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The Dilemma of Interstatutory Interpretation

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The Dilemma of Interstatutory Interpretation

Anuj C. Desai*

Abstract

Courts engage in interstatutory cross-referencing all the time, relying on one statute to help interpret another. Yet, neither courts nor scholars have ever had a satisfactory theory for determining when it is appropriate. Is it okay to rely on any other statute as an interpretive aid? Or, are there limits to the practice? If so, what are they? To assess when interstatutory cross-referencing is appropriate, I focus on one common form of the technique, the in pari materia doctrine. When a court concludes that two statutes are in pari materia or (translating the Latin) “on the same subject,” the court then treats the two statutes as though they were one. The doctrine thus permits judges to use ordinary doctrines of intra-statute interpretation across the two statutes. Determining that two statutes are “on the same subject” thus gives interpreters a powerful tool of interstatutory interpretation.

How, then, should courts determine whether to treat two statutes as one? If we frame the question through the lens of the two currently predominant theories of statutory interpretation—textualism and intentionalism—we can see that

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the traditional approach of asking about the statutes’ “subject matter” in the abstract makes little sense. For textualist judges who care about objective meaning, it makes more sense to engage in interstatutory cross-referencing if and only if the audience for the two statutes—the appropriately informed objective reader of the statutes—is the same. For interpreters who care about subjective legislative intent, interstatutory cross-referencing would generally be appropriate if and only if the two statutes were drafted by and came through the same Congressional committees.

Even if one rejects my proposed approaches, thinking about how to fit interstatutory cross-referencing into modern theories of statutory interpretation raises some confounding issues for those theories. In particular, it requires textualists to articulate explicitly who the audience for any given statute is, for without doing so, the textualist has no theoretical basis for determining when interstatutory cross-referencing is appropriate and when it is not. Thus, irrespective of the specifics of my proposals, looking at the ancient doctrine of in pari materia through the lens of modern theories of statutory interpretation sheds light on important questions about statutory interpretation that courts and theorists have largely ignored.

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I. Introduction

Statutory interpretation theory has failed to grapple seriously with a common technique in statutory interpretation: interstatutory cross-referencing.¹ Courts do it all the time,² and

1. I borrow the term from Professor William Buzbee. See William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 174 (2000); see also Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 32 (1998) (discussing the use of interstatutory cross-referencing as part of the Court’s “integrative function in the larger lawmaking process”).

2. See, e.g., Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court’s First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 234–36 (2010) (showing that for the 166 statutory interpretation cases determined by the Roberts Court during its first three and a half terms, the Supreme Court referenced other statutes 39.2% of the time).

yet scholars and courts have no theoretical framework for when it is appropriate. To start, it is not even clear as an analytical matter whether a second statute, one that is not the statute being interpreted, is an intrinsic or extrinsic aid to interpretation.³ Is a cross-referenced statute just part of the broader context for the statutory provision being interpreted? Or, because it is outside the four corners of the statute being interpreted, is it thus effectively comparable to, say, legislative history? Or, is it comparable to looking at a dictionary as an interpretive aid, which despite being an “extrinsic” aid in literal terms, is viewed as an acceptable source by virtually all judges, including textualists who reject the use of legislative history? So, for example, is the fee-shifting provision of the Toxic Substances Control Act part of the broader context for understanding the fee-shifting provisions in the Civil Rights Act Amendments of 1976?⁴ Or, should courts ignore it because it is a different statute altogether? How should courts, whether using a textualist or intentionalist methodology, decide whether it is appropriate to look to the former when interpreting the latter? It turns out, courts have no good way to answer this question, and, for all the focus on the theory of statutory interpretation over the last four decades,⁵ scholars have not answered the question in any analytically satisfying way either.⁶

3. Compare, e.g., NORMAN J. SINGER, 2B STATUTES AND STATUTORY CONSTRUCTION § 51.01, at 170 (6th ed. 2000) (referring to other statutes as an “extrinsic aid”), with *id.* § 51.01, at 172–73 (referring to the technique as “a variation of the principle that all parts of a [single] statute should . . . be construed together”).

4. See *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 88 (1991) (using the fee-shifting provisions the Toxic Substances Control Act and others to interpret whether expert fees in civil rights litigation could be shifted to the losing party under 42 U.S.C. § 1988) (citing 42 U.S.C. § 2000e-5(k) (1988)); see generally *infra* Part III.D.

5. See Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 3 (2003) (referring to “the continuing cascade of statutory interpretation theories over the past twenty years”).

6. See Deborah W. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 866 (2012) (noting that “[q]uestions regarding how courts determine whether a valid statutory precedent controls a case, particularly when the case arose under a different statute, . . . have been far less considered [by scholars]”).

In this Article, I address the question of when a court should cross-reference another statute to help its interpretive process, but I do so through the lens of modern theories of statutory interpretation. I take no position on the appropriateness of any given methodology, but instead start with the two principal modalities of statutory interpretation in the federal courts today: textualism and intentionalism.⁷ I focus on a long-standing doctrine, one that dates at least as far back as Blackstone,⁸ the so-called “*in pari materia*” (or “on the same subject”) doctrine, and seek to understand when that doctrine should apply based on those two modalities.

As we will see, the payoff is significant. By doing this, I address the question of when courts should engage in interstatutory cross-referencing. More importantly though, viewing the question through the lens of modern theories of statutory interpretation not only helps us understand interstatutory cross-referencing, but also reflects back to shed light on the theories of statutory interpretation themselves.

The Article proceeds as follows: Part II explains what the *in pari materia* doctrine is and then explains where it fits jurisprudentially as a technique in statutory interpretation.

Part III looks at interstatutory cross-referencing through the lens of textualism as a modality in statutory interpretation. For a textualist, the question of when interstatutory cross-referencing is appropriate has no easy answer: there is no plain meaning to rely on, no dictionary to turn to, and no linguistic canon to apply. Instead, one must look to the underlying rationales of textualism and to the notion of the appropriately informed objective reader.

7. As a preliminary matter, I should note that my discussion throughout is premised on the interpretation of *federal* statutes in federal court. Many of the principles might apply, with appropriate adjustments, to the interpretation of state statutes. But, as will be apparent shortly, because my proposals are based on both the lawmaking process and the audience for particular statutes, they depend on factors that will vary between the federal and state levels and from state to state. More on why I have chosen intentionalism, but not purposivism below. *See infra* Part IV.A.

8. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *60 n.54 (14th ed. 1803) (“It is an established rule of construction that statutes *in pari materia*, or upon the same subject, must be construed with reference to each other.”).

As I explain in more detail, to be true to those rationales and to textualism's emphasis on the objective meaning of the text requires consideration of factors outside of the textualist's usual toolbox: it requires an explicit articulation of who the statutory reader for a particular statute is and whether the audience for the two statutes is the same. I go further and argue that doing this effectively requires the interpreter to understand the boundaries of legal practice areas in the real world of lawyering, but even if one disagrees with that claim, the question of determining a statute's audience cannot be avoided.

Part IV turns to the intentionalist modality in statutory interpretation as a lens for determining when interstatutory cross-referencing is appropriate. In contrast to textualists, who are focused on statutory readers, subjective intentionalists focus on statutory authors. I argue that a subjective intentionalist can make a first-cut probabilistic determination of whether two statutes are "on the same subject" based on whether the two statutes originated from the same Congressional committee. Because this is obviously a proposal rooted in and dependent on the lawmaking process, I also address the ways in which changes to the lawmaking process might affect the proposal.

I conclude with some reflections on the implications all this has for statutory interpretation more broadly.

II. Statutes In Pari Materia

The *in pari materia* doctrine is one of numerous ways to engage in interstatutory cross-referencing, to use one statute to help understand another. When a court concludes that two statutes are *in pari materia*, or (translating the Latin) "on the same subject," the court then treats the two statutes as though they were one.⁹ Provisions within the two statutes must thus be harmonized.¹⁰

9. See, e.g., *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) (noting that statutes addressing the same subject should be read "as if they were one law") (internal citations omitted).

10. See NORMAN J. SINGER & J.D. SHAMBIE SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 51.2 (7th ed. 2019) ("[C]ourts try to construe [even]

In applying the doctrine, courts tend to approach the project of harmonization through one of two different lenses. Traditionally, courts would harmonize to “make sense” of the two statutes together.¹¹ In essence, this meant reconciling potentially conflicting provisions so that each had independent meaning or ensuring that the two statutes worked together in a coherent fashion. Doing so would often entail some measure of policy judgment. In recent years, however, with the rise of textualism as a modality in statutory interpretation, the approach to harmonization has at times taken on a more textualist tint.¹² Rather than harmonize to make policy sense of the two statutes as a pragmatic matter, courts will now at times turn to linguistic canons that they might have used to interpret *within* a statute—canons such as the presumption of consistent usage or arguments from negative implication (such as the *expressio unius* canon¹³)—to ensure that the two statutes are linguistically coherent.¹⁴ In essence, the idea is that “treating the two statutes as one” means harmonizing them *linguistically*, rather than as a policy matter.¹⁵

My focus in this Article though will not be on how to apply the *in pari materia* doctrine. The differing approaches to applying the doctrine largely reflect the core differences in interpretive methodology in general. Textualists view harmonization as a process of linguistic harmonization,¹⁶ while purposivists (or,

apparently conflicting statutes on the same subject harmoniously . . .”).

11. See generally *id.*

12. See, e.g., *Wachovia Bank v. Schmidt*, 388 F.3d 414, 424 (4th Cir. 2004), *rev'd*, 546 U.S. 303 (2006), *remanded*, 445 F.3d 762 (4th Cir. 2006) (“[A]pplication of the *in pari materia* canon reflects the judgment that Congress, like other rational speakers, uses words consistently when speaking about similar subjects, *regardless* of its generalized purposes.”).

13. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 107–11 (“In English, it is known as the negative-implication canon.”).

14. See, e.g., *Teles AG v. Kappos*, 846 F. Supp. 2d 102, 111–14 (D.D.C. 2012) (using the *expressio unius* canon to ensure linguistic harmonization between statutes interpreted *in pari materia*).

15. See *Wachovia Bank*, 388 F.3d at 422 (applying the *in pari materia* doctrine to conclude that the word “located” had to have the same meaning in two different statutes).

16. As I explain in more detail below, textualists engage in linguistic

perhaps, in this day and age, I should say “those judges who are less wedded to a purely textualist modality”¹⁷ view harmonization as part of a goal of policy coherence, coherence in the real world that the two statutes inhabit. While this is of some interest, it probably ranks as a footnote in the broader debate about statutory interpretation.

Instead, I want to focus on the determination of *whether* two statutes are *in pari materia*, what I will call the same-subject determination or Step Zero of the *in pari materia* doctrine.¹⁸ It is only after a court answers this question in the affirmative that the court can then treat the two statutes as one and then use the powerful tools of harmonization in the interpretive process.

The way in which courts make this determination tends to be ad hoc and cursorily made, with little explanation.¹⁹ Courts have no analytical tools for determining when two statutes are on the same subject.²⁰ Indeed, it is difficult to escape the conclusion that the determination is made intuitively and may well be made *after* the judge has decided how the statute should ultimately be interpreted. In other words, it seems likely that the determination is not in fact one of the levers of decision, but is instead a results-oriented fig leaf.

harmonization regularly, using linguistic canons such as the presumption of consistent usage or the canon of meaningful variation. *See infra* Part II.A. The phenomenon I address here is the determination of when a textualist should use such a technique *across* statutes. *See infra* Part II.A.

17. *See* Harvard Law School, *The Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 8:28 (Nov. 25, 2015), <https://perma.cc/TK6F-X5X5> (last visited Nov. 12, 2019) (claiming that every current Supreme Court Justice is in some sense a textualist, something that could not have been said before Justice Scalia joined the bench) (on file with the Washington and Lee Law Review).

18. With apologies to Professors Merrill and Hickman. *See* Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 912–14 (2001) (referring to the determination of whether *Chevron* applies as “*Chevron Step Zero*”); *see also* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

19. *Cf.* Widiss, *supra* note 6, at 872 (noting that “it can be difficult to guess *ex ante* which statutes courts will determine to be ‘related’”).

20. *See, e.g.*, *Wachovia Bank v. Schmidt*, 546 U.S. 303, 315–16 (2006) (providing little guidance for determining whether statutes should be read *in pari materia* aside from noting that subject-matter jurisdiction and venue are not “concepts of the same order”).

Whether I am right about this or not, the question the same-subject determination asks a court to consider is a crucial one in many interpretive disputes. Such disputes are, moreover, staples of the statutory-interpretation canon and are, for good reason, embedded in the pedagogy of statutory interpretation.²¹ No good lawyer can ignore interstatutory interpretation. Yet, scholars have largely ignored the question, perhaps in part because the courts have been so lackadaisical when addressing it.

As I hope to show, however, the question is deeply interesting from a jurisprudential standpoint and helps shed light on important questions about the modern theory and practice of statutory interpretation. By looking at this ancient doctrine through the lens of modern modalities of statutory interpretation, we can see aspects of the theories underlying those modalities in a new light.

A. *In Pari Materia Explained: How Courts Determine Whether Two Statutes Are on “the Same Subject”*

At its core, the *in pari materia* doctrine is less a doctrine and more of an underlying principle, the notion that if two statutes are on the same subject, they must cohere, they must harmonize. One way to view the *in pari materia* doctrine then is as a pragmatic tool that courts can use to make sense of an area of law.²²

The Supreme Court’s explicit references to the *in pari materia* doctrine have been few and far between,²³ but even in

21. See generally, e.g., CALEB NELSON, STATUTORY INTERPRETATION 486–524 (2011); WILLIAM N. ESKRIDGE JR. ET AL., LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 859–66 (5th ed. 2014); WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS 857–69 (5th ed. 2009); LINDA D. JELLUM & DAVID CHARLES HRICK, MODERN STATUTORY INTERPRETATION 151–60 (2d ed. 2009).

22. See SCALIA & GARNER, *supra* note 13, at 252 (“The canon is . . . based upon a realistic assessment of what the legislature ought to have meant . . . [T]he body of the law should make sense.”).

23. Since 1995, the Supreme Court has referenced the *in pari materia* doctrine in only twenty-two cases. See, e.g., Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53, 61–64 (2006) (“Given these linguistic differences, the question here is *not* whether identical or similar words should be read *in pari*

these few cases, one can see that the Court has no theoretical framework, or even consistent approach, to the same-subject determination.²⁴ Importantly, the Court has not even tried to articulate a theoretical underpinning for the doctrine other than that statutes on the same subject matter must cohere.²⁵ Though some scholars have made arguments about specific cases or aspects of the problem,²⁶ no one—whether on the Court, in academia, or otherwise—has attempted to connect the same-subject determination to the theories and modalities of statutory interpretation.

