmeier, *supra* note 48, at 243.

50. *See, e.g.*, *Rapanos v. United States*, 547 U.S. 715, 723, 743 (2006) (plurality opinion).

51. *See id.* at 744-45 (citing 33 U.S.C. §§ 1344(a), 1362(12) (2000)).

52. *Id.* at 807 (Stevens, J., dissenting).

53. *Id.* at 744 n.11 (plurality opinion).

54. *Id.* (quoting 33 U.S.C. § 1362(12) (2000)).

55. *See, e.g.*, Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 *STAN. L. REV.* 1105, 1106 (2003) (“Nor is how we carve up conceptual space into word meanings completely determined by nature.”).

language.<sup>56</sup> That case concerned whether the statutory term “modify” could include fundamental changes or only minor ones.<sup>57</sup> Most dictionaries said minor, while Webster’s Third and its followers listed both.<sup>58</sup> Justice Scalia, writing for a four Justice majority, rejected that definition because it “*contradict[ed]* one of the meanings contained in virtually all other dictionaries,” and even contradicted an “alternative meaning[] ... in ... Webster’s Third itself.”<sup>59</sup> Webster’s Third, the opinion noted, “define[d] ‘modify’ to connote *both* (specifically) major change *and* (specifically) minor change. It is hard to see how that can be.”<sup>60</sup>

But of course, multivalence is commonplace in language, even at the level of ordinary lexical definition. Lovers *cleave* to one another and no one should *cleave* them apart. You *cut* a tree down before you *cut* it up. Is a parent who *sanctions* bad behavior permissive or, on the contrary, punishing? Indeed, just three years earlier, Justice Scalia himself had joined *Chapman v. United States*, an opinion that relied on dictionary definitions to conclude that LSD *both* “can be released [from its carrier] by dropping the [carrier] into a liquid” *and* “cannot be ... easily separated from” its carrier.<sup>61</sup> It is hard to see why the term “mixture” can encompass two characteristics that are physically incompatible, but “modify” cannot encompass two gradations of a single concept—a common form of multivalence.

Occasionally, Justices appeal to seemingly objective indicia of ordinariness. Seeking to ascertain whether the ordinary meaning of “carry” included a firearm in a glove compartment, the majority in *Muscarello v. United States* “surveyed modern press usage ... by searching computerized newspaper data bases,” sampling from

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56. See generally 512 U.S. 218 (1994).

57. *Id.* at 225.

58. See *id.* at 225-26.

59. *Id.* at 227.

60. *Id.*

61. 500 U.S. 453, 462 (1991). The *Chapman* majority viewed the key issue as whether pure LSD and its carrier constituted a “mixture” under the statute. *Id.* at 461-62. One dictionary defined “mixture” as having two or more components that, “however thoroughly commingled[,] are regarded as retaining a separate existence.” *Id.* at 462 (quoting *Mixture*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1986)). Another said it meant “two substances blended together so that the particles of one are diffused among the particles of the other.” *Id.* (quoting *Mixture*, OXFORD ENGLISH DICTIONARY (2d ed. 1989)). The majority opinion chose both, without mentioning that they contradicted each other. See *id.* at 461-63.



thousands of sentences with “the words ‘carry,’ ‘vehicle,’ and ‘weapon’ (or variations thereof).”<sup>62</sup> This is a bit like asking whether most deaths are caused by terrorist attacks, then counting terrorist attacks rather than deaths.<sup>63</sup> Since “carry” appears in more utterances than “carry” and “vehicle” together do, searching only within the combination cannot tell us how “carry” itself is ordinarily used.<sup>64</sup> Justice Breyer may have located a relevant speech community, but his method could not yield a reliable answer to the question he needed to answer.

A differently flawed stab at empirical verification appeared at oral argument in *Taniguchi v. Kan Pacific Saipan, Ltd.*, which considered whether a statute allowing attorneys’ fees for interpreters applied only to those who worked with verbal expressions, or also to those who worked with written text.<sup>65</sup> Justice Alito had an idea for Mr. Taniguchi’s attorney: “Suppose somebody did a computer search in a database of ... newspaper articles, magazine articles for ... the term ‘interpreter.’”<sup>66</sup> Out of “a thousand hits,” he asked, “[h]ow many ... do you think would use the term ‘interpreter’ to refer to rendering a written document from one language to another?”<sup>67</sup>

The database Justice Alito imagined exists, as do articulated methodologies for performing the kind of search he suggested.<sup>68</sup> But the whole idea of investigating the empirical question that Justice

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62. 524 U.S. 125, 129 (1998).

63. See Mouritsen, *supra* note 33, at 1947 (calling the *Muscarello* majority’s inquiry “fatally flawed”).

64. See Amos Tversky & Daniel Kahneman, *Judgments of and by Representativeness*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 84, 90-98 (Daniel Kahneman et al. eds., 1982) (discussing the “conjunction fallacy,” in which a person intuitively, against the laws of probability, that specific conditions are more probable than a general encompassing condition, or that the co-occurrence of two conditions is more probable than the occurrence of a single one of them). The *Muscarello* majority, for instance, found that “carry” in the sense of convey in a vehicle characterized “perhaps more than one-third” of examples in its skewed sample, but still chose that meaning. 524 U.S. at 129. The majority did not explain why a minority-of-a-minority usage would count as ordinary. See *id.* at 143 (Ginsburg, J., dissenting) (“One is left to wonder what meaning showed up some two-thirds of the time.”).

65. See generally 566 U.S. 560 (2012).

66. Transcript of Oral Argument at 39, *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560 (2012) (No. 10-1472), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2011/10-1472.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2011/10-1472.pdf) [<https://perma.cc/D8GS-XKTE>].

67. *Id.*

68. See *infra* Part II.B.

Alito claimed to be interested in turned out to be kind of a joke. After Mr. Taniguchi's lawyer suggested that the number might be "more than 50 percent of the hits" in the proposed data set, Justice Kagan commented, "[y]ou're, like, daring Justice Alito to go do this now," leading to laughter in the courtroom.<sup>69</sup> When Justice Alito pressed the lawyer, "How much would you bet?," the audience laughed again.<sup>70</sup> "If you bet me enough," Justice Alito continued, "I'll look at a thousand. I'd be surprised if it's 2 percent."<sup>71</sup> The attorney's demurrals—"I couldn't venture a guess, and I would rather not bet you"—led to yet another round of laughter in the courtroom.<sup>72</sup> In this way, Justice Alito couched his intuitions about language use in something that sounded empirical, but was entirely imaginary—and apparently funny to boot.<sup>73</sup>

To sum up, opinions routinely fail to give rational support for their assertions about how speakers use language. They rest interpretive assertions on evidence about speakers who are clearly *not* relevant, for instance by treating England (but not other English-speaking countries such as Canada or Australia) as part of America for statutory purposes, or by drawing on speech that greatly predates the statute. They do not justify treating some speakers rather than others as relevant, and generally do not even acknowledge the implicit claims of relevance that underlie the use of others' language use. And they have little interest in, or competence at, testing the reliability of their claims about how speakers speak.

### *B. Linguistics and Democracy*

What if we could change judges' competence at reliably depicting ordinary language? There are, after all, pretty good methods for determining how at least some speakers commonly speak. The crowdsourcing impulses of the *Muscarello* majority and the *Taniguchi* colloquy gesture toward corpus linguistics, a linguistic

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69. Transcript of Oral Argument, *supra* note 66, at 39.

70. *Id.* at 39-40.

71. *Id.* at 40.

72. *Id.*

73. Native speaker intuitions about things such as word frequency and patterns of word use are notoriously unreliable. See generally Michael Silverstein, *The Limits of Awareness*, in LINGUISTIC ANTHROPOLOGY 382, 382-83 (Alessandro Duranti ed., 2001).

technique that studies what words mean to speakers and what constitutes idiomatic usage.<sup>74</sup> Scholars collect massive databases to analyze the linguistic patterns of things such as naturally occurring conversations and published texts.<sup>75</sup> Linguists track things such as the grammatical structures a word appears in, the other words it tends to appear with, the social situations it tends to crop up in, the kinds of responsive expressions it tends to elicit, and so on. That helps them map the word's place in language and derive the meanings and implications it is likely to carry for speakers.<sup>76</sup>

Corpus linguistics thus applies big-data analytics to delineate the range of pretheoretical, intuitive reactions a word is likely to elicit in a fluent speaker.<sup>77</sup> This method joins others developed by scholars working in sociolinguistics and linguistic anthropology, among other empirical fields.<sup>78</sup>

74. See generally *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560 (2012); *Muscarello v. United States*, 524 U.S. 125 (1998).

75. See GENA R. BENNETT, *USING CORPORA IN THE LANGUAGE LEARNING CLASSROOM: CORPUS LINGUISTICS FOR TEACHERS* 2 (2010) (“A corpus is a large, principled collection of naturally occurring examples of language stored electronically.... [C]orpus linguistics serves to answer two fundamental research questions: (1) What particular patterns are associated with lexical or grammatical features? (2) How do these patterns differ within varieties and registers?”); GRAEME KENNEDY, *AN INTRODUCTION TO CORPUS LINGUISTICS* 3 (1998) (“[T]here are many different kinds of corpora.”); Mouritsen, *supra* note 33, at 1954-70 (explaining the basics of corpus linguistics); see also CHRIS HEFFER, *THE LANGUAGE OF JURY TRIAL: A CORPUS-AIDED ANALYSIS OF LEGAL-LAY DISCOURSE* 59 (2005) (using a trial transcript corpus to analyze how legal professionals communicate with laypeople in trials). See generally Vijay K. Bhatia, Nicola N. Langton & Jane Lung, *Legal Discourse: Opportunities and Threats for Corpus Linguistics*, in 16 *DISCOURSE IN THE PROFESSIONS: PERSPECTIVES FROM CORPUS LINGUISTICS* 203 (Ulla Connor & Thomas A. Upton eds., 2004) (exploring the utility of corpus approaches to differentiating legal discourse from other forms of communication); Lucja Biel, *Corpus-Based Studies of Legal Language for Translation Purposes: Methodological and Practical Potential*, in *RECONCEPTUALIZING LSP: ONLINE PROCEEDINGS OF THE XVII EUROPEAN LSP SYMPOSIUM 2009*, 1 (Carmen Heine & Jan Engberg eds., 2010), [www.asb.dk/fileadmin/www.asb.dk/isek/biel.pdf](http://www.asb.dk/fileadmin/www.asb.dk/isek/biel.pdf) [<https://perma.cc/DK5F-WJLF>].

76. See, e.g., John W. Du Bois, *Discourse and Grammar*, in *THE NEW PSYCHOLOGY OF LANGUAGE: COGNITIVE AND FUNCTIONAL APPROACHES TO LANGUAGE STRUCTURE* 47, 49 (Michael Tomasello ed., 2003).

77. *Id.* (“The real story of discourse and grammar research is that there is a place for pattern, and generalization, in both domains. Discourse and grammar each claim a distinctive type of patterning, neither of which is reducible to the other. And yet ... grammar and discourse interact with and influence each other in profound ways ... so that in real life neither can even be accessed, not to mention explained, without reference to the other.”).

78. See generally PAUL BAKER, *SOCIOLINGUISTICS AND CORPUS LINGUISTICS* (2010).

One thing to note: judicial opinions adverting to ordinary language use overwhelmingly convey the impression that it is fairly easy to determine what ordinary language use consists of.<sup>79</sup> The existence of several branches of scholarly inquiry built around complex methodologies deployed to determine what constitutes ordinary usage should at least suggest that this is not the case. Deciding how ordinary people usually use language is often not simple, obvious, or conclusive—not something you can ascertain by quoting a dictionary or a favorite novel.<sup>80</sup>

### 1. *Speech Communities and Their Habits*

Recently, several scholars and judges have proposed incorporating corpus linguistics into legal interpretation.<sup>81</sup> The proposal has sparked some lively discussion.<sup>82</sup> Several judicial opinions already reflect or discuss this impulse.<sup>83</sup> Since judges make claims about the ordinary usage of statutory terms anyway, it seems reasonable to want to give those assertions some empirical grounding. But, like any analytical modality, corpus linguistics is not a transparent revelation of objective truth. It requires making decisions that, in the legal context, are inevitably normative.

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79. See *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 227 (1994).

80. See, e.g., Lawrence M. Solan, *The New Textualists' New Text*, 38 LOY. L.A. L. REV. 2027, 2059 (2005) (noting the possible utility of corpus linguistics to statutory interpretation). Solan also notes that courts are “bankrupt ... when they must actually decide just what makes ordinary meaning ordinary.” *Id.* at 2053.

81. See generally Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788 (2018).

82. Carissa Hessick's recent posts about corpus linguistics to a legal scholarship discussion website, for instance, inspired sustained discussion in the comments. See Carissa Byrne Hessick, *Corpus Linguistics Re-Redux*, PRAWFSBLAWG (Sept. 25, 2017, 9:56 AM), prawfsblawg.blogs.com/prawfsblawg/2017/09/corpus-linguistics-re-redux.html [https://perma.cc/8LRV-CZUX] (discussing the issue and linking to other posts with separate comments); see also Ben Zimmer, *The Corpus in the Court: 'Like Lexis on Steroids'*, ATLANTIC (Mar. 4, 2011), https://www.theatlantic.com/national/archive/2011/03/the-corpus-in-the-court-like-lexis-on-steroids/72054/ [https://perma.cc/7EXZ-9CWC]. See generally Carissa Byrne Hessick, *Corpus Linguistics and the Criminal Law*, 2017 BYU L. REV. 1503 [hereinafter *Corpus Linguistics*].

83. For instance, a concurring opinion in a Utah Supreme Court case undertook a corpus linguistics analysis of a key term, which both the majority opinion and another concurrence discussed at some length. *Utah v. Rasabout*, 356 P.3d 1258, 1264-66, 1271 (Utah 2015).

One clear difficulty with using corpus linguistics in statutory interpretation is its uncertain place within the legal landscape.<sup>84</sup> Like any social science, corpus linguistics speaks in terms of trends and tendencies, resisting the definitive, decisive, and exclusive results favored by the adversarial system.<sup>85</sup> Usually, such evidence is presented by expert witnesses, or addressed by amicus briefs.<sup>86</sup> In contrast, at least one judge has undertaken his own corpus linguistic analysis in his opinions.<sup>87</sup>

Does the empirical analysis of language use for statutory interpretation differ from other kinds of empirical inquiry? We would not expect, for instance, the Justices in *Chapman v. United States* to do their own chemical analysis of LSD,<sup>88</sup> or the Justices deciding *Rapanos v. United States* to perform hydrological studies.<sup>89</sup> The idea that judges should do their own empirical investigation of language use seems to rest on an assumption that language patterns are pretty easy to figure out and generally available to competent speakers—an assumption very similar to the criticism of judicial intuitions that has prompted the promotion of corpus linguistics to begin with.

Or perhaps since statutory meaning is the traditional province of the judiciary, determining what a word means in a statute differs fundamentally from determining how easy it is to separate LSD from its carrier. That certainly comports with the American tradition of common law style interpretation of statutes. But it is hard to square with claims stating that statutory interpreters should use corpus linguistics because it provides an objective—that is, a *non-judicial*—understanding of the empirical realities of language. If judges have particular authority over statutory language of a sort that they do not have over other empirical facts, then outsourcing decision-making to a data set would seem to defeat it. And if judges

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84. See *supra* notes 81-83.

85. See generally THE ROLE OF SOCIAL SCIENCE IN LAW (Elizabeth Mertz ed., 2008) (collecting articles that explore the troubled relationship between social science research and legal discourse and process).

86. See Ronald Roesch et al., *Social Science and the Courts*, 15 L. & HUM. BEHAV. 1, 1-2 (1991).

87. See, e.g., *Rasabout*, 356 P.3d at 1274-76 (Lee, J., concurring in part and concurring in the judgment).

88. See 500 U.S. 453, 462 (1991).

89. See generally 547 U.S. 715 (2006).

are supposed to figure out empirical facts about language use rather than use their particular authority, then it is hard to distinguish that kind of empiricism from empiricism regarding drug composition and water flow.

