Ordinary Meaning Against Itself

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Introduction

We all know—because judges won't stop telling us—that American courts interpret statutes using ordinary meanings. Justice Holmes told us to ask "what [the] words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used."[1] Justice Scalia said that legal "words mean what they conveyed to reasonable people at the time they were written."[2] Justice Gorsuch recently reminded us that the Supreme Court "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."[3] So central has the notion of ordinary meaning become that statements like this have the ring of truism, even cliché: so foundational that they must be repeated, but so obvious that they need not be justified.

The idea that the ordinary meaning of individual words is the main lens through which courts should read legal language has become what the sociologist of science Bruno Latour would call a "black box," something that is so fully "settled [that] one need focus only on its inputs and outputs and not on its internal complexity."[4] For Latour, who studied the production of knowledge, black boxing describes "the way scientific and technical work is made invisible by its own success."[5] A black box encapsulates a kind of background presumption that resists our prodding and prying, presenting the sleek surface of the already known, the pre-established, the unquestionable. But of course, it's precisely that kind of box that most warrants unpacking.

In American legal interpretation, courts often invoke rules, or "canons," for interpretation.[6] Canons are supposed to guide courts in their interpretive work. There are two

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[1] Oliver Wendell Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417, 417-18 (1899). It's a little unclear why this "normal speaker" should speak English in particular; since the US has no official language, this qualification seems to impose a precondition for recognition by legal actors that itself has no legal basis.

[2] Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 16 (2012).

[3] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020).

[4] Bruno Latour, Pandora's Hope: Essays on the Reality of Science Studies 304 (1999).

[5] Id.; see also Bruno Latour, Science in Action: How to Follow Scientists and Engineers Through Society 4 (1987) ("If you take two pictures, one of the black boxes [that used to be open controversies] and the other of the [still-]open controversies, they are utterly different.").

[6] See generally Scalia & Garner, supra note 2 (describing and listing canons of interpretation).

ISSN 2819-3636

main flavors. "Linguistic canons" are supposed to provide rules for interpreting legal language in general, almost (the claim goes) like grammatical rules. In the English sentence "the dog sees the cat," we recognize the dog as the seeing subject, the cat as the object of seeing, because English grammar indicates subjects and objects mostly through word order (as opposed to, say, case markings).[7] Linguistic canons are supposed to function in a similar neutral, empirically based way.[8] For instance, when a statute provides a list of prohibited items, a linguistic canon advises the court to assume that items not listed are not prohibited: the inclusion of some things implies the exclusion of all others, or, as the Latin name of the canon has, *inclusio unius est exclusio alterius*.[9] The idea of linguistic canons is to provide rules for interpreting legal text regardless of the specifics (though in practice, they can be deployed differently in different contexts).

The other rules are "substantive canons," which articulate policy preferences. These are largely seen to be separable from linguistic canons: they don't purport to mimic or describe grammar-like patterns of speaking, but to express normative commitments. These normative commitments are supposed to nudge courts to interpret legal texts in particular ways—even ways that depart from their most likely, most accessible, or most justifiable linguistic meaning.[10] For instance, American courts are supposed to avoid invalidating legislative enactments unless absolutely necessary. If a statute allows for one interpretation that would pose constitutional problems and another that would not, the substantive canon of *constitutional avoidance* tells courts to choose the less constitutionally problematic option—even if it's a less justifiable interpretation of the text.[11] In other words, substantive canons

[7] Grammar itself can be described as a patterning that emerges from "the actual stream of discourse" over time and social participants. John W. Du Bois, The Discourse Basis of Ergativity, 63 Language 805, 852 (1987).

[8] I hedge here because at least some linguistic canons do not fulfill these desiderata. See, e.g., Kevin Tobia, Brian Slocum & Victoria Nourse, Statutory Interpretation from the Outside, 122 Colum. L. Rev. 213, 256-57 (2022) (reporting experiment data suggesting that ordinary English does not use the rule of the last antecedent). Linguistic canons often don't describe language patterning so much as express language ideologies. See Anya Bernstein, Saying What the Law Is, 48 Law & Soc. Inquiry 14, 22 (2023) (describing a language ideology as "a story . . . people tell about language that helps tell further stories about other aspects of social life"). But this essay is not about that; here I'm simply outlining how American legal culture generally presents these tools.

[9] This canon is also called *expressio unius est exclusio alterius*. See Scalia & Garner, supra note 2.

[10] Kevin Tobia and Brian Slocum have recently suggested that canons also come in a mixed flavor: their experiments suggest that ordinary English speakers tend to interpret the language of rules through background normative presumptions. Brian G. Slocum & Kevin Tobia, The Linguistic and Substantive Canons, 137 Harv. L. Rev. F. 70 (2023). Although the authors do not phrase it this way, their experiments effectively demonstrate, for a legal audience, the central role that culture plays in communication—a role that renders attempts to isolate any purely linguistic, value-free meaning in an utterance implausible. See, e.g., Michael Silverstein, "Cultural" Concepts and the Language-Culture Nexus, 45 Current Anthropology 621, 621 (2004) ("Whenever languages . . . are used in their . . . human habitats, cultures . . . can be said to be communicating. . . . In discursively mediated interaction . . . we . . . experienc[e] culture by communicating through . . . language-in-use.").

[11] See Scalia & Garner, supra note 2; Anita S. Krishnakumar, Reconsidering Substantive Canons, 84 U. Chi. L. Rev. 825 (2017).

are, in a sense, anti-linguistic canons: they push courts to ensure particular outcomes that are not clearly justified by, and may even depart from, the court's normal interpretation of legal text.[12]

Using ordinary meanings to interpret statutes tells courts how to understand the legal text's words. In that sense, it's treated as a foundational linguistic canon. In fact, it may be something even bigger and deeper. As, in Brian Slocum's phrasing, the "most fundamental principle of legal interpretation,"[13] ordinary meaning provides the basis on which other linguistic canons can even come into play. The claim of linguistic canons is to reflect how people actually speak; the commitment to using ordinary meanings is what makes this claim relevant. It allows judges to argue that using a linguistic canon like *expressio unius* is warranted because it reflects how ordinary speakers use language—how ordinary meaning is produced. So it is often treated as a kind of ur-linguistic canon; the principle that launched a thousand canons.