Let us start with the Court’s most recent case addressing the *in pari materia* doctrine, *Wachovia Bank v. Schmidt*.²⁷ In

materia to mean the same thing.” (emphasis added)); *United States v. Estate of Romani*, 523 U.S. 517, 531 (1998) (“[T]he priority act and the bankruptcy laws ‘were to be regarded as *in pari materia*, and both were unqualified; . . . as neither contained any qualification, none could be interpolated.” (quoting *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224 U.S. 152, 158 (1912))); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711–12 (1996) (applying former precedent to reapply the *in pari materia* doctrine (citing *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995))). As I noted, however, the basic technique of interstatutory cross-referencing, including in ways that amount to a use of the *in pari materia* doctrine, are widespread. See *supra* note 2 and accompanying text.

24. Compare *Wachovia Bank*, 546 U.S. at 315–16 (rejecting the *in pari materia* doctrine’s application where matters were not sufficiently related), with *Burlington Northern & Santa Fe Ry.*, 548 U.S. at 61–63 (refusing to use the *in pari materia* doctrine due to differences in the language of the statute as a whole).

25. Notably, Justice Scalia rests the doctrine on the principle that “the body of the law should make sense.” See SCALIA & GARNER, *supra* note 13, at 252 (“It rests on two sound principles: (1) that the body of the law should make sense, and (2) that it is the responsibility of the courts, within the permissible meanings of the text, to make it so.”). The cases confirm Justice Scalia’s characterization. See, e.g., *Things Remembered, Inc.*, 516 U.S. at 136 (“Courts serve the legislature’s purpose best by reading [the statute] to make sense and avoid nonsense, and to fit harmoniously within a set of provisions composing a coherent chapter of the Judicial Procedure part of the United States Code.”); see generally SUTHERLAND, *supra* note 10, at § 51.2.

26. See, e.g., Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways that Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177, 203 (2017) (arguing that, “[a]bsent clear evidence to the contrary, consistency presumptions should not be applied . . . across different statutes”).

27. 546 U.S. 303 (2006).

Wachovia Bank, the Court unanimously held that a venue statute was not *in pari materia* with a subject-matter jurisdiction statute.²⁸ The Court’s reasoning, though, has little potential applicability beyond the specific statutes it addressed. To see why, the case is worth exploring in some detail.

Wachovia Bank involved a so-called “national bank”²⁹ that brought a diversity action against South Carolina citizens in federal court in South Carolina.³⁰ Wachovia’s main office was in North Carolina, but it had branch offices in, among other places, South Carolina.³¹ The legal question was thus whether, for diversity purposes, Wachovia was a citizen solely of North Carolina where it had its main office, or also of all those other places where it had branch offices.³² If a national bank were deemed to be a citizen of every state in which it has a branch office, then Wachovia would be a citizen of (among other places) South Carolina, and federal courts would thus not have jurisdiction over any action against South Carolina citizens based on diversity jurisdiction.³³

For purposes of diversity jurisdiction, a national bank’s citizenship is based on 28 U.S.C. § 1348, which provides that national banks are “deemed citizens of the States in which they are respectively located.”³⁴ The question in *Wachovia Bank* thus centered on the meaning of the word “located”: Is a national bank “located” solely in the state where its main office resides or is it also “located” in every state in which it has a branch office?³⁵ The key problem, at least from an intentionalist, “faithful servant”

28. *See id.* at 316.

29. *See id.* at 306 (“[N]ational banks . . . [are] corporate entities chartered not by any State, but by the Comptroller of the Currency of the U.S. Treasury.”).

30. *See id.* at 308 (“[C]itizens of South Carolina sued Wachovia in a South Carolina state court for fraudulently inducing them to participate in an illegitimate tax shelter. . . . Wachovia [then] filed a petition [in federal court] seeking to compel arbitration. . . . As the sole basis for federal-court jurisdiction, Wachovia alleged the parties’ diverse citizenship.”).

31. *See id.* at 307.

32. *See id.* at 306–07.

33. *See* 28 U.S.C. § 1332(a) (2018) (detailing the instances where federal courts would have diversity jurisdiction over the parties).

34. *Id.* § 1348.

35. *See supra* note 32 and accompanying text.

approach to statutory interpretation, was that Congress clearly did not contemplate the issue: when Congress adopted the statute, interstate banking was not permitted and thus national banks were not allowed to have branch offices in another state.³⁶ National banks were first authorized by Congress in 1863,³⁷ and the relevant statutory language dated back to 1887,³⁸ with an important predecessor statute that Congress had adopted in 1882.³⁹ Yet, Congress didn't authorize national banks even to have branches at all until the 1920s⁴⁰ and didn't provide general authorization for national banks to open branches in another state until 1994, more than a century later.⁴¹ Thus, when it adopted the relevant language in the jurisdiction statute in the nineteenth century, Congress clearly did not anticipate—indeed, could not have anticipated—a national bank with branch offices in another state.⁴² The word “located” obviously referred to the one state where the bank had its main office.⁴³ The jurisdiction

36. See Paul Lund, *National Banks and Diversity Jurisdiction*, 46 U. LOUISVILLE L. REV. 73, 79–80 (2007) (“When Congress first authorized the creation of national banks, they were not allowed to operate any branch offices.”).

37. See *id.* at 76 (“Congress first authorized the creation of national banks in 1863, at the height of the Civil War.”).

38. See *id.* at 81 (describing briefly the 1887 Act's citizenship language).

39. See *id.* at 80–81 (“The 1882 Act provided that federal court jurisdiction over suits involving national banks was to ‘be the same as, and not other than’ suits involving a state bank, thereby eliminating automatic federal question jurisdiction over all cases to which a national bank was a party.”); Act of July 12, 1882, ch. 290, § 4, 22 Stat. 162, 163.

40. See Christian A. Johnson & Tara Rice, *Assessing a Decade of Interstate Bank Branching*, 65 WASH. & LEE L. REV. 73, 81 (2008) (“In 1922, . . . the [Office of the Comptroller of the Currency (OCC)] . . . permitted national banks to establish branches only within their home city, provided, however, that a state bank was permitted to operate branches within that city.”).

41. See generally Rieggle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, § 101, 108 Stat. 2338, 2339–43.

42. See Lund, *supra* note 36, at 107

Authorization of interstate branch banking by national banks was still many years in the future at the time the statutory language now found in [28 U.S.C. §] 1348 originated or even at the time of its most recent recodification. Thus, the effect that branch banking would create on national banks' access to diversity jurisdiction could not possibly have crossed Congress's mind.

43. See *id.* at 82–83 (describing how few courts had analyzed the “located”

statute was recodified in 1948, when at least some national banks had branch offices, but even then, it did not matter for purposes of diversity jurisdiction whether the word “located” meant just where the bank’s main office was or encompassed all of its branch offices too: either way, the bank was “located” in only one state. The expansion of national banks to interstate banking thus exposed what Professor Caleb Nelson has rightly referred to as a latent ambiguity in the word “located,” one that did not exist at the time of passage, either from a subjective or objective perspective.⁴⁴

The Court concluded that, for jurisdictional purposes, a national bank was “located” only where its designated main office was.⁴⁵ Much of its reasoning is not important to me. What is important though is its rejection of an argument based on the *in pari materia* doctrine. The Fourth Circuit had concluded that a national bank was “located” anywhere it had a branch office, and it had relied in part on the fact that the Supreme Court had previously interpreted the term “located” in a venue statute for national banks “as encompassing any county in which a bank maintains a branch office.”⁴⁶ The very same term—“located”—encompassed branch offices in the venue statute, and so, the Fourth Circuit had reasoned, since the venue statute and the jurisdiction statute were *in pari materia*, the word “located” should have the same meaning in the jurisdiction statute.⁴⁷ Importantly, for my purposes, the Fourth Circuit had based its conclusion that the two statutes were *in pari materia*—i.e., it had based the same-subject determination—on the fact that “the jurisdiction and venue statutes pertain to the

language issue for most of the statute’s history because it had been a non-issue prior to authorization of bank branching).

44. See NELSON, *supra* note 21, at 505 (stating that “from the standpoint of the enacting Congress, the word ‘located’ . . . may have harbored a latent ambiguity”).

45. See *Wachovia Bank v. Schmidt*, 546 U.S. 303, 318 (2006) (“Reading § 1348 in this context, one would sensibly ‘locate’ a national bank for . . . qualification for diversity jurisdiction, in the State designated in its articles of association as its main office.”).

46. *Id.* at 313.

47. See *Wachovia Bank*, 388 F.3d at 418–20 (using the *in pari materia* doctrine to construe “located” to mean wherever a bank has a branch).

same subject matter, namely the amenability of national banking associations to suit in federal court.”⁴⁸ Thus, the lower court explicitly delineated a particular “subject matter,” one that on first blush seems pretty narrow—“the amenability of national banking associations to suit in federal court”—and then held that both provisions—the venue provision and the jurisdiction provision—were within that “subject matter.”⁴⁹ Only then did the Fourth Circuit go on to conclude that the word “located” thus had to have the same meaning in both statutes.⁵⁰ This is a classic textualist approach to the *in pari materia* doctrine: where two statutes are *in pari materia*, they must be treated as one *linguistically*, and so the court can apply a linguistic canon across the two statutes—here, the presumption of consistent usage. Perhaps that is not the right way to apply the doctrine—perhaps the court should have attempted to reconcile the policies of the two statutes—but given how narrow the “subject matter” was, it is hard to imagine rejecting the court’s same-subject determination. Yet, the Supreme Court did . . . and did so unanimously.⁵¹

The Court concluded that the venue statute and the jurisdiction statute were not *in pari materia*, despite both statutes applying narrowly only to national banks. After noting that, with respect to national banks in particular, the word “located” was “a chameleon word,” sometimes meaning only the

48. *Id.* at 432.

49. *See id.* at 421–22

The Supreme Court’s interpretation of ‘located’ in *Bougas* controls the meaning of ‘located’ in [§] 1348 Because the jurisdiction and venue statutes pertain to the same subject matter, namely the amenability of national banking associations to suit in federal court, under the *in pari materia* canon the two statutes should be interpreted as using the same vocabulary consistently to discuss this same subject matter.

50. *See id.* at 423 (“Therefore, the two statutes should be treated as *in pari materia* and the Supreme Court’s interpretation of ‘located’ in *Bougas* must control the meaning of the same term in [§] 1348.”); *supra* note 49 and accompanying text regarding *Bougas*.

51. *See Wachovia Bank*, 546 U.S. at 315–16.

bank's main office and at other times including the branch offices,⁵² the Court held that

[v]enue and subject-matter jurisdiction are not concepts of the same order. Venue is largely a matter of litigational convenience; accordingly, it is waived if not timely raised. Subject-matter jurisdiction, on the other hand, concerns a court's competence to adjudicate a particular category of cases; a matter far weightier than venue, subject-matter jurisdiction must be considered by the court on its own motion, even if no party raises an objection.⁵³

Therefore, the Court concluded, the fact that it had previously held that the word "located" encompassed branch offices in the venue statute did not mean that it had to interpret "located" the same way in the jurisdiction statute.⁵⁴

Despite concluding that the *in pari materia* doctrine did not apply, however, the Court in effect went on to apply the policy-coherence approach to the *in pari materia* doctrine. One important policy rationale for why the term "located" in the venue statute included all of the national bank's branch offices, the Court concluded, was treating national banks the same as state-chartered banks and corporations.⁵⁵ In contrast, if the word "located" in the jurisdiction statute included all of a national bank's branch offices, this would result in national banks having far more limited access to federal court under diversity jurisdiction than an ordinary corporation or state-chartered

52. *See id.* at 313–14, 318 (“To summarize, ‘located,’ as its appearances in the banking laws reveal, . . . is a chameleon word; its meaning depends on the context in and purpose for which it is used.”).

53. *Id.* at 316 (citations omitted).

54. *See id.* at 319

The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.

(quoting Walter Wheeler Cook, “*Substance*” and “*Procedure*” in the *Conflict of Laws*, 42 *YALE L.J.* 333, 337 (1933)).

55. *See id.* at 316–17 (“[T]his Court’s reading of the venue provision in *Bougas* effectively aligned the treatment of national banks for venue purposes with the treatment of state banks and corporations.”).

bank.⁵⁶ For diversity-jurisdiction purposes, an ordinary corporation is a citizen only of the state in which it is incorporated and the state of its principal place of business, at most two, and often just one, state.⁵⁷ In contrast, if the word “located” in the national bank jurisdiction statute included all of a national bank’s branch offices, the bank would be a citizen of multiple states—in Wachovia’s case, sixteen states—thereby severely limiting a national bank’s access to federal court under diversity jurisdiction.⁵⁸

In other words, despite the Court’s explicit rejection of the argument that the venue statute and the jurisdiction statute were *in pari materia*, we can see *Wachovia Bank* as in some sense an application of the *in pari materia* doctrine.⁵⁹ The Court effectively concluded that the two statutes both had a common policy rationale, treating national banks the same as (or, at least as similar as possible to) other corporations, and the word “located” was to be interpreted in both statutes to further that same policy goal.⁶⁰ Of course, this meant that the word “located” meant different things in the two different statutes.⁶¹ But still, this sort of reasoning is an attempt to create policy coherence

56. See *id.* at 319 (“The resulting Fourth Circuit decision rendered national banks singularly disfavored corporate bodies with regard to their access to federal courts.”).

57. See *id.* at 318 (“[A] corporation’s citizenship derives, for diversity jurisdiction purposes, from its State of incorporation and principal place of business. It is not deemed a citizen of every State in which it conducts business or is otherwise amenable to personal jurisdiction.” (citing 28 U.S.C. § 1332 (2018))).

58. See *id.* at 317 (“[W]hile corporations ordinarily rank as citizens of at most 2 States, Wachovia, under the [Fourth Circuit’s] novel citizenship rule, would be a citizen of 16 States.”).

59. See NELSON, *supra* note 21, at 502.

60. See *Wachovia Bank v. Schmidt*, 546 U.S. 303, 318 (2006) (“Reading § 1348 in [the corporate citizenship] context, one would sensibly ‘locate’ a national bank for the very same purpose, *i.e.*, a qualification for diversity jurisdiction in the State designated in its articles of association as its main office.”).

61. Compare *id.* at 318–19 (finding the bank was “located” only “in the State designated in its articles of association as its main office”), with *Citizens & S. Nat’l Bank v. Bougas*, 434 U.S. 35, 42–45 (1977) (determining that for purposes of the venue statute, “located” meant all places in which a bank had branches).

across the two statutes—indeed, policy coherence between the two statutes and those involving other corporations as well, an even broader and deeper policy coherence—precisely what the *in pari materia* doctrine has long been used to do.⁶² Justice Ginsburg’s conclusion that the two statutes were not *in pari materia* reflected the framing of the application of the *in pari materia* doctrine in terms of *linguistic* coherence, not policy coherence. The assumption about how to apply the doctrine—that it required linguistic coherence, as the Fourth Circuit had held—thus shaped the logically preceding question, whether to invoke the doctrine at all. If the Court had accepted that one can apply the *in pari materia* doctrine as a tool of policy coherence, then it easily could have found the venue and jurisdiction statutes to be *in pari materia* and still come to the same result. And it could have done so without narrowing the contours of the concept of “subject matter” so much that venue and jurisdiction—two areas that surely must be within the same “subject matter”—end up being viewed as different “subject matters.”

