

# CAN A STATUTE HAVE MORE THAN ONE MEANING?

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*What statutory language means can vary from statute to statute, or even provision to provision. But what about from case to case? The conventional wisdom is that the same language can mean different things as used in different places within the United States Code. As used in some specific place, however, that language means what it means. Put differently, the same statutory provision must mean the same thing in all cases. To hold otherwise, courts and scholars suggest, would be contrary both to the rules of grammar and to the rule of law.*

*This Article challenges that conventional wisdom. Building on the observation that speakers can and often do transparently communicate different things to different audiences with the same verbalization or written text, it argues that, as a purely linguistic matter, there is nothing to prevent Congress from doing the same with statutes. More still, because the practical advantages of using multiple meanings—in particular, linguistic economy—are at least as important to Congress as to ordinary speakers, this Article argues further that it would be just plain odd if Congress never chose to communicate multiple messages with the same statutory text.*

*As this Article goes on to show, recognizing the possibility of multiple statutory meanings would let courts reach sensible answers to important doctrinal questions they currently do their best to avoid. Most notably, thinking about multiple meanings in an informed way would help courts explain under what conditions more than one agency should receive deference when interpreting a multi-agency statute. Relatedly, it would let courts reject as false the choice between Chevron deference and the rule of lenity for statutes with both civil and criminal applications.*

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## INTRODUCTION

Consider the following cases:

1. The Immigration and Nationality Act (INA) permits deportation of a noncitizen convicted of a “sexual abuse of a minor.”<sup>1</sup> A conviction of “sexual abuse of a minor” also increases the maximum prison term for unlawful reentry into the United States.<sup>2</sup> The Board of Immigration Appeals (BIA) has authorized the deportation of a noncitizen convicted under a relatively prophylactic state law statutory rape prohibition that includes consensual sex between a twenty-one-year-old and a seventeen-year-old, reasoning that her offense constitutes “sexual abuse of a minor.” Should a court defer to the BIA’s interpretation?
2. The Dickey-Wicker Amendment prohibits the use of federal funds for “research in which a human embryo or embryos are destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in utero.”<sup>3</sup> The Secretary of Health and Human Services (HHS) interprets that prohibition as consistent with the funding of research involving human embryonic stem cells. Should a court defer to the Secretary’s interpretation? Does it matter that the Departments of Labor and Education must also interpret that language?
3. The Freedom of Information Act (FOIA) exempts from disclosure personnel and medical files the disclosure of which would “constitute a clearly unwarranted invasion of personal privacy.”<sup>4</sup> The Central Intelligence Agency (CIA) takes the position that both corporate and natural persons enjoy “per-

<sup>1</sup> See 8 U.S.C. § 1101(a)(43)(A) (2012) (defining “aggravated felony” as including “sexual abuse of a minor”); 8 U.S.C. § 1227(a)(2)(A)(iii) (2012) (listing conviction for an “aggravated felony” a basis for removal).

<sup>2</sup> 8 U.S.C. § 1326(b)(2) (2012) (providing that conviction for an “aggravated felony” increases the maximum prison term).

<sup>3</sup> Pub. L. No. 111-117, § 509(a)(2), 123 Stat. 3034, 3280 (2009).

<sup>4</sup> 5 U.S.C. § 552(b)(6) (2012).

sonal privacy,” as that phrase is used. Should a court defer to the CIA’s interpretation of this exemption? Does it matter that other agencies have interpreted the exemption as applying only to the privacy interests of natural persons?

Words mean different things in different settings.<sup>5</sup> Courts recognize this, for the most part. Given “strong evidence that Congress did not intend the language to be used uniformly,” courts assign “different reading[s] to the same language” in different statutes.<sup>6</sup> Or, for that matter, to the same language in the *same* statute, if that language appears in different places.<sup>7</sup>

So far, so good. But what about the same language in the same statute *in the same place*? In other words, what about a single statutory provision? Here courts get more rigid. “[A] statute is not a chameleon,” they insist, and “[i]ts meaning does not change from case to case.”<sup>8</sup> To let judges read statutes this way would be “dangerous,”

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<sup>5</sup> Throughout, this Article uses terms like “means” and “meaning” in a broad, pragmatic sense—roughly, what a speaker conveys to her audience(s) by using the words and sentences she does. See Richard H. Fallon, Jr., *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1235 (2015) (calling this “contextual” meaning). This Article relatedly assumes that what a statute “means” in a linguistic sense corresponds, at least presumptively, to what it “means” in a legal sense—that is, to its legal effect. See, e.g., Hrafn Asgeirsson, *Can Legal Practice Adjudicate Between Theories of Vagueness?*, in VAGUENESS AND THE LAW: PHILOSOPHICAL AND LEGAL PERSPECTIVES 95, 96–97 (Geert Keil & Ralf Poscher eds., 2016) (developing an account of the presumptive legal reasons generated by the communicative content of statutory language). For important objections to this position, see Mark Greenberg, *The Standard Picture and Its Discontents*, in 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 39, 76 (Leslie Green & Brian Leiter eds., 2011) (noting that courts read unstated mens rea requirements in many statutes and rely on the rule of lenity and that parts of the Model Penal Code are understood to mean what the commentary says rather than the linguistic meaning of the text).

<sup>6</sup> *Smith v. City of Jackson*, 544 U.S. 228, 260–61 (2005) (O’Connor, J., concurring) (arguing that the ADEA’s language, despite being nearly identical to that of Title VII, means something distinct); see also, e.g., *FAA v. Cooper*, 566 U.S. 284, 291–94 (2012) (noting that “actual damages” has different meanings in different statutes); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 522–25 (1994) (explaining that “virtually identical language” has different meanings in the Copyright Act and Title VII).

<sup>7</sup> See, e.g., *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441–42 (2014) (noting that “air pollutant” has different meanings in different parts of the Clean Air Act); *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 313–14 (2006) (noting that “located” has different meanings in different parts of the National Bank Act); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595–97 (2004) (noting that “age” has different meanings in different parts of the ADEA); *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 212–13 (2001) (noting that “wages paid” has different meanings in different parts of Title 26); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343–44 (1997) (noting that “employee” has different meanings in different parts of Title VII); *District of Columbia v. Carter*, 409 U.S. 418, 420–21 (1973) (noting that “state or territory” has different meanings in different parts of Title 42).

<sup>8</sup> *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 730 (6th Cir. 2013) (Sutton, J., concurring); see also, e.g., *United States v. Santos*, 553 U.S. 507, 522 (2008) (plurality

inviting statutory “invent[ion]” as opposed to “interpretat[ion].”<sup>9</sup> The suggestion, it seems, is that whereas meaning varying from place to place is common sense, meaning varying from *case to case* would be madness.

This “one-interpretation rule” leaves courts with unappealing practical choices, forcing them to decide between what seems like the best or correct outcome in the instant case and the best or correct outcome in some future case falling under the same statutory provision.<sup>10</sup> In *Esquivel-Quintana v. Sessions*, for instance, the Supreme Court was presented with the question of whether, in a civil case, to defer to an administering agency’s interpretation of an unclear statutory provision that has both civil and criminal applications—in that case, a provision concerning immigration, an area of law in which the executive historically enjoys substantial deference<sup>11</sup>—or whether instead to apply the rule of lenity to resolve the unclarity.<sup>12</sup> A Sixth Circuit panel had divided on the question. The majority had held that deferring to the agency’s interpretation was compulsory under existing, if soon-to-be-overruled, Supreme Court precedent.<sup>13</sup> In partial dissent, Judge Sutton had insisted that a court must apply the rule of lenity in such cases since to defer to the agency would be to let that agency dictate federal criminal law and thereby “threaten[ ] a complete undermining of the Constitution’s separation of powers.”<sup>14</sup> A premise of Judge Sutton’s argument, seemingly unquestioned by the Sixth Circuit majority, was that “statutory terms should not have different meanings in different cases,” and so to accept the agency’s reading in a civil case would be to accept it for future criminal cases as

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opinion) (“[T]he proposition that one undefined word, repeated in different statutory provisions, can have different meanings in each provision . . . is worlds apart from giving the same word, *in the same statutory provision*, different meanings *in different factual contexts*.”), *superseded by statute*, 18 U.S.C. § 1956 (2009); *Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004) (“[W]e must interpret the statute consistently . . . .”); *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 519 n.10 (1992) (plurality opinion) (similar).

<sup>9</sup> *Clark v. Martinez*, 543 U.S. 371, 378, 386 (2005).

<sup>10</sup> *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1028 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part) (arguing that the rule of lenity should be applied consistently to statutory provisions with both criminal and civil applications).

<sup>11</sup> Alina Das, *Unshackling Habeas Review: Chevron Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 151 (2015) (observing that “[u]nder the longstanding ‘plenary power’ doctrine, courts have given wide berth to decisions by . . . the executive as to which individuals to admit and exclude from the United States”).

<sup>12</sup> 137 S. Ct. 1562 (2017).

<sup>13</sup> *Esquivel-Quintana*, 810 F.3d at 1024 (citing *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 703–04, 704 n.18 (1995)).

<sup>14</sup> *Id.* at 1030 (Sutton, J., concurring in part and dissenting in part) (quoting *id.* at 1024).

well.<sup>15</sup> The Supreme Court went out of its way to avoid the question, implausibly declaring that the statutory language at issue was “unambiguous[ ].”<sup>16</sup> The Court’s desire to do so was understandable—if the choice was between courts dictating immigration policy in a single case and the BIA determining federal criminal law, both options were bad.

Practical downsides notwithstanding, the one-interpretation rule might seem like linguistic necessity.<sup>17</sup> To assign different readings to the same language as used in different places is just to acknowledge that language is sensitive to context—for example, sometimes “courts” includes foreign courts, other times only domestic.<sup>18</sup> Once language is *used*, however, it is natural to think that its meaning is “fixed”<sup>19</sup>—whether some reference to “courts” includes foreign courts is not, barring unusual circumstances, subject to change over time.<sup>20</sup> And from this, it seems to follow that the only “context” at issue when making sense of language *as used* is the context *in which it was used*, that is, the setting in which the words at issue were spoken or written down.<sup>21</sup>

If that simple story were correct, then the only context of interest when interpreting statutory language would be the setting in which Congress enacted it. Does “courts” include foreign courts? That might depend on various things: the subject matter of the legislation generally, whether “courts” was customarily inclusive or exclusive at the

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<sup>15</sup> *Id.* at 1023.

<sup>16</sup> *Esquivel-Quintana*, 137 S. Ct. at 1572 (“We have no need to resolve whether the rule of lenity or *Chevron* receives priority in this case because the statute, read in context, unambiguously forecloses the Board’s interpretation.”).

<sup>17</sup> See Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1311 (2016) (characterizing the one-meaning rule as a “logical[ ]” constraint on statutory interpretation).

<sup>18</sup> Compare *In re Bd. of Dirs. of Multicanal S.A.*, 340 B.R. 154, 167–68 (Bankr. S.D.N.Y. 2006) (holding that “any court,” as used in Securities Act of 1933, § 3(a)(10), may include foreign courts), with *Small v. United States*, 544 U.S. 385, 394 (2005) (holding that “‘convicted in any court’ refers only to domestic courts, not to foreign courts” as used in 18 U.S.C. § 922(g)(1)).

<sup>19</sup> See Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015) (articulating and defending the “fixation thesis” as applied to constitutional text).

<sup>20</sup> See *infra* note 62 and accompanying text (observing that a change in factual circumstance might affect the extension of statutory language, as when a scientific advance renders safe a treatment that was previously “dangerous”).

<sup>21</sup> See David Feder, *Esquivel-Quintana v. Lynch: The Potential Sleeper Case of the Supreme Court Term*, NOTICE & COMMENT (Sept. 13, 2016), <http://yalejreg.com/nc/esquivel-quintana-v-lynch-the-potential-sleeper-case-of-the-supreme-court-term-by-david-feder> (“It’s true that context matters a great deal in statutory interpretation. But ‘context’ in this sense refers to the textual context—not whether the case arises in the civil or criminal context.”).

time of enactment, which reading better coheres with Congress's apparent policy aims, etc. Not among those things, however, would be anything to do with the case in which that question happened to arise. Whether, for example, that case happened to involve one type of defendant as opposed to another would be neither here nor there with respect to what "courts" means.<sup>22</sup> Nor, assuming both civil and criminal applications, could it matter that that case happened to be civil as opposed to criminal in character.<sup>23</sup> As Chief Justice Warren put it: "There cannot be one construction for the Federal Communications Commission and another for the Department of Justice."<sup>24</sup>

As it turns out, however, that simple linguistic story is a bit *too* simple. Specifically, it overlooks that speakers can and often do transparently communicate different things to different audiences with the same verbalization or written text. Take, for example, the famous Uncle Sam poster that says "I Want YOU for U.S. Army."<sup>25</sup> What that poster communicates depends in an obvious way upon who reads it—if *A* reads the poster, it communicates that Uncle Sam wants *A* for U.S. Army, if *B* reads it, that Uncle Sam wants *B*, etc.<sup>26</sup> Or similarly, if someone is having friends over and says, "Grab something to drink from the fridge," that utterance communicates to each friend permission to have an alcoholic or non-alcoholic beverage (assuming everyone is of age). If, however, some friends have brought small

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<sup>22</sup> See *Clark v. Martinez*, 543 U.S. 371, 379 (2005) (refusing to read statutory text differently as applied to two different classes of defendants on the grounds that "the statutory text provides for no distinction between" them).

<sup>23</sup> See *Leocal v. Ashcroft*, 543 U.S. 1, 12 n.10 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."); *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 519 n.10 (1992) (plurality opinion) (similar); *Crandon v. United States*, 494 U.S. 152, 158 (1990) (similar).

<sup>24</sup> *FCC v. Am. Broad. Co.*, 347 U.S. 284, 296 (1954).

<sup>25</sup> JAMES MONTGOMERY FLAGG, *I WANT YOU FOR U.S. ARMY: NEAREST RECRUITING STATION* (1917), <https://lccn.loc.gov/96507165>.

<sup>26</sup> Here it is helpful to distinguish what Uncle Sam (or the poster's author) communicates to *A* and to *B*, which is to say the "content" his utterance(s) expresses, from the "character" of the sentence he utters. See David Kaplan, *Demonstratives*, in *THEMES FROM KAPLAN* 481, 505 (Joseph Almog et al. eds., 1989). In speaking to *A* and to *B*, Uncle Sam plainly uses the same English sentence. As such, the sentence Uncle Sam uses "means" the same thing to *A* and to *B* in a narrow sense. This sense of common "meaning" is captured by the notion of character, which is a quality that inheres in words and sentences, as opposed to *uses* of words and sentences. On the standard picture, a sentence character combines with the relevant context to express a content—here, for example, the sentence "I want you for U.S. Army" combines with the relevant context(s) to express to *A* the content that Uncle Sam wants *A* for U.S. Army and to *B* the content that Uncle Sam wants *B* for U.S. Army. See *id.* As used, the sentence "I want you for U.S. Army" thus expresses different content to *A* and to *B*—in this sense, the sentence *as used* "means" something different to each.

children, that same verbalization invites the children to take a non-alcoholic beverage only. As this Article explains, such familiar examples remind us that what language communicates often depends not just upon the setting in which the words at issue were spoken or written down, but also upon the setting in which they are heard or read. Applied to statutory language, this insight suggests that statutory meaning may (or at least should) sometimes depend upon the interpretive setting.<sup>27</sup> As a purely linguistic matter, there is nothing to prevent Congress from communicating something different in, say, civil and criminal settings with the same statutory text. The question in each case is just whether Congress has done so here.

