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## Hierarchy and Heterogeneity: How To Read a Statute in a Lower Court

Aaron-Andrew P. Bruhl

*William & Mary Law School*, [apbruhl@wm.edu](mailto:apbruhl@wm.edu)

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# HIERARCHY AND HETEROGENEITY: HOW TO READ A STATUTE IN A LOWER COURT

Aaron-Andrew P. Bruhl†

*Is statutory interpretation an activity that all courts should perform the same way? Courts and commentators implicitly so conclude. I believe that conclusion is wrong. Statutory interpretation is a court-specific activity that should differ according to the institutional circumstances of the interpreting court. The U.S. Supreme Court is not the model all other courts should emulate.*

*I identify three kinds of institutional differences between courts that bear on which interpretive methods are appropriate: (1) the court's place in the hierarchical structure of appellate review, (2) the court's technical capacity and resources, and (3) the court's democratic pedigree, particularly as reflected in methods of judicial selection. Attending to these institutional factors would yield insights for both judicial practice and academic theory. In terms of prescriptions for courts, the differences justify a heterogeneous regime in which courts at different levels of the judicial hierarchy use somewhat different interpretive methods. But even apart from my specific recommendations, the larger point is that scholars need a normative account of what lower-court statutory interpretation should look like. Such a normative framework would help us evaluate the lower courts' output (which is becoming the subject of an important and growing body of descriptive work) and determine which of the Supreme Court's practices should—and should not—be followed in the lower courts.*

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† Associate Professor, University of Houston Law Center. This work was previously presented at the Columbia Law School Legislation Roundtable, the Law and Society Association Annual Meeting, a University of Texas faculty colloquium, and Prawfsfest! 8. For helpful comments, I thank those audiences as well as Amy Coney Barrett, Mitch Berman, Amanda Frost, Abbe Gluck, Ethan Leib, Hillel Levin, David Pozen, and Emerson Tiller.

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## INTRODUCTION

Is statutory interpretation an activity that all courts should, in principle, approach the same way?

Courts overwhelmingly assume the answer is *yes*. Moreover, they treat the U.S. Supreme Court as the model to emulate. This is particularly true when it comes to the lower federal courts, which uncritically apply the same interpretive doctrines and canons the Supreme Court uses.<sup>1</sup> This is not to say that the federal courts have achieved

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<sup>1</sup> See, e.g., *Elgharib v. Napolitano*, 600 F.3d 597, 601 (6th Cir. 2010) (stating that the court “employ[s] a three-step legislative-interpretation framework established by the Supreme Court”); *Wisniewski v. Rodale, Inc.*, 510 F.3d 294, 297–301 (3d Cir. 2007) (attempting to discern and apply the Supreme Court’s latest rules on implied private rights of action); *In re Sorrell*, 359 B.R. 167, 183 (Bankr. S.D. Ohio 2007) (applying “[c]anons of statutory construction approved by the Supreme Court”); *White & Case LLP v. United States*, 89 Fed. Cl. 12, 22 (2009) (explaining that the court’s prior law on deference to administrative agencies had been superseded by later Supreme Court precedents).

uniformity in interpretive methodology, for indeed they have not. Although certain interpretive tools and doctrines are fairly well established, interpretive methodology displays significant diversity from judge to judge and from case to case, both in the Supreme Court and in the lower courts. Nonetheless, the governing theoretical assumption is that all the federal courts are in principle engaged in the same enterprise when they interpret statutes, such that the proper interpretive regime for the Supreme Court (whatever that happens to look like) is also the proper regime for the federal courts of appeals and district courts.

When we turn to the interpretive practices of the state courts, we find that most of them likewise treat statutory interpretation as a generic activity that should not much vary from court to court. Indeed, the aspiration to universality is present even in those states in which state high courts have self-consciously adopted their own interpretive regimes that diverge somewhat from the Supreme Court's practices.<sup>2</sup> Such courts do not claim merely that their method is correct for their state; they assert it is simply the best way to do things—period.<sup>3</sup> Further, the expectation is that all of the lower courts in the state should interpret statutes using the state supreme court's methods.<sup>4</sup> Likewise, where state legislatures have attempted to enact binding interpretive directives, those rules are meant to apply equally to all of the courts of the state.<sup>5</sup> A court's place within the appellate hierarchy is irrelevant.

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<sup>2</sup> A recent article by Abbe Gluck shows that several state high courts have attempted to establish binding interpretive frameworks based on a form of "modified textualism." Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 *YALE L.J.* 1750, 1754–60 (2010). As Gluck explains, even when these state courts depart from the U.S. Supreme Court's practices, they typically rely on federal sources and general jurisprudential arguments rather than state-specific considerations. *Id.* at 1789, 1800, 1804; *see also id.* at 1860 (referring to the "common nature of [the interpretive] enterprise" in federal and state courts).

<sup>3</sup> As an illustration, consider these comments from a Texas case:

[This court's interpretive method] is of ancient origin and is, in fact, the *only method* that does not unnecessarily invade the lawmaking province of the Legislature. The courts of this *and other jurisdictions*, as well as many commentators, have long recognized and accepted this method as *constitutionally and logically compelled*.

Boykin v. State, 818 S.W.2d 782, 786 (Tex. Crim. App. 1991) (emphasis added). The court then cited several U.S. Supreme Court cases and general treatises, as well as Texas cases. *Id.*; *see also* *People v. McIntire*, 599 N.W.2d 102, 107 n.8 (Mich. 1999) (rejecting the "absurd results" doctrine and relying on Justice Antonin Scalia's criticisms of *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892)).

<sup>4</sup> *See, e.g.*, *Dan De Farms, Inc. v. Sterling Farm Supply, Inc.*, 633 N.W.2d 824, 824 (Mich. 2001) (vacating the lower court's decision because it violated the state supreme court's interpretive rules); *Young v. State*, 983 P.2d 1044, 1046 (Or. Ct. App. 1999) ("[W]e are constrained to apply the methodology established by the Oregon Supreme Court.").

<sup>5</sup> *See, e.g.*, N.Y. STAT. LAW § 92 (McKinney 2010) (directing "the courts" to ascertain the legislative intent); TEX. GOV'T CODE ANN. § 311.023 (West 2005) (referring to materials that "a court" may consider in interpreting statutes).

The existing scholarly literature on statutory interpretation similarly slights the possibility that statutory interpretation should systematically differ according to a court's place in the judicial system. A huge mass of scholarship addresses the Supreme Court, exhaustively examining and evaluating not just the Court's interpretive methods and its leading cases but every nuance of the interpretive theories espoused by particular members of the Court (and in particular types of cases, and in various historical eras, and so on). Other writing in the field does not explicitly designate the Supreme Court as its intended object of study but addresses itself to statutory interpretation in general—yet then the analysis treats the Court as if it were the only actor, virtually ignoring the courts that do most of the work.<sup>6</sup> That subtle shift, the unconscious generalization from interpretation at large to interpretation by the Supreme Court, would be unobjectionable if statutory interpretation were a single activity that all courts should do the same way. But the focus on the Supreme Court would be a serious problem if different courts should in fact use different approaches or even aim at different targets.

To make the problem of methodological homogeneity versus heterogeneity more concrete, consider the following scenarios:

- Suppose the Supreme Court interprets a statute in a way that accords with the statute's literal language but produces a bizarre result. "This is probably not the result Congress had in mind," the Court writes, "but Congress is of course free to respond to our decision by amending the statute to produce a more sensible result." Should a district court follow the Court's methodological lead by interpreting a statute to produce a strange result Congress did not intend, even if Congress will probably never hear about the district court's unpublished decision?
- Suppose a high court adopts an interpretive method that requires hundreds of person-hours of effort, such as performing a thorough examination of the entire legislative history of every statute that comes before the court (or, for a more textualist court, performing extensive linguistic research). Is that method appropriate for a trial judge who is confronted with thinner staffing, a crushing workload, no amicus briefs, and attorneys of uneven quality?
- Federal district judges go through the same formal process of presidential nomination and senatorial approval as Supreme Court Justices, yet the considerations that govern both the president's decision in choosing nominees and the Senate's decision in confirming them are quite different in the two cases. If Su-

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<sup>6</sup> See Todd D. Rakoff, *Statutory Interpretation as a Multifarious Enterprise*, 104 Nw. U. L. REV. 1559, 1571 n.41 (2010) (noting the tendency in contemporary scholarship "to view the question 'How should statutes be interpreted?' as synonymous with the question 'How should the Supreme Court of the United States interpret statutes?'").

preme Court Justices are chosen with greater consideration of their political views, does that give them a greater license to use their own policy preferences in interpreting unclear statutes? And what about elected state judges? More generally, how should modes of judicial selection matter, if at all?

- Suppose the Supreme Court finally resolves a question of statutory interpretation that has been occupying the lower courts for years. The Court approaches the question from scratch, engaging in an extensive analysis of the text, legislative history, relevant canons of interpretation, and policy consequences. The Court dismisses one of its prior statements as mere dictum and does not even mention the fact that its interpretation departs from the view adopted by the vast majority of the lower courts. If the question were instead pending before a lower court that had not yet addressed the issue, should it take the same blank-slate approach of ignoring other interpreters?

Because of our preoccupation with the Supreme Court, we are currently ill-equipped to answer questions like those above. Happily, some scholars have begun to look beyond the Supreme Court and to produce careful positive accounts of how other courts actually do interpret statutes.<sup>7</sup> This growing body of work addresses questions such as whether particular lower courts employ certain methods or canons more or less often than does the Supreme Court, how lower courts respond to the Supreme Court's interpretive trends, how interpretive methods interact with ideology and other influences, and the like. These studies are valuable, in part because they have revealed that some lower courts, particularly some state courts, are doing things a bit differently.<sup>8</sup> As these descriptive accounts start to mount, however, what we also need is additional *normative* work on how lower courts *should* approach statutory interpretation. This Article intends to supply that need, or at least to begin to do so. This normative work will help us evaluate the lower courts' output and determine whether the lower courts' divergences from (or convergences with) the Supreme

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<sup>7</sup> See, e.g., FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 180–200 (2009) (federal courts of appeals); Jason J. Czarnezki & William K. Ford, *The Phantom Philosophy? An Empirical Investigation of Legal Interpretation*, 65 MD. L. REV. 841, 874–86 (2006) (U.S. Court of Appeals for the Seventh Circuit); Gluck, *supra* note 2, at 1771–1811 (selected state courts); Alex B. Long, “If the Train Should Jump the Track . . .”: *Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 GA. L. REV. 469, 476–79 (2006) (state employment discrimination statutes in state courts); James P. Nehf, *Textualism in the Lower Courts: Lessons from Judges Interpreting Consumer Legislation*, 26 RUTGERS L.J. 1, 33–81 (1994) (consumer cases in state and lower federal courts); Daniel M. Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, 31 N.M. L. REV. 325, 338–51 (2001) (federal tax cases in trial courts).

<sup>8</sup> I will often use the shorthand expression “lower courts” to refer to all courts besides the U.S. Supreme Court—the inferior federal courts as well as the state courts.

Court's practices are appropriate. In addition, it will let us recommend desirable changes and stave off mistaken reforms.

The current paucity of normative work on lower-court interpretation is in a way quite surprising. Recent statutory interpretation theorizing has placed a renewed emphasis on the institutional dimension of interpretation. The basic insight is that interpretation might be a place-specific activity. As Cass Sunstein and Adrian Vermeule put it in an influential article: "The central question is not 'how, in principle, should a text be interpreted?' The question instead is 'how should certain institutions, with their distinctive abilities and limitations, interpret certain texts?'"<sup>9</sup> Vermeule expands on this theme in a recent book, again emphasizing that "institutional analysis is indispensable to any account of legal interpretation."<sup>10</sup>

This place-based approach is all for the good, but so far the institutionally oriented literature has tended to look beyond the courts altogether and focus on the distinctive role of executive interpreters and administrative agencies.<sup>11</sup> This look outside the judiciary is valuable and appropriate, for today agencies are the front-line interpreters in many areas of the law, and so it matters greatly whether agencies can and should approach statutory interpretation differently than do

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<sup>9</sup> Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886 (2003). I speak of a "renewed emphasis" on institutions because concern with institutions is hardly new. See Richard A. Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 MICH. L. REV. 952, 954-60 (2003) (discussing prior institutionally oriented work); Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 246-56 (sounding themes similar to those later emphasized by Sunstein and Vermeule).

<sup>10</sup> ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION I* (2006).

<sup>11</sup> For work that discusses the competencies of executive and administrative interpreters as contrasted with those of courts, see, for example, *id.* at 205-15; Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 574-92 (1985); Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 2-6 (2004); Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, 2009 MICH. ST. L. REV. 89, 103-05; Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 504-21 (2005); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1196-1202 (2006); Richard J. Pierce, Jr., *How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss*, 59 ADMIN. L. REV. 197, 198-204 (2007); Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 329-35 (1990). Sunstein and Vermeule are most interested in contrasts between courts and noncourt interpreters like agencies; they acknowledge they are "eliding many questions about the internal design of the judicial system." Sunstein & Vermeule, *supra* note 9, at 924 n.126. There are some scholars who have contemplated lower courts as distinctive institutions that should diverge from the Supreme Court, though with a focus on a particular interpretive rule or subject area. The most valuable contribution here is Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 327-51 (2005), which explores whether the rule of strong horizontal stare decisis for statutory precedents should apply in lower courts.

courts. But what also matters is that there are courts and then there are courts, and while agencies might be very different from courts, courts are not all the same.

The goal of this Article is to take differences between courts seriously and explore what implications those differences might hold for statutory interpretation. I identify several kinds of institutional differences that militate in favor of interpretive divergences across courts, both at the level of general approach and at the level of particular canons of interpretation. Further, I argue that it is workable for a judicial system to display a degree of methodological heterogeneity. But even if my specific conclusions are found unpersuasive, focusing scholarly energy on the lower courts would still have the virtue of revealing some new topics and problems with the potential for high returns on academic investment. Certainly, at least, the rewards promise to be higher than the incremental return on yet more work focused on the Supreme Court. More strongly, the message for scholars is that it simply will not do to construct interpretive theories that make sense for the Supreme Court but that ignore the lower courts or treat them as “exceptions” to be dismissed in a footnote. The rest of the system must at least be considered, even if the ultimate prescription is that all courts should act the same.

As an illustration of how paying attention to lower courts could enlighten us, consider one current trend in statutory interpretation theory. It has long been recognized (and often lamented) that “American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.”<sup>12</sup> One prominent strand of the contemporary literature responds to this fact by advocating greater uniformity, either by making interpretive methodology binding as a matter of *stare decisis* or instead by having legislatures enact binding interpretive codes.<sup>13</sup> Uniformity can operate both horizontally, as where a court is bound by its own prior interpretive rules, and vertically, as where a superior court’s interpretive method is

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<sup>12</sup> HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (prepared from 1958 tentative edition).

<sup>13</sup> See Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 *YALE L.J. ONLINE* 47, 47 (2010) (“Finding methodological consensus for statutory interpretation cases is all the rage these days.”). For recent work advocating methodological uniformity, see Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 *GEO. L.J.* 1863, 1884–97 (2008) (advocating *stare decisis* as a tool to create uniformity of statutory interpretive methods); Gluck, *supra* note 2, at 1846–58 (tentatively recommending general adoption of “modified textualism”); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 *HARV. L. REV.* 2085, 2140–56 (2002) (calling for a federal statute setting forth interpretive rules); Jordan Wilder Connors, Note, *Treating Like Subdecisions Alike: The Scope of Stare Decisis as Applied to Judicial Methodology*, 108 *COLUM. L. REV.* 681, 708–14 (2008) (arguing that the Supreme Court should impose its interpretive methodology on lower courts through *stare decisis*).



mandatory for inferior courts.<sup>14</sup> If the analysis of this Article is correct, then the vertical aspect of the uniformity program is mistaken. Lower courts should not be required to follow the same rules as the high court if the aptness of those rules is place-specific. Heterogeneity need not just reflect an unfortunate reality but can instead be correct as a matter of principle.

Before proceeding further, I should add some clarifications and caveats. The lower federal courts and the state courts are a large and diverse lot. For some purposes all that matters is that they are not the Supreme Court, but in most instances it is wrong to treat them as an undifferentiated mass. (And to do so would be particularly unsatisfying in a project that emphasizes the need for disaggregation and nuance.) Therefore, at various points I will note differences between appellate courts and trial courts, between federal courts and state courts, and so on. But I should emphasize that there is plenty of room for further work that takes differences between courts even more seriously, especially when it comes to state courts.<sup>15</sup> In addition, as the reader might already perceive, these same place-based distinctions hold implications not just for statutory interpretation but for judicial interpretation more generally (notably constitutional interpretation<sup>16</sup>) and indeed for judicial decisionmaking more generally. Here we will leave aside those other fields and instead focus our energies on statutory interpretation in particular.

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<sup>14</sup> See, e.g., Foster, *supra* note 13, at 1868–69 (calling for the Supreme Court to give its methodological precedents “extra-strong” horizontal precedential effect and for lower courts to “strictly adhere” to superior-court methodological precedents).

<sup>15</sup> One particularly complicated issue, which I introduce in this Article and explore more fully in future work, is the impact of judicial elections. Should elected judges use different interpretive methods? For example, do elected judges enjoy a greater license to follow popular preferences at the expense of legislative intent? See Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation* (Dec. 5, 2011) (unpublished manuscript) (on file with author).

<sup>16</sup> Cf. Ori Aronson, *Inferiorizing Judicial Review: Popular Constitutionalism in Trial Courts*, 43 U. MICH. J.L. REFORM 971, 971–74 (2010) (arguing that lower courts, due to their institutional advantages, should have the sole power of constitutional judicial review); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1137 (1999) (arguing that some standards of constitutional review employed by federal courts rely on institutional considerations that are not applicable to state courts); Frederick Schauer, *The Occasions of Constitutional Interpretation*, 72 B.U. L. REV. 729, 730–39 (1992) (distinguishing between interpreter-indifferent and interpreter-relative constitutional interpretation). One school of thought that requires mention here is the “new judicial federalism” that encouraged state courts to interpret their state constitutions independently of the Supreme Court’s interpretations of the U.S. Constitution. See, e.g., William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495–502 (1977). Such a program could be justified on grounds that institutional differences justify different methodologies, as in Helen Hershkoff’s work, but for the most part the new judicial federalism simply concerned the desirability of state courts reaching different outcomes.

Next, to make explicit one of the premises from which this project proceeds: This Article considers the relevance of various courts' distinctive institutional roles and competencies. Much of the institutional discussion here would be moot if the Constitution or other high-level theoretical considerations (such as the nature of democracy or the nature of language) fully specified the details of the interpretive regime that all courts must use. This project starts with the presupposition that such bedrock commitments, important as they are, do not answer all the interesting questions. That is not to say that institutional constraints swamp everything else and independently dictate the details of the correct method of statutory interpretation. I agree that the Constitution does indeed contribute to the determination of the proper interpretive method. My premise, however, is that constitutional constraints do not narrow down the field so far that they exclude room for other kinds of considerations.<sup>17</sup> In short, substantial territory is up for grabs, and in making our choices within that range we should attend to the distinctive institutional characteristics of different courts.

The Article is organized as follows:

Part I sets the stage for the argument by more fully describing "hierarchical heterogeneity"—my term for a regime in which courts at different levels of the judicial system use different interpretive methods—and explaining how my approach fits within existing debates over uniformity in statutory interpretation. Part I also establishes the feasibility of a system of hierarchical heterogeneity, defending such a system from the charge that it would be unworkable and unstable. Provided that heterogeneity is restricted in certain ways, it is compatible with a well-functioning system of appellate review. Finally, for those who remain skeptical about the possibility of heterogeneous interpretation, Part I articulates an argumentative fallback position according to which courts would employ a uniform methodology; this uniform approach, however, would be based on the needs and capacities of the *lower courts*, not the Supreme Court. In other words, the Supreme Court would be required to emulate its "inferiors" rather than the other way around.

With the theoretical background in place, the next several Parts of the Article then delve into how courts at different levels of the judicial system differ in ways that are relevant to statutory interpretation theory and practice. I identify three categories of differences. The first difference stems from *mere hierarchy*: even if all courts were otherwise identical in competence and capacity, the bare fact that they are arranged in a hierarchical appellate structure suggests that they

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<sup>17</sup> I return to the topic of the permissible range of interpretive methods in Part I.A, *infra*.

should diverge somewhat in their interpretive approaches (or so argues Part II). The second difference concerns *technical capacity*: the Supreme Court decides cases in a resource-rich environment, but the methods appropriate in such an environment might not be ideal for courts with more constrained decisional capacities (Part III). The third relevant way in which courts vary concerns *modes of judicial selection*: judges on different courts are selected in different ways, and this too might affect how they should read statutes (Part IV).

