THE AUDIENCES OF STATUTES

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Although a maxim of statutory drafting is to identify the relevant audience and draft so that the audience can "get the message," conventional theories of statutory interpretation often overlook important considerations about how statutes communicate and delegate to a diverse range of intended audiences. Statutes exist to change the conduct and behavior of many kinds of intended audiences, including administrative agencies, state and local governments, law enforcement officers, corporations, interest groups, lawyers, and laypeople. Influenced by lessons from the philosophies of law and language, this Article contends that judicial statutory interpretation serves an important yet underappreciated role in providing a legal grammar for how other legal audiences are expected by law to understand, implement, and conform their conduct to the law. If so, then prevailing judicial methods of interpretation may not be equally suitable for all statutory audiences. This is because diverse audiences have distinct roles, interests, and capabilities, and statutes communicate to, and alter the conduct of, relevant audiences in very different ways. Some statutes set out specific rules that apply directly to the conduct of lay audiences, others conscript qualified third parties to transmit legal knowledge to affected members of the public, and others furnish open-ended mandates for governmental audiences to implement through subsequent regulation and enforcement. Yet dominant interpretive theories like textualism and purposivism often seem to treat judges as the chief audience for statutes, and therefore call for the same methods of interpretation regardless of the statute or its intended audience(s).

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This Article argues that considerations of statutory audience and canons and methods of interpretation are necessarily linked, and it offers the first extensive account of the relationship between judicial statutory interpretation methodology and statutory audience. This ambit is both descriptive and normative. Descriptively, this Article identifies the subtle ways in which courts already implicitly, if inconsistently, seem influenced by statutory audience considerations. Courts invoke substantive canons of interpretation that can be understood in part as audience canons: the rule of lenity (for laypeople), interpretive deference (for administrative agencies), clear notice rules (for states as Spending Clause counterparties), and mistake-of-law defenses (for deficient taxpayers but not criminal defendants). These substantive judicial doctrines recognize that statutes communicate to, and alter the behavior of, different audiences in distinctive ways. Yet when it comes to choices of interpretive methods, courts often employ one-size-fits-all approaches to interpretation, drawing (or not *drawing) on the same preferred semantic and syntactic canons of construction, evidence of linguistic usage, and other sources of statutory meaning regardless of the statute or its audience(s). Courts do so even when this approach may undermine both the normative goals that motivate audience-oriented substantive doctrines as well as the efficacy of the statutory scheme itself.*

Normatively, this Article contends that many disagreements in statutory interpretation may be attributed to conflicts in prioritizing competing statutory audiences, because many statutes are directed at multiple and distinct audiences. To demonstrate this, this Article revisits prominent statutory interpretation cases in financial fraud, environmental, and civil rights law from the standpoint of statutory audience. Viewed through this lens, canonical statutory interpretation debates that typically register as disputes about method can also be understood as disagreements about audience. Indeed, judicial opinions often seem written with distinct (and conflicting) statutory audiences in mind. This Article concludes that explicitly addressing audience considerations in interpretation can highlight the important normative stakes of statutory interpretation theory; enhance the efficacy of statutes; offer lessons for legislative and regulatory drafting; and may even provide a way forward beyond debates between textualism and purposivism.

INTRODUCTION

"IDENTIFY THE AUDIENCE.—Decide who is supposed to get the message."[1] So instructs the U.S. House of Representatives' legislative drafting manual. This advice is common to many statutory drafting guides, which emphasize that a statute's audience should influence a statute's structure, style, and terminology.[2] Different audiences have varied levels of legal fluency and background knowledge, and distinct audiences have very different modes of interacting with a given statutory scheme.[3] It would be foolish to draft a playground ordinance in the same manner as a multinational corporate tax provision.[4] For statutory drafting, at least, audience considerations appear to be a central concern.

When it comes to the *interpretation* of statutes, however, important considerations of audience often go overlooked in statutory interpretation debates. In using the term "audience," I mean to focus on the range of legal actors whose behavior may be altered as a result of a statutory enactment. These include audiences that are actively engaged in understanding statutory meaning, as well as those passively affected by statutory rules, and also include the many third parties whom the law conscripts to transmit legal knowledge to the affected audience(s).[5]

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1 OFFICE OF THE LEGISLATIVE COUNSEL, U.S. HOUSE OF REPRESENTATIVES, 104TH CONG., HLC NO. 104-1, HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE 5 (1995).

2 *See* F. Reed Dickerson, *Legislative Drafting*, *in* THE REGULATORY STATE 157, 159 (Lisa Schultz Bressman, Edward L. Rubin & Kevin M. Stack eds., 2010) ("[T]he legislative draftsman will do well to consider the persons to whom the law is primarily addressed," which will "bear on style and terminology" to ensure that "the writing [is] directed at the level of understanding shared by the bulk of that group.").

3 *See id.* at 159–60; Sean Farhang, *Legislating for Litigation: Delegation, Public Policy, and Democracy*, 106 CALIF. L. REV. 1529, 1534 (2018) (finding that for statutes that rely primarily on courts and civil litigation for statutory enforcement, Congress provides greater substantive policy specificity in the statute itself as compared to statutes that direct enforcement to agencies, because courts have less capable policy-making infrastructures than agencies have).

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

5 One reason I use the term "audience" is to acknowledge that although a statute may formally *address* one audience (say, corporate executives), other audiences may be just as involved in constructing its meaning and implementation (say, corporate counsel and outside auditors). Moreover, one statutory audience may mediate the interpretations of others: a citizen, for example, could look up the statutory text herself, *and* consult her accountant, *and* call the IRS

Not all statutes communicate to their respective audiences in the same manner: some statutes establish specific rules that regulate the conduct of lay audiences like the general public, while other statutes set out broad mandates to specialized government audiences, who implement them through subsequent regulation and enforcement.[6]

Despite these differences, when it comes to *methods* of interpretation (i.e., semantic and syntactic canons of construction, evidence of linguistic usage, and extratextual sources of statutory meaning), judges often treat all statutes, and all statutory audiences, homogeneously. They deploy the same tools and rules of interpretation to decipher a firearms carriage rule with direct application to the general public as they do to decode technical statutory language directing federal agencies to implement the Affordable Care Act.[7]

Judges sometimes express broad concerns about statutory ambiguity and fair notice, and emphasize the importance of consistency and predictability yet they generally tend not to inquire about whether a statute is too ambiguous or provides too little notice *for its intended audience*, nor whether the selec-

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helpline for guidance, each of whom may have different understandings of what the law requires. And as any taxpayer who has prevailed against the IRS can attest, the agency is not always right about the meaning of the statute. Others writing in the philosophy of law have also used the term, although often more narrowly with respect only to those *directly* addressed by the law. *E.g.*, ANDREI MARMOR, THE LANGUAGE OF LAW 28 (2014); BRIAN G. SLOCUM, ORDINARY MEANING: A THEORY OF THE MOST FUNDAMENTAL PRINCIPLE OF LEGAL INTERPRETATION 71 (2016); Scott Soames, *Toward a Theory of Legal Interpretation*, 6 N.Y.U. J.L. & LIBERTY 231, 242 (2011). By contrast, the concept of statutory audience can also be conceived of as those who are not specifically *regulated* by a given statute, but rather are members of the public at large, who want to ensure that social problems are adequately addressed through legislation. *See* Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and Separation of Powers*, 99 GEO. L.J. 1119, 1142 (2011) (noting that when Congress enacts legislation, it is speaking to multiple audiences, "to the people as well as the courts").

6 *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 625 (1984) (discussing the distinction between conduct rules addressed to the general public and decision rules addressed to officials).

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

tive and inconsistent application of interpretive methods raises rule-of-law or integrity-of-statute concerns. Too often, a drafters' imperative—to identify the audience(s) and provide an effective statutory scheme for the audience(s) to follow and implement—is lost in the judicial interpretive enterprise. Whether prevailing judicial approaches to interpretation further the legislative prerogative to ensure statutory audiences "get[ ] the message"[8] is often overlooked. Rarely is it asked whether these approaches provide predictable and useful signals for subsequent statutory audiences involved in legal rule transmission, implementation, and compliance.[9]

From a rule-of-law perspective, the frequent disconnect between questions of statutory audience uptake and questions of interpretive method is puzzling.[10] Most jurisprudential theo-

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8 Indeed, recent empirical scholarship suggests that many prevailing judicial methods of interpretation are neither shared by, nor known to, legislative drafters. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013); Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014).

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

10 While the core theories of textualism and purposivism are less attentive to audience concerns, a number of scholars have assessed unique interpretive perspectives of first-order interpreters such as prosecutors (*see, e.g.*, Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 479 (1996) (arguing that federal prosecutors currently have a "significant share of delegated lawmaking authority"); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 406 [hereinafter Kahan, *Lenity and Federal Common Law Crimes*] (arguing that consistently applying the rule of lenity would minimize prosecutorial abuse of discretion)) or federal administrative agencies (*see, e.g.*, Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 504 (2005) (arguing that "[f]ully legitimate judicial interpretation will conflict with fully legitimate agency interpretation"); Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 809 (2002) (arguing for unique meta-rules for the interpretation of statutes directed at agencies); Peter L. Strauss, *When the Judge is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 321 (1990) (discussing how administrative agencies, instead of judges, frequently act as the interpreters of statutes); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 477 (1989) (discussing the deference that courts give to administrative agencies' interpretations of statutes); Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1018 (2015) (examining how administrative agencies interpret statutes)). Other scholars have examined portions of this question over the years. *See, e.g.*, William S. Blatt, *Interpretive Communities: The Missing Element in Statu-*

ries of law understand the law as a means of implementing societal plans and coordinating social behavior.[11] For a statute to achieve such aims, its meaning and effect must be communicated or transmitted to its relevant audience(s), and for this to be successful, the relevant statutory audience(s)—or others acting on their behalf—must be able to ascertain the statute's meaning and translate its plan into action.[12] (Indeed, a fundamental tenet of almost any account of the rule of law is that the law must be sufficiently accessible, intelligible, and predictable for those governed by it.[13]) In this Article, I will call these

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tory Interpretation, 95 NW. U. L. REV. 629, 630 (2001) (observing different methods of interpretation for statutes regulating interpretive communities in labor law as compared to administrative law); Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 1040 (2017) (pressing for a "conversation model of interpretation" that considers the contexts in which interpreters encounter legislative text); Drury Stevenson, *To Whom Is the Law Addressed?*, 21 YALE L. & POL'Y REV. 105, 139 (2003) (arguing the law is addressed to the state and its actors, not to the citizens in general nor the segment of the population to whom a text refers).

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

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

13 *See, e.g.*, TOM BINGHAM, THE RULE OF LAW 37 (2011) ("The law must be accessible and so far as possible intelligible, clear and predictable."); H.L.A. HART, THE CONCEPT OF LAW 124 (2d ed. 1994) ("If it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without further direction, . . . nothing that we now recognize as law could exist."); Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 8 (1997) (noting that nearly all modern accounts of the rule of law emphasize the capacity for legal rules to effectively and stably guide conduct). Other leading Anglo-American legal philosophers, including Lon Fuller, and, more recently, Scott Shapiro, have made similar claims. *See generally infra* subpart I.B (discussing the need for statutory audiences to be able to develop meaning from statutes without resort to judicial adjudication).

individuals and statutes are enacted to alter institutions the statute's "first-order" audiences, because their behavior is what statutes are enacted to alter, and they give meaning to statutes through practice and implementation.[14] If statutory provisions are understood as legislative plans, then they are almost always inherently incomplete or ambiguous ones, so first-order interpretive practices are essential for putting legislative plans into action.[15]

Awareness of judicial rules of interpretation will necessarily be essential to the successful implementation of statutes by their first-order audiences. This is because judicial interpretive rules will ultimately determine which legal meanings attributed to statutes by first-order audiences will be deemed legally correct. In this sense, courts often function as "second-order" interpreters: they establish rules for interpretation that, when superimposed on the underspecified statutory text, provide a kind of legal grammar for understanding how to derive specific legal meaning from ambiguous text. When judges determine statutory meaning by applying a particular canon, source, or method, they narrow the statute's range of possible applications by selecting one meaning from several—or sometimes *many*—plausible interpretations of an often underspecified and ambiguous statutory text.[16] As second-order interpreters, courts guide first-order statutory audiences in determining which potential semantic meaning is legally "correct," and judicial rules of interpretation therefore signal to relevant audiences how similar statutory ambiguities should be resolved in *future* cases.

A focus on statutory audiences raises other critical considerations: if statutes have distinctive audiences, and communicate to those audiences in different ways, when and how should statutes drafted for one audience be interpreted differently from statutes drafted for another? For example, as many administrative law scholars have long argued, agency officials preparing a proposed rule for notice and comment will very likely turn *first* to a statute's legislative history, which often contains more specific instructions from Congress to the

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

15 *See infra* subpart I.B.

16 William Baude and Stephen Sachs have helpfully described this as "the law of interpretation," which creates a legal structure that enables the exercise of legislative authority through legal enactments. *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1097–99 (2017).

agency than exists in the statute itself.[17] Given the technical nature of many statutory provisions addressed primarily to agencies regulating sophisticated entities, the notion that these statutes will (or should) always transmit instruction only in a narrow band of "ordinary" or "plain" semantic meanings might seem somewhat odd.

However, the expectation of "plain" legal meaning may be more appropriate for statutes addressed to lay audiences and specify conduct rules that apply directly.[18] A cyclist hoping to ride through a park that prohibits vehicles will almost certainly not think (or know) to consult arcane extratextual legislative history or conduct whole code analysis to determine if their cycling flouts a sign's prohibition on vehicles in the park. In that circumstance, the "plain text" of an ordinance replicated on a park sign may be all that is appropriate to expect the affected audience to consider. Between these extremes, statutes in areas such as environmental, civil rights, and tax law also communicate to their relevant audiences in distinctive ways, and alter their behavior through distinctive mechanisms. Each may warrant particular approaches to interpretation, especially because many statutory schemes conscript or deploy qualified third parties to transmit legal knowledge and assist in legal compliance.

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This Article reorients statutory interpretation theory in terms of statutory audience, constructing a framework for situating and embedding questions of audience within a theory of statutory interpretation. Reframing the task of statutory interpretation in terms of statutory audience reveals several important and yet underexamined considerations for the field.

The Article proceeds in four parts. Part I explores the essential role that statutory audiences play in implementing and interpreting statutes by drawing on concepts from both the philosophy of law and language. I identify the essential role

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17 *See, e.g.*, Mashaw, *supra* note 10, at 510–12 (arguing that in the legislative history Congress often provides agencies with more specific instructions than in the text of the statute itself); Strauss, *supra* note 10, at 346–47 (arguing that agencies are much closer to the legislative process than are courts and that legislative history materials enhance agencies' capacities to fulfill enacting Congress's legislative aims).

18 And, as I will argue, even if statutes are rarely expected to put members of the public directly on notice, the fact that statutory prohibitions *sometimes* do is reason enough that a preliminary inquiry about statutory audience should always be an initial step in the interpretive enterprise.

that judicial statutory interpretation serves to help clarify how statutory audiences should effectuate statutory plans, and I explain why statutes directed at different audiences will necessarily alter behavior in different ways.

Part II then sets out a typology of the very different kinds of statutory audiences and statutory interpreters, including ordinary audiences (laypeople and the general public); influential intermediary audiences (such as industry experts, lawyers, advocacy groups, and others who help laypeople comply with the law, as well as low-level government officers like law enforcement officers), and official audiences (such as administrative agencies, whose interpretations often carry the force of law in the absence of judicial reversal). And, on occasion, even *judges* can be the first-order audience, as with attorneys' fee-shifting provisions that delegate discretionary action to courts alone.

An audience-focused examination of statutory interpretation theory in turn highlights the frequent disjuncture between how courts deploy substantive canons (rules for the interpretation of statutory texts) and interpretive *methods* (semantic and syntactic canons of construction, evidence of linguistic usage, and other sources of statutory meaning) used to attribute meaning to specific words or phrases in such texts.[19] Revisiting canonical cases in criminal, tax, administrative, and civil rights law, this Part examines how courts sometimes seem to express awareness of distinctive statutory audience concerns. Courts invoke substantive canons that are audience-oriented, such as the rule of lenity (for lay audiences), the mistake-of-law doctrine (for certain generalist audiences but not others), administrative deference (for agency audiences), and clear notices rules (for the states as Spending Clause counterparties).[20] Yet courts are often unreflective in their use of interpretive methods. Sometimes they draw on sources of "ordinary meaning"

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19 Here, I adopt the distinction between substantive legal canons or rules, which judges apply *to* text, and linguistic interpretive methods, canons, and sources, which govern how judges determine the linguistic meaning *of* text. *See* Baude & Sachs, *supra* note 16, at 1105–09. Others have employed a similar typology. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, ELIZABETH GARRETT & JAMES J. BRUDNEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 319–36 (5th ed. 2014) (distinguishing between linguistic canons and substantive canons); Brudney & Ditslear, *supra* note 9, at 12–14 (also distinguishing between linguistic and substantive canons); Gluck & Bressman, *supra* note 8, at 923-24 (distinguishing between "textual canons" and "'substantive canons', which are policy-based presumptions, like the rule of lenity or *Chevron* deference").

20 For a helpful recent review of the Roberts' Court's deployment of substantive canons in statutory interpretation, see Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825 (2017).

unlikely to reflect real-world usage or to enhance the notice function of statutory text. In other instances, they have selectively imposed one particular "ordinary meaning" on a vague and open-ended statutory decision-rule that seems to permit an administrative agency to implement it in any of several permissible ways.

These observations are especially important because, as I explain in Part III, many statutes have multiple and distinct statutory audiences. Judicial choices about interpretive methods often seem to relate—albeit tacitly, and often inconsistently—to which of several possible statutory audiences a given judge has in mind. To demonstrate this, this Part revisits canonical statutory interpretation cases including *Yates v. United States*,[21] *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,[22] and *Arlington Central School District Board of Education v. Murphy*.[23] In those cases, I argue that debates about substantive canons and interpretive methods in statutory interpretation often seem to function as proxy wars for unsurfaced (or unspoken) normative disagreements about statutory *audience*. Arguments about whether to prioritize legislative history or evidence of ordinary usage can just as easily be understood as disputes about whether to read statutes through the lens of the administrative agency, the laypeople, a sophisticated actor, or some other audience of the statute.

Recognizing that choices about interpretive methods will not always be value-neutral also helps to clarify the normative stakes in many important statutory interpretation disagreements. This includes, first and formost which audience to prioritize when interpreting a statute that sets out conflicting priorities. This suggests that courts should be more explicit in stating the assumptions about statutory audience that motivate their use of various methods of interpretation. Criteria might include the audiences to which the statute is primarily addressed; whether the statute anticipates that the audience(s) will rely on intermediaries to achieve compliance; and the manner of the statutory communication. A statute may seek to communicate to a broad audience in a specific conduct rule, set out an intransitive decision rule to be implemented via administrative agency, or delegate that legal knowledge be transmitted via influential interpreters like accountants, legal counsel, or compliance officers. Making considerations of stat-

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21 135 S. Ct. 1074 (2015).
22 515 U.S. 687 (1995).
23 548 U.S. 291 (2006).

utory audience central to statutory interpretation would enhance the capacity for statutes to communicate effectively to the relevant audience(s) and ensure that questions of statutory ambiguity are resolved with greater efficacy and legitimacy.

Part IV concludes by briefly exploring the ramifications of a statutory interpretation methodology that is audience-centered, both for judges and for statutory drafters. Attending to questions of audience in statutory interpretation may also provide a path beyond the debates about textualism and purposivism that have often dominated (and sometimes exhausted) the field in recent years.[24] A theory of interpretation that assesses questions of statutory audience and interpretive method together helps to reveal why (and when) each approach retains merit, depending on the statute and its audience(s). Such a methodology might also contribute toward a principled compromise between judges' apparent preference for pragmatic freedom in interpretation[25] and (at least some) judges' stated aspirations for greater predictability and consistency.[26]

Emphasis on audience also helps to clarify recent debates about the continued viability of administrative deference doctrines like *Chevron* deference[27] and *Auer*/*Kisor* deference.[28] If ensuring adequate notice for regulated audiences is an essen-

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24 *See* Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177, 191 (2017) [hereinafter Gluck, *The Failure of Formalism*] (arguing that those earlier "debates have taken us as far as they can go").

25 *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1324 (2018) (identifying pragmatism as an important theme in federal appellate judges' statutory interpretation methodology and recognizing the absence of legal doctrines that can guide interpretive pragmatism).

26 *E.g.*, Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) ("To make judges more neutral and impartial in statutory interpretation cases, we should carefully examine the interpretive rules of the road and try to settle as many of them *in advance* as we can. Doing so would make the rules more predictable in application.").

27 *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

28 *Auer* deference is named for the case that stands for it, *Auer v. Robbins*, 519 U.S. 452 (1997), in which the Court affirmed the practice of judicial deference to administrative agencies in the interpretation of agencies' own ambiguous regulations. *Auer* has been widely criticized from both the bench and the academy. *E.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2425 (2019) (Gorsuch, J., concurring in the judgment) ("A legion of academics, lower court judges, and Members of this Court—even *Auer*'s author—has called on us to abandon *Auer*."); Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103 (2018) (reviewing arguments against *Auer* deference).

tial inquiry for the judicial review of agency interpretations, then identifying the relevant conduct rule for that regulated-audience should be the central question. While a conduct rule may sometimes be derived from the text of an administrative statute, more commonly specific conduct rules for regulated parties derive from administrative rules, regulations, and guidance promulgated by the agency. In such circumstances, skepticism of deference to the agency interpretation of the ambiguous *regulation*, rather than the ambiguous *statute*, may be more appropriate. And textual methods of interpretation seeking a term's "ordinary meaning" may be likely to enhance notice.

Finally, attention to statutory audience also provides several lessons for statute drafting that can help to mitigate interpretive confusion in the first place.

I
STATUTORY MEANING AND AUDIENCE

During his confirmation hearing to become Chief Justice, John Roberts famously compared the job of a judge interpreting a law to that of an umpire: "to call balls and strikes."[29] While Chief Justice Roberts was both praised and scorned for his analogy,[30] less attention was given to his accompanying remark: "Nobody ever went to a ball game to see the umpire."[31] Notwithstanding the future Chief Justice's observation, the literature has long framed statutory interpretation problems as problems primarily for judges—rather than the many other audiences of statutes.