*B. The Same-Subject Determination as an Instantiation of
Coherence in Law*

At core, the *in pari materia* doctrine is based on an underlying principle, the notion that if two statutes are on the same subject, they must cohere, they must harmonize.⁶³ One way to view the *in pari materia* doctrine then is as a pragmatic tool that courts can use to make sense of an area of law.⁶⁴

Framed in these terms, it is not difficult to see the doctrine as emblematic of a broader notion of pragmatism in legal interpretation. The underlying assumption is that the law should

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

63. See SCALIA & GARNER, *supra* note 13, at 252 (“[L]aws dealing with the same subject—being *in pari materia* . . .—should if possible be interpreted harmoniously.”).

64. See *Newman Mem’l Hosp. v. Walton Constr. Co.*, 37 Kan. App. 2d 46, 68 (2007) (describing the *in pari materia* as a “pragmatic kind of test”).

make sense;⁶⁵ harmonizing within an area of law would thus simply be one way to make that area of law make more sense. Thought of through the lens of “making sense” of the law, we can see shades of modern-day Posnerian pragmatism.⁶⁶ Indeed, we might even go further and see the *in pari materia* doctrine as an instantiation of Dworkinian coherence⁶⁷ or the Legal Process school’s notion that judges who do statutory interpretation must fit new legislation into “the general fabric of the law.”⁶⁸ This notion of coherence across law might be likened to T.S. Eliot’s famous essay on art and tradition:

No poet, no artist of any art, has his complete meaning alone. His significance, his appreciation is the appreciation of his relation to the dead poets and artists. You cannot value him alone; you must set him, for contrast and comparison, among the dead. I mean this as a principle of aesthetic, not merely historical, criticism. The necessity that he shall conform, that he shall cohere, is not onesided; what happens when a new work of art is created is something that happens simultaneously to all the works of art which preceded it. The existing monuments form an ideal order among themselves, which is modified by the introduction of the new (the really new) work of art among them. The existing order is complete before the new work arrives; for order to persist after the supervention of novelty, the *whole* existing order must be, if ever so slightly, altered; and so the relations, proportions, values of each work of art toward the whole are readjusted; and this is conformity between the old and the new.⁶⁹

65. See SCALIA & GARNER, *supra* note 13, at 252 (“[*In pari materia*] rests on two sound principles: (1) that the body of law should make sense, and (2) that it is the responsibility of the courts, within the permissible meanings of the text, to make it so.”).

66. See generally, e.g., RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 59–96 (2003).

67. See RONALD DWORKIN, LAW’S EMPIRE 19 (1986) (“[J]udges should construct a statute so as to make it conform as closely as possible to principles of justice assumed elsewhere in the law.” (citing *Riggs v. Palmer*, 22 N.E. 188, 189 (N.Y. 1889))); see generally POSNER, *supra* note 66.

68. See 4 HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1416 (Tent. ed. 1958) (referring to “the mode of fitting the statute into the general fabric of the law”).

69. T.S. ELIOT, *Tradition and the Individual Talent*, in SELECTED ESSAYS 13, 15 (2d ed. 1951). See also RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 141–42

The idea of every piece of art both being shaped by the past and in turn, almost paradoxically, shaping the past is directly analogous to the idea that a statute “must be read,” as Judge Friendly once put it, “as part of a continuum,” affecting both the law that preceded it and the law that followed.⁷⁰

Coherence across statutes derives from the notion that every statute connects not just with other statutes on the same subject, but also with *all* other statutes as well as the common law. Its origins are in a broader jurisprudential and historical notion of coherence in the law, the notion that all law fits together in a single coherent mass.⁷¹ The *in pari materia* doctrine can thus be viewed as something broader than its characterization and categorization in the modern statutory-interpretation casebook:

(similarly noting that T.S. Eliot’s ideas about poets both “interpret[ing] and through interpretation retrospectively shap[ing]” the tradition of poetry applies more broadly to the interpretation of all texts, including law). I am indebted to Professor Andrew Coan for drawing this analogy and directing me to the T.S. Eliot essay.

70. HENRY J. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes*, in BENCHMARKS 196, 214 (1967) (“[W]e must consult not only what went before but what came after—the statute must be read as part of a continuum.”). All this would of course appear to be anathema to modern-day textualists, a point I will return to shortly. See *infra* Part IV.B.1. For now, though, the important point is that coherence in the law and harmonization of the law are the foundations of the *in pari materia* doctrine. See *supra* note 65 and accompanying text.

71. The cites on this are innumerable. See, e.g., Andrei Marmor, *Coherence, Holism, and Interpretation: The Epistemic Foundations of Dworkin’s Legal Theory*, 10 L. & PHIL. 383, 383–84 (1991) (“A legal system, [Dworkin] has repeatedly argued, comprises not only the settled or conventionally identifiable law, but also those norms which be shown to fit or cohere better with the best theory of the settled law.”); Ken Kress, *Coherence and Formalism*, 16 HARV. J.L. & PUB. POL’Y 639, 641 (1993) (“In his article *Legal Formalism*, Weinrib claims that his versions of conceptual coherence (and unity) are necessary for moral legitimacy.” (citing Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 952 (1988))). Attorney Ohlendorf provides a recent example in the specific context of statutory interpretation. See John David Ohlendorf, *Against Coherence in Statutory Interpretation*, 90 NOTRE DAME L. REV. 735, 738 (2014) (“[C]ourts have been led both to undervalue Congress’s intent to impliedly repeal legislation and to place a thumb on the scale in favor of displacement of federal common law out of a desire to make the total body of law fit together as harmoniously as possible.”); cf. Krishnakumar, *supra* note 2, at 238–41 (describing what the author refers to as “legal-landscape coherence” in the Supreme Court’s jurisprudence, contrasting it with “statute-specific coherence”).

Seen through this lens, the *in pari materia* doctrine is thus not just a species of what Professor Popkin refers to as “statutory patterns”⁷² or what Professor Eskridge and co-authors refer to as “interpretation in light of other statutes”⁷³ or as a “corollary” to the Whole Act Rule.⁷⁴ Rather, the *in pari materia* doctrine can be viewed as an example of the jurisprudential notion that all law is part of one coherent whole, that all statutes and the common law work together.

Seen through this lens then, the *in pari materia* doctrine draws lines that determine, within the larger mass of law, those sub-categories of law that really should cohere; perhaps it is unrealistic to make all law cohere, the argument might go,⁷⁵ but judges should at least do so within the confines of a single “subject matter.” Importantly though, if this were indeed the right way of thinking about the *in pari materia* doctrine, the doctrine’s goal would be coherence—within the “subject matter,” to be sure, but coherence nonetheless. Even in this more limited sense, then, this goal has a Dworkinian feel to it and bears little resemblance to what either subjective intentionalists or textualists purport to seek—“Congressional intent” for intentionalists or objective linguistic meaning for textualists. But for those from the Legal Process School, one might see coherence within a subject matter as simply a manifestation of Hart and Sacks’ idea of “reasonable persons pursuing reasonable goals reasonably”:⁷⁶ We might assume, though without any specific

72. See WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS 812–85 (5th ed. 2009) (addressing *in pari materia* doctrine in chapter entitled “Statutory Patterns”); see also William D. Popkin, *Foreword: Nonjudicial Statutory Interpretation*, 66 CHI.-KENT L. REV. 301 (1990).

73. ESKRIDGE, FRICKEY & GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 1066 (4th ed. 2007) (addressing *in pari materia* doctrine in section entitled “Interpretation in Light of Other Statutes”); see also NELSON, *supra* note 21, at 486 (same).

74. See ESKRIDGE, *supra* note 21, at 677 (including *West Virginia University Hospitals, Inc. v. Casey* in section of “Whole Act Rule” and its corollaries). For a discussion of the Whole Act Rule, see *infra* note 100 and accompanying text.

75. See generally, e.g., Adrian Vermeule & Ernest A. Young, *Hercules, Herbert and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730 (2000).

76. See HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC

evidence, that coherence between two statutes that are *in pari materia* is what the legislature wants, policy sense rather than policy nonsense.⁷⁷ This act of harmonization would of course often entail some imaginative reconstruction,⁷⁸ since there will usually not be any explicit evidence of legislative intent. Still, either with an assumption of legislative reasonableness or a view about a robust judicial role, one could treat the *in pari materia* doctrine as a modern-day vestige of this historical notion of coherence in the law: To determine whether two statutes are *in pari materia* is simply to ask whether those two statutes belong together in a single subcategory of the law that, as a normative matter, ought to cohere.

As the world becomes more complex and law itself increases in complexity, answering this question might become more difficult, and the answers might change. For example, it could be that as law expands, the subcategories become more and more finely divided. For example, perhaps in the early nineteenth century, the federal law of telecommunications (i.e., the law regulating mail delivery) would have been in the same category as, and should thus cohere with, the federal law of transportation (the law regulating federal “roads,” which were often *postal roads*).⁷⁹ Perhaps even in the late nineteenth century, some aspects of the law of telecommunications—say the laws regulating the telegraph—should cohere with some aspects of the law of transportation—the laws regulating the railroads—since

PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (noting that courts should “assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably”).

77. See, e.g., LAWRENCE M. SOLAN, *THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION* 104 (2010) (“One reason for a court’s interpreting laws to foster a coherent code is the assumption that the legislature would have wanted it to do so.”).

78. See Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) (“I suggest that the task for the judge called upon to interpret a statute is best described as one of *imaginative reconstruction*.” (emphasis added)). This approach to statutory interpretation asks an interpreter to “imagine how [members of the enacting legislature] would have wanted the statute applied to the case at bar.” *Id.*

79. See U.S. CONST. art. I, § 8 cl. 7 (“The Congress shall have Power . . . [t]o establish post offices and post roads . . .”).

telegraph lines were often built along railroad lines.⁸⁰ Yet, it was probably no longer necessary for the entire field of telecommunications law to cohere with the entire field of transportation law. Indeed, in the United States, with its private ownership of telegraph and its public ownership of the postal service, it might not even have been necessary for the entire field of telecommunications law to cohere.⁸¹ And of course by the early twenty-first century, with the law of transportation, at least broadly speaking, including federal laws regulating motor vehicle safety and fuel economy and local laws regulating traffic flow, it is difficult to make a case that these laws ought to cohere with telecommunications law writ large—or, as we now say, “cyberlaw”—including the rules of e-commerce or net neutrality.⁸² These are viewed as completely different “subject matters” because of increased complexity in the world. In effect, a single “subject matter” has subdivided into many. Indeed, even within what could arguably be viewed as telecommunications law, it would be hard to argue that all of such laws need to cohere—say the applicability of state sales tax laws to out-of-state online retailers versus the applicability of copyright law to uploaded YouTube videos.⁸³ Amidst this constant change, in law and in the

80. See RICHARD R. JOHN, NETWORK NATION 164–67 (2010) (discussing 1875 National Telegraph Act and 1879 Butler Amendment allowing railroad companies to own and operate telegraph lines along their rights-of-way).

81. See, e.g., Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communication Privacy*, 60 STAN. L. REV. 553, 577–84 (2007) (describing differences in privacy protections between postal and telegraphic communications).

82. Compare 42 U.S.C. § 7521 (2012) (instructing the Environmental Protection Agency to regulate motor vehicle fuel economy standards), and CAL. VEH. CODE § 21101 (Deering 1998) (providing for local regulation of highways), with Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Pub. L. 108-187, 117 Stat. 2699 (2003) (imposing “limitations and penalties on the transmission of unsolicited commercial electronic mail via the Internet”), and *In the Matter of Restoring Internet Freedom*, 33 F.C.C. Rcd. 311 (2017) (rescinding net neutrality).

83. Compare *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099–2100 (2018) overturning *Quill v. North Dakota*, 504 U.S. 298 (1992) (holding that states may impose a sales tax on internet sales by out-of-state retailers with no physical presence in the state), with *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 37 (2d Cir. 2012) (applying the Digital Millennium Copyright Act’s intermediary liability provisions to YouTube videos).

world, there can thus be no Archimedean point for determining when two statutes are *in pari materia*.

Key, though, is that, seen through this lens, the question that Step Zero of the *in pari materia* doctrine asks is a normative question about whether two statutes ought to cohere. It has nothing to do with specific legislative intent or the objective meaning of words. On its face, then, the same-subject determination bears little connection with either the intentionalist or the textualist modality in statutory interpretation.

*C. The Same-Subject Determination as a Delineation of the
“Context” Surrounding Statutory Language*

While we can thus think of the *in pari materia* doctrine as simply a hollowed-out relic of the idea of all law as one coherent jurisprudential mass, we can also look at it from the smallest units of law outwards rather than from the mass of law inward. Rather than thinking of a theoretical construct of all law subdivided into those categories that should be internally coherent, we can instead think of the *in pari materia* doctrine through the lens of the specific text of a statute, asking what else other than that text can be used as evidence of the statute’s meaning. In other words, we can think of the same-subject determination as drawing boundaries around the statutory text: within those boundaries lies the statute’s “context,” which the judge may of course consider when interpreting the statute.⁸⁴

To illustrate the point, consider a simple, well-known example from the statutory-interpretation canon: the use of the Whole Act Rule when interpreting the words “labor” and “service” in the statute at issue in *Church of the Holy Trinity v. United States*.⁸⁵ In *Holy Trinity*, the Court had to determine whether a

84. Cf. 2B NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 51.01 at 172–73 (6th ed. 2000) (“The principle that statutes in *pari materia* should be construed together is a variation of the principle that all parts of a statute should be construed together and its corollary that an amendment and the unchanged portion of the original act should be construed together.”).

85. 143 U.S. 457 (1892).

church that had hired and then prepaid the transportation costs of a minister, E. Walpole Warren, to come from England to New York violated a statutory prohibition on “assist[ing] or encourag[ing] the importation or migration[] of any alien to perform labor or service of any kind.”⁸⁶ The court quickly “conceded that the act of the [church] is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other.”⁸⁷ But as many commentators have pointed out, the terms “labor” and “service” could have multiple meanings, and it is not difficult to find dictionary meanings of the terms that would limit their reach to manual work.⁸⁸ If so, “the relation of rector to his church” would, contrary to the Court’s conclusion, not be “one of service” and would not “impl[y] labor.” After all, the term “labor” is etymologically connected with the term “laborer,” and no one would view Reverend Warren as a “laborer.”⁸⁹ And the term “service” is etymologically connected with the term “servant,” which again is a far cry from anyone’s idea of a minister.⁹⁰ Of course, these are by no means the only possible definitions of “labor” and “service,” but they are plausible. It is thus possible in the abstract to argue, contrary to Justice Brewer’s concession

86. *Id.* at 458 (quoting Act of Feb. 26, 1885, ch. 164, 23 Stat. 332).