Because Parts II, III, and IV focus on distinct ways in which courts differ, each can give only one piece of the puzzle. Accordingly, I conclude by trying to draw together the various strands of analysis to see where they together point us. To provide a preview, one particular conclusion that is supported by multiple institutional considerations is that deference to administrative agencies should be greater in the lower courts. There are other specific findings as well, but I should caution that even at the end of the analysis my conclusions will be measured. The problem of methodological choice is complex and, as already acknowledged, involves values besides institutional ones. Therefore, my analysis will be shorter on ultimate reckonings and longer on partial answers. From my point of view, it would be success enough if courts and scholars were to include judicial-institutional variations in the calculus.

## I

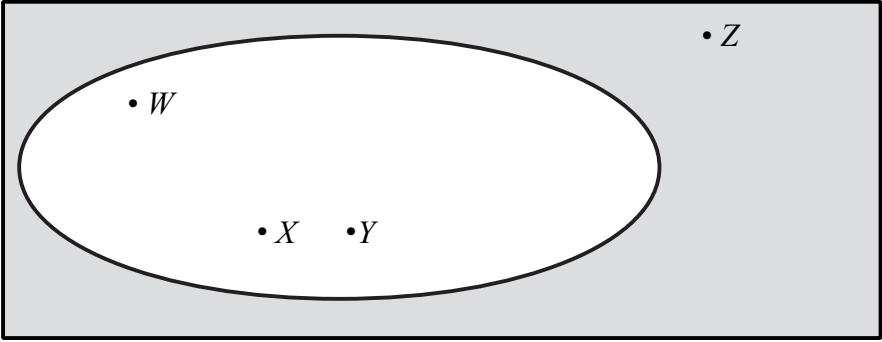
### HIERARCHICAL HETEROGENEITY: THE IDEA AND ITS FEASIBILITY

The basic idea of hierarchically heterogeneous interpretation is that interpretive approaches, doctrines, and rules should, to some substantial and interesting degree, differ depending on the interpreter's position within the judiciary. The goal of this Part of the Article is to explain the various ways in which methodological uniformity can operate in statutory interpretation, to establish that it is feasible for courts at different levels of the hierarchy to diverge in their methods, and to give a sense of the kinds of variations that are plausible. The rest of the Article will then highlight some institutional differences across courts that should, I contend, lead to particular interpretive divergences.

In explaining various aspects of methodological uniformity and disuniformity, a diagram might be useful. The rectangle below represents, in obviously much simplified form, the universe of possible methods of statutory interpretation. Each point identifies a particular method, which is defined by a set of attributes regarding its general approach as well as its more specific doctrinal content (e.g., a particular point might be described as: generally textualist in orientation,

heavy reliance on “whole code” interpretations, weak deference to administrative interpretations, minimal role for rule of lenity, no doctrine of constitutional avoidance, weak form of stare decisis, etc.).

FIGURE 1



The distance between two points represents the degree of variation between the two methods. Methods *X* and *Y* are somewhat different, and both are quite different from *W* and *Z*. The advocate of methodological uniformity contends that all courts should occupy the same point (or come as close as reasonably possible). The advocate of heterogeneity disagrees. Thus, the issue of methodological uniformity centrally concerns whether courts can occupy different points and, if so, how far apart they can be. Distinct from that debate over uniformity per se is the matter of the *content* of an interpretive method, that is, which *particular* point(s) courts should occupy. Some parts of the map might be off limits because, for example, the methods in that region are unconstitutional.<sup>18</sup> The region of impermissible methods is represented by the shaded region, in which one finds method *Z*.

Much of the discussion in this Part of the Article will concern methodological uniformity per se rather than the content of particular methods. Nonetheless, it is useful to begin the analysis by discussing the range of interpretive methods that are permissible—the territory within which institutional considerations can operate.

#### A. In Which Ways Might Courts Plausibly Diverge in the Content of Their Interpretive Methods?

The content of an interpretive method includes everything from broad approaches or orientations—textualism, intentionalism, purposivism, pragmatism, justice seeking, etc.—to specific interpretive doctrines and tools. The doctrines and tools are themselves numerous and include linguistic canons (like the rule against surplusage and

<sup>18</sup> See *infra* text accompanying notes 19–23.

the canon *noscitur a sociis*), substantive presumptions (like the rule of lenity and the rule that waivers of sovereign immunity must be clearly stated), and rules regulating the use of extrinsic sources (like rules governing the force of legislative history and administrative guidance). Because there are so many components to interpretive methodology, and because there are so many conceivable approaches to each component, the possibilities for methodological variation are nearly limitless, at least in theory. More realistically, however, the proponent of interpretive diversity is working within a finite range of possibilities. It is worth exploring the nature and extent of the factors that narrow the range.

To begin at the foundational level, it has been said that “[a]ny theory of statutory interpretation is at base a theory about constitutional law,”<sup>19</sup> and I certainly agree that any method has to comport with the requirements of the Constitution (and state constitutions for state courts), the constraints of democratic self-government, and similar fundamental commitments. My own view is that those requirements, important as they are, actually tell us little. The essential problem with building a theory of statutory interpretation on the Constitution alone (and likewise for the “nature of adjudication” or the “fundamental conditions for communication,” etc.) is that its prescriptions are too general to do much work cutting between plausible interpretive theories.<sup>20</sup> That is not to deny that the Constitution plays a role. Some specific interpretive doctrines and canons might be constitutionally required, such as some version of the rule of lenity, for instance.<sup>21</sup> No point can be in the permissible zone unless it contains such required canons. Looking beyond specific rules to matters of more general orientation, it would seem to be inconsistent with the judicial role for judges to decide cases by wholly ignoring clearly applicable statutory text and judicial precedent and relying solely on their own policy preferences. Similarly, even if we decided on institutional grounds that the best way for a particular court to decide tough inter-

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<sup>19</sup> Jerry Mashaw, *As If Republican Interpretation*, 97 *YALE L.J.* 1685, 1686 (1988).

<sup>20</sup> For example, if the Constitution requires courts to be faithful agents of the legislature (which is itself contestable), does that duty require adherence to the enacted words even if absurd and unintended as applied, or obedience to the legislature’s wishes (how determined?), or fidelity to some legislative meta-intent licensing a degree of pragmatism? Likewise, if legislation has to be understood as the communication of an intelligent speaker, that seems unlikely by itself to demand, say, a particular version of the rule of lenity or the doctrine of constitutional avoidance.

<sup>21</sup> See *Dunn v. United States*, 442 U.S. 100, 112 (1979) (stating that the rule of lenity “reflects not merely a convenient maxim of statutory construction” but rather “is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited”); cf. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 *B.U. L. REV.* 109, 163–81 (2010) (discussing whether various substantive canons are constitutionally permissible on the faithful-agent view).

pretive disputes were to consult the Magic 8 Ball, that method would probably violate due process.<sup>22</sup> But these exclusions involve extreme cases, leaving a great deal of room for interpretive choice.<sup>23</sup>

I acknowledge, of course, that there are differing views regarding the relative contributions of various determinants of proper methodology. Some people believe that the Constitution has greater resolving power when it comes to interpretive methodology, such that the field of play for subconstitutional argumentation is smaller. To take one example, some prominent commentators believe that the Constitution, rightly understood, requires a certain form of textualism and in particular that it forbids almost all use of legislative history.<sup>24</sup> Those with rather maximalist views of the constitutional constraints on interpretive methods might find some of my institutional prescriptions either congenial-but-superfluous (because already required by their other commitments) or impermissible (because forbidden by their other commitments).

Once we have excluded the (admittedly disputed) region occupied by the impermissible theories, the choice of methods within the permissible set is determined by considerations that essentially boil down to policy. Now, policy itself is multifarious. Some policy arguments may draw their inspiration from constitutional values or political theory, but the kinds of policy considerations emphasized here will be more judicial-institutional in character. Such considerations might, one could hope, gain traction where arguments at the level of first principles have stalled. And even those readers with rather maxi-

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<sup>22</sup> The law's attitude toward randomization is actually a bit more complicated than one might at first think. See, e.g., Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 4–6 (2009).

<sup>23</sup> Although it is peripheral to this project, it should be noted that the permissible zone for institutional choice may differ depending on which institution—namely courts or legislature—is doing the choosing. Rosenkranz, *supra* note 13, at 2093, 2098. That is, it could be that a particular switch in interpretive method can be accomplished only by one body but not the other. I believe that the types of interpretive choices I discuss here are essentially matters of common law in the sense that they could be changed by either courts or legislatures. Cf. *infra* note 162 (discussing which courts could implement methodological changes).

<sup>24</sup> See, e.g., John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 706–31 (1997) (presenting structural constitutional arguments against treating legislative history as authoritative); 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) (arguing for textualism based on the requirements for democratic self-government). Unsurprisingly, I disagree that the Constitution settles the great legislative history debate, except perhaps as to extreme cases (e.g., allowing a sponsor's statement to contradict clear and sensible text). Cf. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 989–91 (4th ed. 2007) (concluding that the new textualism of Justice Scalia has led to reduced reliance on legislative history but has by no means eliminated it).

malist views of the constitutional constraints on interpretive method should not ignore the institutional dimension: what looks like a compelling first-best interpretive theory has to be implemented in light of the character of the actual (or at least a reasonably attainable) legal system, including the institutional differences between various courts.

Once we are working within the zone of permissible interpretive methods, it remains the case that not every theoretically imaginable directive within the permissible zone could be meaningfully implemented. That is, of the many different attributes that together define an interpretive method, not all of those attributes could take on a different value. Many of the linguistic canons, for instance, are rather impervious to adjustment because their influence is almost inevitable and yet simultaneously modest. Consider *noscitur a sociis*, which teaches that a word is known by the company it keeps; thus, when a series of words includes an ambiguous word, that ambiguous word should take on the meaning that aligns it with the other words.<sup>25</sup> If a statute defines “resisting arrest” as “fleeing, assaulting, or obstructing” a police officer, the canon would suggest that “obstructing” means physically blocking rather than, say, lying to the officer about one’s identity. The canon captures some of the truth about the ordinary use of language, and it would be hard to escape the underlying intuition even if the canon did not exist.<sup>26</sup> At the same time, nobody would think that the canon provides a surefire algorithm for deciding cases. It is something to consider—a rule of thumb, a guide to likely meaning—but it is no more than that.<sup>27</sup> In the example just given, for instance, one might think the list too short to generate confidence in a common theme of physicality. For these reasons, it would make little sense to say that certain courts should apply *noscitur a sociis* (or apply it aggressively) while others should not (or should apply it only very weakly).

Most aspects of statutory interpretation methodology, in contrast, can differ in meaningful ways. A method can include an absurd-results exception or not. It can include certain substantive canons or not. It can permit use of legislative history or not. It can treat administrative interpretations as binding or merely persuasive or wholly irrelevant. Now, to be sure, the differences between methods will not

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<sup>25</sup> See *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1402–03 (2010); WILLIAM D. POPKIN, A DICTIONARY OF STATUTORY INTERPRETATION 201–03 (2007).

<sup>26</sup> See *James v. United States*, 550 U.S. 192, 222 (2007) (Scalia, J., dissenting) (“[*Noscitur a sociis* is just an erudite (or some would say antiquated) way of saying what common sense tells us to be true.”). To be clear, not all linguistic canons comport very well with ordinary usage.

<sup>27</sup> See *Graham Cnty.*, 130 S. Ct. at 1402–03 (explaining why the canon was not persuasive in that case).

always be sharp and easy to detect, and they will not always determine outcomes. For example, if the rule is that courts may deviate from a clear text only in cases of absurdity, different judges might disagree whether a given text is clear or whether a given result is absurd. Similarly, if a given method permits use of some canon or extrinsic source only in cases of ambiguity, judges will sometimes disagree over whether the threshold of ambiguity has been crossed. It is nonetheless meaningful to speak about the difference between a regime in which a source can never be consulted, can always be consulted, or can be consulted only in certain circumstances. In any event, if some aspects of interpretive method are vague and indeterminate in ways that make it hard to issue prescriptions, that does not arise from any special feature of the institutionalist project undertaken here; if it is an affliction, it afflicts statutory interpretation theory generally.

## B. Methodological Uniformity as a Value in Statutory Interpretation

Having discussed some constraints on interpretive methods and directives, we can now turn to considering the prospect of interpretive heterogeneity across courts. Just to make sure the point is clear, let me emphasize that our topic is *methodological* divergence. Hierarchical heterogeneity does not deny the precedential force of Supreme Court resolutions of particular points of substantive law (e.g., that a bicycle is a “vehicle” within the meaning of statute *Q*) stemming from the relative handful of cases the Court hears each year;<sup>28</sup> it is just that courts should differ in their interpretive approaches.

Hierarchical heterogeneity is but one form of heterogeneous interpretation. To appreciate its distinctive character, it is useful to explain the different levels at which uniformity can operate and the factors that counsel in favor of, and against, uniformity.

### 1. *The Various Dimensions of Methodological Uniformity*

Interpretive methodology can be uniform or disuniform along multiple dimensions, including at least the following several:

The first dimension concerns statutory subject matter. One possibility is that the same interpretive methods should apply to all statutes regardless of subject matter. A contrary view rejects transsubstantive interpretation and advocates sensitivity to context. For example, perhaps criminal prohibitions should be read narrowly (i.e., as the rule of lenity traditionally directs), jurisdictional statutes should be read literally, and antidiscrimination laws should be read purposively and dy-

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<sup>28</sup> Indeed, I argue that the doctrine of vertical precedent should be *strengthened* so as to give more force to Supreme Court dicta. See *infra* Part III.C.1.



namically. Perhaps courts should shift between broad versus stingy interpretive moods based on the interest-group dynamics at play in a given context.<sup>29</sup> This kind of topic-specific variation is distinct from, but compatible with, the hierarchical variation I envision. My claim is just that, whatever topic-specific or other context-sensitive differences there might be, there should be some hierarchical differences, too.

A second dimension along which disuniformity can appear is within the methodology of a particular judge. In theory, there might exist pure textualists (or purposivists or welfare maximizers or whatever)—judges that rigidly adhere to one idealized form of interpretation to the exclusion of all other modalities of argument. In reality, few if any judges are so regimented; most are somewhat catholic in method, though some more than others.<sup>30</sup> Within-judge eclecticism is distinct from—but compatible with—hierarchical difference. Again, the distinctive claim of hierarchical heterogeneity is that there should be systematic differences across different levels of the judicial system. That does not necessarily mean that trial court judges should be single-minded literalists or Supreme Court Justices should exclusively advance sound policy without any regard for the text. Hierarchical variations will be real, but not so stark.

A third type of disuniformity is more important for our purposes. This type is across-judge variation. Hierarchical heterogeneity is a form of across-judge variation in that it contends that judges at different *levels* of the judiciary should behave differently. But it differs from—and contemplates *less* interpretive diversity than—some more familiar kinds of across-judge variation. Most notably, we should distinguish hierarchical heterogeneity from what we might call interpretive pluralism. The pluralist idea is that it is valuable for a system to manifest multiple interpretive approaches, even within the same level of the judiciary and indeed across judges on the same court. Some judges will be textualists and others will be pragmatists, some will use legislative history while others will favor linguistic canons, and so

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<sup>29</sup> See Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 14–18 (1984); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 226–27 (1986); cf. Elizabeth Garrett, *Attention to Context in Statutory Interpretation: Applying the Lessons of Dynamic Statutory Interpretation to Omnibus Legislation*, ISSUES IN LEGAL SCHOLARSHIP, 2002, at 6, <http://www.bepress.com/ils/iss3/art1> (arguing that special interpretive methods might be required for omnibus legislation).

<sup>30</sup> See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 321 (1990) (“Judges’ approaches to statutory interpretation are generally eclectic.”); Thomas W. Merrill, *Faithful Agent, Integrative, and Welfarist Interpretation*, 14 LEWIS & CLARK L. REV. 1565, 1574 (2010) (stating that although judges vary in their approaches, “[t]here are no pure types among real world interpreters”); Rakoff, *supra* note 6, at 1559–60 (observing that individual judges do not and should not restrict themselves to a single theory).

forth. Let a thousand flowers bloom. This kind of pluralism could serve multiple values. It might help us identify useful innovations, along the lines of the “states as laboratories” metaphor that provides a familiar argument for federalism.<sup>31</sup> Or pluralism could promote transparency, legitimacy, and candor by permitting open contestation rather than attempting to force debate into a methodological straight-jacket.<sup>32</sup> Or pluralism might reflect a concession to the view that the choice of an interpretive method is an act of conscience that must feel authentic to the individual judge but lies beyond the power of any statute, rule, or higher court to direct. The important point is that the kind of diversity envisioned by pluralism is not a product of the comparative institutional competencies of different courts.

An advocate of hierarchical heterogeneity can respond to a call for pluralism within a given level of the judiciary in two ways. The strong response would attempt to challenge pluralism head-on. The strong response would contend, for example, that there is little left to learn from further experimentation; it is time to decide and prescribe, and if we have figured out that some particular method is most appropriate for a given court, then we should abandon the inferior competing methods.<sup>33</sup> That is, we would advocate hierarchical variation (e.g., district courts should differ from the Supreme Court) but suppress horizontal interpretive diversity within a particular level of the judiciary (e.g., all Ninth Circuit judges should act the same, and they should also act the same as all Seventh Circuit judges). The more moderate response would remain largely agnostic about the value of pluralism. After all, variation between courts at different levels, which is the possibility explored in this Article, can coexist with pluralistic variety within each level. So perhaps we should indeed let a thousand flowers bloom—but let the varied garden at one level bloom somewhat differ-

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<sup>31</sup> Cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (noting that the federal system allows states to act as laboratories for social and economic experiments). Vermeule discusses an experiment in which different lower courts would use different interpretive methods (one method for the Ninth Circuit and a different method for the Seventh Circuit, for instance), with the Supreme Court letting the matter “percolate” until the Court has enough data to settle on the best method. He rejects the idea as too costly (especially in terms of disuniformity) and unlikely to generate valuable data. VERMEULE, *supra* note 10, at 164–66.

<sup>32</sup> See Leib & Serota, *supra* note 13, at 48–52 (advocating interpretive pluralism on such grounds).

<sup>33</sup> There is of course the problem of compliance: even if we decide that method X is the one true way, it might be difficult to get judges to follow it. See generally Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 555–64 (2005) (discussing factors that make it difficult for the judiciary to coordinate on an interpretive method). That is indeed an important point to keep in mind as the argument progresses. See *infra* Part III.D. The relevant observation here, though, is that pluralism claims that variety is valuable, not just that it is inevitable (though pluralists can assert that, too). What I am calling the “strong response” denies pluralism’s value.

ently from the varied garden at another level. The moderate response is sufficient for purposes of this Article.

Having explained the different dimensions along which disuniformity can operate and how hierarchical heterogeneity fits into the picture, I next discuss how this particular form of disuniform interpretation can stand up to arguments in favor of greater uniformity.

## 2. *Considerations Supporting Methodological Uniformity*

Hierarchical heterogeneity starts with the basic institutionalist insight that statutory interpretation is a place-specific activity, such that proper judicial interpretation might differ from (say) proper agency interpretation.<sup>34</sup> It then adds a further twist by suggesting that courts at different levels of the judicial hierarchy should also use different approaches, say method X for the Supreme Court and method Y for the federal district courts. Yet there must be some limits on the aspiration to tailor interpretive method to institutional difference. Methodological uniformity has been an enduring goal in statutory interpretation, and quite understandably so, for there is much to recommend it. It is therefore incumbent upon anyone advocating a form of heterogeneity to respond to the case for complete uniformity.

We can divide the considerations supporting methodological uniformity into two categories: uniformity driven by the need for a *predictable interpretive regime* and uniformity driven by the demands of *workable appellate review*.<sup>35</sup> We can consider each in turn.

One test of an approach to statutory interpretation is whether it facilitates the legislature's ability to legislate effectively. Toward that end, some jurists and commentators emphasize the need for courts to employ a clear and consistently applied set of interpretive rules; with that stable "interpretive regime" in place, the legislature can then legislate with greater confidence that its handiwork will be implemented as it intended.<sup>36</sup> (Attorneys and members of the public would benefit too, because they would have a better idea of how courts will read statutes.) A call for hierarchical heterogeneity would seem to conflict with the goal of establishing a consistent interpretive regime, inas-

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<sup>34</sup> See *supra* text accompanying notes 9–11.