And just as nobody goes to the ball game to see the umpire, no theory of statutory interpretation should exist only for judges. Statutory interpretation theories tend to focus on *judging* statutes—i.e., deciding on the proper role of courts vis-à-vis legislatures. But any theory of interpretation should also address how judicial rules of interpretation can hinder or enhance the capacity for law's other audiences to derive meaning from, or conform behavior to, statutory provisions.

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29 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) [hereinafter *Roberts Hearing*] (statement of John G. Roberts, Jr., Nominee to be C.J. of the United States).

30 *See* Charles Fried, *Balls and Strikes*, 61 EMORY L.J. 641, 641 (2012).

31 *Roberts Hearing*, *supra* note 29, at 55 (statement of John G. Roberts, Jr., Nominee to be C.J. of the United States).

For both rule-of-law reasons and integrity-of-statutes reasons, I argue in this Part that it is critical that there be sufficient congruence between how judges derive meaning from statutes and how the law's other audiences are expected to do so. When viewed from the standpoint of non-judicial audiences, it becomes clear how statutory *texts* seek to communicate and alter behavior in very different ways for distinct audiences. The question is then whether prevailing statutory interpretation *methodologies* should also be responsive to varied audience considerations.

A. Judging Statutes

A common trope in discussions of statutory interpretation theory is that American judges lack a principled method of interpreting statutes, something legal theorists[32] and members of the judiciary[33] alike have long recognized. Karl Llewellyn famously (if somewhat facetiously) observed in 1950 that for every canon, there is a countercanon, for every interpretive thrust, a countervailing parry.[34] Nor have stable criteria emerged to evaluate or select among these interpretive tools; in 2017, Seventh Circuit Judge Frank Easterbrook lamented the continuing absence of method in statutory interpretation nearly seventy years after the publication of Llewellyn's lampoon.[35] To this day, judges tend to apply interpretive methods inconsistently such that even sophisticated litigants cannot predict which canons of construction, dictionaries, or sources of meaning may apply in any given case.[36] And the prevailing

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

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

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

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

36 *See* Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 97 (2018) (finding that parties before the Supreme Court regularly brief canons that go unmentioned by the Court, and the Court frequently

dialogue seems to offer no obvious path forward; Abbe Gluck recently concluded that debates between textualism and purposivism have "taken us as far as they can go."[37]

An important reason that these debates have largely run aground, I argue, is that the leading theories of statutory interpretation, textualism and purposivism,[38] are as much theories about how *judges* should behave vis-à-vis the legislatures as they are theories about the interpretation and implementation of statutory texts.[39] Textualist and purposivist theories are largely motivated by faithful-agent concerns that arise due to the inherent tension of common-law judges interpreting statutes enacted by democratically accountable legislatures.[40] Anxiety about legislative supremacy has been called "a shibboleth in discourse about statutory interpretation."[41] A core disagreement between these approaches is not just about the meaning and interpretation of *text* but also a debate about how to *judge* it:[42] textualism and purposivism *both* "seek to provide a superior way for federal judges to fulfill their presumed duty

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cites to canons in opinions that were unmentioned in parties' briefs in the given case). The Court is equally inconsistent in its reliance on dictionaries as sources of evidence of ordinary usage and meaning: James Brudney and Lawrence Baum have found only a "limited match" between the use of certain dictionaries in litigants' briefs before the Supreme Court and in the Court's ultimate reliance on dictionaries in its majority opinions. James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 532–33 (2013). In nearly every instance, the briefs cited a dictionary that the opinion did not. *Id.* at 533.

37 Gluck, *The Failure of Formalism*, *supra* note 24, at 191.

38 *See* Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—And the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685, 686–87 (2014). For the purposes of this Article, I follow Fallon's approach of subsuming intentionalism under the broader rubric of purposivism. *Id.* at 686 n.3.

39 It is perhaps no coincidence that one of the field's most recent and prominent texts, by Chief Judge Robert A. Katzmann of the Second Circuit, is called *Judging Statutes*. *See generally* ROBERT A. KATZMANN, JUDGING STATUTES (2014).

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

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

42 For example, *compare* Willian N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001) (arguing from historical evidence that the federal courts' role has always included the power to interpret statutes equitably as cooperative partners with the legislature), *with* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 7 (2001) (arguing from historical evidence that federal courts' role has always been as Congress's faithful agents, not cooperative partners).

as Congress's faithful agents."[43] Indeed, it has been said that the "fundamental question" for statutory interpretation is "whether courts should view themselves as faithful agents of the legislature or as independent cooperative partners."[44]

Problematically, judges tend to disagree just as much about theories of judging as they do about theories of interpretation.[45] Many debates that are ostensibly about how to *interpret* statutes (i.e., which canons of construction and sources of statutory meaning to prioritize) often transform into debates about how to *judge* statutes, fixating on separation-of-powers concerns related to the proper role of courts vis-à-vis legislatures. Similar separation-of-powers concerns also motivate debates about judicially developed substantive canons like the rule of lenity[46] and *Chevron* deference, which are difficult to justify on faithful agency terms alone.[47]

B. Enacting and Implementing Statutes

Debates about judicial faithful agency often overshadow other equally pressing tasks for statutory interpretation theory. One is to provide an account of how statutes communicate meaning to, and alter the behavior of, relevant audiences. Another is to ensure that judicial interpretive theory enhances a statute's capacity to ensure its relevant audiences get (and effectuate) the statutory message. This is because a critical starting point for any theory of a functional legal system is that those susceptible to the law are able to follow it.[48] While the concept of law is itself a contested and heavily debated concept,[49] I will start from the generally accepted premise that law

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43 Manning, *supra* note 42, at 9.

44 KENT GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION 20 (2013).

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

46 Kahan, *Lenity and Federal Common Law Crimes*, *supra* note 10, at 386.

47 *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 110 (2010).

48 *E.g.*, LON L. FULLER, THE MORALITY OF LAW 106 (rev. ed. 1969). Fuller identified among his eight principles of legality that citizens must know the standards to which they are being held (second principle), that law should in general be understandable (fourth principle), and that laws should not require conduct beyond the abilities of those affected by them (sixth principle).

49 *See* Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 L. & PHIL. 137, 148–49 (2002). *See generally* Fallon, *"The Rule of Law" as a Concept*, *supra* note 13 (arguing that the rule of law should be understood as a concept of multiple, complexly interwoven strands).

is "the enterprise of subjecting human conduct to the governance of rules."[50]

In particular, Scott Shapiro has helpfully analogized laws to specific social plans.[51] On this account, the individuals and/or entities subject to laws—what I call statutory audiences—give functional meaning to these statutory plans through implementation and practice. This, of course, is why many legislative drafters are mindful of the intended audience when they draft statutes—for the social plan to be effective, the audience must be able to get the message.[52]

Communication theory suggests that statutory enactments will inevitably be incomplete social plans—the communication can only be completed through responsive action. This is because statutory texts communicate in a manner distinct from other forms of linguistic communication. In contrast to the speech acts[53] of individual speakers, legislation constitutes a form of collective speech act that is typically the result of one or more compromises. Legislative compromises often result in incomplete decisions about the precise legal content of the enacted legislation.[54]

Statutory plans as a form of communication thus may be strategically and *intentionally* underspecified. As a result, cooperative assumptions in ordinary conversation about how speakers conventionally convey information—for example, that the speaker intends to convey her message with specificity and precision—often do not apply in the case of legislative speech acts.[55] The unique dynamics associated with the production of legislative "speech" are especially important when making assumptions about the sufficiency of the communicative content conveyed by legislative texts. In many conversational contexts, the audience may assume the speaker seeks—through her choice of language, intentional omission or ambiguity, and implicatures that suggest she meant something different than

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50 *See* FULLER, *supra* note 48, at 106.

51 *See* SHAPIRO, *supra* note 11, at 394.

52 *See supra* notes 1–3.

53 This term, which refers to an utterance that serves a function in communication, is frequently associated with the work of philosopher of language J.L. Austin. *E.g.*, J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962).

54 *See* MARMOR, *supra* note 5, at 49–50.

55 *See* Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217, 251–52 (Andrei Marmor & Scott Soames eds., 2011).

what she said—to provide the sufficient quality and quantity of information necessary to convey her meaning.[56]

In legislative contexts, however, textual underspecification, redundancy, and contradiction—both intentional and unintentional—are common features of legislative texts, both in single statutes[57] and across related statutes.[58] Among other things, this may diminish just how much implied content can be reasonably derived from legislative speech acts,[59] with semantically enriched content subject to debatable and competing inferences about how broadly or narrowly to read the statutory text.[60] Despite this, legislated "speech" often necessitates that the audience—those implementing legislative plans—must fill *larger* gaps as compared to instructions given in interpersonal communication between individuals.[61]

Moreover, in contrast to most conversational communicative contexts between speaker and audience, the legislative context is inherently impersonal. Legislators address an audience comprised largely of those not personally known (or even anticipated) by the legislature. Thus, both the precise execution of the plans, as well as those implementing them, may be unknown at the time the broad plan is enacted.[62] Given the inherent ambiguity of human language and the legislature's inability to anticipate future relevant applications,[63] providing

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56 *See generally* PAUL GRICE, STUDIES IN THE WAY OF WORDS 86–116 (1989) (describing the ways in which an audience's context-specific assumptions about which conversational maxims and implicatures apply in a given circumstance can assist the audience in interpreting the speaker's meaning vis-à-vis the different possible sentence meanings of the words the speaker has chosen).

57 As Gluck and Bressman have reported, legislative drafters often draft intentionally redundant provisions, both to make prominent essential aspects of the statute, and also to satisfy certain political stakeholders. Gluck & Bressman, *supra* note 8, at 934–35.

58 *See* William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 179–80, (2000) (describing the notion that Congress legislates with awareness of the contents of existing statutes as the "One-Congress fiction").

59 Nevertheless, at least in certain circumstances, implied content that is *semantically* encoded in legislative utterances may not be problematic to identify, but implied content that is contextual or pragmatically enriched is often much more difficult to pin down. *See* Andrei Marmor, *Can the Law Imply More Than It Says? On Some Pragmatic Aspects of Strategic Speech*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW, *supra* note 55, at 83–84.

60 *E.g.*, Victoria Nourse, *Picking and Choosing Text: Lessons for Statutory Interpretation from the Philosophy of Language*, 69 FLA. L. REV. 1409, 1420 (noting that the choice of how much text to consider will lead to false or contestable implications).

61 *See* SHAPIRO, *supra* note 11, at 136.

62 *Id. at* 217–20.

63 *E.g.*, HART, *supra* note 13, at 128.

"general rules, standards, and principles [as] the main instrument[s] of social control [rather than] particular directions given to each individual separately."[64]

The upshot of this is twofold. First, notions of judicial "faithful agency" may often have limited utility when courts are tasked with attributing legal meaning to ambiguous statutory texts—there may simply not be an objective answer as to what either the legislature "intended" nor what the text "means." Rather, the legal meaning of statutes will often have to be developed through post-enactment implementation and interpretation, or what Scott Soames calls "precisifying."[65] To the degree this is so, then judicial choices about which substantive canons and interpretive methods to prioritize function to provide a legal grammar for how statutory audiences are expected to engage with statutes, at least as much as these choices function as an act of discovering the "plain" or "objective" meaning of the text itself.

A second upshot is that while courts and government officials play an important role in precisifying statutory meaning, statutes are also directed at other audiences, who also play an important role in precisfying statutory meaning. Thus, for statutes to function in their essential capacity as a means to implement social plans and coordinate societal behavior,[66] in at least some circumstances the uncertainty about statutory meaning must also be resolved (and resolvable) by first-order statutory audiences. After all, the rule of law is necessarily grounded in the presumed capacity for *all* individuals to adopt plans,[67] and if courts were needed to supervise every instance of interpretation and to precisify *every* aspect of a given statutory plan, the legal system would grind to a halt.

Importantly, not all statutory provisions seek to communicate or alter behavior in the same manner, nor with respect to the same audiences. Recall Meir Dan-Cohen's observation that an "acoustic separation" often exists between conduct rules and decision rules embedded in the criminal law.[68] Whereas conduct rules are specific statutory provisions that directly address (and seek to expressly alter) the actions of lay audiences, decision rules are aimed at guiding the (often discretionary)

64 *Id.* at 124.

65 *E.g.*, SCOTT SOAMES, 1 PHILOSOPHICAL ESSAYS: NATURAL LANGUAGE 18 (2009).

66 *See* Postema, *supra* note 11, at 183–85.

67 SHAPIRO, *supra* note 11, at 119.

68 *See* Dan-Cohen, *supra* note 6, at 627.

enforcement decisions of government officials, and thus often have little to say directly to the public at large.[69]

This distinction—between statutory provisions that delegate authority to government officials and those that directly regulate the conduct of members of the public more broadly—is essential to my theory of statutory audience. As Ed Rubin has described, statutes have both "transitive" and "intransitive" modes of communication and application.[70] Transitive statutes state the precise rule to be applied, which means that the relevant statutory audiences might be. These kinds of statutory provisions may also require judges to treat the statutory communication as "complete," for rule of law reasons discussed below. put on notice simply by the enactment of the rule itself. Given their direct application, transitive statutory provisions may raise heightened concerns about notice and the possibility of textual ambiguity or vagueness.[71]

By contrast, intransitive statutes merely set out the mechanism by which subsequent rules shall be developed—usually by government officials, such as administrative agencies. As a practical matter, "the ultimate target of the [intransitive] statute cannot know what behavior the statute will require."[72] In these circumstances, the capacity for the affected audience to derive notice from the statutory text itself may be of less concern, because no such notice *can* be derived from the text alone because the legislative communication is incomplete. The legal rule that will modify the audience's behavior will instead derive from an administrative adjudication, regulation, or guidance document promulgated by the agency in accordance with administrative law and in furtherance of the intransitive statutory delegation. So long as the statute provides a sufficient textually-enriched basis to guide *the officials* addressed with implementing it, whether the statutory text alone provides clear

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69 *Id.* at 630–31.

70 *See* Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 373 (1989).

71 Drawing a clear distinction between ambiguity and vagueness is essential to understanding how statutes can give notice to relevant audiences. Whereas a term is ambiguous if it is susceptible to two different, but potentially overlapping meanings (such as the word "blue" conveying both the color and the mood), a term is vague if among the range of normal applications of the term are borderline cases separating instances in which the term clearly applies and when it clearly does not (such as the word "tall"). *See* Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CALIF. L. REV. 509, 512-13 (2011). Thus, as I will explain in subpart II.B, whereas statutory ambiguity is an unavoidable aspect of many statutes, statutory vagueness can raise essential rule-of-law concerns, at least for criminal statutes directed at the general public.

72 Rubin, *supra* note 70, at 381.

notice, or gives specific instructions to the audiences it seeks to regulate, may be of less concern than for transitive provisions.[73] As I will argue in Part II, there may be good reasons to prioritize different interpretive methods depending on whether the relevant audience is regulated by a direct conduct rule or an intransitive statutory delegation.

C. Interpreting Statutes

Because statutes address distinct audiences in different ways, courts play a crucial role in helping statutory audiences (and their interpreters) translate and derive meaning from underspecified and often-ambiguous statutory enactments. How a judge chooses to interpret a legal text will affect that text's *legal* meaning just as much as the semantic meaning of the text itself. This is because the semantic meaning derived from "bare" text is not always synonymous with the legal meaning a judge may attribute to it. A statute's legal meaning can be derived not only from the statute's semantic content, but also from contextual content associated with that statute, such as evidence of the enacting legislature's intentions—collectively, its communicative content.[74]

Most crucially, the legal content of a statute is also not synonymous with its communicative content.[75] When judges apply substantive canons like the rule of lenity, clear notice rules, or the plain meaning rule, they specify the *legal* meaning that shall be derived from the statutory text. That meaning may not be the meaning that one or more of its drafters intended, nor the semantic meaning most commonly associated with the term or phrase in question (to the degree one can be clearly ascertained). In this sense, judicial interpretation provides the authoritative lens through which to view the statutory text, framing and shaping the meaning(s) that others may permissibly derive from that text.

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73 The textual statutory guidance is often very minimal. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001) (noting that an "intelligible principle" to guide agency exercises of authority may be as sparse as an instruction to regulate in the "public interest").

74 As Lawrence Solum has articulated this distinction, the communicative content of any legal text will not only stem from its *semantic content* (the meaning of words and phrases that result from rules of syntax and grammar), but will also be *contextually* (or pragmatically) *enriched* by additional contextual content that contributes to the meaning of the legal utterance. Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 487–88 (2013).

75 Nevertheless, the *legal* content and effect of a statutory utterance will not necessarily be synonymous with a statute's bare semantic meaning, nor even its contextually enriched content. *Id.* at 481–82.

Understood this way, judicial rules of interpretation function as a kind of legal grammar: they provide guidance for deriving *legal* meaning from oft-underspecified statutory text. This is one reason why I call judges "second-order" interpreters: their opinions not only resolve particular first-order interpretive disputes, but also provide interpretive rules and rationales that can have secondary effects for future cases. (This, of course, assumes such rules are justified on the basis of more than the mere ad-hoc whims of the particular judge(s).) Most canons of construction seem to derive their authority from the presumption that they apply across statutes. If so, then their application will necessarily have the effect of altering how future audiences may be expected to understand and interpret legal texts that present similar ambiguities.[76]

Some judges have been explicit about this intended effect. Justice Antonin Scalia's well-known sentiment toward legislative history is perhaps the most pronounced example. Justice Scalia regularly declined to join portions of majority opinions that discussed a statute's legislative history, and would instead write separately to concur and explain why he had arrived at that interpretation *without* resort to the legislative history.[77] In issuing a noncontrolling concurrence, his practice could not be explained as seeking to sway the outcome of the instant case. Moreover, the *judicial audience* for the concurrence was unlikely to be the litigants in the instant case, or even future audiences of *that* statutory provision, for the dispositive reason(s) for the chosen meaning would be limited to those provided by the (controlling) majority or plurality opinion.

Rather, Justice Scalia's practice is best explained as a second-order interpretive signal to *future* first-order statutory audiences more generally. He sought to constrain future lower courts (and therefore also other first-order audiences) from drawing on legislative history as a germane source of legal meaning.[78] Such evidence, in Justice Scalia's view, should not play a role in deciding the statute's *legal* meaning, even when

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76 Indeed, a chief function of a separate concurrence is often to signal to *future* audiences what that author believes to be the more persuasive approach to interpretation.

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

78 See SCALIA, *supra* note 33, at 29–37 (arguing that consulting legislative history is generally unhelpful, time-consuming, and expensive).

such contextual evidence might provide a *better* explanation of the statute's best-fit legal meaning than that derived from the semantic content of the statute alone.[79] Justice Scalia's objection to the use of legislative history is exemplary of broader concerns about the relationship between interpretive method and imputed legal meaning in statutory interpretation.

My thesis, which I will develop in the next two Parts, is that because statutes communicate in distinct ways and to varied audiences, different tools of interpretation may be more appropriate for transitive statutes than for intransitive ones, and for statutes addressed primarily at some kinds of audiences than others.[80] Moreover, most statutes are directed at multiple audiences, so a central task for many statutory interpretation questions should be to identify the principal audience at issue, which will often clarify what the statute means, how it applies, and which normative concerns should prevail. Given all this, an important criteria for any interpretive theory is whether any given approach to interpretation allows for at least *some* (and ideally much) interpretive congruence between how statutory audiences may be legally expected to comply with, and derive meaning from, the statutory text, and how judges use substantive canons and interpretive methods to decide what the statute shall mean, and how it shall apply.[81]

II
THE AUDIENCES OF STATUTES

> [A] legal scholar is able to research the principles of statutory construction and in the quiet of the library indulge himself in an act of ratiocination to conclude that one provision must yield to the other. . . . Where a defendant is threatened by a

79 Scalia was skeptical that legislative history ever provided a better explanation. *Id.* at 36 (arguing that legislative history had made "very little difference" in the outcome of any case outcome over his prior nine terms on the bench).

80 As I will argue in Part II, there are persuasive jurisprudential reasons to expect that transitive conduct-rule provisions that apply to members of the public do conform to assumptions of ordinary language usage, even if those same assumptions may not apply to purposefully underspecified and intransitive statutory decision-rule provisions directed at official audiences like government agencies. *But see* Greenberg, *supra* note 55, at 217–20 (questioning whether communication theory provides the appropriate resources to determine a statute's legal meaning at all).

81 Fuller argued that interpretive congruence is critical, for a "lack of congruence between judicial action and statutory law" can result in "damaging departures from other principles of legality: a failure to articulate reasonably clear general rules and an inconsistency in decision manifesting itself in contradictory rulings, frequent changes of direction, and retrospective changes in the law." FULLER, *supra* note 48, at 82.

> loss of his liberty, . . . we do not find that the law requires his fate should hang on a statute so drawn that it would exculpate him in one provision, inculpate him in another, and then leave it to an exercise in legal research to determine which should prevail.[82]

In this Part, I will develop a framework for considering statutory interpretation questions from the standpoint of statutory audience. In particular, I will concentrate on the relationship between *substantive legal canons* courts use to evaluate statutory interpretation questions, and the *interpretive methods* they use to attribute legal meaning to statutory terms. By substantive canons, I mean judicially developed interpretive doctrines such as the rule of lenity, the absurd results doctrine, the clear notice rule, and deference canons. These substantive canons can be understood in part as audience canons, for courts apply them only when interpreting statutory provisions directed at particular audiences, and they do so—at least in part—for reasons related to audience-specific rule-of-law norms. For example, the rule of lenity is invoked only for the interpretation of criminal statutes broadly directed at the general public, and on the basis that members of the public must be given fair statutory notice when their conduct is susceptible to criminal punishment or civil fines.[83]

By contrast, what I will call interpretive methods consist of the wide range of semantic and syntactic canons of construction, evidence of linguistic usage, and other sources of statutory meaning that courts use to attribute legal meaning to statutory words and phrases. These include canons of construction such as *ejusdem generis*, evidence of ordinary usage such as dictionaries, and contextual sources of statutory meaning such as the statute's legislative history and other evidence of legislative intent.

I will argue that courts have generally been much more attentive to the relationship between considerations of audience in the choice of substantive canons than in their choices of interpretive methods. The rule of lenity, clear notice rule, and *Chevron* administrative deference are all examples of substantive canons that are warranted when statutes are directed at particular statutory audiences. Yet courts often fail to consider whether the selection and prioritization of various interpretive methods are all equally appropriate for the statutory

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82 People v. Marrero, 422 N.Y.S.2d 384, 388 (App. Div. 1979) (Lynch, J., dissenting).