Yet, with a closer look, a commitment to ordinary meaning in statutory interpretation starts to look less like a description of how language works and more like other kinds of commitment—a normative policy preference expressed through a substantive canon. This essay explains why it is.[14] I take a rather peculiar point of departure: I start by discussing corpus linguistics, a methodology for determining ordinary meanings that has recently moved from the academic discipline of linguistics into legal practice. Because corpus linguistics is so meticulously empirical, it offers a particularly helpful vehicle for illuminating the normative quality of ordinary meaning interpretation in law.

Recognizing that ordinary meaning is a substantive canon opens up important avenues of inquiry. It allows—and maybe requires—us to consider the values served by ordinary meaning interpretation in the context of other, sometimes competing values. And it pushes us to consider how our system can best serve the values ordinary meaning interpretation is marshaled to support.

This discussion is not specific to criminal law. But because criminal law so directly affects individual liberty, and because it is so often deployed to sanction and constrain the least powerful, the stakes there may be particularly high. It is also, perhaps, in criminal law that the appeal of using ordinary meaning seems strongest. Basic democratic principles match widespread ethical intuitions that people should be on notice of what conduct is

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[12] See, e.g., Krishnakumar, supra note 11, at 834; see also Eric S. Fish, Constitutional Avoidance as Interpretation and as Remedy, 114 Mich. L. Rev. 1275, 1279 (2016) (arguing that constitutional avoidance is "officially framed as an interpretive technique—a court presumes that the legislature does not intend to act unconstitutionally, and so it construes ambiguous statutes to avoid constitutional problems" but also "is commonly used as a tool of constitutional enforcement, by which a court changes a statute's meaning to protect a constitutional norm").

[13] Brian G. Slocum, Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation (2015).

[14] I build on other work that has recently suggested something similar. See generally Evan C. Zoldan, The Conversation Canon, 110 Ky. L.J. 1 (2021); Jesse M. Cross, The Fair Notice Fiction, 75 Ala. L. Rev. 487 (2023); Marco Basile, Ordinary Meaning and Plain Meaning, 110 Va. L. Rev. 135 (2024).

prohibited and what the sanctions for it are. It might seem obvious, in a pre-theoretical kind of way, that the way to accomplish that is to write criminal statutes to match the language of the people they regulate. And the rubber of criminal statutes really hits the road when a court decides whether to impose their restrictions and sanctions on some person doing some thing. So the democratic imperative to *write* criminal statutes in the language of the people they restrain may seem to translate seamlessly into a requirement that courts *interpret* criminal statutes in that ordinary-meaning sort of way.

Yet as with many black boxes, considering these intuitions directly reveals things to be a bit more complicated. The way we might assume things work does not always correspond to the way they actually work. Indeed, that is what makes corpus linguistics so attractive in the first place.

I. Empirical and Less Empirical Ordinary Language Analysis

Scholars employing corpus linguistics analyze databases collecting instances of actual language usage to draw conclusions about the patterns that—often invisibly—structure how people speak and write.[15] Corpus linguistics is sometimes used to illuminate how individual words are defined in some population by tracking how communicative interaction participants take up and react to one another's utterances. But for the most part the methodology identifies underlying *patterns* of linguistic communication. For instance, corpus-based research has revealed that people narrating a story tend to convey information not in the maximally efficient way that grammar would allow, but in bits and pieces.[16] That is, to describe what a person who just arrived on the scene did, we often introduce the person separately, then refer back to that introduction to narrate their actions. Other research has studied how speakers use grammatical—rather than lexical—choices to subtly convey, without explicitly stating, their attitude toward what they're talking about.[17] Still other work contrasts different genres of speech and writing, revealing, for example, patterned contrasts between academic writing and everyday conversation in American English.[18]

Although such studies use a wide range of often computationally complex methodologies to analyze the language within their corpus, they share an overarching approach.

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[15] I discuss corpus linguistics, and critique legal corpus linguistics, more fully elsewhere. See Anya Bernstein, Legal Corpus Linguistics and the Half-Empirical Attitude, 106 Cornell L. Rev. 1397 (2021); Anya Bernstein, What Counts as Data?, 86 Brook. L. Rev. 435 (2021); Anya Bernstein, Technologies of Language Meet Ideologies of Law, 2020 Mich. St. L. Rev. 1241 (2020).

[16] See Elise Kärkkäinen, Preferred Argument Structure and Subject Role in American English Conversational Discourse, 25 J. Pragmatics 675, 675-76 (1996).

[17] See Sandra A. Thompson & Anthony Mulac, The Discourse Conditions for the Use of the Complementizer That in Conversational English, 15 J. Pragmatics 237, 249-50 (1991); see also T. Florian Jaeger, Redundancy and Reduction: Speakers Manage Syntactic Information Density, 61 Cognitive Psych. 23, 48-50 (2010).

[18] Douglas Biber, A Corpus-Driven Approach to Formulaic Language in English: Multi-Word Patterns in Speech and Writing, 14 Int'l J. Corpus Linguistics 275, 284, 299 (2009) (showing that English-language academic writing tends to deploy set phrases as vessels for individualized content, while everyday conversation tends to use set phrases with content pre-packed).

They look at a relatively large data set of some sort of language use. Depending on the questions it poses, a corpus study might look at anything from naturally occurring conversations to elicited narrations to social media posts to published writing to televised broadcasts, in or across particular areas of interest. Linguists choose—or, often, construct—the corpus based on the questions they want to pursue. To find hidden structures to communication that go beyond explicit word choice and surface grammatical rules, linguists search for patterns through which language users produce recognizable, accepted linguistic utterances within the sociocultural context the corpus represents.