<sup>35</sup> We have already addressed the scenario in which uniformity is not itself the goal but is simply the byproduct of the belief that noninstitutional factors dictate a single, fully specified method that all courts must follow. See *supra* Part I.A.

<sup>36</sup> E.g., *Finley v. United States*, 490 U.S. 545, 556 (1989) (Scalia, J.) ("What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts."); Rosenkranz, *supra* note 13, at 2142 ("A statutory interpretive regime may . . . provide a rule-of-law boon to the public, while lowering the costs of drafting statutes to the legislature."); see also William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law As Equilibrium*, 108 HARV. L. REV. 26, 66–67 (1994) (describing interpretive regimes and discussing their rule-of-law and institutional-coordination benefits).

much as courts at different positions in the system would tend to interpret statutes differently.

A full evaluation of how hierarchical heterogeneity would affect the goal of establishing a stable interpretive regime will have to wait until the end of this Article, once the theory has been more fully worked out.<sup>37</sup> That is because the degree of conflict depends on the details of the hierarchical regime—which interpretive rules will vary, how much, and across which courts—and because the legislature might like the content of my alternative regime enough to trade away some hierarchical consistency. Nonetheless, here I will briefly mention two general reasons to doubt that a congressional need for a consistent interpretive regime bars any effort to introduce hierarchical variation. First, the notion of interpretive regimes makes some assumptions about Congress that are probably unwarranted. Though Congress is not oblivious to judicial interpretive rules, Congress is not as knowledgeable about them as one might hope, and anyway legislators act on incentives besides just ensuring optimal future judicial interpretations.<sup>38</sup> Second, the status quo hardly presents an ideal interpretive backdrop against which to legislate: there is inconsistency from court to court, from judge to judge, and from case to case.<sup>39</sup> The existing regime is cacophonous enough that it is no regime at all, such that adding a degree of hierarchical heterogeneity to the mix would not matter. Indeed, if we simultaneously suppressed *horizontal* disuniformity, the new regime could be an affirmative improvement. Again, though, a fuller treatment of this point will come later.

There is, however, another uniformity-based argument that is potentially more threatening to hierarchical heterogeneity. It arises not from the needs of Congress but from the practicalities of appellate review. Indeed, the reader might already be formulating a fundamental objection to hierarchical heterogeneity. Suppose we found out that lower courts are well suited to approach statutes one way but the Supreme Court does best to approach them another way. That might be interesting in the abstract, the objection would run, but what practical difference could it make? In the end, all courts (or at least all courts in the same structure of hierarchical review) would have to use

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<sup>37</sup> I undertake this evaluation in Conclusion Part B, *infra*.

<sup>38</sup> See Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 594–97, 601–05, 614–16 (2002). State legislatures might be more attentive or otherwise differ in relevant ways. See *infra* text accompanying notes 74–77, 198–99.

<sup>39</sup> See *supra* notes 12–13 and accompanying text (discussing the long-standing observation of inconsistency); cf. James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 96–108 (2005) (using empirical study to cast doubt on claims that interpretive canons can promote predictable and consistent judicial decisionmaking).

the same approach, wouldn't they? It might initially seem so. After all, if lower courts use interpretive approach *A* (say, literalism) and reviewing courts use interpretive approach *B* (say, justice-seeking interpretation), then presumably the reviewing courts will have to reverse some decisions even though both courts perfectly apply their (divergent) approaches. To state the point more generally, we would expect an organization to run badly if the underlings and the supervisors disagree about what a good product looks like. (Imagine a factory where the supervisor, inspecting the products as they roll off the assembly line, rejects every widget because it does not conform to his or her idea of proper widget construction, which differs from the workers' notions. This factory would go out of business.)

The problem is not limited to cases in which the supervisory courts and the lower courts have different overarching aims or goals for interpretation. Even when there is agreement about ultimate aims, the use of divergent means can cause the same problems. So heterogeneity of either broader approaches or specific rules would seem unstable.<sup>40</sup>

The assumption that a system of hierarchically heterogeneous interpretation would lead to such problems might explain why scholars have not seriously entertained such a system. Yet while there is certainly something to the argument for homogeneous statutory interpretation, I believe it can be overcome. A regime displaying heterogeneity is, as I explain next, a fully workable system.

### C. Creating Space for Hierarchical Heterogeneity

To see why hierarchical heterogeneity is feasible, it is useful to begin by considering the problem of judicial review of agency statutory interpretation. As noted at the outset, most of the literature on the institutional dimension of interpretation focuses on administrative agencies, contrasting their competencies with judicial competencies.<sup>41</sup> In this literature, agencies are said to be relatively more adept than courts at employing legislative history and statutory purpose, more competent to update statutes in light of changed circumstances, and

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<sup>40</sup> One could imagine a world in which lower courts and reviewing courts used different methods but always reached the same result (where the result is defined as the case outcome or whatever else one thinks is important), so that there is no inherent instability. Indeed, we should be careful not to overstate how frequently methodological disagreements turn out to matter. Often they do not. See Czarnecki & Ford, *supra* note 7, at 882–83; Daniel A. Farber, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 Nw. U. L. Rev. 1409, 1410 (2000). Nonetheless, I think that the methodological divergences I envision would lead to different results often enough to raise the prospect of heterogeneity being unstable.

<sup>41</sup> *Supra* note 11.

so on.<sup>42</sup> This divergence in interpretive competencies raises the specter of the appellate-review mismatch we have been discussing: if reviewing courts evaluate agency-appropriate interpretations by judge-appropriate standards, we will have many reversals and lots of waste.

Defenders of distinctiveness in agency interpretation have a promising way to avoid this mismatch. Their answer lies in deferential standards of review.<sup>43</sup> The reviewing court is not supposed to seek the single best interpretation of the statute and reverse the agency if there is any disagreement. Rather, the court is supposed to ask only whether the agency's answer is within the range of permissible meanings. Or put differently, the agency is engaged in the activity of delegated policymaking, and the court is engaged in the distinct activity of keeping the policymaking within some legislatively prescribed boundaries. A loose standard of review creates interpretive slack that permits agencies and courts to use different methods of determining meaning without triggering excessive findings of error. (Whether the actually existing federal doctrines governing judicial review of agency interpretation—*Chevron*<sup>44</sup> and its progeny—provide the right degree of slack is a separate question. It might be that courts in fact require agencies to conform too closely to the courts' own image or otherwise unduly restrain agencies' leeway, leading to too many judicial findings of error.<sup>45</sup>)

The existence of interpretive slack can also allow heterogeneity *within* the judicial system, at least at certain levels of the hierarchy. Here, however, the potential source of the slack is not a deferential standard of review; on the contrary, I assume that appellate courts will continue to treat lower courts' statutory interpretations as questions of law reviewed *de novo*.<sup>46</sup> Rather, the slack that facilitates hierarchical heterogeneity comes from discretionary appellate *jurisdiction*.

To elaborate: In our system, litigants sometimes have a right to invoke a reviewing court's jurisdiction, but other times the litigant can appeal only if the reviewing court decides to permit the appeal. Ap-

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<sup>42</sup> See, e.g., VERMEULE, *supra* note 10, at 205–15; Mashaw, *supra* note 11, at 504–24; Strauss, *supra* note 11, at 321–22.

<sup>43</sup> See VERMEULE, *supra* note 10, at 213–14; Herz, *supra* note 11, at 117–20.

<sup>44</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>45</sup> Cf. *infra* Parts III.C.2, IV.B (discussing institutional factors bearing on the proper degree of deference to administrative interpretations).

<sup>46</sup> See, e.g., *Stephens ex rel. R.E. v. Astrue*, 565 F.3d 131, 137 (4th Cir. 2009). One could argue in favor of granting deference to lower courts or treating statutory interpretation as essentially a question of fact. Cf. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 230–31 (1991) (noting that a majority of the courts of appeals deferred to district judges on questions of state law, but disapproving that practice); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1371 (1990) (raising the possibility of treating statutory interpretation as a question of fact subject to deferential appellate review). Nonetheless, here we will treat *de novo* review as a fixed point.

peals from the federal district court to the court of appeals are appeals as of right,<sup>47</sup> and, as noted, the reviewing court exercises de novo review on matters of law. Therefore, if *those two courts* use different interpretive approaches, district court losers would routinely appeal and win reversal whenever the case falls into the category of cases in which the method matters. That would make for the inefficient and unstable system described above. But things are different when it comes to Supreme Court review. Although the Supreme Court also reviews statutory interpretation de novo, its jurisdiction is almost entirely discretionary and is exercised in only a tiny fraction of cases.<sup>48</sup> Accordingly, the Court is not in the position of the supervisor that has to reassemble every widget that rolls off the line to bring it into conformity with the supervisor's own views of proper widget construction. The Court does not have to, and does not in fact, scrutinize every statutory interpretation decision to see whether it would reach the same outcome as did the court below. Instead, the Supreme Court treats the existence of conflict in the lower courts as virtually a threshold requirement for reviewing a statutory case. For the small number of cases in which the Court grants review, it will use its own methods in resolving the case. But the Court will not otherwise upset the work of the lower courts. Therefore, interpretive heterogeneity between the Supreme Court and lower courts would not lead to excessive and wasteful reversals.

Notwithstanding the absence of actual wasteful reversals traceable to methodological heterogeneity, some may object that in certain cases the litigants will receive a result from the lower courts that differs, solely due to the difference in interpretive methods, from the outcome they *would* receive if the Supreme Court reviewed the case. The oracles of justice would give a different answer in Washington, DC, than they give in Philadelphia or New Orleans. That is true, but it is not a sound objection, for two reasons.

First, one could question the relevance of mere divergence in hypothetical results between the Supreme Court and lower courts. The divergence is most troubling if the lower courts' decisions can be regarded as erroneous. Yet one does not have to embrace a radical form of legal realism to believe that the Supreme Court's decisions are frequently best understood not as correcting error as much as simply substituting one reading of a statute for another.

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<sup>47</sup> The right to one level of appellate review is recognized by federal statutes, *e.g.*, 28 U.S.C. § 1291 (2006), though the Constitution does not appear to require it, *see* *Abney v. United States*, 431 U.S. 651, 656–58 (1977).

<sup>48</sup> There do remain a few vestiges of mandatory Supreme Court jurisdiction, though even in these cases the Court does not issue reasoned opinions if it does not want to. *See* EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 89–117, 146–47 (9th ed. 2007).

The second and more fundamental response, however, is just to point out that such hypothetical divergences occur all the time already, indeed sometimes by design. There are perhaps thousands of cases every year in which the Supreme Court, if it reviewed the case, would reverse. This does not particularly trouble us, for today we do not regard the Court as an error-correcting body whose attention a disappointed litigant has the right to invoke.<sup>49</sup> More notably, we do not even regard all of these divergences as unwanted or accidental. We do not, as a general matter, expect the lower courts to act as proxies for the Supreme Court, attempting to mimic (as perfectly as possible) the result the Supreme Court itself would reach. For example, a lower court is supposed to adhere to existing Supreme Court precedents even if it has very good evidence that the Court would today rule differently if it took the case.<sup>50</sup> Similarly, panels of the courts of appeals are supposed to follow circuit precedent whether or not they believe the Supreme Court would endorse it as a matter of first impression.<sup>51</sup> If we changed these and other practices, we might reduce the number of times the lower courts generated results that differ from the answer the Supreme Court would give.<sup>52</sup> Even if we could

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<sup>49</sup> See *Lawrence v. Chater*, 516 U.S. 163, 176–77 (1996) (Rehnquist, C.J., concurring and dissenting) (“[W]e would do well to bear in mind the admonition of Chief Justice William Howard Taft . . . [Litigants] have had all they have a right to claim, Taft said, when they have had two courts in which to have adjudicated their controversy.” (internal quotation marks omitted)); see also Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643 (2000) (tracing the rise of the idea that the Court’s docket should be largely discretionary).

<sup>50</sup> See *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (“[I]t is this Court’s prerogative alone to overrule one of its precedents.”); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”). To be sure, one can argue that the rule against prediction is misguided. See, e.g., C. Steven Bradford, *Following Dead Precedent: The Supreme Court’s Ill-Advised Rejection of Anticipatory Overruling*, 59 FORDHAM L. REV. 39, 39–42 (1990); Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 5–8 (1994). But see Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 685 (1995) (arguing that the prediction view conflicts with rule-of-law values). Here I am merely describing the currently prevailing doctrine.

<sup>51</sup> The en banc court can overrule circuit precedent, of course, but there is no obligation to do so just to bring circuit decisions in line with predicted Supreme Court outcomes. (Circuit precedent that is actually incompatible with subsequent Supreme Court rulings presents a different situation; it is no longer binding.)

<sup>52</sup> E.g., *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996) (calling governing Supreme Court precedent “wobbly” and “moth-eaten” and predicting its overruling—yet considering itself duty-bound to follow that precedent), *rev’d*, 522 U.S. 3, 20 (1997) (reversing court of appeals but praising its restraint in adhering to precedent). To be sure, directing lower courts to act as the Court’s proxies might actually lead to more errors and reversals if lower courts are bad at predicting the Supreme Court’s decisions. Evan Caminker has identified several situations in which, he argues, embracing prediction would enhance accuracy and reduce error costs. Caminker, *supra* note 50, at 66–74.



reduce the number of divergences, however, we might still prefer to endorse the already existing heterogeneous practices because they promote other values, such as orderliness and stability. Maximizing alignment with hypothesized outcomes is not the only goal.

The same thing might be true here: if there are good judicial-institutional reasons to require lower courts to follow interpretive methods that differ from the Supreme Court's methods, those reasons might be strong enough to outweigh the fact of some divergence in results.

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In sum, it seems to me that one could have a workable system of heterogeneous interpretation as long as there is slack in the appellate system, which could come from either a deferential standard of review (as with judicial review of agency interpretations) *or* nonmandatory jurisdiction (as with Supreme Court review). Only when there is both *de novo* review and mandatory review does heterogeneity cause real trouble. Both of those conditions obtain between a federal district court and the court of appeals, which means that interpretive methodology between those two levels should be harmonized even if the institutional competencies of the two kinds of courts would otherwise call for divergence. In other words, the Southern District of New York needs to be on the same page, interpretively speaking, as the Second Circuit.<sup>53</sup> But there are several points in our system where the conditions do not jointly obtain because jurisdiction is discretionary (or nonexistent), each of which therefore provides room for heterogeneous interpretation:

- The lower federal courts can diverge from the U.S. Supreme Court.
- State courts can differ from the U.S. Supreme Court: there is no review at all for questions of state law, and even for questions of federal law the review is once again only discretionary.<sup>54</sup>

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<sup>53</sup> It would be compatible with hierarchical heterogeneity for the Ninth Circuit and its district courts to differ from the Second Circuit and its district courts. *See supra* Part I.B.1 (discussing the relationship between hierarchical heterogeneity and other forms of interpretive diversity). A system that displayed that kind of geographic diversity would have other problems, however, and I do not endorse it. *See infra* Conclusion Part B.

<sup>54</sup> *See* 28 U.S.C. § 1257 (2006) (providing that the Supreme Court “may” review state decisions presenting federal issues). Some interesting interpretive problems can arise when courts interpret a statute that comes from another system. Consider the issue of whether the *Erie* doctrine requires a federal court interpreting a state statute to follow the state court's interpretive method, despite the lack of state appellate review. Similarly, do state courts need to eschew using a distinctive state interpretive method (if they have one) when they interpret a federal statute? For a discussion of such issues, see generally Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as ‘Law’ and the Erie Doctrine*, 120 *YALE L.J.* 1898 (2011). The values of preserving uniformity and deterring forum shopping mili-

- For similar reasons of nonreviewability, states can vary from each other.
- Because a state high court's review of its own lower courts is in most states largely discretionary,<sup>55</sup> the lower state courts can diverge from their high court.

Calling a system of heterogeneous interpretation workable is, admittedly, faint praise. That the system would not be a positive disaster does not establish that there are good reasons to affirmatively embrace it. Whether there are good institutional reasons to embrace such a regime is the subject of Parts II–IV. We will turn to those arguments in a moment. First, though, there is one more thing briefly to say to those who remain skeptical of hierarchically heterogeneous interpretation.

#### D. A Fallback Argument: Bottom-Up Interpretation

Let us suppose that, despite the arguments above, the reader is still convinced that courts at all levels must interpret statutes the same way. Even so, that hardly means that interpretive theory can continue to all but ignore the lower courts. On the contrary, the choice of the proper hierarchically *uniform* method should still take into account the differing institutional positions within the system. The Supreme Court is important, no doubt, but there are only nine Justices there, and they hear a tiny percentage of the cases handled by all of the other judges and courts in the land. So instead of tailoring interpretive theories around what is good for the exalted one Court—as we implicitly do now—we might instead make such decisions on the basis of what is good for the lowly many. The last shall be first and the first shall be last, one might say. Therefore, even those readers who (alas) reject the possibility of heterogeneity should *still* care about the material that follows.<sup>56</sup>

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tate in favor of making interpretive methodology track the substantive law in cases of cross-system interpretation. For that reason, I would generally have the lower federal courts and the lower state courts emulate each other (though not each other's high court) when interpreting each other's statutes. But I would add that considerations favoring emulation need to be weighed against other institutional considerations of the sort discussed in this Article, such as limitations on the rendering court's decisional capacity. Because I believe that all lower courts, state and federal, should use constrained methods, there should rarely be problems. One particularly interesting way in which lower federal courts and lower state courts differ concerns judicial elections, which arguably confer greater democratic legitimacy on state judges. *See infra* note 194.

<sup>55</sup> *Appellate Procedure Overview*, NAT'L CTR. ST. CTS., <http://www.ncsc.org/topics/appellate/appellate-procedure/overview.aspx> (last visited Feb. 20, 2011).

<sup>56</sup> It is worth noting in this regard that there are other instances in which the Supreme Court acts in ways that are aimed at the interests of the lower courts. For example, the Court will sometimes fashion a decision rule that provides the lower courts with clear guidance or is aimed at ease of administration, even though the rule might not hit the Court's own ideal point. *See infra* text accompanying notes 87–89.

Likewise, although I have suggested that the lower federal courts, while permitted to differ from the Supreme Court, must among themselves follow consistent rules in order to avoid appellate train wrecks, that does not tell us which lower courts' preferences to satisfy. We should not assume that the district courts must follow the rules that the courts of appeals find most convenient. We might instead require the courts of appeals to accommodate those they review. Once again, then, it is important to figure out just how the circumstances of interpretation might vary from court to court. We now turn to the first way in which the circumstances might vary.

## II

### THE INFLUENCE OF HIERARCHICAL ARRANGEMENT

Courts in this country are typically embedded within a hierarchical appellate structure. The Supreme Court sits at the top of the pyramid, overseeing the federal courts and, on matters of federal law, the state courts as well.<sup>57</sup> Even if all courts were otherwise identical in their capacities and constitutions, the mere fact of hierarchical arrangement might affect how they should go about reading statutes. Accordingly, this Part of the Article examines the impact of mere hierarchy.

The fact of hierarchy has several implications for statutory interpretation theory and judicial practice. Three implications are examined in detail here.<sup>58</sup> First, a court's place in the hierarchy affects its relationship with the legislature, and so theories that envision certain kinds of interactions between the Supreme Court and Congress might not work for lower courts (Part II.A). Second, the Supreme Court's decision to review an issue, which is a rare and important event, might itself bring new interpretive materials into existence (Part II.B). Third, the fact that courts exist together within an appellate structure means that their decisionmaking, including their statutory interpretation methodology, should take into account any effects on the workload of other courts (Part II.C).

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<sup>57</sup> See 28 U.S.C. § 1254 (2006) (appellate jurisdiction over cases from federal courts of appeals); *id.* § 1253 (appellate jurisdiction over cases from three-judge district courts); *id.* § 1257 (appellate jurisdiction over state cases involving federal law).

<sup>58</sup> Some other implications of hierarchical arrangement are discussed later, because they also involve other institutional differences between courts. See *infra* Part III.C.1 (discussing whether lower courts should follow Supreme Court dicta to foster uniformity and other values).