As Carissa Byrne Hessick has argued, the sticking point seems to be the issue of judgment.<sup>90</sup> The corpus may contain objective, empirical data, but any *analysis* of that data requires people to make decisions.<sup>91</sup> Most basically, they must choose which words, and combinations of words, to search for. Even such seemingly simple choices can make a big difference. In the *Muscarello* situation, searching for all instances of “carry” yields a different result than searching for all instances of “carry” combined with “vehicle.”<sup>92</sup> What it means to “harbor” an undocumented alien may look different if we search only references to people harboring other people, as opposed to harboring feelings and other intangible things.<sup>93</sup> How should a judge decide which to use?

Moreover, decisions are not limited to word choice. Corpora may include naturally occurring conversations, popular publications, specialized publications, and other contents. How should a judge decide which combination provides the best evidence of the relevant language use? Some corpora include information about the pragmatic

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90. See generally *Corpus Linguistics*, *supra* note 82.

91. See *id.* at 1519 (noting the “centrality of human decision making in corpus linguistics analysis”).

92. See *Muscarello v. United States*, 524 U.S. 125, 128 (1998).

93. *Corpus Linguistics*, *supra* note 82, at 1519-21 (discussing *United States v. Costello*, 666 F.3d 1040 (7th Cir. 2012)). In *Costello*, Judge Posner searched Google for references to people harboring other people. *Id.* at 1520. Scholars criticized that choice because it failed to include the harboring of intangible objects. *Id.* The fact that there are options to decide between demonstrates that the key steps in a corpus analysis—deciding how to do a search and how to interpret it—depend on human judgment, not on the empirical data set. See *id.* at 1520-21. Although only a couple of judicial opinions have attempted corpus linguistic analysis, judges have already managed to reach “precisely opposite conclusions about the ‘ordinary meaning’ of a statutory term based on the same corpus data.” Carissa Byrne Hessick, *More on Corpus Linguistics and the Criminal Law*, PRAWFSBLAWG (Sept. 11, 2017, 1:01 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/09/more-on-corpus-linguistics-and-the-criminal-law.html> [<https://perma.cc/RP5H-2JDQ>] (discussing *People v. Harris*, 885 N.W.2d 832 (Mich. 2016)). In *People v. Harris*, the majority concluded that a major corpus of American usage showed that the term “information” included both truthful and false assertions. *People v. Harris*, 885 N.W.2d 832, 840 (Mich. 2016). The dissent reached the opposite conclusion using the same corpus. See *id.* at 845 (Markman, J., concurring in part and dissenting in part).

context in which language use took place. The same term or phrase, of course, can mean different things depending on that context.<sup>94</sup> We might agree that the semantic definition of water includes its being wet, but the assertion that “water is wet” can mean different things in different situations. Given as an answer to a chemistry teacher’s question, the assertion may receive a reprimand. Spoken by a grandfather to his grandchild at the beach, it might instead elicit giggles. The semantic quality of the utterance, so seemingly transparent in isolation, turns out to depend on the social relations, genres of appropriate conduct, and other circumstances that surround its occurrence.

Thus, whether a conversation takes place at a dinner table or in a classroom, in a forest or on a city street, can affect how people speak, since different situations may be characterized by different usages. How should this figure into a legal determination? Should we look for corpus data that occurs in situations that seem relevant to a particular statutory determination? What might those be, and how should we decide? Should we exclude media sources such as newspapers from the data set because they present edited utterances with no information about the context in which they were produced or understood? Or should we instead rely on them because they are so broadly read?

These questions are difficult, but they are just the beginning. Using corpus linguistics responsibly—rather than as a cover—would require judges to make the kinds of difficult decisions this Part shows them avoiding. For one thing, they would have to decide what they meant by ordinary meaning. As others have noted, opinions use the term “ordinary meaning” to refer to a range of things.<sup>95</sup> It may refer to any meaning that is allowable—that people would recognize and respond to appropriately—or it may indicate an “exclusive” meaning that rules out others.<sup>96</sup> It may refer to a usage

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94. See, e.g., Michael Silverstein, *Cognitive Implications of a Referential Hierarchy*, in *SOCIAL AND FUNCTIONAL APPROACHES TO LANGUAGE AND THOUGHT* 125, 129-30 (Maya Hickmann ed., 1987) (arguing that reference and predication “is a special case” of the “semiotic-functional” aspect of language use, which involves pragmatic situation of language use as “a form of social action, a meaning-dependent and meaning-generating activity”).

95. Lee & Mouritsen, *supra* note 81, at 796-98.

96. *Id.* at 800-01.

that is “common,” or even the “most frequent” one.<sup>97</sup> Alternatively, ordinariness may be a measure of the “prototypical” meanings that set the terms for normal and outlier versions of a particular expression.<sup>98</sup> Or it may refer to what most speakers would *say* a term meant most of the time, even if they were, statistically speaking, wrong—something like popular opinion about prototypicality. There is so little consensus on what ordinary meaning is that judges sometimes invoke different understandings of ordinariness within the same opinion.<sup>99</sup>

For an empirical methodology to help organize judicial decision-making, judges would need to settle on some hierarchy among those uses. That hierarchy, in turn, would require some normative justification. Arguments from democratic accountability can support each of the understandings judges display.<sup>100</sup> It is well established, for instance, that native speakers generally have weak intuitions about the frequency with which particular words are used, or the frequency with which a word is used in some particular way as opposed to some other.<sup>101</sup> This weakness is reminiscent of, and may be related to, broader psychological tendencies: people often overrate the frequency or likelihood of notable, unpleasant, and recent occurrences.<sup>102</sup> People also tend to be more attentive to some linguistic *functions* than others. Speakers tend to be more aware of those aspects of language that refer to, and make assertions about, objects in the world. They are generally less aware of structuring aspects of language, such as syntax. And they are even less conscious of the systematic *effects* language has on social relations and on the meaning-making process.<sup>103</sup>

To give a simple example, when hearing a statement such as “that chocolate is delicious,” listeners would generally be likely to

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97. *Id.*

98. *Id.* at 801-02.

99. *See id.* at 803-04 (noting that the *Muscarello* majority implies that ordinary meaning is determined by most frequent meaning at some points, but by common meaning at others, while the dissent uses the notion both as possible or acceptable and as most frequent meaning).

100. *See infra* note 101-03 and accompanying text.

101. *See supra* notes 66-72.

102. *See, e.g.*, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982) (collecting articles).

103. *See* Silverstein, *supra* note 73, at 382.



notice the noun “chocolate” and the predication about its quality. They would generally be less attentive to the way the deictic “that” assumes, and thereby constructs, joint attention on an object by speaker and addressee.<sup>104</sup> Similarly, speakers may tend to be more aware of the word “that” used in this deictic sense, to point to an object in the world, but neglect its more structural role in phrases such as “I think that” or “he said that,” irrespective of which usage occurs more frequently. In this sense, simple statistical frequency may indicate one form of ordinariness, yet not express what most people think a word means most of the time. Pragmatically, “that chocolate is delicious” might be an expression of gratitude, an offer, or a suggestion, depending on whether one is guest, host, or co-shopper.

In sum, what counts as the relevant kind of ordinary language for purposes of legal interpretation is not at all clear. It is not even clear whether “ordinary” should always mean the same thing. Corpus linguistics can hardly help judges figure out what ordinary language is if the concept of ordinariness itself is up for grabs.

And the decisions do not stop there. Using corpus linguistics responsibly would further require judges to decide on relevant groups of language *users*. As the preceding section implied, though, determining what makes a speech community relevant can be difficult. Think back to *Muscarello*<sup>105</sup> and the *King James Bible*.<sup>106</sup> Why does it seem relatively obvious that the seventeenth century Britons who produced the *King James Bible* do not form a relevant speech community for assessing ordinary American language in the 1960s? Well, those seventeenth-century translators are not affected by the statute and do not form an audience for it—we cannot say that the statute ever addressed them in any meaningful way. They had, and could have, no role in electing those who enacted the statute, nor, of course, did they enact it themselves.

Working through what makes a speech community *irrelevant* illuminates some versions of relevance that judges would need to

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104. See, e.g., Bernard Weissbourd & Elizabeth Mertz, *Rule-Centrism Versus Legal Creativity: The Skewing of Legal Ideology Through Language*, 19 L. & SOC'Y REV. 623, 626-27 (1985).

105. See generally *Muscarello v. United States*, 524 U.S. 125 (1998).

106. See generally KING JAMES BIBLE.

choose among. One option: the relevant speech community could be the one directly affected or addressed by the statute. For instance, Justice Alito's majority opinion in *Taniguchi*, written for six Justices, left off the imaginary corpus discussed at oral argument and instead looked to the "relevant professional literature" addressed to translators and interpreters.<sup>107</sup>

But are professional translators and interpreters the relevant communicative community? The fee-shifting statute, after all, was *about* translators and interpreters, but it *regulated* the conduct of judges: legal professionals who were not addressed by the technical literature the majority cited.<sup>108</sup> A dog ordinance may be *about* dogs, but we would not look to dogs to define it. Deciding which community matters can be contentious.

The *Taniguchi* majority suggests that the relevant speech community for statutory interpretation is not the one whose conduct is regulated by the law, but the one that suffers the law's practical effects.<sup>109</sup> If that is the case, though, then judges might consider other candidates for affected speech communities. It is well known, for instance, that African Americans are dramatically overrepresented in drug arrests, convictions, and incarceration, "[r]elative to their numbers in [both] the general population and among drug offenders."<sup>110</sup> African Americans are thus particularly affected by drug-related criminal and sentencing statutes, kind of like interpreters were particularly affected by the fee-shifting statute in *Taniguchi*.<sup>111</sup> African Americans are also more likely to speak African American Vernacular English than members of other racialized groups,<sup>112</sup>

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107. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 571 (2012).

108. *Id.* at 576-77 (Ginsburg, J., dissenting).

109. *See generally id.*

110. Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 257 (2009). In 2012, "more black inmates were sentenced for drug offenses than inmates of other races or Hispanic origin." E. ANN CARSON & DANIELA GOLINELLI, PRISONERS IN 2012—ADVANCE COUNTS 11 (2013), <https://www.bjs.gov/content/pub/pdf/p12ac.pdf> [<https://perma.cc/22JJ-VKVD>]. However, African Americans comprised only around 13.6 percent of the total population. SONYA RASTOGI ET AL., THE BLACK POPULATION: 2010 3 (2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf> [<https://perma.cc/JD2J-3BK2>].

111. *See generally Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560 (2012).

112. *See, e.g.*, JOHN R. RICKFORD, AFRICAN AMERICAN VERNACULAR ENGLISH: FEATURES, EVOLUTION, EDUCATIONAL IMPLICATIONS 129-30 (1999).

kind of like interpreters are more likely to employ the technical terminology of interpretation than other professional groups.

The *Taniguchi* majority's approach would thus suggest that judges should interpret drug-related criminal statutes with reference to African American Vernacular English. That may seem absurd. But why is it more absurd than interpreting an attorney fee-shifting statute with reference to the technical terminology of interpreters? As with Bourdieu's mayor, it may only seem strange against the "tacitly recognize[d] ... unwritten law" that white-collar professionals have a higher status in court than drug-crime defendant speakers of African American Vernacular English.<sup>113</sup>

Additionally, a given statute can affect and address multiple communities. Many, if not most, statutes address the conduct of administrative agencies.<sup>114</sup> The Telemarketing and Consumer Fraud and Abuse Prevention Act does not itself regulate telemarketers; it instructs the Federal Trade Commission (FTC) to promulgate rules "prohibiting deceptive ... and ... abusive telemarketing acts."<sup>115</sup> The agency's rules and standards then affect private parties. Which is the relevant speech community, FTC employees or telemarketers?<sup>116</sup> Under the *Chevron* doctrine, an agency's reasonable usage holds if the term is multivalent.<sup>117</sup> But which speech community should judges look to when determining whether a term is multivalent? If we see agencies as part of the law-making apparatus that imposes strictures on private parties, it may make sense to ask how private parties understand the statutory terms. But if we see agencies as a separate part of government whose own conduct is regulated by the statutory command to formulate rules, it may make more sense to ask how administrators would use a statutory term.

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113. BOURDIEU, *supra* note 2, at 68.

114. Cf. MAEVE P. CAREY, CONG. RESEARCH SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *FEDERAL REGISTER* 2 (2016).

115. Telemarketing and Consumer Fraud and Abuse Prevention Act, Pub. L. No. 103-297, § 3(a)(1), 108 Stat. 1545, 1545 (1994) (codified at 15 U.S.C. § 6102 (2012)).

116. See, e.g., Peter M. Tiersma, *A Message in a Bottle: Text, Autonomy, and Statutory Interpretation*, 76 TUL. L. REV. 431, 433 (2001) (arguing that statutory interpreters should modify their approach depending on the kind of audience a statute addresses).

117. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984); see also Anya Bernstein, *Differentiating Deference*, 33 YALE J. ON REG. 1, 5-6 (2016).

Agencies also often participate in drafting statutes addressing the agencies themselves.<sup>118</sup> As Jarrod Shobe's research shows, agency personnel often care a lot about the terminology of the statutes they implement: "each agency has its own terms of art that have very specific meanings to the agency,"<sup>119</sup> and agency employees strive to ensure that the congressional staffers who draft statutes use them appropriately.<sup>120</sup> As an interviewee told Shobe, "[w]e have a whole language relevant to our agency's statutes.... We use those terms consistently across time. We are very concerned about that and monitor it closely" when advising Congress on legislation.<sup>121</sup> Moreover, the same terms "frequently have very different meanings across agencies," and even across components of the same department.<sup>122</sup> How should a judge incorporate these realities into a corpus search? Should corpus inquiries exclude popular media and other nonspecialized content, focusing instead on usage within the administrative state?

In short, if judges want to base interpretation on empirical indicia of ordinary language, they need to decide what empirical indicia to look for, what they mean by "ordinary," and which speech community counts. The answers are often not obvious. They always imply a normative stand.<sup>123</sup> An empirically robust approach to alleviating the indeterminacy of linguistic meaning may look attractive, but it cannot resolve the essentially normative issues it raises: what kinds of meaning, and what kinds of speakers, matter?<sup>124</sup>

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118. See, e.g., Christopher J. Walker, *Legislating in the Shadows*, 165 U. PENN. L. REV. 1377, 1378-79, 1382 (2017); Christopher J. Walker, *Lawmaking Within Federal Agencies and Without Judicial Review*, 32 J. LAND USE & ENVTL. L. 551, 552, 557-59 (2017); Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1012 (2015).

119. Jarrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO. WASH. L. REV. 451, 518 (2017).

120. *Id.* at 518-20.

121. *Id.* at 518-19 (footnote omitted).

122. *Id.* at 519.

123. See *supra* Part II.B.1.

124. See, e.g., Lawrence M. Solan, *We Are All Translators Now: Constitutional Analysis as Translation*, 28 COMP. LEGLINGUISTICS 7, 17 (2016), <https://pressto.amu.edu.pl/index.php/cl/article/view/7430/7463> [<https://perma.cc/S664-89YR>] ("The corpus ... can ... provide distributional information about word usage.... It cannot tell the legal analyst what to do with that information." (citation omitted)).

## 2. *Ordinary Versus Statutory*

Perhaps we could avoid some of these difficulties by looking on average, to the entire society that statutes rule. This would throw some current judicial practices into doubt: it would put *Taniguchi*'s concern with subnational speech communities off limits and preclude using the OED's British-English entries to convene supranational ones.<sup>125</sup> But it would have the benefit of justifying judges' reluctance to make other group distinctions. One could posit that a widely recognized standard speech pattern should serve as the reference point for interpreting statutes that apply nationwide. Opinions that draw on national-level publications to discern ordinary speech, for example, comport with this approach. Yet this choice raises its own empirical and normative questions. After all, statutory language is not representative of, or even similar to, the statistically frequent language patterns that can be derived from the corpora of naturally occurring conversations, popular publications, and so on. On the contrary, it is strikingly unusual in its semantics, syntax, and pragmatics.

