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Jazz Improvisation and the Law: Constrained Choice, Sequence, and Strategic Movement Within Rules

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JAZZ IMPROVISATION AND THE LAW: CONSTRAINED CHOICE, SEQUENCE, AND STRATEGIC MOVEMENT WITHIN RULES

*William W. Buzbee**

This Article argues that a richer understanding of the nature of law is possible through comparative, analogical examination of legal work and the art of jazz improvisation. This exploration illuminates a middle ground between rule of law aspirations emphasizing stability and determinate meanings and contrasting claims that the untenable alternative is pervasive discretionary or politicized law. In both the law and jazz improvisation settings, the work involves constraining rules, others' unpredictable actions, and strategic choosing with attention to where a collective creation is going. One expects change and creativity in improvisation, but the many analogous characteristics of law illuminate why change and choice are the norm in law too. Rarely is law just about ferreting out some isolated, clear, but abstruse legal command. In jazz and legal settings, relative assessments of strength are more commonly apt than are expectations of a single correct answer or simple binary right-versus-wrong determinations. There is a world of difference between claims that law simply provides determinate answers, versus claims that law constrains and guides what remain choices. Much as jazz improvisers must be highly sensitive to the surrounding constrained choices of others, legal analysis of context and consequences of legal choices, with substantial attention to others' roles and competence, should always be part of legal actions. This different way of thinking about law's nature helps illuminate and critique both major methodological legal divides, enduring jurisprudential debates, and several cutting-edge case studies. Those case studies include standing law's transformation, including the 2021 TransUnion standing decision, ongoing battles over what

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waters are protected by the Clean Water Act, debates over textualist methodology's claims of constraint, and increasing judicial reliance on the "major questions doctrine" with shifts away from the familiar deferential Chevron framework. Improvising musicians must ensure their choices musically fit with governing forms, practices, and others' choices. Similarly, the Article closes by illuminating why, to further rule of law values and check power abuses, legal actors should always assess the consequential congruence of their tenable choices with surrounding law, giving substantial weight to statutory policies and linked effects analysis by agencies.

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I. INTRODUCTION

This Article argues that a richer understanding of the nature of law is possible through comparative, analogical examination of legal work and the art of jazz improvisation. This exploration of jazz and law and their modal and structural similarities illuminates a middle ground between rule of law aspirations emphasizing stability and determinate meanings and contrasting claims that the untenable alternative is pervasive discretionary or politicized law. Improvising musicians must always make choices in light of constraining rules, others' uncoordinated choices, and with attention to where their collective creation is going. Similarly, the work of law typically involves legal choosing from a range of tenable options, also in sequentially developing settings involving multiple constrained but unpredictable players. Rarely is law actually just about reading or ferreting out some isolated, clear, but abstruse legal command. As a result, this Article argues, much as jazz improvisers must be highly sensitive to the surrounding constrained choices of others, legal analysis of context and consequences of legal choices, with substantial attention to others' roles and competence, should always be part of legal actions. This different way of thinking about law's nature helps illuminate and critique both major methodological legal divides and several cutting-edge case studies, among them the 2021 *TransUnion* standing decision, battles over what waters are protected by the Clean Water Act, debates over textualist methodology's claims of constraint, and increasing judicial reliance on the "major questions doctrine" with shifts away from the familiar deferential *Chevron* framework.

In this analogical exploration, I compare the nature of law and legal work not to final recorded performances of music, but to the internal practices of musicians *doing* improvisation, especially in the small ensemble bebop setting.¹ The rigor and challenging practices and constraints of jazz improvisation have been mischaracterized or glossed over in most previous United States legal scholarship.² Like the work of legal actors generating legal materials such as briefs, court decisions, statutes, regulations, and regulatory guidance and advocacy, jazz improvisation involves substantial freedom of choice, yet it is subject to a

1. For analogous examinations of the practices of jazz improvisation, see generally PAUL F. BERLINER, *THINKING IN JAZZ: THE INFINITE ART OF IMPROVISATION* (1994) (comprehensively analyzing jazz improvisation); Kwami Tain Coleman, *The "Second Quintet: Miles Davis, the Jazz Avant-Garde, and Change, 1959–68* (Aug. 2014) (Ph.D. dissertation, Stanford University) (analyzing the Miles Davis Second Quintet's changing methods); BARRY KERNFELD, *WHAT TO LISTEN FOR IN JAZZ* (1995) (explaining jazz elements); *see also* INGRID D. MONSON, *SAYING SOMETHING; JAZZ IMPROVISATION AND INTERACTION* 3–4 (1996) (discussing improvisatory practices from "insider perspectives" with focus on the rhythm section).

2. *See infra* Part II.

complex array of constraints, rules, and traditions.³ Both law and improvisatory jazz tend, through their application of constraining materials and linked choosing, to go somewhere. Neither is just about what is. In jazz and legal settings, relative assessments of strength are more commonly apt than are expectations of a single correct answer or simple binary right-versus-wrong determinations.⁴ One expects change and creativity in improvisation, but the many analogous characteristics of law illuminate why change and choice are the norm in law too.⁵ Choice, however, does not mean unfettered discretion. Law seldom provides determinate answers, but if wielded with integrity, it constrains legal actors' choosing.⁶

Concededly, this Article's basic claims may run counter to claims of textualists, rule of law advocates, and jurisprudential scholars, who insist law must be stable and knowable.⁷ Fury is often directed at judges or regulators who concede the discretionary and policy-laden elements of their legal work.⁸ The correlative concepts of administrative agency discretion and judicial deference, which share modal attributes with jazz improvisation, are under attack as constitutionally suspect.⁹ A judge who describes his role as just calling "balls and strikes," as declared Supreme Court Chief Justice John Roberts when a Supreme Court nominee, is often lauded for appropriate restraint and virtue.¹⁰

Other skeptical readers may arrive at this point with a predisposition that jazz improvisation is simply too different to illuminate law. They may erroneously conceive of jazz improvisation as something wild, emotional, unconstrained, or ephemeral, almost the antithesis of common perceptions of law as fundamentally about reducing disorder.¹¹ In reality, structured and constrained

3. See *infra* Section III.C.

4. See *infra* Sections III.D, IV.C.

5. See *infra* Part IV.

6. See Richard H. Fallon, *The Meaning of Legal "Meaning" and Its Implication for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1265, 1306–08 (2015) (exploring types of legal "meaning" and favoring "legally constrained normative judgments," and "interpretive eclecticism" over rigid *ex ante* commitment to methods). See *infra* Part V for exploration of consequential congruence analysis.

7. See, e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1146–47, 1150–53 (10th Cir. 2016) (Gorsuch, J.) (claiming agencies can shift policies based on a "policy whim" due to deference regimes in the majority and concurring opinions).

8. See generally Christopher J. Walker, *Attacking Auer & Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103 (2018) (reviewing the literature on deference doctrines).

9. See Walker, *supra* note 8 (citing opinion making such arguments); *infra* Subsection IV.D.4 (presenting deference regime shifts).

10. See *Confirmation Hearing on the Nomination of John G. Roberts to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Supreme Court nominee). For critical analysis, see David S. Louk, *The Audiences of Statutes*, 105 CORNELL L. REV. 137, 149–50 (2020) (citing Charles Fried, *Balls and Strikes*, 61 EMORY L.J. 641 (2012)). See generally Ronald A. Cass, *The Umpire Strikes Back: Expanding Judicial Discretion for Review of Administrative Actions*, 73 ADMIN. L. REV. 553 (2021) (analyzing judicial review of agency discretion and Roberts' views).

11. Cf. BERLINER, *supra* note 1, at 492–93. Even the most "out" or "free" modes of improvisation involve constraining norms; see Coleman, *supra* note 1, at 88 (discussing "time, no changes" form); see also Shelby Pope, *Ishmael Wadada Leo Smith Explains His Colorful, Abstract Musical Notation*, KQED ARTS (Dec. 8, 2016), <https://www.kqed.org/arts/12428335/ishmael-wadada-leo-smith-explains-his-colorful-abstract-musical-notation> [<https://perma.cc/7H8K-3M6B>] (describing Smith's abstract notations guiding his music).

choices in settings akin to conversation with shared goals are central to jazz improvisation, with masterful creativity working within those constraints the apex accomplishment of a jazz improviser. Law and jazz improvisation both involve challenging, intellectual tasks. As master guitarist Julian Lage recently stated, “thinking . . . gets a bad rap with improvisation.”¹²

Despite the powerful influence of constraining texts and practices in both settings, this Article shows that both are characterized by *ex ante* unpredictability and pervasive change over time.¹³ A single determinate or predictable outcome is rare, although choices will be made and outcomes reached.¹⁴ In the realm of law, settlement, at least for a time, is possible.¹⁵ Abundant scholarship often tries to identify the essence of law, pointing to the power of the state, or of legitimated coercive force, or law as a protective force, or the centrality of command.¹⁶ This Article focuses less on law’s effects at particular moments than on how and why legal actors tend to work with and generate legal materials in settings where no single advance correct predictive answer could exist. Doing law changes and clarifies the law, making the line between “doing law” and “the law” forever blurred.

Neither legal work nor jazz improvisation is merely about replicating an earlier creation or discovering some single static thing. In Justice Cardozo’s words, law does not involve simply “match[ing] the colors of the case at hand against the colors of many sample cases,” or vast memory banks.¹⁷ “[S]erious” legal work is of “intellectual interest” because it does not involve a mere matching exercise akin to having the best “card index of the cases.”¹⁸ Similarly, choosing and change are central to jazz improvisation.¹⁹ As stated by bassist Buster Williams, “[i]f it was all thought out before it was done, there would be no need to do it.”²⁰

The focus hence is not on a particular frozen moment in the law or appraisal of a recorded jazz solo, but on understanding *the doing* of each and the implications of their analogous institutional relationships, modalities, sequentially

12. Levine School of Music, *Master Class with Julian Lage*, at 45:48 (Dec. 10, 2020), <https://www.levinemusic.org/performance/guitar-master-class-julian-lage/> [<https://perma.cc/78VA-M6PP>]. He also described improvisation as involving “flexible architecture,” “conversation with topics,” and “listening with a question.” *Id.*

13. See generally John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing and Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129 (1992) (exploring critical race theory through a focus on Archie Shepp’s music).

14. See *infra* Sections III.D, IV.C.

15. See generally LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* (2001) (discussing constitutional law settlement with emphasis on how it often unsettles other legal and political venues).

16. For rejection of the “command” theory of law and call for attention to the “forces” shaping law and consequences, see Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 836–37, 843–44 (1935) (disputing that law involves “logical deduction from fixed principles”).

17. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 20–21 (1921) (criticizing such a view in the common law setting).

18. *Id.*

19. BERLINER, *supra* note 1, at 268 (quoting Williams); see *infra* Section III.C.

20. BERLINER, *supra* note 1, at 268 (quoting Williams).

unfolding settings, and thought patterns dealing with freedom and choice within constraints.

To illuminate these similar skills and modalities, the Article starts in Part II by reviewing briefly past works linking law and music, distinguishing this Article's project from past scholarship. It then turns in Part III to exploration of fundamentals of jazz improvisation and its development over time, drawing primarily on musicians' explanations.

In Part IV, the Article then turns to the mechanisms of legal change and inevitability of legal choice and discretion. After exploring how and when people choose to do legal work, it offers several case studies involving the major institutional modes of law in its codified public law forms—constitutional law, statutory interpretation, and administrative law. The Article presents settings where legal actors claim obedience to determinate commands, yet close analysis actually shows choosing and change much like the practices of jazz improvisation. The case studies include tracing of changes in standing doctrine, with a special focus on the legal leaps and questions raised by the recent 2021 *TransUnion* decision.²¹ It then turns to several decades of battle over unchanged statutory language defining what is a protected “water of the United States.” This issue, in 2022, again went before the Supreme Court.²² The Article then engages with the ongoing statutory interpretation debate over textualist method and the dynamism or constraint resulting from reference to few or many sources, or what has been called the “source proliferation” question.²³ This Part closes with enduring but contested deference frames applicable to judicial review of administrative agency action, focusing on the shifting nature of the new “major questions doctrine.”²⁴

Part V closes by arguing that conceptions of—and aspirations for—fit, congruence and integrity are more appropriate frames for thinking about the reality of principled law than are characterizations of all law as either rudderless or just a world of difficult “balls and strikes.” Much as the best musical improvisation engages with its many resources and constraints, legal actions are likely to show integrity when they grapple honestly with the linked preceding legal materials, methodological norms, institutional competence, and effects and science complexities, with paramount weight usually given to political branch policymaking and well-grounded empirical assessments.

But the Article closes with an additional, crucial point. Legal actors should assess their tenable choices' consequences and how they mesh or clash with other sources of legal authority, especially governing statutes. This is not a call for “purposive” modes of statutory interpretation or broad forays into other statutes' language choices in a claimed effort to make sense of the statutory “corpus

21. See generally *TransUnion L.L.C. v. Ramirez*, 141 S. Ct. 2190 (2021).

22. See *infra* notes 410–14 (discussing unexpected 2021 Supreme Court grant of the petition in *Sackett v. EPA*).

23. See generally Adam M. Samaha, *Looking Over a Crowd: Do More Sources Mean More Discretion?*, 92 N.Y.U. L. REV. 554 (2017).

24. See *infra* Subsection IV.D.4.

juris.”²⁵ Much as jazz improvisers must mesh with surrounding choices of others, legal actors should assess the consequences of their own choices (in advocacy or decisions) and their congruence with preceding or underlying legal materials. With such transparent reasoning, resulting law will be clearer and more prospectively constraining, plus disruptive acontextual outcomes will be less likely.²⁶

II. LAW AND MUSIC REVISITED

That law and music share attributes and thought modalities is not a new observation. Nor is legal scholars’ use of musical metaphors or analogies to illuminate the nature of law. For example, recent legal works reference hip-hop, although focused less on the structures of the music than on culture clashes, inclusion and exclusion, and race and the law.²⁷ This Article’s project is different. It focuses more internally on the practices and structures of law and jazz improvisation and, through this comparative exploration, seeks to illuminate how strategic change, choice, interaction, and resulting systemic dynamism can be reconciled with systems laden with constraining rules. To set the stage for this Article’s distinctive claim that the doing of law and jazz improvisation share many common modal elements, this Part briefly reviews past explorations of law, music, and the arts to sharpen this Article’s different claim.

Among the most elegant explorations of music and the law is in an essay by Professors Sanford Levinson and J.M. (Jack) Balkin, “Law, Music, and Other Performing Arts.”²⁸ Their article looks broadly at music and performance, with a focus on “interpretation” and the choices inherent in interpreting even a written text, be it law or classical music.²⁹ In its most in-depth exploration, the authors assess the implications of performances using period instruments versus contemporary instruments and link that analysis to legal debates over methods to interpret legal texts, especially constitutions.³⁰

Levinson and Balkin give jazz and improvisation passing mention, mainly dismissing its relevance to understanding law. They “exempt[] jazz from the discussion due to its deliberately improvisatory form . . .”³¹ Later, they characterize jazz improvisation as involving “unself-consciously living within it”; the “it” appears to allude to something like living “in the moment”.³² They only “half in

25. See generally Anita S. Krishnakumar, *Cracking the Whole Code Rule*, 96 N.Y.U. L. REV. 76 (2021) (analyzing the Roberts Court’s “whole code” application); see *infra* Subsection IV.D.3.

26. See generally Kevin M. Stack, *Preambles as Guidance*, 84 GEO. WASH. L. REV. 1252 (2016) (exploring agency preambles as a form of guidance).

27. See generally HIP HOP AND THE LAW (Pamela Bridgewater, andré douglas pond cummings, & Donald F. Tibbs eds., 2015) (focusing on how hip hop music engages and raises issues of race, the criminal justice system, and copyright); Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983 (2004) (using hip hop music to inform theories of punishment).

28. See generally Sanford Levinson & J. M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597 (1991).

29. *Id.*

30. *Id.* at 1598–1602.

31. *Id.* at 1623.

32. *Id.* at 1637–38.

jest” question if the “performance of constitutional interpretation” is more like a classical music performance or “jazz improvisation on Thelonious Monk’s *Round Midnight*.”³³ As explored below, these passing characterizations of the nature of jazz improvisation are rooted in several errors.³⁴

The nature of federalism has also been illuminated through musical analogy. Although the Supreme Court’s federalism jurisprudence often emphasizes the benefits of distinctive and separate federal and state roles, the dominant political choice for over a century has been to harness concurrent, overlapping, and often intertwined federal and state roles.³⁵ Sometimes the metaphor of “marble cake” has been suggested as a visual way, or perhaps baking metaphor, to understand federalism.³⁶ A wave of modern federalism scholarship questions the recurrent judicial doctrinal preference for separation, criticizes prevalent federalism metaphors, and highlights the benefits of concurrency and interaction facilitated through diverse federalism choices.³⁷

Dean Robert Schapiro offers a musical metaphor, arguing that the dominant political federalism choice of overlap and interaction is like polyphonic music, where voices can weave around each other and sometimes harmonize, collectively creating a richer whole.³⁸ This evocative classical music metaphor for federalism does not, however, engage much with this Article’s focus on how sequence, choice, and creativity within constraint are pervasive elements of the doing of law. Federalism similarly can be efficacious, especially when leaving room for tailoring, experimentation, and learning benefits over time.³⁹ These attributes are much like jazz improvisation, but that metaphor has not been

33. *Id.* at 1654 (also citing John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833, 837 n.10 (1991), for his dismissal of jazz improvisation as illuminating).

34. Monson notes that some jazz improvisation critics “have no real musical knowledge.” MONSON, *supra* note 1, at 6.

35. See generally William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547 (2007) (exploring federalism regulatory concurrence and implications of regulatory floors and ceilings) [hereinafter Buzbee, *Asymmetrical Regulation*]; William W. Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, 2017 WISC. L. REV. 1037 (exploring climate policy benefits of federalism-facilitated cross-jurisdictional and cross-institutional learning) [hereinafter Buzbee, *Federalism Hedging*].

36. This metaphor is generally attributed to Morton Grodzins, *The Federal System*, in GOALS FOR AMERICANS 74, 74–78 (1960).

37. See, e.g., Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863, 879–98 (2006); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1259 (2009); Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. L. REV. 1097, 1099 (2009); Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 541–43 (2011); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2026–29 (2008). See generally Buzbee, *Federalism Hedging*, *supra* note 35; Buzbee, *Asymmetrical Regulation*, *supra* note 35; William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENV’T. L.J. 108 (2005); Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933 (2008); Sarah E. Light, *Precautionary Federalism and the Sharing Economy*, 66 EMORY L.J. 333 (2017).

38. See ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 7–9, 37–91, 94–97 (2009) (exploring revival of some dual federalism elements and introducing polyphonic music as an “aural” federalism metaphor).

39. See *id.*

suggested by this author or others in the proliferation of recent work about federalism interaction's benefits.⁴⁰

While not directly exploring music and the law, several giants of jurisprudence explore creative collective efforts and how they develop like law. For example, Ronald Dworkin's "chain novel" metaphor explains how even judges acting in good faith to hew to the law necessarily interpret it then pass along its next chapter to lawyers and future law interpreters.⁴¹ Like a chain novel written sequentially by different authors, change is the inevitable result, even if each judge seeks the best answer.⁴² In contrast to this Article, however, Dworkin resisted a "hybrid" concept of law that acknowledged how legal actors both interpret legal materials and create new law, with "discarding" of some materials along the way.⁴³ Despite Dworkin's "single best answer" insistence, he did, at times, grapple with the many actors and institutions that shape the law's development.⁴⁴ Lon Fuller developed a similar theme, likening law to how jokes are heard, then retold with inevitable changes in the retelling.⁴⁵

Judges, writers, and professors from the late nineteenth and early to mid-twentieth century—especially Oliver Wendell Holmes, Benjamin Cardozo, Learned Hand, and Jerome Frank—drew on musical metaphors to describe the work of lawyers, although mostly focused on what judges do in systems governed by common law.⁴⁶ All emphasized the frequent absence of clear answers or dispositive precedent and the resulting need for judicial pragmatic understanding and choosing.⁴⁷ None argued that this sort of reasoning is unprincipled; all viewed law as constraining.⁴⁸ Some of this work alludes to finding the "melody" in the law to derive conclusions.⁴⁹ Much of this work preceded the emergence of jazz, and certainly bebop improvisation, but their exploration of common law's context-rich choosing reveals attributes much like jazz improvisation.

40. *Id.*

41. See RONALD DWORKIN, *LAW'S EMPIRE* 229 (1986) [hereinafter DWORKIN, *LAW'S EMPIRE*]; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 279–80 (1978) (acknowledging questions about the "best answer" claim, and "insist[ing]" judicial task is still "discovering," not "inventing"); *id.* at 294–330 (identifying settings possibly lacking a single best answer); Joseph Raz, *Dworkin: A New Link in the Chain*, 74 CALIF. L. REV. 1103, 1115–19 (1986) (book review) (discussing a book of essays by Dworkin and theories of "the best").

42. See DWORKIN, *LAW'S EMPIRE*, *supra* note 41, at 225–75; Raz, *supra* note 41, at 1116.

43. See Raz, *supra* note 41, at 1113–19 (discussing Dworkin's "best answer" writings and concluding "we have the same hybrid theory we had all along").

44. See *id.* at 1116–18 (discussing how later Dworkin "whittled down" best answer claim).

45. LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 8 (1940). For cogent linking of Dworkin's and Fuller's metaphors, see David Luban, *Rediscovering Fuller's Legal Ethics*, 11 GEO. J. LEGAL ETHICS 801, 804–05 (1998).

46. See Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1260–62 (1947) (discussing music metaphors and "interpretation" as a "middle ground" between "disregarding the composer's intention and being intelligently imaginative").

47. For excerpts of their views and dynamics of common law change, see EVA H. HANKS, MICHAEL E. HERZ & STEVEN S. NEMERSON, *ELEMENTS OF LAW* 34–51 (1994).

48. Fallon similarly observes how common law involves pragmatic change and constraining traditions. See Fallon, *supra* note 6, at 1304.

49. Learned Hand, *The Speech of Justice*, 29 HARV. L. REV. 617, 620 (1916) (discussed in Frank, *supra* note 46, at 1263–64).

Jerome Frank went beyond common-law analysis, exploring the interpretation of statutes and agency roles through a musical analogy.⁵⁰ Frank criticized the aim of “object literalism” and efforts to remove “the human element” in interpreting legal texts, especially statutes.⁵¹ He approvingly quoted Hand’s call for judges and agencies to interpret statutes with “sympathetic and imaginative discovery.”⁵² He viewed the legislature as like a “composer,” who must “leave interpretation to others.”⁵³

A few legal scholars have, to varying degrees and with different scholarly goals, drawn on jazz improvisation to illuminate different facets of law, language, race, or justice. Sara Ramshaw, a Canadian law professor, in *Justice as Improvisation*, provides a notably erudite examination of the nature of improvisation and uses it to illuminate a case study of the evolution of New York City cabaret laws and regulation of jazz musicians.⁵⁴ Her excellent book also provides a vehicle for an extended engagement with the writings of Jacques Derrida.⁵⁵ In United States legal scholarship, John Calmore’s discussion of jazz and law focuses on the more “out” or “fire music” forms of jazz played by Archie Shepp, through the analogy exploring the nature of critical legal studies, race theory, and the effects of race and racism in shaping American music and law.⁵⁶ Sheila Simon’s exploration of jazz and family law tracks the changing forms of jazz, emphasizing the improviser’s freedom and parallels in outsiders’ influence.⁵⁷ Susan Silbey and Patricia Ewick explore the nature of law and legal reasoning by alluding to jazz improvisation’s logic and math-like elements accompanied by “invention, spontaneity, and emotional connection,” shaped by “both logic *and* experience.”⁵⁸ Peter Margulies draws on the place of jazz to explore “outsider innovations in music and legal thought.”⁵⁹

Most of these works pay little attention to how the law is shaped by lawyers and other legal actors and legal institutions, not just judges. They also do not focus on the modal similarities of jazz improvisation and law analyzed here, namely the pervasive reality that law arises and emerges in settings of contestation and sequential interaction where multiple parties seek to influence choices

50. See Frank, *supra* note 46, at 1260.

51. *Id.* at 1260–62.

52. *Id.* at 1263 (quoting Judge Learned Hand’s opinion in *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945)); *id.* at 1269–70 (discussing agencies’ roles).

53. *Id.* at 1264.

54. See generally SARA RAMSHAW, *JUSTICE AS IMPROVISATION: THE LAW OF THE EXTEMPORE* (2013).

55. See *id.* at 6–14, 35–55, 110–24, 134–35 (analyzing Derrida’s insights by weaving in conceptions and practices of improvisation).

56. Calmore, *supra* note 13, at 2138.

57. See Sheila Simon, *Jazz and Family Law: Structures, Freedoms, and Sound Changes*, 42 IND. L. REV. 567, 568 (2009).

58. Susan S. Silbey & Patricia Ewick, *The Double Life of Reason and the Law*, 57 MIA. L. REV. 497, 501 (2003).

59. Peter Margulies, *Doubling Doubtless, and All That Jazz: Establishment Critiques of Outsider Innovations in Music and Legal Thought*, 51 MIA. L. REV. 1155, 1171–75 (1997) (focusing on “outsider innovation” and responses to jazz innovations).

that, in turn, shape the manifested law over time.⁶⁰ Few engage methodological debates where codified public law forms—constitutions, statutes, and regulations—are the key law in play.

Central to this Article’s claim is that the doing of law is not a cloistered search for a settled thing, but instead—like the practices of collective jazz improvisation introduced next—involves a contested and sequential process that no one person or institution controls or can wield in a truly final manner.⁶¹ Layers of law and method choices, plus interacting institutions, collectively create a web of constraints, but they also leave broad space for change, uncertainty, strategic contestation, and selection from multiple tenable choices.

III. JAZZ IMPROVISATION: FREEDOM AND CONSTRAINED CHOICES IN A SEQUENTIAL SYSTEM

This Part illuminates the art of jazz improvisation as a prelude to analysis of how it shares modal and institutional attributes with the doing of law. It explores the law-improvisation analogy primarily from the perspective of musicians, focusing on the rules, traditions, and practices they draw on, are constrained by, but also transform, as they make improvisatory choices.

But what does it mean to improvise? In short, “*improvisation*” in the jazz setting refers to a performer making on-the-spot creative choices that are not planned or dictated in advance.⁶² It does not, however, mean creativity without attention to musical form, changing contexts, or constraining rules and practices. Neither jazz nor law involve just command and obedience. Instead, both are shaped by history, context, sequentially revealed actions of others, and attention to consequences of what remain constrained but ubiquitous choices.⁶³ Improvisation, especially in the small ensemble bebop settings mainly focused upon here, involves far more choice and dynamism than mere interpretation, but is not unstructured inspiration.⁶⁴

This Article is benefited by a recent explosion of writing and materials illuminating the art and practices of improvisation.⁶⁵ The teaching of jazz

60. Justice Holmes sometimes acknowledged how lawyers shape the law. See David Luban, *The Bad Man and the Good Lawyer: A Centennial Essay on Holmes’s The Path of the Law*, 72 N.Y.U. L. Rev. 1547, 1556–57 (1997) (citing OLIVER WENDELL HOLMES, *Remarks to the Essex Bar*, in OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 48, 48–49 (Mark DeWolfe Howe ed., 1962)).