87. *Id.*

88. See VICTORIA F. NOURSE, MISREADING LAW, MISREADING DEMOCRACY 40 (2016) [hereinafter MISREADING LAW] (noting that the “prototypical” meaning of “labor” would have been manual labor); Victoria F. Nourse, *Two Kinds of Plain Meaning*, 76 BROOK. L. REV. 997, 998 (2011) [hereinafter *Two Kinds*] (arguing that the Court dismissed a clear plain meaning in favor of Congressional intent); SOLAN *supra* note 77, at 54–55 (distinguishing between the “ordinary” meaning, which would be manual labor, and the broader “definitional” meaning); Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901, 924–30 (2000) (in support of a more limited definition of “labor” in *Holy Trinity*, noting that “labor” as used in Chinese Exclusion Act meant manual labor).

89. See, e.g., *Labor*, 8 OXFORD ENGLISH DICTIONARY 559 (2d. ed. 1989) (“labor” defined as “Bodily or mental exertion, particularly when difficulty, painful, or compulsory; (hard) work; toil, esp. physical toil”); *id.* (“laborer” defined as “[a] person who performs physical labour, usually as a means of employment; a manual worker, esp. one carrying out unskilled work”).

90. See, e.g., *Service*, 15 OXFORD ENGLISH DICTIONARY 34 (2d. ed. 1989) (“service” defined as “[t]he condition of being a servant; the fact of serving a master”).

“that the act of the [church] is within the letter” of the law, that the terms are ambiguous as to whether they apply to the church’s hiring of its pastor: one possible meaning of “labor” and “service” would encompass what the Court referred to as “brain toilers” such as Reverend Warren, and another possible meaning would exclude them. Where terms are ambiguous and an interpreter must choose among different possible definitions, most judges, even some modern-day textualists, are willing to turn to statutory purpose. Given the evidence about the statute’s purpose, it wouldn’t have been hard to argue that limiting “labor” and “service” to their manual-work definitions was appropriate.

But when confronted with such an approach to interpretation, virtually every first-year law student can see the flaw in the reasoning. But the flaw is found not in the words “labor” and “service,” nor even in Section 1 of the Act⁹¹—the statutory prohibition—at all. Rather, the flaw in arguing for narrow definitions of “labor” and “service” is that elsewhere—in Section 5 of the Act⁹²—the statute includes exceptions for “actors, artists, lecturers, [and] singers,” exceptions that—or, so the argument goes—simply would not have been necessary if “labor” and “service” were meant to be limited to the narrow definition of manual work.⁹³ This is of course a straightforward negative implication argument from context: The context surrounding Section 1 of the statute—namely, the exceptions in Section 5—tells us something about the most likely meaning of the words “labor” and “service” in Section 1.⁹⁴ But of course, one reason context matters here is that virtually everyone agrees that Section 1 and Section 5 must cohere, that it would be wrong to interpret the words “labor” and “service” in Section 1 without taking into account Section 5 and its exceptions.⁹⁵ An interpreter

91. Act of Feb. 26, 1885, ch. 164, § 1, 23 Stat. 332.

92. Act of Feb. 26, 1885, ch. 164, § 5, 23 Stat. 332.

93. *But see* MISREADING LAW, *supra* note 88, at 46 (arguing that the exceptions support the view that “labor” was meant to be limited to manual labor because Congress meant to clarify, not limit the broad category).

94. *See Two Kinds*, *supra* note 88, at 998 (noting that the court used the Section 5 exceptions to further demonstrate that Congress intended the statute to mean “labor” and “service” in a broad sense of employment, rather than manual labor).

seeks to harmonize these two sections, and to do so, concludes that the inclusion of “actors, artists, lecturers, [and] singers” as exceptions listed in Section 5 would be superfluous if the terms “labor” and “service” in Section 1 were limited to manual work.⁹⁶

This argument likely appeals to both intentionalists and textualists. A subjective intentionalist would say that ensuring coherence between Sections 1 and 5 makes sense because the drafter of Section 1 also drafted Section 5—they are, after all, part of the same statute adopted at the same time.⁹⁷ The textualist would likewise say Section 5 is crucial to understanding the meaning of Section 1 but would focus on the objective meaning that the “objectively reasonable” reader would glean from the text.⁹⁸ But why exactly does Section 5 matter at all to the textualist when interpreting Section 1? The answer is that the textualist expects the objective reader to look at and consider statutory context.⁹⁹ The objective reader is expected to know what is usually referred to as the Whole Act Rule (or at least some variation on it—more on this point below).¹⁰⁰ She or he

95. See SCALIA & GARNER, *supra* note 13, at 167 (“Sir Edward Coke explained the [Whole Act] canon in 1628: ‘[I]t is the most natural and genuine exposition of a statute to construe one part of the statute by another part of the same statute, for that best expressteth the meaning of the makers.’” (quoting 1 EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, OR A COMMENTARY UPON LITTLETON* § 728 (14th ed. 1791))).

96. Notice that this is distinct from an *expressio unius* argument based on the fact that ministers are not included in the list of exceptions.

97. *But see* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 934–35 (2013) (noting that the “rule against superfluities” does not comport with how most drafters understand the meaning of texts because drafters often include redundancy to satisfy audiences other than judicial interpreters).

98. See generally SCALIA & GARNER, *supra* note 13, at 170–73 (describing the presumption of consistent usage which presumes that when a word is used more than once in a text, the meanings are consistent).

99. See SCALIA & GARNER, *supra* note 13, at 167 (“Context is a primary determinant of meaning. A legal instrument typically contains many interrelated parts that make up the whole. The entirety of the document thus provides the context for each of its parts.”).

100. See generally James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005) (discussing the Whole Act Rule and its application in a variety of cases in depth). Justice Scalia referred to the Whole Act Rule as the “whole-text canon.”

knows that you have to look beyond a specific statutory provision to understand that provision, that you need to read the entire statute.¹⁰¹ The argument might on first blush seem circular, and at some level it is: a reader who goes straight to the dictionary and finds the manual-work definitions of “labor” and “service” and interprets Section 1 on that basis alone simply does not understand enough about statutes to be deemed the appropriate objective reader.

From the textualist’s perspective, then, one important preliminary consideration is understanding what the objective reader should know.¹⁰² Or, more precisely, *what else other than the immediate text* the objective reader must look to in order to understand the meaning of that text? What is within the relevant context that an objective interpreter should be expected to look at? My example from *Holy Trinity*¹⁰³ is easy: there, no one doubts the relevance of Section 5 for interpreting Section 1.

As I will explain in more detail in Part III, though, this point becomes crucial when we seek to determine whether two statutes are *in pari materia*. For a textualist, one key to determining when one statute is *in pari materia* with a second should be determining when an objective reader would or should look to that second statute. While this question does not answer itself by any means, it does create a more objective approach to the problem. It also serves textualism’s goals of cabining judicial discretion and its rule-of-law value of fair notice. As we will see when I address some examples in Part III, this approach precludes the interpreter who might claim textualism’s mantle

See supra note 95 and accompanying text.

101. *See, e.g.*, *Dig. Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 776 (2018) (determining that the definitions section of a statute must control when interpreting statutory language); *accord* *Babbitt v. Sweet Home Chapter of Comtys. for a Great Or.*, 515 U.S. 687, 700–01 (1995) (looking to a provision in Endangered Species Act that authorized Secretary of Interior to issue permits for takings to help interpret the word “harm” in the definition of the word “take” in the same statute); *id.* at 722–23 (Scalia, J., dissenting) (similarly looking to other provisions in the Endangered Species Act to interpret the same word).

102. *See* SCALIA & GARNER, *supra* note 13, at 16 (“In their full context, words mean what they conveyed to reasonable people at the time they were written . . .”).

103. *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

from engaging in a freewheeling romp through the United States Code to find helpful references to make arguments based on, say, the presumption of consistent usage or, as in *Holy Trinity*, based on negative implications such as the presumption against superfluity. As I explained earlier, what textualists are likely to do once they determine that two statutes are *in pari materia* is different from what subjective internationalists are likely to do,¹⁰⁴ but that is of less concern to me here. Here, I am focused simply on the question of how to determine whether two statutes are *in pari materia*.

Before turning to some examples, though, I want to touch briefly on the question of whether it makes sense for two statutes ever to be deemed *in pari materia*. Why should an interpreter ever look outside the four corners of the specific statute being interpreted? The answer is obvious to anyone who has done any interpretation, including textualists:¹⁰⁵ Law does not spring forth into being like Athena from the head of Zeus.¹⁰⁶ All law—indeed, all language—is painted on a pre-existing canvas that consists of not just background principles of how to interpret,¹⁰⁷ and not just ordinary uses of language, but also pre-existing law. The *in pari materia* doctrine is just one example, then, of a broader set of questions about how an interpreter is to grapple with the rest of the law. Everyone—textualist and intentionalist alike—considers the fact that a statute is not an isolated document. The question the *in pari materia* doctrine raises is a subset of the broader question of what else—in particular, what other statutes—the interpreter should view as relevant context in the interpretive process.¹⁰⁸

104. See *supra* notes 16–17 and accompanying text; see also NELSON, *supra* note 21, at 487.

105. See, e.g., *Artis v. District of Columbia*, 138 S. Ct. 594, 608–17 (2018) (Gorsuch, J., dissenting) (textualist Justice looking outside four corners of statute to draw on history, context and canons of interpretation to interpret statutory language).

106. See EDITH HAMILTON, *MYTHOLOGY* 29 (1950) (detailing the birth of Athena from Zeus’s head).

107. See NELSON, *supra* note 21, at 1–5 (discussing background “principles of interpretation”).

108. I should be clear that I am distinguishing between drawing on another statute as evidence of the use of the English language and drawing on another

*III. Interstatutory Cross-Referencing and the Textualist
Modality*¹⁰⁹ in Statutory Interpretation

A. Textualism, Linguistic Theory, and the Objective Reader

Textualism is an approach to statutory interpretation that, as its name suggests, focuses on the text of a statute as the principal—in many cases, sole—factor in interpreting a statute.¹¹⁰ Textualism comes in lots of related flavors, but the

statute as evidence of the specific meaning of the statute being interpreted. The *in pari materia* doctrine uses another statute as evidence of the specific meaning of a statute and not merely as evidence of the use of the English language. If used as evidence of the way language is used generally, cross-referencing some other statute would be no different from citing Shakespeare or Dickens or the Bible. Compare *Muscarello v. United States*, 524 U.S. 125, 127–31 (1998) (using dictionaries, the Bible, famous writings, recent media coverage and case law to demonstrate the meaning of “carry” in the context of firearms), *with id.* at 143–44 (Ginsburg, J., dissenting) (“Unlike the Court, I do not think dictionaries, surveys of press reports, or the Bible tell us, dispositively, what ‘carries’ means embedded in [the statute].”). Such a use could presumably be subject to work on the corpus of language that has become all the rage in interpretation these days. See Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 795 (2018) (“Corpus linguists study language through data derived from large bodies—*corpora*—of naturally occurring language.”). But, the *in pari materia* doctrine’s use of cross-referenced statutes is a different phenomenon. It relies on the similarity in subject matter and the fact that the cross-reference is another statute, not just some other random use of language, to argue that the cross-referenced, related statute is *better* evidence of specific usage in the particular statutory context, rather than evidence of general linguistic usage. See *supra* note 63 and accompanying text. I am indebted to Professor Christopher Robertson for helping me clarify this important distinction.

109. I borrow the term “modality” here from the literature on constitutional interpretation. See generally PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982) (describing six modalities of constitutional argument: historical, textual, doctrinal, prudential, structural, and ethical). It strikes me as a more apt term. Cf. John David Ohlendorf, *Purposivism Outside Statutory Interpretation*, 21 TEXAS REV. L. & POL. 235, 270 (2016) (“The idea is that a variety of considerations—text, structure, consequences, precedent, deeply held values—all get folded into a robust, wide-ranging balancing process, with the ultimate contribution of each modality to the final conclusion left ‘to the realm of judgment.’” (citing Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 167 (2008))).

110. See SCALIA & GARNER, *supra* note 13, at 16 (“Textualism, in its purest form, begins and ends with what the text says and fairly implies.”).

core commonality that all textualists share is that the text comes first and foremost and that the language of the statute must take precedence over other evidence of either Congress's subjective intent or its purpose.¹¹¹ While textualists thus generally refuse to rely on either legislative history or any alleged purpose unexpressed in enacted statutory text, many will look to normative or substantive canons (such as the rule of lenity¹¹² or presumption against the abrogation of sovereign immunity¹¹³) where such a canon might be relevant. The normative canons, though, are not the core of the textualist modality. Rather, the core of the textualist modality is to use linguistic tools to determine what legal theorists refer to as the statute's "communicative content."¹¹⁴ Importantly, textualists often interpret statutes by determining the "plain meaning" of a

111. See SCALIA & GARNER, *supra* note 13, at 18

Nontextualism, which frees the judge from interpretive scruple, comes in various forms. Perhaps the nontextualists' favorite substitute for text is purpose. . . . [P]urposivism . . . facilitates departure from text in several ways. Where purpose is king, text is not—so the purposivist goes around or behind the words of the controlling text to achieve what he believes to be the provision's purpose. Moreover, *purpose* is taken to mean the purpose of the author (the legislature or private drafter)—which means that all sorts of nontextual material such as legislative history . . . becomes relevant to revise the fairest objective meaning of the text. The most destructive (and most alluring) feature of purposivism is manipulability.

112. See, e.g., *United States v. Santos*, 553 U.S. 507, 523 (2008) (using the rule of lenity to interpret a statutory ambiguity).

113. See, e.g., *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 29–45 (1989) (Scalia, J., dissenting) (discussing Pennsylvania's abrogation of sovereign immunity under the Comprehensive Environmental Response, Compensation and Liability Act).

114. See Richard H. Fallon, *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1266–67 (2015) ("[Professor] Solum equates the centrally relevant sense of linguistic meaning with what he calls 'communicative content,' which he regards as a function of semantic meaning and the contextual facts that give rise to what philosophers of language call 'pragmatic enrichment.'" (citing Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 484 (2013))).

statute's language based on how an objective reader would understand the text.¹¹⁵

The textualist's claim to reject subjective intent and focus only on an "objectified intent"¹¹⁶ is an attempt to shift the focus of statutory interpretation from writer to reader, to draw the distinction between, in linguists' terms, "speaker's meaning' and 'sentence meaning' (or 'expression meaning')." ¹¹⁷ As Professor Solum articulates the distinction, "speaker's meaning should be analyzed in terms of a speaker's (or author's) intentions."¹¹⁸ In contrast, "[t]he sentence meaning (or 'expression meaning') of an utterance is the conventional semantic meaning of the words and phrases that combine to form the utterance."¹¹⁹ The idea of "sentence meaning" is premised on the notion that "words and expressions have standard meanings—the meanings that are conventional given relevant linguistic practices."¹²⁰ In short, textualism aims to capture what the linguists call "sentence meaning." Traditionally, textualists viewed the process of determining meaning through the lens of what Justice Scalia referred to as "objectified intent," and this process was thought to be based on the perspective of the statutory reader.¹²¹

B. Textualism's Rationales and the Same-Subject Determination

As either a theory or a modality of statutory interpretation, textualism itself provides no inherent answer to the question of

115. See *supra* note 102 and accompanying text.

116. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 17 (Amy Gutmann ed., 1997) (stating that "objectified intent" is "the intent that a reasonable person would gather from the text of the law"); see also SCALIA & GARNER, *supra* note 13, at 33 ("The interpretive approach we endorse is that of the 'fair reading': determining the application of a governing text to the given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued.").