This methodology is fundamentally, almost aggressively, empirical. Analyzing a data set of language use by some kinds of language users in some sociocultural context, it draws conclusions about how the participants in the data set use language. It pays attention to the differentiated quality of language use—the way that different sociocultural settings and different language-using populations correspond to, and produce, different types of language use. That is, corpus linguistics shows how language users participate in, and even co-create, particular *genres* of language use, like informal narrative, academic publication, news reports, social media posts, etc. At a more granular level than much social science, it shows how participants use, perpetuate, and modify mutually recognizable ways of speaking through speaking in those ways.[19]

Importantly, corpus linguistic studies do not purport to tell us how the people in the analyzed corpus will understand *other*, unrelated, genres of language use. But that hope does underlie the way that corpus linguistics has been adapted for legal interpretation. Some legal scholars and practitioners have heralded corpus linguistics as an empirical way to reveal the ordinary meaning that so much legal interpretation strives for. These writers also use corpora of English language usage. The favorites are a few very large corpora compiled by (or under the supervision of) Mark Davies, a linguistics professor at Brigham Young University.[20] The very extensive Corpus of Contemporary American English (COCA) favors modern texts produced for the general public, like TV shows, magazine articles, and books.[21] The Corpus of Historical American English (COHA) uses texts "from the 1820s-

[19] Corpus linguistics was developed before artificial intelligence, but presumably artificial intelligence could be used to gather relevant materials for a corpus and its pattern-recognition magic could help illuminate patterns in how corpus participants use language. In legal interpretation, however, AI would likely face the same limitations as legal corpus linguistics does.

[20] See Mark Davies, Professor of Linguistics (https://perma.cc/4ADQ-C2ZY).

[21] See, e.g., Corpus of Contemporary American English (https://www.english-corpora.org/coca/) ("The corpus contains more than *one billion* words of text (25+ million words each year 1990-2019) from eight genres: spoken, fiction, popular magazines, newspapers, academic texts, TV and movies subtitles, blogs, and other web pages."); see also id., "Texts" (explaining that the corpus's "spoken" language category is limited to broadcast programs, with "[t]ranscripts of unscripted conversation from more than 150 different TV and radio programs (examples: *All Things Considered* (NPR), *Newshour* (PBS), *Good Morning America* (ABC), *Today Show* (NBC), *60 Minutes* (CBS), *Hannity and Colmes* (Fox), *Jerry Springer*, etc).").

2010s."[22] And the Corpus of Founding Era American English (COFEA) focuses on "written American English from . . . 1765-1799."[23]

A. Using vs. Understanding Language

Legal practitioners have used these corpora to draw conclusions about the meanings of American laws. In other words, in legal corpus linguistics, judges and legal scholars interpret legal text by examining the language usage of those governed by it. Academic corpus linguistics examines data sets of language use to illuminate patterns structuring the way that participants in the corpus *actually use* the language they use in the context they use it in. Legal corpus linguistics, in contrast, examines data sets of language use to illuminate the way that participants in the corpus *would understand* language used by others in highly dissimilar contexts. Legal corpus linguistics looks for an audience's understanding of language by looking at that audience's language use.

This is a dramatic methodological departure. But legal corpus work has not articulated a theory of just how a corpus of language *use* reveals how people like those represented in the corpus would *understand* the language uses of others in other settings. Of course, it *may* be the case that people understand language usages just the way they themselves employ them. But that seems quite doubtful, even based on our own everyday experiences. Allow me to draw from my own.

Imagine, if you will, that an ingenious linguist has compiled a corpus of my language use across my everyday communicative interactions and written work. The linguist searches this corpus for every instance in which I have used the word "fire" or words related to it, determining how I tend to deploy it and what it tends to co-occur with. Imagine further that I am present one day when my teenage child shares some ice cream with a friend. "Bro," my child says appreciatively, "this ice cream is fire." The friend grunts agreement. I have spent some time around people of this demographic; and despite my best resolutions, I have also perused some social media. So as an audience to the ice cream interaction, I can (if only reluctantly) interpret my child's use of "fire" to mean, roughly, "really, really good."[24] The Bernstein Corpus would likely lack a single such usage; the closest relationship you'd get between ice cream and fire would probably be my musings on Baked Alaska. But, given my exposure to relevant speech styles, and my recognition that my child's speech is not my own, my ability to come to the "really, really good" interpretation is not particularly surprising.

People bump against different genres of language used for different purposes all the time. There's no particular reason to think that they treat all these different genres just like

[22] See Corpus of Historical American English (https://www.english-corpora.org/coha/).

[23] See Corpus of Founding Era American English (https://perma.cc/YPM3-B3RG) (explaining that the corpus includes presidential papers, laws, executive agency reports, legal treatises, pamphlets and periodicals, and books).

[24] Don't even get me started on "Bro."

their own speech. Minimally socially competent people can differentiate between an academic article, a news report, and a conversation with their neighbor. They don't necessarily assume that an academic article will sound just like they or their neighbor do. All the more so for a truly bizarre genre like statutory text. Indeed, linguistics itself shows that language users are sensitive to genre and sociocultural context.[25]

B. Statutes vs. Ordinary Language

So a corpus of ordinary language *use* does not provide evidence of how ordinary language users would *understand* the language of statutes—unless we could show that the language of statutes was the same as ordinary language use. If it were, then the corpus would represent it, too. But this is a fool's errand. Semantically, statutes deploy words in weird ways, sometimes giving them new meanings or meanings that last for only a few paragraphs. Syntactically, they can be extraordinarily complex, overloaded with subordinate clauses, mysterious cross-references, run-on sentences, and all sorts of things an English teacher would find objectionable. They're also often really, really long;[26] there's probably a reason that the legislators who vote on statutes usually don't read them.[27]

Statutes are also highly intertextual in unusual and unpredictable ways.[28] As Jesse Cross has explored in detail, one provision of one statute might say one thing in a way that seems pretty clear, but another provision in an entirely other statute might modify or even countermand the first one's seemingly clear statement.[29] Reading one statute—much less one statutory provision—in isolation simply can't reveal what "the law" is. But statutes often give no indication that you should go read anything else, much less what that other thing is. Cross points out that knowing how to trace out these "nontransparent[] interconnect[ions]" requires something more than ordinary skill.[30] It takes "regime literacy": the "ability to locate the full regime of relevant texts within [the] massive corpus" of statutory law, a literacy that "relies upon ex ante knowledge . . . of where interconnected provisions

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[25] See, e.g., Biber, supra note 18.

[26] Cross, supra note 14, at 495.