61. See Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 662–67 (1957) (calling for broader contextual analysis to understand and develop law). I return in Part IV to analysis of choice consequences and Fuller. See *infra* Part IV.

62. BERLINER, *supra* note 1, at 1–2 (discussing definitions of improvisation).

63. See generally FULLER, *supra* note 45; Ben Sidran, *Talking Jazz: An Oral History* (1995).

64. See Levinson & Balkin, *supra* note 28, at 1654 (dismissing jazz improvisation as sharing attributes with legal work).

65. See generally BERLINER, *supra* note 1; SCOTT DEVEAUX, *THE BIRTH OF BEBOP: A SOCIAL AND MUSICAL HISTORY* (1997); MONSON, *supra* note 1. For an insight-laden exploration of the nature of jazz improvisation, see Alessandro Duranti & Kenny Burrell, *Jazz Improvisation: A Search for Hidden Harmonies and a Unique Self*, in 27 RICERCHHE DI PSICOLOGIA 71, 72 (2004) (focusing attention on what musicians “say and do . . . when they play jazz”).

improvisation at top music schools and universities has also contributed to this proliferation of analysis.⁶⁶ Similarly, digitized releases of jazz masters' work further illuminate the art of jazz improvisation and, with such radically varied performances, how improvisation really is there.⁶⁷

For reasons explained more below, the period and styles of jazz improvisation that most share elements with the doing of law are the forms of small ensemble performance first emerging in the 1940s, especially with the rise of bebop, then modal improvisation (both within and outside the bebop genre), and even variants of free or out jazz.⁶⁸ The innovative work of Miles Davis and his ensemble colleagues present sustained illustrative examples, but this Article also draws upon many others' insights and mastery.⁶⁹

A. *The Song and Music*

Jazz, like law, is usually rooted in a written or at least notated text that shapes the musical performance. Some of the earliest recorded jazz and blues, much coming out of the South, developed in a mainly unwritten tradition but used recognizable common forms, often drawing on blues traditions and also church music, especially more gospel-style music with call and response and dramatic performance arcs prevalent in African American churches and communities.⁷⁰

For most of the twentieth century and still today, however, written music is the starting point for most jazz.⁷¹ Musicians often draw on what are referred to as "real" or "fake" books that convert compositions into what usually is a single page distillation.⁷² Different books recast selected pieces into suggested chords, simplified or adjusted forms of the melody, and also arrangements.⁷³ Ashley Kahn, in his study of the jazz masterpiece, *Kind of Blue*, discusses how

66. In addition to the renowned Berkeley College of Music, top universities now study jazz improvisation. For example, pianist Vijay Iyer now teaches about improvisation at Harvard, as does Ingrid Monson. See Alec Wilkinson, *Time Is a Ghost*, NEW YORKER (Jan. 24, 2016), <https://www.newyorker.com/magazine/2016/02/01/time-is-a-ghost> [https://perma.cc/E6JG-M6Y6].

67. Recent Miles Davis box sets of CDs illuminate changing improvisatory choices, both years or mere days apart. See, e.g., MILES DAVIS & JOHN COLTRANE, *THE FINAL TOUR (THE BOOTLEG SERIES, VOL. 6)* (Columbia Records 2018) (offering varied performances within 3 nights of one week); MILES DAVIS, *MILES DAVIS AT NEWPORT 1955–75 (THE BOOTLEG SERIES VOL. 4)* (Columbia Records 2015) (offering dramatically varied performances over twenty years); MILES DAVIS QUINTET, *LIVE IN EUROPE 1967* (Sony Music Entertainment 2011) (offering the Quintet's varied performances over a single week in 1967).

68. See *infra* Section III.B.

69. See Amiri Baraka, *Miles Davis: "One of the Great Mother Fuckers,"* in *A MILES DAVIS READER* 63, 63 (Bill Kirchner ed., 1997).

70. DIZZY GILLESPIE WITH AL FRASER, *TO BE, OR NOT . . . TO BOP* 140–41 (1979) (describing bebop as "blending our ideas into a new style of music" and drawing on "European harmony and music theory superimposed on our own knowledge from Afro-American musical tradition"); *Statement of Horace Silver*, in BEN SIDRAN, *TALKING JAZZ: AN ORAL HISTORY* 138, 141 (1995) (tracing his study of "boogie-woogie and blues" players, learning by ear, and "piano folios" of pianist Teddy Wilson performances).

71. See *supra* Section III.A.

72. *Statement of Jack DeJohnette*, in SIDRAN, *supra* note 70, at 386 (drummer and pianist describing his listening, imitation, study of fake books, then mastery of tunes in "all the keys").

73. See *id.*

trumpeter, composer, and band leader Miles Davis reworked show tunes that eventually became jazz standards.⁷⁴ Davis loved the playing of pianist Ahmad Jamal and asked his own pianist, Red Garland, to similarly emphasize their harmonic beauty.⁷⁵ Fake books then adopted the Davis reconception of these pieces, often in their recorded form.⁷⁶ These and many other jazz tunes—often referred to as “standards”—are eventually known by heart by experienced musicians.⁷⁷ To know a tune means to know the melody, know the chords, usually know it in several different or all keys, know improvisatory choices and challenges, and often know others’ versions of the tune.⁷⁸

As a result, the jazz standard version of such songs (or tunes) is often far different from the composers’ original composition or earliest performances, sometimes jettisoning parts of the original piece (especially introductory passages) or suggesting different chords (clusters of notes often played by a piano or guitar) and voicings (the stacked series of chord notes that can be shifted in order) than evident in the original.⁷⁹ This musical distillation, however, is more a process of composition and music theory than of the improvisation this Article explores.

In performance, musicians will further adjust by changing keys, tempos, adding variations, and making choices about a performance’s “pulse” and “groove” in its collective creation.⁸⁰ Such choices may accommodate the musicians’ abilities, but also can be part of the hybrid of cooperative and competitive simultaneity that characterizes jazz improvisation.

B. *The Musical Conversation and Collective Creation*

Especially with musicians playing in 1940s to 1960s foundational bebop small ensemble settings—for example, performances by Dizzy Gillespie, Charlie Parker, Clifford Brown, Sonny Rollins, Dexter Gordon, Miles Davis, Bill Evans, and John Coltrane, among many others, and still followed today—the basics of the musical “conversation” tend to follow a fairly constant form.⁸¹ This is not a conversation in the sense of clean, sequential turns with silence of others. Overlap, polyphony, and mutual simultaneous adjustment are the norm, making vast

74. ASHLEY KAHN, *KIND OF BLUE: THE MAKING OF A JAZZ MASTERPIECE* 36, 42 (2000).

75. *Id.*

76. *Statement of Jack DeJohnette*, in SIDRAN, *supra* note 70, at 386.

77. See Duranti & Burrell, *supra* note 65, at 76–80 (discussing the “appropriation,” “transformation” and remaking of familiar tunes known as “standards” into something “new and exciting”).

78. *Statement of Illinois Jacquet*, in GILLESPIE, *supra* note 70, at 147–48 (describing shift to bebop’s emphasis on “chord changes” and playing “the whole chord instead of the melody” and emphasizing “[y]ou have to get into the books”).

79. KAHN, *supra* note 74, at 36 (discussing how Davis reshaped earlier compositions).

80. Davis gave his *Bitches Brew* musicians minimal guidance so to free up the improvisers, while with *Kind of Blue* he sketched simple conceptions and provided modal scales. *Id.* at 96–99 (regarding *Kind of Blue*); Duranti & Burrell, *supra* note 65, at 82–83 (discussing Davis’s practices).

81. Musicians often characterize improvisation as like a conversation, including when “you can turn a mistake . . . into . . . a positive.” Duranti & Burrell, *supra* note 65, at 85 (quoting musicians Sherman Ferguson and Kenny Burrell); Ramshaw, *supra* note 54, at 72–76, 83 (discussing improvisation’s conversational and collective elements and other key tools and forms wielded by musicians).

performance variety the norm.⁸² At the highest levels of improvisational prowess, especially with the growing acceptance of more “out” and “free” styles of jazz, many of the structures and practices described here are used but then transition into freer, less structured, interactive, on-the-spot musical choosing.⁸³

As Charles Mingus commented, “you have to improvise on somethin’.”⁸⁴ For both musicians and audiences, that framing “something” is critical to make the improvisation apparent and successful.⁸⁵ In other words, as with law, choices are central, but are shaped by frames or constraints. In the small ensemble bebop jazz form focused on here, the melody is usually played through once or twice, but virtually never precisely as written.⁸⁶ Sometimes the melody is only lightly sketched.⁸⁷ The exact rhythms and melodic lines and chord voicings will be varied, but the central melody is usually discernible, despite adjustments and embellishments.⁸⁸

Some jazz greats view this initial statement of the melody and structure, then building improvisational motifs over the course of an improvisation, as critical to allow the audience and other musicians to discern the improvisation that follows.⁸⁹ When less structured or when confusion takes over, musicians and the audience alike may struggle. Vocalist Billie Holliday exhorted one of the great jazz trombonists, Curtis Fuller, to play less and draw in the audience: “When you play, you’re *talking* to people. So learn how to edit your thing.”⁹⁰

After playing or sketching the melody, improvisation begins. Musicians take turns in a leadership soloing role, developing their own improvised take on the tune and the chords, then handing off the lead, soloing role to another musician.⁹¹ Sometimes the handoff is a seamless segue, but sometimes the choice is to make the shift clear and somewhat abrupt.⁹²

That someone is in the lead, in the sense of the musical foreground, does not mean that others are not also improvising. The rhythm section of bass, drums, and piano or guitar (or both) often collectively create an ever-changing, although

82. See *supra* Subsection III.C.1.

83. The Miles Davis Quintet from around 1960 adopted more aggressive, “freer” and “avant-garde” styles, including a Davis request Herbie Hancock play with “no chords.” *Statement of Herbie Hancock*, in SIDRAN, *supra* note 70, at 264–66. Hancock characterized these shifts as a move to “controlled freedom.” *Statement of Herbie Hancock*, in BERLINER, *supra* note 1, at 341.

84. *Statement of Charles Mingus*, in KERNFELD, *supra* note 1, at 119 (quoting JANET COLEMAN & AL YOUNG, MINGUS/MINGUS (1989)).

85. See *id.*

86. See *supra* Subsection III.C.2.

87. See Coleman, *supra* note 1, at 64.

88. See *supra* Section III.A.

89. BERLINER, *supra* note 1, at 264–67 (quoting musicians explaining need for balancing repetition, thematic development with “controlled risk taking”).

90. Giovanni Russonello, *Curtis Fuller*, 88, *Master of Jazz, Whose Trombone Had a Big Majestic Sound*, N.Y. TIMES, May 16, 2021, at 29 (quoting Billie Holliday and Curtis Fuller, respectively).

91. Russonello describes Curtis Fuller’s interplay with John Coltrane for the tune, Blue Trane: “Mr. Fuller’s five-chorus solo . . . begins by playing off the last few notes of the trumpeter Lee Morgan’s improvisation, as if curiously picking up an object a friend had just put down” before going into his own “spontaneous repertoire . . .” *Id.*

92. See *supra* Subsection III.C.3.

still anchored, musical base over which a soloist works.⁹³ The rhythm section often determines the pulse, groove, and chord density that shapes the sound and also degree of improvisatory freedom of the lead soloist.⁹⁴

Because all musicians are adjusting in light of each other's constrained but unpredictable choices, actual rote repetition is a near impossibility. All members of an improvising ensemble must be "so thoroughly familiar with the basic framework of the tune that he or she can attend to what everyone else in the band is doing."⁹⁵ Because ensemble jazz improvisation involves such simultaneous choosing and interactive adjusting, it is akin to a "conversation."⁹⁶ The next Part breaks down the building blocks of improvisatory choices in this conversation.

Radical performance changes with the same pieces and soloists at different times illustrate the dynamic nature of musical improvisatory conversation. The Miles Davis performances of the Mort Dixon and Ray Henderson tune, *Bye Bye Blackbird*, offer a wonderful example.⁹⁷ The 1955 studio version offers masterful solos by Davis and John Coltrane, with their soloing referencing the melody and closely hewing to the piece's chords and chordal movement.⁹⁸ When Davis and Coltrane again toured in 1960, *Bye Bye Blackbird* was transformed.⁹⁹ Davis starts his 1960 solo with different notes, soloing arc, and motifs or themes, but in timbre and pacing still resembling the 1955 performance.¹⁰⁰ The same is true of the rhythm section.¹⁰¹

The latitude for change and creativity, yet within constraining structures, is most evident when Coltrane takes the solo handoff from Davis.¹⁰² After brief playing reminiscent of his 1955 solo, Coltrane shifts into a wholly different gear.¹⁰³ A torrent of notes, dissonance, and far freer and intense playing follows, with contrasting honking and use of pedal tones against a flurry of notes.¹⁰⁴ He draws on new insights into modal playing and additional chord notes, picking up on ideas developed by Davis and pianist Bill Evans, which in turn built on music

93. Ingrid Monson focuses on the rhythm section shaping the groove and soloist choices. MONSON, *supra* note 1, at 90–93 (1996) (quoting musicians likening a "groove" to "walking" with someone, "mutual feeling of agreement on a pattern," and like "getting into a bubble bath" and relaxing).

94. Saxophonist Johnny Griffin said the music of Thelonious Monk "box[ed] him in." *Statement of Johnny Griffin*, in SIDRAN, *supra* note 70, at 201–02. Saxophonist Sonny Rollins recalls John Coltrane as saying that if you "miss a change with Monk's music, it is like stepping into an elevator shaft when it's empty." *Id.* at 174. Pianist Horace Silver kept music "simple" or with "open space" to provide soloists "open space for blowing." *Id.*, at 143–45. *See also infra* Subsection IV.D.3 (applying these concepts to "many sources" statutory interpretation debate).

95. MONSON, *supra* note 1, at 83.

96. *See* BERLINER, *supra* note 1, at 348–86 (exploring the conversation characterization); *id.* at 386 (quoting musicians about "give and take" and "collective interplay").

97. *See* MILES DAVIS, *Bye Bye Blackbird, on 'ROUND ABOUT MIDNIGHT* (Columbia Records 1957).

98. *See id.*

99. DAVIS & COLTRANE, *supra* note 67.

100. *See id.*; DAVIS, *supra* note 97.

101. DAVIS & COLTRANE, *supra* note 67; DAVIS, *supra* note 97.

102. *Id.*

103. *Id.*

104. Improvising with a pedal tone is, basically, hitting on the same bass note repeatedly while varying the rest of the soloing note and rhythm choices. *See* BERLINER, *supra* note 1, at 361 (discussing "pedal points" and resulting soloist "harmonic latitude").

theory innovations in jazz and classical music.¹⁰⁵ By 1960, Coltrane had transformed these ideas into his own substantially transmogrified and distinctive form.¹⁰⁶ Both recordings feature the same piece and same lead musicians, yet vastly different musical outputs emerge.

C. *Explaining the Basics of Jazz Improvisation*

This Section breaks down key elements, building blocks, and choices prevalent in jazz improvisation, including tracing of changing practices. As with law's modes and materials, these improvisational key elements are both sources of constraint but also resources drawn upon with creativity.

1. *Melodic Embellishment to Bebop*

The very nature of jazz improvisation has been ever-changing. The earliest recorded jazz improvisation involved little more than musicians offering variations on, and sometimes mere embellishments of, a song's melody.¹⁰⁷ Much was deeply rooted in the blues, but it also drew on gospel music, African music and rhythms, Tin Pan Alley music, ragtime music, marching band music, Roma music, Middle Eastern music, show tunes, and classics of the American Songbook, classical music theory, and then a growing and rich array of original compositions by jazz musicians themselves.¹⁰⁸ At virtually all stages of the development of jazz, leading innovators and performers have been African American.¹⁰⁹

Melodic embellishments remain a form of jazz improvisation, especially among singers, but today would be viewed as unimpressive if a musician's entire skill set. By the time of the innovations of New Orleans jazz, musicians such as Jelly Roll Morton, Sidney Bechet, Louis Armstrong and Belgian-born Romani-French guitarist Django Reinhardt created, enriched, and then provided practices and lessons for others to study and imitate.¹¹⁰ Virtually all jazz musicians credit Louis Armstrong as foundational (at least in recorded form) for his sophisticated work with melody, chords, and a dazzling use of time, harmonic creativity, and rhythm.¹¹¹ Armstrong's innovations influenced transitional players, like

105. See DAVIS & COLTRANE, *supra* note 67; DAVIS, *supra* note 97.

106. Davis recounts Coltrane's leap in *Statement of Miles Davis*, in SIDRAN, *supra* note 70, at 10–12 (recalling "I gave him those chords and he just went . . . he wasn't playing like that before" and then Coltrane developed his own "sound" and put his own "stamp" on it) (emphasis in original).

107. See Duranti & Burrell, *supra* note 65, at 76–78.

108. See BERLINER, *supra* note 1, at 489 (discussing national and ethnic contributions to jazz and characterizing it as substantially an African American contribution to music); *Statement of Max Roach*, in SIDRAN, *supra* note 70, at 78 (discussing influences and mentioning ragtime and marching band instruments and music as important influences); *Statement of Horace Silver*, in *id.* at 141 (mentioning importance of "boogie-woogie and blues" to forms of jazz he developed).

109. Bebop innovator and trumpeter Dizzy Gillespie highlighted African rhythms in jazz. *Statement of Gillespie*, in SIDRAN, *supra* note 70, at 29–30 (focusing on the "looseness" of African rhythms incorporated into jazz, beat accents, and the pervasive "triplet form").

110. See, e.g., Louis Armstrong, *The Decca Singles 1935–1946* (Mosaic Records 2017).

111. See KERNFELD, *supra* note 1, at 24, 189 (referring to Armstrong's "overwhelming impact"); *Statement of Gil Evans*, in SIDRAN, *supra* note 70, at 23 (stating until Miles Davis, no one had "change[d] the tone of the

Coleman Hawkins, who preceded bebop but contributed to many of its elements.¹¹² Innovative transitional greats like Hawkins and guitarist Charlie Christian took New Orleans jazz and early or traditional forms of improvisation and began to develop the phrasing and less melodically constrained improvisation practices that, with further innovations, became known as bebop.¹¹³

Bebop became dominant by the late 1940s, at least among the top jazz musicians. Bebop remains part of the enduring heart of jazz improvisation.¹¹⁴ The label “bebop” remains contested, as sometimes is the term “jazz”; many musicians resist labels to describe their genre or type of music.¹¹⁵ Pioneering bebop drummer Kenny Clarke used the term “bebop” to describe the musical form he, Gillespie, and Charlie Parker were central in developing, but also said it was a label of journalists.¹¹⁶ “It was just modern music . . . just music,” he stated.¹¹⁷ Others called it “progressive music,” contrasted with “traditional playing” or “old patterns” of soloing in earlier Louisiana and Dixieland styles.¹¹⁸ Pianist Mary Lou Williams called the development of bebop simply “[w]hen the thing started.”¹¹⁹ She said “bop came along with a more modern thing, and the blues and the swing part, but it was just more colorful.”¹²⁰ Miles Davis called hearing a live performance of early bebop by its two greatest innovators, Dizzy Gillespie and Charlie Parker, the “greatest feeling I ever had in my life.”¹²¹

While early “traditional” jazz improvisation centered on the melody, bebop-style improvisations quickly leave the melody behind and free soloists to choose from more structural or architectural elements.¹²² As Miles Davis noted, bebop often involves “a lot of real fast notes and chord changes.”¹²³ Gillespie

trumpet” since Armstrong); *Statement of Phil Woods, in id.* at 188 (stating that “without” Armstrong “we wouldn’t have any expressiveness at all”); *Statement of Wynton Marsalis, in id.* at 346–48 (discussing rhythmic and harmonic innovations in jazz, how Armstrong and his ensembles “adher[ed] to the form,” and linking Armstrong’s playing “flat nines, flat fives, flat sixes” to Duke Ellington’s music and classical composer Arnold Schoenberg).

112. For explanations of Armstrong’s influence, see BERLINER, *supra* note 1, at 124. Scott DeVaux focuses on bebop and the contributions of Hawkins. See DEVEAUX, *supra* note 65, at 72–115 (analyzing musical structures and Hawkins’ innovations).

113. See DEVEAUX, *supra* note 65, at 72–115.

114. If measured by earnings or sales, characterization of the “dominant” forms of jazz might differ. See KAHN, *supra* note 74, at 63 (discussing implications of corporate music labeling).

115. Pianist and composer Chick Corea stated “there is always a fusion of sorts taking place. All this means is a continual development—a continual merging of different streams.” Giovanni Russonello, *Chick Corea, Jazz Keyboardist and Innovator, Dies at 79*, N.Y. TIMES (Feb. 11, 2021), <https://www.nytimes.com/2021/02/11/arts/music/chick-corea-dead.html> [<https://perma.cc/J8YA-ALAZ>].

116. GILLESPIE, *supra* note 70, at 142.

117. *Id.*

118. *Id.* at 145–48 (quoting saxophonist Illinois Jacquet about evolution of jazz, Gillespie, and need to “get your own creation, your own painting, or your own style”).

119. *Id.* at 149 (quoting Mary Lou Williams).

120. *Id.* at 150.

121. He adds, “with my clothes on.” MILES DAVIS, *THE AUTOBIOGRAPHY OF MILES DAVIS WITH QUINCY TROUPE* 7 (Vincent Virga ed., 1989).

122. See, e.g., BERLINER, *supra* note 1, at 128–29 (discussing melodic improvisation transition to “vertical and horizontal musical elements” and mix of “chord and non-chord tones”).

123. See DAVIS, *supra* note 121, at 219.

and others recall a tour in the South where audiences were puzzled and somewhat hostile to these early bebop forms.¹²⁴ In the words of pianist Fred Hersch, bebop “is like the music of Mozart or Bach,” due to its use of longer “unbroken” musical phrases, but also because there are “little things that talk in the music.”¹²⁵ The tools, resources, and constraints of bebop improvisation follow.

2. *Chords, Scales, and Modal Playing*

Chords, the sequence of chords, and sometimes melodic moves accompanying those chords, remain both resources and constraints for the improviser.¹²⁶ The following relationship of chords and improvisation is critical to the balance of choice and constraint—what Horace Silver called “freedom *within* [] organization”—that pervades jazz improvisation.¹²⁷ Each chord states and often implies a stacked or sequential series of notes that would, if played along with the chord, create what could be called a harmonious sound.¹²⁸ But improvisers also work with dissonance, unusual music intervals, “tension and release,” and other means of heightening drama, so one cannot just talk of harmony or definite confined choices.¹²⁹ Bebop musicians innovated based on music theory, deriving additional notes and chord structures not used in earlier forms of jazz.¹³⁰

Varied chord voicings can create a substantially different sound and music movement. Note choices can simplify or add chord ambiguity, complexity, or dissonance, which both challenge and provide opportunities for improvisation.¹³¹ Chord density, voicings, and detail have implications for contemporary debates over interpreting and working with legal texts, as explored below.¹³² Pared-down ensembles or chord choices or note omissions create extra space and freedom for the improviser.¹³³ More fully voiced chords and denser accompaniment will force a soloist into more particular directions chosen by the accompanists.¹³⁴

124. Dancer Fayard Nicholas recalls Southern audiences at first were unhappy and “dumbfounded at first” because they “couldn’t understand” or dance to “this bebop music.” Of that tour, Gillespie concedes “people weren’t ready for bebop in a big context.” GILLESPIE, *supra* note 70, at 228–30.

125. *Statement of Fred Hersch*, in BERLINER, *supra* note 1, at 157.

126. Jacquet focused on this shift to chords, featured soloists, and away from melody and simultaneous Dixieland-style “all playing together.” GILLESPIE, *supra* note 70, at 146–47.

127. *Statement of Horace Silver*, in SIDRAN, *supra* note 70, at 143 (quoting Silver).

128. See *Statement of Jackie McLean*, in *id.* at 128–30 (discussing these improvisational choices).

129. See BERLINER, *supra* note 1, at 198, 201–02, 211–12 (explaining tension and release).

130. See GILLESPIE, *supra* note 70, at 92 (discussing how discovery of the “flatted fifth” changed his “musical conception,” other “pretty notes in our music,” and showing them to Davis); *id.* at 135–36 (discussing work with Thelonious Monk on chord theory).

131. See Duranti & Burrell, *supra* note 65, at 84–85 (discussing “tension” and “release,” correction of mistakes, and how improvisers “paint ourselves . . . in and out of corners”) (quoting Jeff Clayton); KAHN, *supra* note 74, at 28 (quoting Davis that improvisation is a “high-wire act”).

132. In analogous work, Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726 (2020), questions claims of determinacy in “ordinary meaning” methods and finds divergent experiment results with dictionaries and “legal corpus linguistics.”

133. See Coleman, *supra* note 1, at 64 (discussing freedom provided with absence of piano chords).

134. See DAVIS, *supra* note 121, at 275 (describing Herbie Hancock as playing “chords [that] were too thick” and with “too many notes”).

Relatedly, each player's sensibility and skill set vary, further requiring musicians' mutual adjustments. Importantly, something that is literally correct—the “phrase follows the rule” in the sense of conforming to rules of music theory—can, nonetheless, “be wrong to play[]” given the musical contexts and choices of other.¹³⁵

Scale-based choices also are central to improvisation. Each chord implies or works alongside a scale of notes, which provide a larger number of musical choices.¹³⁶ Musicians will sometimes study a tune's many structures—at a minimum melody, chords, alternative chord substitutions, and chord sequences—and construct tune-specific scales that work for improvisation over substantial segments of the tune.¹³⁷

Much jazz is rooted in blues chords—the familiar so-called one, four, and five chords that work with particular scales over most or all of a blues-structured piece.¹³⁸ Even when playing a more complicated jazz standard like *All the Things You Are*, many musicians will add “blue” notes to their choices.¹³⁹ This is true with omitted note scales like the pentatonic scale associated with blues, adding the so-called “blue note” between the fourth and fifth note on a major scale. Indeed, musicians' addition of that single note to their improvisations—“the flatted fifth”—provided a key new element in bebop.¹⁴⁰ Shifting between scale forms itself can create a dramatic effect, as can dropping in musical quotes and ideas from all forms of music.¹⁴¹

Theoretical insights led to the emergence of modal scales embraced by Miles Davis. Most famously in his *Kind of Blue* album, Davis developed tunes that utilized the modal scale-linked innovation he, arranger Gil Evans, and pianist and composer Bill Evans developed from studying other music theorists, especially George Russell, thinking at the keyboard, and also studying classical music.¹⁴² With the modal shift, musicians did not have to adjust note selections with each new chord.¹⁴³ Instead, Davis provided simplified scales that would fit over a sequence of chords, giving musicians space to solo more freely.¹⁴⁴ These

135. *Statement of Barry Harris*, in BERLINER, *supra* note 1, at 249; *Statement of James Moody*, in *id.* at 104 (explaining that your “ear would just reject” something “out of context[]” like a “scream [on a] peaceful street”).