117. See Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 489–90 (2013) (citing PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 3–143 (1989)).

118. *Id.* at 490.

119. *Id.* at 491.

120. *Id.*

121. See *supra* note 116.

when it is appropriate to rely on one statute to interpret another.¹²² When a textualist decides it is appropriate, the textualist will of course use linguistic canons, such as the presumptions of consistent usage or meaningful variation, across the two statutes.¹²³ Yet, as we saw in *Wachovia Bank*, even textualists will treat the appropriateness of relying on a second statute to interpret a statute as an *in pari materia* question.¹²⁴

In practice, then, everyone—including textualists—understands that the so-called Whole Code Rule in statutory interpretation, if taken literally, is far too broad to work consistently in practice: There is no way to create complete linguistic consistency across the entire United States Code.¹²⁵ The array of different laws in the U.S. Code is just too large to demand linguistic coherence across the entire code.¹²⁶ On the

122. Cf. Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433, 477 (2012) (explaining that textualists do rely on, among other things, other statutes in the interpretive process).

123. See John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 434–36 (2005) (explaining that textualists employ linguistic canons as they interpret statutes).

124. See *supra* Part II.A; see also *Wachovia Bank v. Schmidt*, 388 F.3d 414, 422–23 (4th Cir. 2004) (Luttig, J.) (determining the meaning of a statute through the canon of *in pari materia*), *rev'd*, 546 U.S. 303 (2006). Judge Luttig, a prominent textualist, wrote the Fourth Circuit opinion finding the two statutes were *in pari materia*. *Id.* at 415. Justice Scalia joined the unanimous Supreme Court decision finding that the two statutes were not *in pari materia*. See *Wachovia Bank v. Schmidt*, 546 U.S. 303 (2006). Neither of them thought the word “located” necessarily had to have the same meaning in both statutes. See *id.* at 316–19 (discussing whether “located” should have the same meaning in both statutes); *Wachovia Bank*, 388 F.3d at 422–24 (same). Both recognized that at least sometimes statutes do not have to cohere linguistically. See *Wachovia Bank*, 546 U.S. at 314 (“Congress’ use of the two terms may be best explained as a coincidence of statutory codification.”); *Wachovia Bank*, 388 F.3d at 422–23 (addressing variety of circumstances in which words in different statutes do not cohere linguistically).

125. See, e.g., Bruhl, *supra* note 122, at 477 (discussing the decision costs of interpreting a statute in the context of the entire U.S. Code); cf. Buzbee, *supra* note 1, at 232, 237–39 (arguing that allowing courts to reference statutes throughout the code provides judges too much discretion).

126. See Gluck, *supra* note 26, at 202–04 (explaining that features of the legislative process “pose a perhaps insurmountable obstacle” to the assumption that linguistic consistency exists “across an entire statute or . . . even across multiple statutes”). This may be one reason why the Dictionary Act, the U.S.

other hand, everyone—including textualists—will at times engage in interstatutory cross-referencing, thereby recognizing that the context for interpretation sometimes includes statutes other than the one being interpreted.¹²⁷ This thus leads to the fundamental question that Step Zero of the *in pari materia* doctrine raises: how should a textualist judge determine whether the statute to be interpreted—let us call it “Statute A”—is “on the same subject” as the statute being compared—let us call it “Statute B”?

The question then is, how should a textualist draw the demarcation lines of subject matter in a principled way? We can look to the animating rationales underlying textualism, as those reasons can help us understand how to determine what constitutes the same subject. Or, at the very least, how to determine what factors we might use when inquiring as to whether two statutes are on the same subject.

Textualists rely on several rationales for textualism, although these rationales tend to be used for specific aspects of the debate between textualists and their opponents, rather than as a full-throated defense of textualism per se: some are used to defend “plain meaning,”¹²⁸ others are used to oppose the use of legislative history,¹²⁹ and others are used to defend the use of linguistic canons like the presumption of consistent usage or

Code’s definition section, provides that its definitions apply “unless the context indicates otherwise.” 1 U.S.C. § 1 (2018); *see, e.g.*, *Rowland v. Cal. Men’s Colony*, 506 U.S. 194, 199–200 (1993) (employing the “context” clause in the Dictionary Act to interpret a statutory term contrary to the Dictionary Act definition). As we will see, whether to aspire for consistency across the entire U.S. Code remains a crucial question when addressing the broader question of interstatutory cross-referencing. *See infra* Part III.D.

127. *See Wachovia Bank*, 388 F.3d at 422 (employing interstatutory cross-referencing through the canon of *in pari materia*). Again, let me emphasize that I refer here to relying on another statute based on the notion that the specific usage in that other statute provides *better* evidence of the meaning of the statute’s language than evidence of English language usage generally. *See supra* note 108 (discussing this distinction).

128. *See* David A. Strauss, *Why Plain Meaning?*, 72 NOTRE DAME L. REV. 1565, 1565 (1997) (“The basic idea—that the interpretation of a statute begins by considering the ordinary meaning of its words—seems obviously right.”).

129. *See* Manning, *supra* note 123, at 420 (“[M]any textualist judges typically refuse to treat legislative history as ‘authoritative’ . . .”).

substantive canons like the rule of lenity.¹³⁰ Broadly speaking though, the principal arguments fall into four categories: (1) text as enacted law;¹³¹ (2) decision costs/efficiency;¹³² (3) judicial constraint;¹³³ and (4) notice.¹³⁴

The first two rationales provide little help in determining whether two statutes are *in pari materia*. First, the argument that only the text is enacted law does not help determine whether two statutes are on the same subject. For some textualist judges and scholars, the argument has some purchase on the appropriateness of using legislative history.¹³⁵ For many, it also

130. See generally SCALIA & GARNER, *supra* note 13 (including not only “semantic” and “syntactic” canons, but also “expected-meaning” canons such as the presumption against extraterritoriality, “government-structuring” canons such as the presumption against federal preemption, and “private-right” canons such as the rule of lenity).

131. See, e.g., John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1304–07 (2010) (explaining a shift in textualism that resulted in it having a “more formal, constitutionally grounded cast”).

132. See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006) (arguing that judges should generally stick close to text because of uncertainty and bounded rationality).

133. See SCALIA, *supra* note 116, at 17–18 (explaining that a non-textualist approach allows judges to interpret a statute based on “their own objectives and desires”). A variation of this argument is that textualism creates more predictable interpretive results, which in turn facilitates better legislative drafting, a variation on what Hart and Sacks famously referred to as the “flagellant theory of statutory interpretation.” HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 91 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). There remains an open question as to whether the practice of textualism, with its multiple linguistic and substantive canons, actually does a better job at limiting judicial discretion than competing theories. See, e.g., Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court’s First Decade*, 117 MICH. L. REV. 71 (2018) (based on an extensive study of the Roberts Court’s use of interpretive canons, concluding that predictability and stability cannot justify use of the canons).

134. See, e.g., Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 352 (2005) (explaining that textualists focus on the reasonable meaning of the text due to the belief that “people should not be held to legal requirements of which they lacked fair notice”).

135. See, e.g., Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV. 81, 90–91 (2017) (arguing that the use of legislative history is “illegitimate” because it is “insufficient to constitute legislation in our system of governance”).

dovetails with the idea, rooted in public choice theory, that legislation is the product of interest group politics and that judges should honor the bargain embedded in the text.¹³⁶ Neither of these ideas provides help on the question here. *All* statutes are enacted law, and, if public-choice theory reflects the legislative process, all are the product of interest group politics. This fact tells us little about the same-subject determination because that determination is about the relationships among statutes, since it asks *which* statutes are “on the same subject” (and thus *which* statutes can be relied on as a source of interpretive aid). While the argument that only the text is enacted law may bear on the relevance of legislative history, it has nothing to say about the same-subject determination.

Second, although the argument that textualism reduces decision costs (an argument that probably has far more purchase in the trial courts than in the U.S. Supreme Court)¹³⁷ does have something to say about the proper *scope* of the same-subject determination, it has little to say about the *content* of that determination. Reducing decision costs as a rationale would support a more limited *in pari materia* doctrine, perhaps even the elimination of the doctrine altogether. After all, the further afield an interpreter may look for aid in interpreting a statute, the greater the potential costs of decision. This rationale for textualism favors plain meaning and a focus on the four corners of the document,¹³⁸ but with as limited a conception of the relevant “document” as possible: the further afield the interpreter may go, the more context the interpreter may consider, and thus

136. William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 296–97 (1988) (noting that Easterbrookian textualism embodies public choice ideals and “provides one useful way to limit rent-seeking legislation”).

137. See Bruhl, *supra* note 122, at 470–73 (positing that resource disparities among different levels of courts should affect the appropriateness of using different techniques of statutory interpretation); see also Anuj C. Desai, *Heterogeneity, Legislative History, and the Cost of Litigation: A Brief Comment on Bruhl’s “Hierarchy and Heterogeneity”*, 2013 WIS. L. REV. ONLINE 15 (2013) (noting that to evaluate Bruhl’s normative claim, we first need answers to certain empirical questions).

138. See VERMEULE, *supra* note 132, at 4 (asserting that judges should “stick close to the surface-level or literal meaning of clear and specific texts”).

the higher the decision costs. But the decision-costs rationale does not help an interpreter decide *whether* two statutes are in fact *in pari materia*. If we are going to have an *in pari materia* doctrine at all, textualist judges need tools for determining when two statutes are “on the same subject.”

Third, the argument that textualism limits judicial discretion can help us understand the *in pari materia* question in a limited sense, but it is one that is crucial to my proposed approach: if limiting judicial discretion is an important goal of statutory interpretation, it counsels for a more rule-like approach for determining what constitutes statutes on the same subject, rather than one based on standards. Rules tend to limit decision maker authority more than standards.¹³⁹ Again though, as with the rationale from decision costs, the judicial-constraint argument for textualism does not tell us anything about what the content of the rule should be.¹⁴⁰

It is the final rationale for textualism though, the argument based on the principle of notice, that can help with the content of such a rule. Much of what drives textualism is the notion that it is simply unfair to regulate citizens without providing proper notice.¹⁴¹ Those subject to the law should know what the law is and should only be subject to the objective understanding of the law as promulgated and not to the subjective understanding or intentions of the legislators.¹⁴²

139. See Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 78 (1992) (“any rule reduces judicial discretion as compared with a standard”); Nelson, *supra* note 134, at 375 (“A more ‘rule-like’ principle or directive will itself incorporate some advance judgments . . . [.] generalizations that the implementing officials might think unfounded in a particular case, but that they are nonetheless supposed to accept.”).

140. Professor William Buzbee has argued that an open-ended approach to statutory cross-referencing permits judges too much discretion. See Buzbee, *supra* note 1, at 232, 237–39. While I wholeheartedly agree, my point here is somewhat different. To the extent that *any* statutory cross-referencing is to be allowed, a rule-like approach will serve as more of a constraint than one based on standards.

141. See Nelson, *supra* note 134, at 352 (stating that textualists “emphasiz[e] . . . that people should not be held to legal requirements of which they lacked fair notice”).

142. See *id.* (explaining the connection between textualism’s focus on fair notice and the importance of objective understanding).

Many textualists view this important value as crucial to the relationship between lawmakers and citizens.¹⁴³ On this view, statutory interpretation must emphasize plain meaning because such an approach allows the ordinary person to understand the law.¹⁴⁴ It is thus the *reader* of the law whose understanding prevails over the lawmakers'.¹⁴⁵ Textualists' focus on the reader of the law rather than the drafter of the law is imbued too with what I elsewhere refer to as textualism's Benthamite strand:¹⁴⁶ it

143. See *Flores-Figueroa v. United States*, 556 U.S. 646, 658 (2009) (Scalia, J., concurring in part and concurring in the judgment)

I likewise cannot join the Court's discussion of the (as usual, inconclusive) legislative history. Relying on the statement of a single Member of Congress or an unvoted-upon (and for all we know unread) Committee Report to expand a statute beyond the limits its text suggests is always a dubious enterprise. And consulting those incunabula with an eye to making criminal what the text would otherwise permit is even more suspect. Indeed, it is not unlike the practice of Caligula, who reportedly "wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people."

(citations omitted). See also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (making the same point, but referring to Nero, not Caligula: "It is said that one of emperor Nero's nasty practices was to post his edicts high on the columns so that they would be harder to read and easier to transgress."); SCALIA, *supra* note 116, at 17 (after criticizing the view that the meaning of a law should be determined by what the lawgiver meant, stating, "That seems to me one step worse than the trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not easily be read"). Justice Scalia's historical claim about Caligula likely comes from Blackstone. See 1 WILLIAM BLACKSTONE, COMMENTARIES *46 (14th ed. 1803) (noting that law must be notified "in the most public and perspicuous manner; not like Caligula who (according to Dio Cassius) wrote his laws in a very small character, and hung them upon high pillars, the more effectually to ensnare the people").

144. See Scalia, *supra* note 143, at 1179 ("Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes.").

145. See SCALIA, *supra* note 116, at 17 (explaining the importance of meaning as the ordinary reader would understand it rather than a lawmaker).

146. See Anuj C. Desai, *Textualism Step Zero* (unpublished manuscript) (on file with the Washington and Lee Law Review) (explaining the importance of Bentham's ideas about simplicity in law); see also Dean Alfange, Jr., *Jeremy Bentham and the Codification of Law*, 55 CORNELL L. REV. 58, 61 (1969) (noting that Bentham "was dedicated to the belief that justice, order, certainty and simple procedure could be implanted permanently into any legal system through the adoption of a comprehensive but concise legal code").

is the ordinary person's understanding of the text that must prevail over the unknowable and, even if knowable, unadopted legislative intent.¹⁴⁷

Textualists understand though that such a focus on the statutory reader requires the positing of an “objectively reasonable” person, from whose position the statute must be understood.¹⁴⁸ Determining who exactly that “objectively reasonable” person is may not, however, be a simple task.¹⁴⁹ Professor Nelson has, with characteristic insight, used a slightly different term from the term “objectively reasonable person” to describe a textualist's typical statutory reader: Nelson refers to the “‘appropriately informed’ interpreter.”¹⁵⁰ The use of the term “‘appropriately informed’ interpreter” rather than “objectively reasonable” person allows for a subtle shift away from the ordinary person as objective reader, at least (or so I will argue) as to certain types of laws.¹⁵¹

Indeed, in a world where law is such a complex phenomenon, the notice rationale by itself simply cannot answer all questions of statutory interpretation.¹⁵² As most textualists recognize, at least implicitly, much law is not aimed at all citizens.¹⁵³ Thus, to

147. See John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 751–52 (2017) (explaining that Justice Scalia believed that a judge should rely on the enacted text over legislative intent).