Worth highlighting, the sorts of linguistic examples upon which this Article relies are both pervasive as an empirical matter and un concerning as a normative one. In these respects, this Article's defense of multiple statutory meanings differs significantly from past scholarly efforts. In his classic article on "acoustic separation," for instance, Meir Dan-Cohen raises the possibility that statutory language might communicate different norms to the general public (what Dan-Cohen calls "conduct rules") and to administering officials (what he calls "decision rules").<sup>28</sup> Often it would be socially beneficial, Dan-Cohen reasons, to communicate a prophylactic rule to citizens—say, "no destruction of property"—but a somewhat narrower rule to courts—say, "no destruction of property (unless necessary)."<sup>29</sup> In so doing, a legislature would incentivize citizens to act on the "safe side" without having to impose unreasonably harsh penalties.<sup>30</sup> This strategy is familiar from nonlegal settings. Parents, for instance, sometimes communicate one thing to a child—say, "no screen time unless you read for an hour"—and another to a babysitter—say, "no screen time unless [she] read[s] for (the better part of) an hour." As these examples suggest, however, acoustically separated instructions depend straightforwardly upon the withholding of information: If the conduct rule is to do any work, those subject to it must remain ignorant of the

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<sup>27</sup> Insofar as the principle that a statute cannot have more than one meaning is part of our positive law of interpretation, the proposal here should be understood as revisionary. See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1108–09 (2017) (arguing that "unwritten law can establish . . . default rules of interpretation," and that those rules "remain binding even if they aren't ideal"); Frederick Schauer, *Is Law a Technical Language?*, 52 SAN DIEGO L. REV. 501, 506 (2015) (asking whether legal language should be understood as a "specialized discourse of a specialized profession," the norms of which diverge from those of "everyday, ordinary language").

<sup>28</sup> Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630 (1984).

<sup>29</sup> See *id.* at 637–39 (discussing "necessity" and "duress" defenses).

<sup>30</sup> *Id.* at 650–51.

separate decision rule.<sup>31</sup> Such instructions are, for that reason, both potentially unstable<sup>32</sup> and, more importantly, normatively suspect.<sup>33</sup>

Or consider Jonathan Siegel's more recent defense of multiple statutory meanings.<sup>34</sup> Siegel offers a host of reasons why, in his view, it would be *desirable* for courts to be able to assign individual statutory provisions different meanings in different settings. To do so would let courts reach "sound results" in individual cases.<sup>35</sup> It would also better cohere, Siegel insists, with the "judicial power," appropriately conceived.<sup>36</sup> Siegel's linguistic defense of multiple meanings is, by contrast, remarkably sparse, consisting entirely of an appeal to *syllapses*—that is, figures of speech in which a single word that governs or modifies two or more other words must be understood differently with respect to each.<sup>37</sup> When one says "I *ran* ten miles on Monday and the Marathon Oil Company on Thursday," for instance, one communicates that one "ran" in two different senses.<sup>38</sup> As Siegel concedes, such grammatical parallelisms are "uncommon," though "hardly impossible," even in ordinary conversation.<sup>39</sup> More worrisome insofar as such examples are supposed to lend support to multiple *statutory* meanings, syllapses are used mostly for humorous effect—an effect, for better or worse, that legislative language typically lacks.<sup>40</sup>

This Article's linguistic examples are much more prosaic. Often it is just more efficient to communicate different things to different

<sup>31</sup> The child, for example, has incentive to only read for the better part of an hour if she learns that that is enough to secure screen time.

<sup>32</sup> For the reason that enforcement patterns often become public knowledge, thus revealing the decision rule.

<sup>33</sup> See, e.g., JOHN STUART MILL, *ON LIBERTY* 16 (Prometheus Books 1986) (1859) (arguing that a clear and transparent conduct rule based on whether an action will harm society should be applied to "human beings in the maturity of their faculties").

<sup>34</sup> Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 *TEX. L. REV.* 339, 342 (2005).

<sup>35</sup> *Id.* at 393–94.

<sup>36</sup> Tellingly, Siegel provides as a partial gloss on his conception of the "judicial power" that courts have "some power to depart from statutory text." *Id.* at 373.

<sup>37</sup> See Gideon O. Burton, *Syllepsis*, *SILVA RHETORICAE*, <http://rhetoric.byu.edu/Figures/S/syllepsis.htm> (last visited Nov. 8, 2018).

<sup>38</sup> See Siegel, *supra* note 34, at 366–67 (emphasis added).

<sup>39</sup> *Id.* at 366.

<sup>40</sup> *Id.* at 366–67; see also Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 *ARK. L. REV.* 1149, 1157–58 (2003) (remarking that one would not expect to find "double entendres" in the Constitution). Worse still, it is not even clear that syllapses involve multiple meanings in the sense at issue here—that is, different contents being expressed by the same word or sentence in different interpretive contexts—but rather different contents being expressed by different phrases. See Adrian Vermeule, *Three Commerce Clauses? No Problem*, 55 *ARK. L. REV.* 1175, 1179 (2003) (arguing that, in the Commerce Clause, "[t]he threefold repetition of the word 'commerce' is suppressed but unmistakable," such that it is not true that the same word means three different things).



audiences with the same instrument. Why produce individualized recruiting messages when one can address all recruits with a single poster? Or why address adults and children separately when one can address them simultaneously, trusting each to know what to do? The way such instruments work is straightforward and, importantly, plain to view. The invitation to “grab something to drink,” for instance, does not depend for its operation on adults believing that the verbalization communicates the same thing to children, or vice versa. To the contrary, everyone understands what the words mean to each—a child, for example, would not be puzzled by her parent selecting a beer. In these respects, the examples of which this Article makes use translate readily to the legislative setting. Enacting statutory language is costly, and so it would often make sense for Congress to enact one multi-setting provision rather than two (or three or four) provisions that are setting-specific. And so long as that single provision’s sensitivity to the interpretive setting is transparent—as it must be, if that provision is to guide behavior—that Congress chooses to speak through one provision rather than many is normatively undisturbing.

Whether a statute can have more than one meaning might seem of strictly academic concern. As this Article illustrates, though, the practical cost of ignoring multiple meanings is real. The Supreme Court has, as this Article describes, gone out of its way to avoid important doctrinal questions, the available answers to which are artificially constrained by the one-meaning rule. This is especially true in administrative law, where the interaction between *Chevron* deference and the one-meaning rule has proven particularly problematic. The Court has, as discussed above, conspicuously refrained from clarifying the relationship between *Chevron* and the rule of lenity for statutory provisions with both civil and criminal applications.<sup>41</sup> This creates headaches in areas like immigration,<sup>42</sup> securities,<sup>43</sup> and environmental law,<sup>44</sup> where civil/criminal provisions are hugely consequential.<sup>45</sup> As

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<sup>41</sup> See *supra* notes 10–16 and accompanying text; see also Nicholas R. Bednar & Kristin E. Hickman, *Chevron’s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1426 (2017) (“[C]onflicting Supreme Court precedents have left an ongoing debate over whether ‘*Chevron* still leaves some place for the rule of lenity,’ particularly, although not exclusively, when a regulatory statute provides for both civil and criminal enforcement.” (quoting *Espinal-Andrades v. Holder*, 777 F.3d 163, 170 (4th Cir. 2015))).

<sup>42</sup> See 8 U.S.C. §§ 1227(a)(2), 1326(b) (2012) (designating certain offenses as grounds both for removal and for enhanced criminal penalties upon unlawful reentry).

<sup>43</sup> See 15 U.S.C. § 77t(b), (d) (2012) (civil and criminal penalties for securities violations).

<sup>44</sup> See 33 U.S.C. § 1319(b)–(c) (2012) (civil and criminal penalties for unlawful discharge of pollutants).

<sup>45</sup> For other examples, see 15 U.S.C. § 1264(a), (c) (civil and criminal penalties for hazardous substances violations); 18 U.S.C. §§ 1963–1964 (civil and criminal penalties for

this Article argues, the most plausible reason for the Court's inaction is that the one-meaning rule imposes an unattractive and, importantly, *false* choice between those two interpretive doctrines.

Relatedly and even more consequentially, the Supreme Court has, for decades, failed to settle under what conditions “deference is warranted for agency views of a statute that multiple agencies . . . administer.”<sup>46</sup> This is especially worrisome when shared enforcement authority “can be found throughout the administrative state, in virtually every sphere of social and economic regulation, in contexts ranging from border security to food safety to financial regulation.”<sup>47</sup> Again, under the one-interpretation rule, one can see why the Court has been so reluctant to speak definitively. As this Article explains, it would make obvious sense in various circumstances for Congress to delegate primary interpretive authority over the same statute to different agencies in different circumstances.<sup>48</sup> And yet, constrained by the one-meaning rule, the Court must either pick one agency for all cases, or instead pick no agency, interpreting the statute on its own. As is this Article's theme, there is (or at least should be) a third and better way.

This Article has two parts. In Part One, it explains why it is tempting to think that statutory language must have only one meaning. It then introduces familiar but, thus far in legal scholarship, overlooked conversational examples that help to show why, as a purely linguistic matter, multiple statutory meanings are not only possible but likely. Finally, it clarifies how multiple statutory meanings are consistent with some of the basic, genuine insights—like the thesis that statutory meaning is fixed at the time of enactment—upon which the intuitive but erroneous case for singular statutory meaning is built. In Part Two, this Article considers various potential applications of the principle that statutory language can have more than one meaning, ranging from highly plausible, such as statutory language

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racketeering violations); 21 U.S.C. § 333(a)–(b) (civil and criminal penalties for food, drug, and cosmetics violations); 31 U.S.C. §§ 5321–5322 (civil and criminal penalties for money laundering).

<sup>46</sup> Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 221; see also Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1797 (2015) (observing that “the Supreme Court has yet to decide how its central deference doctrine—*Chevron*—applies when multiple agencies share authority”).

<sup>47</sup> Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1134 (2012).

<sup>48</sup> See *infra* notes 172–92 and accompanying text; see also, e.g., Daniel A. Farber & Anne Joseph O'Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. 1375, 1453 (2017) (“To the extent that *Chevron* prioritizes congressional intent, multiple interpreters are often actively chosen.”).

with civil and criminal applications, to highly implausible, such as federal law provisions administered by state and federal courts. In so doing, this Part attempts to show that linguistic plausibility imposes a meaningful constraint on claims of multiple statutory meanings.

## I MORE THAN ONE MEANING?

Much of the time, courts treat it as obvious that a statute can have only one meaning. The sentiment seems to be that that is just how language works. To the extent they take seriously their role as *interpreters* of statutory language, these courts reason, they are straightforwardly obligated to construe statutes consistently across cases. Such implications of linguistic obviousness are typically coupled with expressions of practical caution. To recognize multiple statutory meanings, these courts warn, would be to give judges the ability to rewrite laws as they please. Both linguistic and practical necessity thus compel a one-interpretation rule.

This Part tries to articulate both the linguistic and practical considerations that appear to support singular statutory meaning. In doing so, it attempts to capture why it seems to many not just true but glaring that a statute must mean the same thing in all cases. It then goes on to identify the subtle mistakes in the case for singular meaning. It explains why multiple meanings are both familiar and untroubling, and why the reasons that motivate their use are just as present in the legislative context as in ordinary conversation. Finally, it assures that waiving the one-interpretation rule would do little to facilitate judicial activism or statutory rewriting. On the one hand, claims of multiple statutory language are constrained by linguistic plausibility in just the same way as are claims that the same words mean different things in different statutes. On the other, the one-interpretation rule facilitates a different form of judicial willfulness through the introduction of (what should be) false interpretive choices.

### A. *The (Erroneous) Case for Singular Meaning*

The often-implicit case for singular statutory meaning is equal parts linguistic and pragmatic. This Section explicates each in turn.

#### 1. *Linguistic Considerations*

A shared premise among contemporary courts is that words have meaning only in context. When interpreting statutory language, courts

no longer turn just to dictionaries in search of “ordinary meaning.”<sup>49</sup> Instead, they ask how Congress has used the language at issue *in this instance*, looking to contextual cues to figure that out. In *Yates v. United States*, for example, the question before the Court was whether a law prohibiting the “destr[uction of] . . . any record, document, or *tangible object*” for purposes of frustrating an investigation applies to a fisherman who tosses overboard undersized fish in an effort to avoid a fine.<sup>50</sup> As a matter of “ordinary meaning,” the plurality conceded, fish are both “objects” and “tangible,” and so the law seems initially to apply.<sup>51</sup> Attending to context, however, the plurality reasoned that the prohibition Congress had expressed was much narrower. The caption of the prohibition at issue reads: “Destruction, alteration, or falsification of *records* . . . .”<sup>52</sup> The preceding items in the list of protected things are, as noted above, “records” and “documents.”<sup>53</sup> And, perhaps most striking, the prohibition appears in the Sarbanes-Oxley Act, a statute famously responsive to widespread “corporate and accounting deception.”<sup>54</sup> For these reasons and more, the plurality concluded that “tangible object” *as used* referred to tangible objects within a restricted domain, namely tangible objects “used to record or preserve information.”<sup>55</sup> Here, Congress had thus used “tangible object” in much the same way as a teacher uses “kids” when, on the way home from a field trip, she says to the bus driver, “all the kids are on the bus.”<sup>56</sup> It matters not to the truth of her statement that various children remain in the museum. What matters instead is just that all the kids *in her class* are accounted for and onboard.

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<sup>49</sup> See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 109 (2001) (“[R]easonable users may give words a contextual gloss that reflects ordinary usage, but that is not found in dictionaries, which have a limited capacity to record all of the subtleties of usage.”); see also William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 545 (2017) (characterizing “ordinary meaning” as “the meaning one would normally attribute to those words given little information about their context”).

<sup>50</sup> *Yates v. United States*, 135 S. Ct. 1074, 1078 (2015) (plurality opinion) (emphasis added) (quoting 18 U.S.C. § 1519 (2012)).

<sup>51</sup> *Id.* at 1081.

<sup>52</sup> *Id.* at 1083 (emphasis added) (quoting 18 U.S.C. § 1519 (2012)).

<sup>53</sup> *Id.* at 1085–86 (quoting 18 U.S.C. § 1519 (2012)).

<sup>54</sup> *Id.* at 1079.

<sup>55</sup> *Id.*

<sup>56</sup> See Richard G. Heck Jr., *Semantics and Context-Dependence: Towards a Strawsonian Account*, in METASEMANTICS: NEW ESSAYS ON THE FOUNDATIONS OF MEANING 327, 355–57 (Alexis Burgess & Brett Sherman eds., 2014) (discussing a similar example); see also, e.g., Jason Stanley & Zoltán Gendler Szabó, *On Quantifier Domain Restriction*, 15 MIND & LANGUAGE 219 (2000) (exploring this context-dependent use of quantifiers).

Another premise, largely if not universally shared, is that the meaning of statutory language is “fixed” at the time of enactment.<sup>57</sup> Let’s stick with *Yates*. Assume *arguendo* that the plurality was right, and that “tangible object” *as used* refers to tangible objects used to record or preserve information. On that reading, a digital flash drive containing financial records plainly falls within the meaning of that phrase as it appears. Suppose, however, that popular usage of the term “tangible” were to drift over time, such that to be “tangible” were no longer merely to be perceptible by touch, but were, instead, to possess non-trivial weight. In that linguistic future, would it be a hard question whether a flash drive is still a “tangible object” for purposes of the prohibition in *Yates*? Presumably no. So long as flash drives were still “tangible” in the sense of being perceptible to touch, i.e., in the sense that that term was used in 2002 when Congress enacted the language at issue, the prohibition would continue to apply. Whether, in addition, those drives would count as “tangible” within contemporary usage would be more difficult, but also beside the point.