83 *See* SCALIA & GARNER, *supra* note 12, at 296–97.

audience(s) and the audience-oriented substantive canon(s) they deploy. Moreover, I will argue that choices about which interpretive approaches to prioritize may be just as dependent on questions of audience as substantive canons of interpretation are.

A. The Audiences of a Statute

Statutes have distinct and varied audiences, and these audiences may diverge in both normatively and interpretatively important ways. Broad variation exists in the knowledge, training, sophistication, resources, and interpretive context of different first-order statutory audiences, as well as the interpretive intermediaries who assist them in ascertaining their legal rights and obligations.[84] Moreover, statutes seek to alter the behavior of their audiences in very different ways: some apply conduct rules directly to the public at large, others conscript third-party interpreters to assist statutory audiences in meeting their legal obligations, and others direct official audiences to develop and implement specific rules from broad, intransitive mandates.

The Individuals with Disabilities Education Act (IDEA)[85] exemplifies the diverse kinds of audiences a statute may have, and the distinct ways statutes alter behavior and communicate rules and rights.[86] The IDEA, like many federal statutes, has multiple (and often-adverse) audiences. A chief aim of the IDEA is to use federal special education grants to induce states to enhance opportunities for children with disabilities.[87] The IDEA does so in part by tying federal funding to state compliance with administrative procedures that ensure children are properly evaluated for their learning needs and then provided with a public education suitable to those needs.[88] To do so, the

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84 *E.g.*, Brudney & Baum, *supra* note 36, at 541 (noting that "criminal statutes tend to affect a less educated population than laws regulating employers and businesses in general").

85 Individuals with Disabilities Education Act, Pub. L. No. 91-230, 84 Stat. 175 (1970) (codified as amended at 20 U.S.C. §§ 1400–06, 1411–19, 1431–45, 1451–56, 1461, 1471–74, 1481–87 (2012)).

86 I will return to the statute later to examine how the Court handled questions of audience in *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006), in *infra* subpart III.C.

87 *See* 20 U.S.C. § 1411(a) (2012).

88 *See generally id.* § 1414 (setting out required evaluation process). As of 2006, the year *Murphy* was decided, all fifty states received special education grants. *Special Education—Grants to States*, U.S. DEP'T OF EDUC., https://www2.ed.gov/fund/grant/apply/osep/b06611table.html [https://perma.cc/UUR8-2EPA] (last modified Feb. 7, 2006).

IDEA conscripts both the Department of Education and state-level education officials in each state, who together cooperatively implement these statutorily required procedures.[89]

But the IDEA also directly addresses its on-the-ground audiences. It establishes the rights of parents, guardians, and students, and sets out procedures that govern the resolution of individual disagreements between a child's parent or guardian and the child's school district concerning the appropriate educational accommodations for that child.[90] The IDEA stipulates that eligible parents and guardians are entitled to an annual notice of their statutory rights furnished by their state, typically through a notice document that replicates much of the statutory language itself.[91]

For a parent or guardian to bring an effective claim of inadequate accommodation, they often must hire both an attorney to press their case and a qualified professional expert to evaluate the child's needs and offer evidence that the child's provided education is inadequate.[92] The IDEA establishes a formal role for both attorneys and qualified professional experts under the statute.[93] If the parent or guardian feels an administrative hearing did not adequately resolve her concerns, she is eligible to bring her case before a federal judge by filing suit.[94] Given the often-considerable costs associated with challenging a local district's determination in court,[95] Congress amended the IDEA in 1986 to enable courts, in their discretion, to shift fees to cover reasonable attorneys' fees in

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89 *E.g.*, 20 U.S.C. § 1416 (2012) (establishing a federal role in monitoring, technical assistance, and enforcement of state IDEA compliance).

90 *Id.* § 1415 (setting out procedural safeguards).

91 The IDEA requires that parents receive annually a copy of a procedural safeguards notice. *Id.* § 1415(d)(2). As promulgated by the Department of Education, this form replicates much of the statutory text directly in the notice document; given that the law instructs that the notice be "written in an easily understandable manner," one must presume the Department felt parents should be able to understand the statutory text itself. U.S. DEP'T OF EDUC., IDEA 2004 MODEL FORM: PROCEDURAL SAFEGUARDS NOTICE (2004), https://www2.ed.gov/policy/speced/guid/idea/modelform-safeguards.doc [http://perma.cc/XK3T-2LHC].

92 PETER L. STRAUSS, CONGRESS AT WORK: A DOCUMENTARY SUPPLEMENT FOR COURSES IN LEGISLATION 65 (2016) (noting that expenses for psychologists are central to any dispute over a child's special education needs).

93 20 U.S.C. § 1414(b)(4)(A) (2012).

94 *Id.* § 1415(i)(2).

95 *See* Smith v. Robinson, 468 U.S. 992, 1031 (1984) (Brennan, J., dissenting) (noting the burden of litigation costs on children with disabilities).

circumstances where a parent or guardian prevails on the merits.[96]

Note how many distinct audiences directly addressed by this statute. These include, among others: (1) the Department of Education; (2) state-level education officials; (3) local school officials; (4) the parent or guardian (and their child); (5) the qualified professional experts; (6) the federal judge; and (7) the parent or guardian's attorney.

TABLE 1: PRINCIPAL AUDIENCES OF PROVISIONS OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Audience	*Illustrative Provision*	*Illustrative Statutory Text*
(1) U.S. Department of Education	20 U.S.C. § 1416(a)	"*The Secretary* shall . . . monitor implementation [through] oversight of the exercise of general supervision by the States."
(2) State Education Departments		"*[E]ach State* shall have in place a performance plan . . . ."
(3) Local Education Agencies and Officials	*Id.* § 1415(a)	"Any . . . *local educational agency* that receives assistance under [the IDEA] shall establish and maintain procedures . . . to ensure that children with disabilities and their parents are guaranteed procedural safeguards."
(4) Parents	*Id.* § 1415(d)(1)–(2)	" A copy of the procedural safeguards *shall be given to the parents* . . . [and] shall include a full explanation of the procedural safeguards, . . . written in an easily understandable manner, . . . related to . . . the opportunity to present and resolve complaints."
(5) Qualified Assessment Professionals	*Id.* § 1414(b)(4)(A)	"[T]he determination of whether the child is a child with a disability . . . and the educational needs of the child shall be made by a team of *qualified professionals* and the parent of the child."
(6) Federal Judges	*Id.* § 1415(h)(i)(3)(B)	"*[T]he court*, in its discretion, may award reasonable attorneys' fees as part of the costs . . . to a prevailing party who is the parent of a child with a disability."
(7) Attorneys	*Id.* § 1415(b)(7)(A)	"[R]equir[ing] . . . *the attorney representing a party* . . . to provide due process complaint notice [to school officials]."

96 Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, § 2, 100 Stat. 796, 796 (codified as amended at 20 U.S.C. § 1415 (2012)).

The IDEA is just one example of the distinctive audiences a single statute may have, and the dynamically varied ways these audiences can be expected to engage with the statute and avail themselves of the rights, obligations, and procedures it sets out. In the next sections I will topologize these different audiences and identify how the law expects different audiences to engage with statutory rules in different ways. These sections also consider how substantive canons and interpretive methods employed by courts may alter the interpretive burdens about how first-order audiences may face.

B. Ordinary Audiences

Formally, laypeople are a primary audience of many statutes, just as parents and guardians are a primary audience directly addressed by various provisions of the IDEA. Numerous federal, state, and local statutes regulate nearly every aspect of daily life, from local ordinances that affect parking, transportation, and housing, to statutes that regulate schools, workplaces, information privacy, consumer and civil rights, and use of the natural environment. While not all statutes seek to communicate directly to laypeople in the manner that some IDEA provisions do, many statutes *do* function to put members of the public on notice of particular rights, responsibilities, and obligations.

Yet even for transitive statutes that convey direct conduct rules, one might object that lay audiences rarely *actually* engage with statutes directly. Yet there are several reasons why this concern should not mitigate the expectation that statutory rules have the *capacity* to communicate effectively to the larger public. First, a primary condition of legality is that law generally be minimally legible for its audiences, at least in circumstances where the consequences for noncompliance may be severe.[97]

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97 *See* FULLER, *supra* note 48, at 93.

Moreover, *statutes themselves* often require that lay audiences engage with,[98] or at least be provided with,[99] the direct statutory text. As if to enhance the possibility for first-order audience interpretation, some state legislatures have stipulated that terms and phrases in state statutes shall be interpreted according to audience- and trade-specific meanings.[100] Presumably, such requirements suggest that for at least some statutes, the relevant audience(s) may be legally expected to be put on notice by the text of the statute alone. If so, the statutory text must communicate meaning relatively effectively.

In addition, while many statutory schemes ensure that law is legible to the public at large through reliance on various interpretive intermediaries like accountants, lawyers, compliance officers, and government bureaucrats, these intermediaries often cannot fully absolve statutes of the need to communicate effectively to relevant audiences. As I will discuss in subpart II.C, prevailing "mistake of law" doctrines often disclaim the right for members of the public to rely on sources of interpretive knowledge other than the statutory text itself.[101]

That judicial rules of interpretation help ensure that the law communicates effectively to lay audiences is also a familiar principle in both common law and private law, where numerous doctrines reflect audience concerns. A chief interpretive principle in property law has been said to be the "ease of communication and cost of processing by the relevant audience" of

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98 *See* United States v. Boyle, 469 U.S. 241, 249, 250 (1985) (upholding a late payment penalty against a taxpayer because "Congress has placed the burden of prompt filing on the executor," "[t]he duty is fixed and clear," and "one does not have to be a tax expert to know that tax returns have fixed filing dates"). Laypersons are expected to engage with statutory text in numerous aspects of their daily lives, including statutory text that directly impacts their contracts, legal releases, and workplace rights. *See, e.g.*, Jefferson v. California Dep't of Youth Auth., 28 Cal. 4th 299, 307 (2002) (requiring that contracting parties seeking to unequivocally release all unknown claims include in such agreements the reproduced text of CAL. CIV. CODE § 1542, which sets out statutory limits on the waiver of releases); CAL. LAB. CODE § 2872 (West 2019) (employment agreements that require employee to assign invention rights to employer must include written notification of rights under § 2870, which typically appears in employee invention assignment agreements).

99 *See, e.g.*, *supra* note 91 and accompanying text.

100 *E.g.*, GA. CODE ANN. § 1-3-1 (2019) ("In all interpretations of statutes, the ordinary signification shall be applied to all words, except words of art or words connected with a particular trade or subject matter, which shall have the signification attached to them by experts in such trade or with reference to such subject matter."). *See generally* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1824–29 (2010) (indicating that tensions exist between the interpretations designed by the legislature and those enacted by the judiciary).

101 *See infra* Section II.C.1.

the rule, so as to ensure that property law rules signal ownership "at a low cost to a wide audience."[102] For example, the common-law rule of ownership at possession functions as a communicative statement by the owner to all others that the property in question has become theirs.[103] Legal audiences' varied interpretive circumstances also help to explain important distinctions between the laws of contract and property. The audience of many contracts may be limited to the contracting parties and so permit bespoke legal entitlements; by contrast property law rules must effectively communicate ownership to a wider range of potential third-party audiences, necessitating a more restricted and straightforward set of rules.[104] Moreover, Article 2 of the Uniform Commercial Code prescribes different interpretive rules for merchants than nonmerchants, in part in recognition of differences in knowledge, expectations, and experience between merchant and nonmerchant drafters of contracts.[105]

Finally, a prevailing assumption (or "necessary fiction")[106] among judicial interpreters and legislative drafters alike is that statutes must communicate in a manner in which their audiences will be able to "get the message."[107] Notice concerns are often expressly considered by courts when interpreting transitive statutes that set out specific conduct rules for the general public, such as many general criminal statutes. In recent years, the Supreme Court has repeatedly demonstrated a willingness to strike down "a criminal law so vague that it fails to give *ordinary people fair notice* of the conduct it punishes."[108]

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102 *See* Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1118, 1125 (2003).

103 *See* Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 77–79 (1985) (arguing that possession requires "a kind of speech, with the audience composed of all others who might be interested in claiming the object in question").

104 *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 8 (2000).

105 *See* Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1146–48 (1985).

106 United States v. R.L.C., 503 U.S. 291, 309 (1992) (Scalia, J., concurring in part and concurring in the judgment).

107 OFFICE OF THE LEGISLATIVE COUNSEL, *supra* note 1, at 5.

108 Johnson v. United States, 135 S. Ct. 2551, 2556 (2015) (emphasis added) (holding the residual clause of the Armed Career Criminal Act's definition of "violent felony" unconstitutionally void for vagueness); *see also* United States v. Davis, 139 S. Ct. 2319 (2019) (same holding for 18 U.S.C. § 924(c)'s definition of "crime of violence"); Sessions v. Dimaya, 138 S. Ct. 1204, 1210, 1223 (2018) (same holding for residual clause of Immigration and Nationalization Act's definition of "aggravated felony").

Given these considerations, statutory vagueness can be avoided through thoughtful drafting, and can be policed on constitutional grounds. However, problems with statutory *ambiguity*—which are *inherent* in most legislatively enacted texts for the reasons discussed in subpart I.B, *supra*—must be resolved in part through the interpretive process itself.[109] Judges have repeatedly cautioned that ambiguous statutes must not be interpreted so as to put the regulated public on adequate notice. As Justice Oliver Wendell Holmes, Jr. famously declared in *McBoyle v. United States*,[110] even if it were unlikely that a criminal were to "consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in *language that the common world will understand*, of what the law intends to do if a certain line is passed."[111] (Notably, Justice Holmes said this even about *malum in se* prohibitions like murder, where legal notice could reasonably be inferred from generally shared moral understandings of right and wrong, without the need for specific statutory textual notice.[112])

For statutes that address an audience of the general public, courts often prioritize certain substantive canons and interpretive methods that assist in ensuring adequate notice and enhance the communicative capacity of the statute. Yet despite broad patterns in prioritizing audience-specific methods and interpretive approaches, I will argue that in practice, courts often fall short of consistently employing methods of interpretation congruent with the norms that motivate their usage in the first place.

Several interpretive practices are exemplary of this problem, including (1) inconsistent and unexamined attributions to "ordinary" meaning;[113] (2) the rule of lenity's fraught relationship with the concept of textual ambiguity;[114] and (3) the resort to extratextual methods or sources of interpretation that are unlikely to put ordinary individuals on notice as to what the

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109 On the relevance of the distinction between the concepts of vagueness and ambiguity, see *supra* note 71.

110 283 U.S. 25 (1931).

111 *Id.* at 27 (emphasis added).

112 Indeed, it is probable, though problematic, that legal moralism often seems to play a role in how courts interpret criminal statutes, even if they are not always especially reflective about how they do so. *See infra* section II.B.4.

113 *See* Stefan Th. Gries & Brian G. Slocum, *Ordinary Meaning and Corpus Linguistics*, 2017 BYU L. REV. 1417, 1424 (2017).

114 *See* Daniel Ortner, *The Merciful Corpus: The Rule of Lenity, Ambiguity and Corpus Linguistics*, 25 B.U. PUB. INT. L.J. 101, 102 (2016).

conduct that a statute prohibits.[115] In addition, courts are often unreflective in how they invoke what criminal law scholars like Dan Kahan have described as "legal moralism"—the presumption that concerns about *textual* notice may be diminished where a statutory prohibition conforms to the public's broad conceptions about right and wrong conduct.[116]

To illustrate these inconsistencies, this subpart examines each of these concepts by drawing on the canonical statutory interpretation case of *Muscarello v. United States*.[117] By way of *Muscarello*, I will show why the question of audience should be central to statutory interpretation: it helps to clarify questions about how to decide between competing ordinary meaning(s); the kind of ambiguity that warrants application of the lenity rule; how extratextual sources may be appropriately drawn upon; and when judicial notions about legal moralism can obviate concerns about textual ambiguity.

1. *Ordinary Meaning(s), Prototypical or Common*

First, statutory audience can help to clarify precisely what is to be achieved when seeking the "ordinary meaning" of a statutory term or phrase. For statutes directed at lay audiences, courts generally seek to assign to the statutory text its "ordinary meaning," the semantic meaning attributed to a term or phrase as ordinarily used in the English language.[118] Of course, ascertaining the "ordinary" meaning of a term or phrase is not always straightforward, as demonstrated by the debate in *Muscarello v. United States*.[119] This is because courts are often insufficiently specific about two critical threshold questions: (1) whether "ordinary meaning" refers to the *prototypical*, *permissible*, or *most common* meaning of the relevant term of phrase; and (2) how ambiguous (*and to whom*) the statutory term at issue must be. As I will explain, considerations about the audience to whom the statute is addressed will

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115 *See, e.g.*, Robert H. Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says*, 34 A.B.A. J. 535, 538 (1948) (arguing against the use of legislative history because most people, and even many lawyers, do not have easy access to legislative history).

116 *See* Dan M. Kahan, *Ignorance of the Law* Is *an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 128–29 (1997).

117 524 U.S. 125 (1998).

118 *See* Gries & Slocum, *supra* note 113, at 1424 (noting that "[t]he basic premise of the ordinary meaning doctrine is that a legal text is a form of communication that uses natural language," and thus, for "reasons including rule of law and notice concerns, textual language should be interpreted in light of the accepted and typical standards of communication that apply outside of the law").

119 524 U.S. 125 (1998).

help to clarify whether the prototypical, permissible, or most common meaning may be appropriately attributed to the statute.

Muscarello concerned the interpretation of a mandatory five-year prison term for any individual who "carries a firearm" "during and in relation to" a "drug trafficking crime."[120] The Court was asked to decide whether two separate defendants, who kept firearms located in, respectively, the locked glove compartment and the trunk of their cars driven to the scene of a drug trafficking crime, violated the statutory prohibition on "carry[ing] a firearm," even if the firearm was in the car, not on the person, during the drug trafficking incidents.[121] Both Justice Stephen Breyer, writing for the majority,[122] and Justice Ruth Bader Ginsburg, writing for the four dissenting Justices, agreed that the term should be given its ordinary meaning.[123]

TABLE 2: PRINCIPAL AUDIENCE OF 18 U.S.C. § 924(C)

Audience	*Relevant Provision*	*Relevant Statutory Text*
Any person	18 U.S.C. § 924(c)(1) ("Prohibited Acts")	"*Whoever*, during and in relation to any crime of violence or drug trafficking crime . . . , uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years."

The problem is that deciding which meaning is the "ordinary" one is often more difficult than deciding whether, as a general matter, a term's ordinary meaning should apply. To ascertain the "ordinary meaning" of statutory texts, courts—and especially the contemporary Supreme Court—often refer to dictionary definitions of the relevant word or words in question.[124] This is especially so when the statute in question is directed at an ordinary or lay audience, as in the case of most general criminal prohibitions.[125] In theory, contemporary dic-

120 *Id.* at 126 (quoting 18 U.S.C. § 924(c)(1) (1994)).
121 *Id.* at 126–27.
122 *Id.* at 128.
123 *Id.* at 139–40.
124 *See* Brudney & Baum, *supra* note 36, at 486.
125 James Brudney and Lawrence Baum have identified that dictionary use by the Supreme Court is significantly greater in criminal law cases than in commercial law cases, *id.* at 520, and they speculate that this can be justified because such laws "affect a less educated population" that is "less likely to receive legal counsel about how to comply with statutory prohibitions, [and so] the unfiltered ordinary meaning of text may assume greater importance," *id.* at 541.

tionaries encapsulate commonly shared semantic meanings and therefore reflect the ordinary usages of words.[126] Yet individual dictionary definitions may reasonably diverge about the prevailing meaning of a word.[127] As essayist David Foster Wallace once famously described, "dictionary wars" over meaning and usage are often just as heated as judicial disagreements about statutory meaning.[128]

Confusion about what is meant by "ordinary" meaning was compounded in *Muscarello* by the selection of sources of evidence of ordinary meaning deployed, for the majority seemed to have a rather *extra*ordinary audience in mind. In addition to several contemporary dictionaries and four dictionaries of etymology, the *Muscarello* majority also drew on evidence of "ordinary" usage from works by "the greatest of writers," including the King James Bible, Daniel Defoe's *Robinson Crusoe*, and Herman Melville's *Moby Dick*.[129] From the standpoint of a generalist audience, the majority's sources purporting to reveal a term's "ordinary meaning" do not seem reflective of relevant ordinary usage practices. After all, the firearm carriage prohibition was originally passed as part of the Gun Control Act of 1968,[130] had been amended in relevant ways by both the 1984 omnibus spending act[131] and the 1986 Firearm Owners' Protection Act,[132] and was being interpreted in 1998. It is unclear precisely what an English novel published in 1719, or even an American novel published in 1851, revealed about the term's

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126 Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 283 (1998) ("Modern lexicographers see their task as describing how speakers of English use words.").

127 *Id.* at 285 (noting that modern lexicographers "do not expect their definition to give the absolute meaning of the word" but rather to give the reader enough information "to surmise, at least approximately, its meaning in context") (internal quotation marks omitted).

128 *See* David Foster Wallace, *Tense Present: Democracy, English, and the Wars over Usage*, HARPER'S MAG., April 2001, at 40, 40 (discussing the "ideological strife and controversy" between "notoriously liberal" dictionaries and the "notoriously conservative" dictionaries designed as "corrective responses" to overly "permissive" liberal ones).

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

130 Gun Control Act of 1968, Pub. L. No. 90-618, § 924(c), 82 Stat. 1213, 1224 (codified at 18 U.S.C. § 924(c) (2012)).

131 Pub. L. No. 98-473, § 1005, 98 Stat. 1837, 2138 (1984) (codified as amended at 18 U.S.C. § 924(c) (2012)) (amending statute to present "uses or carries a firearm" prohibition for crimes of violence).

132 Firearm Owners' Protection Act, Pub. L. No. 99-308, § 104, 100 Stat. 449, 456–57 (1986) (codified as amended at 18 U.S.C. § 924(c) (2012)) (amending statute to include mandatory sentencing enhancement for use or carriage of a firearm in "a drug trafficking crime" in addition to a "crime of violence").