### A. Interacting with the Legislature: Same Game, Different Leagues

The visibility of a decision depends on which court announces it. The Supreme Court issues about eighty merits opinions a year.<sup>59</sup> The decisions typically bind the whole country, and many are widely reported even in the popular press. The particularly relevant audience known as Congress, acting through its relevant committees and staffers, certainly knows about the Court's rulings. The lower federal courts, by contrast, issue many thousands of decisions a year,<sup>60</sup> and most of them (because unpublished and nonprecedential<sup>61</sup>) are important only to the parties. Now, to be sure, the fact that Congress cannot comprehensively monitor the massive output of the lower courts certainly does not mean that it will not get wind of some decisions. Interest groups can sound fire alarms over particular decisions even if Congress does not regularly patrol the *Federal Supplement 2d*.<sup>62</sup> Nonetheless, it seems perfectly sensible to imagine both that Congress itself will tend to monitor lower courts less closely and that interest groups will sound the alarm less often and less loudly over lower-court decisions. Thus, in general, Congress will know less about lower-court statutory interpretations than it does about Supreme Court interpretations.<sup>63</sup> And, indeed, the empirical evidence bears out that intuition.<sup>64</sup>

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<sup>59</sup> See JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2010 ANNUAL REPORT OF THE DIRECTOR 82 tbl.A-1 (2011).

<sup>60</sup> *Id.* at 44 tbl.S-1, 46 tbl.S-3, 138–40 tbl.C, 204–06 tbl.D.

<sup>61</sup> In the federal courts of appeals, “unpublished” opinions are nonprecedential but are still usually available in electronic databases. In the district courts, the majority of the decisions are not readily available at all. See Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 VILL. L. REV. 973, 982–87 (2008).

<sup>62</sup> Cf. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165–66 (1984) (developing the patrol and alarm models of congressional oversight of the bureaucracy).

<sup>63</sup> The level of the rendering court is not the only factor that determines visibility. Other determinants include the subject area and the direction of the decision. For example, the Department of Justice is quite good at notifying Congress of pro-defendant rulings and obtaining statutory overrides. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 352, 361–62 (1991). The existence of differences in congressional awareness across issue areas might suggest that courts should tailor their interpretations accordingly. This does not bear on whether there should also be hierarchical fixed effects, which is the concern here.

<sup>64</sup> See ROBERT A. KATZMANN, COURTS AND CONGRESS 73–74 (1997); Eskridge, *supra* note 63, at 337 n.12, 415–16; Stephanie A. Lindquist & David A. Yalof, *Congressional Responses to Federal Circuit Court Decisions*, 85 JUDICATURE 61 (2001). Various methods for improving congressional oversight and facilitating statutory amendments have been proposed. See KATZMANN, *supra*, at 76–79 (requiring the D.C. Circuit's chief staff counsel to forward opinions to key members of Congress); Henry J. Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787, 802–07 (1963) (proposing creation of a committee charged with revising federal statutory law); Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1429–34 (1987)

What difference does it make that lower-court statutory interpretation is less visible to legislators? Possibly quite a bit. Although some people might suppose that the obvious object of the interpretive enterprise is to discern and carry out the legislature's command (admittedly sometimes an elusive goal), some theories do not even aim at that target. Indeed, some approaches advocate reading statutes in ways *counter* to the likely legislative intent. For example, Einer Elhauge proposes that courts should sometimes use counterpreferential canons that will provoke the legislature to respond to the court's interpretation and clarify its desires.<sup>65</sup> That is, if we suspect Congress probably wanted outcome X but was not clear about it, the courts should sometimes give Congress not-X to elicit a response

These types of preference-elicitation accounts are sophisticated and hold substantial appeal, but they are of course also subject to criticism. Vermeule contends that they are deficient because they neglect the problem of judicial coordination. If only a few judges engage in democracy-forcing interpretation, the message is unlikely to get through to Congress. A critical mass is instead necessary, but that is hard to achieve, says Vermeule, because judges are independent-minded, diverse in their approaches, and hard to discipline.<sup>66</sup> Elhauge responds that courts could coordinate (such as through the familiar doctrine of *stare decisis*) and in any event that preference-eliciting interpretation is divisible in the sense that each judge can make an incremental contribution regardless of how many others participate.<sup>67</sup> My own contention is that it matters which courts are at issue: the Supreme Court might succeed in eliciting legislative responses even if it coordinates only poorly, but lower courts might fail

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(proposing a committee to address "less controversial cases" involving "the arcane minutiae of federal statutes."); John Copeland Nagle, *Corrections Day*, 43 UCLA L. REV. 1267, 1267-70 (1996) (proposing that Congress set aside a day for passing legislation designed to correct statutory mistakes).

<sup>65</sup> Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2282-85 (2002); cf. Robert Gertner & Ian Ayres, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989) (developing the related concept of penalty default rules in contract law). To be clear, Elhauge does not propose that courts always rule contrary to the legislature's likely preferences. Rather, his prime interpretive directive is to follow the legislature's preferences when ascertainable. See Elhauge, *supra*, at 2171.

<sup>66</sup> VERMEULE, *supra* note 10, at 118-37, 128-37. Elizabeth Garrett offers another important institutional criticism, namely that judges might lack the capacity to make the calculations necessary to decide whether preference elicitation is appropriate, especially when it comes to estimating the odds of legislative override. Elizabeth Garrett, *Preferences, Laws, and Default Rules*, 122 HARV. L. REV. 2104, 2137-38 (2009). I take up capacity-related considerations (though not with regard to Elhauge in particular) in Part III, *infra*.

<sup>67</sup> EINER ELHAUGE, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* 332-34 (2008).

even if they coordinate fairly well.<sup>68</sup> An interpretation cannot elicit a response if it is not heard in the first place. If the legislature does not respond, all we are left with is an interpretation that is probably contrary to the legislature's preferences. That alone does not necessarily render the interpretation wrong, but it does make the interpretation—and the more general idea of preference-eliciting or democracy-forcing methods—harder to justify.

The casualties of the low visibility of lower-court interpretation might not be limited to approaches that are explicitly based on provoking legislative responses to particular interpretations. Potentially affected is any theory that envisions some sort of dynamic interaction between the courts and Congress. That covers quite a bit of territory. It includes something as modest as the claim, often offered in defense of an unpalatable interpretation, that if the interpretation is wrong, Congress can fix it.<sup>69</sup> So too with the claim that congressional inaction following a judicial interpretation of a statute indicates congressional acquiescence, with the accompanying implication that the courts should not revisit the acquiesced-in interpretation. That claim is always somewhat questionable, but it is especially problematic when it comes to lower courts.<sup>70</sup> The low visibility of lower-court decisions also calls into question the strand of textualist thought that justifies strict textualism by positing that it will have the disciplining effect of teaching Congress to draft more clearly.<sup>71</sup> One could challenge that line of thought even when it is used in the Supreme Court.<sup>72</sup> But

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<sup>68</sup> Elhauge briefly acknowledges that his theory might not work as well below the Supreme Court, Elhauge, *supra* note 65, at 2225, though I would suggest that it is a more serious problem than he seems to think, inasmuch as the vast bulk of statutory interpretation occurs below the high court. Lower courts therefore cannot be treated as a minor exception.

<sup>69</sup> *E.g.*, *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1624 (2010) (“To the extent Congress is persuaded that the policy concerns identified by the dissent require a recalibration of the [statute’s] liability scheme, it is, of course, free to amend the statute accordingly.”).

<sup>70</sup> Amy Coney Barrett’s article on statutory *stare decisis* in the courts of appeals concludes that the super-strong version of the doctrine that applies in the Supreme Court should not apply in the courts of appeals, in part because the inference of acquiescence is less warranted. Barrett, *supra* note 11, at 342–47; *see also* Lindquist & Yalof, *supra* note 64, at 68 (concluding that the view that Congress will correct incorrect interpretations “has little empirical foundation, at least in the courts of appeals”).

<sup>71</sup> *See* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 636–46 (1995) (discussing textualism as a “disciplinary” approach to statutory construction); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 103 (2000) (“A central argument for textualism is that it has a democracy-forcing effect: Judicial refusal to remake enacted text forces Congress to legislate more responsibly *ex ante*.”).

<sup>72</sup> *See* William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1551 (1998) (questioning whether “Congress is institutionally capable of responding to the new textualism by anticipating more issues and resolving them more clearly in statutes”); Nourse & Schacter, *supra* note 38, at 594–97, 614–16 (contrasting judicially desired draft-

whatever one thinks of its use there, it seems pretty clear that the *lower courts* would be less effective disciplinarians or indeed conversational partners of any sort. It is not much of a dialogue when one side hears only every fifth word.

What all of this comes to is that whatever interpretive bank-shots and strategic counterpreferential machinations might be suitable for the Supreme Court, the lower courts would do better to take the more naïve approach of just trying to decide cases *correctly*—correctly on each case’s own terms, that is, without regard to any possible influence on Congress. Now, admittedly this recommendation lacks precision. But it does tell us something; it does narrow the field. One specific doctrinal implication is that, even if the Supreme Court were to follow the lead of some academic textualists and reject the absurd-results doctrine,<sup>73</sup> lower courts should not follow along. The broader lesson is that lower courts should not try to induce legislative responses in particular cases or to improve the legislative process more generally—maneuvers that, as we have seen, some judges and theorists would endorse.

Finally, before leaving the topic of decisional salience, this is an appropriate point to distinguish between the federal and state judiciaries. In particular, this is an area in which state supreme courts are more like the U.S. Supreme Court than they are like the lower federal courts. Just as the Supreme Court’s decisions interpreting federal statutes can be expected to catch Congress’s eye, so too will state high-court decisions interpreting state law attract attention in their respective state legislatures. Indeed, it might be that the states provide the best conditions for true dialogue between the judiciary and the legislature: the relationships between legislators and high-court justices in a state capital are often close, and, significantly, both sides speak the same language because in most states the justices face the voters in elections of one sort or another.<sup>74</sup> (Further, a small but significant

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ing virtues such as clarity with political imperatives such as ensuring passage through compromise and suppressing disagreement).

<sup>73</sup> See John C. Nagle, *Textualism’s Exceptions*, ISSUES IN LEGAL SCHOLARSHIP, 2002, at 1–2, 5, 12, <http://www.bepress.com/ils/iss3/art15> (arguing that textualists should disavow the absurd-results doctrine); cf. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390–93 (2003) (rejecting the absurd-results doctrine but arguing that textualists can still avoid many absurdities by making their textual analysis less literal and more contextual).

<sup>74</sup> See ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 299–301 (2009) (explaining that state judges have “more regular involvement in the workings of other branches” and “are often deeply involved in the state’s ongoing policy-making processes”); Hans A. Linde, *Observations of a State Court Judge*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 117, 118 (Robert A. Katzmann ed., 1988) (stating that “[a]s elected representatives, like legislators, [state judges] feel less hesitant to offer their policy views than do appointed judges” and that state judges find it “relatively easy . . . to stay in touch with legislative activities”); *infra* Part IV (describing the methods by which state

percentage of state supreme court justices have served as legislators or other elected officials.<sup>75</sup>) So state high-court justices will be heard in the capitol, and, better than most federal judges, they actually know what to say. Theorists who yearn for dialogue between courts and legislatures should direct their attention to the states.<sup>76</sup> The distinctive political capability of state judges is a significant point, and we will return to it later when discussing the role of judicial selection.<sup>77</sup>

## B. Creating Their Own Reality (New Agency Guidance)

The rarity and salience of Supreme Court review also leads to another hierarchical divergence: Supreme Court cases can generate their own interpretive realities. We usually suppose that the universe of interpretive materials is basically fixed as a case moves from court to court. To be sure, more of the materials might be unearthed and competently presented to the courts as the case moves through the system,<sup>78</sup> but the same interpretive materials are, one might suppose, available the whole time. But this is not so. The Supreme Court's grant of certiorari could trigger legislative action, such as floor statements from interested members offering their interpretive advice or perhaps the introduction of new legislation. Such matters are usually easy to dismiss as mere "subsequent legislative history."<sup>79</sup> A much more important way in which the Supreme Court's interest in a case can generate a new interpretive reality, however, is that it can elicit an

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judges are selected and how the selection process bears on how they should interpret statutes).

<sup>75</sup> See Chris W. Bonneau, *The Composition of State Supreme Courts 2000*, 85 JUDICATURE 26, 28 tbl.1 (2001) (providing data on prior political experience of state supreme court justices as of 1994 and 2000); Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228, 232 tbl.1 (1987) (providing similar data as of 1980–81); see also Linde, *supra* note 74, at 118 ("[M]any state judges, by dint of prior political experience as legislators or prosecutors, are quite familiar with the legislative branch and feel comfortable interacting with it.").

<sup>76</sup> This paragraph refers to the states as an undifferentiated group, which is of course a simplification. For one thing, states differ in terms of the institutional channels for interbranch communications. See Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1059–75 (1991) (describing mechanisms for interbranch interaction in various states). In terms of personnel, the proportion of state supreme court justices with prior elective experience varies significantly across states. See Bonneau, *supra* note 75, at 30 tbl.2; Glick & Emmert, *supra* note 75, at 232. Other relevant differences would include variations in legislative professionalism and the availability of direct democracy, not to mention the idiosyncrasies of culture. See *infra* text accompanying notes 198–99 (discussing differences in state political systems).

<sup>77</sup> *Infra* Part IV.A.

<sup>78</sup> See *infra* Part III.A (explaining that the Supreme Court has access to more information than lower courts).

<sup>79</sup> See, e.g., *Doe v. Chao*, 540 U.S. 614, 626–27 (2004); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990).



authoritative administrative interpretation that was not available to the lower courts.

A notable example of administrative guidance that can appear for the first time in the Supreme Court is an amicus brief filed by the relevant administrative agency (or by the Solicitor General in consultation with agency officials) that purports to set forth the government's official view on the correct interpretation of a federal statute or regulation. To be sure, courts sometimes discount agency views expressed in connection with specific litigation on the ground that they lack an adequate deliberative pedigree or represent mere litigating positions.<sup>80</sup> Yet the Supreme Court has also deferred to the views expressed in agency briefs in numerous decisions.<sup>81</sup> If briefs newly setting forth the agency's official position receive substantial weight, this would represent a major deviation from the assumption of a fixed universe of interpretive materials.<sup>82</sup>

How should the system respond to such latter-day administrative guidance? One answer is that the lower courts should conform their interpretive practices to the Supreme Court's model by requesting the government's views whenever the courts might give them weight. Indeed, one recent Supreme Court case seemed to criticize a lower court for not inviting an agency to file a brief expressing its views on the meaning of one of its regulations.<sup>83</sup> Yet this solution presents its own difficulties. Should we really expect every district court in the land to request, and then wait for, a government amicus brief whenever a statute administered by an agency is the subject of litigation?<sup>84</sup>

<sup>80</sup> *E.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

<sup>81</sup> There were at least four such cases in the Supreme Court's October 2010 Term. *See Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1139 (2011) (crediting agency's view, as expressed in Solicitor General's amicus brief, that agency regulation did not preempt state tort law); *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2575 & n.3 (2011) (deferring to agency's interpretation of its own regulation even though it was advanced in an amicus brief); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2260–61 (2011) (same); *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880–82 (2011) (same). Although the practice of deferring to amicus briefs is not new, *see, e.g.*, *Auer v. Robbins*, 519 U.S. 452, 461–62 (1997), it seems that the Court today is less hesitant about it.

<sup>82</sup> This has sometimes troubled the Supreme Court. *See United States v. Mead Corp.*, 533 U.S. 218, 238 n.19 (2001) (recognizing the oddity of the scenario in which "deference [to the agency] was not called for until sometime after the litigation began, when central management at the highest level decided to defend the [agency's prior informal position], and the deference is not to the [prior position] as such but to the brief"). As usual, my concern is with the judicial-institutional aspects of deferring to agency amicus briefs rather than other objections. *Cf.* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 613–19, 654 (1997) (criticizing deference to agency interpretations of the agency's own regulations on separation-of-powers grounds).

<sup>83</sup> *See Chase Bank*, 131 S. Ct. at 880 n.7.

<sup>84</sup> *Cf. Williamson*, 131 S. Ct. at 1143 (Thomas, J., concurring in the judgment) ("According to the majority, to determine whether [a federal regulation] pre-empts a tort suit, courts apparently must embark on the same expedition undertaken here: sifting through

Would the agencies and the Department of Justice welcome a regime in which they were required to offer such guidance on an everyday basis?

If it is impractical or undesirable for the lower courts to emulate the Supreme Court in this regard, we are left with two more possibilities. First, we could decide that this form of interpretive discontinuity is acceptable. In the rare event in which the Supreme Court reviews a particular question of statutory interpretation, its job would be to get the best answer, even if that means using new materials or techniques not available to the lower courts or litigants. Second, if we wished to retain hierarchical uniformity of interpretive methods, we could require the Supreme Court to follow the methods that work for the lower courts. As explained earlier, one can get uniformity by leveling down as well as by leveling up.<sup>85</sup>

### C. Judicial Agenda Effects

No court is an island, acting in isolation. Each is part of a system, and its decisions should take that into account. This is fairly easy to grasp when, as usual, we think about things from the Supreme Court's perspective at the top of the pyramid and look down at the lower courts. We understand that the Court is not making decisions just for itself but is instead acting as the manager of a large bureaucracy. Therefore, one factor the Court sometimes does—and certainly should—consider in fashioning its decisions is whether the contemplated decisional formula is one that its inferiors can readily administer.<sup>86</sup> (There are connections here to the classic rules-versus-standards debate, of course, where ease of administration is generally regarded as one of the attractive features of rules.<sup>87</sup>) A savvy managerial court might also consider what kinds of decisional formulas will make it easy to monitor whether lower courts are complying with the supervisor's directions. This too might suggest an advantage of rela-

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the Federal Register, examining agency ruminations, and asking the Government what it currently thinks.”)

<sup>85</sup> See *supra* Part I.D.

<sup>86</sup> See, e.g., *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1193–94 (2010) (choosing one jurisdictional test over another in part due to simplicity of administration); see also Anita S. Krishnakumar, *The Anti-Messiness Principle in Statutory Interpretation*, 87 NOTRE DAME L. REV. (forthcoming 2012) (arguing that many Supreme Court cases apply a norm disfavoring interpretations that would require implementing courts to engage in complicated factual inquiries). To be sure, it might be that the Court does not give enough weight to the needs of the judicial bureaucracy; some complain that its opinions are too hard to understand and administer. See Adam Liptak, *Justices Are Long on Words but Short on Guidance*, N.Y. TIMES, Nov. 18, 2010, at A1, available at <http://www.nytimes.com/2010/11/18/us/18rulings.html>.

<sup>87</sup> See, e.g., FREDERICK SCHAUER, *PLAYING BY THE RULES* 145–49 (1991); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 63 (1992).

tively clear, rule-like interpretations of statutes over looser, standard-based interpretations.<sup>88</sup> The point is not that managerial and hierarchical considerations should always trump other values but just that the Court's place atop the judiciary should affect how it fashions its decisions.

Lower courts too should consider bureaucratic needs when they interpret statutes. One could take this insight in several directions, but here I will focus on one specific practical application: lower courts should account for how their statutory interpretation decisions affect the Supreme Court's control over its agenda. Again, this should not be the exclusive consideration, but it is one factor that should be included among others.

Although the Supreme Court's docket is largely discretionary, lower courts can force its hand. A decision holding a federal statute unconstitutional is a case that the Court virtually has to take.<sup>89</sup> Decisions invalidating statutes therefore not only impinge (according to the classic countermajoritarian paradigm, anyway) on the democratic process but, when rendered by a lower court, also interfere with the Supreme Court's power to control its own agenda. If we believe it is valuable for the Court to address constitutional questions on its own schedule,<sup>90</sup> that is a reason for lower courts to interpret statutes so as to avoid findings of unconstitutionality. They do this already, of course, according to the canon of constitutional avoidance.<sup>91</sup> The canon has usually been justified through appeals to judicial restraint and respect for the legislature—that is, separation-of-powers grounds.<sup>92</sup> More recent accounts emphasize the way the doctrine fos-

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<sup>88</sup> Cf. Toby J. Heytens, *Doctrine Formulation and Distrust*, 83 NOTRE DAME L. REV. 2045, 2048 (2008) ("Because complicated or open-ended standards increase the risk of good faith misunderstandings and create opportunities for disguising deliberate noncompliance, the Court may be better served by laying down simple rules whose application depends on only a few factors."); Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J.L. ECON. & ORG. 326, 339 (2007) (explaining that a rational reviewing court would impose determinate rules rather than flexible standards when the lower courts do not share its political preferences).

<sup>89</sup> See GRESSMAN ET AL., *supra* note 48, at 264.

<sup>90</sup> Cf. Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 42, 49–51 (1961); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 7 (1996).