To state this second premise more precisely, the claim is that the object of statutory interpretation is the communicative content expressed by the statutory language at issue, and, in turn, that the communicative content of statutory language is fixed at the time that language is enacted.<sup>58</sup> For obvious reasons, Lawrence Solum calls this the “fixation thesis.”<sup>59</sup> As illustrated by the example above, the fixation thesis entails that the correct reading of a statute does not change over time as the result of, for example, semantic drift.<sup>60</sup> Importantly, the fixation thesis is consistent with coming to learn over time what is encompassed by some statute—advances in scientific knowledge, for instance, might reveal as “dangerous” some treatment previously thought safe.<sup>61</sup> Likewise, changes in factual circumstances might affect

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<sup>57</sup> See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 9 (1994) (conceding that “[t]he ‘original intent’ and ‘plain meaning’ rhetoric in American statutory interpretation scholarship and decisions treats statutes as static texts and assumes that the meaning of a statute is fixed from the day of enactment”).

<sup>58</sup> See Solum, *supra* note 19, at 15–16 (discussing this idea in the context of constitutional interpretation).

<sup>59</sup> *Id.* at 15 (defining the “fixation thesis” as the view that “the object of constitutional interpretation is the communicative content of the constitutional text, and that content was fixed when each provision was framed and/or ratified”).

<sup>60</sup> See *id.* at 16–18 (discussing what Solum terms “linguistic drift”).

<sup>61</sup> See *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (holding that carbon dioxide emissions constitute a “pollutant” as used in the Clean Air Act regardless of whether the enacting Congress “appreciated the possibility that burning fossil fuels could lead to global warming”); see also Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 *STAN. L. REV.* 395, 415–19 (1995) (describing legal developments related to the

whether something is covered by a statute or not—scientific advances might also render safe some treatment that was previously “dangerous.”<sup>62</sup> What remains fixed is just what statutory language means, in a broad, pragmatic sense.

It’s tempting to think that, together, the two above premises entail that a statute can have only one meaning. If statutory meaning is a function of context and if the meaning of statutory language is fixed at the time of enactment, then it seems to follow that the only context at issue when interpreting statutory language is the context of its enactment. How, after all, could what statutory language means turn on facts about the case in which it is interpreted (e.g., that the case happens to be civil as opposed to criminal) when, *ex hypothesi*, its meaning was fixed years ago? This simple, intuitive inference gains plausibility when looking at the typical statutory interpretation case. Again, consider *Yates*. In that case, the Court cited various contextual considerations in support of its reading: the prohibition’s heading, its position within the larger statute, other statutory provisions enacted contemporaneously, etc.<sup>63</sup> In terms of broader historical context, the Court reminded that it was the Enron accounting scandal that prompted Sarbanes-Oxley’s enactment.<sup>64</sup> Again and again, the Court pointed to features of the context *in which Congress enacted the statutory language at issue* as evidence of what that language means. To be fair, the Court in *Yates* also seemed influenced by the fact that the case before it involved a fisherman.<sup>65</sup> Tellingly, though, it did not occur to the Court to consider whether “tangible object” might mean one thing in a case involving a fisherman and another in one featuring an accountant. Instead, the apparent ridiculousness of applying an accounting fraud statute to the captain of the *Miss Katie* merely bolstered the idea that “Congress did not intend” a broad reading of

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change in scientific understanding concerning whether homosexuality constitutes a psychological “pathology”).

<sup>62</sup> See U.S. DEP’T OF HEALTH & HUMAN SERVS. & U.S. DEP’T OF AGRIC., 2015–2020 DIETARY GUIDELINES FOR AMERICANS 32, 81 (8th ed. 2015), [https://health.gov/dietaryguidelines/2015/resources/2015-2020\\_Dietary\\_Guidelines.pdf](https://health.gov/dietaryguidelines/2015/resources/2015-2020_Dietary_Guidelines.pdf) (waiving daily limit on cholesterol consumption and recommending eggs as part of a healthy diet). *But see* Commonwealth v. Welosky, 177 N.E. 656, 658–61 (1931) (citations omitted) (holding that, the Nineteenth Amendment notwithstanding, a state jury service statute limiting service to “person[s] qualified to vote for representatives to the [state legislature]” excluded women, reasoning that the Massachusetts Constitution limited the franchise to men at the time of enactment).

<sup>63</sup> See *supra* notes 50–55 and accompanying text.

<sup>64</sup> *Yates v. United States*, 135 S. Ct. 1074, 1079 (2015).

<sup>65</sup> See Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407, 412 (2015) (observing that the *Yates* plurality “accentuated the odd facts at issue,” deploying “several maritime puns”).

“tangible object” when it enacted that language in 2002.<sup>66</sup> In other words, the “absurdity” of applying the statute in the instant case was evidence of what Congress had (and did not have) in mind back then.<sup>67</sup>

## 2. *Practical Considerations*

That a statute could have more than one meaning is also supposed to be practically unsettling. The thought here seems to be that, insofar as they are permitted to treat statutory language as meaning one thing in one setting and something else in another, there is nothing to prevent courts from creating statutory exceptions out of whole cloth. At its limit, this ability to make up ad hoc exceptions would threaten to replace the rule of law with the rule of individuals, allowing courts to, for example, read prohibitions narrowly for favored groups and broadly for those disfavored.

Justice Scalia sounded this alarm most loudly in *Clark v. Martinez*.<sup>68</sup> There, the question was whether statutory language that has been construed narrowly pursuant to the canon of constitutional avoidance must be construed the same way even in cases in which a broader, more natural construction would plainly be constitutional as applied. More specifically, in an earlier case, *Zadvydas v. Davis*, the Court had held that a provision of the INA permitting the government to “detain” a deportable noncitizen “beyond” the ordinary 90-day removal period must be read to include an “implicit” presumptive duration limit of six months.<sup>69</sup> The reason was that reading that provision as permitting indefinite detention would give rise to a serious constitutional concern insofar as such a reading would seem to infringe upon the Due Process rights of noncitizens who have been admitted into the country—noncitizens such as the defendants in *Zadvydas*.<sup>70</sup> In *Clark*, the question was whether that same statutory language must be read the same way in a case in which the noncitizen defendant has not been admitted into the country and so has no plausible Due Process objection to indefinite detention. Writing for the Court, Justice Scalia declared “dangerous” the “principle that judges can give the same statutory text different meanings in different

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<sup>66</sup> *Yates*, 135 S. Ct. at 1083.

<sup>67</sup> See Ryan D. Doerfler, *The Scrivener’s Error*, 110 Nw. U. L. REV. 811, 832 (2016) (observing that courts sometimes “take the absurdity of some candidate interpretation as reason to reject it in favor of some other interpretation”).

<sup>68</sup> 543 U.S. 371 (2005).

<sup>69</sup> 533 U.S. 678, 689 (2001) (citations omitted).

<sup>70</sup> See *id.* at 690.

cases.”<sup>71</sup> As he reasoned, to read the provision at issue differently for admitted and non-admitted noncitizens when “the statutory text provides for no distinction between” them “would be to invent a statute rather than interpret one.”<sup>72</sup> It would, in turn, “render every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case.”<sup>73</sup>

The concern that Justice Scalia expressed in *Clark* is easy to understand. If, say, facially neutral statutory language could suddenly mean one thing for major financial institutions and another for community banks, one does not have to work very hard to imagine how permitting courts to recognize multiple statutory meanings might facilitate judicial favoritism. To be sure, when selecting among possible readings of statutory language, one has to worry already that courts choose in part on the basis of policy preference as opposed to interpretive accuracy. Under the current regime, however, there is at least a reputational price courts must pay when assigning statutory language something other than its most natural reading.<sup>74</sup> As Justice Scalia explained, if a court (legitimately or illegitimately) assigns statutory language an unnatural reading to protect some class of litigants, the rule that a statute can have only one meaning entails that other classes of litigants must be afforded the same reading as well. So, for example, if a court wants to read a facially neutral banking statute in a way that eases the regulatory burden on major financial institutions, it must read the statute to ease the burden on community banks as well. Maybe, for a partisan of big banks, that price is worth paying. But it is at least a price she must pay. If, by contrast, that court could simply insert a distinction between big and small banks into the statute, that price on partisanship disappears.

### B. *The Case for Multiple Meanings*

The case for singular statutory meaning is simple and intuitive. It is also subtly but fundamentally mistaken at each stage.

#### 1. *Linguistic Considerations*

In terms of language, the case for singular meaning ignores familiar cases in which speakers communicate different content to dif-

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<sup>71</sup> *Clark*, 543 U.S. at 386.

<sup>72</sup> *Id.* at 378–79.

<sup>73</sup> *Id.* at 382.

<sup>74</sup> Beyond the standard reputational cost courts incur when adopting a strained reading of statutory language. See *infra* note 120 and accompanying text.



ferent audiences with the same verbalization or written text.<sup>75</sup> Advertisers, for example, often address prospective customers individually with the same billboard, poster, or recording. When a pharmaceutical company tells you to “ask your doctor” whether its product is “right for you,” it is, uncontroversially, instructing you to ask *your* doctor whether its product is right for *you*.<sup>76</sup> It is, however, at the same time instructing Karen to ask *her* doctor whether its product is right for *her* and Hector to ask *his* doctor whether its product is right for *him*. Again, the same was true when Uncle Sam said “I want YOU for U.S. Army.” So, too, when President John F. Kennedy urged Americans to “ask not what your country can do for you,” but instead to “ask what you can do for your country.”<sup>77</sup> In all of these cases, the speaker in question managed to talk to numerous individuals individually all in one linguistic go.

While examples involving indexicals such as “you” or “your” are perhaps the most obvious, multi-audience communication is much more pervasive than that. Instructions or permissions are routinely addressed to heterogenous audiences, with each subset of the audience interpreting the instruction or permission with an eye to its own situation. The earlier example of a host telling adults and children to “grab something to drink” is one illustration. Consider, for another, a section of a university handbook on parking policy specifying that “faculty members may park in employee-designated spaces.” That instruction communicates to most faculty members permission to park in employee-designated spaces *only*. For disabled faculty, however, that same sentence expresses permission to park in employee-designated spaces *in addition* to spaces reserved for those with a disability.

In all of these cases, what the words at issue mean depends not just upon the setting in which they were *spoken or written down*, but also upon the setting in which they are *heard or read*. And because, in each case, they can be heard or read in multiple, relevantly different settings, the words at issue can have more than one meaning in exactly the sense the one-interpretation rule rejects. The way that such bill-

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<sup>75</sup> See generally Andy Egan, *Billboards, Bombs and Shotgun Weddings*, 166 SYNTHESE 251 (2009) (analyzing cases in which a single verbalization or written text communicates different content to different audiences); Stefano Predelli, ‘*I Am Not Here Now*,’ 58 ANALYSIS 107 (1998) (same); Alan Sidelle, *The Answering Machine Paradox*, 21 CANADIAN J. PHIL. 525 (1991) (same).

<sup>76</sup> See, e.g., Julie M. Donohue, Marisa Cevasco & Meredith B. Rosenthal, *A Decade of Direct-to-Consumer Advertising of Prescription Drugs*, 357 NEW ENG. J. MED. 673 (2007) (describing and analyzing direct-to-consumer marketing of pharmaceuticals).

<sup>77</sup> John F. Kennedy, President, United States of America, Inaugural Address (Jan. 20, 1961), in 1961 PUBLIC PAPERS OF THE PRESIDENTS, at 1, 2–3.

boards, handbooks, etc., work is, in one sense, straightforward. Such instruments deploy language that is sensitive to context in some way or other, and listeners or readers know to interpret with an eye to the context in which they listen or read—faculty members with a disability know to interpret the parking instruction attending to the fact that disabled individuals receive separate parking accommodation. Everyone involved recognizes that the language at issue may be listened to or read in multiple settings, and so no one believes falsely that what those words mean for her here and now are what they must mean for someone else in some other time or place<sup>78</sup>—Karen understands, for instance, that Hector hears “your doctor” as used in the pharmaceutical commercial as referring to *his* doctor, not hers, and vice versa. All of this is possible because the multi-purpose character of these various communications is plain to view—everyone understands that these advertisements and the like are intended to be heard or read in various settings, and so everyone knows to interpret them in view of the setting in which they happen to find themselves.

The motivation for using words in this way is, in most cases, linguistic economy. For obvious reasons, it is desirable for advertisers to communicate individualized messages to prospective customers. At the same time, to produce advertisements addressed specifically to Karen or Hector would, in many cases, be cost-prohibitive or otherwise practically infeasible.<sup>79</sup> Similar cost considerations are plainly at work in the decision to use the same instructions or permissions to heterogeneous groups—it’s simply easier to address all of one’s guests simultaneously, to use the earlier example, than to address adults and children separately. Again and again, speakers are able to get two (or more) for the linguistic price of one.

Turn now to statutory language. In terms of both substance and motivation, legislation looks, in relevant respects, a lot like ordinary conversation. As to substance, statutory provisions routinely contain language that is sensitive to context in one way or another. Congress almost never uses indexicals like “you” or “your”<sup>80</sup>—if it were to use

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<sup>78</sup> See Egan, *supra* note 75, at 260 (observing that attending to different *times* is not enough to make sense of the multiple contents expressed by such verbalizations or written text since they may express multiple contents *simultaneously* if simultaneously heard or read by multiple audiences).

<sup>79</sup> Obviously, the feasibility of individualized messages depends upon the technological constraints associated with the chosen medium—individualized emails are, for example, much easier to produce than individualized television advertisements given current technology.

<sup>80</sup> *But see* Anthony J. Casey & Anthony Niblett, *The Death of Rules and Standards*, 92 IND. L.J. 1401 (2017) (discussing the prospect of context-specific laws, made possible by advances in technology such as big data and artificial intelligence).

them more often, the one-meaning rule would probably enjoy few adherents. And indeed, in situations in which legislatures *do* use indexicals, no one has trouble interpreting those provisions correctly—to use a classic example, a statute that instructs drivers to proceed at a “reasonable speed” is elliptical for a “reasonable speed (for your circumstance),” and drivers, police, and courts interpret that provision accordingly.<sup>81</sup>

Perhaps the main contribution of this Article, then, is to alert readers that *other* forms of context sensitivity can be leveraged to communicate multiple messages in just the same way that indexicals are used for that purpose in, for example, the “I want YOU for U.S. Army” poster.<sup>82</sup> Consider, for example, that Congress makes regular use of *gradable adjectives* like “dangerous,” “serious,” or “significant.”<sup>83</sup> Because they are gradable, such adjectives, like indexicals, acquire meaning only in context.<sup>84</sup> Take “serious.” Seriousness comes in degrees—a first-degree burn is a less serious injury than a second-degree burn. For that reason, context must determine the level of seriousness that qualifies as “serious” in each conversational context—in some contexts, both a first- and a second-degree burn constitute a “serious” injury, in others only a second-degree burn counts, and in others still neither does.<sup>85</sup>

In addition to words like “you” or “serious,” which are inherently sensitive to context, Congress routinely though maybe less obviously uses seemingly context-insensitive language in ways that combine with context to communicate additional or unspoken content. When

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<sup>81</sup> Thanks to Adam Samaha for this example.

<sup>82</sup> Indeed, even in the philosophical literature, the discussion of multiple meanings has focused almost exclusively upon indexicals. *See, e.g.,* Egan, *supra* note 75, at 259–61 (discussing the example of a billboard that reads “JESUS LOVES YOU”).