"generally accepted *contemporary meaning*" in 1998, the meaning the majority purported to be seeking.[133]

The majority's sources of ordinary meaning were thus not especially "ordinary" at all, and could be susceptible to accusations of cherry-picking to support a preferred outcome.[134] *Muscarello* exemplifies the sometimes ad-hoc manner in which courts select sources of "ordinary" usage. Indeed, a recent study of Supreme Court statutory interpretation opinions identified "a casual form of opportunistic conduct" not only in the Justices' choice of dictionaries, but also in whether they used historical dictionaries from the time of the statutory enactment or contemporary ones at the time of the legal filing.[135]

In addition, the majority also surveyed the use of the term "carries a firearm" in hundreds of American newspaper articles in a manner akin to the then-obscure, now-burgeoning subfield of statutory interpretation known as corpus linguistics.[136] This approach to the study of ordinary meaning draws on patterns of word usage across numerous popular sources in an effort to provide a large-*n* account of how language is most commonly used in contemporary society.[137] In similar fashion, the majority in *Muscarello* noted that according to its survey of newspapers, in "perhaps more than one third" of instances, the terms "carry," "vehicle," and "weapon" all appeared in the same sentence, which the majority suggested supported its preferred meaning of *transporting* a firearm.[138]

The problem with these sources of ordinary usage, as noted by the dissent, is that neither "dictionaries, surveys of press reports, [n]or the Bible tell us, *dispositively*, what 'carries' means embedded *in [the statute]*."[139] To demonstrate the ease with which evidence of ordinary meaning can be cherry-picked, the dissent cited its own "lessons from literature" and newspaper usages to show how "highly selective" the majority's choices

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133 *Muscarello*, 524 U.S. at 139 (emphasis added).

134 *See* Adam M. Samaha, *Looking Over a Crowd—Do More Interpretive Sources Mean More Discretion?*, 92 N.Y.U. L. REV. 554, 615–16 (2017) (arguing that if judges follow rules against cherry-picking sources, then increasing the number of sources will reduce discretion, but if cherry-picking sources is not constrained, then judicial discretion will increase as the number of sources increases).

135 *See* Brudney & Baum, *supra* note 36, at 490, 511–12.

136 *See Muscarello*, 524 U.S. at 129–30.

137 *See* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 795 (2018).

138 *Muscarello*, 524 U.S. at 129.

139 *Id.* at 142–43 (Ginsburg, J., dissenting) (emphasis added) (footnotes omitted).

were.[140] Moreover, it noted that if "carries a firearm" connotes transportation in a vehicle in *one-third* of searched articles, "[o]ne is left to wonder what meaning showed up some *two-thirds* of the time."[141] This suspicion appears to be well supported: a recent study employing a prominent corpus linguistics database found 104 instances where "carries a firearm" and related firearm synonyms "indicated a sense of *carry a firearm on one's person*, while only five instances suggested a *carry a firearm in a car* sense."[142]

Instead, the dissent concluded that the verb "carries" may be susceptible to *either* meaning, so the crucial question should be what the term "carries a firearm" tends to connote in everyday usage: immediacy or active employment.[143] If anything, evidence of common everyday usage would suggest that the statutory prohibition should *not* reach transporting a firearm in a locked trunk or glove compartment. The disagreement in *Muscarello* thus implicitly turned on what it means to seek a statutory term's "ordinary meaning" and *whose* understanding of ordinary meaning should prevail.[144] After all, recent empirical scholarship suggests that ordinary readers of English will read more or less ambiguity into a statutory provision depending not only on their preferred interpretive policy outcome, but also on whether they are asked if the term is ambiguous *for them*, or for an ordinary reader of English.[145]

As Thomas Lee and Stephen Mouritsen have helpfully identified, when judges speak of ordinary meaning, they seem to be "speaking to a question of relative frequency—as in a point on [a] continuum" from (1) a *possible* meaning, to (2) a *common* meaning, to (3) the *most frequent* meaning, to (4) the *exclusive* meaning.[146] Yet courts are rarely clear about which of these possibilities they have in mind when they speak of "ordinary" meaning. Yet what meaning is meant by "ordinary" meaning is often dispositive of the outcome in the case of a dispute about the legal meaning of a term.

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140 *Id.* at 142–44.

141 *Id.* at 143 (emphasis added).

142 Lee & Mouritsen, *supra* note 137, at 847.

143 *Muscarello*, 524 U.S. at 150.

144 *See, e.g.*, James A. Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L.J. 957, 962 (2019) (finding that lay audiences understand particular terms like "but-for causation" differently than do judges).

145 *See* Ward Farnsworth, Dustin F. Guzior & Anup Malani, *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257 (2010).

146 Lee & Mouritsen, *supra* note 137, at 800.

Moreover, courts often appear to have yet another ordinary meaning in mind: (5) the *prototypical* meaning, which is the meaning most strongly associated with a given term in a given context. Thus, the ordinary sense of the term "vehicle" would be the vehicle that is most "vehicle-like."[147] Lawrence Solan has similarly noted that judicial disagreements over ordinary meaning "can be seen as battles among the justices over definitions versus prototypes."[148] Thus, the disagreement in *Muscarello* is better explained as a debate about whether the ordinary meaning of "carries a firearm" should be determined on the basis of its *common* meaning (which would include transporting a firearm, per the majority), or according to its *prototypical* (or *most frequent*) meaning[149]—which was to "pack[ ] heat," per the dissent.[150]

2. *Ambiguity and the Rule of Lenity*

Muscarello also illustrates underlying tensions in the applicability and application of the rule of lenity to statutory terms for which the ordinary meaning is sought. The lenity rule instructs that when there are two rational readings of a criminal statute, courts should choose the harsher one only when Congress "has spoken in clear and definite language."[151] The lenity doctrine is a pragmatic and necessarily audience-oriented canon, for it is invoked by courts only when the statutory audience is the public at large.[152] Here, the stated concern is fair notice—an audience norm that is especially important when a statute is directed at the general public.[153]

However, the lenity doctrine implicates two important considerations necessary for the rule to achieve its pragmatic purpose. The first concerns how *much* ambiguity must be present before invoking the rule, for empirical research suggests that ambiguity is often in the eye of the beholder.[154] Across their

147 *Id.* at 801–02.

148 Lawrence M. Solan, *Why Laws Work Pretty Well, but Not Great: Words and Rules in Legal Interpretation*, 26 L. & SOC. INQUIRY 243, 258 (2001).

149 *Id.* at 258–59.

150 Muscarello v. United States, 524 U.S. 125, 145 (1998).

151 McNally v. United States, 483 U.S. 350, 359–60 (1987).

152 *See, e.g.*, Liparota v. United States, 471 U.S. 419, 427, 433–34 (1985) (applying the rule of lenity when determining what mental state the government had to prove in a case involving illegally acquiring or possessing food stamps); *see also* Yates v. United States, 135 S. Ct. 1074, 1099 n.6 (2015) (Kagan, J., dissenting) (considering "when an ordinary citizen seeks notice of a statute's scope" in deciding whether the rule of lenity should be invoked).

153 *See, e.g.*, United States v. Kozminski, 487 U.S. 931, 952 (1988) (explaining that one of the purposes of the rule of lenity is to provide fair notice).

154 *See* Farnsworth et al., *supra* note 145, at 271.

jurisprudence, the Justices on the Supreme Court have in recent years articulated what commentators have described as at least *four* different versions of the lenity test.[155] The most stringent version, which calls for the invocation of lenity only in the case of "*grievous* ambiguity," is the version articulated by Justice Breyer and which he applied in *Muscarello*.[156]

As Dan Kahan has suggested, pushing the rule of lenity to the bottom of the lexical ordering hierarchy,[157] after exhaustively canvassing sources of interpretive meaning, may make it "impossible" for lenity to perform its function of ensuring adequate notice.[158] *Muscarello* thus suggests that ambiguity and meaning ultimately depend on which (and how many) dictionaries one consults, newspapers to which one subscribes, authors one reads,[159] and canons one considers,[160] and when one decides to stop seeking additional evidence of usage altogether. And as Justice Scalia once noted, "[m]ost cases of verbal ambiguity in statutes involve . . . a selection between accepted alternative meanings shown as such by many dictionaries."[161]

Rather, where the choice is between a prototypical meaning frequently associated with usage of the phrase in question

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155 These range from invoking lenity unless the government's interpretation is "unambiguously correct"; to invoking lenity when there is "reasonable doubt" about the term's meaning; to invoking it only when the government's proposed interpretation seems to be "no more than a guess." Ortner, *supra* note 114, at 103–04.

156 Muscarello v. United States, 524 U.S. 125, 138–39 (1998) (emphasis added).

157 Adam Samaha has defined lexical ordering in statutory interpretation as "the prioritization of one set of considerations such that others might or might not be ruled out." Adam M. Samaha, *If the Text Is Clear—Lexical Ordering in Statutory Interpretation*, 94 NOTRE DAME L. REV. 155, 162 (2018).

158 Kahan, *Lenity and Federal Common Law Crimes*, *supra* note 10, at 386. Kahan argues that this incoherence suggests that the rule of lenity instead functions as a nondelegation doctrine more ideologically compatible with conservative Justices like Scalia and Thomas. *Id.* at 393. Yet lenity had long been invoked prior to the Justice Scalia-led revival of arguments for textualism as the basis of non-delegation. *E.g.*, Bell v. United States, 349 U.S. 81, 83 (1955). Moreover, it neither explains why Justices Scalia and Thomas sometimes rejected the rule's applicability in a case where their colleagues invoked it, *see* Yates v. United States, 135 S. Ct. 1074, 1098–99 (2015) (Kagan, J., dissenting), nor explains why more purposivist and delegation-friendly Justices such as Justices Breyer and Sotomayor have invoked lenity to *narrow* their own discretion and Congress's tendency to punt the issue, *see id.* at 1088 (majority opinion).

159 *See Muscarello*, 524 U.S. at 129–30.

160 Kahan, *Lenity and Federal Common Law Crimes*, *supra* note 10, at 386 (noting that the rule of lenity becomes dispositive only when a court gives the rule priority over other interpretive conventions that create or resolve statutory ambiguities).

161 MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 227 (1994).

that would narrow its application, and a common meaning that would broaden it, the rule of lenity will enhance notice only if the narrower, prototypical meaning prevails. This is especially so where that meaning would seem to comport with how the general public is most likely understand the phrase "carry a firearm"—as in "packing heat," rather than "transporting by vehicle." Only in circumstances where the statute's relevant audience is likely to associate the term with the broader meaning would it be coherent to decline to apply the lenity rule.

Indeterminacy as to how much ambiguity must be present to invoke the lenity rule is exacerbated by a second problem. Because the Court has provided no coherent account of how to prioritize or exhaust sources and canons before invoking the lenity rule,[162] neither first-order audiences nor even *litigants* can know when they have adequately fulfilled their interpretive burden to ascertain an ambiguous term's meaning. This also thwarts the rule's purpose. And resolving ambiguity by resorting to additional sources comes at a cost: the time, resources, and effort necessary to consult those sources. From the standpoint of statutory audience, heightening interpretive expectations may reduce capacity to understand the law. As Ryan Doerfler has argued, democratic and fair notice norms may be just as appropriate in guiding choices of interpretive method over criminal statutes, since they "minimize the epistemic burden for involved parties."[163]

This is not to say that courts should always limit the evidence about semantic content to a single preferred grammar canon, or sources of ordinary meaning to a single dictionary, nor to categorically exclude contextual sources of meaning that extend beyond the text itself, as a strict lexical ordering rule might require.[164] Rather, for the rule of lenity to be coherent, it must be applied in a principled fashion, which requires consistent prioritization of interpretive methods and sources, including ordinary meaning and usage sources, whether those sources are dictionaries, corpus linguistics, or other evidence of linguistic usage that is relevant to resolving the ambiguity of statutory text. The lenity doctrine may be premised on the fiction that statutory text must give members of the public notice, but Justice Scalia was not wrong in lamenting that this

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162 Kahan, *Lenity and Federal Common Law Crimes*, *supra* note 10, at 390–91 (noting that some Justices rank the rule of lenity lexically subsequent to all other interpretive conventions, while others advocate "pushing lenity up to the top of the interpretive hierarchy").

163 Doerfler, *supra* note 10, at 1040.

164 *See* Samaha, *supra* note 157, at 162.

"necessary fiction descends to needless farce when the public is charged even with knowledge of Committee Reports."[165]

Statutory audience thus provides one such rule of decision: an interpretive framework that conceptualizes first-order audiences helps to explain circumstances under which the plain meaning rule's *conditional* "less is more" approach gains particular normative purchase.[166] Where the statute's audience is the general public, ordinary usage and meaning, dictionary definitions, and canons reflecting common linguistic practices may be more reasonable guides to meaning than more obscure contextual sources, such as legislative history or whole code analysis. If the rule of lenity is to accomplish its aim—to relieve defendants of culpability for conduct whose criminality is textually ambiguous—then it would only seem appropriate to apply the rule *before* consulting sources of interpretation that it may be reasonable to expect such defendants to consider, let alone ones that are unlikely to be reflective of so-called "plain" meaning.

3. *Extratextual Meanings*

Muscarello also illustrates why the thoughtful use of extratextual interpretive conventions and sources is essential to any theory of statutory interpretation that conforms to basic principles of legality. When a statute's first-order audience is the general public, it is one thing to draw heavily on dictionary definitions and other evidence of semantic meaning or ordinary usage; it is another to decide what to do once those sources yield competing plausible interpretations. In *Muscarello*, the majority did not stop after considering evidence of ordinary meaning. Instead, the opinion proceeded to apply the whole statute canon[167] and engage in a lengthy examination of Congress's intent as manifested in the legislative history.[168] These methods of interpretation would seem much less likely to help communicate a statutory term's "ordinary" meaning to a generalist audience—especially when set against the backdrop in which the rule of lenity might apply. Indeed, one argument for a textualist approach to interpretation that would preclude

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165 United States v. R.L.C., 503 U.S. 291, 309 (1992) (Scalia, J., concurring in part and concurring in the judgment).

166 *See* William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 546 (2017) ("There are reasons to consider all pertinent information. There are reasons to categorically discard certain kinds of pertinent information. But why consider it only *sometimes*?")

167 *Muscarello*, 524 U.S. at 135–36.

168 *Id.* at 133–34, 137.

"legislative process" evidence like legislative history is that Congress should "accommodat[e] the linguistic expectations of the regulated, rather than the other way around."[169]

Depending on the context, reliance on evidence of contextual meaning, like legislative history, may accommodate the linguistic expectations of the statute's *official* audience. This is especially true when the statutory provision is intransitive and where "the regulated" audiences will not be governed primarily by the statutory text alone, but by regulations subsequently promulgated from it. By contrast, legislative history can be a particularly obscure and inaccessible source of legal knowledge for lay audiences of statutory conduct rules, and even for many of their *lawyers*.[170] These concerns are especially heightened when interpreting conduct rules that carry criminal consequences. This issue was first prominently raised by Justice Jackson—the most recently appointed Supreme Court Justice to have become a lawyer by way of apprenticeship rather than by law degree.[171] Justice Jackson once wrote that there were "practical reasons" to accept the "meaning which an enactment reveals on its face" rather than turning to legislative history:

> Laws are intended for all of our people to live by . . . . [T]he materials of legislative history are not available to the lawyer who can afford neither the cost of acquisition, the cost of housing, or the cost of repeatedly examining the whole congressional history. . . . To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country.[172]

While legislative history is far more readily available to lawyers today,[173] those without Westlaw, Lexis, and/or ProQuest Congressional accounts may not think so, and any citizen without legal training is unlikely to know where to begin.[174]

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169 Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2202 (2017).

170 Jackson, *supra* note 115, at 538.

171 Kashmir Hill & David Lat, *You Don't Need No Stinkin' Law Degree to Be on the Supreme Court*, ABOVE L. (May 14, 2010, 10:01 AM), https://abovethelaw.com/2010/05/you-dont-need-no-stinkin-law-degree-to-be-on-the-supreme-court/ [https://perma.cc/HUB6-7DMQ].

172 Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 396–97 (1951) (Jackson, J., concurring).

173 Moreover, even modern-day Justices often seem unaware of the finer points of identifying relevant evidence from legislative history. *See infra* section II.D.2.

174 *See* Lawrence Solum, *Legal Theory Lexicon: Textualism*, LEGAL THEORY BLOG (Jan. 21, 2018, 9:00 AM), http://lsolum.typepad.com/legaltheory/2018/01/legal-theory-lexicon-textualism.html [https://perma.cc/7XKK-H6YZ] ("One of the important rule of law values is publicity: the law should be accessible to ordinary

Nevertheless, Justice Jackson's concern about accessibility does remain for statutes whose audiences are ordinary individuals who are expected to be on notice of the law's requirements whether or not they have, or can even afford, access to counsel. This critique was among Justice Scalia's recurring criticisms of legislative history. In his concurrence in *Conroy v. Aniskoff*,[175] Scalia argued that legislative history "undermines the clarity of law, and condemns litigants (who, unlike us, must pay for it out of their own pockets) to subsidizing historical research by lawyers."[176] More recently, Adrian Vermeule has argued that the costs associated with legislative history research for litigants are high, while the benefits are, at best, difficult to specify.[177] Justice Jackson, Justice Scalia, and Vermeule were right to recognize that statutory interpretation theory should be mindful of the legal and interpretive expectations that judicial interpretive methodologies necessarily impose on the relevant statutory audience(s), and this critique is most pressing when those audiences are laypeople. Yet these arguments might carry far less weight when the relevant statutory audiences are more sophisticated and well-resourced, and where the provision in question contains no direct conduct rule aimed at a broad and generalist audience—a consideration I will address in subpart II.D, *infra*.

4. *Legal Moralism as Contextual Evidence of Meaning*

In addition to semantic and contextual sources of statutory meaning, members of the public also probably discover or intuit criminal statutory prohibitions through a process that Dan Kahan has called "legal moralism,"[178] the idea that criminal prohibitions largely condemn conduct already widely believed to be immoral.[179] Although legal moralism was not explicitly invoked by the majority in *Muscarello*—likely because the idea is hard to justify on faithful agency grounds—the concept might support the broader interpretation of the firearm car-

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citizens. Ordinary citizens are likely to interpret statutes to have their plain meaning, because ordinary folks rarely have the training to understand legislative history and even if they did have such training, it would simply be too costly to analyze the legislative history of statutes to determine their meaning."); *see also* Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542, 560–61 (2009) (questioning whether legislative history diminishes the fair notice of laws).

175 507 U.S. 511 (1993).

176 *Id.* at 519 (Scalia, J., concurring in the judgment).

177 ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 192 (2006).

178 *See* Kahan, *supra* note 116, at 140.

179 *Id.* at 140–42.

riage prohibition. One might therefore argue that the need for clear *textual* notice is diminished where legal moralism alone can identify conduct that is morally, and therefore legally, prohibited.[180]

In *Muscarello*, the majority noted that the statute's basic purpose was to combat the "'dangerous combination' of 'drugs and guns'" by "persuading a criminal 'to leave his gun at home.'"[181] This suggests it would be intuitive for ordinary individuals to know that carrying a gun during and in relation to a drug trafficking transaction warrants moral disapprobation, regardless of statutory notice. If so, then the rule of lenity might have less normative purchase in requiring clear *textual* notice of criminality, because the public may be assumed to be on *moral* notice.

The problem with relying on legal moralism to salvage textual notice problems is that members of the public may reasonably disagree about both the immorality or relative dangerousness of some kinds of conduct. This might include whether certain conduct warrants *additional* penalties. (At present, this is especially evident in the states' and the federal government's varied and in-flux decriminalization of marijuana use.) In cases of reasonable disagreement, legal moralism may not necessarily obviate problems with criminal statutory ambiguity. In *Muscarello*, for instance, reasonable individuals might disagree that regularly storing a legally obtained firearm in a vehicle is an inherently morally wrongful activity—many, for example, may consider doing so to be a reasonable approach to personal safety, even if they might, on certain occasions, also engage in criminal conduct.

Moreover, what the majority in *Muscarello* seemed to perceive as obviously immoral conduct (keeping a firearm anywhere near a drug dealing transaction) might, for another reasonable citizen, be an obviously *moral* one (exercising a citizen's Second Amendment right to store a firearm in their vehicle for self-defense, even if that citizen on certain occasions engages in criminal conduct himself). Nor is this answer likely to be uniform across all communities. Particularly in rural areas, firearm possession is significantly more common,[182] and

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180 *Id.* at 137–43. *But see* Justice Holmes' admonition in *McBoyle*, *supra* notes 110–111 & accompanying text.

181 Muscarello v. United States, 524 U.S. 125, 132 (1998).

182 Rich Morin, *The Demographics and Politics of Gun-owning Households*, PEW RES. CTR. (July 15, 2014), http://www.pewresearch.org/fact-tank/2014/07/15/the-demographics-and-politics-of-gun-owning-households/ [https://perma.cc/GN8K-SYM3].

a positive association with gun culture in general is more prevalent,[183] so any incidental carriage of a firearm in a vehicle may not, in fact, carry with it the taint of immorality that the *Muscarello* majority seemed to assume. Given these considerations, a further sentence of incarceration may not seem so morally righteous after all.

In at least some circumstances, then, deciding which moral intuitions should form the basis of the criminal law may be just as contentious as which methods of interpretation to rely upon. When it comes to assuaging concerns about textually ambiguous criminal prohibitions, legal moralism may raise as many questions as it resolves, or allow judges to import their own beliefs about the moral blameworthiness of particular conduct.

C. Reliance on Influential Intermediaries as Interpreters

Statutory audience also helps to explain distinctions the law draws in how lay audiences may rely on influential intermediaries to help them interpret and comply with statutes. These intermediaries have no formal legal authority to pronounce the law's meaning, but their daily practices and institutional roles nevertheless position them to influence how members of the public understand the law. Often, influential intermediaries assist lay audiences in ensuring compliance with statutes regulating everyday activities. These include firearms dealers who are legally responsible for communicating registration and carry requirements to customers,[184] contractors who ensure homeowners' remodels are completed according to local building codes,[185] and accountants who guide their clients through filing requirements under the tax code.

But influential interpreters also include industry groups like the Chamber of Commerce and labor unions; interest groups like AARP and the NRA; and interested third parties like insurers and indemnifiers.[186] They include bar, medical, and

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183 *See* Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 93–96 (2013).

184 *See, e.g.*, CAL. PENAL CODE §§ 26835–26885 (West 2018) (describing notification and training obligations of licensed firearms retailers in selling firearms to customers).

185 *See, e.g.*, *Why Are Building Permits Required?*, BUILDING IN CAL., http://buildingincalifornia.com/building-department/ [https://perma.cc/6S6H-T4NZ] (last visited Apr. 4, 2019) (noting that if a property owner does not hire a licensed contractor, they assume the same responsibilities and are assumed to have the same level of knowledge of code compliance as a licensed contractor).