[27] See Jesse Cross, The Staffer's Error Doctrine, 56 Harv. J. on Legis. 83, 98 (2019) ("[M]embers of Congress typically do not conduct pre-enactment review of statutory text.") (citing Brian Christopher Jones, Don't Be Silly: Lawmakers "Rarely" Read Legislation and Oftentimes Don't Understand It … But That's Okay, 118 Penn. Statim 7, 13-14 (2013)).

[28] "[I]ntertextual relationships between a particular text and prior discourse . . . play a crucial role in shaping form, function, discourse structure, and meaning; . . . and in building competing perspectives on what is taking place." Charles L. Briggs & Richard Bauman, Genre, Intertextuality, and Social Power, 2 J. Linguistic Anthropology 131, 147 (1992). As the literary theorist Mikhail Bakhtin wrote, a linguistic object "reveals . . . the socially heteroglot multiplicity of its names, definitions[,] and value judgments," a "property of any discourse" that encapsulates the "unfolding of social heteroglossia surrounding" it—the texts that have gone before and that coexist with it. See M.M. Bakhtin, The Dialogic Imagination: Four Essays 278-79 (Michael Holquist ed., Caryl Emerson & Michael Holquist trans., 1981); see also Anya Bernstein, Before Interpretation, 84 U. Chi. L. Rev. 567, 573-77 (2017) (discussing intertextuality in statutory interpretation).

[29] Cross, supra note 14, at 497-512 (detailing numerous forms of nontransparent interconnectedness).

[30] Id. at 497.

exist" or should be sought.[31] As Cross notes, ordinary readers are, by definition, unlikely to possess this skill.[32]

We would be hard pressed to find any ordinary genre of speech or writing that shares statutes' key characteristics. Ordinary speakers don't speak at such length. Their English teachers have largely prevailed upon them to cut down on subordinate clauses and run-on sentences. If they violated basic conversational maxims the way statutes do, ordinary speakers would find themselves lacking opportunities for speaking: who wants to converse with someone who constantly contradicts his own assertions without noting or even acknowledging it?[33]

Statutes are also highly sociologically distinctive. Aside from the whole bicameralism and presentment rigamarole—rarely present in ordinary life—the language of statutes is often designed to be non-ordinary. Most federal statutes are addressed to the administrative agencies tasked with effectuating them.[34] And, as Jarrod Shobe has shown, legislative participants tend to be sensitive to agencies' linguistic needs: agencies often weigh in on emerging legislation to ensure that a statute's words match up with the agency's usages.[35] "The same terms frequently have . . . different meanings across agencies"; insofar as there is "consistency of . . . terminology usage" across statutory provisions, it "is agency-specific."[36] Again, there simply is no ordinary language genre that shares these characteristics. So there is no corpus that would reveal how ordinary people would speak, much less understand, statutory words "in the circumstances in which they were used."[37]

In sum, legal corpus linguistics uses evidence and tools developed for empirical analysis, but reaches conclusions divorced from both. Rather than *illuminating* patterns *in* its evidence, legal corpus linguistics draws *conclusions* about things *outside* that evidence—that is, things for which it has no evidence. It draws on non-statutory language use to attribute

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[31] Id.

[32] Id.

[33] Linguist Paul Grice proposed that linguistic communication generally conforms to high-level principles that provide background norms against which to interpret any particular communicative contribution. Paul Grice, Studies in the Way of Words 26 (1989) ("We might . . . formulate a rough general principle. . . : Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged."). These high-level principles, according to Grice, imply making an utterance appropriately "informative"; reasonably likely to be true; "relevant"; and relatively understandable. Id. at 26-27 (introducing Grice's "maxims"). Statutes' nontransparent interconnectivity, along with their semantic and syntactic choices, routinely violate such basic patterns of communication.

[34] See Anya Bernstein & Glen Staszewski, Populist Constitutionalism, 101 N.C. L. Rev. 1763, 1785 (2023) ("[T]he central conversation of governance is . . . between Congress and agencies.") (citing Lisa Schultz Bressman & Abbe R. Gluck, Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II, 66 Stan. L. Rev. 725, 772-74 (2014); Edward L. Rubin, Law and Legislation in the Administrative State, 89 Colum. L. Rev. 369, 372-74 (1989)).

[35] Jarrod Shobe, Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process, 85 Geo. Wash. L. Rev. 451, 519-22 (2017).

[36] Id. at 522.

[37] Holmes, supra note 1.

understandings of statutory language. And it presents those non-evidence-based understandings as the (or at least a) proper way to ascribe meaning to statutes.[38] Its evidence base cannot support either of these conclusions. Legal corpus linguistics thus turns empirical tools to prescriptive ends.

II. Implications for the Ordinary Meaning Canon

The critique of legal corpus linguistics I offer has obvious implications for the ordinary meaning principle more generally. The ordinary meaning principle asserts that courts should interpret statutory language as an ordinary reader would. And practitioners proceed as though looking at how ordinary speakers use language should reveal, transparently, how they understand quite different language in other settings. Traditionally, judges have used their own intuitions, dictionary definitions, and a motley assortment of whatever texts came to hand—from the King James *Bible* to Jane Austen novels to who knows what—to make claims about how particular words worked.[39] Eventually recognizing that many of the texts judges have used are not, in fact, particularly ordinary, some have turned to corpus linguistics tools to give more of an empirical grounding to claims about how ordinary people use language.

But if we treat ordinary meaning claims as empirical claims, we run into the same problem as those that legal corpus linguistics illuminates. There is no obvious relationship between a person's *use* of language in some ordinary genres and that same person's *understanding* of language used by different people in a very different genre. This is so even though the speech genres captured by the COCA and the COHA are, like statutes, mostly created for public consumption. We can imagine our target ordinary speakers watching, hearing, reading, and understanding the TV shows, radio programs, articles, and books that COCA captures. But that does not tell us much at all about how those ordinary speakers would *understand* the syntactically, semantically, and sociologically quite distinct genre of statutory writing. That's because, as I have explained, the way people use language can only tell us how they understand language if the target language resembles the language they use; otherwise we're just pretending that people understand all language the way they themselves happen to speak.