Semantically, statutes create terminology all the time, not through naturally occurring variation and gradual uptake, but by fiat. They are full of speech acts that declare things such as, from now on, a state-based marketplace for private insurance coverage will be called an "American Health Benefit Exchange," or "Exchange" for short.<sup>126</sup> Ordinary language—in the sense of statistically frequent patterns found in the kinds of sources corpus linguistics uses—would give no reason to think that in 2010, "Exchange" meant a health insurance marketplace. And no ordinary speaker would have the power to create such a meaning out of whole cloth. Yet, there it is.

Even when statutes do not invent terminology, they are intertextually enmeshed in wider webs of legal terms that are themselves far from ordinary. For instance, the doctrine of *res judicata* prohibits relitigating the "same" claim, but "same" includes quite distinct claims that could and should have been brought in the first

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125. See *Taniguchi v. Kan Pac. Saipan Ltd.*, 566 U.S. 560, 568-71 (2012).

126. See *American Health Benefit Exchanges*, 42 U.S.C. § 18031(b)(1) (2012).

litigation.<sup>127</sup> It prohibits relitigating an issue that has been determined in a final judgment on the merits, but that includes resolutions that lack final judgments on the merits, such as dismissals for failure to state a claim.<sup>128</sup>

This might seem like a simple problem to solve: everyone agrees that specialized legal terminology should form part of the data set through which statutory meaning is interpreted. However, it is not as simple as it seems. There is no consensus on how to determine when a word is just a word, and when it is a legal term of art. The technical legal meaning of “lawful presence” in immigration law may be something like temporary authorization to stay in the United States even in the absence of a legal right, but a judge still has to decide whether to read it that way or instead choose the less technical interpretation of having a legal right to stay.<sup>129</sup> The term “take” might have a long common law history but also be defined in the statute in which it appears. A judge must decide which to use.<sup>130</sup>

Syntactically, of course, statutes are nothing short of bizarre.

Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm ... shall ... be sentenced to a term of imprisonment of not less than 5 years.<sup>131</sup>

Could you say that at a cocktail party without “people look[ing] at you funny”?<sup>132</sup> And this—the provision at issue in *Muscarello*—is a comparatively simple example, with no cross-references or highly

127. *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

128. *Stewart v. U.S. Bancorp*, 297 F.3d 953, 957 (9th Cir. 2002).

129. *See Bernstein*, *supra* note 9, at 622-23 (discussing the Supreme Court oral argument in *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam)).

130. *See id.* at 574-78, 596-98 (discussing *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Or.*, 515 U.S. 687 (1995)).

131. 18 U.S.C. § 924(c)(1)(A) (2012).

132. *See Johnson v. United States*, 529 U.S. 694, 718 (2000) (Scalia, J., dissenting) (“[T]he acid test of whether a word can reasonably bear a particular meaning is whether you could use the word in that sense at a cocktail party without having people look at you funny.”).

technical terms.<sup>133</sup> Statutes are so highly nonordinary that they are famous for being impossible to read. Even *legislators* read section summaries to help them decipher statutory text.<sup>134</sup> Using corpus linguistics, judges would use statistically frequent speech patterns to interpret utterances that are universally acknowledged not to employ statistically frequent speech patterns.

Pragmatically, statutes are, if anything, even more exceptional. Performative utterances—those that create the state of affairs they describe—are common in everyday life, but statutes take performativity to a whole new level. They constantly create new states of affairs simply by being enacted. We do not usually have vociferous national debates about the appropriate posture for listening to someone sing, but once a statute makes the Star Spangled Banner the national anthem,<sup>135</sup> that kind of debate makes more sense. The world has changed because a statute says it has. Statutes' pragmatic *effects* are thus heightened from those of ordinary speech.

Further, the way statutes are produced—the pragmatic *conditions* for their existence—is not just unusual, it is not even remotely similar to any process that yields statistically frequent speech. What ordinary utterance requires the majority vote of two multimember representative institutions, each with its own complicated authorization structures and rules for producing such texts, plus the agreement of a nationally elected executive officer?<sup>136</sup>

From an empirical perspective, statistically frequent speech patterns give quite limited information about highly extraordinary speech. And from a normative perspective, it is not clear how imputing unrelated speech habits to statutory utterances furthers the values of representative democracy. It's almost as strange as using the *King James Bible*.

In the end, the speech community that judicial opinions usually rely on turns out to be, roughly, a community of “speakers like us”:

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133. See 18 U.S.C. § 924(c)(1)(A).

134. 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, 209 (2017) (“[O]ne of the most important pieces of legislative history to most congressional insiders and legislation experts is the ‘section-by-section’ summary that accompanies most statutes.... [S]easoned statutory players *start* with the [summary] ... before turning to ... the statutory text.”).

135. 36 U.S.C. § 301 (2012).

136. See U.S. CONST. art. I, § 7, cl. 2.

people who read classic literary works and national newspapers, who find specialized jargon more legitimate than the argot of the less educated or less powerful, who consult the OED when in doubt. On this reading, some of the weirder quotations I have discussed may make more sense. The *King James Bible* and Jane Austen do not present *speakers* who are relevant to statutory interpretation, but they are read by the kind of *readers* who are: the highly educated, well-read, relatively formal speakers we would expect to occupy the federal bench.

References to ordinary language may be meant to overcome fears of countermajoritarian usurpation and return interpretive authority to the hands of the people. Nonetheless, they turn out to capture the ordinary language intuitions of *judges*—not the statistically frequent patterns of statistically frequent speech. Appearing to hand power over to ordinary people, this approach sneakily reroutes that power right back to judges themselves.

One may view judges as quite properly involved in democratic lawmaking. As I discuss in Part V, this view is implicit in the common law model of adjudication, and forms part of the Anglo-American legal tradition. On this view, factors such as the formalized and deliberative processes of adjudication; the requirement of reasoning; and the ongoing development of legal interpretations over time by a range of people in a range of situations all bring in the kind of participation and openness that legitimizes judges' interpretation of law.<sup>137</sup> There may, in other words, be good reasons for judges interpreting statutory terms to turn to speakers like themselves. But instead of explaining and defending judges' role in the interpretive process, the outsourcing I describe obscures it by pretending to rely on others. The result: outsourcing that magnanimously hands power to those who already hold it.

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137. Matthew Steilen, *On the Place of Judge-Made Law in a Government of Laws*, 3 CRITICAL ANALYSIS L. 243, 259-60 (2016) (“[A]t least some eighteenth-century Americans thought of judge-made law ... [as] essential to republican government” because the “solemn proceedings” of “forensic litigation” made it “possible for a community in court to freely give the law to itself” in a reasoned way removed from the arbitrariness or self-interest of legislative politics); see also David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996) (“The common law approach restrains judges.”). See generally EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (2013) (describing how legal understandings in different areas of law change over the course of a series of cases decided over many years).



## III. METHOD CONTRA THEORY

The preceding Part describes an outsourcing approach that cuts across Supreme Court Justices and does not seem to be associated with any particular theoretical orientation. A related kind of outsourcing, though, is closely connected to textualism, which asks judges to interpret statutory terms as a reasonable reader would.<sup>138</sup> That appears to locate meaning-making power not in the judge but in the interaction between the legislature and its audience. But textualism then declines to let either legislatures or audiences speak for themselves. Instead, it leaves the judge to speak for both. Textualism thus presents an aspiration to diminish judicial power along with a technique that bolsters it.

For Justice Scalia, textualism's most prominent exponent, the legitimacy of judicial interpretation depended on restraining judicial discretion.<sup>139</sup> As John Manning, another prominent proponent, has explained, Justice Scalia saw the judicial role as vitally circumscribed by the way "our system ... makes the democratically accountable branches primarily responsible for lawmaking."<sup>140</sup> Statutory interpretation theory had to respond to the likelihood that judges would "make an end run around the democratic process by exercising common law discretion 'to *make* the law."<sup>141</sup> Judicial legitimacy rested on the restriction of judicial power: Justice Scalia's "anti-discretion principle was an independent value that swept more broadly than his core commitments to" any particular interpretive approach.<sup>142</sup>

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138. See, e.g., *In re Estate of Whittington*, 409 S.W.3d 666, 670 (Tex. App. 2013).

139. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 17-18 (1997).

140. John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 748 (2017).

141. *Id.* (quoting SCALIA, *supra* note 139, at 6, 10).

142. *Id.* at 750. Strikingly, Manning concedes that this underlying justification for textualism itself has no textual basis. See *id.* ("[E]ven though Justice Scalia's anti-discretion principle is ultimately a theory of judicial power, he does not focus his justification upon any ... detailed account of Article III's original understanding."); see also *id.* at 755 ("Justice Scalia's anti-discretion principle did not necessarily derive from his interpretation of a particular governing text."). You might think that the wholly discretionary creation of a discretion-limiting principle might throw the entire enterprise in doubt, but it doesn't seem to bother Manning any more than it did Justice Scalia. See generally *id.*

In keeping with that antidiscretionary ethos, textualism requires judges to “ground decisions in some form of constraint external to the judges’ own preferences.”<sup>143</sup> For textualists, this distinguishes the modern judge who interprets statutes from “the common law judge[,]” whose “job is really that of ‘playing king—devising, out of the brilliance of one’s own mind, those laws that ought to govern.’”<sup>144</sup> Here, I first take a closer look at how this purported constraint works, then consider what it might mean to play king in a democracy.

### A. *Who Speaks for the People?*

How does textualism express its antidiscretion principle? A judge stays faithful to the law-making process by focusing closely on the statute’s text—the only thing enacted into law. Asking what legislators understood the statute to accomplish or mean might allow views that were *not* enacted as law to determine interpretation, in a kind of *ultra vires* legislation.<sup>145</sup> Plus, the judge could disturb legislative “deals,” the quiet compromises legislators made negotiating the statute, which result in the finished product but might not be clear from records of the enactment process.<sup>146</sup>

Congress, here, is a speaker who speaks once per statute: its voice crystalized in the text, it can offer no metalinguistic gloss on it. Sources specific to the enactment process are thus not legitimate guides to statutory text for textualist interpretation.

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143. *Id.* at 750.

144. *Id.* at 751 (quoting SCALIA, *supra* note 139, at 7 (1997)).

145. See, e.g., Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV. 81, 82 (2017) (“Intents are irrelevant even if discernable ... because our Constitution provides for the enactment and approval of texts, not of intents.”).

146. For instance, statutory provisions “may reflect unrecorded compromises among interest groups, unknowable strategic behavior, or even an implicit legislative decision to forgo costly bargaining over greater textual precision,” that textualists are loathe to probe or disturb. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003). Because these details will often not be available to a judge, “[t]extualists ... believe that the only safe course for a faithful agent is to enforce the clear terms of the statutes that have emerged from that process.” *Id.*; see also Manning, *supra* note 140, at 756 (“Justice Scalia contested [purposivism] primarily on the legislative process ground that if a judge elevates a statute’s purpose over its enacted text, he or she might unknowingly disrupt awkward, behind-the-scenes compromises ... essential to the law’s enactment.”).

Instead of looking to the particular people who produced the statutory utterance, textualists talk about the general populace that comprises its audience. “Textualists give primacy to ... evidence about the way a reasonable person conversant with relevant social and linguistic practices would have used the words,” wrote Manning.<sup>147</sup> “[W]ords mean what they conveyed to reasonable people at the time they were written,”<sup>148</sup> agreed Justice Scalia, insofar as they fit in the context of the “*corpus juris*,” the background of law against which any statute is enacted.<sup>149</sup> Judge Frank Easterbrook, another textualist adherent, agrees: “the significance of an expression depends on how the interpretive community alive at the time of the text’s adoption understood those words.”<sup>150</sup> For textualists, interpretation is grounded in audience understanding.

Textualism thus lays claim to a legitimacy based in popular support: it seeks to base its interpretations of statutory text in the ways that ordinary people would realistically have read them. But just who are these “reasonable [people] conversant with relevant social and linguistic practices”?<sup>151</sup> In keeping with its preference for generality over specificity, textualism never specifies a particular community. How, then, can a judge ascertain how a reasonable audience would have understood a text? Textualism never says.

One might explain this reticence by noting that textualism seeks not the specific understandings of some specific people, but the general—what is sometimes called “objective”—understanding that reasonable people *would* have. Fair enough; American law frequently uses the figment of the reasonable person. Yet, when judges consider how a reasonable person would have acted, say, under some circumstances that gave rise to a tort suit, we ask them to implicitly apply their sense of societal norms about what constitutes

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147. John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 91 (2006).

148. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 16 (2012).

149. See SCALIA, *supra* note 139, at 17; see also Manning, *supra* note 147, at 90-91 (arguing that textualists should look to a term’s “semantic content”). See generally Solan, *supra* note 80, at 2053 (explaining that, for evidence about the meanings of unclear terms, textualists eschew pronouncements by those who wrote and voted on the terms and consider instead what those terms mean to idiomatic speakers).

150. Frank H. Easterbrook, *Foreword* to ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*, at xxv (2012).

151. Manning, *supra* note 147, at 91.

reasonable behavior under those circumstances. But say it is 2018 and a judge is interpreting a statute written in 1934. Where would a judge get a sense of the societal, or linguistic, norms of 1934? Even for a general, objective take on reasonable audience understanding, interpreters need some information about how some reasonable people understood things at some particular time. As with language use, it is impossible to find—or even look for—reasonable understanding without choosing some community whose understanding to use as a guide.<sup>152</sup>

Taking a position on how reasonable people at some time would have understood a term requires inquiring into how some reasonable people used and understood linguistic utterances at that time. Otherwise, interpretation becomes a matter of imaginative reconstruction: the judge must conjure the spirit, not of Congress, but of an entire society at the time of the statute's enactment. Textualism's reliance on reasonable understandings of statutory text thus suggests a fairly empirical methodology. Yet in practice, textualism offers anything but.

Rather than undertaking empirical inquiry, textualism instead restricts access to the kind of evidence that might indicate ordinary understandings within *any* community. It allows judges to use only a very limited array of sources, none of which convey information about how any given community might understand a statute.

For instance, textualists tend to like canons of statutory interpretation.<sup>153</sup> But canons offer *instructions* about how people *should* interpret, not *evidence* of how people *do* interpret.<sup>154</sup> Although a canon might help pin down a statutory meaning by force, it can hardly reveal how competent speakers would understand the statute.<sup>155</sup>

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152. In addition, textualists argue that, as a multi-member body, Congress cannot have a shared purpose. See Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 239 (1992). Nevertheless, textualists ascribe a unitary *understanding* to the audience of competent English speakers—an even more multi-member "they."

153. See generally SCALIA & GARNER, *supra* note 148 (offering fifty-seven canons that the authors consider useful for understanding constitutions, statutes, regulations, and contracts, and thirteen more that they deride as "falsities").

154. See *infra* Part IV (noting that canons do not represent ordinary patterns of communication).

155. Of course, whether a canon *can* pin down a meaning has been a matter of hot debate for a hundred years. See *infra* Part IV. The point here is that, even if it can, that does not tell

Textualists also countenance dictionaries.<sup>156</sup> But, as Part II explained, dictionaries vary greatly in the kind of evidence they provide about how people understand utterances. Indeed, that question has never been the primary focus of most dictionaries, which are more concerned with how speakers speak than with how addressees understand them. Lexicographers who write dictionaries, moreover, are not held to any particular research method.<sup>157</sup>

In any event, judges pay scant attention to discussions of dictionary methods when they are available. Textualists, moreover, sometimes argue for dictionaries that instruct people on how they ought to speak rather than those that strive to describe how people actually speak.<sup>158</sup> Reliance on the linguistic preferences of lexicographers simply cannot provide the kind of certainty textualists seek about how broad audiences would understand a term.