186 *See* John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1579–82 (2017) (describing the role that private insurers play

police officers' associations, all of which educate their members about statutory and regulatory rules relevant to them,[187] and advocate on their behalf when interpretive confusion arises. Influential interpreters also include employers, who have obligations to inform their employees about their legal rights and duties, and therefore serve as critical transmitters of legal knowledge.[188] These influential interpreters assist in what socio-legal scholars call "legal readings"—the practical, everyday signals and rules laypeople internalize to understand what the law means and requires.[189]

The importance of influential interpreters can be recognized by the fact that many statutes are often addressed primarily at these influential interpreters, rather than the lay audiences they assist in compliance. The law recognizes this reliance by forgiving ordinary first-order interpreters for mistakes of legal interpretation. Consider the differential judicial treatment of mistakes of *criminal* law and mistakes of *tax* law. Courts seem to presume that the operative audience for many provisions of the tax code are not taxpayers themselves, but more sophisticated and influential intermediaries like accountants, tax software companies, and IRS officials.[190] Perhaps for this reason, courts are sometimes forgiving of taxpayers' interpretive mistakes that carry punitive consequences, provided they reasonably *relied* on those intermediaries. In contrast, the criminal law generally seems to expect that the primary audience is laypeople themselves, and the law rarely forgives mistakes of law, no matter how well intentioned defendants were in reasonably relying on influential intermediaries.

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in interpreting and communicating changes in the law to the police departments they indemnify).

187 Many industry associations regularly update their members as to changes in the interpretation of laws relevant to them. *E.g.*, *Resources*, CAL. PEACE OFFICERS' ASS'N, https://cpoa.org/resources/ [https://perma.cc/52B6-QLAM] (last visited Aug. 9, 2018) (providing "client alerts" and "legal updates" to alert members of developments in the law relevant to their positions).

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

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

190 Indeed, legislative drafters admit as much. *See* Oei & Osofsky, *supra* note 4, 54–55.

1. *Reliance and Mistakes of* Criminal *Law*

In the criminal law, following Section 2.04 of the Model Penal Code (MPC),[191] most states have implemented "mistake of law" doctrines that permit criminal defendants to raise a mistake of law defense only when they acted in reliance on an *official* statement of the law.[192] The MPC's definition of official interpreters excludes many likely sources of lay legal knowledge. Under the MPC, "official statement[s]" generally include only the interpretations of courts or the "official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense."[193] Thus, individuals may not defend their good faith statutory noncompliance on the basis that they were misinformed by influential intermediaries,[194] regardless of influential intermediaries' expertise and practical experience, as well as the likelihood that laypeople will rely on them in real-world practice.

The case of *People v. Marrero* exemplifies the tensions raised when judicial statutory interpretation is inattentive to audience considerations and the ways laypeople are likely to engage with the law.[195] *Marrero* concerned a New York resident who worked as a corrections officer at a federal prison in Connecticut and was arrested and charged with the unlicensed possession of a handgun in New York City.[196] Marrero had believed that as a federal corrections officer, he qualified as a "peace officer" exempt from firearm registration and carriage requirements under New York law,[197] which defined a peace officer as including "[a]n attendant, or an official, or guard of any state prison *or of any penal correctional institution*."[198]

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191 MODEL PENAL CODE § 2.04 (AM. LAW INST. 2017).

192 Athy Poulos-Mobilia, *Ignorance or Mistake of Law—Will the Memory Ever Fade?:* People v. Marrero, 62 ST. JOHN'S L. REV. 114, 115 (1987).

193 MODEL PENAL CODE § 2.04(3)(b) (AM. LAW INST. 2017).

194 A notable exception is tax law, discussed below.

195 507 N.E.2d 1068 (N.Y. 1987).

196 David De Gregorio, People v. Marrero *and Mistake of Law*, 54 BROOK. L. REV. 229, 233 (1988).

197 People v. Marrero, 404 N.Y.S.2d 832, 832 (Sup. Ct. 1978) (citing N.Y. PENAL LAW § 265.20(a)(1)).

198 *Id.* (quoting N.Y. CRIM. PROC. LAW §2.10(25)) (emphasis added).

TABLE 3: PRINCIPAL AUDIENCE OF N.Y. CRIM. PROC. LAW § 2.10(25)

Audience	*Relevant Provision*	*Relevant Statutory Text*
Persons designated as peace officers	N.Y. Crim. Proc. Law § 2.10(25)	"[O]nly the following persons shall have the powers of, and shall be peace officers: . . . correction officers of any state correctional facility *or of any penal correctional institution*."

The trial court concluded that the statute was ambiguously drawn as to whether the word "state" modified only "prison" or also "any penal correctional institution,"[199] so it dismissed the charge on lenity grounds, reasoning that any basis for excluding state corrections officers would seem to apply equally to federal corrections officers. Despite this, a divided appellate court reversed the dismissal, with the majority drawing on the whole statute canon as well as the legislative history of a related provision in the same statute to determine that the statute was insufficiently ambiguous to apply the rule of lenity.[200] Several dissenters objected to the heightened interpretive requirement that methods like legislative history impose on ordinary interpreters like Marrero.[201] As in *Muscarello*, the court in *Marrero* relied on interpretive methods unlikely to enhance the notice function of the law for its lay audience, and it did so to decide *whether* to invoke the rule of lenity, effectively undermining the notice-enhancing purpose that justifies the canon in the first place.

But *Marrero* also shows why the criminal law often requires laypeople to be legally responsible for statutory interpretation, rather than to outsource that obligation to the influential intermediaries who might assist them. Once Marrero's charge was reinstated, he sought to assert a reasonable mistake-of-law defense, asserting that he had a mistaken but reasonable prior belief that he had been exempt because of advice given by several influential interpreters, all of whom indicated that he did not need to register his firearm due to his status as a federal corrections officer.[202] These included the professor of two of his criminal justice courses at community college, who was himself both a police officer and an attorney; the dealer

199 *Id.* at 833.
200 People v. Marrero, 422 N.Y.S.2d 384, 386–87 (App. Div. 1979).
201 *Id.* at 388 (Lynch, J., dissenting); *see* epigraph, *supra* note 82 and accompanying text.
202 De Gregorio, *supra* note 196, at 240–41.

from whom Marrero had purchased his firearm, and who said it was routine for dealers in the city to sell weapons to federal corrections officers without imposing the registration requirement on them; and both the personnel director of Marrero's prison and the president of the Manhattan facility's union, each of whom was prepared to testify to the widespread belief that federal corrections officers did not need to register their firearms in the city.[203]

Because none of these interpreters were deemed "official" under New York law, the trial court ruled that Marrero could not raise a reasonable mistake of law defense and excluded most of the evidence proffered in connection with it at trial.[204] Most glaringly, the court also excluded as evidence a memorandum from the New York City Police Department addressed to employees of the Metropolitan Corrections Center in Manhattan, stating that federal corrections officers living in New York were peace officers exempt from the permit requirement; because that precinct was not the *official* state agency responsible for New York's penal code, even that interpretation, however influential in practice, could not be relied upon.[205]

Marrero was subsequently convicted, and on appeal, a majority of the Court of Appeals held that the statutory mistake-of-law defense was not available to Marrero because his mistake was based on his "*personal* misreading or misunderstanding" of the law,[206] rather than the official "agency, or body legally charged or empowered with the responsibility or privilege of administering, enforcing or interpreting such statute or law."[207] In essence, the Court held that the law prohibits reliance on the very influential interpreters that members of the general public may be most likely to turn to for assistance.

2. *Reliance and Mistakes of* Tax *Law*

In contrast to the general criminal law, courts interpreting criminal tax laws often permit laypeople to rely on mistaken influential interpreters when determining how to comply with the law, presumably because tax statutes are often considered to be especially difficult to interpret and follow. And because tax laws are often drafted for sophisticated and influential

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203 *Id.* at 240–41 n.52, 241 n.54.

204 *Id.* at 241.

205 *Id.* at 241 & n.54.

206 People v. Marrero, 507 N.E.2d 1068, 1069 (N.Y. 1987) (emphasis added).

207 *Id.* at 1070 (quoting N.Y. PENAL LAW § 15.20(2)).

audiences like tax preparers and tax software companies,[208] the law is more forgiving of mistakes of law in the criminal tax context than in the general criminal context, provided the provision in question seems to *require* reasonable reliance.

Consider, for example, the case of *United States v. Boyle*, in which an estate executor relied on an attorney to assist in filing a federal estate tax return.[209] When the executor failed to file by the statutory deadline, he was assessed a penalty for failure to file a return due to "willful neglect." He appealed, arguing that his failure to file on time was due to a "reasonable cause," i.e., reliance on his tax attorney's mistaken advice.[210] The Supreme Court unanimously rejected that argument, concluding that "Congress has placed the burden of prompt filing on the executor, . . . [and] the duty is fixed and *clear*."[211] In a sense, the Court's conclusion was that the primary audience for the prompt filing burden was the taxpayer, and because it was clearly indicated, it was no excuse that the taxpayer expected his attorney would determine the relevant deadline for him.

TABLE 4: PRINCIPAL AUDIENCE OF INTERNAL REVENUE CODE § 6651

Audience	*Relevant Provision*	*Relevant statutory text*
Taxpayers	26 U.S.C. § 6651(a)(1)	"In case of failure to file any return required under [relevant provisions] on the date prescribed therefor . . . , unless it is shown that such failure is *due to reasonable cause and not due to willful neglect*, there shall be added to the amount required to be shown as tax on such return [additional penalties]."

But the Court *also* clarified that in other circumstances, "reliance on the opinion of a tax adviser may constitute reasonable cause for failure to file a return," because when an accountant or tax attorney "advises a taxpayer on a matter of tax law," it would be reasonable for the taxpayer to rely on such advice,[212] and so any failure to do so would not constitute willful neglect. The Court concluded that "[m]ost taxpayers are not competent to discern error in the *substantive* advice of an accountant or [tax] attorney," whereas "one does not have to be

208 *See* Oei & Osofsky, *supra* note 4, at 54–55.
209 469 U.S. 241, 242 (1985).
210 *Id.* at 244 (quoting 26 U.S.C. § 6651(a)(1)).
211 *Id.* at 249 (emphasis added).
212 *Id.* at 250–51.

a tax expert to know that tax returns have fixed filing dates" and must be filed when they are due.[213]

The distinction the Court seemed to draw in *Boyle* was that while taxpayers may be the audience for certain portions of the tax code drafted with sufficient clarity to provide direct notice to taxpayers, *most* tax provisions are sufficiently complex that the *effective* audiences are tax professionals and certified preparers who assist them. This means that where taxpayers place good-faith reliance on the advice of such influential interpreters, their subsequent mistakes of law are forgiven for all but the most straightforward requirements.[214]

This stands in stark contrast with the interpretation of most criminal laws—as in *Marrero*—where mistaken but good-faith reliance on influential intermediaries was no excuse for noncompliance. Without a nuanced understanding of statutory audience, the distinction between the treatment of generally applicable tax and criminal laws may seem somewhat arbitrary, for statutory compliance obligations would seem to fall on members of the public in both instances, and yet the consequences for mistaken reliance and noncompliance are quite different.

My argument is that the distinction in treatment may be justified in part by the different first-order audiences of these statutes. The primary audience for many criminal statutes is the public at large, and many criminal statutes are drafted such that their provisions apply directly to the conduct of ordinary individuals without elaboration. By contrast, many portions of the Internal Revenue Code are highly technical provisions drafted primarily for official interpreters such as the Internal Revenue Service, whom drafters expect will implement tax laws through textually specific and clear regulatory guidance. Many portions of the Code have direct application but are also sufficiently complex that taxpayers may be reasonably expected to employ the services of tax attorneys and accountants to assist in compliance. Given this more dynamic and complex statutory realm, it may be more reasonable to expect that lay audiences can rely on influential interpreters like accountants and tax attorneys.

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213 *Id.* at 251 (emphasis added).

214 The U.S. Tax Court has identified a three-part test for the tax adviser exception, requiring that the taxpayer (1) turned to a competent professional with sufficient expertise; (2) provide necessary and accurate information to the adviser; and (3) actually rely in good faith on the advisor's judgment. *See* Neonatology Assocs., P.A. v. Comm'r, 115 T.C. 43, 99 (2000), *aff'd*, 299 F.3d 221 (3d Cir. 2002).

D. Official and (Un)official Audiences

Perhaps the most important first-order audiences of statutes are government officials. The law often designates to regulatory agencies like the IRS an "official" interpreter status, and both state and federal laws deem certain officials to be the authoritative interpreters of relevant bodies of law that fall under their jurisdiction. In the criminal law domain, these may include law enforcement agencies who, for prosecutorial purposes, decide whether particular conduct falls within statutory prohibitions, as well as state and federal prosecutors, who will sometimes clarify how criminal prohibitions are to be understood and broadly applied.[215] More commonly, official interpreters abound in federal administrative law. They include agencies entitled to "*Chevron*" deference[216] because they have been delegated law-making authority by Congress to engage in legislative rulemaking with the effect of law.[217] Peter Strauss has called this the "*Chevron* space": the area within which Congress has statutorily empowered the agency to act in a manner that creates obligations or constraints that carry legal force derived from the statute.[218]

Agency deference is often approached in terms of questions about separation of powers and the non-delegation of lawmaking power.[219] Yet I will argue they also raise interesting questions of statutory audience, in part because agencies interpret statutes in many kinds of actions beyond the rulemaking and binding adjudications that *formally* warrant *Chevron* deference: these include interpretative rules, enforcement guidelines, policy manuals, opinion letters, no-action letters, and agency guidance, among others.[220] In theory, where Congress has *not* delegated lawmaking authority to the agency, less deferential "*Skidmore* weight" applies,[221] and so agency interpre-

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215 *See* DANIEL C. RICHMAN, KATE STITH & WILLIAM J. STUNTZ, DEFINING FEDERAL CRIMES ch. 12 (Delegating Criminal Lawmaking) (2d ed. 2014).

216 *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

217 United States v. Mead Corp., 533 U.S. 218, 229–30 (2001). For an excellent overview of the domains for which first-order official interpretations warrant *Chevron* deference, and when they should not, see Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 889–99 (2001).

218 Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1145 (2012).

219 *E.g.*, Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187 (2016).

220 Christensen v. Harris County, 529 U.S. 576, 587 (2000); Merrill & Hickman, *supra* note 217, at 886.

221 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 552 (2000) ("[A]n interpretative rule is only a statement of the agency's present

tations rendered in these more informal documents are not entitled to *Chevron* deference.[222]

In practice, informal or (un)official interpretations such as agency guidance nevertheless have a significant effect on how other first-order statutory audiences act to conform their conduct to law,[223] particularly given that such official interpretive positions may effectively govern the field for years or even decades unless and until a court is called upon to review a legal challenge to the agency's interpretation. Such (un)official interpretive authority sometimes even extends to self-regulatory organizations (SROs), to whom federal agencies delegate enforcement powers. These SROs have enforcement power over their own members' statutory and regulatory compliance, a practice Emily Hammond has described as leading to "double deference" because the agency itself often defers to the interpretations of the SRO.[224] Framed in terms of statutory audience, such practices may be defensible in circumstances in which the non-agency audiences of the statute really do understand the regulatory terrain as well as, or better than, the agency itself.

1. *Unique Interpretive Concerns for Official and (Un)official Audiences*

Framing questions of administrative law and interpretation in terms of statutory audience also helps to reveal the important linkages between statutory audience and interpretive method. First, as Ed Rubin has explained, legislative delegations to administrative agencies often serve to provide broad, intransitive statutory instructions to develop clear and concrete rules, rather than the precise rules themselves.[225] Indeed, this intransitivity is one of the primary justifications for

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interpretation of the statute . . . [and] the Supreme Court made it clear that an interpretative rule has no 'power to control.'"); *see also* Strauss, *supra* note 218, at 1145–46 (describing *Skidmore* "weight" as the weight that an agency's view on a statutory question should have on the courts, which retain ultimate interpretive authority).

222 *Mead*, 533 U.S. at 229–30; *see also* Merrill & Hickman, *supra* note 217, at 901.

223 *See* NICHOLAS R. PARRILLO, ADMIN. CONFERENCE OF THE U.S., FEDERAL AGENCY GUIDANCE: AN INSTITUTIONAL PERSPECTIVE 35 (2017), https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-final-report.pdf [https://perma.cc/GRK7-4WJM].

224 *See* Emily Hammond, *Double Deference in Administrative Law*, 116 COLUM. L. REV. 1705, 1711 (2016).

225 Rubin, *supra* note 70, at 381.

Chevron deference in the first place.[226] Within this "*Chevron* space," Elizabeth Magill and Adrian Vermeule have described how broad authorizing statutes often do not have "a single best interpretation"; instead, interpretation typically involves agency choice within a policy space defined by the range of the statute's reasonable interpretations.[227]

Second, Congress often gives important signals to an agency through the legislative drafting process. Extratextual evidence provided in the legislative history of the statute may therefore be especially useful for the agency tasked with implementing and interpreting the law. For intransitive administrative statutes, agencies rarely make regulatory choices on the basis of an interpretation of the semantic meaning of the text alone. In determining Congress's ambition behind an ambiguous instruction, the agency would almost certainly begin by examining sources of contextual meaning such as the legislative history.[228] As Peter Strauss has noted, "[l]egislative history has a centrality and importance for agency lawyers that might not readily be conceived by persons who are outside government."[229] Congressional drafters often interface directly with agencies in the course of drafting the laws the agencies will be authorized to enforce,[230] including the production of materials that constitute the statute's legislative history.[231] Post-enactment, agencies are staffed with both legal and policy experts who have the time and expertise to undergo such research before acting.[232]

Sophisticated official audiences may also be better suited to consider how a given statutory provision compares to others in related federal statutes. Both the Department of Justice and

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226 *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 206 (2006) (arguing that *Chevron* deference recognizes that "interpretation of unclear terms cannot operate without some judgments by the interpreter," as well as the need for "discretionary judgments to be made by appropriate institutions"—the agencies).

227 Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1045 (2011).

228 *See* Strauss, *supra* note 10, at 329.

229 *Id.*

230 *See generally* Bressman & Gluck, *supra* note 8, at 767–69 (describing how legislative drafters are primarily in interpretive conversations with agencies, not courts).

231 Jarrod Shobe, *Agency Legislative History*, 68 EMORY L.J. 283, 296–97 (2018); Strauss, *supra* note 10, at 347.

232 *See, e.g.*, Laurence H. Silberman, Chevron—*The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 823 (1990) ("*Chevron*'s importance is its recognition that, expertise aside, the agencies, nevertheless, maintain a comparative institutional advantage over the judiciary in interpreting ambiguous legislation that the agencies are charged with applying.").

regulatory agencies are "repeat player[s] in interpretive litigation involving major regulatory statutes," and these audiences generally "have the resources and incentives to compile similar information on all of the major statutes they implement."[233] As a result, cross-referencing other statutory schemes, or relying on related administrative guidance and precedents, may be more appropriate in implementing an administrative statute that is part of the larger regulatory landscape. Unlike most other statutory audiences, agency officials have "a direct relationship with Congress," which provides them with "insights into legislative purposes and meaning that are likely to be much more sure-footed than those available to courts in episodic litigation."[234]

Thus, when courts review the interpretations of such official interpreters, it would seem especially appropriate that they draw on the same resources that Congress often expects the agencies to rely on. This is one rationale for *Chevron* deference,[235] and it is also borne out in judicial practice. Bill Eskridge and Lauren Baer have identified that the Supreme Court relies on legislative history more often in *Chevron* cases than in non-*Chevron* cases, which is not surprising given the relatively greater weight agencies place on legislative history in developing their own interpretations and understandings of statutory meaning.[236]

Nevertheless, the origin of legislative history as an interpretive method cautions against its unvarnished application for statutes directed at all audiences, for its initial development as an interpretive method was motivated by its strategic advantage for particular government audiences. Nicholas Parrillo has documented how legislative history as a method of interpretation arose in the wake of the newly expanded New Deal administrative state, which was "vested with unprecedented capability to process and analyze congressional discourse and translate it into legal argument."[237] Given federal agencies' unequalled access and resources, Parrillo has concluded that

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233 Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209, 273 (2015).

234 Mashaw, *supra* note 10, at 511.

235 Magill & Vermuele, *supra* note 227, at 1045.

236 William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1135–36 (2008).

237 Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 YALE L.J. 266, 315 (2013).

"[l]egislative history was therefore a statist tool of interpretation, in the sense that the administrative state enjoyed privileged access to such material and was a privileged provider of it to the Court, more than was true of other interpretive sources, such as statutory text."[238]

However, agency insiders did not long remain the sole beneficiaries of legislative history. Because of the "peculiar openness of the legislative process in America," Parrillo has noted that judicial reliance on legislative history also privileged "lawyer-lobbyists above the general population of lawyers" (let alone other audiences).[239] These lawyers entered and exited the "revolving door" between law firms, lobbying firms, and government, and after World War II "created a new kind of law firm—the 'Washington law firm'—staffed by veterans of the administrative state and dedicated to constant lobbying of that state and of Congress."[240] Unsurprisingly, industry and trade associations and the Washington law firms they hire are the chief antagonists of the agencies and their frequent sparring partners in litigation. While the playing field has since become more (though not entirely) level, this history demonstrates precisely why normative questions of statutory audience and interpretive methods questions must be evaluated side by side, for some methods of interpretation may be more advantageous for some audiences at the expense of others.

2. *Notice from (and Comment on) Regulatory Statutes*

When interpreting statutes whose audiences are primarily agency officials, notice considerations in interpretation may also shift in important ways. In particular, the normative significance of semantic, notice-based canons and methods such as evidence of ordinary usage, the plain meaning rule, and basic grammar canons of construction may be of lesser importance when the statutory text alone is unlikely to be the principal form of legal notice for the audiences in question. This is because concerns about notice and reliance are often more appropriately evaluated as part of the administrative rulemaking process, rather than on the basis of the statutory text alone.[241] For many administrative statutes whose primary

238 *Id.* at 367.
239 *Id.* at 368.
240 *Id.*
241 Indeed, it is often forgotten that *Chevron* itself concerned an agency's shifting interpretation of a statute that contravened its own prior interpretation of that statute. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 857–58 (1984). For the interpretation of agency rules and regulations, the Court

audiences include both federal agencies and the industries they regulate, all parties may be reasonably expected to draw on more obscure extratextual sources of interpretation such as inferences from legislative history and related statutory usages. Moreover, such audiences are often actively involved in the dynamic rulemaking and guidance-development interpretive process that serves to furnish notice as to agency interpretive choices about statutory meaning.