<sup>83</sup> *See, e.g.,* 18 U.S.C. § 1365(a)(3) (2012) (authorizing an enhanced sentence for tampering with consumer products if “serious bodily injury” results); 18 U.S.C. § 2277(a) (2012) (making it a crime to possess a “dangerous weapon” on board a vessel documented under the laws of the United States without permission of the owner or master of the vessel); 49 U.S.C. § 20104(a)(1) (2012) (granting the Secretary of Transportation special authority in the event of an emergency involving “significant harm” to the environment).

<sup>84</sup> The prevailing view among linguists and philosophers of language is that gradable adjectives are, like indexicals, sensitive to context as a matter of semantics. *See, e.g.,* Christopher Kennedy, *Vagueness and Grammar: The Semantics of Relative and Absolute Gradable Adjectives*, 30 LINGUISTICS & PHIL. 1 (2007) (articulating a semantic theory of “relative” gradable adjectives such as “expensive” and “absolute” gradable adjectives such as “straight”). *But see* HERMAN CAPPELEN & ERNIE LEPORE, *INSENSITIVE SEMANTICS: A DEFENSE OF SEMANTIC MINIMALISM AND SPEECH ACT PLURALISM* 87–113 (2005) (arguing that gradable adjectives such as “tall” are context-insensitive as a matter of semantics).

<sup>85</sup> *See, e.g.,* *People v. Harvey*, 9 Cal. Rptr. 2d 17, 20 (Ct. App. 1992) (citations omitted) (holding that, as a matter of state law, a second-degree burn constituted a “great bodily injury” because it required one month of treatment).

Congress gives a list of particulars, for instance, it exploits shared information to communicate to interpreters whether its list is exhaustive<sup>86</sup>—again, recall the parking example as an everyday analogy. Similarly, Congress uses unqualified terms or phrases, depending upon context to communicate their scope<sup>87</sup>—again, by analogy, think back to “something to drink.” With “tangible object,” for instance, even once one settles how tangible an object must be to count as “tangible,” the question remains *which* tangible objects are at issue—all tangible objects, information-containing tangible objects, etc.<sup>88</sup>

As these and other examples make clear, Congress uses language that is sensitive to context in various ways.<sup>89</sup> Again, Congress sometimes uses words that are inherently sensitive to context—this is context-sensitivity in what philosophers and linguists call the *semantic* sense. Other times, Congress uses language in ways that, in context, communicate something beyond (or instead of<sup>90</sup>) what is strictly speaking ‘said’—this is context-sensitivity in the *pragmatic* sense.<sup>91</sup> Whether some instance of context-sensitivity falls on the semantic or the pragmatic side of the divide is, for legal purposes, basically irrelevant.<sup>92</sup> What matters is just that, in each instance, what Congress communicates—which is to say, what Congress *means* in the legally relevant sense<sup>93</sup>—is in part a function of context. For that reason,

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<sup>86</sup> See *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017) (“The force of any negative implication, however, depends on context. The *expressio unius* canon applies only when circumstances support a sensible inference that the term left out must have been meant to be excluded.” (internal quotation marks and alterations excluded)).

<sup>87</sup> See *Neal v. Clark*, 95 U.S. 704, 709 (1877) (noting frequent application of the *noscitur a sociis* and *eiusdem generis* canons).

<sup>88</sup> As to this sort of context-sensitivity, consider a common, ordinary language example concerning instruction manuals for items like printers, refrigerators, or televisions. Such manuals frequently cover various models. As a result, a reference to, for example, “the paper tray” may have one or multiple referents contingent upon which model of printer you’ve purchased. Similarly, an instruction to “place the car in ‘drive’” may or may not be exclusive depending on whether one has opted for four-wheel drive.

<sup>89</sup> For a fuller account of the ways in which Congress uses context-sensitive language, see, for example, Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 986–98 (2017) (cataloging examples); Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1195–202 (1990) (same).

<sup>90</sup> See Kent Bach, *Speaking Loosely: Sentence Nonliterality*, 25 MIDWEST STUD. PHIL. 249, 250 (2001) (“[W]e commonly speak loosely, by omitting words that could have made what we meant more explicit, and we let our audience fill in the gaps.”).

<sup>91</sup> See generally Kent Bach, *The Semantics-Pragmatics Distinction: What It Is and Why It Matters*, in PRAGMATIK: IMPLIKATUREN UND SPRECHAKTE 33 (Eckard Rolf ed., 1997).

<sup>92</sup> And happily so. See generally SEMANTICS VS. PRAGMATICS (Zoltán Gendler Szabó ed., 2005) (presenting essays by philosophers and linguists discussing where and how to draw the divide).

<sup>93</sup> See Doerfler, *supra* note 89, at 988 (arguing that “[a]s in ordinary conversation, what an interpreter cares about is what a speaker (here, Congress) ‘means’ in a broad, pragmatic sense”).

Congress is, in each instance, in a position to communicate multiple messages—so long, that is, as multiple, importantly different contexts are in play.<sup>94</sup>

So what about multiple contexts? It seems hard to deny that Congress uses context-sensitive language in statutory texts that are intended to be read in multiple, importantly different contexts—importantly different, that is, by Congress’s lights. Here, the most straightforward example is Congress’s use of such language in statutory provisions with both civil and criminal applications. That the civil and the criminal context are importantly different is hardly worth stating. Civil remedies (e.g., damages, injunctions) are much less severe than criminal sanctions (e.g., deprivation of life or liberty).<sup>95</sup> An adverse civil judgment is not accompanied by the same “societal stigma” as a criminal conviction.<sup>96</sup> Reflecting these disparities, the burden of persuasion in the typical civil case is preponderance of the evidence, whereas criminal conviction requires proof beyond a reasonable doubt.<sup>97</sup> Especially relevant here, even the interpretive norms applicable in the two settings differ significantly. In a civil case, the government often enjoys substantial deference in resolving linguistic unclarity, while, in a criminal case, unclarity is to be resolved in favor of the defendant.<sup>98</sup> For all of these reasons and more, civil and crim-

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<sup>94</sup> Again, previous philosophical scholarship focuses on the use of semantically context-sensitive terms, in particular indexicals, to communicate multiple meanings. *See supra* note 82. This focus is motivated primarily by the interesting technical questions to which such examples give rise. As philosopher Andy Egan explains, according to the standard picture: “[O]nce we’ve fixed where (and therefore who) the speaker is, which world the utterance takes place in, and the time at which it occurs, we’ll have fixed all of the facts about the utterance on which its content could depend.” Egan, *supra* note 75, at 252. As Egan argues, however, examples of multiple meanings involving indexicals are enough to suggest that “we need to include a role for the positional context of the audience member, as well as that of the speaker, in the assignment of semantic values to context-sensitive vocabulary.” *Id.* at 253.

<sup>95</sup> *See Mitchell v. United States*, 526 U.S. 314, 328 (1999) (“Another reason for treating civil and criminal cases differently is that ‘the stakes are higher’ in criminal cases, where liberty or even life may be at stake . . . .” (quoting *Baxter v. Palmigiano*, 425 U.S. 308, 318–19 (1976))). *But see Das, supra* note 11, at 145 (observing that noncitizens subject to mandatory detention “may be deprived of their liberty in jails or prisons for days, months, or even years”); Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1939 n.292 (2014) (observing that “immigration proceedings are distinctive among civil cases” insofar as such proceedings can involve “deprivations of ‘liberty’ as opposed to ‘property’”).

<sup>96</sup> *Ball v. United States*, 470 U.S. 856, 865 (1985) (noting criminal convictions carry a heavy societal burden).

<sup>97</sup> *United States v. Regan*, 232 U.S. 37, 47–48 (1914).

<sup>98</sup> *Compare Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (“When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.”), *with*

inal cases are substantially different interpretive environments. It is, in turn, at least noteworthy that Congress sometimes chooses to draft statutory texts that are to be interpreted in both—texts that, without question, contain the full range of context-sensitive language discussed in the preceding paragraphs.<sup>99</sup>

As to motivation, Congress is just as concerned if not more with linguistic economy as are speakers in ordinary conversation. Put simply, enacting statutory language is costly in various ways, and so, given finite resources, it makes sense, other things equal, for Congress to speak less rather than more. This is especially true in an era of partisan gridlock, when enacting statutory language of almost any sort is incredibly difficult.<sup>100</sup> To be a bit more precise, scholars have long recognized that “[j]ust as it is prohibitively costly for private parties to write complete contracts that cover every possible contingency, it is prohibitively costly for legislatures to write complete statutes that anticipate and resolve all possible questions regarding a statute’s proper scope and application.”<sup>101</sup> Owed to these constraints, Congress often uses vague terms when articulating prohibitions or requirements, relying on courts or agencies to render those terms more precise through application.<sup>102</sup> Put another way, the reality of limited

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United States v. Santos, 553 U.S. 507, 514 (2008) (plurality opinion) (“The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.”), *superseded by statute*, 18 U.S.C. § 1956 (2012).

<sup>99</sup> See, e.g., 15 U.S.C. § 77q(a)(2) (2012) (prohibiting in the offer or sale of a security the obtaining of money by means of an omission that renders statements made “misleading”); 15 U.S.C. § 1263(a) (2012) (prohibiting the sale of any misbranded “hazardous” substance).

<sup>100</sup> See SARAH BINDER, CTR. FOR EFFECTIVE PUB. MGMT. AT BROOKINGS INST., POLARIZED WE GOVERN? (2014) (noting a steady increase in legislative gridlock since the mid-twentieth century).

<sup>101</sup> Matthew C. Stephenson, *Statutory Interpretation by Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 285, 287 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010).

<sup>102</sup> Here it is important to contrast Congress’s use of *vague* language with its use of *ambiguous* language. Vague terms such as “reasonable” or “dangerous” have uncertain application in borderline cases—whereas some activities are obviously “dangerous” and others obviously not, for others still it is difficult to say. Ambiguous terms like “bank,” by contrast, admit of multiple distinct readings—“bank” might refer to the edge of a river or to a financial institution. Presumptively, Congress understands the difference between vague and precise language, suggesting that any unclarity in the law resulting from the use of vague language is, to some degree, intentional. See John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 116 (contrasting “precise and specific command[s]” with “open-ended and general one[s]”). Not so with respect to ambiguous language, the use of which is sometimes intentional, but more often accidental. See Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 867–72 (2014) (contrasting “strategic” and “unintentional” ambiguity). Plausibly, this has significant implications for interpretive doctrines like *Chevron*, which are premised upon the implicit delegation of interpretive authority. See

legislative resources incentivizes Congress to use language that is *especially* sensitive to context. Gradable adjectives of the sort discussed above are just one example. Suppose, for instance, that Congress were to try to provide time-and-a-half compensation to employees for time spent performing dangerous work. Absent cost-constraints, Congress might try to come up with an exhaustive list of tasks that would trigger this additional pay. Given the reality of limited resources, however, it would be much more feasible for Congress to enact a generic requirement that employers pay time-and-a-half compensation for performance of “dangerous” work, trusting agencies or courts to sort out what counts as dangerous.<sup>103</sup>

Now suppose that Congress would like its context-sensitive language to be interpreted differently across importantly different contexts. In that situation, Congress would have two options: enact identically worded provisions for each context or enact a single provision, trusting courts or agencies to implement that provision differently across contexts.<sup>104</sup> Again, given the reality of limited legislative resources, Congress has at least some incentive to opt for the latter. Suppose, for instance, that the mining industry were to receive bipartisan assurance that the requirement of time-and-a-half pay for “dangerous” work would be interpreted differently as to miners in view of the special economic challenges faced by that industry, its importance to the American economy, etc. In that situation, Congress could enact a separate “dangerous” work provision that applies only to miners. Alternatively, Congress could just enact a general “dangerous” work provision and then, for example, assign a separate agency—say, the Mine Safety and Health Administration—exclusive jurisdiction over claims by mining company employees.<sup>105</sup>

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Ryan D. Doerfler, *Mead as (Mostly) Moot: Predictive Interpretation in Administrative Law*, 36 *CARDOZO L. REV.* 499, 500–01 n.4 (2014) (arguing that *Chevron* deference is easier to justify with respect to the construction of vague language than with respect to ambiguous language).

<sup>103</sup> See generally Hrafn Asgeirsson, *On the Instrumental Value of Vagueness in the Law*, 125 *ETHICS* 425 (2015) (arguing that the feasibility of translating vague instructions to precise commands varies according to whether the vague language used associates with an attribute that can be quantitatively measured).

<sup>104</sup> To be sure, Congress might instead want its context-sensitive language to be interpreted the *same way* across importantly different contexts. An interpreter must, as discussed throughout, attend to context to determine which is the case.

<sup>105</sup> For an extensive discussion of multi-agency statutes, see *infra* Section II.B.1. Congress could, of course, provide additional cues, noting in, for example, the legislative history the special considerations that support a more permissive interpretation of “dangerous” as applied to mining (though, of course, many judges would ignore such cues on methodological principle).

To be clear, the claim here is not that Congress speaks as economically as possible. Nor is it the case that Congress has overwhelming incentive to speak economically in every instance.<sup>106</sup> The claim, instead, is just that, generally speaking, Congress has incentive to use fewer words rather than more.<sup>107</sup> As such, courts should at least be open to the possibility that Congress has used fewer words rather than more *in the specific way described here*.

Further, in arguing that Congress sometimes intends that its language be interpreted differently in importantly different contexts, the suggestion is not that Congress forms such an intention at the level of word choice.<sup>108</sup> Plausibly, in selecting obviously vague terms like “dangerous,” Congress is conscious of the context-sensitivity of the language it is choosing. Other times, however, Congress, like the rest of us, uses context-sensitive language without being terribly aware. Phrases like “attorney’s fee,”<sup>109</sup> “navigable waters,”<sup>110</sup> or “interest . . . rate”<sup>111</sup> also admit of borderline cases.<sup>112</sup> And yet, Congress, like the rest of us, might easily not be attendant to those cases at the time it uses such words. Fortunately for Congress (and for us), tailoring a

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<sup>106</sup> Indeed, in an era of “unorthodox lawmaking,” for example, legislative drafters sometimes have an incentive to make proposed legislation longer rather than shorter to prevent careful reading before that proposed legislation can be voted upon. *See, e.g.*, Gluck et al., *supra* note 46, at 1804–05 (describing the practice and motivations underlying omnibus legislation, which “packages together several measures into one or combines diverse subjects into a single bill” and is “usually highly complex and long” (internal quotation marks omitted) (first quoting *C-Span Congressional Glossary: Omnibus Bill*, C-SPAN, <http://legacy.c-span.org/guide/congress/glossary/omnibus.htm> [https://perma.cc/RKE5-W3P4] (last visited Feb. 3, 2019); and then quoting BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S.* 112–13 (4th ed. 2012))).

<sup>107</sup> The positive law analogue here is the canon against surplusage, which creates a mild presumption that Congress’s words have independent significance. *See, e.g.*, *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 299 n.1 (2006) (“While it is generally presumed that statutes do not contain surplusage, instances of surplusage are not unknown.”).

<sup>108</sup> Or at least not that it *always* does.

<sup>109</sup> Civil Rights Attorney’s Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (authorizing award of a reasonable “attorney’s fee” to a successful plaintiff in certain actions).

<sup>110</sup> 33 U.S.C. § 1344(a) (2012) (regulating the discharge of dredged or fill material into “navigable waters”).

<sup>111</sup> 12 U.S.C. § 85 (2012) (providing that a national bank may charge its loan customers “interest at the rate allowed by the laws of the State . . . where the bank is located”).