Of course, statutes do use words that are found in other contexts. And we can certainly look at the way individual words, or maybe little groups of words, are used across these very distinct settings. This is indeed what courts often claim to do. But this approach

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[38] Recently, some legal commentators have recognized that people with little connection to law often seek out experts to explain it to them. See, e.g., Basile, supra note 14, at 202 (noting that Justice Barrett has observed that ordinary people sometimes rely on legally trained professionals to understand legal language, putting courts in the position of "employing the perspective of the intermediaries on whom ordinary people rely"). This more sociologically realistic position would also make ordinary language use somewhat irrelevant to interpreting statutes.

[39] See generally Anya Bernstein, Democratizing Interpretation, 60 Wm. & Mary L. Rev. 435 (2018) (explaining and critiquing the ways courts outsource meaning production to legally irrelevant sources).

misapprehends the way language underlies meaning. Like other kinds of linguistic utterances, statutes are not simply collections of words and word groups that retain the same meaning across contexts. The words chosen operate *together* to create utterances that are thousands of pages long and interconnected in very complex ways.[40] They are selected from finite groups of other words that could reasonably have been chosen instead—a reasonableness determination that itself depends on sociocultural and institutional setting.[41] They present meaningful contrasts that express presumed background understandings and highlight exceptions or less obvious cases.[42] They presume sociocultural contexts which make them sensible.[43] And of course they rest on institutional patterns and standards, which for statutes include things like precedents and doctrines, along with other forms of intertextuality like nontransparent interconnectivity.

In short, statutes are a *genre* of language use based in a particular sociocultural setting, and the words they use gain meaning from the patterns and constraints of that genre.[44] Sure, a statute uses words that also appear elsewhere; but that can only give us a very general starting point for a vague idea of the likely range of meanings those words might generically have. It can't support a specific interpretation of *this* term, in *this* case.

In sum, ordinary meanings simply aren't up to revealing statutory meanings in any way supportable by an empirical inquiry into ordinary language use—not even if we just want to ask what that statutory language would mean to an ordinary language user. So the ordinary language imperative makes for a pretty feeble linguistic canon. Instead, it makes more sense to understand it as a policy preference about how we should treat statutory language—that is, a substantive canon.

III. Ordinary Meaning as a Substantive Canon

Ordinary meaning is not a linguistic canon that describes how people produce meaning through language, but a substantive canon that expresses a policy preference. Recognizing this helps counteract the impression, sometimes given by the misuse of empirical methodologies, that courts can perform the equivalent of a chemical assay on statutory text to figure out some meaning that inheres in it. In fact, like all interpreters, courts interact with statutes in social contexts and help produce their meanings—meanings crucial to the way that statutes get effectuated. That means courts interpreting statutes always have choices to make.

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[40] How words fit with the words around them expresses a *syntagmatic* relationship. See Bernstein, Legal Corpus Linguistics, supra note 15, at 1402-12 (describing a range of language factors that contribute to meaning).

[41] How words instantiate choice from a menu of available options demonstrates a choice from within a *paradigm*. See id.

[42] Speakers indicate deviations from background presumptions through *markedness*. See id.

[43] Such patterned sociocultural settings *frame* language use. See id.

[44] See also Chun Hin Jeffrey Tsoi, Congressional Outsiders and Textualist Non Sequitur, 59 U. Rich. L. Rev. 679, 689 (2024) (arguing that statutory interpretation theories that privilege the views of readers unconnected to institutions of governance devalue "the legislature duly elected by the people") (discussing Amy Coney Barrett, Congressional Insiders and Outsiders, 84 U. Chi. L. Rev. 2193 (2017)).

Pretending to outsource that work to ordinary people—or corpus software—does not get courts out of making those choices.[45]

Letting go of the pretense of empirical validity and embracing the inevitability of normative decisionmaking brings new considerations to the fore. We can take into account the practical effects of imposing this policy preference over, and in the context of, others. And we can ask how well positioned courts are to further the values expressed in this policy preference, and how they can do so most effectively.

A. Ordinary Meaning vs. Separated Powers

American federal statutes do not resemble ordinary language usage and are not particularly accessible to most ordinary language users.[46] Insisting that their isolated terms or phrases nevertheless bear the meanings those terms and phrases might have in other, more workaday contexts not only finds no support in empirical investigations of ordinary language use, it also flies in the face of the available evidence about statutes. What can justify such a counterfactual stance?

Maybe judges should treat statutory language this way to pressure Congress into changing the way it writes legislation, making statutes clearer and more accessible to the people they govern.[47] If that is the aspiration, it may be relevant to note that its practical effect appears to be negligible. Statutes have hardly gotten clearer in response to judges' demands.[48] There are probably many reasons for the enduring opacity of US statutes. But at least one probably has to do with their addressees: most federal statutes are written for administrative agency audiences. Judges might like to think that they are statutes' most important readers, but it is agencies that form statutes' primary conversation partner.[49] In this

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[45] See Bernstein, Legal Corpus Linguistics, supra note 15.

[46] It does not have to be thus, but thus it is in the United States. See generally Richard K. Neumann, Jr., The Modern Way to Write a Statute Is to Tell a Story, 28 Legal Writing: J. Legal Writing Inst. 217 (2024) (contrasting statutory drafting in the US and the UK and arguing that the UK style, which is structured more like a story, is clearer and more accessible).

[47] See Scalia & Garner, supra note 2, at 59 (arguing that, because linguistic canons articulate widespread "presumptions about what an intelligently produced text conveys," judges who apply them "promote clearer drafting," because "you can expect those who prepare legal documents competently to draft accordingly").

[48] See, e.g., Barbara Sinclair, Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress (1997) (detailing a wide range of developments in legislation that do not work against clearer or more accessible statutes); Wendy Wagner & Will Walker, Incomprehensible! A Study of How Our Legal System Encourages Incomprehensibility, Why It Matters, and What We Can Do About It (2019) (arguing that federal statutes are often convoluted to the point of being incomprehensible, sometimes on purpose).