136. *See id.* at 196–98 (discussing “contrasts,” “sense of flow,” and balance of “repetition and variation”).

137. *Statement of Tommy Flanagan*, in *id.* at 105 (by studying transcribed solos, Flanagan found ways “you can make one little phrase cover three or four chords”); *Statement of Harold Ousley*, in *id.* at 224 (discussing musicians' constructing scales for particular tunes).

138. *See id.* at 65.

139. *See id.* at 226.

140. Davis internalized that note into his playing choices. *See RAMSHAW*, *supra* note 54, at 78 (quoting John Szwed).

141. Dizzy Gillespie identified similarities between jazz harmonies and Ravel. *Statement of Dizzy Gillespie*, in SIDRAN, *supra* note 70, at 28.

142. *See* Ron Hart, *As 'Kind of Blue' Turns 60, Drummer Jimmy Cobb Shares Miles Davis Memories*, BILLBOARD (Aug. 17, 2019), <https://www.billboard.com/music/music-news/miles-davis-kind-of-blue-drummer-jimmy-cobb-shares-miles-davis-8527648/> [<https://perma.cc/K7VN-4R99>] (quoting Jimmy Cobb regarding sources of the album's theory innovations).

143. *See* KAHN, *supra* note 74, at 68.

144. *See id.* at 66–75 (tracing modal jazz development).

scales have different note intervals, with each creating a distinctive sound.¹⁴⁵ Bill Evans, Ahmad Jamal, McCoy Tyner, and Herbie Hancock kept developing this modal concept.¹⁴⁶ John Coltrane embraced modal improvisation and incorporated it into his ever-evolving saxophone mastery.¹⁴⁷ Such modal playing now is ubiquitous in jazz.¹⁴⁸

3. *Rhythm and Time*

Improvising musicians must also make individual and collective choices about the time or rhythmic element. Musicians must choose where in each beat to place their notes, with collective musical meshing requiring all in the ensemble to share that feel.¹⁴⁹ Musicians often try to create that “swing,” and have a sort of rhythmic “flow” or feel that “makes you want to dance . . . to move.”¹⁵⁰ Jazz involves certain prevalent rhythmic and pulse-like attributes, with a more rolling, triplet-like and syncopated feel than other forms of music with improvisatory elements such as rock and roll, blues, or classical organ playing.¹⁵¹

Musicians also develop their own distinctive approach to time, tone, and how they play around the beat or vary the duration of their notes. Some musicians, perhaps most famously Charlie Parker and John Coltrane, could play rapid, almost inseparable strings of notes that worked with a song’s chords.¹⁵² Dexter Gordon favored improvising that built on chord structures with immense variety and creation of new melodies, all the while playing far, far behind the beat.¹⁵³ But none sounded like the other. Other musicians—for example Bill Evans, Wynton Kelly, Charlie Haden, or Julian Lage today—often adopt a more understated manner reminiscent of the spare and mid-range playing for which Miles Davis was most famous.¹⁵⁴ Other greats, with trumpeter Clifford Brown a notable example, laid out beautiful melodic but varied and often rapid improvised lines, calling to mind classical music forms.¹⁵⁵

145. *See id.* at 69.

146. *See id.* at 72.

147. *Statement of Miles Davis*, in SIDRAN, *supra* note 70, at 10–12 (describing Coltrane’s contributions, musicians’ embrace of modal conceptions, and chord choices influenced by classical composers Ravel, Rachmaninov, Bartok, and Katchutorian).

148. *See id.*

149. Bassist Rufus Reid only meshed with Dexter Gordon when adopting what felt like an overly dramatic, inappropriate “laid back” feel, to which Gordon responded “[t]hat’s it!” *Statement of Rufus Reid*, in BERLINER, *supra* note 1, at 424–25.

150. *Statement of Fred Hersch*, in *id.* at 244–45.

151. *Id.* at 302–03 (discussing musicians’ working on sharing pulse and rhythmic conceptions, including accents and triplet phrasing).

152. Mary Lou Williams says Coltrane would squeeze in “just millions of notes . . . in one bar” but still viewed it as “bop.” GILLESPIE, *supra* note 70, at 150 (quoting Williams).

153. *See supra* note 151 and accompanying text (describing Gordon’s sense of time).

154. *See DAVIS*, *supra* note 121, at 220 (describing how he heard and contrasted with others playing faster or higher).

155. *Statement of Wynton Marsalis*, in SIDRAN, *supra* note 70, at 348 (describing Brown’s mastery); *Statement of Wynton Marsalis*, in *id.* at 348 (stating Brown “played ten times more trumpet than me or anybody I’ve heard”).

4. *Mastery, Persuasive Structure, and Choice Among Constraints*

Skillful improvisers hence draw on an array of theoretical approaches that both generate opportunities and constrain. They know the melody, chords, and what scales and note intervals will work. They must attend to others' choices, including others' rhythmic conception and the collectively created "pulse," taking into account past, concurrent, and anticipated musical choices of others.¹⁵⁶ All must decide how to contribute to the musical "conversation."¹⁵⁷ Such improvisation thus requires a highly technical set of skills, listening prowess, and superb context-rich judgment; it requires "listening with a question."¹⁵⁸

Improvising mastery also requires huge hours of solo practice often referred to as "woodshedding."¹⁵⁹ Musicians will also often in advance work out collective performance conceptions.¹⁶⁰ Others might just sketch ideas, heightening creativity and careful listening on the spot.¹⁶¹ Performers will study and learn others' creative or effective riffs—clusters of musical motifs that can fit in an array of settings—often integrating them into their own playing.¹⁶² Practice and efforts to master challenges are a constant. For example, John Coltrane, when not playing on the stage with Miles Davis, would sometimes go off into nearby backstage areas and test musical possibilities, "run[ning] over chord progressions and sequences" until the practice generated "a song[,] or songs[,] with each a "little musical problem."¹⁶³ Similarly, bebop innovator Dizzy Gillespie praised the mastery of guitarist John Collins: "*he knew a thousand ways to play one thing.*"¹⁶⁴ This capacity to do many things, to solve "musical problem[s]," and handle with skill each other's unpredictable but constrained choices, are the essence of an improvising master.¹⁶⁵

With such shifts to chord and scale-based improvisation, the music moved away from close hewing to a composer's creation. Melodic embellishments still might appropriately be characterized as a mere "interpretation."¹⁶⁶ Bebop improvising, however, is more centrally an act of creation, yet that creation must still hew to these more structural elements of the composer's music; it is an "act of

156. See generally SIDRAN, *supra* note 70.

157. BERLINER, *supra* note 1, at 362–63 (describing listening's importance to create "exciting moments of instantaneous conversation").

158. See Levine School of Music, *supra* note 12, at 47:25.

159. Sonny Rollins famously practiced on a New York City bridge, to "go back in the woodshed and get these things together." *Statement of Sonny Rollins*, in SIDRAN, *supra* note 70, at 176; BERLINER, *supra* note 1, at 115 (discussing woodshedding).

160. *Statement of Art Blakey*, in SIDRAN, *supra* note 70, at 104–05 (discussing how a band can "begin to know each other, trust each other . . . come together").

161. For *Kind of Blue*, Miles Davis provided lightly sketched musical ideas, including modal scales. See KAHN, *supra* note 74, at 68. Bill Evans saw those sessions as akin to Japanese art created in single flowing creation. Bill Evans, *Kind of Blue: Improvisation in Jazz*, ALBUM LINER NOTES, http://albumlinernotes.com/Kind_of_Blue.html (last visited Oct. 29, 2022) [<https://perma.cc/Z9VE-RMGN>].

162. BERLINER, *supra* note 1, at 102–05 (describing musicians learning from others' ideas).

163. *Statement of John Coltrane*, in KAHN, *supra* note 74, at 161.

164. GILLESPIE, *supra* note 70, at 138 (emphasis added).

165. See generally *id.*

166. See generally *id.*

fusion and transformation.”¹⁶⁷ Constrained choices made on the spot create new harmonic possibilities, tensions, and constraints.¹⁶⁸

Structures akin to narrative and creation of drama are central to each lead soloist’s contributions to collective improvisation. Like good writing and effective legal advocacy, important passages in jazz improvisation must be set up so they will be noticed. Lead solos tend to have an arc, with motivic elements, structure, quotes of other players and familiar tunes, and dramatic ebbs and flows that mesh with others’ collective choices.¹⁶⁹ An effective performance is persuasive, pulling the other musicians and the audience along. Roy Eldridge’s solos were, in the words of later trumpeter, Thad Jones, constructed like a “thrilling mystery novel that you can’t put down.”¹⁷⁰ Eldridge, in turn, modeled his performance aspirations on Louis Armstrong’s solos: Armstrong “built his solos like a book—first an introduction, then chapters, each one coming out of the one before and building to a climax.”¹⁷¹

In contrast, a blizzard of unending notes or mechanical playing please no one.¹⁷² Pauses, empty spaces, and spare conceptions can sometimes be the most compelling. Miles Davis was particularly known for playing less, using space and silence to create music of dramatic beauty, especially in contrast to others around him.¹⁷³ In contrast, the dazzling jazz guitarist, Mike Stern, often plays with long streams of notes that in feel and technique blend bebop, blues, and even rock styles.¹⁷⁴ Davis, who included Stern in one of his 1980s bands, admired Stern’s playing and mastery, but quipped Stern should “go to Notes Anonymous” because “like a lot of guys do, [he] play[s] too many . . . notes.”¹⁷⁵

Improvising norms and practices change over time. Early bebop and cool jazz styles, such as heard in recordings of Miles Davis’s quartets and quintets prior to the pathbreaking *Kind of Blue* album, have a clear lead improvising soloist, with less improvising variation behind the soloist.¹⁷⁶ By the 1960s, Miles Davis’ renowned quintet embraced a far busier style of improvisation, with all

167. See BERLINER, *supra* note 1, at 138–45 (describing musicians’ individualized voice and vocabulary).

168. See RAMSHAW, *supra* note 54, at 78 (discussing these practices and choices).

169. Guitarist Julian Lage suggests three main improvisatory strategies: time and chords; motif development; and freer, unstructured choices, and with effective soloists drawing on all three. Levine School of Music, *supra* note 12, at 47:50–52:20.

170. *Statement of Thad Jones*, in BERLINER, *supra* note 1, at 262.

171. *Statement of Roy Eldridge*, in *id.* at 262.

172. Dizzy Gillespie spoke of desire to “waste no notes.” *Statement of Dizzy Gillespie*, in SIDRAN, *supra* note 70, at 30–31.

173. See Baraka, *supra* note 69 (quoting Davis as telling musicians to consider “what I can leave out,” create “warmth in the midst of fire,” contrasted with bluesier, funkier playing by Cannonball Adderley and “thunder and lightning” and “honking” of John Coltrane). Davis attributed his sparse sound to childhood trips to his grandfather’s Arkansas farm. DAVIS, *supra* note 121, at 28–29 (describing “that blues, church, back-road funk kind of thing, that southern, midwestern, rural sound and rhythm . . . after dark when the owls came out hooting”).

174. *Media Information and Assets for Mike Stern, Biography*, MIKE STERN, <http://www.mikestern.org/media.htm> (last visited Oct. 29, 2022) [<https://perma.cc/76S8-7ZNX>].

175. *Statement of Miles Davis*, in SIDRAN, *supra* note 70, at 14.

176. See KAHN, *supra* note 74, at 67.

musicians adjusting tunes and creating new challenges, night after night.¹⁷⁷ Conceptions about instruments' roles also change.¹⁷⁸

The following is important to this Article's analogical exploration of law and jazz improvisation: these many practices, skills, and collective choices make prediction impossible, but provide many criteria against which to assess and compare performances.¹⁷⁹ Each player's contribution must fit, with such fit or congruence requiring skill with these building-block improvisatory elements, knowing the musical forms, plus contextual careful listening to others' choices.¹⁸⁰ Thus, despite this immense variation and pervasive choosing, bebop improvisation involves a highly skilled and technical practice filled with constraints.¹⁸¹ Great variation in choices and collective creation can also create clear mistakes or performance "clams" or "clunkers," as further explored below.¹⁸²

Why, however, does this Article focus on bebop ensembles, with little attention to the many solo jazz masters? Solo playing lacks the interactions and sequentially developed constraints and unexpected moments that pervade both law and ensemble improvisation.¹⁸³ A solo pianist can display the apex of improvisational prowess, but no one else limits the performance choices. Similarly, a fully orchestrated written form can be jazz, but lacks the improvisational choosing with analogues in the law. Law involves fundamentally collective, sequential tasks in settings of uncertainty and often contestation, with constant choices about frames, institutions, and which legal issues to emphasize. Law never involves a single person's choices made in isolation and with outcome-determinative self-control. And law virtually never just involves reading and following. For that reason, this Article will continue to focus principally on small ensemble-based bebop jazz improvisation as the illuminating analogue.

D. *Musical Mistakes and Fit*

To illuminate the law-jazz analogy, it is also crucial to discuss the concept of mistakes. Jazz improvisation involves many choices that could comply with all of the rules.¹⁸⁴ Improvising with a melodically anchored focus, or based on chord notes or scales linked to each chord, or via modal conceptions, or a blend of all, could lead to many correct, appropriate choices.¹⁸⁵ But others' choices will dramatically shape what works.¹⁸⁶ When musicians speak of an ensemble that

177. DAVIS, *supra* note 121, at 273–75.

178. BERLINER, *supra* note 1, at 130–35 (describing changes in instrument conceptions).

179. See RAMSHAW, *supra* note 54, at 83.

180. *Id.*

181. Ramshaw demolishes the "wild" characterization of jazz improvisation, also presenting critics' debates over bebop. *Id.* at 4, 54–70; see also *id.* at 72–76 (reviewing elements of the "jazz form" and structure).

182. *Statement of George Benson, in* SIDRAN, *supra* note 70, at 335 (discussing his mistakes and development).

183. See RAMSHAW, *supra* note 54, at 83.

184. See *id.* at 73.

185. See *id.*

186. See *id.* at 85 (quoting music critics about individual and collective creative endeavor in musical improvisation).

“gels” or becomes “tight,” they are talking about effective musical communication and a shared conception of the music.¹⁸⁷ The fit, gelling, or congruence element in improvisation involves far more than just attention to what notes or scales are literally in harmony with, or fit, a piece’s design.

For example, Max Roach recalled Dizzy Gillespie noting a collective musical breakdown, and just stepping out of his solo until the band got back into sync.¹⁸⁸ Miles Davis’ Second Quintet blended bebop and cool jazz with increasingly prevalent excursions into elements of free or out jazz, which they referred to as “time, no changes.”¹⁸⁹ Such efforts sometimes fell apart in this setting of, in Herbie Hancock’s words, “controlled freedom.”¹⁹⁰ With the dazzling, more driving teenage drummer, Tony Williams, cool, serene tunes became breakneck speed challenges; Davis said some performances were a shambles, but others thrilling.¹⁹¹

A few simple jazz improvisation illustrations might illuminate this seeming incongruity of rule-laden constraining systems that create pervasive choices, many ways to err, but also criteria for comparative assessment. For example, several bebop classics were constructed over chords of early traditional jazz pieces.¹⁹² One could play the bebop tune with a conception working with bebop practices and theory generally credited to Charlie Parker or Dizzy Gillespie.¹⁹³ One could also play in a 1930s or 1940s traditional style and all notes would mesh with the chords.¹⁹⁴ Yet that playing would quite clearly be wrong or, in comparative assessment, weak.

Similarly, Miles Davis, in his autobiography, talks about “cutting heads” in jam sessions, where musicians would competitively throw out musical challenges to test the fluency and skill of each other.¹⁹⁵ Error would eventually result, or the relative skill levels would become apparent.¹⁹⁶ Again, sequence, cooperation, and competition, with comparative contextual assessments of competence, were part of such jam sessions practices and challenges.

Or, to return to the earlier Miles Davis Second Quintet example, former muted and melodic tunes were by 1960 now taken apart and veered into less

187. Bassist Gary Peacock described his famed trio with Keith Jarrett and Jack DeJohnette in such terms: “There were three individuals, but there was one mind expressing itself.” Giovanni Russonello, *Gary Peacock, Master Jazz Bassist, Is Dead at 85*, N.Y. TIMES (Sept. 17, 2020), <https://www.nytimes.com/2020/09/09/arts/music/gary-peacock-dead-at-85.html> [<https://perma.cc/6VCG-TSC3>] (obituary) (quoting Peacock).

188. *Statement of Max Roach*, in BERLINER, *supra* note 1, at 381–82.

189. Coleman, *supra* note 1, at 88, 136–37 (discussing Davis’ embrace of this innovation).

190. *Id.* at 93 (characterizing improvising as like “walking a tightrope”); *id.* at 95–96 (discussing “mistakes,” inadvertent new possibilities, and “disast[ers]”); *see also* BERLINER, *supra* note 1, at 382 (saying Davis’s Second Quintet could “fall apart” but (according to Herbie Hancock) then “Davis with his playing would center it . . . tie it all together . . . and get the thing to grooving so hard”).

191. DAVIS, *supra* note 121, at 264 (describing Williams’ changing “every night” and “you had to be real alert . . . or he’d lose you in a second”).

192. *See* DEVEAUX, *supra* note 65, at 7.

193. *See id.*

194. *See id.*

195. *See generally* DAVIS, *supra* note 121.

196. Both Coltrane and Davis periodically dove back into study and practice to develop greater mastery. KAHN, *supra* note 74, at 166.

structured directions, dynamically creating different versions night to night.¹⁹⁷ If an early 1950s Miles Davis stepped into his own later Second Quintet and tried to use those earlier 1950s more formal conceptions of his own compositions, it would not work. The collective and changing conceptions of the tunes and modes of improvisation had moved on.

Hence, jazz improvisation involves many elements beyond some rule-bound conception of music focused just on one correct thing, or what might be correct under literal or rigid chord-based theories of music, or with close attention only to an original composition. There are many ways to be right and do well, but also many ways to fail or perform poorly.¹⁹⁸ Indeed, rigid sticking to some earlier conception when surrounded by others' different modes and choices is one of the few ways a performer can be sure to be "wrong."¹⁹⁹ Prediction of future "right" choices—whether within one performance or years later—is impossible in a setting of true collective improvisation. Congruence or fit, yet with great room for choice and dynamism, creates many ways to be wrong. Pervasive choosing and change does not mean lacking in rules and constraints.

E. A Note Regarding Free Improvisation and Law

As alluded to above, jazz improvisation has for over fifty years involved varying degrees of "free" or "out" playing.²⁰⁰ Such improvisation hews little to the rulebound constraints shaping bebop jazz ensemble improvisation. Coltrane's exuberant solo turn in Europe on *Bye Bye Blackbird* is an early example of improvisation integrating free soloing approaches against a more structured form.²⁰¹ Freer forms or collective turns are also sometimes embraced by ensembles or even the whole form of a musician's output, as discussed above regarding Davis's famed late 1960s Second Quintet.²⁰²

This sort of shift into freer or out forms of improvisation, but building from a known tune, might seem like the antithesis of law. It is less law-like than bebop, but free jazz arguably shares much with how the law actually evolves, especially in its less principled or defensible forms. As detailed below with legal examples, even in codified law settings, uncoordinated actions of many actors and institutions sequentially will cue up new questions and opportunities.²⁰³ Law does not snap back to some preordained form, but in a linear, sequential manner will develop and change, often in unpredictable ways.²⁰⁴ In this respect, freer jazz forms can unfold much like law.

197. Davis emphasizes the band's varied performances, break-neck tempos, and move away from structured performances. See DAVIS, *supra* note 121, at 263–66, 268, 273–80.

198. GILLESPIE, *supra* note 70, at 151 (praising Charlie Parker's mastery, with "deep, deep notes, as deep as anything Beethoven ever wrote . . . He'd play other tunes inside the chords of the original melody, and they were always right").

199. See RAMSHAW, *supra* note 54, at 83.

200. See *supra* note 11 and accompanying text.

201. See *supra* notes 99–100 and accompanying text.

202. See Coleman, *supra* note 1, at 51–57.

203. See *infra* Section IV.D.

204. See *infra* Section IV.A.

Other forms of more unbridled “free” or “out” jazz are harder to link to law’s practices, especially if musicians cannot work with the skills and forms of improvisational constraint. Miles Davis famously derided Ornette Coleman’s early playing as showing he “could play only one way back then,” “with no kind of training,” playing with “no kind of form or structure . . . just a lot of notes for notes’ sake.”²⁰⁵ Law is virtually never akin to these more fully out or free forms. Choice, sequence, unpredictability, and many actors are characteristics of jazz and law, but the “conversations” and forms of law, like bebop ensemble playing, virtually always start with attention to sources of constraint, although with varying degrees of integrity, thoroughness, and success.²⁰⁶

F. *The Audience, Competition, and Commerce*

A brief foray into the role of competition, the audience, and commerce further illuminates the dynamics driving creativity both within a musical moment and over time. It also provides a further analogy to explain the dynamism and choices that shape law’s path.

One could idealize music as just about the artistry, but professional musicians must make a living, usually relying on a mix of recording sales and live performance.²⁰⁷ Musicians strive to keep offering something that is new.²⁰⁸ While cooperative listening and choosing is central to jazz improvisation, competition also sparks change and success.²⁰⁹ Skilled musicians nudge each other to avoid pat repetition and engage musical challenges.²¹⁰ Improvisatory prowess is central to distinction in jazz.²¹¹ Bassist, composer, and band leader Charles Mingus dressed down a soloist in his band for repeating himself: “play something different. This is jazz You played that last night and the night before.”²¹²

Competition, even in the highly cooperative context of ensemble improvisation, will often lead to innovation and improvement.²¹³ Master drummer Max Roach said of Miles Davis, “Miles just shows several aspects of being creative. If you’re being creative, you can’t be like you were yesterday.”²¹⁴ Davis credited

205. DAVIS, *supra* note 121, at 250–51.

206. See *infra* Part V (discussing the link of methodological consistency, integrity and consequential congruence).

207. Dizzy Gillespie left the musically innovative Edgar Hayes band to the more commercially successful Cab Calloway. GILLESPIE, *supra* note 70, at 96–97.

208. *Statement of Illinois Jaquet*, in GILLESPIE, *supra* note 70, at 148 (discussing innovations of “bebop” but questioning the label).

209. Gillespie describes his chordal innovations, ideas of Thelonious Monk, work with Miles Davis, and compares the relative skills and contributions of jazz masters. *Id.* at 91–92 (discussing the “flatted fifth”); *id.* at 94 (discussing drummers’ contributions); *id.* at 134–37 (discussing Monk); *id.* at 137–38 (discussing innovative guitar style of Charlie Christian and bassist Oscar Pettiford’s adoption of it).

210. BERLINER, *supra* note 1, at 378 (recounting Davis telling his musicians not to use “routine maneuvers”).

211. *Id.* at 206 (discussing musicians’ improvisatory “vocabulary” and need to avoid “habituated and uninspired use”); *id.* at 207 (quoting pianist Fred Hersch about need to “[t]ry something else [and] [b]e resourceful”).

212. *Id.* at 271.

213. See DAVIS, *supra* note 121, at 262–64.

214. Baraka, *supra* note 69, at 72.

Tony Williams and others in the Second Quintet with forcing him to redouble his musical intensity.²¹⁵ Amiri Baraka recounts Miles Davis exhorting John Coltrane to share creative innovations with Cannonball Adderley.²¹⁶ Davis asked his musicians to go beyond the safe and certain, to be creative and in the moment.²¹⁷

Even the greatest musicians encounter challenges and need to redouble their efforts. Miles Davis recalls ensembles and jam sessions that left him “lost” or required him to “practice[] and come out playing as hard as I could”.²¹⁸ After New York City newcomer, Julian “Cannonball” Adderley, dazzled the City’s best musicians in impromptu guest appearances, he was invited to join Miles Davis’s band.²¹⁹ Other emerging saxophone giants were dejected and went back to work: Phil Woods and Jackie McLean said Adderley was “the baddest thing we’d ever heard.”²²⁰ Similarly, Sonny Rollins has long been famous for his fountain of creativity in improvisatory battles.²²¹ He duked it out with a young Wynton Marsalis in the 1980s; in that and other settings, Rollins would shift gears, forcing others to listen and move with him.²²² Rollins and Coltrane each, at different points, dazzled and intimidated the other with newly developed prowess.²²³

215. See DAVIS, *supra* note 121, at 262–64 (discussing Williams and the need to be “real alert” or “he’d lose you in a second”).

216. Baraka, *supra* note 69, at 67 (quoting Davis as saying “I told Trane to show [Adderley] and stop him from accenting the first beat”).

217. DAVIS, *supra* note 121, at 220 (discussing Davis asking his musicians to use “imagination, be more creative, more innovative”).

218. *Id.* at 101–02 (recounting being initially “lost” with Parker’s innovations); *id.* at 146 (discussing jam session competition).

219. KAHN, *supra* note 74, at 49.

220. *Statement of Phil Woods*, in SIDRAN, *supra* note 70, at 188–89.

221. David Marchese, *Sonny Rollins Is at Peace. But He Regrets Trying to One-Up Coltrane*, N.Y. TIMES (Feb. 27, 2020), <https://www.nytimes.com/interactive/2020/02/24/magazine/sonny-rollins-interview.html> [<https://perma.cc/4AXV-M4M4>] (commenting that if “we’re in a saxophone battle, I still have to play my best”).

222. See Robert Palmer, *Concert: Sonny Rollins Meets Wynton Marsalis*, N.Y. TIMES (June 5, 1983) <https://www.nytimes.com/1983/06/05/arts/concert-sonny-rollins-meets-wynton-marsalis.html> [<https://perma.cc/5K7H-575G>] (recounting their musical exchanges); BERLINER, *supra* note 1, at 374–75 (discussing challenges of playing with Rollins).

223. KAHN, *supra* note 74, at 35, 49–51.

G. Framing Jazz Improvisation Schematically

These multi-layered elements and constraints of jazz improvisation can be presented schematically. The crucial time and sequence elements do not quite fit in this simplified schematic, but each element identified below is wielded over the sequential time unfolding of a musical performance.

The multilayered simultaneous elements shaping jazz improvisation, each subject to choices and changes over time

 Musicians with different instruments, skills, experience, tastes, musical voices, and goals

 Genre and style

 Melody/the song

 Chords

 Chord substitutions

 Voicings

 Density of chordal accompaniment (both notes and over the musical sequence)

 Variations and dissonance (for ex., fourth-based chords, additions of ninth, flatted ninth, flatted fifth, blues notes)

 Scales per chord (with variations and dissonance meshing or creating tension with chord enrichments)

 Modal scales (over chord sequences)

 Note patterns, motifs, phrases, and contours

 Chord sequence (over span of piece/melody)

 Tempo

 Rhythmic feel and pulse

 Note placements within each beat

 Density to sparseness of playing (both individual and collective)

 Aligning, responding to, or contrasting with others in ensemble; the “conversation”

Constructing musical arcs and structures;

Thus, in jazz improvisation, pervasive choice exists within a constraining series of rules and practices. Sequential choices of many shape yet more choices available to each other, at all moments creating a collective musical performance. Facility and appropriate use of these practices and rules, in light of others’ choices, together determine the good and bad, and in more structured forms of jazz, the right and the wrong, and especially provide criteria for comparative assessments of excellence.