<sup>112</sup> *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001) (holding that “navigable waters” does not include seasonally ponded, abandoned gravel mining depressions used as a habitat by migratory birds); *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 747 (1996) (agreeing with the executive agency that “interest rate” encompasses fee rates for late payments); *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 102 (1991) (holding that “attorney’s fee” does not include expert witness fees), *superseded by statute*, Civil Rights Act of 1991, 42 U.S.C. § 1988(c).



message to multiple audiences does not require some implausible degree of linguistic self-awareness. Consider, by analogy, the example of an operator's manual for multiple vehicle models.<sup>113</sup> The drafter of such a manual presumably inserts context-sensitive language at various places unawaredly. Happily, though, such a drafter can and presumably does intend simply that the reader of the manual interpret *whatever* context-sensitive language is contained therein with an eye to the model the reader is operating. So, too, Congress can intend simply that *whatever* context-sensitive language is contained in, say, a provision with civil and criminal applications be interpreted in view of the character of the case.

Courts are already familiar with this sort of global interpretive intention. In *Chevron*, for example, the Supreme Court famously held that the use of vague language in an agency-administered statute indicated a delegation of authority to the agency to render that language more precise.<sup>114</sup> As John Manning observes, "*Chevron* replaced [a] longstanding totality-of-the-circumstances approach with a relatively clean, rule-like formula."<sup>115</sup> In so doing, the Court abandoned an approach pursuant to which the question was whether Congress intended to delegate interpretive authority *here*, adopting instead a general presumption that Congress intends that agencies, rather than courts, construe unclear statutory terms.

In sum, given the substantive and motivational similarities between legislation and ordinary conversation, it would, as a linguistic matter, be somewhat surprising if Congress *never* chose to communicate different things to different audiences with the same statutory text. As Part II explains in detail, whether Congress has chosen to do so in a given instance is an intricate question—that statutory language has both civil and criminal applications, for instance, does not necessarily entail that Congress intends that language to mean something different in the civil and the criminal setting, even if it is a pretty strong indication.<sup>116</sup> The claim in this Section is just that, as a purely linguistic matter, courts have little reason *to exclude at the outset the possibility* that a single statutory provision has more than one meaning.

Return now to the simple, intuitive inference from the "fixity" of statutory meaning that seemed to support the one-interpretation rule. To see where that inference goes astray, it helps to observe first that

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<sup>113</sup> See *supra* note 88.

<sup>114</sup> 467 U.S. 837, 844, 866 (1984).

<sup>115</sup> John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 765 (2017).

<sup>116</sup> See discussion *infra* Section II.A.1 (discussing interpretive differences in civil and criminal contexts).

the same verbalization or written text having more than one meaning is entirely compatible with the standard Gricean picture on which communication is grounded in speaker intention.<sup>117</sup> Again, the reason that things like “ask your doctor” advertisements work is that interpreters understand that the language at issue is *meant* to be interpreted with an eye to the context in which the advertisement is being interpreted. If that’s right—if you, Karen, and Hector all interpret that advertisement correctly because each of you recognizes that the advertiser intends that you interpret the advertisement relative to the context in which you hear it (and intends, in turn, that each of you recognize that intention, etc.)—then such forms of communication are also compatible with the thesis that the communicative content(s) of those communications is, in some sense, “fixed” at the time the words at issue are spoken or written down.<sup>118</sup> When the “ask your doctor” commercial was recorded, for example, it was fixed that if you were to hear that commercial, “you” and “your doctor” would refer to *you* and *your doctor*, if Karen were to hear the commercial, that “you” and “your doctor” would refer to *her* and *her doctor*, etc. At the same time, to make sense of that commercial, a given listener must consider not just the context in which the advertisement was recorded, but also, for obvious reasons, the context in which it is being heard—are you listening? Karen? Someone else? The same is true for statutory language. Suppose, again, that Congress were to require time-and-a-half pay for “dangerous” work, intending that “dangerous” be interpreted differently as to mining and non-mining work. In that case, what “dangerous” means as to mining and non-mining work, respectively, is fixed the moment Congress enacts that provision.<sup>119</sup> At the same time, to know *which* of those meanings is intended in some situation, one must consider, in addition to facts about the setting in which Congress enacted that provision, whether one is interpreting the provision in a case involving mining or, say, office work.

## 2. *Practical Considerations*

In terms of practice, the case for singular meaning overestimates the extent to which recognizing multiple meanings would create new opportunities for judicial willfulness. It also ignores the way in which the one-interpretation rule facilitates willfulness already.

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<sup>117</sup> See Egan, *supra* note 75, at 277 (insisting that “[w]e certainly don’t need to sever the connection between content and speaker intentions altogether” to make sense of the cases at issue).

<sup>118</sup> See *supra* notes 58–62 and accompanying text (describing the fixation thesis).

<sup>119</sup> Or, perhaps better, who will determine what “dangerous” means is fixed. See *infra* notes 172–202 and accompanying text.

Start with new opportunities for willfulness. As a threshold matter, any discussion of how to limit judicial willfulness must assume that judges are, to some degree, responsive to threats of reputational harm. If federal judges are indifferent to what people think, there are, in effect, no available sanctions for willful behavior.<sup>120</sup> Assuming, then, that judges are sensitive to reputational harm, how much additional willfulness would there be if courts were permitted to recognize multiple meanings? The answer, it seems, is very little.

As mentioned earlier, courts abandoned long ago any commitment to “literalism” about statutory language.<sup>121</sup> Instead, all now agree that such language must be interpreted in context. In so doing, courts have (rightly) given up on the project of identifying statutory meaning through mechanical application of dictionary definitions. What this means, however, is that interpretive claims are now constrained largely just by intuitions about linguistic plausibility.<sup>122</sup> To use an earlier example, the term “courts” exhibits tremendous variability from context to context. In some contexts, “courts” includes foreign courts. In others, only domestic. Sometimes “courts” includes informal tribunals. Other times not. Indeed, one can imagine not-so-far-fetched conversational scenarios where “courts” might exclude the current Supreme Court. Judge Richard Posner, for example, remarked recently: “I’m very critical. I don’t think the judges are very good. I think the Supreme Court is awful. I think it’s reached a real nadir. Probably only a couple of the Justices, Breyer and Ginsburg, are qualified. They’re okay, they’re not great.”<sup>123</sup> In that setting, it would have been linguistically felicitous albeit intemperate for Posner to add: “At

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<sup>120</sup> Outside of impeachment, at least. U.S. CONST. art. III, § 1 (affording federal judges life tenure and salary protection, conditional upon “good Behaviour”). Many state judges are, of course, subject to democratic sanction in the form of judicial elections.

<sup>121</sup> See *supra* note 49 and accompanying text (describing the shift away from ordinary meaning interpretation).

<sup>122</sup> Very recently, a handful of judges and scholars have proposed a more quantitative approach to interpreting statutory language in context. See, e.g., Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 828–51 (2018) (urging that judges make use of linguistic corpora to determine what constitutes “ordinary” usage in a particular setting). For an important discussion of the limitations of that approach, see Lawrence M. Solan & Tammy Gales, *Corpus Linguistics as a Tool in Legal Interpretation*, 2017 BYU L. REV. 1311, 1342–54.

<sup>123</sup> Richard Posner, C-SPAN (Oct. 4, 2016), <https://www.c-span.org/video/?415557-1/william-domnarski-discusses-richard-posner>; see also ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES (2012); Amy B. Wang, *Trump Lashes Out at ‘So-Called Judge’ Who Temporarily Blocked Travel Ban*, WASH. POST (Feb. 4, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/02/04/trump-lashes-out-at-federal-judge-who-temporarily-blocked-travel-ban> (showing how “judge” can be used in a non-literal way).

this point, I'm not even sure the Supreme Court is really a 'court!'"<sup>124</sup> That "courts" varies in this way does nothing to suggest, of course, that the Supreme Court might be exempt from statutory restrictions that apply to all federal "courts."<sup>125</sup> What it shows is just that the dictionary definition of "court" does not entail that the Supreme Court falls within the meaning of that term as used. Instead, what makes obvious that the Supreme Court is subject to such restrictions is our assessment that, given the setting—a federal statute, no explicit distinction between the Supreme Court and other federal courts, subject matter just as pertinent to the Supreme Court as other federal courts, etc.—it would be bizarre for Congress to use "courts" otherwise.

As Part II illustrates at length, claims of multiple statutory meanings are constrained by linguistic plausibility in just the same way. It is, as Part I demonstrates, linguistically *possible* for Congress to say one thing to financial institutions in general and, simultaneously, another to Goldman Sachs in particular. To suggest, however, that Congress has done so with actual statutory language would almost always be completely far-fetched. The reason is that rarely is there an indication that Congress intends any such thing. Where one looks for indications of congressional intent will, of course, depend upon one's interpretive methodological (or, alternatively, jurisprudential) commitments. Wherever one looks, though, it would be surprising to find evidence that Congress expects a facially neutral banking statute to be interpreted specially as to Goldman Sachs.<sup>126</sup> Assuming that to be so, it would in turn be reputationally costly for a court to insist upon a Goldman-Sachs-specific reading nonetheless. Again, Congress *could* have written such a statute.<sup>127</sup> But it would be implausible to think—and therefore reputationally costly to claim—that it had done so in this instance.

To be clear, if courts were permitted to recognize multiple statutory meanings, that would create an additional way in which courts

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<sup>124</sup> Here, Posner would be characterized most plausibly as engaging in what philosophers and linguists call "metalinguistic negotiation." See, e.g., David Plunkett & Tim Sundell, *Disagreement and the Semantics of Normative and Evaluative Terms*, PHILOSOPHERS' IMPRINT, Dec. 2013, at 1, 15–16 (describing "metalinguistic negotiation" as a negotiation between speakers concerning the "appropriate use" of a term, as when, for example, speakers debate whether Secretariat is fairly characterized as an "athlete").

<sup>125</sup> See, e.g., 28 U.S.C. § 1654 (2012) ("In *all courts of the United States* the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." (emphasis added)).

<sup>126</sup> As contrasted with facially discriminatory statutes such as Dodd-Frank. See, e.g., 12 U.S.C. § 5384 (2012) (creating the authority to "liquidate failing financial companies that pose a significant risk to the financial stability of the United States").

<sup>127</sup> Just as Congress *could* have written a statute for purposes of which the Supreme Court is not a "court."

might mischaracterize what statutes say. Linguistic plausibility is constraining, but not absolutely so. On the one hand, courts would, with little to no reputational harm, be able to mischaracterize a statute as having multiple meanings if that claim were at least plausible. On the other, courts would, with significant reputational harm, be able to make implausible claims of multiple statutory meanings without having to incur the *additional* reputational harm associated with flagrant violation of an established rule of interpretation—in this case, the one-interpretation rule. The claim here is just that the degree to which courts can mischaracterize statutory meaning without reputational harm is meaningfully limited even if courts were permitted to recognize multiple statutory meanings. Recognizing that words and phrases have meaning only in context has not resulted in courts declaring that “glory” means “a nice knock-down argument.”<sup>128</sup> So, too, acknowledging that texts can mean different things in different settings would not lead to claims that facially neutral banking statutes *really* treat Goldman Sachs differently.

On the other side of the ledger, the first and most obvious entry is that, to the extent Congress intends that certain statutory language be read differently in different settings, the one-interpretation rule itself *requires* courts to mischaracterize statutory meaning some of the time. In addition to guaranteeing inaccuracy in relevant cases, that rule thus provides a convenient excuse for courts inclined to ignore multiple meanings for policy reasons.<sup>129</sup> Such courts can claim, “Our hands are tied!” as it were.

Second, assuming Congress sometimes intends multiple meanings, the one-interpretation rule facilitates the imposition of false interpretive choices. To see how, remember that a purported benefit of the one-interpretation rule was that it put an additional price on willful misreading. Specifically, that rule entailed that if a court were to misread statutory language for the benefit of some class of litigants, it would have to misread the same language the same way for the

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<sup>128</sup> LEWIS CARROLL, *THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE* 99 (Florence Milner ed., Rand McNally & Co. 1917) (1871) (“‘But “glory” doesn’t mean “a nice knock-down argument,”’ Alice objected. ‘When I use a word,’ Humpty Dumpty said, in rather a scornful tone, ‘it means just what I choose it to mean—neither more nor less.’”).

<sup>129</sup> Whether eliminating this excuse would offset perfectly the new opportunities for willful misinterpretation discussed above, *see supra* note 128 and accompanying text, depends upon the distribution of cases across the linguistic plausibility spectrum. *Cf.* Doerfler, *supra* note 67, at 840–41 (observing that drafting mistakes can be willfully ignored as well as willfully imagined).

benefit of everyone else.<sup>130</sup> Consider, though, how things play out with the earlier example of required time-and-a-half pay for time spent performing “dangerous” work.<sup>131</sup> In that hypothetical, Congress expressed in various ways special concern with the burdens such a requirement might create for the mining industry. As such, to read the reporting requirement narrowly for the benefit of mining employers (and to the detriment of mining employees) would thus be consistent not just with industry partisanship but also legislative supremacy. Under the one-interpretation rule, however, interpreting courts would face a choice. On the one hand, such courts could read the requirement narrowly for *all* employees (e.g., characterizing limited exposure to toxins as not “dangerous”). In so doing, courts would attend to Congress’s concerns as to mining, but at the same time afford only limited protection to non-mining employees. On the other, courts could read the requirement narrowly for *no* employees. Going that route, courts would afford non-mining employees robust protection, but only at the cost of ignoring Congress’s concerns as to mining. Both options are, of course, bad: Congress’s concern was with mining specifically, not business interests in general. Yet because of the one-interpretation rule, opponents of workplace protections in general would be in a position to leverage Congress’s genuine but specific concern with mining to advance its non-specific agenda. Alternatively, advocates of robust worker protections could exploit the plight of the at-risk office worker to undermine the legislative bargain Congress apparently struck.

As discussed more fully in Part II, Congress sometimes has good reason to want statutory language to be read differently in different contexts. Occasionally, policy aims are, for example, better advanced by reading a prohibition broadly in one setting and narrowly in another. As this Part shows, in those situations, the one-interpretation rule prevents courts from getting things right in both settings. More still, it lets willful actors leverage the desirability of the right reading in one context to secure an unintended interpretation in another.

## II APPLICATIONS

So, in all likelihood, statutes have more than one meaning some of the time. The question this raises immediately is: When? As

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<sup>130</sup> See *supra* note 74 and accompanying text (describing this limitation as a “price” of giving a statute only one meaning).

<sup>131</sup> See *supra* notes 101–05 and accompanying text (explaining why enacting legislation for “dangerous work” is more feasible than legislating for an exhaustive list of professions).

explained above, whether some text has multiple meanings is ultimately a question of communicative intent. With statutory language, the question is thus whether the Congress intends that its words be read differently in different interpretive settings. What sources one consults in answering that question will depend in familiar ways upon one's interpretive methodological or jurisprudential commitments,<sup>132</sup> and on how one conceives of congressional intent in the first place.<sup>133</sup> This Article is, to be clear, agnostic as to these old debates. The claim here is just that however one determines what Congress means,<sup>134</sup> one must apply those same tools to determine whether Congress means one thing or two (or three or four).

This Part considers a range of cases. In some, it is highly plausible that the statutory language at issue has more than one meaning. In others, it is entirely implausible. And in others still, it is more difficult to say.