[49] See Anya Bernstein, Judicial Accountability, 113 Geo. L.J. 651, 653 (2025) (arguing that regulatory statutes carve a place for courts "in a sense, to the side" of the "primary conversation" between legislatures and agencies).

setting, judges are more like bystanders who insist on butting in to correct people engaged in a conversation; it is hardly surprising that they are often ignored.[50]

Still, just because an aspiration is fruitless does not mean it's not worth pursuing. The bigger problem with the prescription of ordinary language use is that courts lack the authority to make it. The judicial power outlined in the Constitution does not include telling legislatures how to legislate. Neither did Congress give courts this power by statute. The Constitution's delineation of legislative power does not prescribe statutory style. There isn't even a common law tradition of judges instructing legislatures in legislation to point to—no background assumptions against which the Constitution was drafted, say, that could justify imposing extra-constitutional requirements. Courts just have no authority to decide how legislatures should write statutes or demand that they write statutes in some particular way. Indeed, the structure of our separated powers argues for the opposite: judges should do their best to comport their interpretations to the ways legislatures actually write statutes, in order to effectuate the laws that legislatures enacted. The ordinary meaning canon collides with the separation of powers.

B. Ordinary Meaning vs. Notice and Predictability

All of this is not to say that the ordinary meaning imperative is divorced from real, important normative commitments. It makes sense to insist that a population governed by a democratic government should have notice of the laws that rule it. And consistent notice should lead in turn to consistent application: people should know what is required of them and should be able to predict how those requirements will be enforced. These are worthy policy commitments indeed. In fact, even if courts are not authorized to tell legislatures how to write statutes, ignoring legislative practices in favor of ordinary meaning interpretation might yet be justified if it ends up providing notice and consistency.

Unfortunately, interpreting statutory terms as though they were being used in non-statutory contexts can't fulfill these desiderata, either. Because of the genre's distinctive qualities, statutory provisions *have* no reliable ordinary meaning. So there is no consistent, predictable way we can expect ordinary speakers to interpret the exquisite corpses that govern them. And there is no reason to think judges can devise such a way themselves, especially given how things have gone so far.

Just think of the poor drug dealer in *Chapman v. United States*—the case that asked whether the mandatory minimum sentence for selling LSD should consider the weight of

[50] Ryan Doerfler similarly imagines legislation as a kind of conversation, arguing that the materials relevant for interpretation should be those available to all conversational participants: legislators, courts, agencies, and the people governed by a statute. Ryan D. Doerfler, Who Cares How Congress Really Works?, 66 Duke L.J. 979, 1032 (2017). I agree that "mutually salient information" about what a statute might mean is important, id., but my image of what this conversation looks like—and who the relevant participants are—differs. Federal statutes are usually addressed not to the citizens they govern but to the agencies that implement them; and evidence suggests that legislation drafters do not consider judges central participants in that interaction. See Bressman & Gluck, supra note 34, at 728 (concluding that congressional staff who draft statutes work in "a primary interpretive conversation with agencies, not with courts"); id. at 774 (reporting as representative a legislative drafter comment that "[t]he last thing we want is for courts to decide what your law means").

the drug alone or include the weight of the carrier that transmitted it to a buyer.[51] Because LSD itself is almost weightless, dealers spray it onto something else to sell it.[52] That something can be a tab of paper or a sugar cube, or all manner of other things; in the example used in *Chapman*, it could be a glass of orange juice—or a pitcher.[53] The amount of LSD, the number of psychedelic trips, and the dealer's revenue don't change depending on what carrier the dealer uses. The people who sell and buy LSD ordinarily do so "by dosage, rather than by weight."[54]

A drug dealer perusing the sentencing statute could reasonably think that it would match his ordinary usage and treat LSD independently of its carrier, unlike some other drugs like heroin, whose dosage includes the filler it's cut with.[55] He might also have employed ordinary assumptions about criminal law—that the punishment should fit the crime, or that legislatures should not impose arbitrarily divergent punishments for similar kinds of conduct—to reckon that his sentence for selling some number of LSD doses wouldn't end up substantially higher than if he instead sold, say, the same number of heroin doses.[56]

But the drug dealer would be wrong, because rather than employing the ordinary understandings of the people penalized by the statute, the Supreme Court majority used the ordinary usage of a single word in the statute, as expressed in dictionaries. The statute provided mandatory minimum sentences for particular weights of "a 'mixture or substance containing a detectable amount of . . . LSD.'"[57] Imagine our drug dealer was somehow able to predict that the majority would focus in on the single word "mixture" rather than the import and coherence of the entire statute; or even that it would use dictionaries rather than the King James *Bible* or Jane Austen or who knows what to suss out that word's ordinary meaning. Even so, how could he know whether the majority would go with Webster's *Third*, which defined a mixture as "'two or more components . . . that however thoroughly commingled are regarded as retaining a separate existence,'"[58] or the *OED*, for which a mixture involved "'two substances blended together so that the particles of one are diffused among the particles of another'"?[59] And say he somehow predicted that he'd need to consider the

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[51] 500 U.S. 453 (1991). Rehnquist wrote the majority opinion, joined by White, Blackmun, O'Connor, Scalia, Kennedy, and Souter. Stevens dissented, joined by Marshall. Id. at 455. *Chapman* affirmed *United States v. Marshall*, 908 F.2d 1312 (7th Cir. 1990) (en banc); both *Chapman's* majority and dissent drew heavily on *Marshall* opinions.

[52] Id.

[53] See id.

[54] Id. at 475 (Stevens, J., dissenting).

[55] Id.

[56] Id. (noting that one would have to sell "between one and two million doses" of heroin to receive the same sentence as someone selling just twelve thousand doses of LSD on blotter paper).

[57] Id. at 455 (quoting 21 U.S.C. § 841(b)(1)(B)(v)).

[58] Id. at 462 (quoting Webster's Third New International Dictionary 1449 (Merriam 1986)).

[59] Id. (quoting 9 Oxford English Dictionary 921 (Clarendon 2d ed. 1989)).

two physically incompatible realities suggested by these definitions—"retaining a separate existence" versus "blended together," inter-diffused particles. How would our drug dealer possibly predict that the majority opinion would decide that LSD fit *both*? Yet so it did, explaining that LSD both "cannot be distinguished . . . nor easily separated from" its carrier and "can be released by dropping the [carrier] into a liquid."[60]

From the kind of ordinary meaning a court chooses, to the sources for ordinary meaning it prefers, to its selection and combination of available ordinary meanings—none of this is predictable to the ordinary person who stands to be sentenced under these laws. Looking to corpus linguistics would not have helped the drug dealer in *Chapman*, either, since there are many ways that "mixture" is used in ordinary speech, often depending on the context and genre of use. The Court would have had a wide range of options to choose from. And because in real-life usage words have a range of ordinary meanings and not just one,[61] a court could still combine separate, even incompatible, meanings to yield baffling *Chapman*-esque interpretations.