The doing and development of law, as explained below, is similarly rife with this balance of choices, constraining rules, and options shaped over time by the work of many interacting people and institutions.

IV. LAW AS JAZZ: COLLECTIVE, STRATEGIC AND CONSTRAINED CHOICES IN THE DYNAMIC LEGAL SYSTEM

The Article now analyzes ways law shares attributes with the art of jazz improvisation, especially due to their common interactive, sequential, and dynamic attributes in settings characterized by constraining but changing rules and practices. Much as merely listening to a jazz improvisation tells you little, merely reading a single legal decision, statutory section or regulation tends to reveal little about what generated the actions or, more importantly, what they mean, can mean, or will become through legal stakeholders' strategic choices. Little in law comes close to mere obedience to clear commands or mere interpretation.

A. *A Note Regarding the Law Versus "Doing Law" Distinction*

But is this Article erring in mixing "law" and the "doing of law"? This Part is designed in large part to address this question. The basic answer is that all law is really the doing of law. Or, to put it differently, law operates through choices about how the law is written, interpreted, implemented, enforced, complied with, and changed; that human intervention involves both doing law and making law manifest in ever-changing forms.²²⁴ No actor or institution ever issues or takes a legal action that is a final endpoint.²²⁵ All legal actions, whether advocacy or a decider's declaration of law, are launched into a world where they will be strategically used, contested, extended, changed, trumped or sidestepped by others. In the words of Charles Fried, legal doctrine is "somewhere between story and argument."²²⁶

For example, a judicial decision is, of course, a quintessential form of law. It may resolve a particular controversy at that moment, yet it also acts as a precedent that shapes what future contentions will be strong or weak.²²⁷ Litigants and later courts will battle over its applicability and implications, with change or later outright overruling possible.²²⁸ The same is true for regulatory and legislative disputants, for legislation, and even for constitutional texts.²²⁹ Rarely are any legal materials static or an utterly clear command. Diverse methodologies will be wielded, with layers and crosscurrents of relevant law, chosen levels of generality, and application puzzles further complicating the effort to discern or predict "the law."

It is possible that frequent claims about law's static or stable nature, or the exclusive legitimacy of one method or choice, are more political or rhetorical gambits than genuinely believed. Duncan Kennedy was perhaps driving at a similar point in stating legal actors may feel the need to "put their demands into

224. See generally Antonin Scalia, *A Matter of Interpretation* (1997).

225. See Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1152 (1994) (explaining that "[legal] [d]octrine must persist in order to constrain").

226. *Id.* at 1144–45, 1150–52 (exploring doctrine's emergence over time).

227. See *id.* at 1140–42 (discussing precedent).

228. See *id.*

229. See *id.*

rights language” because of the view that “rights rhetoric ‘works.’”²³⁰ Claims that space for legal discretion will make law all politics may similarly be strategic ploys, counterarguments, or rhetorical gambits.²³¹ Perhaps few actually see the law as necessarily coming out on one side of the “unhelpful . . . ancient question whether judges find or invent law,” as Dworkin says in his exploration of “integrity in law.”²³²

On the other hand, if the nation’s Supreme Court Chief Justice really sees law, or perhaps his judicial role, as about “balls and strikes,” then critiquing such a claim remains important.²³³ Indeed, such claims that law is about obedience, mandates, and certainty of method are so prevalent that this Article takes them seriously.²³⁴ In addition, questions about “the best” or optimal place for law on the continuum between stability, context-sensitive adjustment, and dynamism remain a legitimate inquiry.²³⁵

As explained and illustrated below, law pervasively involves strategic, constrained choosing in sequentially developing settings. Law rarely commands just one thing, but it does channel, coerce, grant entitlements and presumptions, and organize behavior.²³⁶ Choices and outcomes are reached, and sometimes a legal answer is clear, but rarely does mere reference to some governing text or analytical method irrefutably establish what must be.²³⁷ This Part’s discussion illustrates how and why law is characterized by such sequential, strategic, constrained choosing.

230. Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGALISM/LEFT CRITIQUE 178, 213–14, 217 (Wendy Brown & Janet Halley eds., 2002).

231. See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1985).

232. DWORKIN, LAW’S EMPIRE, *supra* note 41, at 225.

233. See *supra* note 10 and accompanying text (discussing Roberts’ claim).

234. Justice Scalia insisted on the need for determinacy, stability, and checks on abuse, even if his form of textualism is arguably highly indeterminate. Compare Scalia, *supra* note 231 (praising rules in law), with Abbe Gluck, *Textualism without Formalism: Justice Scalia’s Interpretation Legacy*, in JUSTICE SCALIA: RHETORIC AND THE RULE OF LAW 81, 81–85 (Brian G. Slocum & Francis J. Mootz III eds., 2019) (challenging idea that textualism is a formalist method).

235. See Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L. J. 65, 65–66 (1983).

236. Professors Gluck and Schacter question new textualists’ claims of formalism and judicial self-restraint, highlighting largely unordered interpretive move options. Gluck, *supra* note 234, at 85–86 (disputing claims that new textualism is “formalist”); Jane S. Schacter, *Text or Consequences*, 76 BROOK. L. REV. 1007, 1009 (2011) (noting textualist recourse to substantive and political preferences).

237. Justice Cardozo highlighted this mix of clear law, choice, and change. CARDOZO, *supra* note 17, at 129–30, 137 (stating that in “countless litigations” the law is so “clear that judges have no discretion,” but in “the borderland, the penumbra, where controversy begins” a judge must “[i]nnovate”).

B. Legal Tools, Institutions, and Modes Creating Choice and Dynamism

As prelude to case-study illustration of the law-jazz improvisation similarities, a short and highly simplified presentation of law's multilayered elements is offered here, as it was at the end of Part III for jazz improvisation. This simplified schematic form will help frame analysis of how law and ensemble jazz improvisation share practice and structural similarities. As with music, law is revealed and contested over time; that time element is assumed in all of the elements now highlighted.

The multilayered elements, modes, and choices shaping the law

Jurisdictions (federal, state, local)

Institutions generating legal materials (constitutional conventions, legislatures, agencies, courts)

Diverse human actors with diverse interests (for ex., political counsel, corporate counsel, plaintiffs' and defendants' lawyers, non-lawyer clients utilizing the legal system)

Diverse institutions affected by or seeking to shape legal outcomes (for ex., markets, corporations, not-for-profits, communities sharing interests, arms of government (and innumerable others))

Modes (or forms) of law and legal action (for ex., drafting constitutions, legislating, promulgating regulations, issuing legal guidance, advising, permitting, licensing, enforcing, litigating, negotiating, contracting, determining judicial review access, judicial deciding)

Fields of law applicable (for ex., constitutional law, common law bodies (tort, property, contract) administrative law, areas of substantive law (for ex., environmental law, tax law), federal courts, federalism doctrine, criminal or civil procedure, intellectual property law, statutory interpretation method)

Historical contexts of legal matter and materials

Varied factual, technological, societal, economic, and science contexts

Hierarchical power claims about institutions, legal forms, and legal fields pertaining to a dispute or choice

Choices of venues for legal contestation

Choices of sequence with venues

Text selection (word, operative text word cluster, context, structure, signals about a law's functions and purposes, recourse to other laws' similar texts and overlapping turfs)

Precedents (claims about governing or similar cases, statutes, regulatory actions, or historical traditions)

Ascertainment of precedents' power

Methodologies for interpreting or arguing

Purposes and goals of legal materials

Consequences of choices

Implications of each other's choices²³⁸

As discussed in this Part, most legal work arises in settings where no one controls higher level “meta” choices of which jurisdictions, legal actors, legal materials, modes, methods, sequences, or venues should govern. Other players and their interests may initially be unknowable.

C. Law in Play Versus Law as Settled

To set the stage for subject-focused case studies illuminating jazz and law similarities, the Article first focuses at a higher level on when legal work arises. Legal edicts can at times be quite clear—for example, a state-set speed limit, or controlled substance prohibition, or the age at which someone can become the United States president—but new or clarifying law emerges when the preceding state of the law leaves room for play, choice, and change. And because law involves a collective activity, with unpredictable actors, constrained choosing, and outcomes revealed over time, it is structurally a great deal like jazz improvisation.²³⁹ If there is no choice to be made, there is often no work—legal or musical—to do. Hence, questions about legal methodologies and the nature of law cannot assume away the main setting of legal work, namely where a legal choice is subject to uncertainty and contestation.²⁴⁰

If the law is rigid and known, clients hiring lawyers would risk squandering resources on futile legal change efforts.²⁴¹ At times legal work can involve sorting out the maze of laws pertinent to a complex situation or financial puzzle, but the facts or legal intricacy pose the main challenge. In these settings, characterizing the doing of law as akin to “cataloguing” or “archaeological” in nature makes some sense.²⁴² But that sort of work is far less common than non-lawyers and often new law students expect.

Uncertainties and probabilistic analysis are prevalent because law guides, acts on, or constrains actions under consideration. And with situational variation, even a known single piece of applicable law may lead to uncertain results.²⁴³ Add more layers of law, other institutions, and diverse stakeholder goals, and even more predictive uncertainty follows.²⁴⁴ In addition, most forms of law are generated by multiple actors over a time sequence. In Professor Arthur Corbin's words, writing about case precedents regarding the presence or absence of a

238. See *supra* Part III.

239. Sheila Simon, *Jazz and Family Law: Structures, Freedoms, and Sound Changes*, 42 IND. L. REV. 567, 580 (2009).

240. See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 3 (2006) (focusing on the implications of pervasive legal uncertainty and questions about institutional competence).

241. Frank Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & SOC. PROBLEMS 61, 61 (1994).

242. See Fuller, *supra* note 61, at 662–68 (critiquing such views of the law); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 59–60 (1988) (criticizing the archaeological metaphor).

243. See CARDOZO, *supra* note 17, at 128–29.

244. *Id.*

contract, “[b]eing drawn by many hands, there are gaps . . . and . . . conflicting lines.”²⁴⁵ Probabilistic analysis will shape where legal work happens, influencing investment choices in legal advocacy.²⁴⁶ As Judge Easterbrook observed, people do not go to court with “clear cases. Why waste the time and money?”²⁴⁷ People engage with law when there is “conflict” or “ambigui[ty]” or the world has changed so old law does not fit.²⁴⁸ And where the stakes are high enough, need for legal change may justify a long-shot effort.²⁴⁹

Legal work hence tends to happen where lawyers and other law creators see room for discretionary judgments and legal adjustment; as a result, the law moves or becomes more specifically delineated.²⁵⁰ Even in battles over a particular commercial practice and its legality, stakeholders will see different stakes, wield different information and power, and seek to nudge the law or legal arrangements in their preferred direction.²⁵¹ Much as contract law and the linked art of negotiation involve asymmetrical information and different party stakes, solutions and advantage through law will vary for different stakeholders.²⁵² Factual complexities and interactively created circumstances, like musicians throwing each other unexpected choices, will create settings not resolved by earlier legal materials.²⁵³

In addition, legal choosing and resulting dynamism often traces to the absence of any final legal venue and sequence uncertainties.²⁵⁴ This is pervasively true, but especially so in the setting of high stakes regulatory battles involving “the art of regulatory war.”²⁵⁵ In such settings, a multi-layered or grid-like

245. 1 Timothy Bender, *Corbin on Contracts* § 2.13 (2022).

246. For exploration of the claim that common law litigation moves policy towards allocative efficiency, see D. Daniel Sokol, *Rethinking the Efficiency of the Common Law*, 95 NOTRE DAME L. REV. 795, 796–97 (2019) (citing works by Richard Posner and others discussing the efficiency claim).

247. Easterbrook, *supra* note 241, at 61.

248. *Id.*

249. For example, in *F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), preceding governing administrative law doctrine and statutory language provided ample basis to uphold Food and Drug Administration (FDA) authority to regulate tobacco. However, an imperiled tobacco industry fought anyway, ultimately winning and generating new legal exceptions to deference, new statutory interpretation moves, as well as justices embracing methods usually rejected. For a critique, see JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 1191–96 (3d ed. 2017).

250. See, e.g., Ronald J. Gilson, *Lawyers as Transaction Cost Engineers*, NEW PALGRAVE DICTIONARY OF ECON. & L. 508, 509 (1998) (arguing how transactional legal work minimizes transactions costs).

251. See generally *id.*; see also Ronald J. Gilson, Charles F. Sabel, & Robert E. Scott, *Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contractual Forms*, 88 N.Y.U. L. REV. 170, 172 (2013) (arguing that parties and lawyers in contracts innovate and strive for efficiency, with courts only later playing a limited role).

252. See William Samuelson, *Bargaining Under Asymmetric Information*, 52 ECONOMETRICA 995, 995–96 (1984) (exploring asymmetric information problems).

253. This is most notably the case in remaking of Commerce Clause doctrine and “waters” protections. See discussion *infra* Subsection IV.D.2.

254. For example, presidents are little constrained choosing administration priorities. William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357, 1426–29 (2018) (discussing ways president is “tethered” in seeking agency policy change).

255. WILLIAM W. BUZBEE, *FIGHTING WESTWAY: ENVIRONMENTAL LAW, CITIZEN ACTIVISM, AND THE REGULATORY WAR THAT TRANSFORMED NEW YORK CITY* 31–51 (2014) (introducing elements of the “art of

panoply of actors and institutions partake in battles akin to “blood sport.”²⁵⁶ Prediction of others’ choices is difficult to impossible.²⁵⁷ In addition, United States federalism often leaves space for federal, state, and often local governments to make different choices, a possibility stakeholders will utilize.²⁵⁸ Relatedly, legislative, presidential, and agency agenda setting and choices about programmatic and enforcement priorities are rarely determined by any constraining legal texts.²⁵⁹

And within federal, state, or local governments, legislators often empower agencies to handle a social challenge.²⁶⁰ Agencies and stakeholders before them also have both procedural and substantive discretion in making constrained choices.²⁶¹ Agencies choose procedural modes based on a complex assessment of delay risks, benefits of momentum, power of the possible forms of regulation, durability of the action, and how mode choices might trigger different levels of judicial review.²⁶²

Whether a legal decider or counsel, lawyers will assess past related legal actions since most forms of law respect precedent or disfavor unreasoned legal change.²⁶³ Legal materials, especially statutes, often dictate certain methodologies and procedures, identify salient metrics and interests, and favor particular policy outcomes.²⁶⁴ Legal actors will choose legal venues and frames that comport with their goals, trying to anticipate others’ similar strategic choices.²⁶⁵ Each legal clarification, victory, or loss changes probabilities, elicits or produces information, and may shift legal norms, understandings, and stakeholders’ power.²⁶⁶ Even the most bureaucratic of legal institutions involve human

regulatory war” in book analyzing fourteen-year battle against a highway, development, and park project proposed for placement in the Hudson River).

256. See Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1680–81 (2012).

257. For exploration of sequence in shaping constitutional law, see Fried, *supra* note 225, at 1145–46 (exploring how law and other realms of logic, life, and art are “time-extended” and doctrine is “between story and argument”).

258. Buzbee, *Federalism Hedging*, *supra* note 35, at 1039; Carlson, *supra* note 37, at 1098–99.

259. See Buzbee, *supra* note 254, at 1427–29 (noting general lack of law governing prioritization of regulatory actions); see also Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 590 (2021) (analyzing executive power to cause structural deregulation with few checks).

260. See Freeman & Jacobs, *supra* note 259, at 656.

261. For the key doctrinal affirmation of agency procedural discretion, see *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 203 (1947); for exploration of agency forms (or modes) and their implications, see M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1383–84 (2004).

262. See BUZBEE, *supra* at note 255, at 31–51 (introducing and explaining the concept of the “art of regulatory war”); see also Magill, *supra* note 261, at 1384 (identifying agency choices of forms of action and their implications); Robert L. Glicksman & David L. Markell, *Unraveling the Administrative State: Mechanism Choice, Key Actors, and Regulatory Tools*, 36 VA. ENV’T L.J. 318, 326 (2018) (discussing agency modal choices).

263. See Buzbee, *supra* note 254, at 1424 (analyzing consistency doctrine and how law balances stability and room for change).

264. BUZBEE, *supra* note 255, at 33–34, 220–22, 227–28 (analyzing Westway battles shaped by stakeholders seeking outcomes consistent with statutory priorities).

265. Such strategic, sequential, multi-layered regulatory battles are analyzed in *id.* at 31.

266. Cf. Andrei Marmor, *How Law is Like Chess*, 12 LEGAL THEORY 347, 359 (2006) (stating rules and practices of chess “constitute the practice” but “do not exhaust it” and exploring how law works similarly).

judgments shaped by diverse skills, experiences, and priorities, always leaving predictive uncertainty.²⁶⁷

Thus, legal work and law declarations emerge from a matrix laden with constrained choices and predictive uncertainties. If one looks at law only with narrowed focus on a particular actor, a single issue, or the words of a particular legal decision or isolated words in a statute, such framing omits the true forces shaping past and future law.²⁶⁸ Such a narrow or blindered legal focus is akin to looking at a single pixel of a photographic image or a musical note without surrounding context.²⁶⁹ Such a focus will often omit the very interactions, needs, and incentives that drive legal disputes, uncertainties, changes, and also illuminate what happened and where the law is likely to go.²⁷⁰ How the law in diverse areas is subject to such strategic choice, play, and change, even in areas claimed to be governed by rigid law or clear mandates, is explored through the case studies that follow.

D. *Legal Case Studies Illuminating Law-Jazz Similarities*

To illustrate this pervasive choosing and strategizing of law, illuminated through the jazz improvisation analogy, this Section turns to case study examples. In the interest of brevity and due to past scholarship by this author and others, it omits the most easily understood jazz-like realms of U.S. law, namely common law dynamism and federalism-facilitated interactions. In both of those settings, as introduced above, changing circumstances, judicial agency, and strategic uses of different legal venues lead to legal strategizing and change much like the constrained collective choosing and dynamism of jazz improvisation.²⁷¹

Instead, this Article explores law's pervasive constrained, sequential choosing and change by looking at four case studies in public law settings, all of which include claims of mandate, determinacy, and clear answers. One focuses on the constitutionalizing of standing and the 2021 *TransUnion* decision.²⁷² The second looks at battles over what waters are federally protected under the Clean Water Act.²⁷³ Third, this Section looks at the statutory interpretation textualist claim that a narrowed focus on selected text is more determinate and constraining than more pluralist methods.²⁷⁴ Lastly, the Article provides an administrative law example, looking at both consistent strains of deference doctrine but also how this area keeps being remade, especially with the emergence and evolution of the major questions doctrine.²⁷⁵

267. See Fallon, *supra* note 6, at 1293 (concluding human normative judgments in law are unavoidable); Frank, *supra* note 46, at 1264 (same).

268. Frank, *supra* note 46, at 1262–64.

269. See *id.* at 1263–64.

270. See *id.*

271. For brief introduction to the common law dynamism literature, see notes 45–54 and accompanying text; for a brief introduction to federalism, see notes 37–38 and accompanying text.

272. See discussion *infra* Subsection IV.D.1.

273. See discussion *infra* Subsection IV.D.2.

274. See discussion *infra* Subsection IV.D.3.

275. See discussion *infra* Subsection IV.D.4.

In all of these examples, claims that particular legal outcomes or methods are commanded or must be turn out, upon examination, to be barely justified, contingent, and strategic.²⁷⁶ Within each case study, one finds clashes over where space for choice exists.²⁷⁷ Legal methodology is wielded erratically, or perhaps strategically, little constrained by concepts of precedent.²⁷⁸ All involve multiple actors reshaping the law with jazz improvisation-like constrained, collective, sequential, and strategic choosing. And by expanding the analytical lens to see the choosing and change, one finds far more criteria for assessing the legal action's integrity and logic than a more singular, snapshot focus.

1. *The Constitutionalizing and Reshaping of Standing Doctrine*

The Article now turns to standing doctrine, focusing on past Justice Antonin Scalia's key Supreme Court standing opinions and significant standing doctrine shifts in the 2021 *TransUnion* decision.²⁷⁹ Modern standing doctrine continues to be constructed from disparate strains of law, with varying degrees of fit and change readily open to identification and critique.²⁸⁰ This body of standing law is nothing like classical music interpretive choices, but is much like jazz improvisation, but of an unconvincing sort. Key opinions select from sometimes misfitting and disparate cases, legal authority, and a mix of logic and illogic to weave judge-empowering barriers to court access while undoing congressional policy choices.²⁸¹

At its most basic, standing doctrine as currently understood shapes who is allowed to stand and be heard before a court.²⁸² The exact borders and distinctions between standing's constitutional, prudential, and statutory elements have long been murky.²⁸³ The constitutional prong builds mainly on the United States Constitution's Article III "Cases" or "Controversies" language.²⁸⁴ The statutory wrinkle concerns the power of Congress to influence standing: how do a statute's

276. See Fallon, *supra* note 6, at 1278, 1285, 1303 (analyzing concepts of legal "meaning").

277. For an embrace of dynamic views of law, focused on what judges do and should do in interpreting statutes, see WILLIAM N. ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION* 5–6 (1994). For criticisms, see John Copeland Nagle, *Newt Gingrich, Dynamic Statutory Interpreter*, 143 U. PA. L. REV. 2209, 2239 (1995) (questioning updating laws without actual full process of legislating); SCALIA, *supra* note 224, at 22 (criticizing Eskridge and arguing "[i]t is simply not compatible with democratic theory that laws mean what they ought to mean, and that unelected judges decide what that is.").

278. See generally, MANNING & STEPHENSON, *supra* note 249, at 75–77 (discussing methodological variety and stare decisis); Evan J. Criddle & Glenn Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L. J. 1573, 157576 (2014); Gluck, *supra* note 234, at 81–85 (focusing on textualism's many unordered choices).

279. See *TransUnion L.L.C. v. Ramirez*, 141 S. Ct. 2190, 2215 (2021).

280. See William W. Buzbee, *Standing and the Statutory Universe*, 11 DUKE ENV'T L. & POL'Y F. 247, 249 (2001).

281. See *id.* at 248–49.

282. See *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (stating the basic rationales for limiting standing).

283. See Buzbee, *supra* note 28, at 248 (exploring how statutes influence standing after *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992)).

284. See U.S. CONST. art. III, § 2; Buzbee, *supra* note 280, at 258.

requirements, protections, and causes of action influence judicial determinations of who constitutionally can be heard in court?

Much of standing doctrine prior to Scalia's influence involved direct claims of constitutional harms where Congress had indicated nothing about who could be heard in court.²⁸⁵ A substantial body of law also parsed who could bring suit under the Administrative Procedures Act ("APA") cause of action, especially over who was adequately "adversely affected or aggrieved"—the key APA terms—such that they could complain about an agency action.²⁸⁶

Before 1992, no case had ever found a constitutional standing problem if a person brought suit under a particular statute for a particular kind of harm, where Congress had specifically created a cause of action.²⁸⁷ Earlier decisions and scholarship assumed or argued that such statutorily conferred claims would both create a case and eliminate (or perhaps satisfy) constitutional standing barriers.²⁸⁸ This last kind of setting—generally referred to as involving citizen suit provisions—involves Congress creating a "case" in the sense of a cause of action.²⁸⁹ Likewise, the APA cause of action against the government, as well as "private attorney general" causes of action authorizing private suits against private actors for statutory violations, both clearly authorize "cases."²⁹⁰ In addition, since the pre-Founding era, private litigants could bring suits for *qui tam* monetary recoveries when protecting the public's resources from wrongdoing.²⁹¹

Under Justice Scalia's leadership, the Court strengthened standing doctrine as a constitutional barrier to citizen court access.²⁹² He notably claimed that constitutional standing requirements, even as he actually recast them, were "essential

285. See Cass R. Sunstein, *What's Standing after Lujan—Of Citizen Suits, Injuries, and Article III*, 91 MICH. L. REV. 163, 182–92 (1992) (discussing history of standing prior to *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992)); see also *Allen v. Wright*, 468 U.S. 737, 754–55 (1984) (holding no adequate standing injury simply for government violating the law); *City of L.A. v. Lyons*, 461 U.S. 95, 101–02 (1983) (requiring injury to be actual or imminent).

286. Administrative Procedure Act, 5 U.S.C. § 702.

287. See Richard J. Pierce, *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1178–70 (1993).

288. For cases, see, e.g., *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 14 (1942) (noting that under statute, "private litigants have standing only as representatives of the public interest"); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 476–77 (1940) (finding standing under statute even though not given a legally protected interest under it); *Scenic Hudson Pres. Conf. v. Fed. Power Comm'n*, 354 F.2d 608, 615 (2d Cir. 1965) (noting that "a statute may create new interests or rights and thus give standing to one who would otherwise be barred"). For scholarship, see generally Sunstein, *supra* note 285; William W. Buzbee, *The Story of Laidlaw: Standing and Citizen Enforcement*, in *ENVIRONMENTAL LAW STORIES* 201, 201 (Oliver A. Houck & Richard J. Lazarus eds., 2005); see also William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222–23 (1988); Louis L. Jaffe, *Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1035–36 (1968).

289. Judge Fletcher argued that this should be the defining test for standing. See Fletcher, *supra* note 288, at 223–24.

290. See *id.*

291. See *Vt. Agency of Nat. Res. v. United States*, 529 U.S. 765, 773–78 (2000) (reviewing the history of *qui tam* litigation and federal statutes long authorizing such litigation).

292. See Buzbee, *supra* note 288, at 205.

and unchanging.”²⁹³ In reality, the legal shifts Scalia steered into Supreme Court law were not constitutionally inevitable, not dictated by case precedents, and not rooted in determinate constitutional language.²⁹⁴ In his selective picking and choosing from a web of legal materials, plus resulting change and subsequent instability, this body of law manifests attributes much like jazz improvisation, although perhaps of questionable quality due to failures to concede, explain, and justify what actually were creative moves.

The key constitutionalizing doctrinal shift was made in a mostly majority Scalia opinion in *Lujan v. Defenders of Wildlife* (“*Lujan*”).²⁹⁵ Citing Articles II and III of the Constitution, the Court stated beneficiaries of regulation face heightened barriers to the courts, while those subject to regulation—so-called regulatory targets—usually have easier court access because of the direct, palpable, common law-like nature of their interests impinged upon by regulation.²⁹⁶ The Court made clear that claims involving real property, monetary, or tort-like injuries and threatened injuries will generally suffice for standing.²⁹⁷ The Endangered Species Act’s express cause of action authorizing citizens to check private or government illegality did not alone constitutionally suffice for standing.²⁹⁸

This standing doctrine shift involved selective choosing, ignoring, and re-shaping of several bodies of law. First, *Lujan* substantially relied on *Lujan v. National Wildlife Federation*, a case that involved language about litigant access to the courts when dealing with heavily political agency choices.²⁹⁹ That case, however, was about the APA’s judicial review provisions and cause of action, not a constitutional standing case.³⁰⁰ *Lujan v. Defenders of Wildlife*, however, substantially lifted this APA-rooted discussion and made it constitutionally required under Article III of the Constitution.³⁰¹ Like Sonny Rollins integrating another song’s melody into an improvised solo, this precedent language was unmoored from its APA roots to supply a new constitutional test.³⁰²

Second, a line of earlier standing cases dealt with direct claims under the Constitution and constitutional standing concerns, but lacked the issue of possible judicial standing barriers contrary to congressional design.³⁰³ Despite this separation of powers wrinkle and legislative policymaking primacy, the *Lujan*

293. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–60 (1992) (also quoted in *Vt. Agency of Nat. Res.*, 529 U.S. at 771); see also Honorable Patricia M. Wald, *The Cinematic Supreme Court: 1991-92 Term*, 7 ADMIN. L.J. AM. U. 238, 239 (1993) (“There is no way that the origin of the increasingly tough three-pronged standing test— injury, causation, redressability—can be traced to the stark constitutional phrase ‘case or controversy.’”).