Textualists also turn to the common law and other legal sources for help interpreting a statutory term. Legal provisions are surely relevant to the interpretation of law. Yet textualism gives adherents little guidance about how to use them and no way to choose among the audiences they implicate. Should a judge look only to other provisions within the statute, or venture outside it? If she goes outside the statute, what kinds of sources should she consult—the common law, other statutes, administrative regulations?<sup>159</sup> What era should she focus on—the time of the statute’s enactment, that preceding it, or that following it? Should, for instance, the way audiences understood a common-law term in the nineteenth century determine our interpretation of a twentieth-century statute? And if so, how do we treat the twentieth-century audience, which may have abandoned the nineteenth-century terminology?<sup>160</sup> Each choice implicates

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textualists how a statute’s *audience* would understand a term.

156. See *supra* notes 47-49 and accompanying text.

157. Lexicographers may sometimes not be subject to much oversight, either. An “eminent former editor of the Oxford English Dictionary” has been accused of purging the dictionary of English words with foreign origins. See Alison Flood, *Former OED Editor Covertly Deleted Thousands of Words, Book Claims*, GUARDIAN (Nov. 26, 2012, 3:17 PM), <https://www.theguardian.com/books/2012/nov/26/former-oed-editor-deleted-words> [<https://perma.cc/7JUE-QYZ7>] (detailing Sarah Ogilvie’s claim that Robert Burchfield “deleted 17% of the ‘loanwords’ and world English words that had been included by” his predecessor).

158. See *supra* Part II.A.

159. See Bernstein, *supra* note 9, at 607-09 (discussing opinions in *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983)).

160. See *Bob Jones Univ.*, 461 U.S. at 577-78, 596-98, 601-02.

different groups of reasonable people conversant with law and language. With no method for selecting among its options, the *corpus juris* offers a wide field of play, a crowd from which interpreters can pick out their friends.<sup>161</sup>

Textualism also does not tell judges *when* to treat a term as a specialized legal term addressed to a specialized legal audience, as opposed to an ordinary language term addressed to all competent speakers (of whatever time or place).<sup>162</sup> A judge potentially constrained by a technical legal meaning thus still has the option of treating the term as merely ordinary language.<sup>163</sup>

Some formalists even think that “ordinary citizens confronted with ‘technical’ language ... defer to the understanding ... that would be ... available ... to ... the relevant group” of experts, such that a layperson faced with a legal term will just “ask a lawyer.”<sup>164</sup> So judges are to interpret a legal term the way an ordinary speaker would understand it, if the ordinary speaker interpreted the term by asking someone like the judge what it meant.<sup>165</sup> And that is supposed to impose constraint on judicial interpretation.<sup>166</sup>

Beyond these, textualism’s sources are limited. The repertoire does not include studies or other indications of how nonjudicial audiences understand a particular term (though textualist judges, like others, do use others’ language use in an ad hoc way, as

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161. See Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (“It sometimes seems that citing legislative history is still, as my late colleague Harold Leventhal once observed, akin to ‘looking over a crowd and picking out your friends.’”). For an extended discussion of the wide range of options offered by the *corpus juris*, see generally Bernstein, *supra* note 9.

162. See Manning, *supra* note 147, at 78, 81-82.

163. See *supra* Part II.B.1.

164. Lawrence B. Solum, *Originalism and the Natural Born Citizen Clause*, 107 MICH. L. REV. FIRST IMPRESSIONS 22, 25 (2008). Solum cites Hilary Putnam’s “division of linguistic labor” to suggest that “[w]hen members of the general public encounter a [legal] term of art, their understanding of its meaning involves a process of deferral” to legal professionals. *Id.* Putnam’s theory, though, recognized that specialized terms might have ordinary meanings among lay speakers, leading to the *division* of linguistic labor, rather than mere deferral. Hilary Putnam, *The Meaning of “Meaning,”* in 7 MINNESOTA STUDIES IN THE PHILOSOPHY OF SCIENCE 131, 144 (Keith Gunderson ed., 1975). The chemical definition of “gold” might be in the hands of experts, but that does not prevent ordinary speakers from using the term, and successfully meaning something by it, in everyday speech. See *id.* In law as in metallurgy, the choice between treating a term as technical and treating it as ordinary is not quite as simple as Solum suggests. See generally *id.*

165. See Solum, *supra* note 164, at 25.

166. See *id.* at 23-24.

described in Part II).<sup>167</sup> Textualism thus instructs judges to interpret statutory text as a broad audience of English speakers would, but also asks judges to use only sources that provide little information on that topic.

Instead, textualism leaves it to the judge. In its image of legal communication, statutory text speaks to an audience, but because the audience cannot speak for itself, the judge must speak for it. Confronting the many definitions offered by dictionaries, the judge chooses the definition she thinks is best.<sup>168</sup> Given the different ways a term can be used, the judge chooses the one that sounds most idiomatic to her.<sup>169</sup> To demonstrate why her choices make sense, a judge chooses quotations from books she likes.<sup>170</sup> To demonstrate the normative desirability of her choices, the judge serves herself from the interpretive canon buffet.<sup>171</sup>

There may be good reasons for taking this approach. Judges are, generally, experienced professionals trained in legal reasoning and interpretation. Federal judges usually go through an intense vetting process.<sup>172</sup> State judges may be elected by the people whose controversies they adjudicate.<sup>173</sup> We may, in other words, trust or require judges to expound the understandings of a people they imagine, treating them as legitimate participants in the production of legal strictures.<sup>174</sup>

But that is not the view textualism promotes. Textualism claims to *restrain* judicial discretion, to make judges defer to the understandings of others. But it then rules out sources of meaning that might challenge a judge's intuitions or preferences. The judge interprets according to the understandings of a statute's audience—which only the judge is authorized to assert.

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167. See *supra* Part II.

168. See *supra* Part II.

169. See *supra* Part II.

170. See *supra* Part II.

171. See *infra* Part IV.

172. See generally DENNIS STEVEN RUTKUS, CONG. RESEARCH SERV., R43762, THE APPOINTMENT PROCESS FOR U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS: AN OVERVIEW (2016).

173. See *State-By-State Summary of Judicial Selection*, USLEGAL (2016), <https://courts.uslegal.com/selection-of-judges/state-by-state-summary-of-judicial-selection/> [<https://perma.cc/GMD8-DXY2>].

174. See, e.g., Steilen, *supra* note 137, at 258-60; Strauss, *supra* note 137, at 877, 905, 925.

Where a more exacting approach might ask judges to use their judgment, but require them to explain their reasoning, textualism's hidden reliance on intuitions and preferences leaves little ground for rational debate. That may be one reason that textualists can act impatient, even incredulous, in the face of disagreement and uncertainty, even though disagreement and uncertainty are the stuff courts are made of.<sup>175</sup> By combining a *theory* that makes big empirical claims with a *technique* that eschews empirical inputs, textualism bolsters, rather than limits, the judge's interpretive power. To prevent judges from "playing king,"<sup>176</sup> it hands them the keys to the castle.<sup>177</sup>

### B. Who Plays the King?

If judges are not supposed to "play[] king,"<sup>178</sup> who is? Is it Congress, with its two houses, hundreds of members, and byzantine procedures for passing statutes ordered into byzantine categories?<sup>179</sup> Is it the President, who can comment (or tweet) about a bill but whose formal power over enactment is limited to deciding whether to sign something Congress already voted on?<sup>180</sup> Is it executive

175. See, e.g., David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 916-17, 928, 937-38 (2016).

176. SCALIA, *supra* note 139, at 7.

177. Strangely, even critics of textualism sometimes accept its claims of restraint, as though aspirations sufficed to achieve goals. For instance, Abbe Gluck argues that one reason even formalist judges do not abide by formalist dictates is that they want to retain power: "the stakes of a formalist approach in terms of *lost judicial power* are unacceptably high for many judges." Gluck, *supra* note 134, at 183. I hope I have shown here that textualism actually *supports* judicial power. But it does so at the cost of consistency. Its theory, aspirations, and normative orientation are fundamentally at odds with its techniques and tenets. Textualists' inability to consistently abide by textualist strictures thus does not indicate an individual failing or a conflict between theoretical purity and practical power. It is, rather, a structural feature: because the system itself is internally incoherent, textualists cannot avoid being inconsistent.

178. SCALIA, *supra* note 139, at 7.

179. See BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 4-5 (5th ed. 2017); Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking*, *Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1799-1800, 1803 (2015); Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 91, 94-95 (2012) [hereinafter *Decision Theory*]; Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613, 1617-18 (2014) [hereinafter *Elementary*].

180. See Anya Bernstein, *Congressional Will and the Role of the Executive in Bivens*



agencies, the primary implementers of modern statutes, whose personnel often help draft statutes but have no formal say in their passage?<sup>181</sup> Is it the bicameralism-and-presentment *process*, maybe, with its legislators, staffers, and agency personnel writing statutory language revised by various groups both before and after each house of Congress votes on the bill, plus the President who decides whether to sign it?<sup>182</sup> Is it that process plus the enduring life of the statute over time, as it becomes interpreted and implemented by agencies, courts, and other actors? If these phrasings seem convoluted, it is because the process is convoluted. There is no simple way to pin it, and no clear king to pin it on.

Justice Scalia's choice of metaphor may thus reveal more than textualism's aspiration to constrain judges. It also exemplifies the theory's underlying discomfort with the messiness of American law-making. Because of course, in our hydra-headed system, no individual gets to "devis[e] ... th[e] laws."<sup>183</sup> Not even any one institution does.<sup>184</sup> Textualism's image of lawmaking is clean: you either are the law-giver, or you are not.<sup>185</sup> There is no dispersion of power within the sovereign, such that someone could *participate* in the production of law without *determining* it.

Textualism's slogan of democratically appropriate judicial restraint thus turns out to rest on a rather *undemocratic* image of law. In contrast to this absolutist view of politics, the American system of lawmaking is characterized by constant dispersion, differential participation, and the lack of an ultimate determiner.<sup>186</sup>

This all-or-nothing view of the world echoes in other textualist tendencies. Manning, for instance, writes that Justice Scalia's "close analysis of cases" uncovered the "nearly standardless discretion ...

*Actions: What Is Special About Special Factors?*, 45 IND. L. REV. 719, 722 (2012).

181. See Jarrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO. WASH. L. REV. 451, 467-68, 470 (2017); Walker, *supra* note 118, at 1383-84, 1387.

182. Easterbrook, *supra* note 145, at 91.

183. SCALIA, *supra* note 139, at 7.

184. See U.S. CONST. art I, § 7 (outlining legal requirements for enacting federal statutes); 5 U.S.C. §§ 551(1), (4) (2012) (defining an agency rule as, in part, a statement that "implement[s], interpret[s], or prescribe[s] law or policy"). See generally SINCLAIR, *supra* note 179 (examining the complexity of statute enactment in the contemporary government).

185. See generally George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990).

186. See *supra* note 184.

in ... judicial doctrines” by showing that “familiar balancing tests asked the Court to compare incommensurable values,” or to aggregate “multiple unweighted and unranked factors—techniques that allowed the Court to come out either way.”<sup>187</sup> On this description, a complex standard that can potentially “come out either way” creates “nearly standardless discretion.”<sup>188</sup>

This makes sense if you think of a valid standard as something that tolerates only one possible result. And *that* makes sense if you think of constraint as all-or-nothing: either you are constrained completely, or you are not constrained at all. “Take this path and no other.” That standard would certainly constrain discretion (though it might raise the question of why we have judges in the first place).

Yet there is a middle ground. Guidelines or parameters for making decisions can influence decision-makers even though they do not dictate a particular result.<sup>189</sup> “Take a path your little brother can handle” does not dictate a particular result, and potentially allows for a number of different, correct choices. Yet it does offer a guide for making decisions. That guidance is, to be sure, based on assumptions about the addressee’s background knowledge as well as, crucially, her ability and willingness to exercise judgment. It is not easily applicable by an automaton. But with the exercise of

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187. Manning, *supra* note 140, at 754-55.

188. *Id.* Another textualist all-or-nothing: treating evidence of meaning drawn from the enactment process as “illegitimate” because legislative history is “insufficient to constitute legislation under our system of governance.” Easterbrook, *supra* note 145, at 91. On this reasoning, congressional utterances are either law and therefore decisive, or not law and therefore not legitimately relevant. *See id.* But no one who uses legislative history claims it is the law. *See, e.g., Decision Theory, supra* note 179, at 80-85, 90-91. Rather, people use it to get indications or clues about meaning. *See, e.g., id.* Textualists tend to ignore this distinction, simply declining to discuss the possibility that Congress’s nonlegal utterances can be relevant *and* not decisive—that Congress can participate in making meaning without determining it completely. *See id.* This is a bit puzzling, actually, because textualists do find relevant other evidence that is not law and not decisive, such as dictionaries. *See* Manning, *supra* note 140, at 747 n.1. Indeed, Easterbrook himself seems puzzled by it: “[l]ike most other textualists, I am willing to consult legislative history as a cue to linguistic usage, even though not as an authoritative guide to meaning.” Easterbrook, *supra* note 145, at 91. It is not clear what distinguishes this position from that of, say, nontextualists such as Justice Breyer or Judge Katzmann, who also consult legislative history for clues rather than authoritative answers. *See, e.g., Solan, supra* note 80, at 2050-52.

189. Indeed, that is usually what legal theorists mean by “standard,” as opposed to “rule.” *See* Michael Coenen, *Rules Against Rulification*, 124 *YALE L.J.* 644, 652-55 (2014) (explaining this distinction).

knowledge-based judgment, you could “come out either way” and yet not exercise “nearly standardless discretion.”<sup>190</sup>

In claiming to seek the one, true, nondiscretionary answer, textualism actually relies on the judge’s discretion.<sup>191</sup> Its internal contradictions—the way its aspirations contradict its techniques—may thus be related to its distaste for messiness in both lawmaking and legal interpretation.<sup>192</sup> Textualism purports to outsource meaning making and democratically vest power in a nonjudicial audience, but it authorizes only the judge to voice that imagined community’s understandings.<sup>193</sup>

#### IV. CANON LAW: UNRULY RULES

The preceding Parts discuss how legal actors appear to outsource interpretation to general publics. This Part turns to another outsourcing target: interpretive rules, or canons. Canons promise to take interpretive decisions out of the judge’s hands, binding them instead with preexisting, pre-validated rules made over time by others.<sup>194</sup> Rules thus seem to remove power from the individual judge adjudicating a particular case right now and place them in other, more democratically legitimate, hands: the legislature, or, more often, a historically validated judicial tradition.<sup>195</sup> But the judge retains the power to choose which rule binds her in any given case, and there are rules enough to get the judge to a number of different conclusions.<sup>196</sup> More importantly, because there is no principle along which canons are, or can be, ranked, there is little but discretion guiding the choice.<sup>197</sup>

Canons of interpretation have already received considerable attention.<sup>198</sup> Existing criticism suggests that the lack of an accepted

190. Manning, *supra* note 140, at 754-55.

191. See *supra* notes 183-88 and accompanying text.

192. See Manning, *supra* note 140, at 754-55; *Decision Theory*, *supra* note 179, at 80-81.

193. See *supra* notes 158-59 and accompanying text.

194. See Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 *YALE L.J.* 1750, 1763 (2010).

195. See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 *HARV. L. REV.* 1079, 1087 (2017).

196. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 *VAND. L. REV.* 395, 401-06 (1950).

197. See Gluck, *supra* note 194, at 1766.

198. See, e.g., Llewellyn, *supra* note 196, at 401-06.

hierarchy for the canons—a rule to determine which rule to use—undermines canons’ ability to provide a reliable method for interpretation.<sup>199</sup> I first explain how this argument is relevant to outsourcing interpretation, then suggest that the problem it points to rests on an underlying conceptual lacuna: a lack of agreement—or even discussion—about just what it is that a canon of interpretation is supposed to accomplish. Arbitrariness thus pervades the canon system. There is no accepted method to determine which rule to outsource to, and no agreed-upon work the rule is supposed to do. Like the practices and theories discussed in the preceding Parts, outsourcing to canons does not constrain, but merely obscures, decisions made by judges.