<sup>91</sup> See, e.g., Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (stating that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such a construction is plainly contrary to the intent of Congress"); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

<sup>92</sup> See Morrison, *supra* note 11, at 1202–08 (describing such considerations as forming the conventional justification for avoidance). The separation-of-powers stakes can vary according to which court issues the constitutional ruling, which provides an additional reason for a hierarchically variable avoidance doctrine. See Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech*

ters the growth of buffer zones of quasi-constitutional law, which is especially valuable in protecting underenforced constitutional norms.<sup>93</sup> By attending to hierarchy, we can appreciate an additional justification for avoidance in the lower courts in particular, namely that it contributes to judicial agenda control.<sup>94</sup>

Yet considerations of agenda control do not recommend avoidance unequivocally, for giving a statute a cramped reading also causes trouble. Indeed, a narrow construction can be almost as problematic as an outright invalidation in terms of real-world impact. Whether the statute is struck down or instead “merely” bent around the problem, it is either way rendered inoperative as regards the conduct at issue. A lower-court decision impairing an important federal policy in this way, therefore, also has the tendency to require the Supreme Court’s intervention.<sup>95</sup> (The best rule, from the point of view of maximizing the Supreme Court’s freedom of action, is a rule that removes the lower courts from the business of striking down federal statutes altogether, but this would be a much more radical move.<sup>96</sup>)

Given that invalidations and narrowing constructions *both* have agenda effects, do hierarchical considerations ultimately tell us anything useful about the avoidance canon? I believe so. To see why, we need to distinguish between two different versions of the avoidance canon. One version concerns situations in which a statute would be actually unconstitutional if interpreted in one way but not another. In such a case, the canon directs the court to choose the construction that saves the statute, even if it is a worse or even quite strained read-

*Concerns*, 30 U.C. DAVIS L. REV. 1, 16, 92–93 (1996) (arguing for less avoidance in the Supreme Court in particular); *infra* Part IV.B (explaining that the Supreme Court has a stronger mandate to make national policy than do lower courts).

<sup>93</sup> See Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1585–99 (2000); see also William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 599, 632–36 (1992) (discussing avoidance as a form of quasi-constitutional law but remaining ambivalent about its propriety); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213–20 (1978) (discussing the concept of underenforced norms).

<sup>94</sup> Elhauge views the canon in similar managerial terms, though he describes the canon’s role as providing a substitute for lower-court discretion when the text and current political preferences do not supply a correct answer; the canon thus fosters uniformity and adherence to the Supreme Court’s view of national policy in otherwise unclear cases. Elhauge, *supra* note 65, at 2255–56. Our views on this point are complementary.

<sup>95</sup> See GRESSMAN ET AL., *supra* note 48, at 264 (“Where the decision below holds a federal statute unconstitutional or where a federal statute is given an unwarranted construction in order to save its constitutionality, certiorari is usually granted because of the obvious importance of the case.” (emphasis added)).

<sup>96</sup> Our system makes every judge into a constitutional judge, but many foreign legal systems vest the power of constitutional review in a special constitutional court, which shows that there is no logical necessity to our way of allocating judicial power. See ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 32–34 (2000).

ing, so long as the saving construction is possible.<sup>97</sup> The version of the canon more commonly invoked today, however, does not require that one of the candidate interpretations would render the statute actually unconstitutional but instead requires only that the interpretation would raise serious constitutional *doubts*.<sup>98</sup> This latter version of the canon therefore applies much more often than the former version. A number of observers have criticized the modern “mere doubts” version of the canon for various reasons,<sup>99</sup> but agenda effects supply another reason to oppose it, at least in the lower courts: the canon’s broad applicability generates awkward constructions of federal statutes that call for the Supreme Court’s intervention. The classical form of the canon is better in that regard.

Indeed, we can add one more strike against the doubts canon as practiced by the lower courts. One rationale for the doubts version is that it lets a court avoid stating that one interpretation of the statute would actually be unconstitutional, which ruling would trigger the usual worries about countermajoritarianism and restricting future legislative choices. But if such a constitutional statement is made by a *lower* court, that ruling is unlikely to be treated as the final word on the subject, so there is much less intrusion on legislative power. In sum, then, the doubts version of the avoidance canon both has some special disadvantages when used by lower courts and fails to be sup-

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<sup>97</sup> See, e.g., *Hooper v. California*, 155 U.S. 648, 657 (1895) (“The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.”); *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 76 (1838) (“[I]f the section admits of two interpretations, one of which brings it within, and the other presses it beyond the constitutional authority of congress, it will become our duty to adopt the former construction; because a presumption never ought to be indulged, that congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the Court by language altogether unambiguous.”).

<sup>98</sup> See, e.g., *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.”); *United States ex rel. Att’y Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909) (“[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.”). This version, which requires only constitutional doubts, is sometimes termed “modern avoidance” (as opposed to “classical avoidance,” which is triggered only when one candidate interpretation would actually be unconstitutional). See Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997) (employing this terminology); see also John Copeland Nagle, *Delaware & Hudson Revisited*, 72 NOTRE DAME L. REV. 1495, 1495–97 (1997) (making same distinction with different terminology). Whether one version predated the other is not important here; it is clear these are two different rules, and one might be more defensible than the other.

<sup>99</sup> There is a large body of scholarship on the avoidance canon, with its broad modern form coming in for particular criticism. For a sample of the literature, see William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831 (2001); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 81–97; and sources cited *supra* notes 92–94, 98 and accompanying text.

ported by one of its usual justifications. Hierarchical considerations therefore suggest that lower courts should read statutes to avoid unconstitutionality but should not upset statutory schemes in the name of mere doubts.

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The careful reader might well observe that there are a great many other ways in which lower-court decisionmaking can affect the Supreme Court's ability to control its agenda. Notably, any decision creating or deepening a circuit split (whether on a matter of statutory interpretation or otherwise) exerts pressure to grant certiorari.<sup>100</sup> Does that mean that lower courts should avoid splits even more than they do already, perhaps even to the extent of adopting a rule of cross-circuit stare decisis? Whether one circuit should be able to bind others is an interesting question that has generated a sizeable literature.<sup>101</sup> Current doctrine does not embrace such a rule, and, indeed, requiring all lower courts to fall in line behind the first court to decide an issue would have some serious disadvantages. Among other things, the initial circuit could be wrong, and later decisions might improve with the benefit of the analyses in earlier ones. The modest point to be made here is just that the calculus needs to include all the relevant variables. The case against circuit splits should not rely just on the values of uniformity and predictability but also, as some savvy lower courts have noted, on consideration for the Supreme Court's docket.<sup>102</sup>

Not all disuniformity is equally bad, and later we will examine a domain where disuniformity in the lower courts is especially problematic, namely judicial review of administrative regulations.<sup>103</sup> I will argue that requiring lower courts to accord agencies greater interpretive leeway would promote uniformity and, just as importantly, would address other institutional limitations of lower courts. One of those limitations concerns the resources—the technical decisional capacity—

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<sup>100</sup> See SUP. CT. R. 10(a)–(b); H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 246, 251 (1991).

<sup>101</sup> For a very small sample, see RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 381–82 (1996); Arthur D. Hellman, *Precedent, Predictability, and Federal Appellate Structure*, 60 U. PITT. L. REV. 1029, 1056–88 (1999); Walter V. Schaefer, *Reducing Circuit Conflicts*, 69 A.B.A. J. 452, 453–55 (1983).

<sup>102</sup> See, e.g., *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987) (“Bearing in mind the interest in maintaining a reasonable uniformity of federal law and in sparing the Supreme Court the burden of taking cases merely to resolve conflicts between circuits, we give most respectful consideration to the decisions of the other courts of appeals and follow them whenever we can.”); *Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979) (citing among other reasons to follow sister circuit precedent the interest in “avoiding unnecessary burdens on the Supreme Court docket”).

<sup>103</sup> See *infra* Parts III.C.2, IV.B.

the lower courts bring to the interpretive enterprise. It is to that limitation we now turn.

### III

#### HIERARCHICAL DIFFERENCES IN DECISIONAL CAPACITY

So far we have treated all courts as if they were identical except for the fact of hierarchical arrangement. But plainly they are not identical. Different courts have different competencies and capacities. The best approach for one court, with its particular strengths and weaknesses, might not be the best approach for another. If that is true, then the interpretive method that is right for the Supreme Court might, at least in some respects, be wrong for the lower courts.

This Part of the Article considers the impact of cross-court differences in decisional resources and technical competence. I should note at the outset that one could object that statutory interpretation is not a technical enterprise that centrally depends for its success on typical industrial inputs like person-hours and technology. True enough. I understand that technical capacity is only one consideration; indeed, the next Part of this Article considers cross-court variations in democratic pedigree. Further, even within the realm of technical capacity, I recognize that quality does not increase linearly with greater resources. I do contend, however, that the respective interpretive environments of the Supreme Court and the lower courts are different enough that courts should not all follow the same production model.

#### A. Resource Disparities

Courts differ markedly in both the internal and external resources they can bring to bear on an interpretive problem. This factual predicate should not be especially controversial, so a brief summary of the relevant disparities should suffice.

The Supreme Court decides relatively few cases, and each one is the product of massive investment of public and private time and effort. To begin with, there is the investment of attorney resources in the case, which is high even when a particular party does not have much at stake or lacks the money to hire elite advocates. Whenever the Court grants certiorari, a host of outsiders—trade associations, ideological interest groups, entrepreneurial attorneys, law professors, litigation clinics, etc.—descend on the parties and their current counsel to offer free or highly discounted assistance.<sup>104</sup> Even when not working pro bono, attorneys who appear before the Court spend

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<sup>104</sup> See Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1557 (2008); Nancy Morawetz, *Counterbalancing Distorted Incentives in Supreme Court Pro Bono Practice: Recommendations for the New Supreme Court Pro Bono Bar and Public Interest Practice Communities*, 86 N.Y.U. L. REV. 131,

more time preparing than clients will pay for, happy to write off the excess as a good investment in their reputation and future business.<sup>105</sup> If, despite all this, there is any deficiency in the parties' presentations, *amici curiae* will fill the gap. Amicus briefs are present in almost all Supreme Court cases,<sup>106</sup> and it is not unusual for a case to attract ten or more of them.<sup>107</sup> In addition to presenting strictly legal arguments, they can offer resources such as historical research, social science data, and policy analysis; apart from the content of the briefs, their presence provides information on public and elite opinion and interest group alignments.<sup>108</sup> Even when the United States is not a party, the Solicitor General usually files briefs with expert legal analysis,<sup>109</sup> which the Justices might find especially useful in dealing with technical subjects and complex statutory schemes. Beyond all this material and effort flowing into the Court, there are of course the nine Justices and their adjuncts, notably the law clerks and court librarians. The Justices and clerks have business besides the argued cases (for the clerks in particular, the task of screening and summarizing petitions for certiorari), but they can nonetheless devote substantial effort to each merits decision.

This state of affairs stands in stark contrast to the situation in the lower courts. There the judges decide many, *many* more cases, and

138–45 (2011); Adam Liptak, *Specialists' Help at Court Can Come with a Catch*, N.Y. TIMES, Oct. 9, 2010, at A1, available at <http://www.nytimes.com/2010/10/10/us/10lawyers.html>.

<sup>105</sup> See Lazarus, *supra* note 104, at 1557.

<sup>106</sup> *Id.* at 1514–15 (finding that in 2005 96% of cases had at least one amicus brief); see also PAUL M. COLLINS, JR., FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING 47 fig.3.1 (2008) (examining a longer span of time and finding that over 90% of cases had at least one amicus brief).

<sup>107</sup> Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 754–56 (2000).

<sup>108</sup> See, e.g., COLLINS, *supra* note 106, at 63–71; Lee Epstein & Jack Knight, *Mapping out the Strategic Terrain: The Informational Role of Amici Curiae*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 215, 225–28 (Cornell W. Clayton & Howard Gillman eds., 1997); e.g., Brief of Eleven Legal Historians in Support of Petitioner, *Holland v. Florida*, 130 S. Ct. 2549 (2010) (No. 09-5327), 2009 WL 5945956 (providing historical background bearing on the interpretation of the habeas corpus statute); Consolidated Brief of Lt. Gen. Julius W. Becton et al. as Amici Curiae in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516), 2003 WL 1787554 (explaining the value of affirmative action from the point of view of military leaders); Brief for the States of North Carolina et al. in Support of Petitioners, *Cuomo v. Clearing House Ass'n*, L.L.C., 129 S. Ct. 2710 (2009) (No. 08-453), 2009 WL 583791 (amicus brief relying on federalism principles, signed by forty-nine states and District of Columbia).

<sup>109</sup> See Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1353–60 (2010) (describing the Solicitor General's increasingly pervasive role as *amicus curiae*). In recent years, the Solicitor General has participated as *amicus* in about two-thirds of all cases in which the federal government was not a party; in civil cases involving the interpretation of a federal statute, the rate is about three-quarters. *Id.* at 1355, 1359. Apart from the quality of the legal analysis, the briefs are valuable because they set forth the executive's official position. See *supra* Part II.B.



they do so with smaller staffs. The quality of the briefing is lower and more variable.<sup>110</sup> Amicus briefs are rare in the federal courts of appeals and even rarer in the district courts.<sup>111</sup> The resource and time constraints are particularly severe in trial courts, where judges and attorneys alike have to devote time to matters besides nice points of statutory interpretation (matters like the facts, for one thing).<sup>112</sup> Trial judges lack the benefit of colleagues.<sup>113</sup> State courts probably have fewer resources than the corresponding federal court at each level.<sup>114</sup>

Note that we are concerned here primarily with the nature of the place rather than the nature of the people. Beyond variations in internal and external resources, it could be that judges on different courts also differ in their personal characteristics in relevant ways. Supreme Court Justices come from a national talent pool, hold extremely elite credentials, and receive extensive scrutiny before their selection and confirmation. All of this is generally less true of judges on lower federal courts and state courts, though for the latter the selection processes differ substantially from state to state.<sup>115</sup> Whether this background makes Supreme Court Justices more competent statutory interpreters is contestable. They might be better in some ways

<sup>110</sup> See, e.g., *Interview with United States Supreme Court Justices: Stephen G. Breyer*, 13 SCRIBES J. LEGAL WRITING 145, 160 (2010) (assessing briefing in the Supreme Court as “pretty uniformly good” and stating that “[y]ou’ll get very good briefs in the circuits on a lesser number of occasions”). See generally Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 324–48 (2011) (reporting results of a survey of trial and appellate judges asking them to assess attorney quality and disparities in quality).

<sup>111</sup> A recent survey of judges asked them to estimate the percentage of cases with amicus briefs. In the federal courts of appeals, the vast majority of responding judges said no more than 5% of their cases had amicus briefs. In the district courts, the vast majority of responding judges said that amicus activity was minimal. Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 686–87 (2008). Indeed, the Federal Rules of Civil Procedure, which govern proceedings in the federal district courts, do not expressly provide for amicus briefs.

<sup>112</sup> See *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231–32 (1991) (describing comparative advantage of appellate courts over trial courts on determinations of law).

<sup>113</sup> See generally Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003) (describing how collegial deliberation can produce better decisions). Even if there were no deliberative, debiasing, or other benefit from colleagues, the Condorcet jury theorem tells us that the mere fact of having more judges should result in better results, given certain plausible assumptions. See Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 97–100 (1986).

<sup>114</sup> See POSNER, *supra* note 101, at 37–39 (describing working conditions in state courts as inferior to conditions in federal courts). For a classic statement to the effect that the lower federal courts are more technically capable than the lower state courts, see Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1121–23 (1977). On amicus participation in state courts, see, for example, SCOTT A. COMPARATO, *Amici Curiae and Strategic Behavior in State Supreme Courts* (2003); and Matthew Laroche, *Is the New York State Court of Appeals Still “Friendless”? An Empirical Study of Amicus Curiae Participation*, 72 ALB. L. REV. 701 (2009).

<sup>115</sup> See *infra* Part IV.A (discussing judicial selection methods for state judges).

and worse in others. In any event, it might be that the differences in institutional context—the size of the support staff, the number of cases, the quality of the briefing, etc.—tend to swamp any inherent differences in personal ability. Put differently, it is easy to look smart on the Supreme Court and easy to look dull on a busy, underfunded county trial court.

## B. Simplifying the Palette

### 1. *Legislative History in Lower Courts*

The observation that there are important cross-court variations in decisional resources should not be controversial, but what follows from it? We might begin by considering what Vermeule takes away from his study of the limits of judicial competence. Vermeule's analysis is sophisticated, but I will suggest that it should include an additional level of nuance.

Vermeule believes that a realistic assessment of judicial capabilities militates in favor of an avowedly (indeed proudly) “wooden” brand of formalism that sticks close to the surface meanings of texts.<sup>116</sup> In particular, Vermeule condemns judicial recourse to legislative history. Notably, his argument does not rely on formalist premises such as constitutional objections to legislative history. It proceeds instead from instrumental grounds of reliability and utility—that is, does legislative history's marginal contribution to reaching better decisions outweigh its costs, which include the decision costs of researching it and the error costs that result when it leads us astray?<sup>117</sup> On Vermeule's reckoning, legislative history is not worth it. The materials are too voluminous, too varied, and too difficult to evaluate, he contends; thus, any interpretive benefit from using legislative history is outweighed by the effort involved and the risk that courts will misunderstand the materials anyway.<sup>118</sup>

Like most authors, Vermeule speaks of courts in general and focuses on the Supreme Court in particular.<sup>119</sup> Some reviewers have

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<sup>116</sup> See VERMEULE, *supra* note 10, at 4–5.

<sup>117</sup> The question of which decisions are better is of course contested. If the best interpretation is one that follows the literal text without any recourse to external sources, then legislative history certainly will not make for better interpretation so conceived. For present purposes we are not relying on a particular criterion for good interpretation, but we are assuming that the evaluative criteria are such that legislative history could conceivably help. Suppose we consider an interpretation successful if it captures the intent of the enacting legislature, or if it avoids absurdities, or if it advances the statutory purpose, or if it avoids legislative overrides, or if it accords with public values, etc. Legislative history could help achieve such aims, if it is reliable and used skillfully.

<sup>118</sup> See VERMEULE, *supra* note 10, at 107–15, 189–97.

<sup>119</sup> His main case study illustrating the limits of judicial competence in using legislative history is the famous Supreme Court case of *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892). In his comparative institutional analysis, he is primarily interested in

argued that his fears about legislative history are overblown: when used sensitively, legislative history can aid interpretation and can do so without undue cost.<sup>120</sup> My point is that the force of the argument depends on the court at issue. Even if Vermeule's argument fails when it comes to the Supreme Court, he could still be right when it comes to *lower courts* using legislative history. Admittedly, I cannot produce rigorous empirical proof that lower courts are poor users of legislative history (or at least poorer users than the Supreme Court).<sup>121</sup> But one can nonetheless make a strong circumstantial and intuitive case.

Consider first the matter of resources. Research into legislative history can be extremely resource intensive. True, today it is simple enough to find a legislative committee report. But those rarely present the whole picture, and sometimes they are not even especially relevant (such as when the disputed statutory provision was added on the floor). To do a good job, one often has to consult a wide variety of documents, including voluminous floor debates, hearing transcripts, and executive agency reports. After that, one might need to consult the same kinds of materials again for closely related statutes or prior attempts to enact the statute.<sup>122</sup> This can sometimes reach into the thousands of pages. And it is not merely a matter of reading all of it; rather, one has to read it with the sensitivity and political savvy to separate the wheat from the chaff, the reliable from the opportunistic, the real deals from the cheap talk—no mean feat.<sup>123</sup>

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pitting courts against agencies. VERMEULE, *supra* note 10, at 115, 205–15. He only briefly discusses the relevance of differences among courts. *Id.* at 112.

<sup>120</sup> See, e.g., William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2065–70 (2006) (arguing that judges can competently use legislative history as an interpretive aid); Jonathan R. Siegel, *Judicial Interpretation in the Cost-Benefit Crucible*, 92 MINN. L. REV. 387, 406–08 (2007) (questioning whether the use of legislative history is as costly as Vermeule contends).

<sup>121</sup> Certainly, one can find cases in which a reviewing court criticizes a lower court for mishandling legislative history. See, e.g., *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) (“[T]he court below found support for its [interpretation] in the legislative history. Such an interpretation misreads the legislative history.”); *Massie v. U.S. Dep’t of Hous. & Urban Dev.*, 620 F.3d 340, 353 (3d Cir. 2010) (“The District Court . . . relied substantially upon a misreading of the legislative history.”); *Novak v. Kasaks*, 216 F.3d 300, 313 (2d Cir. 2000) (stating that a district court’s interpretation was “based on a misreading of the legislative history”); *Ram Petroleum, Inc. v. Andrus*, 658 F.2d 1349, 1351 (9th Cir. 1981) (similar). Yet in all but the clearest cases, it would take a tremendous amount of effort to review all of the materials in order to make an informed judgment and, even in principle, we still might not be able to decide which court is right. Cf. *Am. Tobacco*, 456 U.S. at 80–84 (Brennan, J., dissenting) (disagreeing with the majority’s reading of the legislative history).