294. See e.g., *Lujan*, 504 U.S. 555.

295. *Id.*

296. *Id.* at 562.

297. *Id.* at 561.

298. *Id.* at 580 (Kennedy, J., concurring in part and concurring in the judgment).

299. See *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 871 (1990).

300. *Id.* at 882–83.

301. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–78 (1992).

302. Sunstein, *supra* note 285, at 181–86, 222–23 (discussing transition of APA language into constitutional doctrine).

303. *Lujan*, for example, was rooted in a citizen suit provision integrated into the Endangered Species Act, not a cause of action, like that under the APA or Section 1983, applicable to a massive number of government actions. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 557–58 (1992).

Court nonetheless said “there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right”; it made no difference that Congress had conferred a cause of action.³⁰⁴

Third, the view that Article II was relevant to standing had been mentioned in *Allen v. Wright* but was given newfound prominence in *Lujan*; it newly viewed citizen suit authorization as running afoul of, or at least requiring judicial trimming, due to Article II’s obligation that the president “Take Care” to enforce the law.³⁰⁵

Fourth, what little the Supreme Court had previously said on this issue of congressional power to confer a cause of action and constitutional standing was contrary to this *Lujan* conclusion. In *Sierra Club v. Morton* and *International Primate Protection League*, the Court indicated that that setting—congressional explicit conferral of a cause of action—would be different since, with an explicitly conferred cause of action, litigants would have a “case.”³⁰⁶

Lujan thus made major new constitutional law: even if a litigant satisfied the elements of a congressionally conferred cause of action, the Court newly gave judges a constitutional veto-gate in the form of standing doctrine.³⁰⁷ When the Court stated there was “no basis” to adjust standing conclusions due to Congress creating a cause of action, this was a conclusory new law declaration, not an assertion grounded in or compelled by earlier legal materials.³⁰⁸

Lujan’s own precedential power was left uncertain due to gaps in reasoning, concurring opinions, Court fragmentation, and especially due to its newly created category of “procedural rights” standing.³⁰⁹ An across-the-board constitutional requirement of palpable common law-like injury was hard to reconcile with hundreds of cases brought under the APA for National Environmental Policy Act³¹⁰ violations, or for violations of the Freedom of Information Act,³¹¹ where informational interests are at stake. Similarly, other government APA violations had for sixty years been litigated by citizens despite remands where ultimate outcomes are unknown.³¹² To address these concerns and likely maintain a majority, the *Lujan* court created a new category of “procedural” injuries that were the subject of their own more forgiving constitutional standing frame.³¹³ As

304. *Id.* at 576–77.

305. 468 U.S. 737, 761 (1984) (declining standing in case characterized as not involving “direct harm” but seeking “a restructuring of the . . . Executive Branch” with its “duty to ‘take Care that the Laws be faithfully executed’”); Sunstein, *supra* note 285, at 194–95 (discussing the Article II analysis in *Lujan*).

306. *See, e.g.*, *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972) (“Where the party *does not rely on any specific statute authorizing invocation of the judicial process*, the question of standing depends upon whether the party has alleged such a ‘personal stake in the outcome of the controversy’”) (emphasis added); *Int’l Primate Prot. League v. Adm’rs of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991) (“[S]tanding is gauged by the specific common-law, *statutory* or constitutional claims that a party presents”) (emphasis added).

307. *See Lujan*, 504 U.S. at 555–56.

308. *See id.* at 576.

309. *See id.* at 571–78 (discussing procedural injury claims).

310. National Environmental Policy Act of 1969, 42 U.S.C. § 4321.

311. Freedom of Information Act, 5 U.S.C. § 552.

312. *See, e.g.*, cases regarding the EPA, such as *Gen. Motors Corp. v. United States*, 496 U.S. 530 (1990).

313. *Lujan*, 504 U.S. at 571–78.

long as underlying interests were sufficiently real and potentially affected, *Lujan*'s language seemed to indicate, litigation seeking compliance with statutory requirements and procedures would suffice.³¹⁴

Further confusing the power of *Lujan*, Justices Kennedy and Souter—whose votes were needed to make a Court majority—rejected key Scalia language.³¹⁵ In Kennedy's opinion, he (aligned with Souter and dissenters on this point) said Congress had the power to “define injuries” and “articulate chains of causation” even if lacking common law analogues.³¹⁶ All of this splintering, change, and omitted explication left considerable doctrinal uncertainty.

Subsequent cases such as *Akins*, *Laidlaw*, and *Massachusetts v. EPA* cut back on *Lujan*.³¹⁷ Clear majorities agreed that congressional choices and priorities influence standing analysis, although the judicial veto-gate role remained.³¹⁸ Clear majorities in *Massachusetts* and the more recent *Spokeo* case embraced the Kennedy *Lujan* view that Congress can define what count as protected interests and “articulate chains of causation” that shape what suffices for standing.³¹⁹ *Spokeo*'s majority also, however, murkily stated both that congressional judgments about interests and injuries are “instructive,” and also that “Article III standing requires a concrete injury even in the context of a statutory violation.”³²⁰

The 2021 *TransUnion* decision again wrenched standing doctrine in a new direction.³²¹ Its effects, however, are likewise uncertain due to questionable logic and precedent omissions in the majority opinion by Justice Brett Kavanaugh.³²² Like *Spokeo*, the case concerned standing and relief for violations of the Fair Credit Reporting Act under an express cause of action.³²³ The plaintiffs alleged violations directly affecting them, among them defendants' dissemination of reports erroneously identifying plaintiffs as terrorists or drug dealers, plus false and incomplete defendant reports sent to plaintiffs.³²⁴

Thus, *TransUnion* seemingly checked all of the key precedent boxes for standing: Congress had protected consumers' interest in accurate credit report information, had set statutory requirements that defendants had violated, had created a private cause of action that even provided for actual and statutory

314. *Id.* (discussing procedural injury standing).

315. *Id.* at 579–81 (Kennedy, J., concurring in part and concurring in the judgment).

316. *Id.* at 580 (Kennedy, J., concurring in part and concurring in the judgment).

317. *See generally* Fed. Election Comm'n v. *Akins*, 524 U.S. 11 (1998); Friends of the Earth, Inc. v. *Laidlaw Env't Servs., Inc.* 528 U.S. 167 (2000); *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007).

318. *See Akins*, 524 U.S. at 29; *Laidlaw*, 528 U.S. at 201; *Massachusetts*, 549 U.S. at 517.

319. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016). For further discussion, see Bradford C. Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?: Massachusetts v. EPA's New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1725–26 (2008) (discussing standing analysis in *Massachusetts v. EPA*); Buzbee, *supra* note 280, at 279 (tracing Kennedy's concurrence into clear majority view); Bradford C. Mank, *Standing and Global Warming: Is Injury to All Injury to None?*, 35 ENV'T L. 1, 63–64 (2005) (analyzing *Akins* and Kennedy's *Lujan* opinion).

320. *Spokeo*, 578 U.S. at 341.

321. *See generally* *TransUnion L.L.C. v. Ramirez*, 141 S. Ct. 2190 (2021).

322. *See generally id.*

323. *Id.* at 2200.

324. *Id.* at 2200–02.

monetary damages (a form of harm and relief *Lujan* privileged, as did *qui tam* precedents), and all of the plaintiffs could show that their own statutorily protected rights had been violated.³²⁵ They were not seeking government compliance with the law, action just in the public's interest, or tracing harms and redress through an uncertain sequence of third parties.³²⁶ They were directly suing the law violators and seeking monetary relief.³²⁷

Nonetheless, *TransUnion* rejected the congressional design and denied standing to thousands of plaintiffs who had directly experienced regulatory violations.³²⁸ Finding that only "republication" to third parties of defamatory information sufficed for standing, the Court only selectively engaged its own precedents.³²⁹ Instead, it cited *Spokeo* and mainly leapt back to Scalia language in *Lujan*, but with even greater emphasis on standing barriers as shaped by "physical, monetary, or cognizable intangible harm traditionally recognized as providing a basis for a lawsuit in American courts."³³⁰ The Court repeatedly alludes to "history" and "tradition" and especially "traditional harms" as shaping and limiting standing.³³¹ It looks for a "close historical or common law analogue" for harms resulting from statutory violations for plaintiffs to have standing.³³²

While the Court never says it is extending or changing standing doctrine, or overruling key standing precedents, at several crucial points it can find no Supreme Court precedents.³³³ And *Sierra Club v. Morton*, or *Laidlaw*, or *Akins*, or *Massachusetts*? The Kennedy and Souter *Lujan* language embraced by majorities in *Massachusetts* and *Spokeo*? None are even cited, let alone discussed.³³⁴ Environmental hypotheticals are offered to illuminate the lack of standing, but without citation or working with language from major environmental standing cases finding "environmental and aesthetic" interests enough.³³⁵

Justices Thomas and Kagan, in separate opinions joined by other dissenters, lambaste the majority for ignoring precedents, getting standing history wrong, and for denying Congress power to give citizens the right to sue for violations directly affecting them.³³⁶ In Justice Thomas's words, the Constitution requires "no such thing."³³⁷ "Never before . . . has [the] Court declared that legislatures are constitutionally precluded from creating legal rights enforceable in federal court if those rights deviate too far from their common-law roots," he observes.³³⁸ Justice Kagan, also writing for four justices in dissent, says that the

325. *See id.*

326. Such attenuated causation claims influenced the *Lujan* standing rejection.

327. *TransUnion*, 141 S. Ct. at 2200–02.

328. *Id.* at 2200, 2209–13.

329. *Id.*

330. *Id.* at 2204–07.

331. *Id.* 2204.

332. *Id.*

333. *Id.* at 2203, 2205 (citing a law review article by Justice Scalia and Seventh and Eleventh Circuit cases).

334. *See id.*

335. *See id.* at 2206 n.2, 2207 n.3.

336. *Id.* at 2214 (Thomas, J., dissenting); *id.* at 2225 (Kagan, J., dissenting).

337. *Id.* at 2214 (Thomas, J., dissenting).

338. *Id.* at 2221 (Thomas, J., dissenting).

TransUnion majority “transforms standing law from a doctrine of judicial modesty into a tool of judicial aggrandizement.”³³⁹

Hence, in this constitutional standing setting claimed to be “essential and unchanging” in *Lujan*, and merely following “tradition” in *TransUnion*, virtually nothing fits those claims.³⁴⁰ Standing doctrine appears increasingly dependent on the setting of the standing dispute.³⁴¹ Neither *Lujan* nor *TransUnion* concede they are refashioning the law.³⁴² Their claims of obedience to constitutional requirements, precedents, and tradition lack support.³⁴³ Material from other settings is imported and refashioned.³⁴⁴ Some might applaud how litigation over regulatory violations is now curtailed, but as Justice Thomas establishes in his lengthy, blistering *TransUnion* dissent, the Court’s creation of newfound barriers to standing is “remarkable in both its novelty and effects.”³⁴⁵ This body of law shows moves like jazz improvisation in its selective use of constraining authority, but, due to illogic and omissions, is akin to an unskilled and unconvincing performance that fails to engage key constraining materials.

2. *What Are Federal Waters?*

This Article now turns to a statutory question from a few unchanged words in the Clean Water Act (“CWA”) since 1972: what are the “waters of the United States” (“WOTUS”) subject to federal jurisdiction?³⁴⁶ Lawyers, agencies, and justices have taken a seemingly settled issue and for several decades used strategic moves to remake the law, again and again.³⁴⁷ Far from mere interpretation or law resulting from the commands of words, several new legal gambits have emerged from and changed this body of law, with multiple legal institutions and regulatory modalities in play.³⁴⁸ Once again, law is done and emerges from constrained choices that are sequentially and strategically made by multiple actors in response to each other.³⁴⁹ It is not just about command, or like interpretation of fully written classical music. Nonetheless, shifts in this law are readily understandable and subject to critical analysis once one expects law to develop in ways akin to jazz improvisation and assesses the legal shifts in light of constraining legal materials. Despite these shifts, key parts of this changing law include claims that certain outcomes are commanded and clear, but analysis reveals that they

339. *Id.* at 2225 (Kagan, J., dissenting).

340. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *TransUnion*, 141 S. Ct. at 2204.

341. *See generally* Richard H. Fallon Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061 (2015).

342. *See generally Lujan*, 504 U.S.; *TransUnion*, 141 S. Ct.

343. *See Lujan*, 504 U.S. at 574–78; *TransUnion*, 141 S. Ct. at 2209–13.

344. *TransUnion*, 141 S. Ct. at 2219–25 (Thomas J., dissenting) (tracing standing’s history and “graft[ing]” of concepts from other settings).

345. *Id.* at 2221 (Thomas J. dissenting). Justice Thomas distinguishes private enforcement of “public rights,” where he thinks standing can be limited, and “private rights” settings where plaintiffs directly experience regulatory violations and Congress conferred on them a cause of action. *Id.* at 2219–21.

346. Clean Water Act of 1977, 33 U.S.C. § 1362(7).

347. *See infra* text accompanying notes 360–94.

348. *See infra* text accompanying notes 371–74 (noting the opposing arguments towards prior settled interpretation of water laws by federal courts).

349. *See supra* note 224 and accompany text.

are actually choices, and sometimes unpersuasive choices as a matter of law or legal craft.

The CWA extends federal jurisdiction to regulate water pollution to “navigable waters,” which in turn are defined as “the waters of the United States.”³⁵⁰ The “navigable waters” language was plucked from the Rivers and Harbors Act (“RHA”)³⁵¹, much like a jazz improviser will quote other tunes or integrate past phrases into a new performance.³⁵² The reach of federal power under this provision has undergone significant reshaping through legislative, agency, litigant, and judicial actions since passage of the RHA and the CWA.³⁵³

The RHA mainly regulated waterways obstructions, but also regulated water pollution.³⁵⁴ In early enforcement actions and regulatory interpretations, the Army Corps of Engineers interpreted the Section 13 “navigable waters” language to limit their regulatory power to materials specifically impeding navigation.³⁵⁵ By around 1970, as pollution concerns intensified, more expansive views of the RHA’s protections were asserted by anti-pollution enforcers and, eventually, the Army Corps itself.³⁵⁶ The statutory definition of “navigable waters” included in the CWA—“the waters of the United States”—went even further.³⁵⁷ Discussions about this 1972 amendment state a desire to provide broader regulatory power than in the RHA.³⁵⁸ An early narrow Army Corps interpretation of this waters language was judicially rejected.³⁵⁹

Subsequently, due to this broad CWA definitional language and supportive legislative history, as well as case law both about federal Commerce Clause power in the post-New Deal years and waters jurisdiction, a period of stability followed.³⁶⁰ For roughly the next thirty years, all government actors, including both Democratic and Republican administrations, embraced the view that this language extended federal jurisdiction to protect waters as far as the Commerce

350. Clean Water Act of 1977, 33 U.S.C. §§ 1251(a)(1), 1362(7), 1362(12) (stating it “is the goal that discharge of pollutants into the navigable waters be eliminated by 1985,” defining “navigable waters,” and defining regulated “discharge of a pollutant” as meaning “any addition of any pollutant to navigable waters”).

351. Rivers and Harbors Act, 33 U.S.C. §§ 400–41. See William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789-1972: Part II*, 22 STAN. ENV’T L.J. 215, 220–21, 258–59, 293–94 (2003) (tracing the definition of “navigable waters” from the Rivers and Harbors Act of 1899 to the Clean Water Act of 1977).

352. See *supra* Subsection III.C.4.

353. See *infra* text accompanying notes 354–414.

354. See 33 U.S.C. § 407; Andreen, *supra* note 351, at 220–21 (discussing the provision regulating pollutants within the Rivers and Harbors Act of 1899); see generally William W. Sapp, Tracy L. Starr & M. Allison Burdette, *From the Fields of Runnymede to the Waters of the United States: A Historical Review of the Clean Water Act and the Term “Navigable Waters,”* 36 ENV’T L. REP.: NEWS & ANALYSIS 10190 (2006) (recounting “navigable waters” developments).

355. Andreen, *supra* note 351, at 221–22.

356. *Id.* at 258–59.

357. Compare 33 U.S.C. § 407 (regulating “navigable waters,” but not providing a definition of the term), with 33 U.S.C. § 1362(7) (defining “navigable waters” as “the waters of the United States, including the territorial seas”).

358. Andreen, *supra* note 351, at 280–81.

359. See Nat. Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975) (rejecting “waters” regulations promulgated by the Army Corps of Engineers as too narrow in scope).

360. See *infra* text accompanying notes 361–62.

Clause would allow.³⁶¹ Promulgated regulations fleshed out particular types of waters subject to federal protection, including a sweep-up provision protecting waters used for, subject to use for, or affecting, interstate commerce.³⁶²

The Rehnquist Court's federalism revival, however, created toeholds for unsettling this bipartisan political consensus over waters protection.³⁶³ *United States v. Lopez* was the first key salvo that shifted the law's path, upholding a challenge to federal Commerce Clause power to regulate guns near schools.³⁶⁴ Attacks on expansive federal environmental laws suddenly had new artillery and provided a double opportunity.³⁶⁵ First, the laws might be weakened or shrunk through constitutionally weighted "clear statement" arguments³⁶⁶, or, second, such efforts to challenge the reach of environmental laws might, in the process, expand upon these new limitations on federal commerce power.³⁶⁷ Basically, the constitutional shifts wrought by *Lopez* and later *Morrison* created opportunities for shrinking both federal statutory and constitutional power.³⁶⁸

When the Army Corps of Engineers asserted jurisdiction over abandoned Midwestern water-filled gravel pits slated for municipal landfilling, it included in its rationale that migratory birds used the pits.³⁶⁹ An earlier Federal Register explanatory document—nonetheless dubbed the "Migratory Bird Rule"—had identified this potential ground for federal jurisdiction.³⁷⁰ Opponents sought to revive the word "navigable" as a rationale to deny federal jurisdiction.³⁷¹ This was a longshot argument. After all, the term was defined with the broad "waters of the United States" language.³⁷² In addition, the Supreme Court and lower courts had long said the definition of "navigable waters" provided jurisdiction

361. For discussion of this expansive intent, see Erin Ryan, *Federalism, Regulatory Architecture, and the Clean Water Rule: Seeking Consensus on the Waters of the United States*, ENV'T L. 277, 285–94 (2016); William W. Sapp, Rebekah A. Robinson, & M. Allison Burdette, *The Float A Boat Test: How to Use It to Advantage in This Post-Rapanos World*, 38 ENV'T L. REP.: NEWS & ANALYSIS 10439, 10442 (2008); Sapp et al., *supra* note 354, at 10201–06.

362. Definition of Navigable Waters of the United States, 51 Fed. Reg. 41,206, 41,250 (Nov. 13, 1986) (finalizing rule regulating wetlands, those adjacent to other waters, all interstate waters, and all intrastate waters the "use, degradation or destruction of which could affect interstate or foreign commerce").

363. See *infra* notes 365–68 and accompanying text.

364. See generally *United States v. Lopez*, 514 U.S. 549 (1995).

365. See Brief for Petitioner at 36–45, *Solid Waste Agency v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001) (No. 99–1178), (relying on *Lopez* to argue the Corps definition of "navigable waters" is beyond the scope the Commerce Clause affords).

366. See *id.* at 15–21.

367. See *id.* at 36–45.

368. See generally *Lopez*, 514 U.S. 549; *United States v. Morrison*, 529 U.S. 598, 627 (2000).

369. *SWANCC*, 531 U.S. at 162, 164–65; Brief for the Federal Respondents at 7–8, *SWANCC*, 531 U.S. 159 (No. 99–1178).

370. Definition of Navigable Waters of the United States, 51 Fed. Reg. 41,206, 41,216–17 (Nov. 13, 1986).

371. Brief for Petitioner, *supra* note 365, at 16–19.

372. Brief for the Federal Respondents, *supra* note 369, at 7–8; see also *United States v. Holland*, 373 F. Supp. 665, 670–76 (M.D. Fla. 1974) (holding that "Congress had the power to go beyond the 'navigability' limitation in its control over water pollution and that it intended to do so"); *Nat. Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975) (holding that Congress had "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution" and "the term ['navigable waters'] is not limited to the traditional tests of navigability").

broader than a navigability focus on use by large-scale ships and the like.³⁷³ Lastly, the Supreme Court in *Riverside Bayview Homes* in 1985 had unanimously agreed that delegated, expert, science-intensive regulatory judgments about the appropriate line between land and water were worthy of deference.³⁷⁴

In *Solid Waste Agency of Northern Cook County* (“*SWANCC*”), however, the Supreme Court embraced these new power-shrinking arguments and unsettled waters law.³⁷⁵ The Court revived “navigable” as power-limiting language.³⁷⁶ Drawing on the Court’s own federalism revival, the Court stated the Army Corps was acting at the outer bounds of federal authority, but without a congressional clear statement authorizing the power assertion.³⁷⁷ The Court also saw the jurisdictional assertion as a problematic incursion on states’ usual land use regulation primacy, plus drew on a statutory savings clause, but otherwise left its constitutional concern unexplained.³⁷⁸

This claim that the action was at the boundaries of federal power was crucial to *SWANCC*³⁷⁹, but a puzzler. The water-filled pits were created by past commercial use, migratory birds’ cross-state movements and linked commerce had long been a basis for federal jurisdiction, and the site’s proposed new municipal landfilling was rife with direct commerce links and commerce effects.³⁸⁰ All anti-pollution laws overlap with state and local land use and pollution regulation, but no previous cases identified this as a constitutional problem.³⁸¹ Still, the Court wavered at this claimed concern, then cited the constitutional avoidance canon as a rationale to narrow the statute’s regulatory reach.³⁸²

The *SWANCC* court’s use of a “clear statement” plus federalism move also created a powerful new precedent for challengers to cite, partly due to its unspecified application.³⁸³ If these vaguely explained concerns were enough, then *SWANCC* could be artillery to challenge federal power without requiring clear explication of the constitutional problem; turf overlap might suffice.³⁸⁴ The

373. See *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 486 n.6 (1987); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985); *Callaway*, 392 F. Supp. at 686.

374. *Riverside Bayview Homes*, 474 U.S. at 134 (emphasizing the science and pragmatic expert judgment involved in drawing the line on the continuum between land and water).

375. *Solid Waste Agency v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 171–72 (2001).

376. *Id.* at 172–73.

377. *Id.*

378. *Id.* at 174.

379. *Id.*

380. Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, CORNELL L. REV. 1199, 1227 (2003) (questioning Court assertion of agency action at the bounds of federal power).

381. See, e.g., *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 138–39 (1985) (discussing how Congress amended the CWA to address conflicting provisions and jurisdiction with potential state provisions and exercises of jurisdiction).

382. *SWANCC*, 531 U.S. at 174.

383. See Matthew B. Baumgartner, *SWANCC’s Clear Statement: A Delimitation of Congress’s Commerce Clause Authority to Regulate Water Pollution*, 103 MICH. L. REV. 2137, 2148–49 (2005); see generally William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992) (discussing the usage of clear statement rules pre-*SWANCC*).

384. See John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 443–44 (2010) (criticizing uses of “clear statement” moves if not linked to constitutional choices reflected in its text).

Court (and litigants) could claim a sort of jurisprudential modesty, yet rewrite law and jettison precedents: Congress simply had not conferred authority with adequate clarity.³⁸⁵

Much as a new musical conception (like bebop chord-focused improvisation, or modal conceptions, or the discovery of the “flatted fifth”) opens new musical improvisatory opportunities, these interwoven strategies seized in *SWANCC* both reflected change and created powerful legal shifts due to their combination of breadth and indeterminacy.

In the *Rapanos* litigation, another case about the reach of the CWA, these opportunities were further exploited and fiercely contested.³⁸⁶ Challengers saw *Rapanos* as a vehicle to extend *Lopez*, *Morrison*, *SWANCC*, and “clear statement” claims as well, possibly weakening the CWA and federal power more broadly.³⁸⁷ If victorious, more waterside land could be developed and pollution discharged with impunity.³⁸⁸ Opponents also sought to weaken the usual judicial deference to agency law interpretations under the *Chevron* case.³⁸⁹

But much as jazz improvisation involves sequential and responsive interactions, supporters of waters protection raised counterarguments and wielded different frames and methodologies.³⁹⁰ Pro-environmental interests and dozens of states emphasized the stable, bipartisan nature of CWA waters protections.³⁹¹ They argued *Riverside Bayview Homes* largely ruled as a precedent.³⁹² Defenders highlighted strong commerce linkages.³⁹³ Even the Bush administration—a generally antiregulatory administration—called for retention of longstanding views of federal CWA power.³⁹⁴

The result was a splintered 4-1-4 mess, but with the different opinions addressing the array of statutory, constitutional, and precedent-based claims.³⁹⁵ Justice Scalia, speaking only for a plurality in his opinion’s limiting language, drew on his “new textualism” toolchest.³⁹⁶ He mostly ignored legislative history, then dismissed decades of administration and court views about waters authority as

385. See also discussion *infra* Subsection IV.D.4 (discussing deference regimes and major questions doctrine’s link to clear statement moves).

386. There were 65 briefs and amici filed in the *Rapanos* legislation. For discussion, see Felicity Barringer, *Reach of Clean Water Act Is at Issue in 2 Supreme Court Cases*, N.Y. TIMES (Feb. 20, 2006), <https://www.nytimes.com/2006/02/20/politics/reach-of-clean-water-act-is-at-issue-in-2-supreme-court-cases.html> [<https://perma.cc/XX3W-QKK5>].

387. Petitioners’ Reply Brief at 12–17, *Rapanos v. United States*, 547 U.S. 715 (2006) (No. 04–1034).

388. Cf. Brief for the National Association of Home Builders as Amicus Curiae Supporting Petitioners at 5–6, *Rapanos*, 547 U.S. 715 (No. 04–1034).

389. See Petitioners’ Reply Brief, *supra* note 387, at 4–6; Brief of The Cato Institute as Amicus Curiae Supporting Petitioners at 17–19, *Rapanos*, 547 U.S. 715 (No. 04–1034).

390. See *infra* text accompanying notes 391–94.

391. See Brief of Former EPA Administrators Carol M. Browner, William K. Reilly, Douglas M. Costle, & Russell E. Train as Amici Curiae Supporting Respondents at 4–7, 26–21, *Rapanos*, 547 U.S. 715 (No. 04–1034).