Recognition of these audience-specific interpretive conditions might provide courts with a more principled rationale for prioritizing legislative history over evidence of ordinary usage, a practice the Court has often struggled to justify even in circumstances where imposing the ordinary meaning of a term would lead to bizarre results. The Court confronted just such a problem in *Public Citizen v. United States Department of Justice*,[242] in which the Court addressed whether, for the purposes of the Federal Advisory Committee Act (FACA), the ABA's Standing Committee on Federal Judiciary had been an advisory committee "utilized" by the Reagan White House when the committee provided the White House advice concerning potential judicial nominees.[243]

Congress passed FACA to ensure both Congress and the public could remain appraised of the existence and activities of numerous groups that served "to advise officers and agencies in the executive branch."[244] To this end, FACA mandates reporting requirements for any "advisory committee" "established or *utilized* by the President."[245] While Congress and the public at large are certainly one indirect audience of FACA, the principal audiences who must *conform their conduct* to the statute include the President, executive branch agencies, and statutorily defined advisory committees, as well as the plaintiffs-in-interest likely to sue to enforce FACA, primarily well-funded D.C. watchdog groups.[246]

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has recently reemphasized that unfair surprise and reliance interests *are* among the chief normative considerations in deciding whether to defer to the agency's interpretation of its own work product, in part because such interpretations are not always developed through standard rulemaking channels. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2421 (2019).

242 491 U.S. 440 (1989).

243 *Id.* at 443.

244 *Id.* at 445–46 (citations and internal quotation marks omitted).

245 5 U.S.C.A. app. 2 § 3 (2012) (emphasis added).

246 *Public Citizen*, 491 U.S. at 447–48 (identifying plaintiff-appellants as the Washington Legal Foundation and Public Citizen).

TABLE 5: PRINCIPAL AUDIENCES OF THE FEDERAL ADVISORY COMMITTEE ACT

Audiences	*Relevant Provision*	*Relevant Statutory Text*
Watchdog Groups, Advisory Committees, Agencies, and the President	5 U.S.C. app. 2 § 3	"(2) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . , established or *utilized* by the President, or established or *utilized* by one or more federal agencies."

From the standpoint of notice, defining "utilize" according to its "plain" meaning or most "ordinary" usage would not necessarily clarify which groups were required to comply with the statute, given the statute's more sophisticated audience, and the lack of direct consequences for members of the general public. Yet because the Supreme Court tends to employ a one-size-fits-all approach to interpretation, it struggled to justify its disinclination to give "utilize" that word's most straightforward meaning. If it did, the ABA committee, as well as countless other organizations, would be required to comply with the open meeting transparency requirements, which would subject the President's Article II judicial nominations process to unusual, and possibly unconstitutional, transparency.

The Court, in a majority opinion penned by Justice William Brennan, acknowledged that while there was "no doubt" that the Executive "utilizes" the ABA Committee "in one common sense of the term,"[247] "reliance on the plain language of FACA alone [wa]s not *entirely satisfactory*," since a "literal reading" of the term would compel an "odd result"[248]: the President's Article II power to nominate federal judges would be constricted in a manner that might raise significant constitutional concerns.[249] Instead, Justice Brennan "search[ed] for other evidence" "beyond the naked text" and considered the purpose and legislative history of FACA,[250] finding that Congress had intended FACA to cover only advisory groups *established* by the Executive Branch and not groups simply utilized by it.[251] In-

247 *Id.* at 452 (internal quotation marks omitted).

248 *Id.* at 452, 454 (emphasis added) (internal quotation marks and citation omitted).

249 *Id.* at 466.

250 *Id.* at 454–55.

251 *Id.* at 461–63.

terpreted in this narrower fashion, Justice Brennan concluded that FACA did not apply to the ABA committee.[252]

However, as Justice Anthony Kennedy noted in a concurrence, the "odd result" of FACA's broader application was hardly akin to the usual settings in which the absurd results canon is applied.[253] The "absurd results" canon is most appropriately used[254]—and in practice *is* generally used[255]—where the audience of the statute is laypeople and where attribution of the ordinary meaning of a term in a criminal prohibition would lead to an egregiously punitive result. In this sense, the absurd results canon functions as a textual corollary of the rule of lenity. In cases where the plain meaning rule might result in a significant disadvantage to members of the general public, courts should consider contextual content beyond the plain text. For FACA, Justice Kennedy contended that the plain language of the statute was the "ready starting point, which ought to serve also as a sufficient stopping point," because nothing more was needed to be known than the plain meaning of "utilize."[256]

Yet recognition of the particular statutory audiences of FACA provides a more defensible justification than Justice Brennan's for looking beyond the ordinary meaning. This approach also explains why Justice Kennedy's "sufficient stopping point" analysis may be insufficient for understanding what the statute seeks to convey, and to whom. Where statutes are directed at agencies and sophisticated interest groups, objections to reliance on contextual evidence like legislative history are weaker. This is so even where the extratextual evidence suggests a meaning different from the "plain" meaning associated with the "ordinary" usage of the term. In *Public Citizen*, the legislative history of FACA concretely demonstrated that Congress did not intend such a broad meaning of "utilize." As Victoria Nourse has subsequently and persuasively shown, Congress's *own* rules required rejection of the broader application of FACA, given that the term "utilize" had been added to

252 *Id.* at 464–65.

253 *Id.* at 470–71 (Kennedy, J., concurring in the judgment).

254 *See* SCALIA & GARNER, *supra* note 12, at 234–39 ("Absurdity Doctrine").

255 Every one of Justice Kennedy's examples of appropriate applications of the "absurd result[s]" canon involves criminal prohibitions or penalties whose audience is the general public. *See Public Citizen*, 491 U.S. at 470–71 (Kennedy, J., concurring in the judgment) (listing cases).

256 *Id.* at 469.

the bill at a point at which *substantive* changes to legislation were no longer permitted under congressional rules.[257]

Nourse is correct in suggesting that recognition of Congress's rules would "simplify the process of analyzing and identifying relevant legislative history"[258]—assuming it is always appropriate to enrich the statutory text with knowledge about its enactment history. *Public Citizen* shows how even second-order *judicial* audiences can get that inquiry wrong: if even nine Justices on the Supreme Court were unaware of how Congress's own rules could signal the importance of particular aspects of the legislative history, one might reasonably question whether such legislative history would simplify the interpretive inquiry for less sophisticated statutory audiences in other circumstances.

Notably, textualists such as Seventh Circuit Judge Amy Coney Barrett have critiqued that approach on related grounds, objecting that it "privilege[s] the legislative perspective by adopting a strained usage that complies with congressional conventions that do not map onto ordinary uses of English."[259] But such an inquiry may be appropriate if the statutory audiences are not "ordinary use[rs] of English,"[260] but rather executive branch agencies and sophisticated D.C. interest groups. In those circumstances, the textualist objection may be less trenchant, because it is not "ordinary use[r]s of English" involved in implementing the statute.

E. Judicial *First-Order* Audiences

In addition to ordinary, influential, and official interpreters, judges are themselves sometimes first-order statutory interpreters, deciding on the meaning and application of statutes in the first instance. This is because some statutory provisions regulate court-specific activities such as the admissibility of evidence, the exercise of judicial discretion in case management, as well as the exercise of federal common-law lawmaking. These provisions are often addressed directly to judges, who are often given broad discretion in their application.

Because judges are repeat players in interpreting these provisions, unique interpretive considerations may apply.

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257 Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 92–97 (2012).

258 *Id.* at 75.

259 Barrett, *supra* note 169, at 2207–08.

260 *Id.* at 2208.

Among these is the presumption of consistent usage.[261] One manifestation of this presumption, the "whole code" (or "record of statutory usage") canon,[262] instructs that the use and meaning of an ambiguous term in one statute can be derived from the meaning of the term as it is used elsewhere in the federal code. The rationale behind this is that "statutory terms should bear consistent meaning across the U.S. Code as a whole."[263] A weaker but more common version of this presumption is the "whole-text" canon that assumes a term used in multiple places in the same statute should be given the same meaning.[264]

The problem with these canons is that they rarely capture statutory meaning as intended by its drafters.[265] For one thing, the presumption is empirically questionable, at best: interviews with numerous legislative drafters have revealed that few find "whole code" analysis to be a useful way of discerning the legislative purpose behind a particular term or phrase.[266] Indeed, even the more modest "whole act" canon often reflects neither actual drafting practices nor legislative expectations for a given statute's meaning, especially for omnibus legislation whose parts are drafted by different subcommittees.[267] As others have noted, imposing rules of consistency on text—a mode of interpretation more prominent among textualists—"shapes and changes the [U.S.] Code as much as the [purposivist] judges-as-legislative-partner model."[268] Judicial

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261 *See* SCALIA & GARNER, *supra* note 12, at 170–73 ("Presumption of Consistent Usage"). Although this presumption generally applies within statutes and "can hardly be said to apply across the whole *corpus juris*," Scalia and Garner acknowledge that "the more connection the cited statute has with the statute under consideration, the more plausible the argument becomes." Moreover, if it "deal[s] with the same subject, the argument could even be persuasive." *Id.* at 172–73.

262 W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 88 (1991).

263 Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 874 (2012).

264 *See* SCALIA & GARNER, *supra* note 12, at 167–69.

265 *See* Buzbee, *supra* note 57, at 189–94 (arguing that the presumption of consistent usage across statutes is premised on the faulty "one-Congress fiction" of a single knowledgeable author aware of semantic usage in all prior related legislative enactments).

266 Gluck & Bressman, *supra* note 8, at 936 ("[O]nly 9% of [legislative drafter] respondents told us that drafters often or always intend for terms to apply consistently across statutes that are unrelated by subject matter.").

267 Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 858–59 (2014) (noting that omnibus bills in particular are often the result of a "conglomeration" of bills drafted by different legislative staffs and committees and then combined together).

268 Gluck, *The Failure of Formalism*, *supra* note 24, at 187.

use of consistent usage canons, then, cannot easily be justified on faithful agency grounds.

The consistent usage canon also falls short of rule-of-law norms like notice, especially for statutory audiences such as the general public. It is difficult to imagine how the consistent usage presumption enhances the likelihood that a given statute communicates to its relevant audience(s), for a systematic search of linguistic usage across the entirety of the U.S. Code would be epistemically burdensome as an *a priori* matter. How many members of the public (or even their *lawyers*) are likely to begin their quest to understand a given statutory term or phrase by comparing its usage across every other federal statute? Moreover, even influential intermediaries tend to be experts in one area of law, not in linguistic usage across all laws. Short of legislating an imposed and uniform U.S. Code definition of a common term in the Dictionary Act[269]—a task for Congress, not the courts—it seems improbable that the consistent usage canon would help lay first-order interpreters seeking to resolve statutory ambiguity.

Instead, the consistent usage canon is better explained as a judicially imposed uniformity of meaning for recurring provisions that appear across many different substantive statutes. In such circumstances, the statutory audience who benefits most is often judges. Consider, for example, the attorney's fee-shifting provisions contained in many substantively distinct federal statutes, including the Individuals with Disabilities Education Act, as described in subpart II.A above, and discussed in subpart III.C below.

TABLE 6: PRINCIPAL AUDIENCE OF FEDERAL FEE-SHIFTING PROVISIONS

Audience		*Relevant Statutory Text*
Courts	42 U.S.C. § 1988	"*[T]he court, in its discretion*, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

These fee-shifting provisions alter the "American Rule" default that attorneys' fees cannot ordinarily be recovered by the prevailing party in litigation,[270] and instead grant trial courts the discretion to award such fees at the close of litigation. A

269 *See* 1 U.S.C. §§ 1–8 (2012).

270 *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 245 (1975).

primary (though not exclusive) audience for such provisions is judges, for they have the sole discretion to act under the statute to shift attorneys' fees. And unlike attorneys who generally specialize in one area of law that may involve a statutory fee-shifting provision, judges are likely to be the only legal actors who *regularly* encounter these provisions across many different statutory schemes. For a recurring provision whose audience is primarily judges, it may be desirable that such a provision convey a consistent meaning across the many substantively varied statutory contexts in which judges are likely to encounter them.

This approach seems to explain, at least in part, why judges will sometimes prioritize the consistent usage canon over other interpretive sources or canons, as Justice Scalia's majority opinion did in *West Virginia University Hospitals, Inc. v. Casey*.[271] For textualists, *Casey* is a demonstration of Justice Scalia's textualism favoring "coherent congressional usage over coherent congressional policy in determining which elements of context to treat as determinative."[272] Yet that explanation, on its own, does not provide an adequate account of *why* judges should care more about coherent usage over coherent policy generally, let alone in any particular case. *Most* statutory interpretation cases concern an ambiguous term, after all, and yet *no* member of the Court—Justice Scalia included[273]—has regularly and systematically subjected every ambiguous term in a statute to whole code analysis. Courts' (knowingly unrealistic) demand for coherent congressional usage over coherent congressional policy may be most justified when a particular audience is a repeat player, engaging with

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271 499 U.S. 83 (1991). Scalia counted no fewer than thirty-four statutes enacted before, simultaneously to, or after the fee-shifting provision in question in 42 U.S.C. § 1988, each of which explicitly granted judges the discretion to award expert witness fees *in addition to* a reasonable attorney's fee. *Id.* at 84. On this basis, Justice Scalia inferred that the default legal meaning of the term "attorney's fee" *did not* include expert witness fees, for reading § 1988's fee-shifting provision to include expert fees would render "dozens of statutes referring to the two separately . . . an inexplicable exercise in redundancy." *Id.* at 92. Justice Scalia reached this conclusion despite evidence in the legislative history, identified by the dissent, that strongly suggested Congress intended for the attorney's fee award to include expert witness fees. *See id.* at 108–11 (Stevens, J., dissenting).

272 John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 94 (2006).

273 *See* Gluck, *The Failure of Formalism*, *supra* note 24, at 185–86 (noting Justice Scalia's abandonment of the presumption of consistent usage in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2441 (2014)). Justice Scalia himself had deemed it a "fiction" that "the enacting legislature was aware of [terminological meaning in] all those other laws." SCALIA, *supra* note 33, at 16.

the same term of art across many different substantive statutes.

III
THE MULTIPLE AUDIENCES OF STATUTES

As the prior Part has demonstrated, examining statutory interpretation decision-making from the standpoint of statutory audiences not only helps to explain why judges invoke different substantive legal canons, but also sheds light on the appropriate relationship between audiences, substantive canons, and interpretive methods. While most of the statutory provisions revisited in Part II had fairly straightforward principal audiences, some statutes contain particular provisions that, read on their own, might suggest one audience, but when read in context of the larger statute, are better understood as addressing a more particular audience. Textual and contextual clues contained in a statute, coupled with the way the legislature has prescribed for its implementation, can often help to clarify when that statute is actually addressed to a narrower audience rather than a broader one.

Many statutes have multiple and very differently situated audiences, particularly those statutes that contain both broad regulatory mandates directed to the relevant implementing agency as well as specific prohibitions and instructions addressed directly to the audiences to be regulated. This Part revisits several canonical statutory interpretation cases to identify how drawing explicit attention to statutory audience can help to clarify statutory meaning. It also shows how canonical cases in statutory interpretation that are typically taught as debates about interpretive methods can also be understood as debates about the appropriate audience lens through which to interpret the statute.

A. Identifying the Principal Audience

Being attentive to statutory audience can help to clarify when a statutory term should be given its broadest permissible ordinary meaning, or a more specific and narrower meaning appropriate to the principal audience of the statute in question. In particular, where the statutory scheme primarily addresses a particular subset of the general population, there are good reasons to doubt that a term contained therein should always be given its broadest permissible meaning.

Consider *Yates v. United States*,[274] a recent instant classic of statutory interpretation. In *Yates*, the Supreme Court examined whether a fish was a "tangible object" whose destruction was prohibited by the Sarbanes–Oxley Act's prohibition on the destruction of evidence intended to "impede, obstruct, or influence" a federal investigation.[275] The defendant in *Yates*, a commercial fisherman, had been caught offshore by the Coast Guard with several dozen slightly undersized deep-sea fish in violation of federal fisheries law; Yates dumped the fish before returning to harbor so as to avoid being assessed a penalty back on shore.[276] Yates was subsequently convicted of knowingly impeding a federal investigation by destroying the fish, in violation of Sarbanes–Oxley's prohibition on the destruction of tangible objects.

At trial and on appeal, the defendant argued that the tangible object destruction prohibition should be read in light of its passage as part of the Sarbanes–Oxley Act.[277] Sarbanes–Oxley was enacted in the wake of the Enron Corporation's corporate accounting scandal, which included systematic accounting fraud as well as the destruction of numerous incriminating financial documents related to the scandal. In *Yates*, the defendant asserted that the retention of "tangible object[s]" subject to the statute were *document*-related objects such as computer hard drives and logbooks that were reasonably related to evidence of financial fraud, not every conceivable tangible object.[278]

In *Yates*, a majority of the Court sided with the defendant, reversing his conviction.[279] Justice Ginsburg, writing for the plurality, acknowledged that while the term "tangible object" as a matter of pure signification could encompass an object such as a fish, the *legal* meaning of the term was cabined both by the linguistic context of the words surrounding it,[280] as well as the legislative context, given its passage as part of Sarbanes–Oxley.[281] Writing for four dissenting Justices, Jus-

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274 135 S. Ct. 1074 (2015).

275 *Id.* at 1078; Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, § 802(a), 116 Stat. 745, 800 (codified as amended at 18 U.S.C. § 1519 (2012)).

276 *Yates*, 135 S. Ct. at 1079–80.

277 *Id.* at 1079–80.

278 *Id.* at 1080.

279 *Id.* at 1088–89.

280 Applying the *ejusdem generis* and *noscitur et sociis* canons, the plurality noted that the words immediately surrounding "tangible object" ("falsifies, or makes a false entry in any record [or] document") narrowed its meaning. *Id.* at 1085–87.

281 *Id.* at 1081.

tice Elena Kagan countered that the term should mean the same thing in Sarbanes–Oxley "as it means in everyday language—any object capable of being touched."[282] Although not articulated as such, the core of the disagreement turned on the principal audience of the statute: was the tangible-object destruction prohibition best understood narrowly, targeting auditors and corporate officers involved in document management and retention, or understood broadly, empowering law enforcement officers to target every member of society and every tangible object?

The plurality chose the narrower interpretation, in part on the basis of the more specific audience at which the statute was directed. Sarbanes–Oxley was enacted to address financial crimes, and so the audience that the statute seemed most clearly intended to reach were corporate officers and auditors,[283] not commercial fishermen. Moreover, the plurality noted that contextual clues throughout the statute supported this narrower reading. The section containing the prohibition was entitled, "Criminal Penalties for *Altering Documents*,"[284] and the prohibition's heading indicated an audience of corporate officers and auditors involved in criminal fraud by means of the "[d]estruction, alteration, or falsification *of records*."[285] Moreover, although not mentioned by the plurality, but in support of its conclusion, the tangible object provision was part of a subsidiary act incorporated into Sarbanes–Oxley and separately subtitled the "Corporate and Criminal Fraud Accountability Act," further suggesting that the tangible object provision was aimed at *corporate* fraud.[286]

Yates also reflects how contemporary lawyers' focus on the U.S. Code can sometimes obscure evidence of distinctive statutory audiences specific to the statute in question. Today, once a federal statute is enacted into law, the Office of the Law Revision Counsel transmutes Congress's enacted statute at large into specific and segmented provisions of the U.S. Code;

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282 *Id.* at 1091 (Kagan, J., dissenting).

283 *See* Howard Rockness & Joanne Rockness, *Legislated Ethics: From Enron to Sarbanes–Oxley, the Impact on Corporate America*, 57 J. BUS. ETHICS 31, 42, 45 (2005) (noting the primary focus of Sarbanes–Oxley was "regulating corporate conduct in an attempt to promote ethical behavior and prevent the fraudulent financial reporting" and that "[m]uch of the legislation is aimed directly at senior management").

284 *Yates*, 135 S. Ct. at 1083; *see* Sarbanes–Oxley Act of 2002, Pub. L. No. 107–204, § 802, 116 Stat. 745, 800 (codified as amended at 18 U.S.C. §§ 1519–20 (2012)) (emphasis added).

285 *Id.* § 802(a) (emphasis added).

286 *Id.*

often left out altogether are important portions of the bill, such as the legislative findings and purposes—which may help to clarify the principal audience(s) the statute seeks to address.[287] As Sarbanes–Oxley was subsumed into the U.S. Code,[288] both the heading and the short title noted above disappeared, along with the indication that the tangible-evidence-destruction prohibition was contained within Sarbanes–Oxley, a statute seeking to remedy *white-collar* criminal fraud.

TABLE 7: PRINCIPAL AUDIENCE OF SARBANES–OXLEY ACT OF 2002

TITLE VIII—CORPORATE AND CRIMINAL FRAUD ACCOUNTABILITY

SEC. 801. SHORT TITLE.

This title may be cited as the "Corporate and Criminal Fraud Accountability Act of 2002".

SEC. 802. CRIMINAL PENALTIES FOR ALTERING DOCUMENTS.

(a) IN GENERAL.—Chapter 73 of title 18, United States Code, is amended by adding at the end the following:

"§ 1519. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy

"Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

While most law students, lawyers, and even *judges* generally focus on the U.S. Code rather than the statutory text as enacted, when members of Congress vote to enact a statute, they vote on the session law, which contains the entire statutory text (including headings, titles, and recitations of legislative findings and purpose).[289] In the case of *Yates*, the tangible evidence provision was not enacted simply to enhance neigh-

287 *See* Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. CHI. L. REV. 669, 673 (2019) [hereinafter Shobe, *Enacted Legislative Findings*] (noting that "it is common practice for a bill to be stripped of its findings and purposes before the rest of the statute is placed in the main text of the US Code" and that "findings and purposes are sometimes left out of the Code altogether").

288 *See* Destruction, Alteration, or Falsification of Records in Federal Investigations and Bankruptcy, 18 U.S.C. § 1519 (2012).

289 *See* Shobe, *Enacted Legislative Findings*, *supra* note 287, at 691 (explaining that once a bill is enacted, it is codified in the U.S. Code).

boring sections of the U.S. Code, each of which criminalizes particular acts tending to thwart federal investigations of all kinds.[290] Thus, while the dissent correctly noted that the tangible-object destruction prohibition was among several other federal evidence tampering prohibitions, there is good reason to think that the statute's principal audience can be better identified from how the entire relevant provision in question was enacted—in a bill directed chiefly at reducing corporate fraud by elevating the regulatory and compliance requirements for corporate officers and auditors, not in a statute seeking to enhance any and all kinds of law enforcement investigations.