### A. *Easy(-ish) Cases*

#### 1. *Civil/Criminal*

Start with an easy(-ish) case. For the reasons articulated above, civil and criminal cases are importantly different interpretive settings.<sup>135</sup> The sanctions associated with criminal conviction are much more severe. The procedural and interpretive norms that govern criminal cases are, accordingly, much more forgiving to defendants. In light of these differences, it is, at a minimum, *interesting* that Congress chooses to give certain statutory provisions both civil and criminal significance. Presumptively, Congress is aware that civil and criminal cases are importantly different.<sup>136</sup> More still, when Congress gives a

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<sup>132</sup> See, e.g., Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1241 (2006) (observing the “lively and ongoing academic debate over whether it is legitimate for courts to rely on extratextual sources when construing statutes” (emphasis omitted)).

<sup>133</sup> See, e.g., John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419–21 (2005) (contrasting “classical intentionalism” with “modern textualism,” the latter of which deploys “a sort of ‘objectified’ intent” (internal quotation marks omitted) (quoting Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 17 (Amy Gutmann ed., 1997))).

<sup>134</sup> See *supra* note 5 and accompanying text (discussing this Article’s broad use of the term “mean”).

<sup>135</sup> See *supra* notes 95–98 and accompanying text.

<sup>136</sup> See Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1067–68 (2015) (“[B]etter that ten guilty persons escape, than that one innocent suffer’ is perhaps the most revered adage in the criminal law, exalted by judges and scholars alike as a cardinal principle of Anglo-American jurisprudence.” (alteration in original) (citations after first quotation omitted) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*352)).

provision both civil and criminal significance, it does so explicitly, meaning that Congress intends specifically that its language be read in those (again, importantly different) settings.<sup>137</sup> Taken together, these considerations make it at least plausible that, in any given instance, Congress intends that its language (may) be read differently in those different settings.<sup>138</sup> To do so would only make sense given the differing practical interests at stake—differences of which, again, Congress was presumptively aware.

To see why it would be reasonable for Congress to do this, consider the recent dispute in *Esquivel-Quintana v. Sessions* over the meaning of the phrase “sexual abuse of a minor” as it appears in the INA.<sup>139</sup> Under the Act, “sexual abuse of a minor” is an “aggravated felony.”<sup>140</sup> Noncitizens convicted of an “aggravated felony” are, among other things, subject to deportation.<sup>141</sup> In *Esquivel-Quintana*, a lawful permanent resident had pleaded guilty to a statutory rape offense in California—“unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator.”<sup>142</sup> The Department of Homeland Security (DHS) later initiated removal proceedings, reasoning that the defendant’s offense constituted “sexual abuse of a minor” and so an “aggravated felony.”<sup>143</sup>

On appeal, the question was whether California’s statutory rape offense is defined too broadly to count as “sexual abuse of a minor” per se. In California, “unlawful sexual intercourse” is defined as “an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor,” with “minor” defined, in turn, as “a person under the age of 18.”<sup>144</sup> Before the BIA, the defendant argued that “consensual sex between two partners who are 21 and almost 18” does not amount to sexual “abuse.”<sup>145</sup> The Board disagreed, holding that for a statutory rape offense involving a sixteen- or seventeen-year-old victim to be categorically sexual abuse of a minor, the statute must require a meaningful age difference between the victim and the perpetrator but that, in its view,

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<sup>137</sup> See, e.g., 15 U.S.C. § 77t(b), (d) (2012) (providing criminal and civil remedies, respectively, for Securities Act violations); 18 U.S.C. §§ 1963, 1964 (2012) (providing civil and criminal remedies, respectively, for RICO violations); 33 U.S.C. § 1319(b), (c) (2012) (providing civil and criminal remedies, respectively, for Clean Water Act violations).

<sup>138</sup> See *infra* note 157 and accompanying text.

<sup>139</sup> 137 S. Ct. 1562 (2017).

<sup>140</sup> 8 U.S.C. § 1101(a)(43)(A) (2012).

<sup>141</sup> 8 U.S.C. § 1227(a)(2)(A)(iii) (2012).

<sup>142</sup> 137 S. Ct. at 1567 (quoting CAL. PENAL CODE § 261.5(c) (2018)).

<sup>143</sup> *Id.*

<sup>144</sup> PENAL § 261.5(a).

<sup>145</sup> See Brief for Petitioner at 1, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017) (No. 16-54).



California's three-year age difference requirement was meaningful.<sup>146</sup> A divided Sixth Circuit panel denied the defendant's petition for review, deferring to the BIA's interpretation of "sexual abuse of a minor." As the majority explained:

When Congress used the ambiguous words "sexual abuse of a minor," it declined to specify a particular age of majority or age differential for statutory rape. Nowhere in the statute did Congress specify the definitions of "sexual abuse" or "minor." Congress left these questions open to interpretation by the [BIA].<sup>147</sup>

In dissent, Judge Sutton agreed that "sexual abuse of a minor," as used, was "ambiguous," but insisted that deferring to the BIA's interpretation was nonetheless inappropriate.<sup>148</sup> As Judge Sutton observed, though the instant case was civil in character, a conviction for "sexual abuse of a minor" could have criminal consequences as well.<sup>149</sup> As such, any unclarity in that phrase should, he inferred, be resolved in favor of the defendant. To hold otherwise would be to give DHS "implied gap-filling authority over ambiguous criminal statutes," contradicting the long-settled principle that "criminal statutes 'are for courts, not for the Government, to construe.'"<sup>150</sup> The Supreme Court sidestepped the issue, declaring, perhaps disingenuously,<sup>151</sup> that "sexual abuse of a minor" as used "unambiguously forecloses the Board's interpretation," and that "for a statutory rape offense to qualify as sexual abuse of a minor under the INA based solely on the age of the participants," it is clear that "the victim must be younger than 16."<sup>152</sup>

One has some sympathy for what the Court did. On the one hand, to hold that the rule of lenity applies in a case like *Esquivel-Quintana* would, in effect, be to transfer various policymaking decisions from agencies to courts. Whether to deport a noncitizen con-

<sup>146</sup> See *In re Esquivel-Quintana*, 26 I. & N. Dec. 469, 475–76 (BIA 2015).

<sup>147</sup> *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1025 (6th Cir. 2016), *rev'd*, 137 S. Ct. 1562 (2017).

<sup>148</sup> See *id.* at 1028–29 (Sutton, J., concurring in part and dissenting in part).

<sup>149</sup> See 8 U.S.C. § 1326(b)(2) (2012) (increasing the maximum prison term for illegal reentry into the United States).

<sup>150</sup> *Esquivel-Quintana*, 810 F.3d at 1027 (quoting *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014)).

<sup>151</sup> See, e.g., Andrew Hessick, *Esquivel-Quintana and Chevron*, NOTICE & COMMENT (May 31, 2017), <http://yalejreg.com/nc/esquivel-quintana-and-chevron/> ("[I]t's hard to say that [the cited] materials unambiguously establish that the Immigration Act defines minor as younger than 16."); Rick Hills, *Ambiguity—the Most Ambiguous Concept in the Law of Interpretation*, PRAWFSBLAWG (May 30, 2017), <http://prawfsblawg.blogspot.com/prawfsblawg/2017/05/ambiguity-the-most-ambiguous-concept-in-the-law-of-interpretation.html> (remarking that the Court's opinion is "difficult to take seriously as an interpretation of 'unambiguous' statutory text").

<sup>152</sup> *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568, 1570, 1572 (2017).

victed of a comparatively prophylactic statutory rape offense is, seemingly, just the sort of policy question courts do best to leave to more technically expert, more politically accountable agencies.<sup>153</sup> And while the Court was forced to make that decision for DHS in this instance, it did so in a way that avoided assigning all such future decisions to the judiciary. On the other hand, to hold that *Chevron* applies in such a case would, as the Sixth Circuit majority conceded, be to let “executive officers,” as opposed to legislatures, “define crimes.”<sup>154</sup> Citizens would, in that scenario, potentially lack adequate notice of the criminal law.<sup>155</sup> And agencies would enjoy a potentially dangerous “aggregation of power in the one area where its division matters most: the removal of citizens from society.”<sup>156</sup>

Needless to say, the above dilemma rests on the premise that a statute can have only one meaning. Relax that premise, and it becomes possible to benefit from both *Chevron* and the rule of lenity in the appropriate settings. In civil cases, courts could defer to administering agencies’ more technically-expert, more politically-accountable policy decisions, resolving statutory unclarity in the way the agency thinks makes the most sense.<sup>157</sup> At the same time, courts could resolve unclarity in favor of the defendant in criminal cases, thereby ensuring fair notice and preserving separation of powers where the practical stakes are raised. Given the obvious appeal of this

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<sup>153</sup> See *Negusie v. Holder*, 555 U.S. 511, 517 (2009) (“Judicial deference in the immigration context is of special importance, for executive officials ‘exercise especially sensitive political functions that implicate questions of foreign relations.’” (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988))); *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (“The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: ‘Our Constitution vests such responsibilities in the political branches.’” (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978))). *But see* Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29, 41 (1977) (assessing the BIA’s role and concluding that it lacks the types of resources necessary to produce the quality of decisions it should be issuing).

<sup>154</sup> *Esquivel-Quintana*, 810 F.3d at 1023.

<sup>155</sup> See *id.* (“The rule of lenity ensures that the public has adequate notice of what conduct is criminalized.”); *accord id.* at 1027–28 (Sutton, J., concurring in part and dissenting in part) (agreeing with the majority’s reasoning but applying it to arrive at a different result).

<sup>156</sup> *Id.* at 1027 (Sutton, J., concurring in part and dissenting in part).

<sup>157</sup> To be clear, it may be that what makes the most sense according to the agency is to read the statute as one would pursuant to the rule of lenity. See Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 602 (2009) (observing that “*Chevron* supposes that interpretation is an exercise in identifying the statute’s range of reasonable interpretations, a range that opens up a ‘policy space’ within which agencies may make reasoned choices” (quoting E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 12 (2005))).

solution, the question becomes: Why *wouldn't* Congress intend that a statutory provision with both civil and criminal applications be read differently in those different settings? One possibility is that Congress intends that the administering agency's interpretation control in both types of cases. To attribute this intention to Congress would, however, be unflattering for the reasons canvassed above. Another possibility is that Congress intends that unclarity be resolved in favor of the defendant in civil and criminal cases alike. To attribute this intention to Congress would be normatively and constitutionally unproblematic—there is nothing to prevent Congress from prioritizing fair notice and separation of powers in the civil law setting.<sup>158</sup> At the same time, why think that Congress would intend to give up the advantages of agency flexibility absent the special concerns associated with potential criminal sanctions?

Again, whether Congress intends that some statutory provision with both civil and criminal applications is to be read differently in those different settings is a case-specific inquiry. In *Esquivel-Quintana*, for example, perhaps there is evidence in the legislative history that Congress intended that “sexual abuse of a minor” be read narrowly in civil and criminal cases alike.<sup>159</sup> The point here is just that, in general, there are certain practical advantages to be gained by assigning civil/criminal provisions multiple meanings. As such there is, in each instance, *prima facie* reason to attribute to Congress the intention that the provision in question be read in that way.<sup>160</sup>

## 2. State/Federal

Now an even easier case. State courts routinely interpret federal statutes. As any litigator knows, state courts differ from federal courts in various ways. State courts have different procedural rules.<sup>161</sup> They also have much higher caseloads.<sup>162</sup> State judges tend to be elected

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<sup>158</sup> Especially in areas like immigration law, where “civil” penalties are potentially severe. See Das, *supra* note 11, at 145 (describing those harsh civil penalties, such as long detention); Re, *supra* note 95, at 1939 n.292.

<sup>159</sup> Here, again, one sees how interpretive methodological (or jurisprudential) commitments determine the shape of the inquiry into multiple meanings.

<sup>160</sup> See Baude & Doerfler, *supra* note 49, at 562 (observing that “a court’s perception of what Congress is trying to *say* depends in large part on that court’s understanding of what Congress is trying to *do*”).

<sup>161</sup> See Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1131 (1986) (“Because of the continuing significance of state courts in adjudicating federal rights, state court procedures can have enormous practical importance for federal rightholders.”).

<sup>162</sup> Compare *Federal Judicial Caseload Statistics 2010*, Publication Table C, ADMIN. OFF. U.S. CTS. (Mar. 31, 2010), <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2010.aspx> (280,000 civil

instead of appointed.<sup>163</sup> Those judges are also subject to additional restrictions such as mandatory retirement.<sup>164</sup> Despite these differences, it is widely assumed that federal statutes mean the same thing in state court as they do in federal court.<sup>165</sup> And rightly (if accidentally) so. In most instances, it would be entirely implausible to claim that Congress intended that its language be read differently in those different settings.

To see why, it helps initially to set aside a couple of enticing but ultimately bad reasons for thinking that federal statutes must mean the same thing in state and federal court. The first is that a commitment to uniformity follows from a more basic commitment to rule of law.<sup>166</sup> Here the thought seems to be that if federal statutes were to mean different things in state and federal court, litigants would be able to choose between those courts strategically. As discussed below, if one were to pair a statute that means different things in state and federal court with a scheme of concurrent state- and federal-court jurisdiction, forum shopping would indeed be a serious concern. Suppose, however, that Congress were to create a cause of action for, say, “any employee engaged in commerce” against her employer if that employee was “injured owed to employer negligence.” Suppose further that Congress were to assign to state courts exclusive jurisdiction over claims by employees of state and local governments, and to assign federal courts exclusive jurisdiction over all other claims. In that situation, litigants would have no opportunity to forum shop—state and local employees/employers would be channeled to state

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cases initiated in federal court in 2010), *with State Court Caseload Statistics*, CT. STATS. PROJECT, <http://www.courtstatistics.org/Other-Pages/StateCourtCaseloadStatistics.aspx> (almost 18 million in state court in 2010) (last visited Feb. 3, 2019).

<sup>163</sup> JED HANDELSMAN SHUGERMAN, *THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* 3 (2012) (“Almost 90 percent of state judges face some kind of popular election.”); *Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST. (May 8, 2015), <https://www.brennancenter.org/rethinking-judicial-selection/significant-figures> (finding that “39 states use some form of election at some level of court”).

<sup>164</sup> *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (upholding the Missouri Constitution’s mandatory retirement provision for most state court judges against federal statutory and constitutional challenges).

<sup>165</sup> *See* Anthony J. Bellia Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1554 (2006) (arguing that there is “an apparent constitutional presumption that a federal statute should have the same meaning in the first instance whether enforced in a state or a federal court”). The assumption of federal/state uniformity is importantly different from “the general assumption that . . . ‘Congress when it enacts a statute is not making the application of the federal act dependent on state law.’” *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989) (quoting *Jerome v. United States*, 318 U.S. 101, 104 (1943)).

<sup>166</sup> *See* Bellia, *supra* note 165, at 1556–57 (“[L]egal philosophers have described the idea that underlies anti-forum-shopping measures—essentially that courts should treat like cases alike—as a fundamental principle of fairness for any legal system.”).

court, everyone else to federal. As such, the statute creating the cause of action could seemingly mean different things in state and federal court consistent with rule of law.

A second and related argument is that such uniformity is somehow required by the Supremacy Clause.<sup>167</sup> In practice, the Supremacy Clause compels state courts to follow Supreme Court rulings.<sup>168</sup> What that clause entails, then, is that federal statutes must mean the same thing in state court and the Supreme Court. But only in certain cases. To continue with the previous example, suppose the Supreme Court were to construe the imagined employer negligence statute in a case originating in federal court. If, later, some state court were to construe that same statute differently, there would be no reason to think that the state court in question would have violated the Supremacy Clause necessarily. If Congress intended for the statute at issue to be read differently in cases originating in state and federal court, then that prior Supreme Court decision would simply be on a different legal question—namely, what that statute means in a case originating in federal court. And if, in turn, the Supreme Court were later to review that state court’s decision, it would be open to the Court to distinguish the instant case from the prior one—that prior case, after all, would have left open what the statute at issue means in cases originating in state court. Indeed, the Supreme Court might, on that question, defer to the relevant state’s highest court, reasoning that, for example, the statute in question incorporates state common law standards for cases originating in state court. As this example shows, then, the Supremacy Clause does not preclude federal statutes from meaning one thing in state court and another in, say, federal district court. Or for that matter in the Supreme Court, depending upon the case.