392. See, e.g., Brief for the United States at 9, 17, *Rapanos*, 547 U.S. 715 (No. 04–1034).

393. See, e.g., *id.* at 39–44.

394. See *id.* at 50.

395. *Rapanos*, 547 U.S. at 757.

396. *Id.* at 722–57 (Scalia, J.) (plurality opinion).

reflecting “entrenched executive error” and overreach.³⁹⁷ Science and effects were not addressed.³⁹⁸ For him, it was a question of clear language, with a heavy weighting (it appeared) of concern with regulatory excess.³⁹⁹ He focused on dictionary definitions of “water” or “waters,” the use of “the” before “waters,” the “waters” relationship to permits required for “point sources,” and a brief foray into federalism to reject agency deference and the claim of agency jurisdiction.⁴⁰⁰ Calling his view the “natural,” “common sense,” and even the “only plausible” reading, he advocated a brand new, unprecedented limiting read.⁴⁰¹ His plurality opinion asserted that the CWA only protected permanently flowing, connected waters.⁴⁰²

This novel limiting of the statute, in effect, would have newly removed from federal protection most of the arid West and Southwest, where hot and dry conditions often leave many riverbeds and other water-linked features dry.⁴⁰³ The nation’s most precious water resources would have been least protected.⁴⁰⁴ Scalia said nothing about these consequences of this interpretation, apart from criticizing the dissenters as offering a “policy-laden” conclusion that would (in his view) let the Army Corps “regulate the entire country as ‘waters of the United States.’”⁴⁰⁵

Justice Kennedy’s swing vote opinion, which called for judges to ensure that disputed waters had a “significant nexus” due to their connections and functions, was mostly embraced by the four dissenters.⁴⁰⁶ The dissenters agreed with protecting both Kennedy’s waters and the small but sometimes different waters protected by the Scalia plurality.⁴⁰⁷

The resulting mix of *Rapanos*, *SWANCC*, the earlier *Brown & Williamson* decision have, as a line of precedent, subsequently been harnessed in frequent calls for “clear statement” presumptions against federal power and against deference to agency power claims.⁴⁰⁸ Along with the earlier Commerce Clause revival precedents, these cases together create linkable anti-regulatory gambits.

Between 2015 and 2021, the waters battle shifted to agencies and the courts. The Obama administration by rule in 2015 sought to restore “waters” protections

397. *Id.* at 722–29, 752 (asserting “immense expansion of federal regulation of land use” and making “error” point).

398. *Id.* at 722–57.

399. *Id.*

400. *Id.* at 735–38.

401. *Id.* at 731, 733 n.3, 739.

402. *Id.* at 739.

403. See Brief of Former EPA Administrators, *supra* note 391, at 8–9.

404. *Id.*

405. *Rapanos*, 547 U.S. at 746–47.

406. *Id.* at 759–87 (Kennedy, J., concurring); *id.* at 787–812 (dissenting opinions).

407. *Id.* at 810 (Stevens, J., dissenting) (opinion joined by Justices Souter, Ginsburg, and Breyer). The dissenters, however, would have reached similar policy conclusions due to deference to regulatory judgments. *Id.* at 799, 80708.

408. See *e.g.*, Opening Brief of Petitioners on Core Legal Issues, at 36–41, *West Virginia v. E.P.A.*, (D.C. Cir. 2016) (No. 15–1363) (emphasizing such arguments in challenge to the Obama administration Clean Power Plan).

based substantially on science rather than just a language focus. They sought comment on and then published a “connectivity” study of all peer reviewed science regarding waters’ functions.⁴⁰⁹ That study provided the foundation for the Obama regulation.⁴¹⁰ The Trump administration, in a series of reversal actions, built heavily on the plurality opinion in *Rapanos* by Justice Scalia to argue that they legally had to shelve the Obama Clean Waters Rule.⁴¹¹ That action, in turn, led to judicial challenges, and splintered decisions.⁴¹² The Biden administration commenced its own new waters jurisdiction rulemaking.⁴¹³ In early 2022, in *Sackett v. EPA*, the Supreme Court voted to wade yet again into the waters question despite a strong agency, Department of Justice, and lower court consensus on waters protected post-*Rapanos* and despite a transitional moment in agency interpretations.⁴¹⁴

Hence, as with jazz improvisation, the “waters of the United States” battles reveal the following: despite static statutory language for almost fifty years, and roughly fifty years of largely settled Commerce Clause jurisprudence, what seemed settled is in flux. Due to the many actors and institutions sequentially and strategically interacting—lawyers, scientists, stakeholder groups, states, agencies, and judges—disparate claims and resources have reshaped “waters” law.⁴¹⁵ Commerce Clause power assertions are now vulnerable, deference weakened, and antiregulatory interests now have a new multi-case spear to attack both waters regulation and federal power.⁴¹⁶ Each shift has triggered changed strategies, much as improvising musicians must adjust to others’ choices, whether predictable or unexpected.⁴¹⁷ Below the Article offers a critique of this body of law based on conceptions of congruence and integrity, with greater sensitivity to context, institutional allocations, and choice consequences.⁴¹⁸

409. See generally Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,053 (June 29, 2015) (final rule); see also Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, 80 Fed. Reg. 37,053 (January 14, 2015) (the EPA study).

410. See 80 Fed. Reg. 37,053 (January 14, 2015).

411. See The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250, 22,259 (Apr. 21, 2020) (final rule). The Trump Administration’s regulatory roll-back of the Obama-era Clean Water Rule faced many court challenges. See Pamela King & Hannah Northey, *Who’s Suing Over Trump’s WOTUS Rule?*, E&E NEWS: GREENWIRE (June 24, 2020, 1:13 PM), <https://www.eenews.net/articles/whos-suing-over-trumps-wotus-rule/> [<https://perma.cc/VE8S-U8XK>] (reviewing challenges).

412. See King & Northey, *supra* note 411.

413. Revised Definition of “Waters of the United States,” Proposed Rule, 86 Fed. Reg. 69372 (Dec. 7, 2021).

414. For review of this grant and linked battles, see Hannah Northey & Pamela King, *Supreme Court Tees Up Wetlands Fight That Could Cuff EPA*, E&E NEWS: GREENWIRE (Jan. 24, 2022, 1:32 PM), <https://www.eenews.net/articles/supreme-court-tees-up-wetlands-fight-that-could-cuff-epa/> [<https://perma.cc/ZXN2-9V2M>] (reviewing this grant and linked battles); see also *Sackett v. EPA*, 8 F.4th 1075 (9th Cir. 2021), cert. granted, 142 S. Ct. 896 (2022).

415. *Id.*

416. See *supra* notes 364–65 and accompanying text.

417. See, e.g., Northey & King, *supra* note 414.

418. See *infra* Part V.

3. *Textualism Choices and the “Many Sources” Debate*

This Article now explores the jazz improvisation-law analogy by focusing on a key element of the “new textualism.”⁴¹⁹ As seen in the *Rapanos* Scalia plurality opinion, new textualist statutory interpreters tend to focus on the claimed ordinary meaning of small portions of a statute’s key operative texts, with linked claims that this methodology is necessary, legitimate, and results in constraint of legal actors.⁴²⁰ As the Court’s most prominent textualist, Justice Scalia, wrote for the Court in the early, foundational textualist *West Virginia* case, recourse to purpose or views of sound policy “profoundly mistake[] our role” and the “best evidence of [statutory] purpose is the statutory text.”⁴²¹ While virtually all today agree on the primacy of statutory text, critics of the new textualism champion more pragmatic and pluralistic methodologies.⁴²² Critics also argue that textualists’ favored moves are erratic, create their own broad interpretive latitude, and disrespect the coordinate roles of other legal actors and institutions.⁴²³

This Subsection focuses on the following question: does a legal focus on a few words or attention to more surrounding materials result in more interpretive constraint?⁴²⁴ The implications of musical sparseness or density for improvisatory constraint or freedom help illuminate this ongoing statutory interpretation dispute.⁴²⁵ In addition, although the cases to be analyzed claim textualist virtue and parsimony, they actually show strategic choice, erratic fealty to claimed methods and neutrality, frequent recourse to a growing and different set of other materials, and questionable logic.⁴²⁶ Looking for the jazz improvisatory-like moves confirms layers of strategic choosing, not determinate clear outcomes or methods driven by text alone, inexorable logic, or constitutional necessity.

Freed to look at lots of materials, so the textualist argument goes, legal actors will just seek and rely on what they like.⁴²⁷ As Judge Leventhal quipped,

419. For a recent analysis of the importance of text selection, see generally William N. Eskridge & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718 (2021).

420. See *id.* at 1723; see *Rapanos v. United States*, 547 U.S. 715, 722–57 (2006).

421. *W. Va. Univ. Hosp. Inc. v. Casey (West Virginia v. Casey)*, 499 U.S. 83, 98, 100 (1991).

422. Attention to intent, purpose, and imputation of intent have been part of legal methods going back to Aristotle. MANNING & STEPHENSON, *supra* note 249, at 22–24, 33–36, 41–44, 48–51.

423. See generally Eskridge & Nourse, *supra* note 419 (highlighting expansive indeterminate textualist toolchest); Gluck, *supra* note 234, at 81, 83–85 (same).

424. See Eskridge & Nourse, *supra* note 419, at 1757 (criticizing “gerrymandering” in textual analysis); see generally Krishnakumar, *supra* note 25 (analyzing Roberts Court’s use of the “whole code” move).

425. This issue has generated a substantial body of scholarship. See, e.g., William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 189–94, 231–32, 236–40 (2000) (questioning unitary drafting practices fiction and cross-statute inferences); see generally Krishnakumar, *supra* note 25 (critiquing the “whole code” move on the Roberts Court); Samaha, *supra* note 23 (examining “many sources” question primarily through logic, probabilities, and math-based analysis). Adrian Vermeule questions “collateral statute” comparisons versus clause-focused textualism. ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* 203–05 (2006).

426. See e.g., *W. Va. Univ. Hosp. Inc. v. Casey (West Virginia v. Casey)*, 499 U.S. 83 (1991).

427. In *West Virginia v. Casey*, Justice Scalia states that additional analysis called for by the dissent of Justice Stevens would lead to inappropriate judicial overreach. *Id.* at 88–101.

partisans could simply look over a crowd and pick out only their friends.⁴²⁸ Textualists claim that partisans (or other legal actors, including judges) under a “consider everything” method could selectively choose and disregard salient materials to reach their own preferred ends.⁴²⁹ A more narrow text-only approach, textualists argue, better constrains and furthers rule of law aspirations.⁴³⁰

As a matter of logic, if statutory interpretation were akin to a scholar’s solitary etymological search for a best or desired answer—or in musical terms, like a solo piano player figuring out a wholly written classical music piece—the claimed textualist concern would have a kernel of logic. Unconstrained solo interpreters might make strategic, quirky, sloppy, or misguided interpretive choices. Unpredictable or ends-based interpretation would flourish, so the argument goes.⁴³¹

Legal work never, however, involves a single actor with final authority. How do comparative claims of constraint and power abuse concerns fare when one takes into account the actual jazz improvisation-like elements of law? Start with the realistic assumption that all legal actors—including Supreme Court Justices—are vulnerable to error or politicized actions, all wield multiple forms of legal authority and make methodological choices, and all engage with multiple players acting sequentially. Which method—a small, isolated text focus or a broader analysis of surrounding texts and related legal materials—would better check overreach or error and, especially, be likely to respect the work of the principal, namely Congress?

Concededly, *both* approaches to statutory interpretation—new textualism with a microtextual focus, versus pragmatic recourse to a broader set of materials—actually involve jazz improvisation-like choices about frames, constraining texts, and opportunities for choice that can change results.⁴³² The jazz improvisation legal analogy, however, supports the view that textualism’s narrowing focus will tend to free the interpreter more than methods that engage with more materials. This conclusion links to how law, like ensemble jazz improvisation, is far from a solitary actor’s etymological search. Instead, the work of law involves a collective, sequential, contextually constrained practice involving numerous players. A web of constraining materials that must be engaged leaves far less latitude for the decider’s own discretionary judgments.

These methodological implications are well illustrated by disputes over judicial power to shift the costs of expert witnesses or consultants as part of a statutory authorization for courts to award “attorney’s fees.”⁴³³ But that initial framing—adopted in the famous *West Virginia v. Casey* case majority opinion by

428. See generally Samaha, *supra* note 23 (discussing this assertion).

429. *Id.* at 557.

430. See Eskridge & Nourse, *supra* note 419, at 1812.

431. *Id.* at 1718.

432. *Id.*

433. See 42 U.S.C. § 1988 (stating that in actions “to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985 and 1986 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs”).

Justice Scalia—was actually debatable from the get-go.⁴³⁴ Why not work with more of the actual statutory language, which allows the shifting of “attorney’s fees *as a part of costs*”?⁴³⁵ Or maybe that too is inadequate. Why not consider relevant bodies of related law in all of their modes? Such a broadened legal focus would examine at least the following: the key operative term; surrounding statutory context and structure; the operative logic of the statute; materials from the process leading to the disputed statutory enactment; judicial precedents; regulatory materials and experience; and perhaps enduring legal norms. Such a subject-area focus would zero in on law concerning shifting of attorney, expert witness, and consultant expenses in the civil rights setting. The alternative approach, embraced by the majority in *West Virginia v. Casey*, was to compare statutory language choices regarding expert expense shifting in other laws, regardless of their regulatory field, with little attention to clues from other forms of law more directly linked to the case and issues presented.⁴³⁶

As framed by the majority in *West Virginia*, statutory empowering of judges to shift “attorney’s fees” was insufficient to authorize shifting of plaintiffs’ expert witness expenses.⁴³⁷ By putting that linguistic microtextual snippet under the judicial microscope, opponents of expense shifting and then the Court majority (via Scalia’s opinion), reasoned as follows: Parties bearing their own attorney’s fees was the American norm under the “American Rule”; deviation had to be authorized by Congress.⁴³⁸ Second, the Court turned to dozens of other statutes from different fields of law and policy, calling it the “record of statutory usage.”⁴³⁹ Many statutes authorize shifting of expert witness expenses, including laws enacted near the time of the language enactment at issue in *West Virginia*.⁴⁴⁰ Because Congress did not similarly include language expressly authorizing shifting expert expenses in the disputed civil rights statute, the Court stated it could not “eliminate clearly expressed inconsistency of policy and treat alike subjects that different Congresses have chosen to treat differently.”⁴⁴¹ The Court said this analysis “*show[ed] beyond question* that attorney’s fees and expert fees are distinct items of expense.”⁴⁴²

This was a powerful argument. But by digging deeper, this conclusion’s inevitability quickly falls into doubt. First, as just mentioned, the majority

434. See e.g., *W. Va. Univ. Hosp. Inc. v. Casey* (*West Virginia v. Casey*), 499 U.S. 83 (1991).

435. Emphasis added. For a recent analysis, see Victoria Nourse, *Picking and Choosing Text: Lessons for Statutory Interpretation from the Philosophy of Language* 69 FLA. L. REV. 1409, 1410–14, 1425–27 (2017) (criticizing “isolationist” methodology, “pragmatic enrichment” risks, and parsing *West Virginia v. Casey*).

436. See *id.*; see also T. Alexander Aleinikoff & Theodore M. Shaw, *The Costs of Incoherence: A Comment on Plain Meaning*, *West Virginia University Hospitals, Inc. v. Casey*, and *Due Process of Statutory Interpretation*, 45 VAND. L. REV. 687, 690 (1992); see generally Buzbee, *supra* note 425; Krishnakumar, *supra* note 25; Samaha, *supra* note 23.

437. *West Virginia v. Casey*, 499 U.S. 83 (1991).

438. *Id.* at 85–101.

439. *Id.* at 88.

440. *Id.* at 88–92 (citing such other statutes’ language).

441. *Id.* at 92.

442. *Id.* (emphasis added).

manipulated the text under analysis.⁴⁴³ The actual language was “attorney’s fees as part of costs.”⁴⁴⁴ The majority, however, selectively dropped the last four words of this clause from most of its analysis.⁴⁴⁵ Yet this largely disregarded language implies that fees are a form of costs.⁴⁴⁶ Conceived as a Venn diagram, costs is the larger category, and attorney’s fees is one item falling into that category.

So, what else could count as “costs”? Might expert witness or consultant expenses necessary for pursuit of a civil rights case be better viewed as a “cost” than as a subset of “attorney’s fees”? The Supreme Court itself had already held that this statutory provision authorized shifting of paralegal expenses.⁴⁴⁷ Furthermore, the provision at issue, Section 1988, was enacted in rejection of the Supreme Court’s *Alyeska* ruling, and thereby expressly rejected the default American Rule.⁴⁴⁸ Under the Court’s approach, however, not only was the American Rule still given substantial weight, but three divergent drafting choices would achieve the same result of prohibiting expert expense shifting: (1) an express prohibition on shifting expert expenses; (2) silence about expenses and cost shifting; or (3) allowing attorney’s fee shifting.⁴⁴⁹

But the problems went further. The *West Virginia* Court compared this statute to numerous other statutes authorizing shifting of expert expenses.⁴⁵⁰ If courts are to compare other statutes’ language, which statutes? The Court was making an argument from inference: if so many statutes in disparate areas authorize expert expense shifting, then silence means it is not authorized.⁴⁵¹ But why not focus on linked bodies of law, or work from the same congressional committees, inferring that those with subject area familiarity might embrace similar statutory drafting norms?⁴⁵²

Even more importantly, where did *the law* in all of its forms stand on expense shifting in civil rights and other anti-discrimination litigation? After all, Political Science 101 and empirical study teach that statutes are not passed or revised by legislators sitting alone, but with legislators and interest groups motivated by some need, problem, or desire for advantage.⁴⁵³ At a minimum, legislators think about their actions and electoral benefits; they must be delivering

443. Buzbee, *supra* note 425, at 149.

444. *West Virginia v. Casey*, 499 U.S. at 103 (emphasis added).

445. Buzbee, *supra* note 425, at 149.

446. *Id.*

447. *West Virginia v. Casey*, 499 U.S. at 98–100 (discussing *Missouri v. Jenkins*, 491 U.S. 274, 285 (1985)).

448. See 42 U.S.C. § 1988; *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 (1975) (substantially limiting judicial discretion to shift attorney’s fees due to the strength of the “American Rule”).

449. For further analysis of this issue, see Buzbee, *supra* note 425, at 193–94.

450. See *West Virginia v. Casey*, 499 U.S. at 88–92. For analysis of the Roberts Court’s use of “whole code” comparisons, see generally Krishnakumar, *supra* note 25.

451. See VERMEULE, *supra* note 240, at 202–05 (questioning whether predictable inferences can be drawn from cross-statutory comparisons).

452. See Krishnakumar, *supra* note 25, at 87–90, 133–38 (criticizing the “whole code” move if inattentive to statutes’ linkages); Nourse, *supra* note 435, at 1425–27 (criticizing case’s method).

453. See generally Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533 (1983) (discussing interest group influence in shaping legislation).

something for somebody, or ideally for an array of stakeholder voters.⁴⁵⁴ Indeed, a key underpinning of textualism and against liberal recourse to purpose is that every statute is its own contested terrain, with most players acting out of self-interest and often reaching compromise.⁴⁵⁵

Hence, if the issue is how does *the law* work in the area of civil rights litigation as related to *this* particular disputed provision, then that logically needed to be the focus of analysis. If the law in all of its myriad forms in this area of law—statutory, regulatory, and case law—generally allowed judicial shifting of expert costs even without more express statutory authorization, then why invest in securing new authorizing language from Congress?

Going one step further, note the drafting conundrum created by the Court’s method. By comparing the disputed provision with dozens of other statutes, mostly without attention to their time of enactment or subject area, the Court was making what has been labelled the Whole Act or Code Rule move, or horizontal statutory interpretation, or interstatutory cross referencing.⁴⁵⁶ It relies on a “one-Congress fiction” of common drafting practices.⁴⁵⁷ Here is the conundrum: as occurred in *West Virginia v. Casey*, and as earlier noted by Judge Posner, adding greater statutory specificity to any statute could cause mischief in interpretation of other unrelated statutes with less specific linguistic choices.⁴⁵⁸

The Court recounted, but then gave no apparent weight to, the sequence of legal actions preceding enactment of the Section 1988 language at issue in *West Virginia*.⁴⁵⁹ The Supreme Court’s strengthening of the American Rule in *Alyeska* said nothing about expert witness costs, and neither did the legislative cure that set the stage for *West Virginia*.⁴⁶⁰

Legislative history language supportive of expert witness expense shifting was paradoxically wielded against such power: “this undercuts rather than supports WVUH’s position: The specification would have been quite unnecessary if the ordinary meaning of the term included those elements.”⁴⁶¹ Thus, in a logic

454. Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 87–89, 144–45 (discussing legislators’ need to garner other legislators’ votes and be responsive to voters).

455. *Id.*; see generally Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L. J. 1275 (2020) (analyzing policy purposes shaping ostensibly textualist Supreme Court opinions).

456. Buzbee, *supra* note 425, at 232–36. For a large data base and qualitative analysis of cases utilizing the “whole code” interpretive mode, see generally Krishnakumar, *supra* note 25.

457. See generally Buzbee, *supra* note 425 (questioning “one-Congress fiction” behind interstatutory comparisons).

458. *Friedrich v. City of Chi.*, 888 F.2d 511, 516–17 (7th Cir. 1989), *vacated*, 499 U.S. 933 (1991) (in light of *West Virginia v. Casey*), 499 U.S. 83 (1991)); see also Buzbee, *supra* note 425, at 189 (discussing *Edwards v. United States*, 814 F.2d 486, 488 (7th Cir. 1987) and stating interstatutory referencing without regard to time of enactment “will make the body of unrepealed statutes a minefield for [a] new law”).

459. *West Virginia v. Casey*, 499 U.S. at 92–102.

460. See 42 U.S.C. § 1988; *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 (1975).

461. *West Virginia v. Casey*, 499 U.S. at 91–92, 91 n.5 (saying this language was “an apparent effort to depart from ordinary meaning and to define a term of art”). For further analysis of this language in a linked successor case, noting the “as part of” language but still declining shift of expert expenses, see *Arlington Cent. School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 292 (2006).

puzzler, legislative history cutting in either direction would lead to the same inference.

In the wake of the Court's decision, Aleinikoff and Shaw questioned the case's "horizontal" cross-statutory cross referencing.⁴⁶² They advocated "vertical" history analysis of relevant statutes and legal treatment on that issue in that area over time in Congress and the courts.⁴⁶³ If civil rights litigation often requires expert assistance, and Congress sought to spark private claims with fee shifting, they argued, under what logic would Congress silently prohibit what was needed and previously allowed?⁴⁶⁴ More broadly, why ever expect that Congress would draft across fields in a single way when legislators change, coalitions shift within Congress, agencies change priorities, plus lines of case precedent are distinct to subject areas?⁴⁶⁵

Moreover, textualism is rooted in claimed need for predictable and constraining methodology, making horizontal whole code analysis a problem: how could any litigant or legislator anticipate what statutes might be cross referenced?⁴⁶⁶ Furthermore, by making the focusing choice, where the Court looked at "attorney's fees," ignored surrounding language, and refused to look at "disconfirming" materials, the Court avoided materials that might refute an initial judicial inclination.⁴⁶⁷

Such choices about the size of the textual cluster or broader analysis of other laws are critical, yet hard to predict. As Professors Eskridge and Nourse label the "petty textualism," "isolationist," or textual "gerrymandering" move, textualist courts will often focus on a microtext—sometimes a few words.⁴⁶⁸ In other cases, however, textualists will analyze surrounding language, and sometimes broader context, statutory structure, or consequences of alternative reads.⁴⁶⁹ Such a judicial choice to focus narrowly or look more broadly, or assess consequences of interpretive choices, can change outcomes.

That the narrow or broadened lens can be decisive is readily evident. In *West Virginia v. Casey*, the focus was on the presence or absence of language about expert expenses, with consequences and larger structural and overall law analysis ignored.⁴⁷⁰ Undercutting incentives for bringing data-intensive civil rights cases did not matter. In contrast, in *Utility Air Regulatory Group* ("*UARG*"), the Court rejected the interpretation called for by the Clean Air Act's language and numbers in a case concerning agency power to require permits for

462. Aleinikoff & Shaw, *supra* note 436, at 697.

463. *Id.* at 696–98.

464. *Id.*

465. Buzbee, *supra* note 425, at 204–20.

466. *Id.* at 236–39 (discussing the unpredictability problem).

467. VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY 115–16 (2016). The Alito majority and Breyer dissent engage with these materials' implications, but through clashing methods. *See generally* Arlington Cent. School Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006).

468. *See* Eskridge & Nourse, *supra* note 419, at 1730 (highlighting significance of word cluster choice and manipulation).

469. *See generally* Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347 (2005).

470. *W. Va. Univ. Hosp. Inc. v. Casey* (*West Virginia v. Casey*), 499 U.S. 83, 92 (1991).

greenhouse gas polluters.⁴⁷¹ Relying heavily on broader contextual and structural analysis and consequences of possible statutory views, the Court majority limited the powers of the Environmental Protection Agency (“EPA”).⁴⁷² Similarly, the plurality *Rapanos* opinion about “waters” jurisdiction, reviewed above, went on for pages about alleged regulatory overreach, mostly based on reported cases that, by definition, involved jurisdictional claims of overreach.⁴⁷³ That same ostensibly textualist opinion, however, gave virtually no weight to the CWA’s own stated goals, criteria guiding agency work, or benefits of waters’ protections, or agency science about such effects.⁴⁷⁴

In other Court opinions, notably the Court’s rejection of a statutory challenge to the Affordable Care Act in *King v. Burwell*, a majority of justices used a broader lens form of textualism that integrates analysis of text, context, structure, the functions of statutory provisions, plus consequences of disputed interpretive choices, while still largely shunning legislative history.⁴⁷⁵ Varying approaches to a statute’s operational logic are also evident in the recent *Bostock* case.⁴⁷⁶ Self-proclaimed textualists Justices Gorsuch and Kavanaugh clash, with Gorsuch looking to see how the key operative prohibition works in practice.⁴⁷⁷ Kavanaugh, in contrast, focused more on what he believed enactors would have meant (or perhaps intended at the time) in using the word “sex.”⁴⁷⁸ Hence, variants of textualist methodology can drive dramatically different outcomes.

Where one comes out on the “expert witness” expense shifting question, or the merits of microtextualism versus more contextual, structural, and consequence-focused analysis, is less relevant to this Article than two key lessons. First, the foundational *West Virginia v. Casey* textualist opinion, despite its claims of restraint and necessity, actually involved an abundance of interpretive choices and manipulations.⁴⁷⁹ Nothing dictated the methodology wielded or even the texts chosen; it was a deviation from then-prevalent interpretive methods. It also rested on a disputable normative claim that its methodology is more institutionally appropriate.

Second, by making selective text choices, as well as choices to downplay historical materials and attention to consequences, the *West Virginia v. Casey* majority was, like the choices of improvising jazz musicians, building from strategic choices about what to utilize.⁴⁸⁰ The paucity of materials considered freed up the Court, allowing it to reach a seemingly powerful conclusion. The cross-statutory comparisons and minimal grappling with vertical history and

471. *See Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 316 (2014).