This is not to say that judges shouldn't use their language competency to help interpret statutes. Anyway, they can hardly avoid starting from what they know. But it does suggest that disputes about how some statutory term or provision should be interpreted can generally not be reliably settled by some external, objective, correct answer from the world of ordinary meaning. Rather, it would make sense for judges to take a range of ordinary meanings into account as they weigh other available evidence. Thinking about terminology, a judge can ask how a term is used or defined elsewhere in the statute and what other statutes have to say about it. Thinking about statutory structure, she can ask how the provision at issue fits into the statutory scheme, how the statute treats relevant related issues, and how other statutes govern related areas. Other clues can come from other relevant legislative enactments, decisions, and explanations.[62] The backdrop against which Congress legislated can provide valuable information too: contemporaneous statutory commands, common law principles, regulatory provisions, congressional drafting practices, and judicial interpretation trends.[63] And of course a judge has to pay attention to

[60] Id.

[61] See, e.g., Lawrence M. Solan, Corpus Linguistics as a Method of Legal Interpretation: Some Progress, Some Questions, 33 Int'l J. Semiotics L. 283, 286-88 (2020) (concluding that nineteenth-century Supreme Court opinions treated ordinary meaning as a range of meanings acceptable or understandable to members of a speech community, while contemporary Supreme Court opinions tend to treat it as the single most prevalent or prototypical usage—a finding that indicates that perhaps even the ordinary meaning of "ordinary meaning" involves a range of meanings).

[62] See, e.g., Victoria F. Nourse, A Decision Theory of Statutory Interpretation: Legislative History by the Rules, 122 Yale L.J. 70, 74 (2012) (arguing that using "Congress's own rules" about legislative process illuminates the decisions Congress makes as a body).

[63] Cf. Jarrod Shobe, Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting, 114 Colum. L. Rev. 807, 810 (2014) (arguing that "the evolution of the [legislative] drafting process" and the ways its "changes have affected the creation of statutes" should "bear on how statutes should be interpreted").

precedents and doctrines that cabin statutory meanings. Ordinary meaning can offer some input and suggest some possibilities; it can't answer the question.

IV. Supporting Notice and Predictability

What then to do about notice and predictability? Discussions of the ordinary meaning imperative sometimes proceed as though it were our only hope for approaching these important democratic and rule-of-law goals. Abandoning ordinary meaning in interpreting statutes seems tantamount to abandoning the people they rule. And once we acknowledge that ordinary meaning interpretation doesn't help those people much, either—just ask the drug dealer from *Chapman*—the situation seems hopeless.

So it is worth asking why individual statutory words being interpreted by courts, in particular, must bear the weight of notice and predictability. Think of all the things that have to happen for someone to feel the full brunt of the criminal law hammering down on them. A legislature criminalizes and penalizes some conduct. A person (allegedly) engages in conduct that has been criminalized. Maybe police decide to focus on him.[64] Prosecutors decide to bring charges. A lawyer prepares a defense of some sort. A jury decides to convict, or a prosecutor gets a plea deal. But in the end, the person's fate is determined by a judge flipping through dictionaries looking for the word "mixture."

Doesn't this seem like an oddly narrow way to fulfill such broad values as notice and predictability? Substantive canons are supposed to nudge judges to interpret statutes in ways that support normative policy commitments. And ensuring notice and predictability to people affected by the law is a real, important, normative policy commitment. But insisting on giving statutory words the meanings they'd have in other contexts just doesn't do much to support that commitment. As a substantive canon, ordinary meaning is a bust.

If anything, given my analysis here, it may be that supporting normative policy commitments to notice and predictability requires *rejecting* the ordinary meaning canon. But that does not mean all hope is lost. Perhaps there are better ways of pursuing the canon's underlying normative policy commitments than hanging them all on an individual word interpreted by an individual judge.[65]

A. Ordinary Values

Some of these other options might even keep a direct connection to the common people. Our imagined drug dealer trying to decipher the sentencing statute already suggested a couple of ideas along these lines. Rule of law principles suggest that legislative majorities should not create situations where similarly culpable people face vastly dissimilar

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[64] See Bernard E. Harcourt, Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age 137, 156 (2007) (noting that law enforcement may behave differently with respect to differently salient groups in ways that lead arrest patterns to diverge from legal violation patterns).

[65] See Cross, supra note 14, at 548 ("Do we revamp statutory text to comport with fair notice? Or do we expand discussions of fair notice beyond the text? Of these two options, only the latter seems realistic or desirable today.").

penalties for no apparent reason. For instance, we like to say that the law should treat like cases alike and avoid arbitrary distinctions in punishment. There's also something of a tradition of proportionality in our everyday discussions of law: many people share an intuition that we should "let the punishment fit the crime,"[66] avoiding arbitrarily harsh penalties.

People may not walk around phrasing these as explicit articulations of their personal democratic theory. But from kids talking about how teachers run a classroom to employees discussing managers to citizens seeking public services, it wouldn't be surprising to find these basic intuitions playing a part in common understandings of the ethics of governance. Of course, I make no empirical claims here. But it may well be that many ordinary people living in the US often share such basic intuitions about how law should function—at least as much as they share the intuition that a "mixture" involves "'two or more components that . . . retain[] a separate existence'"[67] while also being "'blended together so that the particles of one are diffused among the particles of another,'"[68] much less the intuition that decades of prison time should hang on how a court decides to cobble together a definition for the word "mixture."