<sup>122</sup> For a long list of the various kinds of legislative history items that courts sometimes cite, see Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1138–39 (1992).

<sup>123</sup> See, e.g., McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 718–27 (1992) (using positive political theory to determine which legislative statements accurately reflect the views of the pivotal voters); Daniel B.

At the Supreme Court, the legislative history will very likely receive a thorough airing, and many of the people conducting and evaluating the research will have significant experience handling such material. In the lower courts, by contrast, the attorneys will more often lack the time or economic motivation (and sometimes the competence) to do this work well.<sup>124</sup> Lower-court judges and their clerks might not be able to do this work thoroughly either, especially when they have a backlog of hundreds of pending cases, daily criminal sentencing hearings, and other pressing duties. To the extent resource constraints pose a problem, they pose a far more serious problem for courts other than the Supreme Court.

There is an additional risk in the use of legislative history in the lower courts beyond the difficult and time-consuming nature of the research. As its foes constantly stress, legislative history is susceptible to manipulation and selective quotation; indeed, if the critics are believed, it is *uniquely* subject to manipulation.<sup>125</sup> As the familiar quip goes, citing a piece of legislative history is like looking out over the heads of a crowd and picking out your friends.<sup>126</sup> Justice Scalia does not even want his own colleagues using legislative history. Yet, one might imagine that the risks of manipulation should actually be *lowest* in the Supreme Court, given the institutional context in which it operates. Each party (or its amici) can point to its own friends in the crowd, but perhaps the end result of all the selective friend-picking is that nobody is liable to be misled. Similarly, if one Justice uses a partial and misleading quotation, another Justice can dig out a passage that contradicts it or puts it in context,<sup>127</sup> which reduces the incentive

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Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1430–51 (2003) (similar); see also Cheryl Boudreau et al., *What Statutes Mean: Interpretive Lessons from Positive Theories of Communication and Legislation*, 44 SAN DIEGO L. REV. 957, 973 (2007) (“[N]ot all legislative history is created equal, for some aspects of legislative history are trustworthy indicia of legislative meaning and others are not. Thus, the task for judges is to determine which aspects of legislative history are trustworthy and to rely only upon those sources when decoding statutory meaning.”).

<sup>124</sup> See Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 804 (1983) (“A year and a half of reading briefs in cases that often involve statutory interpretation has convinced me that many lawyers do not research legislative history as carefully as they research case law. They may not know how.”).

<sup>125</sup> See, e.g., Scalia, *supra* note 24, at 36 (“Legislative history provides . . . a uniquely broad playing field. In any major piece of legislation . . . there is something for everybody.”). It is questionable whether legislative history is uniquely manipulable or, indeed, any more manipulable than interpretive canons. See James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CALIF. L. REV. 1199, 1202, 1225–32 (2010).

<sup>126</sup> Scalia, *supra* note 24, at 36 (attributing the remark to Judge Harold Leventhal).

<sup>127</sup> Cf. David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1736–38 (2010) (finding that citation to legislative history in a Supreme Court opinion is positively correlated with the presence of citations to legislative history in another opinion in the same case—i.e., a “tit-for-tat” effect).

to engage in transparent manipulation. As with the matter of resource constraints and competence, the worry about manipulation actually makes much more sense in the *lower* courts. Because advocates in lower court cases are more likely to be mismatched, there is a greater risk that misleadingly selective quotation from a vast pool of material will go unchallenged. The situation is particularly acute in trial courts, where there is just one judge and no colleagues to help ensure impartiality when looking out over the crowd.

The aim of this line of argument, to be clear, is not singlehandedly to establish that lower courts should not use legislative history, all things considered. Rather, the more modest claim is that institutional considerations make the use of legislative history more problematic the lower one goes in the legal hierarchy. Even if the Supreme Court has the ability to examine a large and complicated legislative record and identify the key assurances made to the pivotal members of the enacting coalition, a busy trial court might not. It is in the lower courts that the arguments against legislative history, whether or not ultimately successful, are the strongest.<sup>128</sup>

Similar comments apply to the use of “regulatory history,” the multifarious and sometimes obscure body of agency preambles, letters, and other materials that inform the meaning of a promulgated regulation or other guidance.<sup>129</sup> Such materials can figure prominently in Supreme Court opinions.<sup>130</sup> Yet even if regulatory history has a proper place in Supreme Court decisionmaking, it is problematic in lower courts, where judges and advocates have fewer resources for researching and analyzing such material and, often, less experience handling it.<sup>131</sup>

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<sup>128</sup> There are intermediate positions between a complete ban on legislative history and an “anything goes” acceptance of it. See Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395 (1951) (Jackson, J., concurring) (“Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared.”). But cf. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 322 (2d ed. 2006) (likening using legislative history to eating potato chips in that “you can’t eat just one”).

<sup>129</sup> See generally Lars Noah, *Divining Regulatory Intent: The Place for a “Legislative History” of Agency Rules*, 51 HASTINGS L.J. 255, 257–61, 280–82 (2000) (discussing regulatory history as an interpretive tool and comparing it to legislative history).

<sup>130</sup> See, e.g., *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 875–81 (2000) (relying on agency statements stretching over several decades to determine the meaning of a regulatory standard).

<sup>131</sup> To be sure, expertise tracks hierarchy only imperfectly. See *infra* note 148. The D.C. Circuit, for example, has expertise in regulatory processes and a partly specialized bar.

## 2. *Toward Textualism?*

If sound institutional reasons weigh against the use of resource-intensive interpretive strategies in the lower courts, does that lead to an argument in favor of textualism?

Not necessarily. Although the “new textualism” of interpreters like Justice Scalia is certainly associated with disdain for legislative history, it involves much more than that. In particular, this brand of textualism is not a simple command to read the relevant words and stop with one’s surface-level first impression. It has long been understood, of course, that textual analysis is a holistic endeavor that requires consideration of the whole statute at issue.<sup>132</sup> But modern textualism has a much more ambitious aim. As Justice Scalia put it:

Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into *the body of both previously and subsequently enacted law*. . . . [I]t is our role to make sense rather than nonsense out of the *corpus juris*.<sup>133</sup>

Thus, the relevant linguistic context is not just the whole act, but the whole of the law—the entire U.S. Code, statutes no longer in force, the common law, prior judicial interpretations, and much more. A few eye-opening examples are collected in the margin.<sup>134</sup> Whatever other virtues or vices might be possessed by this kind of baroque textualism, the method is not easy, quick, and cheap.

Vermeule recognizes the costs and complexity of whole-code coherentist textualism, so he would exclude collateral statutes in favor of a “clause-bound” approach that “focuse[s] on the directly dispositive clauses or provisions at hand.”<sup>135</sup> Yet even with the field of inquiry narrowed to the directly relevant clause, there is no guarantee that one will get a quick-and-dirty style of interpretation. An obvious

<sup>132</sup> See, e.g., 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § 46:5 (7th ed. 2007).

<sup>133</sup> *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100–01 (1991) (Scalia, J.) (emphasis added) (citation omitted); see also Scalia, *supra* note 24, at 17 (“We look for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”).

<sup>134</sup> See, e.g., *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 717–18 (1995) (Scalia, J., dissenting) (citing, *inter alia*, Blackstone, federal legislation, a treaty, and an 1896 case that itself cited the Digest of Justinian, all to shed light on the meaning of the word “take,” which was already expressly defined in the statute at issue); *W. Va. Univ. Hosps.*, 499 U.S. at 88–92 (citing over forty other statutes to determine the meaning of the phrase “fees and other expenses”); *Moskal v. United States*, 498 U.S. 103, 122–26 (1990) (Scalia, J., dissenting) (citing dozens of federal and state statutes; federal, state, and British decisions; and various treatises and then concluding that “it [was] plain that ‘falsely made’ had a well-established common-law meaning at the time the relevant language . . . was enacted”).

<sup>135</sup> See VERMEULE, *supra* note 10, at 202–05.

example here is *Muscarello v. United States*, which concerned whether the meaning of “carries a firearm” includes “conveys” (as in a car glove compartment) as well as the narrower meaning of “bears on the person.”<sup>136</sup> The majority believed the ordinary meaning included both senses. In support, it relied on several dictionaries, the Bible, *Robinson Crusoe*, *Moby-Dick*, and computer databases of newspaper articles.<sup>137</sup> The dissent responded in kind with Rudyard Kipling, the film *The Magnificent Seven*, the television series *M\*A\*S\*H*, a different translation of the Bible, and a reanalysis of the majority’s newspaper study.<sup>138</sup> The case verges on unintentional self-parody, but this sort of thing is not unusual in the Court’s opinions or the briefs presented to it.<sup>139</sup>

At this point, the reader might wonder what a low-resource interpretive regime would actually look like and whether it would be at all attractive. Perhaps one imagines a judge being locked in a room with only the relevant statute and told to stare at the words for no more than fifteen minutes. No legislative history, no Brandeis briefs, and none of the dozens of other statutes in which the same crucial phrase appears. Fifteen minutes and then on to the next case.

One might suppose that the model just described sounds like some sort of (very dull) game show. But if one thinks about it, our imaginary scenario actually does not differ that wildly from what actually happens in trial courts, especially state trial courts. Such a method would not use legislative history very much, but that would not necessarily make it contemporary textualism. After all, judges have been seeking legislative intent and engaging in purposivism since long before they referred to legislative history.<sup>140</sup> Blackstone did not cite Parliament’s debates, and yet modern textualists would shun him because, although he certainly emphasized the ordinary meaning

<sup>136</sup> 524 U.S. 125, 126–31 (1998).

<sup>137</sup> *Id.* at 127–30. This was an opinion by Justice Breyer, not one of the Court’s textualists.

<sup>138</sup> *Id.* at 142–44 (Ginsburg, J., dissenting).

<sup>139</sup> As another example, a recent case concerned whether the statutory term “travels” could refer to travel that predated the enactment of the relevant statute. *Carr v. United States*, 130 S. Ct. 2229, 2236–37 (2010). The petitioner’s brief cited, inter alia, Shakespeare, *Moby-Dick*, and *The Adventures of Augie March*. Brief for the Petitioner at 18–19, *Carr*, 130 S. Ct. 2229 (No. 08-1301), 2009 WL 4617130, at \*18–19.

<sup>140</sup> See, e.g., Heydon’s Case, (1584) 76 Eng. Rep. 637, 638 (Exch.) (explaining that courts should determine the mischief in the common law that Parliament aimed to suppress and then interpret the statute to effectuate that goal). For a historical treatment of British and early American statutory interpretation practice, see generally WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 9–87 (1999).

of the text, he also licensed consideration of purpose, spirit, and equity.<sup>141</sup>

In sum, resource constraints do not necessarily select one of the grand theories of interpretation. Capacity constraints point toward simplicity, but all the theories come in flavors of greater or lesser complexity. One can be a Vermeule-style stripped-down textualist or a simple purposivist or a common-sense interpreter with no grand theory in particular. Of course, resource constraints are just one factor to consider; other Parts of this Article present additional considerations, each only partial by itself, which the Conclusion then attempts to combine together into a more integrated picture.

### C. Outsourcing to Other Interpreters

We have been considering whether resource constraints should affect interpretive methodology. The discussion has so far proceeded in the blank-slate mode, ignoring the role of prior interpretations. But that is somewhat artificial because the slate is rarely blank in lower courts. The existence of other interpreters presents a valuable opportunity for resource-constrained lower courts for the simple reason that following an existing interpretation is generally cheaper than answering a question oneself in the first instance. Indeed, reducing decision costs is one of the typical justifications for the doctrine of *stare decisis*.<sup>142</sup> And it may also produce better decisions, if the prior interpreter is better informed. The following Parts describe two outsourcing strategies for lower courts.

#### 1. *The Supreme Court*

Supreme Court holdings are strictly binding on the lower courts. Supreme Court dicta, however, are not binding on anyone, at least as a formal matter. Yet while the Court itself has little hesitation in avoiding its own dicta when other interpretive forces and sources pull in another direction, the lower courts nonetheless tend to treat the high court's dicta as quite authoritative, indeed nearly binding.<sup>143</sup>

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<sup>141</sup> See 1 WILLIAM BLACKSTONE, COMMENTARIES \*59–62; see also John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 8 (2001) (describing the traditional English notion of the “equity of the statute” and rejecting it as incompatible with the American constitutional structure).

<sup>142</sup> See BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1932); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 599 (1987). Vermeule cites reduction of decision costs as an argument in favor of a particularly strong form of *stare decisis* for statutory precedents. VERMEULE, *supra* note 10, at 223. He seems to have in mind strengthening horizontal *stare decisis*, but I will discuss expanding the scope of vertical *stare decisis*.

<sup>143</sup> See, e.g., *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 496 n.41 (3d Cir. 1992) (“[W]e consider and respect Supreme Court dicta as well as holdings because the Supreme Court hears relatively few cases and frequently uses dicta to give



The trend seems to be in the direction of continuing to elide the formal distinction between holding and dictum.<sup>144</sup> Is this a salutary development, one that we should embrace and even encourage? I believe so, for several reasons.

One reason for lower courts to treat the Supreme Court's dicta as binding is that following the Court's words is a cheap interpretive strategy. This is true regardless of whether those words happen to be holding or dictum. In fact, abolishing the distinction would save some effort, since then it would be unnecessary for lower courts and litigants to argue over whether a statement was one or the other.

Of course, flipping a coin is also a cheap decision procedure, much cheaper even than following dicta, but I am not recommending that. Following dicta would be a bad approach if rules announced in dicta tended to be substantively poor decision rules. Indeed, one of the traditional arguments against giving binding effect to dicta is that dicta are generally less well considered than holdings, precisely because they are extraneous to the actual result.<sup>145</sup> So treating dicta as binding might save some decision costs, but that would be awfully shortsighted if the resulting cheap decisions were very poor.

And yet, the case against following dicta is also a bit too hasty. Although it is true that we might expect a given court's holdings to be of a higher quality than *that court's* dicta, the more relevant question here involves a cross-institutional comparison, namely whether dicta issued by a high-capacity court (the Supreme Court) are better deci-

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guidance to the lower courts."); see also Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1250 (2006) (describing and criticizing the tendency to treat dicta as binding); Frederick Schauer, *Opinions as Rules*, 53 U. CHI. L. REV. 682, 682-84 (1986) [hereinafter Schauer, *Opinions as Rules*] ("Fine distinctions between holding and dicta are rarely relevant. . . . [I]t is not what the Supreme Court held that matters, but what it *said*. In interpretive arenas below the Supreme Court, one good quote is worth a hundred clever analyses of the holding."). An item can be authoritative (i.e., provide content-independent reasons for obedience) even if it is not absolutely binding in the way that (say) a Supreme Court holding is conclusive within its scope. See Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1952-56 (2008) (discussing the relationship between authoritative and bindingness). See generally Chad Flanders, *Toward a Theory of Persuasive Authority*, 62 OKLA. L. REV. 55, 55-59, 61-83 (2009) (discussing the idea of persuasive authority and different types of persuasive authority).

<sup>144</sup> See Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 240-60 (2010) (offering explanations for why opinion language is becoming more important than analysis of holdings). The line between holding and dicta is, despite its antiquity and its place in the basic lawyerly tool kit, notoriously slippery. See generally Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1044-76 (2005) (offering a series of rules for distinguishing dicta from holding); Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 182 (1930) (same). Similar complexities beset the question whether a prior pronouncement is on point or distinguishable. The distinctions are nonetheless familiar and meaningful enough to invoke for present purposes.

<sup>145</sup> See, e.g., K.N. LLEWELLYN, *THE BRAMBLE BUSH* 46 (1960); Leval, *supra* note 143, at 1262-63.

sion rules than those a much lower-capacity court would independently generate. Recall in this regard all of the Supreme Court's institutional advantages over other courts: high attorney effort, extensive amicus participation, ample staffing, a limited docket, etc.—in short, the Court has more and better informed minds, working on fewer cases.<sup>146</sup> As a further refinement, note that the character of the Supreme Court's dicta depends on the rule regarding their bindingness. The Court already knows its words are taken quite seriously, and the words would probably be even better considered if the rule were that everything it said would be law.<sup>147</sup> In terms of the relative superiority of the decision rules, it seems to me that the choice between high-court dicta and lower-court independent decisionmaking is a close call but that the Supreme Court has a slight edge so long as its dicta do not stray too distantly from the case before it.<sup>148</sup>

Beyond economizing on lower-court decision costs and possibly improving the quality of lower-court decisions, a further benefit of treating the Court's dicta as binding is a potential reduction in the conflicts and splits within the lower courts that arise with independent

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<sup>146</sup> For somewhat differing views on whether the law-finding advantages of higher courts justify the doctrine of vertical precedent, compare Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605, 1622–25 (1995) (emphasizing the superiority of reviewing courts), with Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 845–49 (1994) (reaching a more equivocal conclusion regarding relative proficiency).

<sup>147</sup> Cf. Schauer, *Opinions as Rules*, *supra* note 143, at 682–84 (arguing that because the language of a Supreme Court opinion may be more influential than the holding, the Court already chooses its words carefully). If we made the Court's dicta binding, that would tend to increase the effort it must expend in formulating its opinions. It seems likely, however, that the decreased costs in all the later lower-court cases would more than make up for it, to the extent we are considering just decision costs.

<sup>148</sup> Competence and hierarchy are only imperfectly related. To add a further level of detail, the comparison of relative proficiency might distinguish between subject areas. Supreme Court Justices are generalists, but there are some specialized lower-court judges (e.g., bankruptcy judges). Those specialists might be better interpreters because they have a better grasp of the relevant policies and how different rules will work in practice. Cf. Edward S. Adams & Daniel A. Farber, *Beyond the Formalism Debate: Expert Reasoning, Fuzzy Logic, and Complex Statutes*, 52 VAND. L. REV. 1243, 1315–22 (1999) (discussing tensions that arise from generalist review of specialist decisionmaking); Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 WASH. U. L.Q. 535, 591–97 (1993) (arguing that the Supreme Court does and generally should take a more textualist approach to bankruptcy cases as compared to the more policy-oriented approaches taken by lower courts, especially bankruptcy courts); Sunstein & Vermeule, *supra* note 9, at 888 n.12, 922–23 (arguing that specialist judges should be less formalist). Furthermore, even some courts with general jurisdiction can possess subject-specific expertise in practice (e.g., the Southern District of New York and the Second Circuit on securities matters). Finally, the Justices are largely ignorant of trial-court litigation, see Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 850–52 (2010), such that they might be inept at fashioning and interpreting procedural rules. Of course, one cannot develop interpretive doctrines to track every nuance, as complexity carries its own costs. It may be that reviewing courts sometimes defer to specialists *sub rosa* despite the formal requirement of *de novo* review.

de novo decisionmaking.<sup>149</sup> From the perspective of the uniformity problem, treating dicta as law is functionally equivalent to expanding the Court's merits docket.

## 2. *Administrative Agencies and Variable Deference*

Another good strategy for constrained interpreters is to follow an administrative agency's interpretation of a statute rather than to come up with a uniquely correct interpretation from scratch. Current law takes advantage of this opportunity via the *Chevron* doctrine, according to which courts are supposed to defer to agency interpretations of unclear texts.<sup>150</sup> Vermeule advocates a strong rule of deference, in part as a way to save decision costs and also because he believes agencies are better interpreters than courts.<sup>151</sup> Once again, though, we might improve on his analysis by disaggregating courts. The interpretive competencies of agencies—which include familiarity with congressional intent, policy consequences, and how various parts of a regulatory scheme work together—are possessed by courts in varying degrees. In terms of the amount of technical competence and interpretive resources available, the Supreme Court approximates an agency much more closely than can a district court. (Of course, agency interpretation is not solely, and perhaps not even primarily, a technical enterprise. Yet to the extent it is an exercise in policymaking and political judgment, agencies again have a larger advantage over lower courts, as discussed below.<sup>152</sup>) This counsels in favor of having a *Chevron* doctrine that varies in strength according to which court is applying it: stronger in lower courts, weaker in the Supreme Court.