Importantly, the *statute's operation* can also help to identify the principal audience whose behavior it seeks to regulate. Sarbanes–Oxley requires regulated audiences to undergo compliance training,[291] and an entire cottage industry has emerged to support corporate officers' ongoing compliance obligations.[292] The Act also established a new agency, the Public Company Accounting Oversight Board (PCAOB), which "enlist[s] auditors to enforce existing laws against theft and fraud by corporate officers."[293] The PCAOB oversees corporate compliance with Sarbanes–Oxley, issuing disciplinary or remedial sanctions for parties who fail to conform to relevant storage and disclosure requirements as a prophylactic measure to ward off more significant financial fraud.[294]

The PCAOB's oversight in ensuring compliance with Sarbanes–Oxley serves in part to furnish notice to the statute's principal audiences as to the statute's relevant document retention requirements.[295] In this context, the tangible-document destruction prohibition gives the compliance requirements of Sarbanes–Oxley teeth by criminalizing the act that is much easier to prove—destruction of documents—than

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290 *See* Tobias A. Dorsey, *Some Reflections on Not Reading the Statutes*, 10 GREEN BAG 2D 283, 283–84 (2007).

291 Rockness & Rockness, *supra* note 283, at 45.

292 *See, e.g.*, SARBANES OXLEY 101, https://www.sarbanes-oxley-101.com/ [https://perma.cc/Y9FN-2MR6] (last updated Nov. 9, 2019) (providing links to Sarbanes–Oxley organizational compliance checklists, certifications and audit materials, and downloads for compliance software).

293 John C. Coates IV, *The Goals and Promise of the Sarbanes–Oxley Act*, 21 J. ECON. PERSP. 91, 91 (2007).

294 *See* Larry Catá Backer, *Surveillance and Control: Privatizing and Nationalizing Corporate Monitoring After Sarbanes-Oxley*, 2004 MICH. ST. L. REV. 327, 397–402.

295 *See* Ashoke S. Talukdar, *The Voice of Reason: The Corporate Compliance Officer and the Regulated Corporate Environment*, 6 U.C. DAVIS BUS. L.J. 3 (2005) (noting that "the importance of education and training programs in compliance awareness is often reflected in the laws itself").

the predicate act the statute seeks to prevent—fraudulent financial reporting. From the standpoint of the rule-of-law norm of statutory notice, Sarbanes–Oxley's compliance provisions ensure that the principal audiences (corporate officers and auditors) are aware of its document retention requirements, unlike fishermen and other members of the general public who are far less likely to be put on notice. Even the Department of Justice itself recognized shortly after the statute was enacted that the statute sought "new tools to hold *white collar criminals* accountable."[296]

B. (Mis)identifying the Relevant Audience

Many other statutes, of course, have multiple principal audiences, and interpretive tensions are especially likely to arise where statutes address multiple and distinct statutory audiences *in the same provision*. One such example is the Endangered Species Act (ESA) of 1973. Section 9 of the Act makes it an offense for "any person subject to the jurisdiction of the United States" to "take any [endangered or threatened] species within the United States or the territorial sea of the United States."[297] One first-order audience for this provision of the ESA is quite literally *any person*. The penalties provision of the ESA sets out a scheme of escalating civil and criminal penalties from $500 to $50,000 depending on the nature of the violation of the statutory provision (or any further regulation issued under it), and up to a year's imprisonment.[298]

Yet the statutory provision addresses another first-order audience: the several federal agencies delegated lawmaking authority by Congress to promulgate regulations the prohibition on, among other things, the taking of endangered species. The ESA expressly delegates to the Secretary of the Department of the Interior the authority to promulgate regulations pertaining to threatened species, and makes violations of those regulations equally subject to civil and criminal penalties.[299] Covered regulations include those designating endangered and threatened species and the habitats critical to their survival.[300]

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296 Memorandum on the Sarbanes-Oxley Act of 2002 from the Attorney General to the Director, FBI, Director, Exec. Off. of U.S. Attorneys, all U.S. Attorneys, and all Special-Agents-in-Charge (Aug. 1, 2002), https://www.justice.gov/archives/ag/attorney-general-august-1-2002-memorandum-sarbanes-oxley-act-2002 [https://perma.cc/WNA9-GUYA] (emphasis added).

297 16 U.S.C. § 1538(a)(1)(B) (2018).

298 *Id.* § 1540(a)(1), (b)(1).

299 *Id.* § 1538(a)(1)(G).

300 *Id.* § 1533(a)(1)–(3).

The statute therefore includes both a transitive criminal prohibition directed at "any person" as well as an intransitive instruction to the agency to promulgate regulations elaborating on the extent of those prohibitions.

On the basis of its delegated power to promulgate regulation related to takings, the agency defined by regulation that a taking could include acts that kill or injure wildlife, including "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."[301] By concluding that habitat degradation was a chief way to harm endangered species, the agency essentially prohibited certain *incidental* takings of land which is the essential habitat for survival of endangered species.

Complicating interpretation of the statute is the fact that it was subsequently amended in 1982 to establish a permitting scheme that would exempt covered parties from the agency's regulatorily-defined incidental takings definition of the taking prohibition, provided such parties put in place an agency-approved conservation plan that mitigates potential harm resulting from the transformation of lands containing critical habitat to covered species.[302] The amended version of the statute was thus not only directed at the public at large, but also at a more specific subset of the public: landowners seeking to obtain affirmative permission from the agency to transform property designated by agency regulation—not by the statute itself—as critical habitat.

301 *See* 50 C.F.R. § 17.3 (1994).
302 16 U.S.C. § 1539(a)(2)(A) (2019).

TABLE 8: PRINCIPAL AUDIENCES OF THE ENDANGERED SPECIES ACT (POST-1982 AMENDMENTS)[303]

Audience	*Relevant Provision*	*Relevant Statutory Text*
(1) Any person	Sec. 9(a)(1)(B), codified at 16 U.S.C § 1538(a)(1)(B) ("Prohibited Acts")	"[I]t is unlawful for *any person* subject to the jurisdiction of the United States to . . . *take any [endangered] species* within the United States."
	Sec. 11(b)(1), codified at 16 U.S.C. § 1540 (b)(1)	"*Any person* who knowingly violates any provision of this chapter, of any permit or certificate issued hereunder, or of any regulation issued in order to implement [relevant] subsection[s] . . . shall, upon conviction, be fined not more than $50,000 or imprisoned for not more than one year, or both."
	50 C.F.R. § 17.3 (1994) ("Definitions")	"*Harm* in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such act may include *significant habitat modification or degradation* where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."
(2) The Secretary of the Department of the Interior	Sec. 10(a)(B), codified at 16 U.S.C. § 1539(a)(1) ("Exceptions")	"*The Secretary* may permit, under such terms and conditions as he shall prescribe, . . . any taking otherwise prohibited by section 9(a)(1)(B) if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."
	Sec. 10(B)(2)(A), codified at 16 U.S.C. § 1539(a)(2)(A) ("Permits")	"No permit may be issued . . . unless *the applicant* therefor submit to the Secretary a conservation plan that specifies . . . the impact which will likely result from such a taking [and] what steps the applicant will take to minimize or mitigate such impacts . . ."

These excerpts of the ESA nicely capture how a single statutory provision can contain both transitive and intransitive components that may lead to interpretive confusion, because such a provision addresses multiple kinds of statutory audiences at once, and anticipates different kinds of audience engagement with the very same statutory language. This tension was a central, though unappreciated, feature of the well-known case of *Babbitt v. Sweet Home Chapter of Communities for a*

303 Pub. L. No. 97-304, 96 Stat. 1411 (1982).

Great Oregon.[304] *Sweet Home* concerned the aforementioned regulation promulgated under the ESA that defined significant habitat modification or degradation that killed or injured endangered species, including on private land, as a violation of the takings prohibition under the ESA.[305]

The regulation sparked controversy because the statute itself lacked any direct prohibition on habitat modification or degradation, and so to justify the agency's authority to regulate private lands, the Secretary relied on a logical syllogism that seemed to reach beyond the mere ordinary meaning of the term "take."[306] Because the Act elsewhere defines "take" to "mean[ ] to harass, *harm*, pursue, hunt, shoot, wound, kill, trap, capture, or collect,"[307] the agency promulgated the regulation in furtherance of the subdefinition of take as prohibiting harm to endangered species. On this basis, the agency determined that substantial habitat modification or degradation that significantly impaired breeding, feeding, or sheltering any of the covered species caused them significant *harm*, and therefore constituted a "tak[ing]."[308]

Plaintiffs in *Sweet Home* were concerned that the regulation could allow the taking prohibition to apply to the development or alteration of private property containing critical habitat for several threatened and endangered species of birds. The legal consequence was that landowners would be prevented from cutting down forest land on their own private property, unless they either risked civil and/or criminal penalties for violating the harm prohibition as defined by the regulation, or else sought and received a permit exempting them from the incidental takings prohibition.[309] Landowners, logging companies, and "families dependent on the forest products industries" challenged the rule.[310] The landowners contended that the agency lacked the authority to promulgate it, for logging privately owned forest land could not constitute a "taking" of endangered species where the trees in question did not, at the time of the logging activity, contain any such species.[311]

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304 515 U.S. 687 (1995).

305 *See* 50 C.F.R. § 17.3 (2018) ("Harm in the definition of 'take' in the Act . . . may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.").

306 *Sweet Home*, 515 U.S. at 690.

307 *Id.* at 691 (quoting 16 U.S.C. §§ 1538(a)(1), 1532(19)) (emphasis added).

308 *Id.* (quoting 50 C.F.R. § 17.3 (1994)).

309 *Id.* at 692.

310 *Id.*

311 *Id.* at 696.

1. *Judicial Disagreement About the Relevant Audience*

What is striking about the written opinions in *Sweet Home* is just how differently the majority and dissent seem to conceive of the primary audiences of the ESA, a difference apparent from the opening sentences of each opinion. Writing for the majority, Justice John Paul Stevens commenced his discussion by focusing on the Department and the Secretary: "[t]his case presents the question [of] whether the Secretary exceeded his authority under the Act by promulgating that regulation."[312] Justice Stevens's opinion repeatedly invoked the framework of *Chevron* deference: because Congress did not unambiguously manifest its intent in legislating the term "take," the majority determined that at *Chevron* Step Two, the Court "owe[d] some degree of deference to the Secretary's reasonable interpretation" and upheld the regulation.[313] For Justice Stevens, the primary statutory audience was the Secretary, and so the relevant question was whether Congress's directions to the agency were sufficiently ambiguous and, if so, whether the agency statutory audience had reasonably interpreted the statutory instruction.[314]

It seems rather clear that not all Justices were focused on the same audience Justice Stevens was. Indeed, Justice Scalia, writing on behalf of three dissenting Justices, seemed to emphasize his disagreement about the relevant statutory audience in the opening paragraph of his dissent. Justice Scalia's concern was the "financial ruin" the regulation could have on "the simplest farmer who finds his land conscripted to national zoological use."[315] Indeed, Justice Scalia's dissent emphasized in its second paragraph the very broad audience of the ESA's take prohibition: "*any person* subject to the jurisdiction of the United States."[316] He also observed that the agency's definition of "take" could sweep up a vast range of daily practices for those involved: "farming, ranching, roadbuilding, construction and logging" could all constitute prohibited conduct under the regulation, "no matter how remote the chain of causation and no matter how difficult to foresee (or to disprove) the 'injury'."[317]

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312 *Id.* at 690.

313 *Id.* at 703.

314 *Id.* at 691–92 (quoting 16 U.S.C. § 1536(a)(2)).

315 *Id.* at 714 (Scalia, J., dissenting).

316 *Id.* at 715 (emphasis added).

317 *Id.* at 721 (Scalia, J., dissenting) (quoting 16 U.S.C. § 1538(a)(1)).

Framed in this way, Justice Scalia's dissent is most powerful in its emphasis on how difficult it might be for members of the public to understand or foresee how their daily practices could be implicated by the ESA. This approach calls to the fore considerations of notice and intent usually more relevant for the interpretation of criminal statutes directed at laypeople than complex environmental statutes directed at administrative agencies. Herein lies the tension: the ESA provision in question functioned as *both*—a transitive direct criminal prohibition applicable to members of the public, *and* an intransitive and broad delegation of rulemaking to the agency. (Justice Stevens acknowledged as much in a buried, but important footnote on the rule of lenity's potential application to administrative *regulations* that interpret statutes implicating criminal prohibitions.[318])

Given the seeming disagreement between the majority and dissent about which audience to focus on, it is not surprising that each opinion also emphasized different methods of statutory interpretation, each more appropriate for the audience they seemed to have in mind. Justice Scalia appeared to read the statute through the lens of a "simple farmer" layperson, and the interpretive approach he emphasized largely seemed congruent with such an audience. While Justice Scalia briefly engaged with the legislative history (if only in an effort to refute the majority's use of it, and with his usual disclaimers),[319] his opinion relied much more heavily on semantic and syntactic canons like *noscitur a sociis*[320] and the ordinary meaning and dictionary definitions of "take"[321] and "harm."[322] Emphasizing the importance of attributing the ordinary usage of the term "*take*"—especially significant where the statutory audience is laypeople—Justice Scalia criticized the majority's "tempting fallacy" of concluding that 'take' means 'harm,' which means 'impair breeding' such "that *once defined*, 'take' loses any significance, and it is only the [cross-]definition that matters."[323]

By contrast, Justice Stevens largely drew on methods of interpretation especially appropriate for an administrative agency audience. His majority opinion did not *once* consult a

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318 *Id.* at 691 n.18 (majority opinion).

319 *Id.* at 726 (Scalia, J., dissenting) ("Even if legislative history were a legitimate and reliable tool of interpretation (which I shall assume in order to rebut the Court's claim) . . . .").

320 *Id.* at 720–21.

321 *Id.* at 717.

322 *Id.* at 719.

323 *Id.* at 718.

dictionary definition for the ordinary usage of the term "take": it was enough that Congress provided a specific statutory cross-definition of the term.[324] Because the ESA directs the Secretary to enforce the statute with the force of law, Justice Stevens concluded that the term "take" was sufficiently ambiguous at *Chevron* Step One. At Step Two, Justice Stevens concluded that deference was warranted to the agency after consulting the legislative history of the ESA and employing the "whole text" and "presumption against ineffectiveness" canons, approaches which are much more appropriate for administrative audiences seeking tools to implement a relatively open-ended and intransitive legislative instruction. Thus, much as the agency did, Justice Stevens focused on the legislative intent and purpose of the ESA, derived from both a careful reading of other provisions in the statutory scheme[325] and an extensive discussion of the legislative history of the ESA and its subsequent amendments,[326] rather than on the ordinary usage of the terms "take" and "harm."

2. *Identifying the Relevant Audience*

Justice Stevens's discussion of the legislative history is critical to understanding the audience dynamics at work in *Sweet Home*. As Victoria Nourse has explained, the interpretive question at issue was much more clearcut after the statute was amended in 1982, for fairly strong evidence suggested that Congress had effectively "hardwired" the Secretary's definition of "harm" by way of its 1982 amendments.[327] Indeed, although Justice Stevens did not focus on the legislative history of those amendments to the ESA, it did not go unnoticed in his opinion that these amendments indicated congressional support for the agency's definition of harm.[328]

Nevertheless, what *was* overlooked was that the 1982 amendments to the statute also introduced *a new and distinct audience*: applicants seeking permits to be exempted from the take prohibition which, by 1982, clearly included habitat degradation, if "such taking is incidental to, and not the purpose

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324 *Id.* at 704 n.18 (majority opinion).

325 *Id.* at 702–04.

326 *Id.* at 704–08.

327 Victoria F. Nourse, *Decision Theory and* Babbitt v. Sweet Home*: Skepticism About Norms, Discretion, and the Virtues of Purposivism*, 57 ST. LOUIS U. L.J. 909, 917 (2013).

328 *Sweet Home*, 515 U.S. at 704 ("[The Committee Reports] make clear that Congress intended 'take' to apply broadly to cover indirect as well as purposeful actions.").

of, the carrying out of an otherwise lawful activity."[329] Congress amended the ESA in recognition of the fact that the Secretary's broad interpretation of harm had resulted in a substantial number of everyday activities that could inadvertently result in an incidental "taking" by harming endangered species through the transformation and destruction of critical breeding and migratory habitats.[330] Potential applications of the broad regulatory interpretation had "provoked great concern among property owners, developers, and state and local government officials" prior to the 1982 amendment.[331] The statute was thus directed not only at activities of the public at large, but also at landowners whose property development would constitute incidental takings prohibited under the statute absent permit exemptions granted by the Secretary.

The plaintiffs in *Sweet Home* were thus *not* the simple farmer depicted by Justice Scalia, but landowners, logging companies, and timber workers who had been aware of the regulation for nearly two decades.[332] Had the plaintiffs actually sought a permit and been denied one, then on an as-applied basis, concerns might have arisen about how the agency had construed the reach of the statutory provision in those particular circumstances. But that was not the case in *Sweet Home*, which raised a facial challenge to the regulatory definition altogether.[333] As Justice Sandra Day O'Connor noted in her concurrence, the agency's interpretation of the regulation as requiring that an incidental taking result in actual and foreseeable harm all but ensured that the ordinary farmer's everyday activities would not be covered by the regulation.[334]

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329 16 U.S.C. § 1539(a)(1)(B) (2012).

330 Doug Williams, *A Harder "Hard Case,"* 57 ST. LOUIS U. L.J. 931, 951 (2013).

331 *Id.* at 953.

332 *Sweet Home*, 515 U.S. at 704 n.18.

333 The procedural history on this question is a bit unclear, as the agency did not raise the issue of the facial challenge prior to its petition for certiorari before the Supreme Court. Below, the district court summarized only that the Fish and Wildlife Service had "placed restrictions on timber harvesting." Sweet Home Chapter of Cmtys. for a Great Or. v. Lujan, 806 F. Supp. 279, 282 (D.D.C. 1992), *aff'd sub. nom.* Sweet Home Chapter of Cmtys. for a Great Or. v. Babbitt, 1 F.3d 1 (D.C. Cir. 1993), *aff'd in part, rev'd in part*, 17 F.3d 1463 (D.C. Cir. 1994), *rev'd*, Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995). However, at no stage in the litigation did the plaintiffs contend either that they had been threatened with a civil or criminal penalty for logging conduct or that they had submitted a conservation plan and sought a permit from the harm prohibition and had been denied one by the agency.

334 *Sweet Home*, 515 U.S. at 708–09, 713 (O'Connor, J., concurring).

Thus, the proper question in *Sweet Home* was not whether the statutory definition had failed to give unsuspecting farmers notice; as of 1995, the year the case was decided, there had been few reported efforts to pursue criminal or civil penalties for violations of the rule in question.[335] Rather, the pertinent question was whether the agency's refusal to allow a landowner permission to alter or transform his land was so categorically beyond the reach of the statute as to render the agency's interpretation of harm altogether unreasonable. Viewed in this light, Justice Stevens's invocation of *Chevron* deference to the agency becomes more justifiable, and in that context, Justice Scalia's concern about effective statutory notice for ordinary farmer audiences seems misplaced, however legitimate that concern may be for other statutory applications, including other potential applications of the ESA. (As I will discuss in subpart IV.B, such interpretive confusion may be avoided by more carefully separating transitive and intransitive statutory instructions.)

C. Misstating the Audience

How the concept of notice operates in statutory interpretation cases also seems to depend in part on whom a court perceives to be the relevant audience of a given statute. This may sometimes explain why courts emphasize one interpretive method in a statute directed at one audience, only to emphasize another source or method when interpreting an almost identical statute directed at a different audience. If a judicial interpreter takes audience considerations seriously, a methodological departure from one statute to another may very well be acceptable; indeed, this approach can enhance rule-of-law norms by tailoring interpretive methods appropriate to the statutory audience.

However, *Arlington Central School District Board of Education v. Murphy*[336] demonstrates the care courts must take when considering questions of statutory audience. In *Murphy*,[337] the Court was asked to determine whether the IDEA's attorney's fee-shifting provision included awards for expert witness fees,[338] a question similar to the fee-shifting question presented in *West Virginia University Hospitals, Inc. v.*

335 *See* Williams, *supra* note 330, at 968.
336 548 U.S. 291, 297 (2006).
337 *Id.* at 294–95.
338 20 U.S.C. § 1415(i)(3)(B) (2012).

Casey.[339] *Murphy* exemplifies an instance in which at least some members of the Court explicitly addressed the interpretive concerns faced by a first-order statutory audience. Yet the majority almost surely misconstrued the nature of that audience, and therefore the basis on which to determine whether the statutory text provided adequate notice. (*See* Table 1, *supra* subpart II.A on page 163, identifying the distinct audiences of the IDEA.) *Murphy* thus demonstrates why the choice of which first-order audience to prioritize can often be dispositive to the outcome of the decision, and why statutory interpretation theory must take questions of statutory audience more seriously.

Statutory audience seems to help explain the contrasting outcomes of *Casey* and *Murphy*. In *Casey*, although Justice Scalia looked primarily at "[t]he record of statutory usage" of fee-shifting provisions across multiple sections of the U.S. Code, in dicta he also pointed to the contrasting evidence in the legislative histories of § 1988 and the IDEA to conclude that while Congress expressly intended for the IDEA to include expert witness fees, it did not state as much with respect to § 1988.[340] Justice Scalia highlighted a joint explanatory statement of the Committee of the House and Senate Conference indicating that "[t]he conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses."[341] Legislative history rarely so directly answers an interpretive question, and Justice Scalia reasoned that this statement supported the Court's conclusion that § 1988's fee-shifting provision *excluded* expert witness fees because "[t]he specification [in the legislative history of the IDEA] would have been quite unnecessary if the ordinary meaning of the term included those elements. The statement is an apparent effort to *depart* from ordinary meaning and to define a term of art" as used in § 1988.[342]

Given Justice Scalia's dicta in *Casey*, a lower court might reasonably conclude that the IDEA's fee-shifting provision included expert witness fees, and several lower courts did, including in *Murphy*.[343] Yet when *Murphy* came before the Court, a majority diminished the importance of the legislative his-

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339 499 U.S. 83, 84 (1991). For further discussion on *Casey*, see *supra* subpart II.E.

340 *Casey*, 499 U.S. at 88–92.