Ordinary understandings of legitimate governance could have made a difference in *Chapman*. The majority's interpretation of the statute keyed the mandatory minimum to the almost weightless weight of LSD plus the irrelevant weight of its carrier, meaning that "a major wholesaler caught with 19,999 doses of pure LSD would not be subject to the 5-year mandatory minimum sentence, while a minor pusher with . . . one dose on a sugar cube, would."[69] This distinction as among sellers of LSD violates ordinary principles of treating like cases alike, avoiding arbitrary penalty distinctions, and keeping punishment proportional to culpability.[70] Same when we pitch the dealer of LSD against the dealer of other criminalized substances: the defendant who sells twelve thousand doses of LSD gets the same sentence as one who sells one million (or more) doses of heroin,[71] with no principled reason to justify that difference. The Court's message is clear: it's better to sell heroin in large quantities than LSD in small ones.

Pity the poor drug dealer who wasn't savvy enough to predict that *greater* culpability would yield a *shorter* prison sentence. The outcome might have been different if the majority had fixated less on "mixture" and kept more of an eye on ordinary understandings about

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[66] W.S. Gilbert & Arthur Sullivan, The Mikado; or, The Town of Titipu Act II (1911 [1885]).

[67] Chapman, 500 U.S. at 462 (quoting Webster's Third New International Dictionary 1449 (Merriam 1986)).

[68] Id. (quoting 9 Oxford English Dictionary 921 (Clarendon 2d ed. 1989)).

[69] Chapman, 500 U.S. at 458.

[70] See also id. at 475 (Stevens, J., dissenting) ("[T]he person who sells the single dose of LSD in a pitcher rather than in a glass will receive a substantially higher sentence.").

[71] Id. at note 12 (citing Marshall, 908 F.2d at 1334 (Posner, J., dissenting)); see also id. at 477 (Stevens, J., dissenting) ("Instead of punishing more severely those who sell large quantities of LSD, the Court would punish more severely those who sell small quantities of LSD in weighty carriers, and instead of sentencing in comparable ways those who sell different types of drugs, the Court would sentence those who sell LSD to longer terms than those who sell proportionately equivalent quantities of other equally dangerous drugs.").

legitimate governance.[72] If the Court had ruled along the lines of such ordinary understandings, the population the statute targeted would have been on notice of at least the general outlines of the duties and penalties the law imposed, and been placed in a position to predict, at least in a general way, the likely outcomes of some conduct relative to other available options. People might even be able to roughly predict that more culpability would go along with longer prison sentences. This version of ordinary understanding interpretation might have served the policy commitments of notice and predictability better than the single-word-centric approach.

B. Statutory and Institutional Distributions of Labor

Just as it seems unrealistic to insist that individual statutory words bear the burden of ensuring notice and predictability, so it seems like an awful lot to ask of judges. Perhaps notice and predictability are best supported not at the litigation stage but at other points in a statute's life course. After all, the "law" that governs people comes from a whole-of-government complex, including not just legislatures enacting statutes and courts interpreting them, but institutions that effectuate them on the ground. Maybe the whole of government is responsible for providing notice and ensuring predictability, too.

A statute itself often distributes these responsibilities. Many federal statutes require and authorize various bodies to specify general terms, issue interpretations, and generally set the terms for the real-world implementation of statutory provisions. That work is most often done by administrative agencies. The interpretations offered by way of statute effectuation are often themselves pretty specialized; a Federal Register post is hardly like a blog post. But they are generally much easier to understand than actual statutes: although they constitute their own sui generis genre, regulations tend to have fewer syntactic vagaries and less nontransparent interconnectivity than the statutes they're based on. And agencies are more available to the publics they regulate for communication, clarification, and input than Congress is.[73]

So a statute often distributes the labor of ensuring notice by telling agencies to make rules and publish explanations effectuating its provisions. And of course, a statute also distributes the power to implement its provisions through other coercive means. In the criminal law arena, some of that distribution is to criminal law enforcers: police and prosecutors. Surely much of the onus of providing notice and predictability should rest with them. These are government agencies that are regularly in touch with the people they help govern. Explaining what they think a law means, how they plan to effectuate it, and why

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[72] Id. at 469 ("[T]he severity of the sentences in LSD cases would be comparable to those in other drug cases . . . if the weight of the LSD carrier were disregarded.") (citing Marshall, 908 F.2d at 1335 (Posner, J., dissenting)).

[73] See generally Anya Bernstein, Glen Staszewski & Wendy Wagner, Sidelining the Public, 68 Ariz. L. Rev. 295 (2026) (comparing public engagement in Congress and federal agencies).

their effectuation comports with the requirements of the statute should be a baseline requirement of democratically accountable policing and prosecuting. It's something courts could use as a substantive canon, even.

It turns out, then, that the ordinary meaning imperative could have significant implications for law enforcement bodies. It suggests treating them first and foremost as administrative agencies that owe accountability both to the statutes they effectuate and to the population they help govern.[74] Such administrative accountability "requires government actors to justify their positions so that others can evaluate, challenge, or override them," at the very least.[75]

Law enforcers can support a commitment to notice by clarifying the contours of statutes that criminalize conduct in ways that alert people to constraints on their conduct before they find themselves stuck between a judge and a dictionary. And these institutions can support predictability by informing people under their purview how they plan to carry out their enforcement duties and then sticking by those plans. This kind of communication can also support democratic legitimacy more generally by giving ordinary people opportunities to contest these plans and interpretations—giving people a role in determining how they should be governed. In other words, taking the commitments of the ordinary meaning imperative seriously suggests moving toward more notice and more comment in the law enforcement arena. That would serve the values underlying the ordinary meaning imperative more effectively, and more realistically, than pretending that ordinary people speak in the language of statutes.

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[74] See Christopher Slobogin, Policing as Administration, 165 U. Pa. L. Rev. 91, 95 (2016) ("[P]olice departments are agencies, and as such should have to abide by the same constraints that govern other agencies."); but see Maria Ponomarenko, Rethinking Police Rulemaking, 114 Nw. U. L. Rev. 1, 6-7 (2019) (arguing that rulemaking in the police context is impracticable and that policing should instead introduce "regulatory intermediaries" who "can stand in for the public and help govern the police").

[75] Anya Bernstein & Cristina Rodríguez, The Accountable Bureaucrat, 132 Yale L.J. 1600, 1604 (2023); see Cross, supra note 14, at 550 (arguing for "an increased focus on intermediaries" who make the law more accessible to ordinary publics).