In addition to considerations of interpretive capacity, other institutional factors also point toward a rule of strong deference in lower courts. In particular, review of agency statutory interpretation by lower federal courts threatens a particularly troubling kind of geographic disuniformity. Part of the point of putting an agency in charge of a statutory scheme, rather than leaving implementation up to the more decentralized process of judicial interpretation, is achiev-

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<sup>149</sup> Cf. Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 56–59 (2009) (arguing that the Court should use the few cases it decides to issue broad rulings to guide the lower courts); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1100–05 (1987) (observing that the limited size of the Supreme Court's docket gives it managerial reasons to write more broadly than the case at hand requires).

<sup>150</sup> See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

<sup>151</sup> See VERMEULE, *supra* note 10, at 115, 205–15.

<sup>152</sup> See *infra* notes 183–86 and accompanying text.

ing nationwide uniformity.<sup>153</sup> That value is largely lost when various courts, acting as back-end reviewers, issue conflicting interpretations of the statute and disagree over whether regulations conform to it.<sup>154</sup> (The Supreme Court might not defer adequately, but at least its decisions apply throughout the whole country.)

We could eliminate these and similar problems if, following Frank Cross's suggestion, we got rid of judicial review of agency rulemaking.<sup>155</sup> But we could also deal with the problems in a less radical way if we instead focused on the source of many of the downsides of judicial review—namely, the lower courts. We could require them to follow a standard of review more deferential than the one the Supreme Court applies. If ratcheting up the deference proves inadequate, we could simply eliminate their power to set aside regulations.<sup>156</sup>

Eliminating the lower courts' ability to overturn regulations would be a fairly major departure from present practice, and I am not prepared to endorse it here. But it is worth briefly discussing, if only to provide an example of one of the more ambitious reforms that the institutional turn might endorse.<sup>157</sup> In such a world, judicial review of

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<sup>153</sup> See Strauss, *supra* note 149, at 1121–22. Amanda Frost has recently argued that courts and commentators tend to overstate the value of uniformity. See generally Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567 (2008). It may be that uniformity is not always as crucial as it is made out to be, but, as Frost would recognize, the importance of uniformity varies depending on the context. Like various other commentators, I believe that the administration of national regulatory programs is a context in which uniformity is particularly valuable. See, e.g., Strauss, *supra* note 149, at 1005, 1009–14.

<sup>154</sup> See Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1248–57 (1999) (discussing how conflicting interpretations damage the rule of law and uniformity); Diver, *supra* note 11, at 585–87 (similar).

<sup>155</sup> See Cross, *supra* note 154. To be clear, he does not propose that courts would be unable to review constitutional challenges to regulations, though those are very rare. See *id.* at 1269, 1329 n.460. Nor, presumably, would his views about judicial review of rulemaking preclude judicial review of the factual basis or procedural regularity of particular agency enforcement actions.

<sup>156</sup> If deference to agency interpretations went so far as to be absolute, there would seem to be little point in maintaining jurisdiction in the lower courts (setting aside the separate matter of individualized challenges to particular agency enforcement actions). If we retained jurisdiction but required strong (or absolute) deference, would that conflict with the courts' duty to "say what the law is"? The answer would be that in such a system the agency gets to decide the content of the law by acting as the legislature's (often implicit) delegate. A better objection, therefore, would sound in the nondelegation doctrine. See Rosenkranz, *supra* note 13, at 2126–31 (discussing delegation-based limits on *Chevron* deference); see also Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 6, 25–28 (1983) (discussing the relationship between *Marbury*, deference, and delegation). But recall that the Supreme Court will remain available in this system to police compliance with governing statutes.

<sup>157</sup> Yet another option is to centralize review in one lower court. We currently pursue this strategy to some degree, permitting review of certain agency actions only in the D.C. Circuit. E.g., 42 U.S.C. § 300j-7 (2006) (Safe Drinking Water Act); *id.* § 7607(b) (Clean Air Act). Greater centralization in a lower court has its own drawbacks, however. For example, it might be that concentrating review in a semispecialized court tends to embolden

agency rulemaking would still exist, but it would not be a general incident of federal judicial power. Lodging the power solely in the Supreme Court ameliorates many of the problems stemming from lower-court review: disuniformity, lack of capacity, and (as we will discuss in a moment) a democratic deficit. At the same time, retaining Supreme Court review preserves an independent check, complementary to congressional oversight, on agency lawmaking.<sup>158</sup> Although it is true that the Supreme Court's limited docket would restrict the number of regulations it could invalidate, that might be considered an advantage rather than a defect. Ensuring deference to agency decisionmaking through institutional design is likely to be more productive than trying to constrain courts through fine-tuning the parchment barriers represented by standards of review.<sup>159</sup>

#### D. A Note on Judicial Incentives and Compliance

The nature of a prescriptive theory is that it tells us what ought to be done rather than describing what actually is done. At the same time, part of the value of the institutional perspective is that it might make normative theorizing more useful by grounding it in the reality of particular contexts. That reality should include the incentives faced by different courts.

A recommendation to the Supreme Court that it cease using legislative history or other resource-intensive methods and defer more to agencies might have little traction. The Court has nearly complete control over its workload, and nobody tells it which methods to use (not even its own prior cases succeed in doing that, as interpretive methodology tends to have at best inconsistent horizontal stare decisis effect<sup>160</sup>). The Court's current behavior suggests that it likes to de-

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that court to second-guess agency decisionmaking. See Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 90–93 (2011) (summarizing findings showing that the D.C. Circuit is less deferential than other circuits and offering several possible explanations). For discussion of the various factors bearing on the choice of specialist versus generalist reviewing courts and centralized versus decentralized judicial review, see generally Harold H. Bruff, *Coordinating Judicial Review in Administrative Law*, 39 UCLA L. REV. 1193, 1221–47 (1992); and Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1116–21, 1139–70 (1990).

<sup>158</sup> For an argument emphasizing the need for independent judicial review to protect against agency lawlessness and to safeguard the separation of powers, see, for example, Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1241–48 (2002).

<sup>159</sup> Cf. Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676, 679–80, 688–708 (2007) (advocating, as an alternative to the *Chevron* doctrine, a rule according to which agency interpretations could be overturned only by a supermajority judicial vote, such as 6–3 in the Supreme Court or 3–0 in the courts of appeals).

<sup>160</sup> See Connors, *supra* note 13; Foster, *supra* note 13.

cide a rather small number of cases through lengthy and lavish opinions.<sup>161</sup>

A recommendation to the lower courts that they should simplify their approach—such as by shunning legislative history, deferring more to agencies, giving even greater weight to sister-circuit precedent—might find a more receptive audience. An interpretive directive that the Supreme Court would experience as an unbidden constraint might be experienced as a welcome liberation in resource-constrained lower courts. Put differently, hierarchically heterogeneous interpretation could be more incentive compatible than the usual uniform methodology.<sup>162</sup>

It seems that the lower courts tend to use legislative history less than the Supreme Court does.<sup>163</sup> Perhaps they are taking some of my

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<sup>161</sup> See Ryan C. Black & James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 HOUS. L. REV. 621, 632–36 (2008) (presenting longitudinal data on the number and length of majority opinions over time).

<sup>162</sup> That is, lower courts might want to adopt some of the variations I suggest even in the absence of a directive from the Supreme Court to do so. Nonetheless, I believe the Supreme Court does have the power to require lower courts to use certain interpretive methods. It is already the case that, to the extent the Court can overcome its own disagreements and establish meaningful and discernible ground rules, the rules apply to the lower courts: lower courts are required to attend to the details of deference regimes (e.g., *Chevron* vs. *Skidmore* deference), to apply various clear statement rules and presumptions, and so forth. Admittedly, it is not entirely clear where the Supreme Court gets this power to regulate interpretive methodology, in part because it is not clear what interpretive methodology is: procedural common law, adjunct substantive law, a sort of evidence law, a craft, or something else. Cf. Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 325–26 (2006) (questioning the Supreme Court's power to supervise lower-court procedure through adjudication); Gluck, *supra* note 54, at 1909–18 (attempting to identify the nature of interpretive methodology for *Erie* purposes). If the Supreme Court can impose interpretive directives, as it now does, then I see no barrier to it imposing directives that vary by court. That too already occurs. For example, the Supreme Court gives some deference to lower-court interpretations of state law but forbids the courts of appeals from deferring to district courts. Compare *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 880 (1992) (deferring to lower-court interpretations of state law), and *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499–500 (1985) (citing prior cases approving deference), with *Salve Regina Coll. v. Russell*, 499 U.S. 225, 230–31 (1991) (instructing courts of appeals to review district court interpretations of state law *de novo*). Similarly, the Supreme Court until recently required lower courts to follow decisional-sequencing rules in qualified immunity cases that the Court itself did not follow. See *Brosseau v. Haugen*, 543 U.S. 194, 195, 198 n.3 (2004) (per curiam) (requiring lower courts to decide the constitutional issue first, but reversing the lower court without considering the constitutional issue). Regarding the possibility of Congress, rather than the Supreme Court, imposing binding interpretive rules, see generally Rosenkranz, *supra* note 13.

<sup>163</sup> I concede that this statement largely reflects my sense of things rather than rigorous testing. Cf. Gluck, *supra* note 2, at 1835–37 (hypothesizing that the “modified textualism” embraced by a number of state courts results in less use of legislative history than in the Supreme Court). Although one can measure the proportions of lower-court decisions and Supreme Court decisions that cite legislative history, that defer to an agency, and so forth, that does not provide an ideal measure of relative propensity to cite legislative history, in large part due to selection effects. This makes it difficult to reach solid empirical conclusions about methodological divergences.

recommendations to heart already, or perhaps litigants are not presenting the material and the courts lack the time to research it themselves. In any case, the analysis developed in this Article shows that the lower courts are right to diverge from the Supreme Court in this respect. The Supreme Court need not be an aspirational model for every court.

To the extent that the lower courts actually prefer simplified methods, one would not expect serious problems of compliance. Nonetheless, surely there will be cases in which a lower court deviates from the proper method either intentionally or mistakenly. The large majority of such cases would not implicate circuit splits on important questions of federal law or otherwise satisfy the Supreme Court's usual criteria for reviewing a case on the merits. But that would not prevent the Court from responding to noncompliant decisions by summarily vacating and remanding for application of the correct methodology, a procedure that would resemble the Court's current practice of granting, vacating, and remanding (GVR).<sup>164</sup> Indeed, the Court already sometimes issues summary GVR-like orders in cases in which the court below erred in its decisionmaking *process*, though not necessarily its outcome.<sup>165</sup> At least one state supreme court has issued such orders when a lower court used the wrong interpretive method.<sup>166</sup> The U.S. Supreme Court could develop a similar practice.

#### IV

#### THE POTENTIAL RELEVANCE OF HIERARCHICAL DIFFERENCES IN JUDICIAL SELECTION

Even within a particular judicial system, judges at different levels might obtain their jobs through different processes. Under current practice, the President does not select someone to be a generic federal judge; the appointment is instead to a particular federal court:

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<sup>164</sup> See Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—And an Alternative*, 107 MICH. L. REV. 711, 712–16 (2009) (discussing the GVR practice); Arthur D. Hellman, "Granted, Vacated, and Remanded"—*Shedding Light on a Dark Corner of Supreme Court Practice*, 67 JUDICATURE 389, 390–91 (1984) (same); see also *Thomas v. Am. Home Prods.*, 519 U.S. 913, 914–15 (1996) (Scalia, J., concurring) (noting that the Court issues GVR orders without regard to whether the case satisfies the usual criteria for granting certiorari).

<sup>165</sup> See, e.g., *Corcoran v. Levenhagen*, 130 S. Ct. 8, 9 (2009) (summarily vacating and remanding where the court of appeals rejected one claim advanced by a habeas petitioner and then denied relief without even discussing the petitioner's other claims); *Solimine v. United States*, 429 U.S. 990, 990 (1976) (summarily vacating and remanding for further consideration in light of an argument not considered below); see also *Beer v. United States*, 131 S. Ct. 2865, 2865–66 (2011) (vacating the lower court's decision without finding error and requiring the lower court to address an additional issue on remand).

<sup>166</sup> See, e.g., *Dan De Farms, Inc. v. Sterling Farm Supply, Inc.*, 633 N.W.2d 824, 824 (Mich. 2001) (vacating and remanding because the lower court considered legislative history without first finding the statute ambiguous).

the U.S. Supreme Court, the District Court for the Eastern District of Washington, and so forth. Supreme Court nominations make national headlines, and some citizens cast their votes for president based on the kind of nominees a presidential candidate promises to choose. Although federal district judges go through the same formal constitutional process of presidential nomination and senatorial approval, in reality the process is quite different given the lower stakes involved. When one turns to state judiciaries, one finds significant diversity both in methods of selection and in how the judiciary relates to the other branches of government. There may also be hierarchical variation within a given state's judiciary, with judges at one level of the system selected in a different way and by different decisionmakers than judges at another level.

Should differences in selection and tenure matter when it comes to the proper method of statutory interpretation? Although the question is easy to state, it is exceedingly complicated to answer. One vexing aspect of the problem concerns the role of judicial elections, the institution that divides all federal judges from most state judges. To take one possibility, should elected judges enjoy greater interpretive freedom in recognition of the democratic legitimacy and accountability that elections are often thought to confer? The impact of elections is so complex that a complete accounting requires its own dedicated exploration elsewhere.<sup>167</sup> Consistent with the primary aims of this Article, here I will emphasize hierarchical variations within particular judicial systems, such as between the Supreme Court and the lower federal courts or between a state high court and its lower courts. To set up the normative discussion of how modes of selection should matter, I first briefly elaborate on how judges in fact differ in the relevant respects.

#### A. Differences Between and Within the Federal and State Judiciaries

Let us begin with the federal judiciary, where the internal variations may be hardest to see.<sup>168</sup> From one point of view, there is no distinction to be made: all federal judges have the same life tenure,

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<sup>167</sup> The relationship between judicial elections and statutory interpretation is taken up in Bruhl & Leib, *supra* note 15. For extremely illuminating discussions of whether and how judicial elections should affect *constitutional* judicial review, see David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2064–2133 (2010); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 324–28 (2008).

<sup>168</sup> The discussion here concerns the Article III judiciary. There are of course other kinds of federal judges—bankruptcy judges, administrative law judges, etc.—that are somewhat less insulated than their Article III counterparts. For the most part, I will speak of “federal judges” with the understanding that this means Article III judges.



the same manner of appointment, and so on.<sup>169</sup> Whatever federal judges' relationship to democracy might be—straightforward deficit or more complex complementarity—they all have the same relationship to it.

Yet formalities aside, the reality is that Supreme Court Justices are not selected through the same process as is a federal district judge.<sup>170</sup> Today the President typically chooses a Supreme Court nominee with extreme care, considering among other things the nominee's ideological compatibility with the President's program and the nominee's appeal to the President's electoral coalition. Then the nominee is subjected to an elaborate confirmation process that likewise scrutinizes not just (or not even primarily) the nominee's technical competence but also the general acceptability of his or her political views. The process is different for a federal district judge. Although the selection process has changed over time and depends somewhat on the partisan alignments at the time of the nomination, home-state officials and local constituencies play a strong role in selecting candidates. (There is still some truth, though less than there used to be, to the old quip that the definition of a federal judge is a lawyer who knows a senator.<sup>171</sup>) Senate scrutiny, especially political scrutiny, is lighter for district court nominees. The selection process for judges on the courts of appeals falls somewhere in the middle.

The variations within the federal judiciary are real, but the differences are much more striking when one turns to the states.<sup>172</sup> In some states, the judges are chosen on pretty much the same terms as most other officeholders: through fairly frequent multicandidate

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<sup>169</sup> See Akhil Reed Amar, *Parity as a Constitutional Question*, 71 B.U. L. REV. 645, 650 (1991) ("The Constitution itself establishes parity among federal judges, supreme and inferior, by prescribing identical rules for presidential appointment, Senate confirmation, life-tenure, undiminishable salary, and so on, for all federal judges . . . ." (emphasis omitted)).

<sup>170</sup> For an overview of the federal judicial appointments process, see generally LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 7–116 (2005); and SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997).

<sup>171</sup> The appointment process for lower-court judges has shifted over the course of the last several decades from one centered on patronage to one that gives greater consideration to policy. See NANCY SCHERER, *SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS* 1–46 (2005). The shift has been less pronounced for district courts than courts of appeals. *Id.* at 6, 19. The differences between Supreme Court appointments and lower-court appointments discussed in the text should be understood as differences in degree rather than in kind, with the degree of difference variable over time.

<sup>172</sup> The information on state judicial selection summarized in this paragraph is drawn from AM. JUDICATURE SOC'Y, *JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS* (2011), available at [http://www.judicialselection.us/judicial\\_selection\\_materials/records.cfm?categoryID=6](http://www.judicialselection.us/judicial_selection_materials/records.cfm?categoryID=6); and Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1104–05 (2007).

(sometimes partisan) elections. In other states, the judges are initially chosen through some form of merit system, in still others through gubernatorial or legislative appointment. But even when judges do not initially get on the bench through an election, in most states they remain in office only by facing the voters, such as in retention elections. All in all, looking at the nation as a whole, about 90% of the judges on state appellate courts and general-jurisdiction trial courts face some kind of election. These judges have strong incentives to learn and understand the preferences of their constituents.<sup>173</sup> Only a small handful of states appoint judges and then let them remain in office without further political accountability until they reach a mandatory retirement age or (in the case of Rhode Island alone) for life.

Diversity can exist within a given state as well. Judges on different courts of a state might attain the bench through different means (competitive partisan elections at one level, merit selection with retention elections at another, etc.).<sup>174</sup> Even if all judges in a particular state face essentially the same kind of elections, they will usually have different constituencies. For example, the high court justices are usually chosen by the voters of the whole state, but trial judges typically have smaller constituencies such as counties or judicial districts.<sup>175</sup>

The short of it is that the title “judge” can conceal some real differences, even within a particular jurisdiction. Given those differences, what are the implications for statutory interpretation?

## B. How Modes of Selection Should Affect Statutory Interpretation

It is not clear how selection methods should influence interpretive methodology, if indeed they should influence it at all.<sup>176</sup>

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<sup>173</sup> See Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 *STAN. L. REV.* 1629, 1659–71 (2010).

<sup>174</sup> An extreme example in this regard is Indiana. Depending on the level of the court and the county, the method could be merit selection with retention elections, nonpartisan elections, or partisan elections. See *AM. JUDICATURE SOC'Y*, *supra* note 172. There is even more variation if one considers courts of limited jurisdiction. See *Methods of Judicial Selection: Limited Jurisdiction Courts*, *AM. JUDICATURE SOC'Y*, [http://www.judicialselection.us/judicial\\_selection/methods/limited\\_jurisdiction\\_courts.cfm](http://www.judicialselection.us/judicial_selection/methods/limited_jurisdiction_courts.cfm) (last visited Nov. 13, 2011).

<sup>175</sup> Note, however, that in a few states even the supreme court justices are elected from districts rather than in statewide elections. See *CHRIS W. BONNEAU & MELINDA GANN HALL*, *IN DEFENSE OF JUDICIAL ELECTIONS* 12–13 tbl.1.2 (2009).

<sup>176</sup> I am addressing the normative question of whether modes of selection *should* affect interpretive method. It is nonetheless worth noting that a substantial body of literature addresses how institutional arrangements for selecting judges do in fact affect judicial behavior. For brief summaries and further citations, see Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 *VA. L. REV.* 719, 731–39 (2010); and Joanna M. Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 *J. LEGAL STUDS.* 169, 174–76 (2009).

There are some views of the judicial role in statutory interpretation—of varying degrees of plausibility and popularity—according to which differences in appointment and tenure would seem to be wholly *irrelevant* when it comes to determining the proper interpretive method. One might take that stance if, for example, one believes that judging simply involves the application of known rules to case facts; all judges should do that the same way. Alternatively, one might deem selection processes irrelevant to proper method if one believes that judges are supposed to be engaged in a search for objective moral truths, truths that in no way depend on the election returns. Or one might think selection irrelevant if one believes the sole criterion of interpretive legitimacy is whether a decision has the consequence of maximizing wealth. Still others might consider judging a practice governed by its own autonomous, internal norms of professional craftsmanship; how one joined the guild is irrelevant to the sound practice of the common trade.<sup>177</sup> Whatever the rationale, the idea would be that a judge is a judge, and that role is all that matters.