341 *Id.* at 91–92 n.5 (quoting H.R. REP. NO. 99–687, at 5 (1986) (Conf. Rep.)).

342 *Id.*

343 *See* Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 402 F.3d 332, 336–37 (2d Cir. 2005), *rev'd*, 548 U.S. 291 (2006) (discussing dicta in *Casey*).

tory,[344] largely on the basis of the statute's audience. Notwithstanding his own dicta in *Casey*, moreover, Justice Scalia joined the majority in holding that the IDEA did *not* permit expert witness fees to be included in shifted attorneys' fees as part of costs.[345] In a dissent joined by two others, Justice Breyer largely emphasized the same legislative history Justice Scalia had cited in *Casey*, recognizing that "[m]embers of both Houses of Congress voted to adopt *both* the statutory text before us and the Conference Report that made clear that the statute's words include the expert costs here in question."[346] In this sense, Justice Breyer framed one relevant audience as the members of Congress who seemed to be assured they were voting on amendments that would include expert witness fees as part of costs.

First-order audience may partially explain the departure, but it also reveals the importance of being attentive about which first-order statutory audience to prioritize, as well as the interpretive implications that might be drawn from this choice of audience. Writing for the majority, Justice Samuel Alito posited that the IDEA's primary statutory audience was state education officials who had to decide whether to accept federal IDEA grants.[347] Because Congress had enacted the IDEA under its Spending Clause power,[348] the majority framed the question not as one of legislative purpose, but as one of clear notice to the relevant statutory audience:

> [W]e must view the IDEA *from the perspective of a state official* who is engaged in the process of deciding whether the State should accept IDEA funds and the obligations that go with those funds. We must ask whether such a state official would clearly understand that one of the obligations of the Act is the obligation to compensate prevailing parents for expert fees.[349]

Interpreting the statute from the standpoint of the state official, the majority concluded that the legislative history (however

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344 Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 304 (2006).

345 *Id.* at 293–94.

346 *Id.* at 313 (Breyer, J. dissenting) (emphasis added).

347 *Id.* at 296 (majority opinion).

348 The majority noted that the Court had previously imposed a "clear notice" rule for statutes passed under Congress's Spending Clause power when the provision in question attaches conditions on the states in exchange for accepting federal funds. *Id.* at 295–96 (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

349 *Id.* at 296 (emphasis added).

clear itself) was insufficient "to provide the clear notice required under the Spending Clause."[350]

Statutory audience, then, would seem to help explain the disjuncture between *Casey* and *Murphy*. In *Casey*, the Court seemed to focus on how judges routinely encounter attorney's fees provisions, and it drew on the whole code canon as well as legislative history to prioritize consistency in meaning across statutes. In *Murphy*, by contrast, the Court dismissed that same legislative history suggesting clear congressional intent in favor of a clear notice rule for the IDEA's primary audience of state and local officials.

Murphy also demonstrates the importance of taking care when interrogating questions of notice and statutory audience. The majority justified its imposition of a textual "clear notice" requirement because Congress enacted the IDEA under its Spending Clause power. Yet as Justice Ginsburg recognized in her concurrence, the IDEA was *also* enacted pursuant to Section 5 of the Fourteenth Amendment, for which the Court does *not* presume such a "clear notice" rule of interpretation.[351] The Spending Clause invocation alone, then, could not justify the departure in interpretive method from the same legislative history relied upon in *Casey*.

Further, Justice Ginsburg emphasized that the concept of notice, regardless of the enumerated power Congress used to pass legislation, must be carefully considered. She argued that the Court's judicially imposed "'clear notice' requirement should not be unmoored from its context."[352] Unlike, for example, a past case that considered "an unexpected condition for compliance—a new [programmatic] obligation for participating States," the Justice noted that "[t]he controversy here is lower key."[353] It concerned "not the educational programs IDEA directs school districts to provide, but 'the remedies available against a noncomplying [district]'"[354]—in other words, a subsidiary issue is unlikely to be dispositive in deciding whether to accept hundreds of millions of dollars a year in federal funding.[355]

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350 *Id.* at 303.

351 *Id.* at 305 (Ginsburg, J., concurring in part and concurring in the judgment).

352 *Id.*

353 *Id.* (alteration in original).

354 *Id.* (alteration in original) (citation omitted).

355 KYRIE E. DRAGOO, CONG. RESEARCH SERV., R44624, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) FUNDING: A PRIMER 17–18 tbl.2 (2018).

A further complication is that it is far from clear that the majority correctly identified the first-order statutory audience likely to engage directly with the IDEA's statutory requirements when deciding whether to accept federal funds. The majority's posited state education official was rather underspecified. For a statute as wide-reaching as the IDEA, audiences that engage *generally* with the IDEA could vary from state education agencies that regularly interact directly with the U.S. Department of Education over IDEA compliance, to local school boards, to individual school officials who sometimes apply for personnel grants themselves. The majority did not take care to specify which of these audiences it had in mind, nor provide any empirical basis for what that audience might have known, or be able to learn, about the IDEA's requirements.

In actuality, the majority perhaps underestimated the knowledge and sophistication of the most plausible audience: state officials who engage directly with the Department of Education in understanding the IDEA's requirements and deciding whether to accept conditional federal funds. Local educators are *not* the state officials directly involved in the states' decision to consent to IDEA requirements; rather, since at least 1970, the IDEA has mandated that states establish advisory councils that advise both local officials and state education agencies as to requirements under the IDEA.[356] Moreover, the Department of Education has long allocated recurring annual IDEA formula grants to *every* state in order to support special education and related services,[357] and these grants are awarded on the basis of mechanical calculations about each state's relative population of children with disabilities.[358] Acceptance of these annual awards is conditional on IDEA compliance, which means every state had continually consented every year to the IDEA's requirements well before the dispute that arose in *Murphy*. Given all this, the majority's posited concern about audience notice seemed to touch on only a small fragment of the complex compliance notice issues at stake.[359]

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356 Pub. L. No. 91-230, § 131(a)(1), 84 Stat. 121, 135 (1970) (repealed 1978); *see also* 20 U.S.C. § 1441 (2012).

357 U.S. Dep't of Ed., *State Formula Grants*, IDEA, https://sites.ed.gov/idea/state-formula-grants/ [https://perma.cc/HB4B-ZB5Q] (last visited June 4, 2019).

358 *See* 20 U.S.C. § 1411(d)(A) (2012).

359 As the respondents in *Murphy* emphasized, the IDEA fee-shifting provision had been the law for twenty years, and *no* prior state litigant had made the Spending Clause argument about defective notice: "courts overwhelmingly interpreted [the provision] as imposing an obligation on school boards to pay parents

Moreover, recall that state officials were not the only important audience of the statute. One might equally wonder whether *the parents* in *Murphy* had reason to believe they would be reimbursed for the nearly $30,000 they spent to obtain the expert assessment necessary to vindicate their child's special education needs. After all, the IDEA guarantees an appropriate education *at no cost to the parents*, something Justice Breyer emphasized in his dissent.[360] If so, then the Murphys might reasonably have felt the IDEA gave clear notice that they would not be responsible for any fees associated with vindicating their child's needs. An explicit debate about the relevant statutory audience to prioritize, how that audience was likely to encounter the statute's requirements, and the circumstances under which a clear notice presumption should trump clarifying legislative history, would have helped to explain the conflicting interpretive approaches in *Murphy* and *Casey*.[361]

In the absence of such analysis, the majority's disinclination to credit the legislative history is perhaps better justified with respect to the relevant audience of the provision in question: judges.

TABLE 9: PRINCIPAL AUDIENCE OF IDEA FEE-SHIFTING PROVISION

Audience	*Relevant Provision*	*Relevant Statutory Text*
Federal Judges (as *first-order* audience)	20 U.S.C. § 1415(h)(i)(3)(B)	"*[T]he court, in its discretion*, may award reasonable attorneys' fees as part of the costs . . . to a prevailing party who is the parent of a child with a disability."

As discussed above in subpart II.E, requiring consistency in the meaning of statutory terms seems to be especially important for provisions directed at judicial audiences. This would appear to help clarify the standpoint from which Justice Ginsburg approached the statute in her concurrence. Citing the default rule for interpreting attorneys' fee-shifting provisions,

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their costs." Brief of Respondents at 48–49, Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006) (No. 05-18), 2006 WL 838890, at *48–49.

360 *Murphy*, 548 U.S. at 313 (Breyer, J., dissenting) (noting that the IDEA guarantees appropriate special education "at *no cost* to parents").

361 For example, administrative law scholar Peter Strauss has suggested the probable audience of the IDEA was the "affected public—particularly those well-advised by lawyers" who would have known about the legislative history and the IDEA's inclusion of expert witness fees in shifting the fees and costs of litigation. Peter Strauss, *Judging Statutes*, 65 J. LEGAL EDUC. 443, 447–48 (2015) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

Justice Ginsburg observed that whatever Congress's intended meaning, "Congress did not compose [the fee-shifting provision's] text, as it did the texts of other statutes too numerous and varied to ignore, to alter the common import of the terms 'attorneys' fees' and 'costs' in the context of expense-allocation legislation."[362] On this basis, Justice Ginsburg was disinclined to "rewrite" the statutory text actually passed by Congress, and she concluded that the ball was "properly left in Congress' court to provide" the appropriately articulated provision.[363] Viewing fee-shifting statutes as being addressed to *judges*, rather than to the audiences that those provisions seek to benefit or regulate, may best justify why courts have repeatedly applied methods of interpretation uncommonly relied upon in most other interpretive disputes.

IV
CONCLUSION

In the preceding sections, I have sought to show why considerations of statutory audience are essential for any comprehensive theory of statutory interpretation. Statutes seek to alter the behavior of very different audiences in quite distinctive ways. Judicial rules for interpretation will necessarily affect how various statutory audiences are expected to conform their behavior to statutes, yet not all methods and sources of interpretation may be equally suitable for all statutes and all statutory audiences. Failure to recognize this dynamic may risk undermining not only judicially developed substantive canons that are themselves at least partially audience-motivated—such as the rule of lenity, the clear notice rule, and administrative deference—but also rule-of-law values like notice, judicial deference, and consent. Being attentive to the distinctive conditions and considerations for different statutory audience interpreters clarifies the normative and jurisprudential stakes of statutory interpretation. Of course, divergent views about statutory audience do not fully explain the disagreements in the canonical statutory interpretation cases I have revisited. Nevertheless, raising questions about statutory audience and nonjudicial interpretation does shed light on core tensions in theories of statutory interpretation methodology.

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362 *Murphy*, 548 U.S. at 306–07 (Ginsburg, J., concurring in part and concurring in the judgment).

363 *Id.* at 307.

In this section, I consider several lessons that the examination of statutory audience may yield for statutory interpretation theory.

A. Prioritizing Audience-Appropriate Interpretative Methods

As the preceding sections have shown, audience norms, substantive legal canons, and interpretive methods are (and should be treated as) inextricably related. Despite this, judges often disregard the relationship between norms, substantive canons, and interpretive methodology. Often, the methods chosen tend to undermine the very audience norms judges seek to enforce. This is especially true when judges seek to ensure that adequate notice is provided for statutes directed at the public at large, or when judges are tasked with interpreting statutes delegating enforcement and lawmaking authority to administrative agency audiences.

1. *The Relationship Between Audience and "Ordinary" Meaning*

—When invoking audience notice canons like the rule of lenity, courts should clarify what is meant by "ordinary" meaning, how that meaning can be identified, and for which audience the chosen meaning might be considered "ordinary."

Audience notice is not only a critical rule-of-law norm, but it is also a chief justification for the rule of lenity. Yet as this Article has reviewed, courts are often maddeningly imprecise in making claims about the "ordinary" meaning of statutory terms that are supposed to put the general public on fair notice. If the lenity rule is invoked because the statutory audience is laypeople to whom the statute must give adequate notice, then interpretive methods should be prioritized only to the degree they tend to *enhance* the statute's capacity to provide fair notice to its relevant audiences.

In such circumstances, a judge might reasonably hesitate before relying on the whole code or whole act canons, specialized technical definitions, or legislative history, methods likely to make a statutory law *less* accessible to the lay audiences whose behavior it was enacted to govern. Reliance on those methods cannot help but risk weakening due process and fair notice, while also undermining the normative force of interpretive canons like the rule of lenity or the reasonable mistake of law defense. Of course, legal moralism should be considered as

well: for statutes whose prohibitions cover obviously immoral conduct, textual notice may be of diminished relevance.

Judges should also strive to be clearer about the precise threshold of ambiguity sufficient for the rule of lenity to apply. Courts should expressly address whether they think the meaning that should be sought is the relevant word or phrase's *prototypical* meaning, its *most common* meaning, or merely a *frequent* or *permissible* meaning. They should also develop a more principled basis for selecting from among evidence of ordinary usage and semantic meaning. For example, courts should be explicit about whether contemporary or enacting-era dictionaries are more appropriate, as well as their reasons for concluding that one dictionary's definition better reflects ordinary usage than another's. Dictionaries, after all, are themselves hardly neutral sources of meaning.[364]

In addition, with careful refinement over time, the thoughtful use of corpus linguistics may sometimes enhance inquiries into ordinary usage of phrases, because sophisticated analysis of large databases of ordinary usage may be less prone to cherry-picking and be better able to capture the ordinary meaning of English words used in *phrases* rather than as isolated words—provided those databases are themselves reflective of sources of relevant usage, and readily accessible.

As *Muscarello* demonstrated, and judges like Justice Kavanaugh have criticized,[365] the extent of textual ambiguity seems to emerge or recede depending on which sources a court chooses to prioritize and which sources it chooses to ignore. When this is so, there is no principled basis for deciding whether sufficient ambiguity exists such that the rule of lenity should be invoked, or whether it is appropriate to move to Step Two of the *Chevron* deference inquiry. Of course, the lack of such a principle undermines both the force of these substantive doctrines as well as the rule of law itself, for first-order statutory audiences cannot predict when they apply either.

2. *Regulatory Statutes and Administrative Deference*

—When interpreting administrative statutes, courts should identify whether the provision in question is an intransitive decision rule or a transitive conduct rule. If the former, textual notice and ordinary usage should be of diminished concern; if the latter, courts should prioritize evidence of meaning appropriate for the statute's non-official regulated audiences.

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364 *See* Wallace, *supra* note 128.

365 *See* Kavanaugh, *supra* note 26, at 2118.

It should by now be clear that the interpretive dynamics for intransitive statutes directed at administrative agency audiences can be quite different from transitive statutes that apply directly to lay audiences. This is true regardless of whether formal administrative deference regimes like *Chevron* apply to the statute in question. Nevertheless, there are good reasons to treat intransitive statutory provisions that delegate rulemaking to an administrative agency as communicating to that audience in a manner very differently from transitive statutes directed at the public at large.

For this reason, where an ambiguous statutory term or phrase is part of an intransitive delegation to an agency, the plain meaning rule and evidence of ordinary usage may be of limited value in precisifying the statute's meaning. This is especially so where the statute in question calls for the regulation of sophisticated audiences like corporations, industry professionals, or interest groups, for which more complex and contextual methods of interpretation may be perfectly appropriate.

Some judicial approaches to the interpretation of federal statutes have made strides in this direction, but could still be enhanced from the standpoint of audience norms. The Seventh Circuit, for example, has long had a policy of relying primarily on the semantic content of the statute in its approach to interpreting an administrative statute at *Chevron* Step One; only once the statute is determined to be sufficiently ambiguous on the basis of semantic content alone will the Circuit draw on the statute's contextual content (such as the legislative history) in assessing the reasonableness of the agency's asserted meaning at Step Two.[366] While such an approach rightly reflects the comparatively weaker arguments for textualist methods where the legislative delegation plainly exists within the "*Chevron* space" of agency policy-making choice, this interpretive approach could be even more nuanced. After all, the benefit of focusing on semantic content and evidence of ordinary usage in *Chevron* Step One will depend in large part on whether the statutory provision also has direct transitive application to other audiences, as with the ESA's take prohibition in *Sweet Home*, or only to more sophisticated institutional entities, as with the FACA provision in *Public Citizen*.

A related takeaway is that fair notice concerns may often be less relevant for administrative authorizing statutes and more relevant for the rules and regulations promulgated under

366 *See* Bankers Life & Cas. Co. v. United States, 142 F.3d 973, 983 (7th Cir. 1998).

them. Where this is so, the *Auer*/*Kisor* deference[367] that courts sometimes accord administrative agencies when interpreting agencies' own ambiguous rules and regulations may be of questionable merit, especially where those regulations serve as the notice document for the regulated audiences of the underlying statutes. Assessing these regulations from the standpoint of audience might provide an alternate basis for skepticism of *Auer* deference, at least when the first-order audience of the regulation is likely to be the public at large and the regulation serves as the effective notice document. I hope to explore this question, and the role of regulatory notice more generally, in future work.

3. *Attend to the Statutorily Designated Role of Interpretive Intermediaries*

—What conduct the statutes covers, and whose behavior the statute seeks to alter, can often be understood by how the statute conscripts third-party intermediaries as influential interpreters.

Statutory interpretation is often treated as an exercise in the application of interpretive tools to a particular line of text. Yet outside of the courtroom, many statutes are implemented, enforced, and interpreted by a range of third parties who are conscripted by the statute to enhance compliance by the targeted audiences. This context is often critical for understanding what the statutory provision means, to whom it is addressed, and how legislative drafters anticipate the target audience(s) will get the message.

For example, the Sarbanes–Oxley Act relies on auditors to communicate statutory requirements to corporate officers and financial professionals through training certifications and compliance schemes. This compliance regime clarifies how the statute ensures that regulated audiences are aware of their reporting and record-keeping responsibilities in a word, how the audience "gets the message." And it also suggests that the fisherman's off-shore catch at question in *Yates* was not the fraudulent conduct the statute sought to prohibit. The role of third-party interpreters also helps to explain the differential application of mistake-of-law rules in general criminal versus criminal tax contexts, for courts seem to deem it reasonable for taxpayers to rely on the interpretive advice of certified tax

367 Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019); Auer v. Robbins, 519 U.S. 452 (1997).

preparers and advisors, but not for individuals seeking clarification as to the criminal consequences of other kinds of conduct.

Given this, courts should be more attentive to the statute's envisioned role for third-party intermediaries when seeking to understand both what the statute means and to whom it applies.

B. Drafting Single Statutory Provisions That Address Multiple Audiences

—Legislative (and regulatory) drafters should avoid drafting provisions that direct different audiences to take different actions by way of the same legal text.

The possibility of distinct and competing audiences for administrative statutes raises a related lesson for statutory (and regulatory) *drafters*. Whenever possible, legal rules should be drafted so as to avoid communicating in multiple registers to two (or more) audiences at once. The interpretive confusion in *Sweet Home* arose because the ESA provision in question contained both (i) a direct, transitive criminal conduct rule for ordinary individuals (i.e., "don't take endangered species") as well as (ii) an indirect, intransitive administrative delegation to the agency to promulgate rules furthering protections for such species (i.e., "prevent the harm to, and therefore the taking of endangered species").

When the same statutory provision serves as the basis both for a potential criminal indictment for a member of the general public and for administrative notice-and-comment rulemaking related to a complex permitting scheme regulating large-scale land development, confusion and disagreement over which audience to focus on—and therefore which interpretive methods to prioritize—are especially likely to arise. The ESA provision in question is no drafter's idealized conception of a model statute.

C. Reconsidering Textualism and Purposivism

—Considerations of Audience Suggest Possibilities for Pragmatic Compromise between Textualism and Purposivism and Highlight the Pragmatic Utility of Each Approach to Interpretation.

Examining statutory interpretation methodology in light of statutory audience may also have the effect of reconciling aspects of the disagreements between textualists and

purposivists. A focus on statutory audience in interpretation might provide those not fully wedded to either approach with a more flexible yet principled method of selecting between the interpretive methods advocated for under either theory on the basis of the relevant audience of the statutory provision in question. Among textualism's most appealing features is its emphasis on a common-sense approach to interpretation and its provision of tools of interpretation readily available to lay audiences.[368] Purposivism, by contrast, rightly identifies that for the interpretation of statutes whose texts do not communicate sufficient information to provide specific conduct rules, limiting interpretive sources to a term's semantic content may be inapt, in light of the broader statutory ambit, context, and enactment history as well as the inherent limitations of statutes as a form of communicative speech. An audience-oriented approach to statutory interpretation provides a fresh basis to consider each approach's merits and weaknesses, while providing some guiding ex ante principles for the selection of methods in close cases, an approach that at least some judges apparently continue to seek.[369]

* * *

While this Article has set out a somewhat stylized conceptual framework for important questions about statutory audience, knowledge about first-order audience understanding and application of law is uneven, and much work remains to enhance our understanding of how nonjudicial audiences engage with statutes and regulations. This will assist in continuing to contribute to making statutory interpretation more consistent, principled, and systematic. That research might include surveying members of the public to discover folk understandings of legal terms and concepts, or providing a case study on how regulators and compliance officers cooperate to develop regulatory compliance regimes.[370] A few scholars in the emerging field of experimental jurisprudence have recently begun to conduct such undertakings, examining approaches that ordinary individuals take when interpreting or identifying common legal terms and concepts.[371]

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368 *See Textualism as Fair Notice*, *supra* note 174.

369 *See* Kavanaugh, *supra* note 26, at 2121.

370 Nick Parrillo's recent empirical examination of the federal agency guidance process is an especially instructive example. *See* PARRILLO, *supra* note 223.

371 *See, e.g.*, Farnsworth et al., *supra* note 145 (presenting experimental research suggesting readers of statutes are more likely to identify statutory ambiguity when asked to give their own interpretation of the statute rather than that of

This Article provides an initial conceptual framework to ground a larger investigation into how statutes are interpreted and implemented outside of courts. Such work will provide a better understanding of the ways that first-order audiences give meaning to law, and how regulated audiences rely on statutory and regulatory texts, tools of interpretation, and the advice of influential intermediaries and official interpreters in complying with statutory mandates. Having put forward a theory of statutory audience and first-order statutory interpretation, future work calls for shedding greater light on how these interpretative actions work in practice.

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an ordinary reader of English); Macleod, *supra* note 144 (presenting experimental research data suggesting that the "ordinary meaning" that courts sometimes attribute to common causal phrases included in jury instructions are not the meanings lay audiences understand those terms to convey); Roseanna Sommers, *Commonsense Consent*, 129 YALE L.J. (forthcoming 2020) (on file with author) (presenting experimental research data suggesting lay audiences understand the concept of consent differently than do judges and scholars).