So why, then, would it be implausible generally to claim that some federal statutes should be read differently in state and federal court? The answer is that hardly ever is there reason to think that the distinction between state and federal court was on Congress’s mind. Unlike those between civil and criminal cases, there is no presumption that Congress is attendant to the differences between state and federal courts. To the contrary, “[u]nder [our] system of dual sovereignty,” the Supreme Court “ha[s] consistently held that state courts have

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<sup>167</sup> See *id.* at 1553.

<sup>168</sup> Cf. Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1904 (2011) (“[B]ecause the state supreme courts are coordinate (not inferior) to the federal courts of appeals on matters of federal law, state courts have no obligation to harmonize their interpretive choices with the decisions of their local federal courts of appeals.”).

inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.”<sup>169</sup> Where Congress is silent, courts thus presume concurrent state court jurisdiction over federal claims.<sup>170</sup> And this presumption applies often, since Congress rarely includes jurisdictional language of any kind. In this respect, the contrast between state and federal courts is again unlike that between civil and criminal cases. As discussed above, where Congress gives some statutory provision both civil and criminal significance, it does so explicitly.<sup>171</sup> In so doing, Congress indicates conscious attention to the fact that the provision at issue will be read in both settings. With state and federal court jurisdiction, by contrast, Congress demonstrates no such attention—that statutory language will be read in both state and federal courts appears, in most instances, an afterthought. And this, again, cuts against the idea that, in those instances, Congress thought of state and federal courts as importantly different interpretive settings. Finally, go back to forum shopping. Since concurrent jurisdiction is the default, litigants exercise choice over whether to bring federal claims in state or federal court where, as is typically the case, Congress is silent as to jurisdiction. As such, if Congress were to intend nonetheless that some such federal statute be read differently in state and federal court, it would create a clear incentive for litigants to forum shop without any apparent justification. Given the seeming undesirability of this scheme, it would, other things equal, be uncharitable to attribute to Congress that intention.

Again, none of this is to suggest that Congress could not intend that some statutory provision be read differently in state and federal court. To use the earlier example, if Congress were to create a general cause of action, and then to assign state and federal courts exclusive jurisdiction over different subsets of claims, it would be far from ridiculous to claim that Congress intended for that cause of action to be interpreted differently in state and federal court. Since, however, Congress generally says nothing as to the allocation of jurisdiction between state and federal courts, it is, correspondingly, generally implausible to claim that Congress intends for federal statutes to be read differently in those—seemingly, in Congress’s view, unimportantly—different settings.

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<sup>169</sup> *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

<sup>170</sup> *Clafin v. Houseman*, 93 U.S. 130, 136 (1876) (noting that state courts have concurrent jurisdiction “where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case”).

<sup>171</sup> See *supra* note 137 and accompanying text.

## B. Hard Cases

### 1. Multiple Agencies

Congress often gives multiple agencies authority to administer the same statutory provision.<sup>172</sup> Unsurprisingly, those agencies sometimes interpret that shared provision differently. In those situations, which interpretation(s) should prevail? That question is shaped by the general presumption that Congress intends for courts to defer to reasonable readings by agencies of the statutory language they implement.<sup>173</sup> Given that presumption, each agency would seem to have a plausible claim to deference, assuming reasonable interpretations by both. How, then, should a court choose between them? Or, alternatively, how might a court avoid having to choose?

The Supreme Court has adopted two strategies in this area. The first has been to defer to no agency's interpretation. In cases involving statutory language administered by numerous agencies, the Court has indicated consistently that to defer to a single agency's interpretation would be inappropriate. In *United States v. Florida East Coast Railway Co.*, for instance, the Court rejected flatly the idea that it should defer to an agency's reading of certain provisions of the Administrative Procedure Act (APA), explaining that "[t]his Act is not legislation that the [agency], or any other single agency, has primary responsibility for administering."<sup>174</sup> Similarly, in *Bowen v. American Hospital Ass'n*, a plurality insisted that it need not defer to an agency's interpretation of section 504 of the Rehabilitation Act since "[t]wenty-seven agencies, including the National Endowment for the Arts, the Nuclear Regulatory Commission, and the Tennessee Valley Authority, have promulgated [implementing] regulations," belying any claim to special agency "expertise."<sup>175</sup>

The Court's second strategy has been to defer to a single agency based on apparent hierarchy. In *Martin v. Occupational Safety & Health Review Commission*, for example, the Court considered a vertical "split enforcement" scheme in which one agency was tasked with rulemaking and enforcement and another with adjudication.<sup>176</sup> Reasoning that Congress intended that the former agency be "singl[y] . . . 'accountable for the overall implementation of th[e] program,'" the

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<sup>172</sup> See, e.g., Freeman & Rossi, *supra* note 47, at 1134 ("Congress often assigns more than one agency the same or similar functions or divides authority among multiple agencies, giving each responsibility for part of a larger whole.")

<sup>173</sup> See, e.g., *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

<sup>174</sup> 410 U.S. 224, 236 n.6 (1973).

<sup>175</sup> 476 U.S. 610, 642 n.30 (1986).

<sup>176</sup> 499 U.S. 144, 151 (1991).

Court inferred that Congress did *not* intend that the latter be able to “use *its* adjudicatory power to play a policymaking role.”<sup>177</sup> Thus, even if a court would normally defer to a reasonable interpretation adopted through adjudication, it need not if Congress has not “invest[ed]” an agency “with the power to make law or policy by other means.”<sup>178</sup>

Implicit in the strategies above is that a court should defer to *at most* one agency in situations of shared administrative authority—again, pursuant to each strategy, deference is conditional on an agency’s having “primary”<sup>179</sup> authority or “sing[ular]”<sup>180</sup> responsibility.<sup>181</sup> This comes as no surprise. So much is, after all, required by the one-interpretation rule.<sup>182</sup>

But suppose one (rightly) ignores that rule. Might Congress intend that courts defer to more than one agency in situations of shared authority at least some of the time? Interestingly, circuit courts have shown willingness to defer to multiple agency interpretations in situations not obviously covered by the Supreme Court decisions above. In *Collins v. National Transportation Safety Board*, the D.C. Circuit considered whether more than one agency might be owed deference in a “horizontal” split-enforcement scheme—that is, a scheme in which multiple agencies “share[ ] responsibility for initial enforcement.”<sup>183</sup> In the court’s view, the critical question was whether the authority of the agencies at issue “potentially overlaps,” or whether instead those agencies have “mutually exclusive authority over sepa-

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<sup>177</sup> *Id.* at 153–54 (quoting S. REP. NO. 91-1282, at 8 (1970)).

<sup>178</sup> *Id.* at 154.

<sup>179</sup> *Fla. E. Coast Ry. Co.*, 410 U.S. at 236 n.6.

<sup>180</sup> *Martin*, 499 U.S. at 153.

<sup>181</sup> See Gersen, *supra* note 46, at 224 (calling this interpretive premise the “exclusive jurisdiction canon”).

<sup>182</sup> Jody Freeman and Jim Rossi suggest that, in addition, courts should defer to agencies that administer multi-agency statutes when administering agencies coordinate and arrive at a shared reading. See Freeman & Rossi, *supra* note 47, at 1208–09. Despite its being consistent with the one-interpretation rule, the Supreme Court has yet to embrace Freeman and Rossi’s suggestion. Perhaps this is because it would lead to the awkward question of what to do when only one agency has weighed in—should courts defer to that one agency, construing the silence of other agencies as acquiescence, or should they instead refuse to defer unless *all* relevant agencies have affirmatively signed on to the construction put forward? Be that as it may, the Court is already accepting of the idea that an agency should receive deference only if it has exercised its interpretive authority *in the right way*. See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (holding that deference is presumptively appropriate when Congress has “delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated *in the exercise of that authority*” (emphasis added)). As such, questions concerning what to do in the absence of agency coordination hardly seem an insurmountable burden to deferring when agencies *do* coordinate.

<sup>183</sup> 351 F.3d 1246, 1251 (D.C. Cir. 2003).



rate sets of regulated persons.”<sup>184</sup> In the latter situation, the court opined, “risks of inconsistency or uncertainty” for regulated parties are minimal, and so deference to multiple agencies would plausibly be appropriate.<sup>185</sup>

Concerning situations of “mutually exclusive authority,” the D.C. Circuit’s reasoning seems sound. If Congress has assigned to different agencies “mutually exclusive authority over separate sets of regulated persons,” that is strong indication that Congress regards those “separate sets of . . . persons” as importantly different. More still, because each “set[ ] of . . . persons” is under the authority of only one agency, all such “persons” are insulated from potentially conflicting instructions from other agencies. Given the lack of practical downside, the question thus becomes why *wouldn’t* Congress want those different agencies to be able to interpret the provisions they share differently?

As to situations in which agency authority “potentially overlaps,” things are a bit more complicated than the D.C. Circuit suggests. On the one hand, the court is right to observe that potentially overlapping authority brings with it potentially conflicting instructions if more than one agency can be owed deference. On the other, as Jacob Gersen has argued, overlapping authority also provides opportunity for agencies to compete.<sup>186</sup> As Gersen puts it, “[i]f agencies prefer to increase jurisdiction rather than decrease it,” assigning overlapping jurisdiction incentivizes agencies to craft better regulations, “so that their jurisdiction is not eliminated” down the road.<sup>187</sup> Gersen concedes that agency competition is no “silver bullet,” and that the costs and benefits of competition must be assessed case by case.<sup>188</sup> In some situations, for example, Congress’s interests may be better served by incentivizing coordination rather than competition.<sup>189</sup> Gersen’s claim is just that deferring to multiple agencies in situations of overlapping authority is not obviously irrational, and so it is not obviously uncharitable to attribute to Congress an intention to create such a scheme.

To return to the earlier case involving the Dickey-Wicker Amendment, that probably falls somewhere in between the two above

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<sup>184</sup> *Id.* at 1253.

<sup>185</sup> *Id.*

<sup>186</sup> Gersen, *supra* note 46, at 212 (calling this the “competing agents” approach (emphasis omitted)).

<sup>187</sup> *Id.* at 213.

<sup>188</sup> *Id.* at 214; *see also* Gluck et al., *supra* note 46, at 1852 (“When Congress gives multiple agencies notice-and-comment rulemaking authority in a single statute, without discussing judicial review, one cannot justify not according *Chevron* deference to *any* agency simply because there are multiple agencies in the picture without bringing in some additional, trumping norm like accountability or expertise.” (footnote omitted)).

<sup>189</sup> *See supra* note 182.

situations.<sup>190</sup> On the one hand, HHS and, say, the Department of Education (DOE) potentially regulate some of the same entities. On the other hand, because the HHS Secretary's interpretation in that case applies solely to HHS funding decisions, the only potential for conflict in the event of a contrary DOE interpretation is that some entity engaged in embryonic stem-cell research would be eligible for one source of funding rather than two. More still, because the HHS Secretary's interpretation in that case merely renders additional activities eligible for funding, a regulated entity could retain eligibility for HHS and DOE funding simply by refraining from engaging in embryonic stem-cell research.<sup>191</sup>

Turning back to vertical split-enforcement schemes, there the possibility of agency competition presents itself again, along with "risks of inconsistency or uncertainty." Unlike horizontal schemes, however, vertical schemes lend themselves to a ready alternate explanation. As the Supreme Court observed in *Martin v. Occupational Safety & Health Review Commission*, assuming Congress allocates rulemaking and enforcement authority to one agency and adjudicative authority to another, the adoption of a vertical scheme suggests an intention to create an independent *factfinder*.<sup>192</sup> As Chief Justice Roberts reminded us,<sup>193</sup> the core of the adjudicative function is application of law to fact. Interstitial lawmaking may be, as many have argued, ancillary to that function.<sup>194</sup> Supposing, however, that Congress has assigned interstitial lawmaking authority to some other agency explicitly, it stands to reason that Congress intends any interstitial lawmaking by the adjudicating agency to be, at most, provisional.<sup>195</sup>

Last, what about "generic" statutes like the APA, FOIA, or section 504 of the Rehabilitation Act? The standard argument against deferring to an agency's interpretation of a statute administered by

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<sup>190</sup> See *supra* note 3 and accompanying text.

<sup>191</sup> In other words, this situation would be a far cry from one in which regulated parties are confronted with conflicting regulatory requirements.

<sup>192</sup> 499 U.S. 144, 154–55 (1991).

<sup>193</sup> See *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. 55 (2005) (statement of John G. Roberts, Jr.) ("Judges are like umpires. Umpires don't make the rules, they apply them.")

<sup>194</sup> See, e.g., *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in the judgment) ("Those who ratified the Constitution knew that legal texts would often contain ambiguities. . . . The judicial power was understood to include the power to resolve these ambiguities over time.")

<sup>195</sup> Cf. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–84 (2005) (holding that a judicial interpretation of an agency-administered statute is merely provisional unless that statute is "unambiguous").

numerous, heterogenous agencies is, again, that no interpreting agency can plausibly claim special expertise.<sup>196</sup> To paraphrase the Supreme Court, whereas the Environmental Protection Agency (EPA) has special insight concerning air pollution, no agency can claim analogous understanding of administrative procedure. Be that as it may, an agency can claim expertise about procedure at various levels of generality. The Securities and Exchange Commission (SEC), for example, probably has no more to say about administrative adjudication *in general* than does the EPA. But with respect to administrative adjudication *under the Securities Act*? The opposite is surely the case. If that's right, why not think that Congress intends for courts to defer to the SEC concerning how to interpret the APA's adjudication provisions *in SEC proceedings*?<sup>197</sup>

A second (and responsive) argument against deferring to agency readings of generic statutes is that such statutes are intended to impose uniformity.<sup>198</sup> If a basic purpose of the APA is, for instance, to give uniformity to adjudicative proceedings across agencies, one might reason that to let the SEC and the EPA interpret the APA's adjudication provisions differently would be to render those provisions less effective.<sup>199</sup> This inference, however, has a problem. As contemporary courts recognize, Congress legislates means as well as ends.<sup>200</sup> Thus,

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<sup>196</sup> See *supra* note 175 and accompanying text; see also *Collins v. Nat'l Transp. Safety Bd.*, 351 F.3d 1246, 1252–53 (D.C. Cir. 2003) (“Where a statute is generic, two bases for the *Chevron* presumption of implied delegation are lacking: specialized agency expertise and the greater likelihood of achieving a unified view through the agency than through review in multiple courts.”).

<sup>197</sup> A related objection to deferring to an agency's interpretation of a statute like the APA is that no agency is tasked with administering such a statute. See *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 138 n.9 (1997) (“The APA is not a statute that the Director is charged with administering.”). Again, as to the APA in general, that objection is surely correct. But what about the APA as applied to administrative adjudication under the Securities Act? The SEC, for example, adopts its Rules of Practice for Administrative Proceedings through notice and comment pursuant to authority granted to the agency under the Securities Act (among other statutes). See 15 U.S.C. § 77s (2012); 17 C.F.R. pt. 201 (2018). Why not think of that authorization and use of rulemaking authority as, in effect, interpreting the portions of the APA that govern agency adjudication? See *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (“We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.”).

<sup>198</sup> See *Collins*, 351 F.3d at 1252–53.