Without purporting to demonstrate that it is totally wrong to regard the proper judicial role as essentially invariant with respect to modes of selection, I do submit that such a view fails to capture the whole truth of the matter. I venture that most readers would agree that interpreting statutes is, in part, a political activity in the sense that it involves contested policy judgments in zones of discretion. But if that is so, should it not matter how the judge was selected, and by whom, and how the judge's behavior can (or cannot) be controlled? If we turn for a moment to the realm of constitutional theory, an indifference to judicial selection would make it hard to comprehend one of the central preoccupations of the field, namely the countermajoritarian difficulty—which is, after all, supposed to be a *difficulty* precisely because of the unelected nature of the (federal) judges who can overturn the legislation enacted by our elected representatives.<sup>178</sup> Statutory interpretation does not formally involve the power to nullify legislation in the same way as constitutional judicial review does, but it can nonetheless thwart legislative and popular preferences.<sup>179</sup>

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<sup>177</sup> See Rakoff, *supra* note 6, at 1559–60, 1571–72.

<sup>178</sup> The literature on the “countermajoritarian difficulty”—attempting to solve it, dissolve it, debunk it, or otherwise grapple with it—is too large to provide even a responsible sample, so I will just cite the work most closely associated with it: ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

<sup>179</sup> At least at the federal level, it is much easier to change an unwanted interpretation of a statute than to change an unwanted interpretation of the U.S. Constitution. Nonetheless, unwanted statutory interpretations are hard to override due to factors like legislative inertia and “vetogates” and because the court's interpretation of a single section of a large statute might have unraveled a political compromise. And even when overrides succeed, they are not instantaneous.

All federal judges are unelected, but judges at different levels of the hierarchy can nonetheless lay claim to somewhat different licenses when it comes to policymaking. Federal district judges, though chosen through a formally national process, have special ties to local constituencies, which may afford them special leeway in their own communities.<sup>180</sup> At the same time, these district judges have a lesser claim, as compared to Supreme Court Justices, to have been democratically authorized to make *national* policy.<sup>181</sup> This is not the same as claiming that the Supreme Court's decisions *in fact* tend to align with majority preferences somehow defined (the topic of a significant literature<sup>182</sup>); it is instead a normative claim about the Justices' greater relative warrant for making policy choices of their own.

For an example of how methods of selection might influence interpretive method, we can start with a topic that is by now familiar: judicial review of agency interpretations. Many modern statutes are directed primarily toward agencies and are meant to empower the agencies to elaborate the details of a policy scheme the statute only roughly sketches.<sup>183</sup> Because policymaking discretion is at issue when courts confront such statutes, the prevailing doctrines already recognize that we should favor more politically accountable decisionmakers when faced with statutory gaps. In particular, the familiar *Chevron* doctrine of judicial deference to agencies is justified in significant part

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<sup>180</sup> Cf. C.K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* 58–116 (1996) (documenting the influence of regional factors and recruitment procedures on district court decisionmaking); Aronson, *supra* note 16, at 1013 (observing that “trial judges are generally understood to be cognizant of, and often expected to be responsive to, local sensibilities” and arguing that diversity across lower courts “carries a democratic significance in its representation of the constitutional tendencies of different communities”).

<sup>181</sup> See TERRI JENNINGS PERETTI, *IN DEFENSE OF A POLITICAL COURT* 84 (1999) (“Representation occurs when the [Supreme Court] justices decide in accordance with their political views, which have been consciously and deliberately sanctioned by elected officials competing for political control of the [Supreme] Court through the selection process. . . . Although not enforced via direct election, the link between the value premises of a justice’s selection and then the value premises of her subsequent decisions is significant and consequential and constitutes an indirect form of political representation.”); see also Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 284 (1957) (“Presidents are not famous for appointing justices hostile to their own views on public policy nor could they expect to secure confirmation of a man whose stance on key questions was flagrantly at odds with that of the dominant majority in the Senate.”).

<sup>182</sup> For recent articles reviewing the literature, see Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We’re Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 264–67 (2010); Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103, 117–20.

<sup>183</sup> See Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 369–72 (1989).

on an accountability rationale.<sup>184</sup> What *Chevron* did not state, however, is that while all courts (all federal courts, anyway<sup>185</sup>) lack the political responsibility and policymaking license of agencies, not all courts are equally so deprived. As compared to the inferior federal courts, the Supreme Court has a better claim to have been authorized to make national policy. Other things being equal, judicial review of national administrative policy is therefore more fraught when conducted by a district judge than by the Supreme Court.<sup>186</sup>

The implications potentially extend well beyond judicial review of administrative regulations. Although it would be naïve to believe there is a bright line between mere faithful interpretation of legislation on the one hand and presumptively problematic “legislating from the bench” on the other,<sup>187</sup> it is nonetheless true that interpretive theories vary in the extent to which they contemplate judges as active and independent policymakers as opposed to constrained subordinates. Toward the more active end are approaches that encourage judges to promote the best theory of justice,<sup>188</sup> to adapt statutes in

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<sup>184</sup> See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (“In contrast [to courts], an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . . [F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”). To be sure, agencies are not legislatures, and so the usual counter-majoritarian complaints about invalidating legislation cannot be transferred directly and without modification to the issue of the propriety of invalidating regulations. See Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 806–74 (1997) (emphasizing the differences between judicial review of statutes and regulations).

<sup>185</sup> Many state judges face elections, which complicates the accountability rationale for deferring to agencies. See Bruhl & Leib, *supra* note 15; D. Zachary Hudson, Comment, *A Case for Varying Interpretive Deference at the State Level*, 119 YALE L.J. 373, 373–77 (2009).

<sup>186</sup> The jurisdictional statutes used to recognize this to a much greater extent than they do now. Beginning in the early twentieth century, suits seeking to enjoin a state law had to be heard by a three-judge district court, a requirement later extended to suits seeking to enjoin federal statutes. See David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 6–11 (1964). Those provisions are no longer in effect, though three-judge district courts are still used for certain politically charged topics like redistricting. See, e.g., 28 U.S.C. § 2284(a) (2006).

<sup>187</sup> As Jane Schacter explains, it is far too simplistic to say that any approach to interpretation besides a very strict understanding of legislative-agent theory is “undemocratic.” Judges can promote (various conceptions of) democracy through looser interpretive methods. See Schacter, *supra* note 71, at 595–96, 606–07 (explaining the “metademocratic” approach to legitimating methods of statutory interpretation). Likewise, William Eskridge argues that judicial dynamism is necessary and appropriate even on the basis of familiar liberal democratic premises. See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 120–30, 151–56 (1994).

<sup>188</sup> See, e.g., RONALD DWORCKIN, *LAW’S EMPIRE* 313–54 (1986); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279, 388–93 (1985).

light of broader societal developments,<sup>189</sup> and to review older statutes for obsolescence.<sup>190</sup> As usual, my aim is not to reach an all-things-considered judgment regarding the suitability of these approaches.<sup>191</sup> Rather, the point is that the appropriateness of these theories varies depending on the judge in whose hands they are deployed. Whatever one thinks about judicial interpretive independence as a general matter, the Supreme Court should enjoy more of it than the district courts.

The Supreme Court's relative legitimacy in policymaking is bolstered by its relative epistemic advantages. As discussed above, the Supreme Court operates in a resource-rich environment.<sup>192</sup> The information at its disposal not only conduces to greater technical interpretive competence but also supports more informed policymaking. Through amicus briefs or otherwise, the Justices can learn about policy consequences, current congressional and executive preferences, public opinion, and other facts useful to sound policymaking. Though there are limits to what we can expect from the Court in terms of sound national policymaking, we can at least expect more from it than from the lower courts. And if blind ideology is actually all that influences the Court's decisions in hard cases, as some might claim, then at least the Justices were selected and confirmed with full consideration of their ideology.

Turning to the state courts, we can again set aside for present purposes the larger question of whether and how judicial elections should influence interpretive methodology.<sup>193</sup> The relevant point here is that, if being elected matters, it can matter differently depending on which level of court is at issue. Judges with a statewide constituency can more credibly claim to be policymakers on matters of statewide law than can judges with geographically limited constituencies. State high court judges' greater legitimacy as statewide policymakers dovetails with their greater access to information and familiarity with the state political landscape.<sup>194</sup> If state high-court

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<sup>189</sup> See, e.g., ESKRIDGE, *supra* note 187, at 123–30; T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 56–61 (1988).

<sup>190</sup> See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 2 (1982).

<sup>191</sup> In particular, although the questions about democratic legitimacy are hard enough, a complete accounting would need to consider other issues too, such as objections to dynamism that sound in rule-of-law values like predictability. See Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 Nw. U. L. REV. 1389, 1393 (2005) (arguing that dynamic interpretation compromises “the important values of statutory continuity, coherence, and predictability”).

<sup>192</sup> See *supra* Part III.A.

<sup>193</sup> See *supra* note 167 and accompanying text.

<sup>194</sup> See Devins, *supra* note 173, at 1659–71; *supra* text accompanying notes 74–76. One particularly interesting problem concerns situations in which state courts interpret federal law and federal courts interpret state law. If state courts, especially state supreme courts, have the democratic legitimacy to behave in ways federal courts cannot, does that extend

judges can be creative and entrepreneurial leaders—perhaps in ways the unelected Article III judiciary cannot—it does not follow that their judicial subordinates should emulate that model.

#### CONCLUSIONS AND DIRECTIONS FOR FUTURE RESEARCH

I have contended that statutory interpretation is a place-specific activity that needs to respond to the institutional circumstances of the interpreting court. Parts II, III, and IV focused on three distinct ways in which courts differ: hierarchical position, technical competence, and modes of selection. Consideration of each of those dimensions yielded some partial answers about the proper interpretive method for various courts. The time has come to combine the different vectors so as to reach some more general conclusions about how lower-court statutory interpretation should differ from the Supreme Court's model.

##### A. How to Read a Statute in a Lower Court: Against Blank-Slate Interpretation, For Modesty<sup>195</sup>

The analysis presented in this Article highlights a defect shared by leading interpretive approaches such as textualism, intentionalism, and purposivism. What all of these foundationalist theories have in common is that they are what we might call “blank-slate” theories. The Supreme Court and other high courts often engage in blank-slate interpretation, at least in cases that lack an agency interpretation, but lower courts rarely can or should operate in that mode. For them, the question is seldom, “What is the best interpretation of the statute?” but instead is usually, “What is the best interpretation *given what other interpreters—the high court, other courts, and agencies—have already said about it?*” Lower courts are correct to look to other sources for guidance and should be encouraged to go even further than they do already.

In particular, several strands of reasoning suggest that the lower federal courts should heavily defer to agency interpretations.<sup>196</sup> Two of the leading rationales for deference—the agencies' greater expertise and their political pedigree—have their greatest force not in the Supreme Court but in the lower federal courts. Deference to agencies

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to their interpretations of federal law? When a federal court interprets state law pursuant to the *Erie* doctrine, does it matter more that the federal judge is not elected or that the state judge across the street is? For a discussion of such crossover cases, see Bruhl & Leib, *supra* note 15; Gluck, *supra* note 54.

<sup>195</sup> As the reader familiar with the literature may realize, the title of this section, like the subtitle of this Article, echoes Eric Lane, *How To Read a Statute in New York: A Response to Judge Kaye and Some More*, 28 HOFSTRA L. REV. 85 (1999).

<sup>196</sup> As previously noted, agency deference is a bit more complicated in many state systems. See *supra* note 185.

also helps suppress disuniformity and circuit splits, which are particularly problematic in regulatory law and often require Supreme Court intervention. Current law already has a doctrine of deference, but the official doctrine should call for hierarchically variable deference.

Similar reasoning supports deference to higher courts' dicta. Following the outside interpreter allows the lower court to borrow decisional capacity and political competence, promotes uniformity within the jurisdiction, and reduces decision costs. Further, lower courts should, as many do, hesitate before departing from views embraced by many of their peers at the same level of the judiciary.<sup>197</sup>

When lower courts do engage in blank-slate interpretation, this Article suggests that they should emphasize the enacted text and eschew ambitious policymaking. As textualists would recommend, they should be extremely wary of delving into legislative history. Yet this is not the same as recommending that they become textualists, at least if one has in mind the textualism practiced by some of its most sophisticated current exponents. That brand of textualism is too complicated for constrained interpreters. Further, textualism's willingness to impose unexpected results could, in the hands of lower courts, result in too many uncorrected bad interpretations. Preferable would be modest, traditional judging that emphasizes the enacted text but reads it reasonably and with a healthy aversion to generating awkward results. Happily, this seems to be what the lower courts already tend to do. They should not take the U.S. Supreme Court as their model: not its occasionally lavish deployments of obscure legislative history, not its occasionally rigid literalism.

I hasten to add that the statements above address hierarchical differences in generic terms and would have to be modified to fit the circumstances of particular systems. Although state lower courts generally enjoy less technical competence *and* less policy competence than state high courts, these characteristics vary across states. And we should remember that the judiciary is just one part of the state's political system. State constitutions vary in their openness to popular lawmaking through initiatives and referenda,<sup>198</sup> state legislatures vary in

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<sup>197</sup> See, e.g., *Admiral Fin. Corp. v. United States*, 378 F.3d 1336, 1340 (Fed. Cir. 2004) (“[W]e accord great weight to the decisions of our sister circuits when the same or similar issues come before us, and we do not create conflicts among the circuits without strong cause.” (internal quotation marks omitted)). *But see* *Zimmerman v. Or. Dep’t of Justice*, 170 F.3d 1169, 1173, 1184 (9th Cir. 1999) (refusing to defer to an administrative regulation and creating a circuit split in order to follow the best reading of the statutory text). As noted earlier, there are reasons to doubt the wisdom of a rule giving nationwide stare decisis effect to a single circuit’s decision. See *supra* notes 100–102 and accompanying text (discussing and citing literature on intercircuit stare decisis).

<sup>198</sup> See generally M. DANE WATERS, *INITIATIVE AND REFERENDUM ALMANAC* (2003) (cataloguing the direct democracy mechanisms available in the states).



their professionalism,<sup>199</sup> and so forth. All of these variables need to be considered. Thus, instead of speaking generally about “statutory interpretation in state courts,” a comprehensive treatment of state courts would proceed on more particularized terms.

## B. Hierarchical Heterogeneity as an Interpretive Regime

This Article explores the possibility of a regime of hierarchically heterogeneous statutory interpretation. The basic insight motivating the project is that courts differ quite substantially in their institutional circumstances. Courts should use methods of decisionmaking that make sense in light of those circumstances.

There are, of course, limits on the degree to which courts can diverge. Courts in the same judicial system work together, confronting the same issues and handling the very same cases as they move through different stages of the litigation process. Some amount of coordination is therefore required in order to avoid waste and perhaps even chaos. Thus, as explained earlier, heterogeneity cannot exist between every level in the pyramid of appellate review.<sup>200</sup> There is room for heterogeneity whenever appellate review is discretionary (or nonexistent). For example, heterogeneity can exist between the Supreme Court and all the courts below it but not between a federal court of appeals and its district courts. Even if the court of appeals and the district court diverge in their institutional circumstances to such a degree that their ideal interpretive methods would be different—and they well might—that degree of fine tailoring must yield to the systemic interest in avoiding wasteful reversals.

At this point we should recall that the judicial system itself is only part of a larger legal system that includes the legislature. Thus, we should also consider how, if at all, the heterogeneous interpretive regime described here would affect the legislature. One possibility, of course, is that the interpretive regime would not make any difference to the legislature. Members of Congress are motivated by political imperatives that involve much besides learning the details of judicial interpretive canons and ensuring optimal judicial interpretations.<sup>201</sup>

Nonetheless, let us assume (perhaps counterfactually) that Congress notices and responds to judicial interpretive practices. We can then consider whether there is any deleterious effect associated with

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<sup>199</sup> See generally Peverill Squire, *Measuring State Legislative Professionalism: The Squire Index Revisited*, 7 STATE POL. & POL'Y Q. 211, 213–15, 220–21 (2007) (discussing the concept of legislative professionalism and ranking state legislatures).

<sup>200</sup> See *supra* Part I.C.

<sup>201</sup> See Nourse & Schacter, *supra* note 38, at 594–97, 601–05, 614–16. My discussion here will focus on Congress. As noted above, state legislatures might be more attentive or otherwise differ in relevant ways. See *supra* text accompanying notes 198–99.

either heterogeneity per se or the particular interpretive divergences I recommend.

Regarding heterogeneity per se, one test of an approach to statutory interpretation is whether it facilitates the legislature's ability to legislate effectively. As described earlier, some commentators emphasize the value of a stable interpretive regime as a backdrop against which Congress can legislate.<sup>202</sup> The status quo performs poorly on this score: there is inconsistency from court to court, from judge to judge, and from case to case. Given this inconsistency, it is hard to say that adding some hierarchical heterogeneity would do any more harm. If horizontal disuniformity were simultaneously suppressed, the resulting regime would be an improvement over the status quo.

Of course, when formulating theoretical ideals we need not take the status quo as a given. The baseline could instead be a hypothetical system of complete homogeneity. As compared to that baseline, a system displaying some hierarchical variation along the lines I have described would not provide as clear an interpretive backdrop. But this is not a fatal problem. Few disputes over statutory language make it all the way to the Supreme Court. Thus, even if we assume that Congress would respond to the interpretive regime, it would make sense for Congress (and attorneys advising clients) to use the lower courts' methodology as the guide, and that methodology would be consistent. In any event, for diehard advocates of complete uniformity who remain unconvinced, recall the "fallback" position described earlier in the Article: we could have uniformity but model it on the methods that are best for the lower courts rather than the methods most congenial to the Supreme Court.<sup>203</sup>

What also matters to Congress is not uniformity versus heterogeneity per se but the specific contents of the method employed in the lower courts. The style of lower-court interpretation I envision would not depart wildly from current practices, so it seems unlikely that it would pose significant problems for Congress. Regarding my proposal to increase lower-court deference to agencies, one reason that Congress delegates authority to an agency is precisely to avoid the issuance of conflicting regulatory commands from a multitude of unaccountable lower-court judges. My proposal would advance that congressional goal while leaving the Supreme Court available to keep agencies from straying too far. Of course, if Congress wished to deviate from this regime of enhanced deference, it could do so by statu-

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<sup>202</sup> See *supra* note 36 and accompanying text (discussing the idea of interpretive regimes).

<sup>203</sup> See *supra* Part I.D.

tory enactment.<sup>204</sup> But in the absence of a statutory mandate, enhanced deference would be the default.

### C. Directions for Future Research

I started by asking whether statutory interpretation is an activity that all courts should approach the same way. I have provided a number of institutional reasons to believe the answer is *no*. Moreover, I have discussed several particular ways—ranging from overall method to specific interpretive rules—in which courts should diverge.

Beyond that, my broader aim here has been to improve the statutory interpretation debate by making sure that it accounts for the fact that not all courts are the Supreme Court. In fact, most of them are not the Supreme Court. Courts differ, and surely some of those differences bear on how best to interpret statutes. What I have written here about the implications of those differences is just the beginning. Regarding the state courts, for instance, we might generalize by saying that they are higher on popular competence but (especially in lower state courts) lower in technical capacity than federal courts. In part because of broader understandings of the nature of judicial power in state systems and in part because state courts actively shape a body of common law,<sup>205</sup> open policymaking by state judges might be more acceptable and successful than it would be in the federal system. Perhaps the same openness should extend to their statutory interpretation methodology. But this is merely tentative, and additional thought needs to be given to fully exploring how, if at all, state courts' democratic pedigree (if that is indeed what elections confer) should affect their approach to reading statutes.<sup>206</sup> Nuanced treatment of differences between states would be valuable as well.

Additional positive work concerning how the lower courts actually go about their interpretive business would also be desirable. As noted at the outset, it appears we are in the midst of a surge in such work.<sup>207</sup> That is all for the good. Indeed, it seems likely that the marginal value of additional descriptive work would be extremely high, if

<sup>204</sup> See generally Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637, 2653–70 (2003) (discussing congressional ability to vary the level of judicial deference to administrative interpretations and mechanisms for doing so).

<sup>205</sup> See WILLIAMS, *supra* note 74, at 299–300 (explaining that “state judicial branches are quite different from the federal judiciary” and are “often deeply involved in the state’s ongoing policy-making processes”); Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 19–29 (1995) (emphasizing the predominance of common law reasoning in state courts even when statutes are at issue); Linde, *supra* note 74, at 117–19 (listing factors contributing to the “active participation of state judges in the policy process”).

<sup>206</sup> As noted previously, the role that judicial elections should play in determining the proper approach to statutory interpretation is the subject of future work. See *supra* note 15.

<sup>207</sup> See *supra* notes 7–8 and accompanying text.

only because there is so much information out there to uncover. Yet that substantial value cannot be fully realized without a normative framework that will let us evaluate whether lower courts are doing well and, perhaps, tell them how to do better. The Supreme Court should not be the yardstick by which to measure the lower courts' interpretive methods, so we will need to generate proper criteria, which is what I hope to have begun to do here.