472. *See id.* at 321–34 (calling for examination of broader context and breadth of regulation).

473. *See Rapanos v. United States*, 547 U.S. 715, 733–46 (2006).

474. *See* notes 389–410 and accompanying text.

475. *See King v. Burwell*, 576 U.S. 473, 484–98 (2015).

476. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738–44 (2020).

477. *See Eskridge & Nourse*, *supra* note 419, at 1718–22 (analyzing differences in textualist method evident in *Bostock*).

478. *See Bostock*, 140 S. Ct. at 1830–34 (Kavanaugh, J., dissenting).

479. *See generally* *W. Va. Univ. Hosp. Inc. v. Casey (West Virginia v. Casey)*, 499 U.S. 83 (1991).

480. *See id.* at 99–100.

interpretive consequences left largely unaddressed the decision's own effects and logic (or illogic) of the result.⁴⁸¹ In contrast, in cases using a text-dominant analytical method that attends more to surrounding language, context, structure, and consequences, and whether that broader set of materials meshes with textually apparent goals, with *King v. Burwell* a paradigmatic recent example, the Court seems far less free.⁴⁸²

Similar choices about methods and which constraining materials to emphasize is a constant of jazz improvisation. Jazz improvisation provides its own analogical answer to the question of whether grappling with more or fewer sources results in greater constraint of a legal actor.⁴⁸³ Musicians consistently view less dense accompaniment or musical forms as a way to free up the improviser, as critics of microtextual methodology see happening in law.⁴⁸⁴ A narrowed legal lens gives the interpreter broad space for “pragmatic enrichment” and heightens risks of error due to inattention to disconfirming and clarifying materials.⁴⁸⁵ Similarly, if an improvising jazz soloist in an ensemble wants greater freedom, then the surrounding musical fabric is simplified and chord-based accompaniment is even sometimes jettisoned.⁴⁸⁶ A jazz improviser accompanied by no one has massive freedom.⁴⁸⁷ Without the contextualizing constraints of other musicians, almost anything could work.⁴⁸⁸ Add a drummer, and the freedom diminishes. Add a bassist or especially if one also adds a chordal instrument like a piano, then the soloist making improvising choices is yet more constrained. Denser accompanist choices and more detailed music will constrain the lead improviser. Choices of notes, pacing, and tone are in the collective's hands, even if some improvising choices remain for the lead soloist.⁴⁸⁹

In a 1950s interview, John Coltrane discussed how improviser freedom is enhanced with less chord-based accompaniment of a piano.⁴⁹⁰ He stated that “when you're not playing on a given progression, . . . it would get in your way to have somebody point in another direction and you trying to go in another, there it would be better for you not to have it.”⁴⁹¹ McCoy Tyner, a jazz piano master, for similar reasons used modal scale styles and less defined chord voicings to open up choices for others: “I would leave space, which wouldn't identify

481. *See id.* at 87.

482. *See generally* King v. Burwell, 576 U.S. 473 (2015).

483. *See supra* Subsections III.C.4, IV.D.3.

484. *See supra* Subsection III.C.4.

485. *See generally* Nourse, *supra* note 435.

486. *See supra* notes 133–35 and accompanying text (discussing implications of density of accompaniment).

487. *See supra* Section III.B.

488. *See* Coleman, *supra* note 1, at 114.

489. *See id.*

490. FRANK KOFSKY, BLACK NATIONALISM AND THE REVOLUTION IN Music 231 (Pathfinder Press 1970) (Coltrane interview).

491. *Id.*

the chord so definitely to the point that it inhibited your other voicings.”⁴⁹² With such voicings, he would “create[] more space for improvisers.”⁴⁹³ As Coltrane stated more poetically, Tyner “gives me wings and lets me take off from the ground from time to time.”⁴⁹⁴ Newer jazz arrival Joel Ross, a vibraphonist, similarly explains: “The more notes you have, the more you’re dictating the harmony, and I don’t want to do that.”⁴⁹⁵

Similarly, the move of Ahmad Jamal, Miles Davis, and Bill Evans, influenced by music theorist George Russell, to shift to modal scale soloing over a sequence of measures, instead of measure-by-measure chord-based or melody-rooted improvisation, also facilitated less constricted playing.⁴⁹⁶ Modal conceptions eased the task of weaving of new melodies, motifs, and themes in that improvisation.⁴⁹⁷

Whether one views this “text alone versus more materials” debate as akin to a limited palette⁴⁹⁸, or through math logic⁴⁹⁹, or through cognitive psychology and the “focusing” illusion,⁵⁰⁰ or here through the jazz improvisation analogy, the law conclusion is the same: the frequent statutory textualist moves to narrow the perspective and even shun other materials are moves that broaden the legal actor’s interpretive choice. If you add erratic methods in ignoring or considering consequences of an interpretive choice, or choosing texts or broader context or structure, then even more outcome-determinative discretion exists.⁵⁰¹ Such statutory interpretation methodological variation is akin to a jazz improviser who not only is minimally constrained by others’ choices, but also rapidly shifts in genre and style choices. This form of textualism is thus, paradoxically, like the least structured forms of free or out jazz.⁵⁰² With erratic methods or minimal reference to constraining materials, legal actors give themselves vast latitude for choice.⁵⁰³ If, instead, legal or musical actors must consistently mesh with others’ earlier contributions and contemporaneous choices, especially with careful “faithful agent” efforts respecting legislatively set policies, freedom is greatly diminished.⁵⁰⁴

492. Ben Ratliff, *McCoy Tyner, Jazz Piano Powerhouse, is Dead at 81*, N.Y. TIMES (Mar. 7, 2020) <https://www.nytimes.com/2020/03/06/arts/music/mccoy-tyner-dead.html> [<https://perma.cc/HR6H-Q5TU>] (quoting Tyner).

493. *Id.* (quoting music critic Ben Ratliff).

494. *Id.* (quoting John Coltrane).

495. Giovanni Russonello, *How the Vibraphonist Joel Ross Keeps Finding Fresh Rhythms*, N.Y. TIMES (Oct. 21, 2020), <https://www.nytimes.com/2020/10/21/arts/music/joel-ross-good-vibes-who-are-you.html> [<https://perma.cc/3UHN-SW4L>].

496. *See supra* at 144–49 and accompanying text (introducing modal improvisation).

497. *See supra* Section III.C.

498. *See* Thomas W. Merrill, *Faithful Agent, Integrative, and Welfarist Interpretation*, 14 LEWIS & CLARK L. REV. 1565, 1596–97 (discussing the incompleteness of textualism).

499. *See generally* Samaha, *supra* note 23.

500. *See* Nourse, *supra* note 435, at 1424.

501. *See id.* at 1423.

502. *See supra* Section III.E.

503. *See supra* Subsection IV.D.3.

504. *See* Merrill, *supra* note 498, at 1579 (emphasizing faithful agent considerations).

4. *Administrative Law Deference Contestation*

As its last case study of jazz-like elements that pervade law, the Article turns to contestation over judicial deference to agency policymaking. The very concept of legal “deference” has a logic much like the practices of jazz improvisation: “deference” from reviewing courts leaves agencies room for varied choices and judgments—exercises of discretion—within frameworks that constrain.⁵⁰⁵ That core of deference is part of this Subsection’s analysis, but the principal focus here is on doctrinal emergence and transformation. It focuses first on enduring rationales for deference, then legal changes surrounding the *Chevron* scope of review framework, and then traces the emergence and evolution of the “major questions doctrine,” a reviewing frame strengthened and decisive in the 2022 *West Virginia v. EPA* decision.⁵⁰⁶ Here too, one again finds legal choice, change, strategic avoidance, and reframing, with shifting doctrine sometimes unmoored from its logic and underpinnings.

For most of the twentieth century, agencies were viewed as deserving of deference from reviewing courts, with enduring (although now questioned) key justifications: Congress chose an agency to handle a problem; agencies know more than courts do about their regulatory field’s law and on-the-ground effects; and agencies are more politically accountable than courts due to three factors. First, Congress through statutes delegates subject-area responsibilities to the agency. Second, agency leadership is accountable via the President and also subject to democratic input due to Senate advice and consent through the confirmation process. Third, agencies must act transparently and justify their choices through quasi-democratic and interactive adjudicatory or rulemaking modes requiring notice, input opportunities, and agency justification.⁵⁰⁷ Cases like *Universal Camera*, *Hearst*, and *Skidmore* began to articulate and sharpen why, when, and how courts should review and usually defer to agency judgments.⁵⁰⁸

Chevron was built from these familiar pieces, but involved a major agency policy shift and new Supreme Court language describing deference.⁵⁰⁹ The Supreme Court accepted EPA room, via a promulgated notice-and-comment regulation, to allow states and regulated polluters to make pollution control choices as though their facilities emitted pollution into a bubble.⁵¹⁰ This, in effect, meant

505. Professor Strauss describes this logic of deference. See Peter L. Strauss, *Deference is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,”* 112 COLUM. L. REV. 1143, 1145 (2012) (describing the logic of deference).

506. See *West Virginia v. E.P.A.*, 142 S. Ct. 2587, 2607–16 (2022) (articulating the major questions doctrine factors and applying them to the question of EPA power). See *infra* Subsection IV.D.4 (discussing *West Virginia v. EPA*’s major questions analysis).

507. See Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, 2009 MICH. ST. L. REV. 89, 104–05 (2009) (in comparing institutional competence of courts and agencies to further delegated goals); see also Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 875 (2015) (discussing agency accountability, expertise, why agencies must consider purposes, and judicial review).

508. See generally MANNING & STEPHENSON, *supra* note 2 (presenting foundational cases).

509. See *Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council*, 467 U.S. 837, 866 (1984).

510. See *id.* at 865–66.

sources could engage in flexible internal trading and production adjustments, thereby often avoiding more rigid and costly methods to reduce pollution.⁵¹¹

The *Chevron* Court, however, reformulated deference framing language into the now familiar *Chevron* two-step.⁵¹² Under step one, courts should give no deference to an agency if Congress has answered the “precise question at issue.”⁵¹³ Under step two, courts should give substantial deference to an agency’s reasonable interpretive policy choice if Congress left a statutory silence, gap, or ambiguity.⁵¹⁴ *Chevron* was not claimed to be a radical break from earlier court-agency deference frameworks.⁵¹⁵ It also confirmed that agencies can change policies despite unchanged statutory language.⁵¹⁶ None of this was new.⁵¹⁷ But *Chevron*’s new language toggled between no deference and substantial deference, rather than earlier more holistic assessments of agency discretion and judicial deference.⁵¹⁸

Much as new musical conceptions free up new performance ideas, the case quickly was seized upon to broaden agency calls for judicial deference.⁵¹⁹ *Chevron* involved a notice-and-comment rulemaking, but the opinion did not focus upon that procedural posture.⁵²⁰ So agencies sought deference for virtually any agency law interpretation linkable to language indeterminacy.⁵²¹ An agency view in a brief? A top regulator’s memorandum? *Chevron* deference was claimed.⁵²²

However, although *Chevron* blessed the business-friendly bubble trading policy, its usual step two deferential frame could also be used by agencies to expand their turf or push policies disliked by stakeholders.⁵²³ It also allowed agencies to keep innovating and adjusting even during periods of political gridlock.⁵²⁴

As the years went by, *Chevron* was refined, riddled with exceptions, and subject to a growing number of settings where either it did not apply or deference weakened.⁵²⁵ For example, expansive uses of *Chevron* to favor the government with little attention to agency’s procedural form (or modality) were checked by the *Mead* case.⁵²⁶ *Chevron*’s deference frame was, via *Mead*, generally narrowed

511. *See id.*

512. For analysis of *Chevron*’s framework and surrounding law, *see* Michael Herz, *Chevron is Dead: Long Live Chevron*, 115 COLUM. L. REV. 1867, 1872 (2015).

513. *Chevron*, 467 U.S. at 842–43.

514. *Id.* at 843.

515. *See* Thomas W. Merrill, *The Story of Chevron: The Making of An Accidental Landmark*, 66 ADMIN. L. REV. 253, 276 (2014) (tracing *Chevron*’s unexpected path).

516. *See Chevron*, 467 U.S. at 863–64.

517. *See* Merrill, *supra* note 515, at 255.

518. *Id.* at 256.

519. *See id.* at 263.

520. *See Chevron*, 467 U.S. at 840–66.

521. *See* Merrill, *supra* note 515, at 256.

522. *See* *Chicago v. Env’t Def. Fund*, 511 U.S. 328, 339 (1994) (discussing but disregarding views in new EPA administrator memorandum used by government lawyers in call for deference).

523. *See* Merrill, *supra* note 515, at 256.

524. *See Chevron*, 467 U.S. at 840–66.

525. *See* Herz, *supra* note 512, at 1867–79 (questioning *Chevron*’s novelty and reviewing exceptions).

526. *See* *United States v. Mead Corp.*, 533 U.S. 218, 238–39 (2001).

to a subset of actions where the agency was authorized to act with the “force of law” and the agency acted through deliberative process, generally through notice-and-comment rulemakings.⁵²⁷ Scholars, judges, and litigants have also made clear that step two cases have embedded within them step one questions, meaning the judicial reviewing role remains important in all cases.⁵²⁸

The weakening and shrinking of *Chevron* territory continued. More of *Chevron* “reasonableness” analysis at step two is now acknowledged to overlap with “arbitrary and capricious” and “reasoned decision-making” judicial review usually seen as governed by the *Overton Park* and *State Farm* cases.⁵²⁹ Statutory language may leave room for interpretation, but when the choice is more about science, facts, contested policy, or agency response to criticisms, the agency choice can be rejected under more rigorous “hard look review.”⁵³⁰ A new “step zero” emerged, wholly bypassing *Chevron*.⁵³¹

This Subsection now turns to the jazz improvisation-like elements in the emergence, transformation, and then unmooring of the “major questions” canon or doctrine from its roots. This doctrine emerged from precedent language and democracy-respecting rationales linked to deference doctrine, but it has become a doctrine to undercut choices of Congress and agencies despite their multiple layers of political accountability.⁵³² This new doctrinal move, so far, has usually been wielded against agency power, typically with little attention to a statute’s protective goals. In the blockbuster 2022 *West Virginia v. EPA* case, its application was decisive.⁵³³

The major questions doctrine, in its most basic and early form, is a judicially created doctrine that courts should skeptically and carefully review agency actions that involve the following concurrent attributes: a new sort of agency claim of power, where the textual grounding is weak, and the regulatory action involves issues or maybe effects of great economic or political significance.⁵³⁴ If applied, either agency power is rejected, or narrowed, or deference frameworks nullified.⁵³⁵ Given that *Chevron* involved a regulation of most factories in the United States, and with a new regulatory tool, a new *Chevron* exception due to a

527. See *id.* at 229.

528. See Herz, *supra* note 512, at 1870.

529. *Id.* at 1884.

530. See generally *id.*

531. See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006) (exploring threshold questions about *Chevron*’s applicability).

532. See *id.* at 193.

533. See *West Virginia v. EPA*, 132 S. Ct. at 2607–16 (reviewing precedents, embracing the major questions doctrine label, and using it to reject EPA’s interpretation of “best system of emission reduction” even if agency had a “plausible textual basis” for its action due to lack of “clear congressional authorization”) (citation omitted). For critical analyses of earlier developments of this doctrine, see Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 2000 (2017) (arguing that the so-called “power canons” have no basis in law and are contrary to congressional intent); Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 457–59 (2016); Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2197 (2016).

534. See Note, *supra* note 533, at 2196–2202.

535. See *id.* at 2191 (highlighting “mercurial” uses of this doctrine).

major question has always been a puzzler.⁵³⁶ Indeed, all federal rulemakings result in national law and usually will have major effects.

The major questions exception to deference started with a somewhat modest strain that was reconcilable with *Chevron*'s respect for Congress delegating power to agencies.⁵³⁷ Courts asked if it made sense to find or assume an agency had the interpretive power claimed.⁵³⁸ In *MCI*, the Court did not deny that key statutory language—"modify"—could encompass an array of actions and meanings, but that seeming trigger for *Chevron* deference was rejected.⁵³⁹ It was, the Court concluded, too slender a textual reed to authorize agency elimination of a key regulatory tool.⁵⁴⁰

In *FDA v. Brown & Williamson*, the major questions doctrine really began to emerge.⁵⁴¹ Despite broadly worded statutory power conferred on the Food & Drug Administration ("FDA"), the Court rejected FDA power to regulate tobacco product advertising.⁵⁴² The agency had earlier disavowed power to regulate tobacco (sometimes due to lack of factual basis), plus Congress had itself directly regulated tobacco in several other laws.⁵⁴³ Collectively, the Court found, they signaled that Congress had not delegated to the FDA the power claimed.⁵⁴⁴ *Brown & Williamson* included language that became part of the heart of the major questions counter to *Chevron* deference.⁵⁴⁵ Courts need to question an "implicit delegation" to agencies in light of the "nature of the question" presented.⁵⁴⁶ In "extraordinary cases," courts might "hesitate" to find such delegation, especially using "common sense" to determine if Congress is "likely to delegate a decision" of such "economic and political significance" to the agency.⁵⁴⁷

In *Whitman v. American Trucking*, the Court closely examined and compared Clean Air Act provisions and declined to imply agency obligation to consider costs when other provisions required attention to economic impacts and costs.⁵⁴⁸ Congress would not put "elephants in mouseholes."⁵⁴⁹ While the case did not build on the major question precedents, its inferences from statutory structure became an important part of this doctrine.⁵⁵⁰

536. *Id.*

537. *Id.* at 2197.

538. *Id.* at 2195.

539. *MCI Telecomms. v. AT&T*, 512 U.S. 218, 225–26 (1994).

540. *Id.* at 229–32.

541. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (applying the major question doctrine to the regulation of the tobacco industry).

542. *Id.* at 120.

543. *Id.* at 146.

544. *Id.* at 161.

545. *See Note, supra* note 533, at 2201, 2220.

546. *Brown & Williamson*, 529 U.S. at 159–60.

547. *Id.*

548. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 457 (2001).

549. *Id.* at 468.

550. *See Heinzerling, supra* note 533, at 1977–78.

By the time of *UARG*, the focus on the extent of agency powers became central, with a linked resistance to agency power to act in new ways.⁵⁵¹ In 2021 and 2022 decisions and battles over climate regulation and federal powers to address the COVID-19 pandemic, the major questions doctrine has become central.⁵⁵² The focus now is often almost entirely on the alleged novelty of the agency action and claimed huge effects, with the focus on burdens allegedly borne by opponents of regulation.⁵⁵³

In 2022's *West Virginia v. EPA* decision, most notably, the Court acknowledged a "plausible textual basis" for EPA's regulation of coal burning power plants based on actual system-based arrangements under which required emissions levels were set with reference to measures on and off site.⁵⁵⁴ And although any analysis based on "best" benchmarking—the express statutory mandate—will tend to generate dynamic updating that reflects innovations, the Court found the shift in regulatory outcomes suspect.⁵⁵⁵ It also downplayed Congress's statutory change of operative language from "technology" to "system" in light of how it would result in a "transformative expansion" in the agency's authority.⁵⁵⁶ Rather than finding the congressional choice to amend the statute to use the term "system" decisive or even illuminating, the Court called it "an empty vessel" and "a vague statutory grant."⁵⁵⁷ Furthermore, that the actual regulation under discussion had never come into effect, yet its goals been exceeded by other technological and market changes, was sidestepped; the action was still claimed to have such a huge "magnitude and consequence" that even clearer authorization was needed.⁵⁵⁸

The new strong judge-empowering form of the major questions doctrine thus now downplays legislative language, congressional allocations of power, relative expertise, statutory goals, science, actual proof of claimed huge effects, or concerns with judicial restraint.⁵⁵⁹ Judges are empowered, agencies reeled in, and express, enacted congressional policy goals are given little close or balanced attention. Costs of compliance or concerns of those opposing regulation are given heavy if not exclusive weight, while express protective statutory policies are given short shrift.

551. *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 333–34 (2014) (rejecting EPA power to regulate smaller greenhouse gas emitters, but allowing regulation of sources already regulated).

552. *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (applying doctrine to reject federal power to impose eviction moratorium due to COVID risks); *West Virginia v. E.P.A.*, 142 S. Ct. 2587, 2610 (2022).

553. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (focusing on hardship to landlords of eviction moratoria, federalism, "breathtaking" agency power claims, and lack of precedent).

554. *West Virginia v. EPA*, 142 S. Ct. at 2609.

555. *See id.* at 2614.

556. *Id.* at 2609–14.

557. *Id.* at 2614.

558. *Id.* at 2616–17.

559. *Id.*; *see also Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661, 665 (2022) (per curiam) (rejecting OSHA COVID business vaccination mandate, citing *Alabama* "major questions" discussion, focusing on employees opposed to vaccination, and stating agency cannot regulate risk that is same in workplace and society).

Hence, like the ever-evolving choices of jazz improvisation, the most prevalent and cited governing deference frame since the 1980s has nonetheless been used and tested strategically, remade, and recast. The major questions doctrine has itself emerged as a powerful countermove, increasingly unmoored from its initial close focus on what Congress chose or would logically choose in each particular statute.⁵⁶⁰ Judicial views about regulatory overreach are now generally imputed to Congress, often without any attempt to document the existence of such congressional concerns or engage agency record materials analyzing the both the risks and benefits of regulatory choices.⁵⁶¹

These doctrinal uses and refinements of deference doctrine reveal, as with jazz improvisation, selective strategic choosing, leading to new lines of argument. Rhetoric of restraint, modesty, and concerns with unchecked power are part of the Roberts Court's language.⁵⁶² Nonetheless, through the major question doctrine's transformation and prominence, courts are newly freed to engage in value-laden judgments about regulatory wisdom and excess with little respect for the work of Congress or agency expertise and delegated missions.

V. REASONED DISCRETION AND THE IMPORTANCE OF CONSEQUENTIAL CONGRUENCE

Jazz improvisation in its practices and interactions is thus much like the doing of law. Both are subject to constraining frames that over time change. Rules, institutions, and actors interact sequentially and strategically and, as a result, choice is pervasive and certainty elusive.⁵⁶³ The prevalence of choice does not, however, mean unconstrained choice, or choice that is beyond criteria for critical assessment. That could be the end of this Article: law and jazz improvisation share many modal similarities, making sense of law's balance of movement and constraint. Law is not just about mere reading, or obedience, or balls and strikes, or like classical music interpretation.⁵⁶⁴

This conclusion, while accurate, does raise a logical concern that calls for normative and prescriptive analysis. If law involves so much sequential, strategic constrained choosing and change, are there legal methods that best further rule of law aspirations, keeping change and choice bounded and potential abuses of power constrained? This Part offers two main claims: First, engaging, rather than shunning, the many sources shaping legal choice and change is a better strategy to constrain than is reliance on false claims of determinacy or mere claimed obedience to an often unduly or selectively narrowed set of legal materials.⁵⁶⁵

560. See Note, *supra* note 533, at 2208; *West Virginia v. EPA*, 142 S. Ct. at 2632 (Kagan, J., dissenting).

561. See Note, *supra* note 533, at 2208; *West Virginia v. EPA*, 142 S. Ct. at 2631 (Kagan, J., dissenting).

562. *West Virginia v. EPA*, 142 S. Ct. at 2608 (Kagan, J., dissenting).

563. Fallon's similarly calls for "interpretive eclecticism" and acknowledgement of "legally constrained normative judgment." Fallon, *supra* note 6, at 1306–08.

564. See *supra* notes 8–11 and accompanying text (introducing these claims about the nature of law).

565. Cf. MARTHA C. NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE 89 (1995) (discussing judicial reasoned judgment and calling Herbert Wechsler's disregard of "emotions" and "the experience of oppression" in writing about segregation as having "about it a bizarre sort of Martian neutrality").

Second, legal actors should always assess the legal consequences of their own constrained choices for congruence with the legal materials shaping those choices, with priority given to legislative policy judgments and power allocations reflected in the law.⁵⁶⁶ As a shorthand, this Article labels such analysis of context and choice consequences the assessment of *consequential congruence*.

A. *Consequential Congruence*

This Article is not calling for mere obedience or interpretation or freezing of the law, but assessment of *consequential congruence*. This shorthand phrase attempts to distill the following recommended practice: a legal decider or advocate should analyze whether a seemingly tenable legal choice is compatible with the surrounding materials, institutions, and layers of law and method choice that law pervasively involves, with respect for institutional primacy. Such a mix of backwards-looking analysis and ownership of a legal actor's own choices serves to check imprudence and error, plus institutionalize respect for other legal actors' roles.⁵⁶⁷ Such transparent analysis of consequential congruence also makes the new legal action more fully explicated and, as a result, prospectively constraining.⁵⁶⁸ Consistent attention to contextual materials and consequences would also predictably refocus attention on the branches with policymaking primacy—Congress and the executive branch—and constrain judicial temptations to remake policies into what judges might prefer. After all, as Chief Justice Burger stated for the Court in *TVA v. Hill*, it is “emphatically” the “exclusive province of the Congress not only to formulate legislative policies . . . but also to establish their relative priority for the [n]ation.”⁵⁶⁹

This call for attention to consequences of a legal actor's choice or argument is not the same as traditional “purposive” interpretation.⁵⁷⁰ Far from it. Purposive interpretation tends to emphasize a backward-looking assessment of the purposes manifested in the legal text, or perhaps the goals of the earlier law creators or speakers.⁵⁷¹ It has often been mixed with arguments against reliance on unenacted legislative reports and statements—so called “legislative history”—but evidence of purpose is found in many forms.⁵⁷² At its most questionable, purposive

566. See discussion *infra* Section V.C.

567. See *supra* note 26 and accompanying text.

568. See generally Stack, *supra* note 26 (exploring agency preambles' explanatory and constraining roles). For exploration of reasoned judgments as key to check courts as a “naked power organ,” see NUSSBAUM, *supra* note 565, at 87–88 (discussing Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) and emphasizing need for attention to “social and historical facts”).

569. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978).

570. For explorations of purposive analysis debates, see David M. Driesen, *Purposeless Construction*, 48 WAKE FOREST L. REV. 97, 122 (2013); Herz, *supra* note 507, at 92; Krishnakumar, *supra* note 455, at 1275–76; Stack, *supra* note 507, at 871.

571. Herz, *supra* note 507, at 93.

572. Recent scholarship reveals that the line between public law enactment, history, and the statute's usually understood text is highly dependent on codification and drafting choices of congressional staff. See Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1634 (2020); Jarrod Shobe, *Codification and the Hidden Work of Congress*, 67 UCLA L. REV. 640, 690 (2020).

interpretation can be wielded to go beyond bargains evident in the underlying legal text.⁵⁷³

Instead, this Part is suggesting legal actors should assess if their own preferred or tentatively selected choice is *better than alternative possibilities*, but not in the sense of furthering the legal actor's personal preferences or undertaking untethered "welfarist" analysis. Instead legal actors should assess how this possible choice meshes with accumulated wisdom, logic, and stated goals and criteria in the area of law, especially legislative choices and later agency materials documenting effects of inaction or the agency choice.⁵⁷⁴ This includes giving weight to the political branches' assessments of effects that the preceding and governing law prioritize, such as science regarding health risks and benefits, or pollution harms, or data regarding discrimination, or studies of market practices or failures. Then that later actor considers the consequences, in the sense of the likely effects, of the *later actor's own legal choices*. Analysis of legal consequences thus has a different temporal focus and function than sometimes maligned purposive method.