#### A. *Decision Rules for Interpretive Rules*

It is no secret that the canons are rather a mess. Perhaps the most famous formulation of the problem came decades ago in Karl Llewellyn’s thrust-but-parry presentation: popular canons arranged in a column facing equally popular canons that led to opposite conclusions.<sup>200</sup> Do not extend a statute in derogation of the common law, but read remedial statutes broadly irrespective of the common law;<sup>201</sup> hold to previous constructions of particular terms, but provide new interpretations when the statute requires it,<sup>202</sup> and so on. The point was to show that a judge could—indeed, had to—choose between equally legitimized, but different, ways to interpret a given text.<sup>203</sup> The rules could determine the outcome, of course. But which rule to use was itself not rule-bound. Any option had to be “sold, essentially,” through some other justification.<sup>204</sup>

Llewellyn’s presentation has been criticized for treating the rules unfairly: presenting as canons some ideas that have not achieved canonical status; presenting exceptions to a rule as though they were contradictions of it; presenting as a canon something the critic

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199. See Gluck, *supra* note 194, at 1766.

200. Llewellyn, *supra* note 196, at 401-06.

201. See *id.* at 401.

202. See *id.* at 403.

203. See *id.* at 401 (“When it comes to presenting a proposed construction in court ... the accepted convention still, unhappily requires discussion as if only one single correct meaning could exist.”).

204. *Id.*

does not think even qualifies as interpretation.<sup>205</sup> Even so, the point stands. Without a decision rule for choosing among rules, judges do not, and cannot, use the rules “predictably.”<sup>206</sup> And, as Abbe Gluck has persuasively argued, there is no such decision rule, no generally accepted “ranking” to order judges’ recourse to the many canons available.<sup>207</sup> Even as great a fan of rules, Justice Scalia has written that “[e]ach [canon] may be overcome by the strength of differing principles that point in other directions,” but given no indication of what “strength” would look like or how a judge should assess it.<sup>208</sup> So the choices judges make may not fall into Llewellyn’s neatly packaged dyads. But just as Llewellyn argued, judges can, and often must, choose which rules to apply—and that choice itself is not rule-bound.<sup>209</sup>

One thing that might lend a rule strength would be a firm judicial decision to favor it over all others. But in practice, at least federal judges do not treat canons of interpretation as “precedential” in a way that would make “the same interpretive rules ... apply to the same questions from case to case.”<sup>210</sup> Nor has the Supreme Court ever insisted on, or even favored, such “methodological stare decisis.”<sup>211</sup>

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205. See SCALIA & GARNER, *supra* note 148, at 59-60 (presenting the most common objections to Llewellyn’s critique).

206. Gluck, *supra* note 134, at 179.

207. *Id.*

208. SCALIA & GARNER, *supra* note 148, at 59.

209. See Llewellyn, *supra* note 196, at 401.

210. Gluck, *supra* note 134, at 179.

211. Gluck, *supra* note 194, at 1754 (“Methodological stare decisis—the practice of giving precedential effect to judicial statements about methodology—is generally absent from the jurisprudence of mainstream federal statutory interpretation.”); see also Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573, 1576-77 (2014). Indeed, even moves that seem to gesture in that direction turn out to avoid it. For instance, the *Chevron* doctrine governs judicial review of agency statutory interpretation. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984). *Chevron* seems to present a kind of interpretive precedent. See *id.*; Abbe R. Gluck, *What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 609 (2014) (arguing that *Chevron* represents a break with the main line of statutory interpretation theory and practice in part because it is treated as precedential, “whereas the other canons of statutory interpretation are not treated as precedent or ‘doctrine’ of any kind”). But courts have been careful to present *Chevron* as governing a court’s evaluations of an agency’s statutory interpretation, not as guiding the court’s own interpretive practices. See *id.* at 616-18. *Chevron*’s second step asks courts to judge whether an agency’s interpretation is reasonable, an assessment for which the court must use its own judgment—not some method

Another option would be to have Congress legislate that choice. Congress could, in principle, add to the Dictionary Act and the “thousands of rules of construction scattered throughout the U.S. Code” to create a full-fledged statutory law of statutory interpretation.<sup>212</sup> So far, judges have generally rejected the notion that Congress has the power to dictate rules of statutory interpretation, treating “statutory interpretation doctrine as inherently ‘personal.’”<sup>213</sup> In any event, despite the existence of numerous statute-specific rules of interpretation, Congress has yet to legislate how judges should choose among canons of interpretation.<sup>214</sup>

Lacking rules, precedent, or statute, some commentators have looked to the common law model. William Baude and Stephen Sachs have argued that canons of interpretation “are best understood as unwritten law.”<sup>215</sup> On this view, canons provide an example of a more general phenomenon. Every law is intertextually situated in a web of other laws that provide background principles against which it will be understood.<sup>216</sup> Just as a criminal statute assumes the availability of a conspiracy charge, so statutes in general assume the applicability of valid canons of interpretation.<sup>217</sup> That the

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that *Chevron* dictates. See *Chevron*, 467 U.S. at 843-44. And step one asks courts to determine whether a statutory term is ambiguous by using “traditional tools of statutory construction,” without more. *Id.* at 843 n.9. So even when seeming to create statutory interpretation precedent, the Court has insisted that it is not really telling courts how to interpret statutes; it is just telling them how to review interpretations by others.

212. Gluck, *supra* note 134, at 185.

213. *Id.* at 184.

214. See *id.*

215. Baude & Sachs, *supra* note 195, at 1105.

216. Charles L. Briggs & Richard Bauman, *Genre, Intertextuality, and Social Power*, 2 J. LINGUISTIC ANTHROPOLOGY 131, 147 (1991) (“[I]ntertextual relationships between a particular text and prior discourse ... play a crucial role in shaping form, function, discourse structure, and meaning; ... and in building competing perspectives on what is taking place.”). Intertextual relations set up audience expectations “regarding narrative form and content,” and provide the terms on which “identity and power” are asserted. *Id.* at 147-48 (“[B]y invoking a particular genre, producers of discourse assert (tacitly or explicitly) that they possess the authority needed to [re]contextualize discourse that bears these historical and social connections ... in the current discursive setting.”); see also M. M. BAKHTIN, *THE DIALOGIC IMAGINATION* 278-79 (Michael Holquist ed., Caryl Emerson & Michael Holquist trans., 1981) (arguing that foregoing texts lay down a “multitude of routes, roads and paths” through which a given focal text is understood and in relation to which it has social effects); Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1062-70 (1998) (arguing that background principles of administrative law play a key role in the interpretation of regulatory statutes).

217. See Baude & Sachs, *supra* note 195, at 1100.

canons are not codified in statute hardly changes things. “Not much turns on whether, say, the rule against perpetuities is codified by statute or is just good law in the courts; grantors have to draft around it all the same.”<sup>218</sup> If intertextual background principles are good enough for conspiracy and perpetuity, why not for interpretive rules too?

The difference is that, unlike conspiracy and perpetuity, canons do not behave in a law-like way. There is, after all, a pretty good way to know whether the rule against perpetuities “is just good law in the courts”<sup>219</sup>: courts enforce it consistently. Interpretive canons have never achieved that status. Courts do not treat them as binding and employ no consistent parameters for determining which one to use and when. Is the rule against surplusage “just good law in the courts”? It depends which opinion you read. When legal practice is higgledy-piggledy, it can be hard to say whether something is good law or not.

Baude and Sachs try to overcome this by more or less asserting that *it is too* good law: “[m]any legal canons are common law default rules” that maintain their validity until they are “affirmatively displaced.”<sup>220</sup> But not much turns on whether canons are in fact law in some ontological sense; what matters is whether interpreters actually *use* them in a law-like way. And that takes us right back to the initial problem: lots of rules with no principle for choosing among them. Just think of *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, a case famous for the deployment of canons by both majority and dissent.<sup>221</sup> Justice Stevens, writing for the majority, emphasizes antisurplusage and antiderogation; Justice Scalia for the dissent focuses on *noscitur a sociis* and a “whole code” presumption.<sup>222</sup> None have been affirmatively displaced, but which are “good law”? Which are stronger? How would we know?

If there is no default rule for deciding which rule to use, even judges who strive to obey the law of interpretation are bound to reach conclusions that are unpredictable and inconsistent. Of

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218. *Id.* at 1104.

219. *Id.*

220. *Id.* at 1123.

221. *See generally* 515 U.S. 687 (1995).

222. *See* Bernstein, *supra* note 9, at 574-78, 596-98 (discussing how the opinions in *Sweet Home* selected and situated text to interpret).

course, an individual judge could consistently obey some decision rules that she chooses (though that choice itself would be arbitrary). But because her decision rule has no predictable relation to anyone else's, her personal consistency will not lead to consistency among interpretations across judges—and would not, that is, lead to canons acting any more law-like.

Moreover, just like doing the same corpus search does not get everyone to the same conclusion, agreeing that a particular rule applies does not necessarily settle things. The majority and dissent in *Lockhart v. United States* applied the same rule and came to opposite conclusions.<sup>223</sup> In *Lockhart*, the Supreme Court considered whether a child pornography statute that imposed an enhanced sentence for offenders with prior convictions “relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor” applied to someone with a prior conviction for sexual abuse *not* involving a minor.<sup>224</sup> In other words, did “involving a minor” modify just that last phrase “abusive sexual conduct,” or the whole list?<sup>225</sup>

The rule of the last antecedent provides that, “in a list of disparate items, a clause modifies the item nearest to it.”<sup>226</sup> But what is an item? Justice Sotomayor’s majority opinion held that the mandatory minimum applied to those with non-child-related sexual abuse convictions, because the entire list constituted one item.<sup>227</sup> Justice Kagan’s opinion for the dissent argued that the statute addressed the sentencing enhancement only to those who had abused children, the last of several separate items.<sup>228</sup> The canon of interpretation told them how to act once they had decided whether the terms were distinct or related, but it could not help them make that decision.<sup>229</sup> And it is that decision which determined the canon’s effect.

Even if judges want to outsource interpretation to canons, then they still have to choose among rules that can “point in other directions.”<sup>230</sup> Indeed, even a *single* rule can point in different directions,

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223. See generally 136 S. Ct. 958 (2016).

224. *Id.* at 962.

225. *Id.*

226. Easterbrook, *supra* note 145, at 85.

227. *Lockhart*, 136 S. Ct. at 962.

228. See *id.* at 969 (Kagan, J., dissenting).

229. See *id.*

230. SCALIA & GARNER, *supra* note 148, at 59.



depending on how you apply it. Judges may be ruled by the rules, but only as marionettes who hold their own strings.

*B. What Are Rules for?*

Without some consistent way to decide which canon to apply when, or how, interpretive rules cannot do judges' work for them. Perhaps one reason it has been so difficult to converge on a decision-making approach is that it is not entirely clear what canons of interpretation are supposed to accomplish. That makes it difficult to evaluate their strength or assess their success. And that surely makes it difficult to rank them.

Consider some possible purposes for interpretive canons; stick to linguistic canons for now. Perhaps they are supposed to serve as a kind of instruction to Congress. "They promote clearer drafting," Justice Scalia has argued, by informing legislators how judges will interpret statutes.<sup>231</sup> Judges can thus exert a positive influence on legislators, pushing them to do their work in a responsible way.<sup>232</sup> Once Congress knows the rules, "you can expect those who prepare legal documents competently to draft accordingly," because the canons really just articulate "presumptions about what an intelligently produced text conveys."<sup>233</sup>

As a factual matter, though, no one can give Congress a good account of how judges will apply the rules, because judges do not apply the rules predictably. And that is not because they are ill-intentioned or incompetent, but because there is no accepted way to decide which rule to apply or how to apply it. Giving Congress some guidance as to how judges will act may be a noble aspiration, but it is hard to do when judges fail to reliably act in any particular way.

Further, it is not clear that the aspiration is noble. The Constitution gives Congress a lot of leeway over its work. On what grounds do judges purport to dictate best practices to legislators? Judges, after all, must be ready to interpret *all* the statutes that Congress writes, not just those drafted by "those who prepare legal documents competently" or "intelligently" according to a judge's standards.<sup>234</sup>

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231. *Id.* at 51.

232. *Id.*

233. *Id.*

234. *Id.*

Faithful agents generally do not force a principal's hand. That is not to say that courts and legislators do not, or should not, engage in long-term exchanges of views about how best to collaboratively produce the legal strictures that govern our society.<sup>235</sup> But that is hardly the same as throwing down ultimatums about statutory drafting.

If not instructing Congress, perhaps canons are supposed to reflect it. They might provide judges with indications of how Congress generally uses language. That way, judges can interpret according to the way Congress writes, at least in broad strokes. To do that, the canons of interpretation would have to reflect legislative drafting practices, at least in broad strokes. But the available evidence suggests that they mostly fail to do that—fail quite dramatically, in fact.<sup>236</sup>

Strangely, those who advocate the use of canons generally do not urge people to investigate how well they reflect actual Congressional practices.<sup>237</sup> Nor do they usually argue that canons *should* be influenced by information about how Congress drafts statutes.<sup>238</sup> The implication seems to be that judicial interpretation should reflect legislative practice—as long as only the judge gets to say what legislative practice involves.

Another possibility: maybe canons are supposed to help judges interpret statutes as ordinary language, not as legislature-specific utterances. On this theory, canons reflect the linguistic practices not of Congress, but of ordinary speakers. At least some discussions suggest that linguistic canons are supposed to give judges quick rules of thumb for determining how ordinary people would formulate a

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235. See, e.g., Richard H. Fallon, Jr., *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, 732 (2014) (“[S]tatutory interpretation ... is necessarily a cooperative endeavor [between courts and legislatures].”).

236. See generally 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 (2013); Jarrod Shobe, *Inertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807 (2014) (arguing that judges should interpret statutes according to congressional drafting practices at the time of the statute's enactment).

237. See generally SCALIA & GARNER, *supra* note 148.

238. See, e.g., *id.*

stricture, while substantive canons express normative commitments.<sup>239</sup>

But the guidelines linguistic canons offer can be pretty exacting. They ask us to assume that the same term always means the same thing, even across a lengthy utterance; and that an utterance has no meaningless redundancies. Attending a faculty meeting or having a dinner conversation are probably enough to indicate that ordinary conversation does not always work the way linguistic canons suggest it does. Yet, again, proponents of canons rarely set out to revise them to accommodate even our everyday lived experience of how people speak.

So linguistic canons might be meant to affect Congress, reflect Congress, or reflect ordinary speech. And they usually fail to do any of those quite different things. No wonder we find it difficult to rank them.

Substantive canons might fare better, since they are generally seen to reflect normative commitments about judging and political ordering. Still, even they pose similar problems. For instance, what is the plain meaning rule—which instructs a court to use evidence outside the statutory text only if that text itself is not clear—supposed to accomplish? William Baude and Ryan Doerfler criticize that rule for failing to give insight into the statute.<sup>240</sup> When you are trying to ferret out the truth, they argue, it makes no sense to use one kind of evidence only if another is insufficient: “information is either useful or not.”<sup>241</sup> True, but not all inquiries are of the ferretting sort. The information a mammogram or prostate cancer screening yields, for instance, is surely relevant to determining whether a person has cancer. But it may not always be *useful*. Its utility depends on lots of things other than relevance: the patient’s age and that kind of cancer’s speed; the costs and benefits of potential follow-up procedures; the psychological weight of the question on that particular patient; and so on. Whether information is useful, in other words, depends on what you are trying to *do* with it in a particular decision-making context.

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239. See James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 12-14 (2005).

240. See generally William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539 (2017).

241. *Id.* at 540.