148. See Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV. 81, 91–92 (2017) (explaining that the text's meaning lies in the “reaction of the contemporaneous interpretive community”); cf. NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 131 (2019) (referring to “an ordinary English speaker familiar with the law's usages”).

149. See Nelson, *supra* note 134, at 357 (framing the analysis of who constitutes the appropriate reader).

150. See *id.* at 353 (explaining that the “‘appropriately informed’ interpreter” is “someone who knows what interpreters are permitted to know and who will use that information for the purposes that interpreters are permitted to use it”).

151. See *infra* Part III.C.2.

152. See Easterbrook, *supra* note 148, at 82 (“[E]ven textualism . . . does not have an algorithm.”).

153. Justice Gorsuch has explicitly claimed to be picking up Justice Scalia's mantle, including on the question of the ordinary person as a reader of law. See, e.g., *Sessions v. Dimaya*, 138 S. Ct. 1204, 1123–35 (2018) (Gorsuch, J., concurring in part) (adopting Justice Scalia's articulation of the notice rationale for textualism); Neil M. Gorsuch, *Law's Irony*, 37 HARV. J.L. & PUB. POL'Y 743,

understand how the notice principle might shed light on the *in pari materia* question requires a deeper understanding of, using Nelson's term, who the "appropriately informed" interpreter is. Put another way, to answer the *in pari materia* question, a textualist must first identify the statute's audience.¹⁵⁴

At core, then, to effectuate the notice principle requires an understanding of a statute's audience, or to borrow Professor William Blatt's phrase, the statute's "interpretive community."¹⁵⁵ This insight can help us understand how to draw lines for purposes of the *in pari materia* doctrine. In particular, a key principle underlying a textualist approach to whether two statutes are on the same subject ought to be whether the *audiences* of the two statutes are the same.¹⁵⁶ Put another way, two statutes are on the same subject if the "appropriately informed" reader—the audience—is the same. Another way to formulate this question is to ask whether those in the audience of the statute being interpreted—what I am calling "Statute A"—would know about "Statute B," the statute that might or

748 (2014) (favorably drawing on Justice Scalia's reference to Caligula "publishing the law in a hand so small and posted so high no one could be sure what was and wasn't forbidden. (No doubt, all the better to keep everyone on their toes. Sorry . . .)"). Yet, even he will interpret words in a way that no ordinary reader could possibly have been able to do, at least without an extensive knowledge of English common law. See *Artis v. District of Columbia*, 138 S. Ct. 594, 610 (2018) (Gorsuch, J., dissenting) (interpreting the word "toll" in light of common law); see also SCALIA & GARNER, *supra* note 13, at 320–21.

154. This may well be true not just when determining a textualist approach to the *in pari materia* question, but also when applying textualism more generally. See Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 289 n.43 (1989) (noting that the notion of the "objectively reasonable person" simply "begs the question" of what that person knows); see also Desai, *supra* note 146 (explaining the importance of the statute's audience in determining meaning); David Louk, *The Audiences of Statutes*, 105 CORNELL L. REV. (forthcoming 2020) (same).

155. See William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. REV. 629, 629 (2001) ("The shared understanding of [a text's] readers constitutes the 'interpretive community' for the text."). Despite the use of the term "community," I do not mean to preclude the idea that the audience could in some circumstances be all English-language speakers.

156. See *id.* at 630 ("Judges vary their readings of statutes depending on which community comprises their audience for the decision, and rightly so.").

might not be *in pari materia* with the statute to be interpreted.¹⁵⁷ This certainly does not answer all questions, and a textualist could certainly criticize the principle as insufficiently rule-like on the rule-standard continuum.¹⁵⁸ But, the question is a comparative one: is any other approach, at least short of abandoning the *in pari materia* doctrine altogether, both compatible with textualist principles and more rule-like?

Thought of through this lens, it should not be hard to see how the Step Zero *in pari materia* question changes. This approach shifts the inquiry from an abstract question of subject-matter similarity, a question that might have a philosopher's, linguist's, or cataloguer's answer, to the more important question that the rule-of-law principle underlying textualism pushes us to consider: Whether those subject to the law might be subject to legal rules without fair notice.

C. Statutory Audience and Legal Practice Areas as the Subject-Matter Demarcation Lines

1. Lawyers as Statutory Audience

The question of audience is often fraught, but I want here to introduce a point about statutory audience in a world of legal and practical complexity. It is one that many textualists might reject as irrelevant to statutory interpretation, but one that might nonetheless help shed light on how a textualist could determine whether two statutes are *in pari materia*: An overwhelming portion of the United States Code—including even, I suspect, the criminal prohibitions found in Title 18—is not read by those who are subject to it.¹⁵⁹ Indeed, limiting ourselves to those portions of

157. See *id.* at 642–43 (describing the communities and the specific knowledge that they possess).

158. See Nelson, *supra* note 134, at 349 (arguing that what separates textualists from others is a greater affinity for rules, rather than a denial that intent matters in interpretation).

159. See Drury Stevenson, *To Whom Is the Law Addressed?*, 21 YALE L. & POLY REV. 105, 105–06 (2003) (“The people who are subject to the law—the citizens—are almost certain never to read it.”); *id.* (“Average citizens do not

the Code that raise litigation disputes, I suspect this may be even more true. My point here is not that the bad guys do not read the law at all before committing a crime.¹⁶⁰ Rather, my point is that those who read the law itself—a statute’s actual language—in its raw and unexpurgated form, are almost all lawyers and, in particular, lawyers advising clients.¹⁶¹ If I am right about this, it will help us draw the contours of subject matter in ways that will further the textualist’s goal of fair notice.

Before I turn to the question of audiences more generally, though, I want to start with an example that might make this point about lawyers—and its connection to the same-subject determination—more concrete. Consider two statutes that, in the abstract, almost everyone would probably agree are *not* “on the same subject”: the Securities Exchange Act of 1934¹⁶² and the Civil Rights Act of 1964.¹⁶³ Focusing on audience broadly speaking though—and again, let me emphasize that the focus on audience is to further the important rule-of-law value, embedded in a textualist approach to statutory interpretation, that those subject to the law must have fair notice of the law’s objective meaning—perhaps these two areas of law should be treated as

peruse statute books even once in their lifetimes; most will never read even one full paragraph from a court opinion.”).

160. See *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.) (noting that “it is not likely that a criminal will carefully consider the text of the law before he murders or steals”).

161. See Robert K. Rasmussen, *Why Linguistics?*, 73 WASH. U. L.Q. 1047, 1051 (1995) (“Few would suggest that many, let alone most, of the statutes drafted today are designed to be read by the ordinary person.”); Farber, *supra* note 154, at 289 n.43 (“The vantage point more properly should be that of the statute’s actual audience—typically, lawyers applying the conventional approach to statutory interpretation . . .”); see also Stevenson, *supra* note 159, at 145 (“[L]awyers probably constitute most of the actual readership of statutes and court opinions; as such, they hold a significant, even primary place in the ‘audience’ of the law . . .”). But see generally *id.* (arguing that the “written formulations” of the law are aimed at a set of state actors).

162. 15 U.S.C. § 78a (2018).

163. Pub. L. No. 88-352, 78 Stat. 241 (1964). I am purposely at a 10,000-foot view here to illustrate the point. The point of course is that no one would expect coherence, either linguistic or policy coherence, between these two statutes. One might find individual provisions within these two statutes that could indeed be viewed as *in pari materia*, but I would like to stay at this broad level of generality for the moment.

one. After all, the audience for the Securities Exchange Act is the same as, or at least has a very substantial overlap with, the audience for the Civil Rights Act: Every publicly traded company in the country is subject to both statutes.¹⁶⁴ The “audience” for the statutes thus has significant overlap, and society expects publicly traded companies to know and comply with both statutes. But the publicly traded company is of course a legal creation and abstraction—certainly an important one to further the goals of modern-day capitalism, but a legal abstraction nonetheless.¹⁶⁵ Rare is the individual human being who would be familiar with the details—the statutory language and judicial interpretations—of both statutes. Perhaps some super-human General Counsels might fall into the category, but viewed from the perspective of the actual audience of those who would read the statutory language, there is probably little overlap between the two statutes.¹⁶⁶ Civil rights and employment lawyers, perhaps human resources managers as well, will read the Civil Rights Act; and securities lawyers will read the Securities Act. Others will rely on *lawyers’ interpretations* of those laws to regulate their behavior.¹⁶⁷ Clients—let us say the CEO or the Board of Directors if we want to humanize the corporate client—even if one might put them in the category of “ordinary” persons, generally do not act without legal advice, and those that do rarely do so by having consulted a primary legal text such as a statute.¹⁶⁸ Importantly, one of the reasons ordinary people do not

164. See Arthur R. Pinto, *An Overview of United States Corporate Governance in Publicly Traded Corporations*, 58 AM. J. COMP. L. 257, 263 (2010) (explaining the Securities Exchange Act’s application to publicly traded companies); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (concluding that the Civil Rights Act of 1964 extends to the conduct of private actors).

165. Susanna K. Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97, 106 (2009) (“One way of describing the corporation is to say that it is nothing more than a legal construct.”).

166. Cf. Blatt, *supra* note 155, at 642 (explaining that the statute’s audience varies “depending upon the substantive area”).

167. See Stevenson, *supra* note 159, at 146 (“Lawyers are the means by which the citizenry gets its best glimpse of the law itself.”).

168. See *id.* (explaining that the directors and officers of a corporation rely on legal counsel to interpret statutes and provide advice).

act on the basis of just reading statutory language is a concern that there may be other, more relevant laws elsewhere in the statute books.¹⁶⁹ In other words, even knowing *that* a statute is relevant to a certain factual scenario tends to be a lawyer's task.¹⁷⁰ I will return to this broader point shortly.

In short, to better understand how textualism might properly be applied to the question of whether two statutes are *in pari materia*, one must answer the question of whether the audience for the two statutes is the same, or whether the audience at least overlaps. Put another way, one needs to know who the "appropriately informed" objective reader of the statute to be interpreted is and what that person knows.

2. Different Audiences for Different Statutes

To further explore this idea, we might think of statutory language as varying along several dimensions. One dimension would be how much the language speaks to the regulated versus the regulator. Let us start with a law that is actually read by those subject to it, and, for the moment, let us limit ourselves to laws read by the "person on the street" or on the so-called "Clapham omnibus."¹⁷¹ For this category of laws, the textualist interpreter would presumably treat the "person on the street" as the "appropriately informed reader." Thinking about statutes through this lens seems to be implicit in many of the textualists' critiques of intentionalism. I do not want to rehearse here all the critiques of substantive canons or even linguistic canons (such as *expressio unius* or the presumption of consistent usage) based on ordinary use of language (or how the ordinary person on the street might understand the language). Nor do I want to reiterate critiques of textualism based on a realistic assessment of the

169. *Cf. id.* at 106 n.4 ("[I]t is [a lawyer's] job to know or find out the relevant law.").

170. This is of course why first-semester law students are subject to issue-spotting exams.

171. *See* *McQuire v. Western Morning News* [1903] 2 KB 100, 109 (explaining that the "man on the Clapham omnibus" is the hypothetically reasonable person, who is reasonably educated and intelligent, but not legally trained).

legislative process.¹⁷² Many of these critiques are based on the subjective (author's) perspective, while the textualist's focus is on the objective (reader's) perspective.¹⁷³ Instead, I want to focus here on the objective perspective and explore the importance of the "person on the street" perspective as it relates to the first step of the *in pari materia* doctrine. In particular, for a law whose audience is the "person on the street," the approach to determining if two statutes are *in pari materia* requires a determination of whether that "person on the street" could be expected to look at and/or know the second statute (Statute B) when interpreting the first (Statute A). If not, the person reading Statute A could not be expected to know the text, purpose, jurisprudence, or even meaning of Statute B at all, and it would be unreasonable for a textualist to rely on that second statute.¹⁷⁴ Relying on Statute B to help interpret Statute A would be, to use one of Justice Scalia's favorite examples, like Caligula writing the laws in small characters and hanging them on high pillars, the better to ensnare the unsuspecting people.¹⁷⁵

172. See Gluck & Schultz Bressman, *supra* note 97, at 911 ("A study of drafting [legislative] 'reality' has obvious significance for evaluating canons that are intended to reflect or affect Congress."); 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, 780 (2014) [hereinafter Schultz Bressman & Gluck *Part II*] (evaluating judicial interpretation in light of the realities of the legislative process).

173. See Nelson, *supra* note 134, at 357–58 (explaining the distinction between author-focused interpretation and reader-focused interpretation).

174. Cf. *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 866–67 (1986) (Stevens, J., dissenting) (criticizing the majority's use of interstatutory interpretation because Congress was likely unaware of a "relatively obscure provision" in the prior statute when it enacted the second statute). Again, I want to emphasize that the point of the cross-referencing in the *in pari materia* doctrine is distinct from using another statute as evidence of general linguistic usage. If the cross-referenced statute (Statute B) is just used as evidence of general linguistic usage, then the person reading the original statute (Statute A) would not have to look specifically to or know specifically about Statute B. However, as I noted above, such a use of Statute B would not distinguish it as an interpretive aid from any other use of Statute B's language elsewhere in the English language. See *supra* note 108 (elaborating on this distinction).

175. See *Flores-Figueroa v. United States*, 556 U.S. 646, 658 (2009) (Scalia, J., concurring in part and concurring in the judgment) ("Indeed, it is not unlike the practice of Caligula, who reportedly 'wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare

On the other end of the spectrum along this dimension would be statutory language whose audience is not individuals or the regulated entities themselves, but is instead some part of government other than the legislature that adopted the statutory language—in particular, an administrative agency.¹⁷⁶ As Professor Ed Rubin has pointed out, many federal statutes are what he has called “intransitive,” statutes that regulate—empower and/or constrain—the regulators themselves, federal agencies, rather than regulating regulated parties directly.¹⁷⁷ The language in these statutes has a different audience, and thus, from the perspective of the textualist, the “appropriately informed” objective reader should not be the person on the street, but should instead be the federal agency. This may be at least one theoretical reason that textualists have traditionally been open to *Chevron* deference.¹⁷⁸ If the audience of a statute is the agency itself, then it, the agency, is uniquely positioned to understand the statutory language and, certainly compared with a court, to engage in the interpretive task.¹⁷⁹ The

the people.”).

176. See Edward L. Rubin, *The Citizen Lawyer and the Administrative State*, 50 WM. & MARY L. REV. 1335, 1340 (2009) (identifying a subset of statutes that “do not consist of rules governing the populace, but rather they provide instructions to administrative agencies”); see also Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 625 (1984) (discussing distinction between “conduct rules” that are addressed directly to the public and “decision rules” addressed to government officials).