Attention to choice consequences is central to effective jazz improvisation and similar to the legal practice suggested here. Musicians must follow the rules and practices of improvisation, especially each tune's constraining forms, while making their own new choices sensitive to where the collective musical output is collectively, dynamically moving.⁵⁷⁵ Master jazz bassist Gary Peacock captured well improvising musicians' blend of text-bound constraint and collective, creative choosing, saying the music is "like flowers": "The idea is to really nourish them You wouldn't trample them How do I nourish these flowers so they can really express themselves?"⁵⁷⁶ Likewise, assessing and seeking to mesh legal choice consequences with surrounding law and, especially, with respect for institutional capacities and roles of others is not a freeing move, but a way to constrain.

B. *Consequence-Shunning Jurisprudence*

Forms and examples of consequence-blinded legal actions are many. Any assertion of power through law that declares an outcome, yet is not accompanied by a reasoned justification, is the antithesis of law and, of course, does not explore consequences.⁵⁷⁷ A case in point is the Roberts Supreme Court's frequent unexplained stays of lower court or, less frequently, executive branch actions,

573. Herz, *supra* note 507, at 92 n.11.

574. See Merrill, *supra* note 498, at 1583–90 (rejecting "welfarist" approach to statutory interpretation if not tempered with "faithful agent" focus on congressional choices).

575. Silbey & Ewick, *supra* note 58, at 497.

576. Russonello, *supra* note 187 (quoting Peacock).

577. For discussion of this increased use of stays without opinions, see Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 156–57 (2019). See also LON FULLER, *THE MORALITY OF LAW* 34–39 (1969) (through parable of King Rex, explaining why government by fiat is problematic and why key elements of law are likely to arise); Will Baude, *Death and the Shadow Docket*, REASON: VOLOKH CONSPIRACY (Apr. 12, 2019, 3:30 PM), <https://reason.com/2019/04/12/death-and-the-shadow-docket/> [https://perma.cc/WW7L-ANWX].

under what is now referred to as the Court's "shadow docket."⁵⁷⁸ It has rightly been characterized as a mere assertion of power, lacking the key attributes of legitimate legal action.⁵⁷⁹

Another form of legal action inattentive to consequence are court decisions, especially from the U.S. Supreme Court, claiming a legal text is so clear that the Court shuns other presented materials and arguments, sidestepping consideration of whether the Court's own choice consequences make sense in light of surrounding law. For example, in the Supreme Court's *Aviall* case, the Court faced a huge question under the nation's Superfund law, known generally by its acronym, CERCLA.⁵⁸⁰ Could contamination cleanup volunteers sue others responsible for site contamination under an express statutory contribution cause of action? The Court said no, not unless the plaintiff had already been sued by or settled with the government.⁵⁸¹ This ruling undercut incentives for private actors to clean up contaminated sites, frustrated the express goals of the statute, mostly disregarded text that contradicted the majority's answer, and unsettled both the lower court consensus and private contractual practices.⁵⁸² But the Court declined to discuss the consequences of its own interpretation: "Given the clear meaning of the text, there is no need to resolve this dispute [over policy impacts] or to consult the purpose of CERCLA at all."⁵⁸³

Likewise, in *Rapanos*, the Scalia plurality opinion, analyzed above, analyzed dictionaries and made extensive claims of regulatory overreach based on cases, but was inattentive to costs, benefits, and science systematically amassed by the agency, leading to the plurality's conclusion that the CWA could only protect permanently flowing connected waters.⁵⁸⁴ Claiming this was the compelled conclusion about the statute's reach, the opinion left undiscussed whether it made sense to eliminate the Act's protections in much of the arid West and Southwest.⁵⁸⁵ This conclusion clashed with the statute's express national reach, express focus on protecting waters' integrity and aquatic functions, and prohibitions against any filling of waters or polluting without a permit.⁵⁸⁶ Such disparate rules for different states also arguably clashed with "equal sovereignty" federalism norms and usual expectations of nationally uniform federal regulation.⁵⁸⁷

578. Vladeck, *supra* note 577, at 125.

579. *Id.* at 156–60 (discussing Supreme Court decisions lacking accompanying reasoning).

580. *Cooper Ind. v. Aviall Servs., Inc. (Aviall)*, 543 U.S. 157, 167 (2004) (discussing Section 113(f)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9613(f)(1)).

581. *Id.* at 158.

582. *Id.* at 171–74 (Ginsburg, J., dissenting).

583. *Id.* at 167.

584. *See supra* notes 395–400 and accompanying text (reviewing opinion).

585. *See id.*

586. *See supra* notes 354–62 and accompanying text (discussing waters protection history).

587. *See e.g.*, *NLRB v. Hearst Pubs. Inc.*, 322 U.S. 111, 130–31 (1944) (deferring to agency categorizing of employees and referring to "intended national uniformity" of national legislation); Abbe R. Gluck, *Our [National] Federalism*, 123 *YALE L.J.* 1996, 2001 (2014) (discussing prevalence of congressional uniformity goals and some statutes' express allowance of varied state policies).

Or, in the standing arena, the *TransUnion* majority claimed constraint with its repeated reference to tradition.⁵⁸⁸ But the Court, ignoring its own contrary precedents, did not explain how it knew that the regulated business abuses were inconsequential.⁵⁸⁹ Plus, nowhere did it address the separation of powers implications of its decision.⁵⁹⁰ It nowhere discussed what Congress might know about regulated business-caused harms and practices and, as a comparative matter, what courts do not know.⁵⁹¹ It did not analyze how its partial denial of standing would reshape the statute's functioning.⁵⁹² It is akin to an unconvincing and mechanical, but also theoretically erroneous, jazz solo. It meshes with almost nothing other than portions of language in *Lujan* and *Spokeo* and perhaps a shared policy preference for less citizen litigation against business.⁵⁹³ It directly defeats express congressional goals and design.⁵⁹⁴

Contrasting views about consideration of consequences are evident in the Supreme Court's Clean Air Act *Engine Manufacturers* decision.⁵⁹⁵ The question was whether the Clean Air Act's preemption of state emission "standards" for manufacturers of new cars also prohibited states or municipalities from requiring fleet operators to use vehicles much cleaner than federally required.⁵⁹⁶ The Court majority read the Clean Air Act's preemptive provision broadly, claiming clear text, but went no further in its analysis, claiming that no rationale or reason could justify a contrary read.⁵⁹⁷ Justice Souter, in dissent, looked at alternative reads of that provision, legislative history that uniformly showed the preemption concern was to preserve manufacturing economies of scale, anti-preemption norms, and how consequences of a non-preemptive read meshed with other statutory provisions and the statute's logic.⁵⁹⁸ Souter's dissent, by engaging with the law's overall structures, logic, and choice consequences, is far more attentive to consequential congruence than the majority.⁵⁹⁹

Another notable Supreme Court example reviewed above is the *West Virginia v. Casey* case.⁶⁰⁰ The Court found irrelevant whether prohibiting shifting of expert expenses would largely preclude civil rights litigation that Congress sought to encourage.⁶⁰¹ To be swayed by concern about policy impacts, the Court stated, "profoundly mistakes our role" and "is not for judges to prescribe."⁶⁰²

588. *TransUnion L.L.C. v. Ramirez*, 141 S. Ct. 2190, 2200 (2021).

589. *Id.* at 2221 (Thomas, J., dissenting).

590. *Id.* at 2225 (Kagan, J., dissenting).

591. *See generally id.*

592. *See generally id.*

593. *Id.* at 2197.

594. Justice Thomas's lengthy dissent develops these points. *See supra* notes 344–45 and accompanying text.

595. *See generally Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004).

596. *Id.* at 249.

597. *Id.* at 255.

598. *Id.* at 259–66 (Souter, J., dissenting).

599. *Id.*

600. *See supra* notes 436–60 and accompanying text (discussing the case).

601. *See supra* notes 436–60 and accompanying text (discussing the case).

602. *W. Va. Univ. Hosp. Inc. v. Casey (West Virginia v. Casey)*, 499 U.S. 83, 100–01 (1991).

Instead, the Court focused primarily on interstatutory language comparisons, detached from how such provisions or their absence fit in each particular compared body of law.⁶⁰³ Aleinikoff and Shaw, in critiquing the *West Virginia v. Casey* decision, argue for analysis akin to this Article's call for assessment of consequential congruence.⁶⁰⁴ They say that statutory interpreters' conclusions should mesh with some plausible view of functions, goals, or purposes of the statutory provisions at issue.⁶⁰⁵ They call this "the norm of due process of statutory interpretation."⁶⁰⁶

Turning to the world of administrative agencies and law, a recent wave of deregulatory actions similarly relied on focused legal parsing, federalism concerns, and avoidance of consequential congruence analysis. During the Trump administration, agencies often said they had earlier engaged in illegal overreach.⁶⁰⁷ Such "statutory abnegation" claims neglected or lightly considered whether the new resulting policies' effects were congruent with protective goals set forth in regulatory statutes.⁶⁰⁸ Such actions were overwhelmingly rejected due to how they disregarded regulatory contingent facts, namely effects made relevant under governing enabling acts.⁶⁰⁹ Few agency actions turn on mere language interpretation alone.⁶¹⁰

Recall, however, that allegedly problematic consequences are sometimes considered, potentially with decisive effect. For example, in *UARG, Brown & Williamson*, and *West Virginia v. EPA*, and in other cases where the major questions doctrine is wielded, claims of huge political and economic consequences can be decisive.⁶¹¹ Substantive canons of statutory interpretation are now increasingly wielded to further judicial policy views and often undercut statutes' ordinary semantic meaning.⁶¹² Their assessment of impacts, however, is nothing like the context-rich consequential congruence called for by this Article. In

603. *Id.* at 98–99.

604. *See generally* Aleinikoff & Shaw, *supra* note 436.

605. *Id.*

606. *Id.*

607. William W. Buzbee, *Agency Statutory Abnegation in the Deregulatory Playbook*, 68 DUKE L.J. 1509, 1511 (2019).

608. *Id.* at 1513.

609. Buzbee, *supra* note 254, at 1360–63, 1396–1401 (exploring how regulatory contingent facts and data constrain regulatory policy).

610. *See* Buzbee, *supra* note 607, at 1568–70, 1588–91 (exploring effects analysis link to consistency doctrine obligation that agencies offer "good reasons"); *see generally* Stack, *supra* note 507 (explaining agency obligation to act in furtherance of statutory goals).

611. *See supra* notes 471, 541 and accompanying text.

612. Of especial note, in *West Virginia v. EPA*, the operative language was conceded to give EPA a "plausible textual basis" for its action, but Court called the key term "best system" a "vague statutory grant" and "an empty vessel" in a "little used backwater" provision insufficient to support EPA's approach in the Obama Administration's Clean Power Plan. 142 S. Ct. at 2609, 2613–14 (citations omitted). *See generally* Krishnakumar, *supra* note 455 (analyzing policy purposes shaping ostensibly textualist Supreme Court opinions); Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825 (2017) (critiquing Roberts Court's use of substantive canons); MANNING & STEPHENSON, *supra* note 249, at 395–410 (presenting scholarship regarding power of substantive canons).

particular, the major questions doctrine has become one-sided, with analysis of consequences heavily weighted to favor those opposed to regulation.⁶¹³

For example, in *West Virginia v. EPA*, despite the lack of a record basis for claims of huge impacts, and even with regulatory goals already exceeded without the challenged regulation ever coming into effect, the Court repeatedly framed the case as about a regulation with huge, disruptive, transformative consequences and extraordinary claims of agency power.⁶¹⁴ These undocumented and actually contradicted huge consequence claims drove the Court's rejection of agency application of the key statutory term. The Court left utterly off the consequences ledger the protective rationales called for by the Clean Air Act or the agency's empirically grounded analysis of business practices and benefits anticipated from the action.

Microtextual statutory interpretation focused on dictionaries and a sampling of cases to support claims of overreach, as in *Rapanos*, are likewise imbalanced; such methodology neglects effects analysis rooted in statutory criteria by the agency assigned work by Congress.⁶¹⁵ In contrast, the consequential congruence analysis suggested by this Article would prioritize policy choices of Congress and give heavy weight to empirical assessments by agencies of risks and regulatory effects if the agencies respect congressionally set power allocations, procedures, and criteria.⁶¹⁶

C. *Examples and Analogues for Consequential Congruence Analysis*

This Article's call for an omnipresent norm that legal actors assess consequences of their own choices for legal congruence, with careful attention to preceding and governing legal materials, ends up much like administrative law policy change or "consistency" doctrine.⁶¹⁷ Most laws leave room for agencies to make multiple permissible policy choices, especially in light of changing social conditions, science, and policy experience. Courts nonetheless look for procedural regularity, adequate reasoning, and hewing to statutory requirements and goals.⁶¹⁸ Agencies must engage with their own previous related actions, past reasoning, criticisms, and assess on-the-ground changes, effects, and reliance interests.⁶¹⁹ Agencies must justify their actions with "good reasons."⁶²⁰ Any agency policy must further the underlying mandates and purposes of governing

613. Monast, *supra* note 533, at 469.

614. *West Virginia v. EPA*, 142 S. Ct. at 2608–16 (discussing the regulation in such terms).

615. See Petitioners' Reply Brief, *supra* note 387, at 2–17.

616. See *infra* Section V.C.

617. For analysis of this body of law, see generally Buzbee, *supra* note 254.

618. See generally *Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117 (2016); *FCC v. Fox Television Stations (Fox), Inc.*, 556 U.S. 502 (2009); *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

619. See, e.g., *Dep't of Homeland Sec. v. Regents of the Univ. of Cal. (DHS v. Regents)*, 140 S. Ct. 1891, 1916 (2020) (rejecting Trump administration's change of immigration policy forbearance due to lack of reasoned explanation). For cases establishing agency burdens when making a policy change, see *Encino*, 136 S. Ct. at 2125–26; *Fox*, 556 U.S. at 515; *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 57.

620. *Encino*, 136 S. Ct. at 2126; *Fox*, 556 U.S. at 515.

legislation.⁶²¹ As Justice Kennedy noted in *Encino Motorcars*, these agency obligations are variants on agency “hard look review” and “reasoned decision-making” obligations under precedents like *State Farm*.⁶²² These analytical obligations create a modest resistance against change, but check disruptive or unreasoned shifts.⁶²³ A shoddily or pretextually explained action can be rejected, as concluded in the Supreme Court’s census citizenship question case.⁶²⁴

The consequential congruence analysis suggested here also has analogues in past statutory interpretation and jurisprudential and constitutional scholarship that calls for legal actions to have integrity, show fidelity, or be reasonably congruent with the legal fabric. Like Felix Cohen, this Article finds claims that law speaks in immutable ways with utter clarity as “transcendental nonsense.”⁶²⁵ The doing of law is rarely just a language game. Legal language works to achieve something, and stakeholders wield law in light of their goals; legal analysis rarely can turn on words alone.⁶²⁶ Tom Merrill similarly calls for a “pluralist” statutory interpretation method that gives primacy to legislative choices and deals with interpretive puzzles with “integrative” and “welfarist” analysis attentive to “faithful agent” obligations.⁶²⁷ This call for attention to consequences of tenable choices with weight given to the political branches’ choices also shares attributes with Hart and Sacks and the “legal process” school.⁶²⁸ Legal actions, especially statutes, involve language that is a purposive utterance.⁶²⁹ Laws tend to state their goals and set particular means and criteria for action in operative provisions.

621. For argument agency purposivism in interpreting statutes is both required and appropriate, see Stack, *supra* note 507, at 871.

622. *Encino*, 136 S. Ct. at 2125–26. Agencies avoiding issues in contention run afoul of the “reasoned decisionmaking” required under “hard look review,” a generally more rigorous form of “arbitrary and capricious” review. See Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 575–89 (1985) (exploring the implications of rigorous review of agency actions); see generally Buzbee, *supra* note 254.

623. *Fox*, 556 U.S. at 515 (emphasizing multiple choices can be legal and recognizing political influence on agencies).

624. See generally *Dep’t of Com. v. New York*, 139 S. Ct. 2551 (2019) (rejecting addition of a citizenship status question to the census due to “incongruen[ce]” and a “disconnect” between the action taken and “contrived reasons”); *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal. (DHS v. Regents)*, 140 S. Ct. 1891, 1916 (2020) (in rejecting immigration policy shift, emphasizing lack of adequate justification tested through the regulatory process); see generally Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748 (2021) (analyzing these cases).

625. Cohen, *supra* note 16, at 812.

626. The debate between Justices Gorsuch and Kavanaugh in *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) reveals such a textualist divide. Gorsuch focuses on how Title VII’s “because of sex” antidiscrimination mandate in application fits to prohibit employment discrimination due to sexual preference and gender identity, *id.* at 1737–54, especially at 1741, although also calling the law “plain and settled” and making extensive use of dictionaries. Kavanaugh, in his dissent, claims the key words’ “ordinary meaning” could not reach plaintiff’s claims, mostly sidestepping the words’ operational application. *Id.* at 1822–37 (Kavanaugh, J., dissenting). See Eskridge & Nourse, *supra* note 419, at 1768–76 (criticizing both opinions).

627. See generally Merrill, *supra* note 498.

628. HENRY M. HART JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1378 (William N. Eskridge & Philip P. Frickey eds., Foundation Press 1994) (arguing statutory interpreters should assume legislators were “reasonable persons pursuing reasonable purposes reasonably”); see also Fallon, *supra* note 6, at 1250–51, 1280 (introducing Hart and Sacks views and also comparing “reasonable persons” formulation with others’ views).

629. HART & SACKS, *supra* note 628, at 1375.

Legal actors should ensure that they, or actions they are assessing, further consequences evident in preceding or governing law, even if just incrementally “chipping” away at a social challenge.⁶³⁰

Lon Fuller, in particular, framed his jurisprudential perspective much as suggested here. He rejected a “pointer” view of law as too narrow; he called for “fidelity to law.”⁶³¹ He argued that “decisions about what ought to be done are improved by reflection, by an exchange of views with others sharing the same problems, and by imagining various situations that might be presented” and considering “the function performed by” legal materials.⁶³² Lessig’s exploration of “translation” and “fidelity” to “meaning” and “role” has a somewhat different focus on major constitutional debates and the judicial role, but similarly describes approaches that balance respect for others’ roles and choices with movement in the law.⁶³³

Defenders of law as a pragmatism-based discipline, especially in the risk-regulation setting, also suggest ways to reconcile a law-based regime with the reality of change and constrained choice.⁶³⁴ Taking past legal actions as constraining starting points allows the reconciling of law with change and strategic efforts to move the law.⁶³⁵ Under these views of pragmatism, law moves incrementally, subject to many constraints, yet with purpose and justification due to the actions of many legal actors.⁶³⁶ All is not “up for grabs” all the time.⁶³⁷

This call for consequential congruence analysis also shares elements with the general legal respect for precedent, under which legal actors are expected to consider the accumulated wisdom of lines of legal authority developed by many over the years.⁶³⁸ Even if a legal actor is not bound by hierarchical constraint, respect for precedents usually means new choices must be explained and justified with reference to such preceding authority.⁶³⁹ And although methods of interpretation and argument, including textualism, are themselves only lightly constrained by precedent, greater consistency in method by legal actors and institutions would enhance views that they are acting with fidelity or integrity.⁶⁴⁰

630. See generally *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007) (upholding challenge and plaintiffs’ standing despite resulting action being “incremental” and “chipping away” at a problem).

631. See Fuller, *supra* note 61, at 668–69.

632. Fuller, *supra* note 61, at 668.

633. See generally LAWRENCE LESSIG, *FIDELITY AND CONSTRAINT* (2019).

634. For an introduction to pragmatism in risk regulation, see generally ROBERT L. GLICKSMAN & SIDNEY SHAPIRO, *RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH* (2003) (defending pragmatism and criticizing cost-benefit analysis as a decision criterion in risk regulation).

635. For discussion of Judge Richard Posner’s pragmatism views, compared to those of Professor Fallon and originalists and textualists, see Fallon, *supra* note 6, at 1242 and text accompanying note 48.

636. See GLICKSMAN & SHAPIRO, *supra* note 634, at 24.

637. Merrill, *supra* note 498, at 1599 (rejecting pragmatism if not constrained by legislative choices and earlier law).

638. Cf. Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010) (discussing *stare decisis* principles at Office of Legal Counsel).

639. See generally Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

640. See Gluck, *supra* note 234, at 81, 85 (arguing textualist methodology is not “really, as any kind of law,” and not formalist due to “too many available rules”).

Actions that leapfrog over inconvenient facts or contrary precedents fail to hew to law's norms of engaging previous and contrary linked materials.

Legal actions that claim obedience to legal command, yet fail to engage with broader context and consequences, paradoxically undercut goals of prospective constraint.⁶⁴¹ Explanatory gaps, as in the *SWANCC* case, create law that is indeterminate and malleable.⁶⁴² However, legal actions that engage with preceding authority and address consequences, like improvisors who build a solo with logic and thematic clarity, are both more understandable and prospectively constraining.⁶⁴³ Successful work in both music and law requires persuasive reasoning through overt illumination of choice consequences, thereby drawing others in, whether viewed as fellow players or “audiences”—listeners, other players, judges, agencies, those affected by a regulatory action, and the next actors working with that material.⁶⁴⁴

An expectation that legal actors comparatively assess consequences of their own choices is, concededly, imposing substantial work. After all, law tends to involve consequences at several increasingly “meta” levels: the particular on-the-ground impacts of choices in light of underlying facts or science; implications of methods choices; resulting changes in how the law will work; respect for institutions’ roles, expertise and primacy; and precedential implications of the choices.⁶⁴⁵ However, strategic choosing of legal artillery by legal disputants usually involves knowing choices and vetting of others’ claims; neither agencies nor judges are alone in figuring out choice consequences, nor are other legal actors.⁶⁴⁶ Adrian Vermeule’s “institutional analysis” frame soundly emphasizes the limits of judicial competence, but perhaps gives inadequate attention to why lawyers and stakeholders will tend to gather and present materials illuminating consequential congruence, especially in the statutory and regulatory realms.⁶⁴⁷

Heightened attention to context and consequences, with the focus on politically accountable policymakers’ choices and priorities, is apparent in several recent decisions that use a text-dominant mode of analysis, often with overt attention to how a statute functions. *King v. Burwell*, for example, looked closely at the statute’s purpose provisions, its findings, and its operative structures to reject the statutory challengers’ claim.⁶⁴⁸ The Court declined to adopt a reading that would lead to a collapse of the very health insurance markets the statute was

641. See Stack, *supra* note 26, 1291–92 (analyzing functions of preambles).

642. See *supra* notes 375–85 and accompanying text (discussing *SWANCC*).

643. See *supra* notes 89–92, 169–72 and accompanying text (discussing improviser use of motifs and logical construction).

644. See generally Louk, *supra* note 10 (analyzing statutory audiences in addition to courts).

645. *Id.*

646. See generally BUZBEE, *supra* note 255 (reviewing materials wielded in regulatory wars).

647. VERMEULE, *supra* note 240, at 75–85, 153–82 (analyzing judicial competence and method choices).

648. See generally *King v. Burwell*, 135 S. Ct. 2480 (2015); Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress’s Plan in an Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62 (2015) (discussing functional text-focused analysis of *King* majority).

meant to create and protect.⁶⁴⁹ It called for a “fair” reading of the statute.⁶⁵⁰ The dissenters, in contrast, said such consequences should not be considered; language (in their view) demanded a very different outcome.⁶⁵¹ The recent *Bostock* majority opinion considered how Title VII’s “because of sex” prohibition in its application logic unavoidably prohibited discrimination against individuals due to their preference for a particular gender.⁶⁵²

Similarly, in the federalism preemption realm, decisions like *Wyeth v. Levine* and *Gonzales v. Oregon* did not just leap to some judicially preferred federalism balance.⁶⁵³ Instead, each closely examined the implicated bodies of law, how they work, which actors were assigned what roles, the relative competence of those actors, and incentives that the Court’s choices options would create.⁶⁵⁴

With more consistent attention to consequential congruence, opportunities for contextless and abrupt politicized regulatory shifts would be lessened since preceding law and the political branches’ judgments would be given weight.⁶⁵⁵ Such analysis would not eliminate the need, in the words of Professor Fallon, for “the exercise of legally constrained normative judgments.”⁶⁵⁶ But mastery and lucid engaged reasoning, in law and in jazz, are far more likely to persuade, be constrained, and show integrity than are erratic or blindered actions insensitive to the contributions and roles of others.

VI. CONCLUSION

To understand the law and nature of legal work, one cannot focus only on the outcome of a moment in the law, or examine a word in isolation, or neglect the many actors and institutions often contesting and shaping the law. Advocates and legal actors operate in a shared web of institutions and constraints that change over time. Law is not about mere interpretation, nor is it just a matter of principled reading. It is not akin to playing classical, written music, even with ever-present conceded space for interpretive shaping. There is no single law creator, nor does any legal actor actually have an enduring final say on the law.

Instead, as shown here, the shared, sequential, and strategic nature of law is much like bebop jazz improvisation. Like jazz improvisation, where musicians and music shape each other’s permissible choices, legal actors similarly act in settings pervaded by choice and constraints. To be persuasive and sound, both musical and legal choices must attend to constraining or governing materials,

649. *King*, 135 S. Ct. at 2493–94 (rejecting as “implausible” read that would cause “death spiral” of insurance market).

650. *Id.* at 2496 (“[a] fair reading of legislation demands a fair understanding of the legislative plan”).

651. *Id.* at 2496–2507 (Scalia, J., dissenting).

652. *See supra* note 476–78 and accompanying text.

653. *Gonzales v. Oregon*, 546 U.S. 243 (2006); *Wyeth v. Levine*, 129 S. Ct. 1187, 1201–03 (2009).

654. *Gonzales*, 546 U.S. at 254–75; *Wyeth*, 129 S. Ct. at 1201–03.

655. *See* Jonathan R. Macey, *Promoting Public Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 227 (1986) (exploring how respecting stated goals of statutes rather than possible bargains would shift law in public-benefiting directions).

656. *See* Fallon, *supra* note 6, at 1306.

attentive to contexts and practices created by others both over time and proximate to the moment of choice. In both musical and legal settings, the intellectually challenging tasks rarely lend themselves to binary yes/no choices, or a single predictable outcome. Error will often be clear, but choices will often call for comparative critical assessment. The more the actors—whether lawyers or musicians—can weave their musical or legal tale with faithful attention to the many sources of influence and constraint, the better that actor’s choices will be. A great bebop jazz improvisation may be among the apex achievements of human accomplishment, and legal work less frequently a source of joy. Still, law and jazz improvisation share structural and modal similarities and shed light on each other. The practices of jazz improvisation illuminate how, in music and law, powerful constraining materials come in many forms, often leave room for choice and even creativity, yet the constraining materials also provide criteria for assessing integrity and congruence.