The problem—if you want to see it as a problem—is that legal interpretation, too, involves decisionmaking.<sup>242</sup> Interpreters are not mere conduits; they are actors taking politically significant actions. The meanings and effects of legal texts are at least partly produced through their interpretation.<sup>243</sup> Legal interpretation presents a form of justification or rationalization—an appeal to readers for agreement, not a falsifiable scientific inquiry.<sup>244</sup> An interpretive canon, meanwhile, purports to guide the decision-making process. That means that an interpretive canon—a linguistic as much as a substantive one—implies a commitment to some decision-making principle.

The plain meaning rule, for instance, may not aim to give us more information about the statute. Rather, it may express a commitment to treating statutory text as more valuable than other sources—not in an empirical-inquiry way, but in a normative-legitimation way. Similarly, as John Manning has outlined, the absurdity canon commits judges to the decision-making principle that Congress will not violate “commonly held social values” without saying so outright.<sup>245</sup>

When rules express normative commitments, we at least can outline reasonable options for assessing them. We can take a position on their normative stand. For instance, Manning argues that the antiabsurdity rule is inappropriate in a government built on the “sharp separation of lawmaking from judging,” that he contends is a “crucial premise[] of the constitutional structure.”<sup>246</sup> Or we can assess how well the rule actually controls decisionmaking. Manning does not argue that the anti-absurdity rule is ineffective, but he does claim that judges can achieve its normative goals through other means that he finds more acceptable.<sup>247</sup> Opining on a normative

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242. Solan, *supra* note 124, at 17 (“[T]ranslators have to make decisions.”).

243. *See id.* at 14-18.

244. Guyora Binder, *Aesthetic Judgment and Legal Justification*, 43 *STUD. L. POL. & SOC'Y* 79, 80 (2008) (“[L]egal argument ... make[s] a rhetorical appeal to aesthetic judgment rather than an empirical claim to mimetic accuracy, ... [and that appeal is fundamental to the] larger question of the legal system’s legitimacy.”).

245. Manning, *supra* note 146, at 2389-90.

246. *Id.* at 2391.

247. *Id.* at 2392 (arguing that abandoning the anti-absurdity rule “scarcely leaves judges defenseless against legislative infringement of the types of values that the absurdity doctrine now protects”).

commitment and evaluating its efficacy does not *quite* produce a decision rule for choosing among different rules, but at least it gives us a way of evaluating them.

But what about rules whose commitments are more oblique? The rule of the last antecedent is certainly valid and legitimate.<sup>248</sup> Yet it is not entirely clear what principles underlie it. What impulse justifies it? To what position does it commit a judge? Maybe it is something like, “statutes are consistently written to distinguish list items that are controlled by a qualifier from those that are not.” But this is clearly false as an empirical matter. Just reading a statute suggests it is wrong, and research confirms that impression.<sup>249</sup> Perhaps the principle is that “ordinary speech consistently distinguishes list items that are controlled by a qualifier from those that are not.” False again.<sup>250</sup> Or maybe it is “Congress *ought to* write statutes that way.” Not falsifiable, but questionable: why do judges get to tell Congress what to do? It is difficult to rationally argue for or against the rule, to determine how it should apply, or evaluate its strength relative to other rules, when its underlying basis is not articulated or obvious.

The rule of the last antecedent commits a judge to a way of making a decision that seems rather arbitrary, or at least not clearly motivated. Without knowing what principle it serves, a judge might find it difficult to decide how seriously to treat it or how to apply it in a particular case. Say the rule of the last antecedent pulls in one direction and the rule against surplusage pulls in another. How do we assess their relative strengths? Each provides guidance for making an interpretive decision. But without some

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248. See, e.g., *Lockhart v. United States*, 136 S. Ct. 958, 962-63 (2016).

249. See, e.g., Gluck, *supra* note 134, at 209 (explaining that her research indicates that even “seasoned statutory players” find statutory text “dense and unintelligible”).

250. The opinions in *Lockhart v. United States* make up plausible ordinary-language examples that go both ways. See generally 136 S. Ct. 958 (2016). Justice Sotomayor imagines baseball scouts asked to find “a defensive catcher, a quick-footed shortstop, or a pitcher from last year’s World Champion Kansas City Royals,” concluding that the scouts would not care if the catcher were with the Royals. *Id.* at 963. Justice Kagan imagines someone asking a friend to help them “meet ‘an actor, director, or producer involved with the new Star Wars movie,’” noting that a *Zoolander* actor would not do. *Id.* at 969 (Kagan, J., dissenting). Both examples seem plausible. That is because there *is* no rule of the last antecedent in everyday English—at least not one that can be applied acontextually, without background knowledge about the communicative situation and wider cultural factors, such as the reasons people look for catchers and want to be introduced to actors.

articulation of their motivations, it is impossible to make a principled decision about their relative weighting in any given situation. Even the somewhat distinct status of substantive canons does not get us out of this bind. Who should win a match-up between the rule against surplusage and the presumption against preemption? There are surely good arguments for following both our commitment to a particular way of treating language, and to a particular way of distributing political power, but there is no principle that helps us decide what to do when they conflict.

So it may not be too surprising that judges are both so inconsistent in their use of canons, and so unwilling to impose system-wide order on it. Without a consensus, or even a discussion, of what it is that makes a canon worthwhile, it is naturally difficult to make a case for preferring one over another. I do not mean to suggest that the absence of a preference order is necessarily a problem: there may be good reasons to avoid a rigid hierarchy in favor of a case-by-case determination of a given canon's utility in a given situation.<sup>251</sup> The problem is that without some articulation of what a canon is supposed to accomplish, there is no way to figure out if it is likely to succeed.

As with other kinds of outsourcing, judges can present themselves as giving interpretive authority over to rules of interpretation—strictures imposed by someone else. But the rules present a smorgasbord of interpretive options. And since there is neither consensus nor articulation regarding what motivates or justifies many canons, there is little ground on which to argue for the primacy of one over another. This form of outsourcing presents judges as bound by rules, then leaves judges to decide what it is that should bind them.

## V. DEMOCRATIZING INTERPRETATION

Judges and commentators sometimes seem almost embarrassed about the ongoing negotiations involved in maintaining a somewhat stable yet never ossified legal system. By appearing to lodge power

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251. See generally William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) (arguing that judges do, and should, make such case-by-case determinations); Glen Staszewski, *Statutory Interpretation as Contestatory Democracy*, 55 WM. & MARY L. REV. 221 (2013) (arguing that such case-by-case determinations are desirable from the perspective of democracy).

outside the adjudicating court, outsourcing obscures that negotiation—and perhaps more importantly, obscures the constant *availability* of negotiation. The approaches I have discussed ignore, deny, or try to evade the central role of judicial *choice* in interpretation. Key interpretive decisions appear as though in the passive voice, situated within the domains of others—speakers, audiences, traditions.

Ignoring the indeterminate, negotiated aspects of interpretation gives outsourcers a firm, seemingly impregnable, basis for their conclusions: a right answer to an interpretive question. Outsourcing thus bolsters an appearance of *certainty*. But that appearance of certainty comes at the cost of avoiding dispute about the normative, empirical, and methodological questions that interpretation raises. Outsourcing may well grow out of worries about unelected judges usurping democratic power, but in its false certainty it stymies the very kind of debate that characterizes democratic process. This Part explores the stakes of trying to eliminate choice in legal interpretation, and the limits of getting it right. Both the disparagement of choice and the vaunting of certainty, I argue, have profound negative implications for our conception of democracy.

#### A. *There's No Deciding Not to Decide*

As I have discussed in other work, statutory interpretation depends on some unavoidable, structuring choices: selecting text to interpret and situating it in a context the interpreter constructs.<sup>252</sup> Because selecting and situating statutory text form the infrastructure on which any interpretation is built, there is, fundamentally, no way to avoid making crucial choices in legal interpretation. Outsourcing interpretation, in turn, appears to evade choices about meanings. Having decided what to interpret and how to situate it, judges seem to give authority for deciding on meaning over to the inhabitants of the context they have constructed—speakers, audiences, and traditions. This attempt at recusal echoes a worry that has occupied constitutional theory for decades: how to legitimize judicial review by a “countermajoritarian” institution.<sup>253</sup>

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252. See generally Bernstein, *supra* note 9.

253. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE*

Countermajoritarianism is strictly speaking a constitutional worry: unelected judges make rules that elected legislatures effectively cannot override.<sup>254</sup> But statutory interpretation echoes that concern. Both require unelected judges to expound the meaning of texts written by elected bodies. The countermajoritarian worry runs deep—or at least broad—in recent American legal thought.<sup>255</sup> Small wonder, then, that judges and commentators search for ways to democratize interpretation.<sup>256</sup> If judges must be burdened with the responsibility of pronouncing the law, they can at least give the decision-making power over to someone else.

As the preceding Parts demonstrate, though, interpretive outsourcing does not meaningfully limit judicial choices.<sup>257</sup> The authority that judges appear to give away to the *demos* somehow ends up making its way back. The decisions they make about statutory meanings, moreover, are built on an infrastructure of interpretation that indelibly involves other, conceptually prior, decisions about what to interpret and what light to view it in. Outsourcing implies that judges could address the countermajoritarian difficulty by “majoritizing” their legal pronouncements. But this implication runs aground on the fact that outsourcing does not actually obviate the decisions judges must make—it only obscures them.<sup>258</sup>

Some seek to avoid these multiple underlying choices by suggesting a higher-order distinction between *law*, a hierarchical structure that works through commands and obligations, and *language*, a

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BAR OF POLITICS 16 (1962) (“[J]udicial review is a countermajoritarian force in our system.”). This problem “has been the central obsession of modern constitutional scholarship.” Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334-35 n.1 (1998).

254. See Friedman, *supra* note 253, at 334-35.

255. See *id.* at 334-35 n.1.

256. As I discuss in Part III, proponents of textualism often link their approach to the problem of judicial legitimacy. See *supra* Part III. But even when they do not refer to the issue explicitly, countermajoritarian worries form part of the background against which legal writers work.

257. See *supra* Parts II, II.A, II.B, and III (discussing how various outsourcing methods still require judges to make the ultimate decision as to meaning).

258. The outsourcing impulse also runs into the legitimacy problems of *majoritarian* legal interpretation, which threatens to promote majority desires over the protection of minorities and individuals guaranteed by our constitutional system. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694, 750 (1995).



flatter and more multifarious entity that evolves through practices.<sup>259</sup> A number of theoretical works imply this distinction.<sup>260</sup> Baude and Sachs propose it explicitly: we should, they say, “distinguish[] language from law”<sup>261</sup> because “what linguistic conventions to use” when interpreting statutes “is itself a question of law.”<sup>262</sup> They fault scholars for treating interpretation as a linguistic issue—subject to the vagaries of communicative practices—when it is actually a legal one subject to hierarchical ordering principles.<sup>263</sup> “The crucial question for legal interpreters isn’t ‘what do these words mean,’ but ... [w]hat law did this instrument make?”<sup>264</sup> On this phrasing, there are two separate objects in the world: *law* on the one hand, and *language* on the other, kind of like a sandwich might have *ham* on the one hand and *cheese* on the other.

But that is not how the relationship between law and language works. Rather than forming two separate categories, law and language have a part-whole relationship. Language is an encompassing social practice; law is one item within it. To put it bluntly, law is expressed through language. This means we cannot separate law from language; the decision to avoid other decisions is not available. To figure out “[w]hat law ... this instrument ma[d]e,” we have to consider “what ... these words mean.”<sup>265</sup> *Law and language* is not like *ham and cheese*. It is more like *ham and sandwich*.<sup>266</sup>

### B. *Either-or/Both-and*

Even at an abstract level, then, one cannot simply choose to work with law and be done with choices about meaning. Normative, empirical, and methodological decisions are intrinsic to every level of legal interpretation. Given that, we might ask what is *accomplished* by outsourcing’s implicit claim to avoiding decisions that

259. See, e.g., Baude & Sachs, *supra* note 215, at 1082-83.

260. See, e.g., *id.*

261. *Id.* at 1085.

262. See *id.* at 1083.

263. See *id.* at 1082.

264. *Id.* at 1083.

265. *Id.*

266. The analogy is not perfect: one can encounter ham without reference to a sandwich, but there is no law independent of language. A more precise rendering might read, “law : language : (ham in a ham-and-cheese sandwich) : sandwich.”

are not actually avoidable. One key effect of outsourcing is to present the meaning of disputed legal texts as something that can be obvious—something we can get at in a relatively straightforward way.<sup>267</sup> There may, of course, be instances where statutory language seems easy to get right. If the statute says “no vehicles in the park,” everyone might agree that cars are prohibited. But these are not the cases relevant to statutory interpretation: a case that argues something truly obvious usually will not get very far. Moreover, human ingenuity is great enough that people frequently manage to make what at first seems obviously contestable; that, in a sense, is what courts are for.

Outsourcing allows interpreters to lay claim to *certainty* about legal meaning: to say they have got legal interpretation somehow right. The idea that interpretation is something that can be got right may be related to a common misunderstanding about language and law: that language is primarily a tool for *describing* things, while law *affects* them.<sup>268</sup> Perhaps the way we have traditionally phrased the relevant judicial power pushes us to think in this direction. What does it mean, after all, to “say what the law is”?<sup>269</sup> If language consists merely of reference and predication, saying what the law is may just mean accurately describing a preexisting object, law.

But a century of scholarship has shown that reference and predication is just the tip of the iceberg; language, too, affects and creates.<sup>270</sup> The best-known version of creative language is the speech

267. See Bernstein, *supra* note 9, at 646-47.

268. See, e.g., Weissbourd & Mertz, *supra* note 104, at 627 (noting that discussions of legal language tend to focus on the presupposing aspects of communication, which underlie reference and predication, rather than its creative aspects, through which language affects the world).

269. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

270. Information exchange involves identifying an object in the world and making propositions about it, which is what communication scholars call language’s “referential” function. ROMAN JAKOBSON, *LANGUAGE IN LITERATURE* 66 (Krystyna Pomorska & Stephen Rudy eds., 1987). “[R]eference-and-predication” is the aspect of language use most available to speakers’ awareness. See Michael Silverstein, *Language Structure and Linguistic Ideology*, in *THE ELEMENTS: A PARASESSION ON LINGUISTIC UNITS AND LEVELS* 193, 208 (Paul R. Clyne et al. eds., 1979) (noting the widespread “tendency to rationalize the pragmatic system of a language ... with an ideology of language that centers on reference-and-predication” and ignores the other factors that go into meaning creation); see also Michael Silverstein, *Metapragmatic Discourse and Metapragmatic Function*, in *REFLEXIVE LANGUAGE: REPORTED SPEECH AND METAPRAGMATICS* 33, 33 (John A. Lucy ed., 1993) (explaining that reference and

act, or performative utterance, which brings a new state of affairs into being.<sup>271</sup> In the classic example, the officiant who pronounces a couple married does not merely refer to, or predicate about, that state of affairs; she creates it.<sup>272</sup> But creativity suffuses language far beyond the classic speech acts, allowing linguistic utterances, patterns, and so on to affect their social worlds.<sup>273</sup>

This is especially so in the law, where authorized speakers affect, and even bind, others in far-reaching ways. When the Supreme Court interprets a statute, it offers not just a description, but a *prescription* of meaning to the parties before it, to other courts, to future litigants, to Congress, and to us all. The idea that such a saying merely describes an existing entity flies in the face of our experience of legal authority. Courts “say what the law is”<sup>274</sup> much the way the officiant says what a couple is.<sup>275</sup>

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predication can be described as what we think of as “language in the usual sense,” that is, “some grammatically conforming system of expression-types, tokens of which refer to some universe of referents and predicate about some universe of states-of-affairs”). But communication—like any social endeavor—is crowded with other functions and factors. Over the last century, scholars have studied a range of simultaneous functions a given utterance may perform, from expressing attitudes, to glossing other speech, to highlighting its own form, to just keeping the channel of communication open, among others. See JAKOBSON, *supra* note 270, at 67-69 (describing the emotive, conative, poetic, metalingual, and phatic functions of language). And they have noted the ways that making meaning from language both depends on contextual factors (the “presuppos[ing]” aspect) and creates new contexts by affecting the world around (the “creative” aspect); see also Michael Silverstein, *Shifters, Linguistic Categories, and Cultural Description*, in MEANING IN ANTHROPOLOGY 11, 33-34 (Keith H. Basso & Henry A. Selby eds., 1976) (distinguishing between “aspect[s] of the speech situation ... presupposed by the sign token” and the creative aspect, which “make[s] explicit and overt the parameters of structure of the ongoing events” and brings some aspect “into sharp cognitive relief”). Legal writing often “fail[s] to do justice to the creativity of speech, concentrating instead on presupposed ... elements of the speech situation.” Weissbourd & Mertz, *supra* note 104, at 627. So do many everyday understandings of how language works. Research indicates that speakers, in general, are more sensitive to the referents that exist independently of a communication than they are to the social relations or states of affairs that communication itself creates or highlights in a new way. See Silverstein, *supra* note 73, at 382-83. The creative power of speech often falls outside “[t]he [l]imits of [a]wareness.” *Id.*

271. See J. L. AUSTIN, HOW TO DO THINGS WITH WORDS 4-7 (1962); JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 16-19 (1969).