177. See Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 381 (1989) (explaining the concept of “intransitive” statutes, which are directed at administrative agencies rather than citizens).

178. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (stating that *Chevron* “will endure and be given its full scope . . . because it accurately reflects the reality of government”). *But see* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring) (“*Chevron*’s inference about hidden congressional intentions seems belied by the intentions Congress has made textually manifest.”); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2154 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)) (“[C]ourts should [instead] determine whether the agency’s interpretation is the best reading of the statutory text.”).

179. See Kavanaugh, *supra* note 178, at 2152 (stating that *Chevron* “affords agencies discretion over how to exercise authority delegated to them by Congress”).

agency, in this way of thinking, *is* the “appropriately informed” reader, and so its reading is presumptively correct.¹⁸⁰ Key, though, is that a textualist should not interpret an intransitive statutory provision by viewing it solely through the lens of the regulated party and certainly not from the perspective of the “person on the street.”

Rubin’s use of the phrase “intransitive,” with its contrast with “transitive,” suggests that these two categories are both mutually exclusive and exhaustive, that statutory provisions, like verbs, must be one or the other, but may not be both.¹⁸¹ I suspect, though, that despite the phrasing, Rubin well recognizes that the broader audience of even the most intransitive statutory provision has to include not only the relevant agency, but also the regulated entities, even if those regulated entities are not its primary audience. The Ford Motor Company was no doubt part of the relevant statutory audience when Congress empowered the National Highway Traffic Safety Administration (NHTSA) to create auto safety standards,¹⁸² and just as much as NHTSA, Ford ought to play a part in the interpretive community that a textualist concerned with the objective reader should consider.¹⁸³ Still, Rubin’s notion of the intransitive statutory provision rightly helps frame the question of audience through the reality of the

180. See Rubin, *supra* note 177, at 383 (explaining that an intransitive statute affords the agency with a high degree of discretion). I say “presumptively” because *Chevron* does have a first step, and textualists are of course more than willing to exercise judicial power to override an agency’s interpretation when they view the agency as having done violence to the language Congress used. See, e.g., *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 225–32 (1994) (Scalia, J.) (concluding that the Federal Communications Commission exceeded its statutory mandate by interpreting term “modify” too broadly).

181. See Rubin, *supra* note 177, at 383 (explaining the distinctions between a transitive statute and an intransitive one).

182. Actually, at the time, it was formally the Secretary of Commerce. See National Traffic Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, §§ 102(10), 103(a), 80 Stat. 718-19 (granting power to create safety standards to the Secretary of Commerce).

183. See Stevenson, *supra* note 159, at 129 (explaining that a statutory audience “must be the one whose conduct is supposed to be modified by the communication”).

administrative state.¹⁸⁴ With statutes whose audience is an administrative agency, it would be an interpretive error to view the “appropriately informed reader” as the “person on the street.”¹⁸⁵

I want to introduce a second dimension along which laws may be placed, one I alluded to earlier: legal intermediaries versus individuals/regulated parties. This second dimension may be a continuous variable rather than, like Rubin’s, discrete and dichotomous, but it too can help determine who the “appropriately informed” objective reader is, or perhaps more accurately, what is the appropriate linguistic community for the statutory language. When determining whether two statutes are *in pari materia*, I contend, this variable will be crucial.

The *language* of many statutes is aimed at lawyers, or more broadly, agents rather than principals, or intermediaries between Congress and the ultimately regulated party.¹⁸⁶ These are not all the same thing, as I will explain shortly, but, as I mentioned, we can think of this idea as simply a continuous variable that all statutory provisions have in some measure, some more than others. We might take, as a paradigmatic example, the Federal Rules of Civil Procedure.¹⁸⁷ Through a broad purposive lens, those rules are designed to adjudicate disputes in a fair and efficient manner, and so, they ultimately do affect litigants and, secondarily, behavior in the real world.¹⁸⁸ But the direct audience for the Federal Rules of Civil Procedure is obviously

184. See Rubin, *supra* note 177, at 373 (“Our dominant implementation mechanism [of statutes] at present is the administrative agency.”).

185. See *id.* at 381–84 (emphasizing the administrative agency’s role in interpreting an intransitive statute as opposed to an ordinary person).

186. See Stevenson, *supra* note 159, at 146 (“Legislators and rulemakers are aware that lawyers are their primary readers, and many provisions are included to anticipate the reaction of readers schooled in common-law terminology and principles.”).

187. FED. R. CIV. P. (adopted in 1937).

188. See Carl C. Wheaton, *Federal Rules of Civil Procedure Interpreted*, 25 CORNELL L.Q. 28, 29 (1939) (listing the purposes of the rules); *cf.* Hanna v. Plumer, 380 U.S. 460, 474–78 (1965) (Harlan, J., concurring) (concluding that when applying *Erie*’s substance-procedure distinction, federal courts should apply state law “if the choice of rule would substantially affect . . . primary decisions respecting human conduct”).

lawyers—indeed, more specifically, civil litigators—and the textualist who cares about the “appropriately informed” reader should expect the interpretive process to be affected by that fact.¹⁸⁹ To interpret the Federal Rules of Civil Procedure through an objective reader’s lens requires an understanding of what the appropriately informed *civil litigator* knows, not what the “person on the street” knows.¹⁹⁰ For example, the fact that no ordinary “person on the street” would understand the proper interpretation of the word “discovery” as it is used in Title V (Rules 26–37) of the Federal Rules of Civil Procedure plays no role whatsoever in judicial interpretations of those rules: no judge, whether textualist or otherwise, would turn to a lay dictionary to interpret the term.¹⁹¹ What matters is how a civil litigator would understand the words.¹⁹² In contrast, perhaps the paradigm of a type of federal statute whose audience would be the directly regulated party—indeed, the person on the street—is the laws found in Chapter 51 of Title 18 of the United States Code, the federal prohibitions on homicide.¹⁹³ Some lawyers may be murderers, but many murderers are not lawyers.

My claim, however, is that the broad category of laws at the “lawyers as audience” end of the continuum is not limited to

189. See Stevenson, *supra* note 159, at 146 (explaining that statutes are drafted with the knowledge that lawyers are the primary readers).

190. See David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927, 970 (2011) (“The Federal Rules address matters in the particular technical competence of lawyers.”). I recognize of course that some individuals represent themselves pro se (and also that simplicity, predictability, notice, etc. might themselves be goals of the procedural system), but I do not view that fact as undermining the basic point. Cf. Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 384 (noting that “[p]ro se litigants are more likely to . . . have problems understanding and applying the procedural and substantive laws pertaining to their claim” (citation omitted)).

191. See Marcus, *supra* note 190, at 970–71 (explaining the misapplication of canons to the rules because canons capture meaning from the ordinary person’s perspective).

192. See *id.* (describing interpretation of the rules from the perspective of lawyers).

193. See Rubin, *supra* note 177, at 376 n.21 (distinguishing modern legislation, which regulates government agencies, from “traditional rules” like crime, which directly regulate private conduct (citing F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: RULES AND ORDER 124–44 (1973))).

provisions like the Federal Rules of Civil Procedure, rules whose impact on primary behavior is indirect at best. Rather, my contention is that the overwhelming majority of federal laws (or, perhaps the more important denominator here is not federal laws, but rather laws that raise *interpretive disputes*) are actually read by lawyers, not their clients—and here, by “laws,” I again mean statutory language—and that this fact should matter, again at least to the extent that one cares, as textualists should, about who the appropriately informed objective reader is and what that person knows.

Now there is obviously a balance to be struck here. Justice Scalia’s focus on the rule-of-law principle of notice to the governed¹⁹⁴ is a vital part of the textualist’s interpretive process.¹⁹⁵ And the importance of law being understandable to the ordinary person rather than lawyers dates back at least to Bentham’s contention that lawyers and judges were an elite caste, a guild, controlling access to vital information at the expense of the common folk.¹⁹⁶ It is also said to be one of the great advantages of the civil law system over the common law system, and of course, Justice Scalia has decried the continuing influence of common-law thinking in approaches to statutory interpretation.¹⁹⁷ But at the same time, textualists well

194. See *Flores-Figueroa v. United States*, 556 U.S. 646, 658 (2009) (Scalia, J., concurring in part and concurring in the judgment) (“Indeed, it is not unlike the practice of Caligula, who reportedly ‘wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people.’”).

195. See *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 984–85 (7th Cir. 2008) (Easterbrook, J.) (reading “not less than 7 days” literally despite clear evidence that Congress meant “not more than 7 days” because courts should “not pull the rug out from under a litigant who relied on the enacted text”).

196. See H.L.A. HART, *The Demystification of the Law*, in *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 21, 29–39 (1982) (explaining Bentham’s analysis of complex statutes that created the heightened role of lawyers and judges); Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 *VAND. L. REV.* 715, 739 n.89 (1992) (stating that “Bentham and many others [worried] that excess reliance on technical meanings has the antimajoritarian effect of excessively empowering an elite of lawyers and judges”); see generally Desai, *supra* note 146 (noting this phenomena).

197. The title of Justice Scalia’s famous Tanner Lectures was “Common-Law Courts in a Civil-Law System.” See SCALIA, *supra* note 121; see also Easterbrook,

understand that there are times and places for a more technical meaning.¹⁹⁸ The question, then, is when lawyers rather than the “person on the street” should be viewed as the statutory language’s audience. Now, it is true that I am effectively making an empirical claim without evidentiary support, but the claim is actually weaker than it might at first appear. In some sense, it is just a variation of a claim Professor Stephen Ross made over two decades ago, that statutes usually either apply to citizens “via administrative regulations . . . or concern special areas of law that no ordinary citizen would attempt to comply with without legal advice.”¹⁹⁹

Now, I may be loading the dice in my favor with my example here, but consider federal tax law.²⁰⁰ Millions of individuals and entities are subject to the detailed provisions of the Internal Revenue Code (IRC) (and Treasury or Internal Revenue Service (IRS) regulations).²⁰¹ And yet, while many determine compliance

supra note 148, at 82 (noting that pragmatic arguments are “fine in a common-law world but not in the domain of statutes and regulations”). Codification too has as one of its goals the simplification of law. *See* Stevenson, *supra* note 159, at 106 n.5 (explaining Bentham’s rationale for creating a “comprehensive utilitarian code”).

198. *See, e.g.,* Artis v. District of Columbia, 138 S. Ct. 594, 608–17 (2018) (Gorsuch, J., dissenting) (relying on, among other things, the common law to interpret statutory text); *cf.* Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 276 (2017) (arguing that though the Constitution’s audience was the public, “some of the content may have been contained in technical language (for example, ‘ex post facto Law’) accessible via the division of linguistic labor between experts (lawyers) and other members of the public”); Solum, *supra* note 117, at 500 (noting that “some constitutional language seems to be technical in nature”).

199. Stephen F. Ross, *The Limited Relevance of Plain Meaning*, 73 WASH. U. L.Q. 1057, 1059 (1995); *see also id.* at 1067 (“[M]ost federal statutes are written for a narrower linguistic sub-community of specialists and lawyers.”); Stevenson, *supra* note 159, at 150 (“If the idea is that the words of a statute should be given the meaning that a non-lawyer would understand, this is odd; the people do not read the statutes, do not plan around the words. The words were addressed to state actors, and the question should be what the meaning is for them.”).

200. *See* Stevenson, *supra* note 159, at 146 (identifying “environmental, antitrust, [and] tax regulations” as areas of the law that are particularly suited for lawyer interpretation). Apparently, for those in the know, I could also pick the law of baseball. *See id.* at 112 (noting that the official Rules of Baseball “are as tedious and difficult to decipher as the tax code”).

201. *See* Andrea Monroe, *Hidden in Plain Sight: IRS Publications and a*

without a lawyer, virtually none does so by directly consulting—by reading the language in—the Internal Revenue Code, Title 26 of the U.S. Code²⁰² (let alone the Statutes at Large—more on that distinction shortly). Tax lawyers, accountants, IRS and Treasury officials, all might be viewed as part of the relevant linguistic sub-community for the statutory language actually found in the IRC, but the ordinary “person on the street” is obviously not in the group.²⁰³ Virtually every “person on the street”—indeed, almost everyone and every entity regulated by the IRC—complies by following a computer program or, at best, by reading an IRS publication.²⁰⁴ In fact, even many in the group I have described as the relevant linguistic sub-community for the statute get their understanding of the statutory language not from the statute or code but from IRS publications written by agency employees.²⁰⁵ While not all of these people are lawyers, many are.²⁰⁶ In any event, the precise contours of the actual linguistic sub-community are not as important to me as the underlying point, that the audience (however defined) of *some* statutes²⁰⁷ is lawyers.²⁰⁸

New Path to Tax Reform, 21 FLA. TAX REV. 81, 84 (2017) (describing the wide breadth of those who “make up the federal income tax community”).

202. 26 U.S.C. §§ 1–9834 (2018).

203. See Monroe, *supra* note 201, at 83 (“Very few taxpayers turn directly to the Internal Revenue Code to determine their federal income tax liability.”); Blatt, *supra* note 155, at 642 (“Taxation, for example, is the province of a relatively small cadre of lawyers . . .”).

204. See Monroe, *supra* note 201, at 83 (explaining that “taxpayers rely on intermediaries,” such as commercial software or the IRS to file their taxes). Moreover, this is how the Internal Revenue Code’s drafters view things too. See Shu-Yi Oei & Leigh Z. Osofsky, *Constituencies and Control in Statutory Drafting: Interviews with Government Tax Counsels*, 104 IOWA L. REV. 1291, 1336 (2019) (“[Code drafters] are writing with other subject matter experts and intermediaries (including agency officials) in mind.”).

205. See Monroe, *supra* note 201, at 84 (explaining that IRS publications play an important role in interpreting tax law for intermediaries).

206. See *id.* at 115–16 (stating that most of the tax expert community are lawyers).

207. And again, let me emphasize that, when I say “statutes,” I mean the statute’s *language*, not the statute itself. So while the “audience” for tax statutes is of course those who are subject to the tax, the audience for the statutory language is the specialist community of tax lawyers and IRS officials. See Oei & Osofsky, *supra* note 204, at 1336 (“[E]xpert intermediaries, not ordinary

This insight—though perhaps not the empirical claim—is already embedded in statutory interpretation theory, practice, and pedagogy. So, while I think Professor Ross should get some credit for a clear and explicit exposition of the idea, it is implicit in the notion of technical versus “ordinary” meaning, a distinction taught in most current statutory interpretation texts.²⁰⁹

The question of “ordinary” versus technical meaning intertwines directly with the notion of statutory audience.²¹⁰ The classic case used to illustrate the importance of audience in statutory interpretation is the 1893 case, *Nix v. Hedden*,²¹¹ the famous “Is a tomato a fruit or a vegetable?” case.²¹² In *Nix*, the Supreme Court had to interpret a federal statute that imposed a tariff on fruits that was different from the tariff imposed on vegetables. The Court determined that a tomato was, for purposes of that statute, a vegetable; and this was despite the fact that, botanically, a tomato is the “fruit of a vine.”²¹³ Famously relying in part on the fact that no one has tomatoes for dessert,²¹⁴ the Court concluded that the statute incorporated a

taxpayers, [are] the audience for tax statutes . . .”).