<sup>199</sup> See, e.g., *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950) (“One purpose [of enacting the APA] was to introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other.”), *superseded by statute*, Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, as recognized in *Marcello v. Bonds*, 349 U.S. 302 (1955).

<sup>200</sup> See Manning, *supra* note 102, at 115 (observing the “growing sense that the law's ‘purpose,’ properly understood, embodies not merely a statute's substantive ends (its

even if the APA is intended to give adjudicative proceedings uniformity, the question remains to what degree. The accepted way to answer such questions is to attend to the specific language of the statutory provision at issue.<sup>201</sup> The rationale is that the specific communicative content of a provision is the best (and perhaps only) indication of the specific legal change that Congress intends to effect with that provision.<sup>202</sup> Taking that seriously, the APA's adjudication provisions impose uniformity only insofar as the specific communicative content of those provisions requires. And since courts defer to agencies only if statutory meaning has given out, it's hard to see how the APA's commitment to uniformity could preclude varying agency interpretations of unclear APA provisions—that commitment to uniformity, after all, only goes as far as the statute says.

## 2. *Constitutional Avoidance*

Now consider the canon of constitutional avoidance. As a refresher, that canon in its modern form instructs courts to adopt a less natural but “fairly possible” interpretation of some statute if giving that statute its most natural reading would generate “serious doubt[s] of constitutionality.”<sup>203</sup> In *Clark v. Martinez*, Justice Scalia insisted that the applicability of the avoidance canon does not depend on whether the instant case, as opposed to some other, is one in which giving a statute its most natural reading would be constitutionally concerning.<sup>204</sup> As he explained, if a statute draws no distinction between different classes of litigants, it makes no sense to read that statute differently as applied to those different classes.<sup>205</sup> This is true even if a statute is such that only some litigants would have colorable constitutional claims were a court to read that statute ordinarily as applied to them. Instead, Justice Scalia reasoned, if a less natural reading is

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‘ulterior purposes’), but also Congress’s specific choices about the means to carry those ends into effect (its ‘implemental purposes’)” (quoting Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 876 (1930)).

<sup>201</sup> See *id.* at 116 (“If interpreters treat the statutory text as simply a proxy for the law’s ulterior purpose, they deny legislators the capacity, through their choice of words, to distinguish those statutes meant to embody specific policy choices from those meant to leave policy discretion to the law’s implementers.”).

<sup>202</sup> See *id.*

<sup>203</sup> *Crowell v. Benson*, 285 U.S. 22, 62 (1932); see also *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”). This assumes, of course, that the alternate reading is itself constitutionally unproblematic.

<sup>204</sup> 543 U.S. 371, 381–82 (2005).

<sup>205</sup> *Id.* at 378–79.

called for in some cases, it must be applied in all. “The lowest common denominator,” as he put it, “must govern.”<sup>206</sup>

In dissent, Justice Thomas argued that Justice Scalia’s “lowest common denominator” approach was inconsistent with the presumption that “Congress intends statutes to have effect to the full extent the Constitution allows.”<sup>207</sup> That presumption, according to Justice Thomas, is what animates the canon of constitutional avoidance. Rather than narrowing a statute based on third-party constitutional concerns, Justice Thomas reasoned, courts are supposed to apply the avoidance canon on a case-by-case basis. In each case, a court must ask whether adopting a less natural reading would serve to avoid serious constitutional doubts *as applied*.<sup>208</sup> Only if the answer is “yes” is adopting such a reading appropriate. On this approach, the canon of constitutional avoidance would thus reflect the norms that govern constitutional challenges to a statute’s validity. Just as one cannot ordinarily challenge the validity of a statute based on third-party rights, Justice Thomas explained, one may not appeal to the avoidance canon on the basis of third-party doubts.<sup>209</sup>

So who’s right? In large part, it depends upon the kind of presumption upon which the avoidance canon rests—or, alternatively, that it generates. In *Clark*, for example, the interpretive question before the Court was whether Congress intends for the relevant detention provision to be read differently as to admitted and non-admitted noncitizens. As Justice Scalia observed, the provision draws no express distinction between those two types of noncitizens. Nor could the Court, or Justice Thomas, point to a non-textual source indicating Congress’s attention to that distinction. Under normal circumstances, that would be enough to make “clear” that Congress did not intend for the detention provision to be read differently as to admitted and non-admitted noncitizens. And, for Justice Scalia, that was the end of the matter. In his view, the canon of constitutional avoidance rests upon the “reasonable presumption” that “between competing plausible interpretations of a statutory text,” Congress does “not intend the alternative which raises serious constitutional doubts.”<sup>210</sup> Here, there were, by Justice Scalia’s lights, no “competing plausible interpretations.” To the contrary, the reading on which Congress meant to distinguish between admitted and non-admitted noncitizens

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<sup>206</sup> *Id.* at 380.

<sup>207</sup> *Id.* at 396–97 (Thomas, J., dissenting) (quoting *United States v. Booker*, 543 U.S. 220, 320 (2005) (Thomas, J., dissenting in part)).

<sup>208</sup> *Id.* at 395–96.

<sup>209</sup> *Id.* at 396.

<sup>210</sup> *Id.* at 381 (majority opinion).

was completely without support. More still, Congress's apparent failure to distinguish between those two classes of noncitizens did not generate "constitutional doubts"—at least so long as one interprets the detention provision as implicitly time-constrained, as the Court did in *Zadvydas*.<sup>211</sup>

Justice Scalia's gloss on avoidance sounds attractively modest. Members of Congress swear an oath to uphold the Constitution.<sup>212</sup> Charity would thus seem to demand that courts presume Congress intends to effect legal changes consistent with its constitutional obligations.<sup>213</sup> Put differently, the congressional oath makes constitutionally questionable readings of statutory language less plausible than they would be otherwise. The canon of constitutional avoidance, on this understanding, merely serves to capture that linguistic assessment. So conceived, the canon of constitutional avoidance is akin to other linguistic canons such as *expressio unius est exclusio alterius* or the canon against surplusage. It is, in other words, an evidentiary principle meant to reflect linguistic practice, here that of Congress specifically.<sup>214</sup>

The appeal of Justice Scalia's account is that it requires only that courts take the congressional oath seriously. The worry, though, is that it is difficult to square with the avoidance canon's logical form. Specifically, the canon of constitutional avoidance makes the apparent constitutionality of some reading of statutory language *lexically inferior* to other, ordinary interpretive considerations.<sup>215</sup> Again, the avoidance canon only kicks in if more than one reading of statutory language is "fairly possible."<sup>216</sup> And whether some reading is "fairly possible" depends upon its apparent plausibility at the end of the ordinary interpretive process.<sup>217</sup> Lexical ordering is hard to make sense of if lexically inferior considerations are evidence of the same things as

<sup>211</sup> *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

<sup>212</sup> U.S. CONST. art. VI.

<sup>213</sup> See Richard M. Re, *Promising the Constitution*, 110 Nw. U. L. REV. 299, 303 (2016) ("[U]nlike benevolent dictators or lobbyists with de facto influence over government, officials have *promised* the public that they will uphold the law.").

<sup>214</sup> See Baude & Sachs, *supra* note 27, at 1084 (differentiating between "linguistic" canons and "legal" canons, the former of which "stand or fall by their accuracy in reflecting relevant linguistic practices").

<sup>215</sup> See Adam M. Samaha, *If the Text Is Clear—Lexical Ordering in Statutory Interpretation*, 94 NOTRE DAME L. REV. 155, 162 (explaining lexical inferiority).

<sup>216</sup> *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

<sup>217</sup> See, e.g., *United States v. Sec. Indus. Bank*, 459 U.S. 70, 78 (1982) ("We . . . consider whether, as a matter of statutory construction, [the provision] must necessarily be applied in that manner. . . . [B]ecause of the 'cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided.'" (quoting *Lorillard v. Pons*, 434 U.S. 575, 577 (1978))).

considerations that are lexically superior. The reason is that, absent special concern, one does best to consider all available information pertaining to the question at hand.<sup>218</sup> If, in this instance, apparent constitutionality is evidence of what Congress means, why consider it only if *other* evidence leaves one uncertain? Considering apparent constitutionality is not especially costly, for example. So why not consider it as a matter of course?

Lexical ordering is, by contrast, much more understandable if lexically inferior considerations operate as a sort of tiebreaker.<sup>219</sup> If evidence of statutory meaning is indeterminate, for instance, courts must decide the case nonetheless. In that situation, courts typically resort to some default rule, the function of which is to “fill” the remaining “gap.”<sup>220</sup> The canon of constitutional avoidance plausibly is such a default rule. Resolving indeterminacy in ways that avoid constitutional questions sounds sensible, after all.<sup>221</sup> But if that’s what the avoidance canon does—helps resolve cases when statutory meaning gives out—then that canon obviously cannot rest, as Justice Scalia suggests, on a presumption about what Congress means.<sup>222</sup>

Suppose instead, then, that the avoidance canon rests, as Justice Thomas suggests, on the presumption that “Congress intends statutes to have effect to the full extent the Constitution allows.”<sup>223</sup> One way to understand Justice Thomas’s suggestion is that Congress sees application of the canon of constitutional avoidance as akin to constitu-

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<sup>218</sup> See Baude & Doerfler, *supra* note 49, at 546–49 (questioning the exclusion of certain kinds of information under the plain meaning rule); Samaha, *supra* note 215, at 175 (discussing the effects of considering more information in decisional situations).

<sup>219</sup> See Adam M. Samaha, *On Law’s Tiebreakers*, 77 U. CHI. L. REV. 1661, 1669 (2010) (defining “tiebreaker” (emphasis omitted) as a “lexically inferior decision rule” (emphasis omitted)).

<sup>220</sup> Cf. *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (“The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”).

<sup>221</sup> See Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 550–60 (2018) (discussing the orthodox position according to which avoiding serious constitutional questions constitutes “playing it safe”).

<sup>222</sup> Perhaps instead Justice Scalia means to infer from the congressional oath a congressional endorsement of the canon of constitutional avoidance qua tiebreaker. If that is right, though, then Justice Scalia’s inference is a great deal more tenuous, especially given the modern avoidance canon’s requirement of *obvious* constitutionality. See *Clark v. Martinez*, 543 U.S. 371, 395 (2005) (Thomas, J., dissenting) (“Traditionally, the avoidance canon was not a doctrine under which courts read statutes to avoid mere constitutional doubts. Instead, it commanded courts, when faced with two plausible constructions of a statute—one constitutional and the other unconstitutional—to choose the constitutional reading.”).

<sup>223</sup> *Id.* at 397 (quoting *United States v. Booker*, 543 U.S. 220, 320 (2005) (Thomas, J., dissenting in part)).

tional invalidation—that is, as an act of judicial intervention. Accepting this premise, one might reason that just as Congress would prefer that courts invalidate as little of a statute as possible, so, too, Congress would prefer that courts minimize what is, in effect, statutory narrowing.<sup>224</sup> If this is the right way to think about avoidance—that is, as judicial amendment, however friendly—then Justice Thomas’s position makes a good deal of sense: Why narrow a statute in all its applications if one can avoid constitutional doubts by doing so only as to some? At the same time, viewing constitutional avoidance this way makes the avoidance canon itself look a great deal more controversial.<sup>225</sup>

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Hard cases are hard.<sup>226</sup> In a way, though, that’s the point. Whether, to return to the earlier case, Congress intends that FOIA requirements be interpreted differently by different agencies is difficult to say.<sup>227</sup> The claim here is just that courts should grapple with

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<sup>224</sup> This assumes orthodox views about severability, at least. While it goes beyond the scope of this Article, severability doctrine as currently conceived requires courts to engage in counterfactual legislative reasoning. *See, e.g., Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987) (“[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.”). Such counterfactual reasoning is, however, hard to square with the commitments of modern textualism. *Cf. John F. Manning, The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2391 (2003) (“By asking judges to carve out statutory exceptions on the ground that the legislature would have done so, the absurdity doctrine calls on judges to approximate the very behavior that the norm of separation [of lawmaking and judging] seeks to forbid.”). As such, it is less than clear that this aspect of the analogy to constitutional adjudication should be available to Justice Thomas, a noted textualist.

<sup>225</sup> Alternatively, one could argue that constitutional avoidance as conceived by Justice Thomas is not about *interpretation* at all, but is instead a form of constitutional remedy. *See Fish, supra* note 17, at 1311 (arguing that Justice Scalia gets the better of the exchange in *Clark* insofar as avoidance is understood as an interpretive doctrine, but that Justice Thomas’s position becomes much more plausible if one understands it as a remedial doctrine).

<sup>226</sup> Indeed, the interpretive questions raised by such cases may be sufficiently hard that they do not admit of clear answers, even upon thorough consideration. In that event, what courts should do—or, alternatively, what the law is—may be determined by legal considerations *beyond* apparent communicative content. *See, e.g., Baude & Sachs, supra* note 27, at 1093 (“If language alone can’t finish the job, as we agree it often can’t, then something else must. We suggest that this something else is law.”); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 108 (2010) (“We can call the zone of underdeterminacy in which construction (that goes beyond direct translation of semantic content into legal content) is required for application ‘the construction zone.’”).

<sup>227</sup> *See supra* note 4 and accompanying text. The case for FOIA deference is probably weaker than for APA deference insofar as agencies do not as obviously possess the authority to interpret FOIA through notice-and-comment rulemaking or formal adjudication. *See supra* note 197.



such questions, not brush them off through appeal to an ill-founded rule.

### CONCLUSION

Again, words mean different things in different settings. Writing them down or uttering them needn't change this. As this Article observes, what a verbalization or written text communicates sometimes depends not just upon the setting in which it's written or verbalized, but also the setting in which it is read or heard. Such forms of communication are familiar from everyday life. An advertisement that instructs "Call us today!" means something different if read on Tuesday as opposed to Thursday. So, too, an exhortation to "grab something to drink" if heard by an adult or by a child. The (rhetorical) question this Article poses is: If everyday communication can work this way, why not legislation, too?

Needless to say, if a statute can have more than one meaning, a regulation, a treaty, or even a constitution might do the same. While these other legal texts are beyond the scope of this Article, it is easy to see why one might expect multiple meanings with them as well. Such texts reliably contain context-sensitive language. They are also read in multiple, importantly different contexts. Add to this that the drafters of regulations, treaties, and especially constitutions have a strong interest in linguistic economy, and one would expect multiple meanings at least some of the time.

In terms of implementation, the argument here raises intriguing possibilities—agency-specific readings of the APA or FOIA, for example. Most immediately, though, recognizing that a statute can have more than one meaning should lead courts to feel less constrained in areas such as immigration law, where Congress routinely assigns statutory provisions both civil and criminal significance. By allowing for multiple statutory meanings, courts would be in a position to reject as false the choice between *Chevron* and lenity. In turn, courts could facilitate flexible (and sometimes aggressive) enforcement in this and other areas without cost of unduly surprising criminal sanctions.<sup>228</sup>

Equally straightforward, recognizing multiple meanings would allow courts to let different agencies develop the law differently in situations of divided enforcement. Congress increasingly relies upon multiple agencies to enforce individual statutory provisions in multiple contexts. In so doing, Congress appears to be attempting to lev-

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<sup>228</sup> Though, again, the severity of "civil" sanctions in the immigration context is not to be underestimated. See *supra* note 158.

erage (and foster) comparative agency competence in those multiple contexts. Identifying the logic of that enforcement structure, it would only make sense for courts to defer to those multiple agencies in their respective interpretive settings. More still, expressing openness to afford *Chevron* deference to multiple agencies as to shared statutory provisions, Congress might, in turn, feel even freer to experiment with creative enforcement structures.