272. See, e.g., Bernstein, *supra* note 9, at 642.

273. See MARIANNE CONSTABLE, OUR WORD IS OUR BOND: HOW LEGAL SPEECH ACTS 41-42 (2014); Bernstein, *supra* note 9, at 641-49.

274. *Marbury*, 5 U.S. (1 Cranch) at 177.

275. See, e.g., Bernstein, *supra* note 9, at 642.

Yet both cases and commentaries reveal people trying desperately to hem language in, and to subdue the unruly liveliness of legal communication by stuffing it into neat categories. A recent example: a ship's captain threw out fish he'd caught even though a federal officer ordered him to preserve the fish until he got back to shore.<sup>276</sup> The fish were purportedly too small to permissibly catch under the relevant regulations; the officer wanted them preserved for inspection. A statute prohibits "destroy[ing]" a "record, document, or tangible object" to "impede" a federal investigation.<sup>277</sup> Were the fish tangible objects under the statute?<sup>278</sup> In *Yates v. United States*, a majority of the Supreme Court said no, because "tangible object" in that context included only things "used to record or preserve information."<sup>279</sup> The dissent said any tangible object would do.<sup>280</sup>

Neither considered that the fish might be *both* tangible *and* meaning-bearing objects "used to record or preserve information."<sup>281</sup> After all, a fish's body provides information about its size, which is the information the officer wanted to preserve. Meaning often comes in this way, complexly bound up with multiple other things. Long grass bent over in a field can be both an object in itself and a sign of something that has tramped over it.<sup>282</sup> Which one matters more depends on whether you are interested in mowing the grass or tracking the trampler. Different decision-making contexts will highlight different aspects of signification. But the grass itself harbors both at once, and more.

Judges often employ claims to certainty in this way, to legitimize interpretive conclusions without really justifying them or opening them up to debate. Theorists do, too. For example, Andrei Marmor discusses *Tennessee Valley Authority v. Hill*, in which the Supreme Court had to decide whether the Endangered Species Act (ESA) prohibited a dam for which Congress had approved funding, but

276. See *Yates v. United States*, 135 S. Ct. 1074, 1078 (2015) (plurality opinion).

277. *Id.* (quoting 18 U.S.C. § 1519 (2012)).

278. See *id.* at 1079.

279. *Id.*

280. *Id.* at 1091 (Kagan, J., dissenting) ("A 'tangible object' is an object that's tangible.").

281. *Id.* at 1079.

282. In the terminology of semiotic theory, the bent grass functions as an *index* of prior tramping. See RICHARD J. PARMENTIER, *SIGNS IN SOCIETY: STUDIES IN SEMIOTIC ANTHROPOLOGY* 3-4 (1994) (introducing Charles Sanders Peirce's Semiotic Theory).

which would harm a protected species.<sup>283</sup> Because Congress knew about the conflict with the ESA when it authorized the funding, it is clear—to Marmor, anyway—that Congress actually “hoped” to get the dam built, but wanted to do so “obliquely by ... appropriat[ing] ... funds” rather than repudiating the ESA.<sup>284</sup> “One can only surmise,” Marmor concludes, “that there was not enough support in Congress to face the environmentalists head-on.”<sup>285</sup>

Marmor argues that the strategic nature of legal language differentiates it from ordinary conversation, which he describes as characterized by cooperative information exchange.<sup>286</sup> Separating information exchange from strategic language use thus underlies his claim to interpretive certainty about what Congress really wanted. But each part of this neat image is deceptive.

For one thing, everyday experience suggests that ordinary conversation is full of strategy. “Let’s get together soon.” “How do these pants look on me?” “Thanks for a fascinating workshop presentation.” A wealth of empirical research into naturally occurring discursive practices backs that up.<sup>287</sup> Similarly, the situation Marmor

283. 437 U.S. 153, 156 (1978); Andrei Marmor, *Can the Law Imply More Than It Says? On Some Pragmatic Aspects of Strategic Speech*, in *PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW* 83, 101-04 (Andrei Marmor & Scott Soames eds., 2011).

284. Marmor, *supra* note 283, at 102-03.

285. *Id.* at 103.

286. *Id.* at 83 (contrasting “ordinary conversations, in which the parties are presumed to engage in a cooperative exchange of information,” and legal communication, which “is strategic in nature”).

287. See, e.g., ERVING GOFFMAN, *FORMS OF TALK* 128 (Erving Goffman & Dell Hymes eds., 1981) (discussing the “alignment,” “stance,” or “projected self” expressed in the “footing” of communicative event participants, and arguing that “[a] change in footing implies a change in the alignment we take up to ourselves and the others present .... [and] is another way of talking about a change in our frame for events”); Susan Ervin-Tripp, *Is Sybil There? The Structure of Some American English Directives*, 5 *LANGUAGE SOC’Y.* 25, 64 (1976) (analyzing ways speakers make requests without being explicit, and noting that understanding these directives requires knowing not just the meanings of words, but also relevant cultural norms); Susan Gal, *Codeswitching and Consciousness in the European Periphery*, 14 *AM. ETHNOLOGIST* 637, 637 (1987) (“Patterns of choice among linguistic variants can ... reveal ... how [speakers] respond symbolically to class relations ... and ... understand their historic position and identity within regional economic systems structured around dependency and unequal development.”); Michael Silverstein, *The Improvisational Performance of Culture in Realtime Discursive Practice*, in *CREATIVITY IN PERFORMANCE* 265, 282-95 (R. Keith Sawyer ed., 1997) (analyzing a naturally occurring conversation involving the exchange of biographical information, which turns out to involve a wealth of socially strategic utterances drawing on shared understandings of belonging and status hierarchies).

describes supports a range of interpretations.<sup>288</sup> Maybe there was not enough support in Congress to face the construction industry head-on. Or maybe Congress wanted to allow the dam as long as it adhered to legal strictures, which it left an expert agency to determine. One could even wonder if some members of Congress wanted to have their cake and eat it too: to be seen as protecting the environment *and* bolstering the economy. This would surely not be the only time that legislators left incommensurate desires and understandings to others—agencies and courts—to commensurate. Like the *Yates* opinions, Marmor’s argument treats legal meaning as an either-or matter, rather than the both-and phenomenon it is.<sup>289</sup>

Recently, Judge Easterbrook has argued affirmatively for the kind of simplification I criticize here.<sup>290</sup> He notes that judges are incredibly busy generalists.<sup>291</sup> They have neither expertise in every area of law they adjudicate, nor the time to sift through the legislative history that might reveal congressional deals, hopes, or desires.<sup>292</sup> Given their limitations, judges should choose “an appropriately modest interpretive strategy,” the one that “causes the least damage when it goes wrong.”<sup>293</sup>

Easterbrook claims that textualism is that “modest” strategy.<sup>294</sup> But as I explain in Part IV, textualism empowers interpreters in the name of constraining them.<sup>295</sup> And anyway, Easterbrook gives us no

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288. See Marmor, *supra* note 283, at 102-03.

289. See, e.g., Claudia Bianchi, *What Did You (Legally) Say? Cooperative and Strategic Interactions*, in 7 *PRAGMATICS AND LAW: PHILOSOPHICAL PERSPECTIVES* 185, 185-86 (Alessandro Capone & Francesca Poggi eds., 2016) (arguing that Marmor overestimates both the “collaborative aspect of cooperative conversations” and the “conflictual aspect of strategic conversations”).

290. Easterbrook, *supra* note 145, at 82, 96.

291. See *id.* at 96-97.

292. See *id.* Interestingly, Easterbrook focuses on a method that aims to uncover the motivations of individual legislators and the roles they played in the enactment process. See *id.* at 92 (“Here I want to discuss an older argument for identifying reliable legislative history ... [which] proposed that judges could check the reliability of legislative history ... by asking whether it represented a costly commitment.” (footnote omitted)). Easterbrook explicitly eschews responding to newer proposals that seek to uncover not the intentions or desires of specific legislators, but the kind of information about the statute’s likely effects that might have given legislators a shared *understanding* of the statute, irrespective of whether they thought it was a good idea. See *id.* (expressing, for example, “some sympathy” with the “CBO canon” proposed by Abbe Gluck but not engaging with it).

293. *Id.* at 97.

294. *Id.*

295. See *supra* Part IV.

way to evaluate interpretive “damage.”<sup>296</sup> In agreeing that there are sound methods, but disclaiming any ability or obligation to use them, Easterbrook seems to endorse what we might call the *Naked Lunch* canon, after the William Burroughs novel whose narrator quips, “As one judge said to another: ‘Be just and if you can’t be just, be arbitrary.’”<sup>297</sup>

### C. *Structural Uncertainty*

The basic problem with claiming to avoid choice and to achieve certainty is that interpreting legal language makes those things impossible. They are impossible due to the characteristics of both language in general, and legal language in particular. Linguistic meaning in general is subject to the possibility of controversy. Like all linguistic communication, legal expressions can be vague, in the sense that they are unclear at the margins.<sup>298</sup> They can be ambiguous, in the sense of lacking a single uncontroversial object or implication.<sup>299</sup> They can be multivalent, in the sense of having more than one reasonably imputable meaning.<sup>300</sup>

Legal language depends on changeable and contestable cultural conventions for semantic meaning and pragmatic effect.<sup>301</sup> It is

296. See Easterbrook, *supra* note 145, at 97.

297. WILLIAM S. BURROUGHS, *NAKED LUNCH* 5 (James Grauerholz & Barry Miles eds., 2001).

298. See, e.g., Anthony O'Rourke, *Semantic Vagueness and Extrajudicial Constitutional Decisionmaking*, 25 WM. & MARY BILL RTS. J. 1301, 1308-09 (“Philosophers of language define semantic vagueness by reference to ‘borderline cases’ that do not clearly fall either within or without a term’s compass); see also TIMOTHY A. O. ENDICOTT, *VAGUENESS IN LAW* 30-33 (2000).

299. See Bernstein, *supra* note 117, at 6 (“[A]mbiguous’ suggests that a term has a single, correct interpretation, but that the co-text leaves that meaning unclear.”).

300. See *id.* at 6-7 (“With multivalence, there is no single correct answer to the question of what a word refers to, because there are multiple correct possibilities.”).

301. For example, tomatoes may have obviously been vegetables in the “common language of the people” of *Nix v. Hedden*’s day, but if the East Asian fashion of eating tomatoes along with other fruit for dessert catches on, that conclusion may seem less clear. *Nix v. Hedden*, 149 U.S. 304, 306-07 (1893) (determining that tomatoes were vegetables for purposes of a customs statute and noting that tomatoes are like “vegetables, which are ... usually served at dinner” as opposed to fruits, which usually appear “as dessert”). Empirical ethnographic work on language and communication has demonstrated how language use and even lexical definition changes with cultural shifts. See, e.g., Susan Gal, *Bartók’s Funeral: Representations of Europe in Hungarian Political Rhetoric*, 18 AM. ETHNOLOGIST 440, 444 (1991). For instance, in analyzing the concept of “Europe” in Hungarian political debates over the nineteenth and twentieth centuries, Susan Gal noted that the definition and description of Europe changed

intertextually situated in wide, expansive webs of discourse, which render its effects flexible.<sup>302</sup> It is subject to reinterpretation through uptake by new audiences and interlocutors who are themselves embedded in culturally structured forms of intertextual reference and text production.<sup>303</sup> And it may be brought to bear in situations that differ from, or were inconceivable at, its context of production, making the specifics of its application unpredictable.<sup>304</sup>

Like much writing (and perhaps more than most), legal language largely lacks the opportunities for repair, correction, and specification that realtime communicators routinely use.<sup>305</sup> The paucity of opportunities to clarify or negotiate about meanings in real time, in

with each new debate: “although the terms—Europe/Hungary, east/west—remain the same, their meanings shift dramatically over time, as do the social groups that advocate [for] each ... and the political and economic strategies they propose.” *Id.* These changes in the terms’ meanings are masked by their continued use in a “discourse” that “tends to reduce complicated arguments to dualities and helps to unite these disparate movements (over time), constructing a deceptive image of continuity and creating a legitimating solidarity with previous eras.” *Id.* at 446; *see also* Michael Silverstein & Greg Urban, *The Natural History of Discourse*, in *NATURAL HISTORIES OF DISCOURSE* 1, 8 (Michael Silverstein & Greg Urban eds., 1996) (arguing that the production of authoritative texts is one way societies lay claim to a unified, enduring culture, instilling a sense of continuity and coherence over time, even though “every discourse instance is emergent and creative and hence capable of recalibrating the metadiscursive category for future projections”).

302. For instance, a twentieth-century judge interpreting the word “harm” in a statutory definition having to do with the “taking” of animals can choose to view it as intertextually related to contemporary understandings of harm, or alternatively to the common law notion of animal taking. *See* Bernstein, *supra* note 9, at 574-78 (discussing this choice); *see also, e.g.*, Judith T. Irvine, *Shadow Conversations: The Indeterminacy of Participant Roles*, in *NATURAL HISTORIES OF DISCOURSE*, *supra* note 301, at 131, 140 (“[A]n utterance has implicit links to many dialogues ... which together inform its significance, influence its form, and contribute to its performative force.”).

303. For example, an offhand comment in one judicial opinion can become elaborated over a series of cases to become a central part of the doctrine. *See, e.g.*, Bernstein, *supra* note 180, at 730-44 (tracing the development of the “special factors” doctrine in constitutional tort suits).

304. *See id.*

305. *See* Aria Razfar, *Language Ideologies in Practice: Repair and Classroom Discourse*, 16 *LINGUISTICS & EDUC.* 404 (2005) (collecting literature on repair in studies of communication and analyzing repair in the classroom setting); *see also* Michael Silverstein, “*Cultural*” *Concepts and the Language-Culture Nexus*, 45 *CURRENT ANTHROPOLOGY* 621, 622 (2004) (“[D]iscursive interaction brings sociocultural concepts into here-and-now contexts ... via emergent patternings of semiotic forms.... Precipitated as *entextualizations* (by-degrees coherent and stable textual arrays) in relation to *contextualizations* (how texts point to a framing or surround for the text), such ‘text-in-context’ is the basis for all interpretative or hermeneutic analysis.”).



turn, may make legal texts particularly subject to recontextualized reinterpretation.

In addition, the potential for contestation and reinterpretation is central to the American legal system. At the legislation stage, legal strictures often embody compromises and strategic silences that effectively delegate meaning-making decisions to other people at other times. The *Chevron* doctrine, which asks courts to defer to reasonable administrative agency interpretations of ambiguous statutory terms, recognizes this directly: the presence of an ambiguous term in a regulatory statute implies that Congress has delegated interpretive specification to the agency.<sup>306</sup> Although no doctrine specifically says so, our judicial system suggests that legislation also leaves a lot of meaning-making decisions to judges who must interpret statutory language in future cases.<sup>307</sup> In practice, the judge is one of the statute's addressees.<sup>308</sup>

Perhaps most strikingly, our system of adjudication makes fixed legal meanings impossible. It is organized as a chain of open-ended, if punctuated, meaning-making events over time; each interpretation becomes an object for future interpretations.<sup>309</sup> Since we depend on litigants to bring the cases that impel judges to interpret and reinterpret statutory terms, we never know when such an event might come around. But the structure of our adjudication system means that any seemingly final answer a judicial opinion offers is *subject to* potential reinterpretation in the future. Similarly, al-

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306. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). Strategic silences are central not only to legislative enactments but also to judicial decisions, which often leave decisions for a later time or decline to specify rules, standards, or conclusions. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 56 n.6 (2004) ("We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations.").

307. *See SCALIA, supra* note 139, at 13-14 ("[A] very small proportion of judges' work is constitutional interpretation.... By far the greatest part of what I and all federal judges do is to interpret the meaning of federal statutes and federal agency regulations.").

308. Charles P. Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407, 415 (1950).

309. *See Bernstein, supra* note 9, at 648 ("[I]n an adversarial system, it is precisely arguing about things that makes them arguable."). The common law adjudication system is a beautiful instantiation of the more general process of semiosis described by the American pragmatist Charles Sanders Peirce, in which every interpretant becomes itself a sign ready for further interpretation. *See generally* PARMENTIER, *supra* note 282, at 3; Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621 (2004) (applying the semiotic analysis to trademark law's dilution doctrine).

though we never know when or whether a particular legal term will become part of a dispute that impels interpretation, our adversarial system renders most legal terms potentially subject to such dispute.<sup>310</sup>

We sometimes say that *finality* is a value in our legal system.<sup>311</sup> But finality comes to litigants, not to laws.<sup>312</sup> Our system is set up to provide many moments of provisional closure, such that a dispute about meaning can be decided with seeming finality now, but reopened later.<sup>313</sup>

This does not mean that legal meanings are completely unmoored or subject to simple whim, any more than other kinds of efficacious utterances are. We have ways of provisionally stabilizing meanings, from indexes<sup>314</sup> and speech act felicity conditions<sup>315</sup> to metalinguistic glosses,<sup>316</sup> argumentative genres,<sup>317</sup> and cultural patterns.<sup>318</sup> These tools are instilled in our communicative habits and embedded in our intuitive understandings of legitimate communication; violations often carry sanctions.<sup>319</sup> Adjudication in particular imposes some bottlenecks on indeterminacy, as interpretive debates have to be formulated in ways cognizable by courts (another way, perhaps, that we gloss over normative judgments with seemingly objective criteria).<sup>320</sup> Moreover, because of their sociological similarities, judges are likely to share many linguistic intuitions with the people who write statutes; the continued recourse to “speakers like us” helps stabilize legal meanings too.<sup>321</sup> Through specification,

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310. This structural fact is something that Justice Scalia’s Tanner lectures ignore with the claim that America has “*Common-Law Courts in a Civil-Law System*.” SCALIA, *supra* note 139, at 3. The predominance of statutory law over common-law *laws* does not alter the common law structure of adjudication in American courts. See Strauss, *supra* note 137, at 889-90.

311. See, e.g., Aaron-Andrew P. Bruhl, *When is Finality ... Final? Rehearing and Resurrection in the Supreme Court*, 12 J. APP. PRAC. & PROCESS 1, 1-2 (2011).

312. See *id.* at 2.

313. See *id.* at 1-2; *supra* notes 309-10 and accompanying text.

314. See *supra* note 282 and accompanying text.

315. See *supra* notes 126, 271-73 and accompanying text.

316. See *supra* Part III.A.

317. See *supra* notes 216-17 and accompanying text.

318. See, e.g., *supra* note 287.

319. See *supra* Part II.A.

320. See *supra* notes 309-10 and accompanying text.

321. See *supra* Part II.B.2.

articulation, and change over cases, regulations, and commentaries, laws can achieve an undulating sort of solidity.

So, as elsewhere in social life, contestability does not necessarily lead to untrammelled power. But it interacts with power in interesting ways. The ways that we provisionally stabilize meaning, after all—the patterning of genre and the bounds of acceptability—are revealed, and changed, in practice, rather than knowable in the abstract.<sup>322</sup> Judicial interpretations thus bear a heavy and somewhat contradictory burden. They are supposed to fix legal meanings to ensure the predictability and consistency of the law; but they do so within an adjudicatory system that undermines the fixation of meaning.<sup>323</sup> They are supposed to propound the law in a way that legitimizes their own institutional role; but the discourse connecting legitimacy to determinate meanings undermines their ability to do so convincingly.<sup>324</sup> But convincing they must strive to be, because legal interpretation is as much an appeal as an imposition: to occupy their roles successfully, judges must give others reasons to accept their conclusions. Yet, coming full circle, that convincing involves reasons why others should agree that a legal text ought to be given some determinate meaning, in a situation where both the nature of language and the nature of our legal system render such texts fundamentally contingent.

The roles, structures, and obligations that judicial interpretation must negotiate are, thus, somewhat in tension with one another. And yet it seems that our legal culture and our legal system, place a lot of trust in judges. We ask them to tell us what ordinary people think without consulting ordinary people; we tell them to take their pick from a grab bag of rules; we set up an adjudicative system that renders statutory terms always subject to judicial reinterpretation. And judges, in turn, generally act pretty comfortable with that responsibility. They outsource powers in ways that sneakily empower them. Or they simply assert the meaning of a term they are charged with interpreting. Given all of the agonizing about statutory interpretation by both scholars and judges, in practice courts often

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322. *See supra* Part II.B.1.

323. *See supra* notes 298-310 and accompanying text.

324. *See supra* Part III.A.

treat it as surprisingly *unproblematic*: a matter of more or less simple say-so that is tolerated by others.

There may be good reason to trust the judgment of judges. They are trained professionals with experience interpreting legal texts. Their opinions address and affect broad and diverse audiences including laypeople, legal professionals, legislators, and other judges, many of whom respond to judicial pronouncements, letting judges know what people think of their conclusions. And maybe there is something to the multilayered vetting of the federal appointments process, or even the election of judges in the states that use it.<sup>325</sup> Or maybe, on the contrary, the judicial selection system is too politicized, and an arena that allows narrow majorities to install long-term advocates in deceptively neutral positions.<sup>326</sup>

In some sense, whether trusting judges is a good idea is a bit beside the point. The fact is that our legal system vests a lot of power in judges to exercise judgment. They have no choice but to bear that power. We should, of course, weigh in on how they ought to judge, and evaluate whether they do so badly or well. But grading an interpretive approach on the extent to which it restricts or outsources judgment is a bit like evaluating someone on how well she *does not* take responsibility for her work.

Legal interpretation is largely about finding non-arbitrary justifications for essentially contingent developments.<sup>327</sup> That is the attraction of outsourcing: it appears to provide an externally validated resolution to a question that ultimately lacks a single right answer.<sup>328</sup> But pretending to achieve certainty in a system built around synchronic compromise and diachronic change may undermine the very democratic process that outsourcers are concerned with. Facing indeterminacy and explaining the always provisional ways we seek to mitigate it may fulfill those democratic aspirations better.

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325. See Todd D. Rakoff, *Statutory Interpretation as a Multifarious Enterprise*, 104 NW. U. L. REV. 1559, 1571 (2010) (“[M]ost of the judges who give statutes their final interpretations are elected.”).

326. See, e.g., Lawrence B. Solum, *Judicial Selection: Ideology Versus Character*, 26 CARDOZO L. REV. 659, 660-61 (2005).

327. See Binder, *supra* note 244, at 94; William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 635-36 (1990).

328. See *supra* Part V.B.

## VI. CONCLUSION: DEMOCRACY AND DISPUTE

Outsourcing appears to alleviate anxieties about countermajoritarian judges by giving interpretive power to others, but it cannot make good on that democratizing promise. But how democratizing is that promise, really? Both our language and our legal system are structured to prevent final answers to interpretive disputes. Is it really so democratic to insist on reaching final answers anyway?

Rather than seeking a better interpreter to outsource to, perhaps it makes more sense to ask how judges can, and should, exercise judgment in a way that merits the trust our system places in them. That, of course, requires decisions of its own. What justifies legal interpretation, how can interpreters achieve that, and how do we know if they have? These are difficult and debatable questions. But engaging those underlying issues may be more productive than competing for ways to restrain the authority that we also insist judges exercise.

What then should we require of interpreters? At the simplest level, we should ask whether an interpretive move does what it seems to. Does a quotation actually evidence the linguistic practices of the speakers it claims to present? Does a claim about shared understandings represent any? Does recourse to a rule really obviate plausible alternatives? When an approach promises to accomplish something, we should check whether it follows through. Only then can we evaluate its desirability relative to other approaches.

How can we make that call? Only by having a sense of the *method* connecting an interpretation with the reasons proffered for reaching it. Inquiring into method allows us to ask whether the way someone pursues an inquiry can produce an answer to the question they ask. Parts II, III, and VI analyze situations in which the way judges pursue their inquiries cannot yield the results they claim to reach. Outsourcing seeks to mask that disconnect.

Using ordinary language use to clarify the meaning of a statute requires a method for determining which speech community is relevant and how it uses a term.<sup>329</sup> Developing that method involves having an underlying explanation for why ordinary language

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329. See *supra* Part II.B.2.

provides the best guide to the extraordinary language of statutes. That is a lot more complex than opening the *King James Bible* and being done with it.<sup>330</sup> But it can at least help us agree that opening the *King James Bible* may not be a very good way to interpret a statute.<sup>331</sup>

A theory, too, needs a method to actualize its goals. If textualism is to represent audience understandings, it needs a method to identify them. And that requires deciding whose understandings count. Those decisions in turn must rest on some notion of why *those* people matter, and what reveals their understanding. This is more involved than declaring a result that feels like it should be obvious.<sup>332</sup> But judicial interpretations, by definition, arise out of debate: litigants work hard to ensure that things are not obvious. If the requirements of a textualist method sound herculean, it is at least worth noting that this is the sort of undertaking textualism implies. It does not get textualism off the hook from articulating a method to achieve its aspirations.<sup>333</sup>

Similarly, being bound by a system of interpretive canons means having a method for choosing among plausible contenders in a given situation. That requires taking a position on what makes canons worthwhile or what lends them interpretive power. That invites more effort and debate than just choosing a rule and applying it. But that is the difference between reason and fiat.

In other words, before arguing about which sources are best and which meanings are true, I suggest we first ask whether the way a

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330. *Cf. Muscarello v. United States*, 524 U.S. 125, 129 (1998).

331. *See supra* notes 32-35 and accompanying text.

332. *Cf. King v. Burwell*, 135 S. Ct. 2480, 2496 (2012) (Scalia, J., dissenting) (“The Court holds that when the Patient Protection and Affordable Care Act says ‘Exchange established by the State’ it means ‘Exchange established by the State or the Federal Government.’ That is of course quite absurd.”).

333. In contrast, the “Congress-centered” approaches advanced in recent scholarship tend to have more modest empirical claims that are more closely matched to articulated methods. These approaches argue essentially that judges can gain insight into what members of the enacting Congress knew about, and expected from, the statute (irrespective of their desires about it). Methodologically, this school of thought identifies records and procedures that provide legislators with information about the statute and its likely or anticipated effects, allowing judges some insight into what legislators knew about the statute. *See, e.g.,* Gluck, *supra* note 134; *Elementary*, *supra* note 179 (arguing for the use of congressional rules as a means of interpreting the meaning of statutory texts); *Decision Theory*, *supra* note 179 (arguing that Congressional procedures and records reveal shared understandings among legislators about the projected effects of statutes).

judge looks for whatever it is she seeks is likely to uncover it. Not every opinion—perhaps not any opinion—can articulate a full blown methodology for interpretation. But as my discussion indicates, opinions *employ* a method whether they articulate one or not.<sup>334</sup> It would be nice if judges became more explicitly reflective about their methods. But we can evaluate how their inquiry relates to their conclusions whether they tell us about it or not.

And if, as Judge Easterbrook suggests, judges lack a method in statutory interpretation because they lack the time and knowledge it would take—well, perhaps we should find their exercise of power wanting.<sup>335</sup> Judges should not be like the man in the joke, who looks for his lost keys under the streetlight just because that's where the light is. They have the responsibility—and, I suspect, the ability—to develop more effective ways of looking. Critically examining the logic underlying one's assumptions can be difficult. Opening that logic up to public debate can be intimidating. Revising it in light of others' reactions can be unsettling. But judges hold great power in our society. Wielding it *should* be hard.

Focusing on method asks interpreters to justify their actions in ways that are potentially subject to normative, empirical, and methodological debate. That is not a failing; it is part of the point. It is a first step in democratizing interpretation: giving up the veneer of certainty, recognizing that judicial interpretation involves exercising authority, and justifying the way authority is wielded. Focusing on method allows judges and commentators to evaluate and improve interpretive approaches.

In contrast, when judges avoid debate with a claim to certainty, we should get suspicious. Outsourcing has pretensions to democratizing, but by denigrating debate it does the opposite. Articulating the normative, empirical, and methodological bases of an interpretive approach opens it up to the democratic process of deliberation and dispute. It allows us—judges, commentators, audiences—to consider how we should choose among alternatives. And it is realistic about the fact that any alternative will inevitably be incomplete and unsatisfying.

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334. See *supra* Part V.A.

335. See Easterbrook, *supra* note 145, at 81 (“A conference about ‘best practices’ for legal inquiry supposes that there *are* practices. In the field of legal interpretation, that assumption is doubtful.”).

That then may open up discursive room for a more consequentialist inquiry into the larger ends of statutory interpretation. Acknowledging that interpretation is a decision-making process implies asking what norms should inform it. If we value the provisionally stabilizing effects of judicial decisions, perhaps we emphasize long-term reliability. That might argue for deciding legal issues by supermajorities, rather than allowing for precariously split decisions subject to change at the next vacancy. It may likewise push commentators to differentiate litigation outcomes based on how much agreement they garnered, for instance by treating five-to-four Supreme Court decisions as less presumptively solid than those with greater support.

If, on the other hand, we value the judiciary's participation in a contentious public sphere that sets the terms of democratic legitimacy and influences legal culture, we may be less concerned with consensus and more interested in reasoned engagement with different points of view. Our evaluation would then focus less on an opinion's ability to gain agreement and more on its internal logic and responsiveness to others.

Or, if we think of the judiciary as primarily a faithful agent of the statute-writing Congress, we may want interpretive justifications to be grounded in congressional practice and knowledge. That could lead us to examine the practical ways that judicial approaches affect the distribution of power among the branches. There may be less gained, in other words, in seeking an ultimately "correct" interpretative approach than in asking about the values a given approach furthers in practice.

All this suggests an orientation toward statutory interpretation that is normatively articulated, empirically modest, and methodologically focused. That orientation leaves interpreters and commentators open to debate, and their positions open to revision. That openness, I have suggested, furthers democratic goals where outsourcing obstructs them.<sup>336</sup> Rather than taking disputation as a sign of defeat, that is, we should see an eclectic, debatable attitude

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336. See *supra* Part V.C.



toward statutes as the principled course.<sup>337</sup> Eclectic, moreover, is surely a good way to describe the statutes that courts interpret.

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337. See Richard H. Fallon, Jr., *The Meaning of Legal “Meaning” and its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1243 (2015) (“[I]nterpretive eclecticism, which need not be lawless, permits better responses to the complexities that a probing of the concept of legal meaning reveals.”); Rakoff, *supra* note 325, at 1560 (“[T]here are many legitimate and useful modes of statutory interpretation, ... and ... choosing the right one in any given instance is not a question of ‘theory’ ... but of appropriateness or ‘fit.’”); see also Staszewski, *supra* note 251, at 245-48 (arguing that interpretive method is properly variable across cases and resists consistent ordering).