208. See Blatt, *supra* note 155, at 643 (“The legal profession itself is one policy subcommunity.”); see also Rasmussen, *supra* note 161, at 1052–53 (discussing bankruptcy as an example of this same phenomenon).

209. See, e.g., WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS 200–09 (5th ed. 2009); WILLIAM N. ESKRIDGE JR. ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION 645–47 (5th ed. 2014) (detailing the differences between ordinary meaning and the technical meaning of words); OTTO J. HETZEL ET AL., LEGISLATIVE LAW AND STATUTORY INTERPRETATION 396–98 (4th ed. 2008) (using *Nix v. Hedden*, 149 U.S. 304 (1893) to introduce the distinction between ordinary and technical meaning); LINDA D. JELLUM & DAVID CHARLES HRICIK, MODERN STATUTORY INTERPRETATION 87–92 (2d ed. 2009) (describing how to determine technical meaning); SAMUEL ESTREICHER & DAVID L. NOLL, LEGISLATION AND THE REGULATORY STATE 195–205 (2d ed. 2017) (section on “technical vs. lay meaning”).

210. See Oei & Osofsky, *supra* note 204, at 1336 (explaining the relationship between drafting choices and an expert audience).

211. 149 U.S. 304 (1893).

212. See *id.* at 306 (“The single question in this case is whether tomatoes, considered as provisions, are to be classed as ‘vegetables’ or as ‘fruit,’ within the meaning of the Tariff Act of 1883.”).

213. *Id.* at 307.

214. *Id.* Obviously, the Justices had never encountered pastry chef Maggie

lay definition of “fruit,” rather than a technical one.²¹⁵ It is difficult to imagine a textualist objecting to this result, despite the strength of the dictionary definitions undercutting it.²¹⁶ Indeed, the modern-day textualist would probably celebrate the approach, relying as it does on “the common language of the people.”²¹⁷ But the more sophisticated textualist should go further, recognizing that the Court relied on the fact that most *importers* would view tomatoes as vegetables, not fruits.²¹⁸ The key is not simply that the Court chose a lay definition, but that a textualist might legitimately view the importer (non-botanist) businessperson as the “appropriately informed” interpreter.²¹⁹ And it is the “appropriately informed” interpreter who should be viewed as the objective reader of the relevant statutory provision, here the tariff.

In short, the statute’s audience was traders in tomatoes, not horticulturalists, and so the Court interpreted the term “fruit” not to encompass tomatoes, despite the fact that the dictionary contradicted its conclusion.²²⁰ The flip side of this is of course cases involving specialized meaning: for example, the interpretation of contracts under the Uniform Commercial Code, where specialized usage “in the trade” prevails over ordinary

Huff’s artistic creations, such as “Fresh and Candied Tomatoes with Peaches, Plums, and Bitter Almond Sorbet,” at Dallas’s famous FT33 restaurant. See Chelsea Morse, *5 Ways to Eat Tomatoes for Dessert*, FOOD & WINE (Aug. 3, 2015) <https://perma.cc/EHV7-S2MV> (last visited Oct. 17, 2019) (sharing five of pastry chef Maggie Huff’s ideas for tomatoes as dessert) (on file with the Washington and Lee Law Review); see also Tara Parker Pope, *Vegetables Crash the Dessert Menu*, N.Y. TIMES, Apr. 24, 2018, at D4 (providing examples of ways chefs around the country have used “vegetables,” including tomatoes, as desserts).

215. *Nix*, 149 U.S. at 307.

216. See, e.g., *Tomato*, CONCISE OXFORD ENGLISH DICTIONARY 1517 (12th ed. 2011) (defining “tomato” as “a glossy red or yellow edible fruit, eaten as a vegetable or in salads”).

217. *Nix*, 149 U.S. at 307.

218. See *id.* at 306–07 (relying (in part) on the testimony of two importers to find that in the common language of the people, tomatoes are vegetables).

219. See *id.* (finding that under a botanical definition, tomatoes are fruits, “[b]ut in the common language of the people, whether sellers or consumers of provisions,” tomatoes are vegetables).

220. *Nix*, 149 U.S. at 307.

meaning.²²¹ The “plain” meaning of words may not always be the meaning apparent to the ordinary reader.²²² To determine the “plain” meaning, if there is one, requires a determination first of the relevant linguistic sub-community to whom that meaning would be “plain.” Were the term “fruit” used in, say, the Plant Variety Patent Act,²²³ the textualist interpreter would undoubtedly ask not whether sellers or importers of tomatoes would view tomatoes as vegetables, but instead whether scientists who might apply for a plant patent would. The relevant audience for that statute would be different, and the word “fruit” would thus probably have a different definition; it would not matter that tomatoes are, as the Court in *Nix v. Hedden* put it, not fruits “in the common language of the people.”²²⁴ Moreover, textualists well recognize the importance of technical meaning where the intended audience is the “specialized sub-community of lawyers.”²²⁵ All this is perhaps a long way to say that laws can be placed on a continuum as to how much the relevant linguistic sub-community encompasses lawyers, rather than the “person on the street” and/or regulated parties generally, with the laws of legal procedure on one side of the continuum and criminal laws covering, say, violent acts on the other.

3. *Textualism, Statutory Audience, and the Same-Subject Determination*

What does all this have to do with the *in pari materia* doctrine? My claim is, actually, quite a lot. At its core, Step Zero

221. See U.C.C. § 1-303 cmts 1, 3 (AM. LAW INST. UNIF. LAW COMM’N 2017); see also Ross, *supra* note 199, at 1067 (noting that “outside arbitrators resolving disputes under the Uniform Commercial Code” place greater emphasis on trade usage “rather than on the ‘plain meaning’ of the black textual letters written on the pieces of paper bound together as the United States Code”).

222. Cf. SOLAN, *supra* note 88, at 54–55.

223. 7 U.S.C. §§ 2321–2582 (2018).

224. *Nix v. Hedden*, 149 U.S. 304, 307 (1893).

225. See John Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 434–35 (2005) (“[W]here appropriate in context, textualists seek out technical meaning, including the specialized connotations and practices common to the specialized sub-community of lawyers.”).

of the *in pari materia* doctrine asks whether two statutes are “on the same subject,” and textualism asks, in the first instance, who the “appropriately informed” reader is. Thus, for a textualist to determine whether a statute (or a statutory provision) is “on the same subject” as another statute (or statutory provision) requires determining whether the appropriately informed reader would know about the other statutory provision and would view it as being “on the same subject.” Or, perhaps more accurately, *whether the law should expect* the appropriately informed reader to know about the other statutory provision, a “constructive knowledge” standard, so to speak.

Shortly, I will give some examples to help illustrate how to make this determination, but you do not have to agree with any of them to see how this framing changes the core of interstatutory interpretation. Rather than asking an abstract question about how similar the subject matters of the two statutory provisions are, the focus shifts to the core of the first inquiry that a textualist must make every time s/he interprets a statute, who is the appropriately informed reader. To be sure, most textualists usually answer the question implicitly and often with the “person on the street” as the answer.²²⁶ But, even if that is the answer and even if one goes so far as to reject the importance of the lawyer in my Federal Rules of Civil Procedure and tax law examples,²²⁷ and claim that the “appropriately informed reader” is always the “person on the street,” the central point remains: for a textualist to determine whether a second statute is *in pari materia* with a first requires determining whether the appropriately informed reader would know about the second statute. Here, I am not defining the term “know about,” since as I said, it would most likely be a “constructive knowledge” standard and would almost certainly be an objective, rather than subjective, inquiry. Rather, I am simply delineating in broad terms the nature of the inquiry, rather than its precise contours.²²⁸ The key is that a textualist should not really look to

226. See *supra* notes 146–147 and accompanying text.

227. See *supra* notes 186–208 and accompanying text.

228. If the appropriately informed reader is the person on the street, however, the inquiry would likely yield a far narrower category of appropriate uses of the *in pari materia* doctrine than if the appropriately informed reader

another statutory provision elsewhere in the law unless the appropriately informed reader would do the same. Otherwise, the same-subject determination could undermine one of textualism's most important goals, the rule-of-law value of fair notice to the regulated party.

Since often that reader is a lawyer, not a "person on the street" and/or regulated party, determining whether one statutory provision is *in pari materia* with another requires understanding something about whether the "appropriately informed" lawyer would know about the second statutory provision.²²⁹ That is one reason, I suspect, that most textualists are ardent proponents of the Whole Act Rule: context matters because the appropriately informed reader is expected to read the entire statute and think of the entire statute as a coherent whole.²³⁰ A typical "person on the street" would probably not know to do that, but a lawyer would—or, at least, the law expects a lawyer to do so. The question this way of framing the same-subject determination raises then is what other statutes (or statutory provisions) is the appropriately informed reader expected to have read and to think of as relevant in the interpretive process.

D. Applying Textualism to the Same-Subject Determination

Let us turn to a well-known example of the Supreme Court relying on one statute—actually, several statutes—to interpret a second, *West Virginia University Hospitals, Inc. v. Casey*.²³¹ While

were a lawyer, a point I will return to below.

229. See *supra* Part III.C.2.

230. But see Gluck, *supra* note 26, at 203 ("Absent clear evidence to the contrary, consistency presumptions should not be applied for exceedingly lengthy statutes, for different statutory sections within a single statute drafted by multiple committees, or across different statutes.").

231. 499 U.S. 83 (1991). *Casey* is found in most statutory interpretation casebooks. See, e.g., CALEB NELSON, STATUTORY INTERPRETATION 486–524; WILLIAM N. ESKRIDGE JR. ET AL., LEGISLATION AND REGULATION 859–66 (5th ed. 2014); WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS 857–69 (5th ed. 2009); LINDA D. JELLUM & DAVID CHARLES HRICK, MODERN STATUTORY INTERPRETATION 151–60 (2d ed. 2009).

the Court never used the phrase “*in pari materia*,” it was clearly channeling the concept.²³² *Casey* involved the interpretation of the term “attorney’s fee” in a 1976 statute that provided for the shifting of fees in cases brought under 42 U.S.C. § 1983.²³³ The question was whether the relevant statutory provision, codified at 42 U.S.C. § 1988,²³⁴ permitted fee-shifting for testimonial and nontestimonial experts.²³⁵ One key rationale that Justice Scalia, writing for the majority, relied on was that “[t]he record of statutory usage demonstrates convincingly that attorney’s fees and expert fees are regarded as separate elements of litigation cost.”²³⁶ Looking far and wide throughout the United States Code, the Court noted that Congress had in some circumstances explicitly listed “expert witnesses” or “expert witness fees” in fee-shifting statutes, whereas at other times, it had not.²³⁷ The Court strengthened this argument with the fact that Congress had adopted many fee-shifting statutes with language that explicitly shifted “expert” fees in 1976 itself, the very same year Congress passed 42 U.S.C. § 1988, the statute that was being interpreted.²³⁸ Indeed, Congress had passed a fee-shifting provision with the words “expert witnesses,” in the Toxic Substances Control Act,²³⁹ “just over a week prior to the enactment of § 1988.”²⁴⁰ By negative implication, the Court concluded that § 1988’s use of the term “attorney’s fee” *without* the additional reference to “expert fees” meant that “expert fees” were excluded and that § 1988 thus did not permit the shifting of expert fees.²⁴¹

232. See NELSON, *supra* note 231, at 506 (“The principle on which the majority relies in [*Casey*] is closely related to the *in pari materia* idea.”).

233. 42 U.S.C. § 1983 (2018); *Casey*, 499 U.S. at 84.

234. Civil Rights Attorney’s Fees Awards Act of 1976, Pub. L. No. 94–559, 90 Stat. 2641, *amended by* Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1988).

235. *Casey*, 499 U.S. at 84.

236. *Id.* at 88.

237. *Id.*

238. *Id.*

239. 15 U.S.C. §§ 2618(d), 2619(c)(2).

240. *Casey*, 499 U.S. at 88.

241. *Id.* at 92.

Importantly, the array of fee-shifting provisions Justice Scalia cited was wide-ranging: “[a]t least 34 statutes in 10 different titles of the United States Code explicitly shift attorney’s fees *and* expert witness fees,”²⁴² including statutes on environmental law,²⁴³ consumer protection law,²⁴⁴ maritime employment law,²⁴⁵ health law,²⁴⁶ and civil rights.²⁴⁷ As the Court put it, “[t]hese statutes encompass diverse categories of legislation, including tax, administrative procedure, environmental protection, consumer protection, admiralty and navigation, utilities regulation, and, significantly, civil rights.”²⁴⁸

In dissent, Justice Stevens focused on the specific intent of Congress when passing § 1988.²⁴⁹ He concluded that the goal of the fee-shifting provision was to make prevailing plaintiffs whole and that a decision denying recovery for expert fees would create incentives for attorneys to take on many of the tasks that could more efficiently be performed by experts.²⁵⁰ He concluded that “[t]he fact that Congress has consistently provided for the inclusion of expert witness fees in fee-shifting statutes when it considered the matter is a weak reed on which to rest the

242. *Id.* at 89.

243. Toxic Substances Control Act, 15 U.S.C. §§ 2618(d), 2619(c)(2) (2018); Resource Conservation and Recovery Act, 42 U.S.C. § 6972(e) (2018); Natural Gas Pipeline Safety Act, 49 U.S.C. § 60121(b) (2018); Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(4) (2018); Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2632 (a)(1) (2018).

244. Federal Trade Commission Act, 15 U.S.C.A. § 57a(h)(1) (West 1993) (repealed 1994); Consumer Product Safety Act, 15 U.S.C. §§ 2060(c), 2072(a), 2073(a) (2018).

245. Longshoremen’s and Harbor Workers’ Compensation Act Amendments of 1972, 33 U.S.C. § 928(d) (2018).

246. National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-31(c) (2018).

247. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(A); Civil Rights Act of 1964 42 U.S.C. § 2000e-5(k) (2018).

248. *West Virginia U. Hosps., Inc. v. Casey*, 499 U.S. 83, 89 (1991).

249. *Id.* at 104–07 (Stevens, J., dissenting).

250. *Id.*; *see also* *Friedrich v. Chicago*, 888 F.2d 511, 514 (7th Cir. 1989) (Posner, J.) (“To forbid the shifting of the expert’s fee would encourage underspecialization and inefficient trial preparation.”).

conclusion that the omission of such a provision represents a deliberate decision to forbid such awards.”²⁵¹

Numerous commentators have criticized the majority’s opinion as “incoherent”²⁵² or “unrealistic”²⁵³ or worse.²⁵⁴ I suspect though that nearly all of that criticism, like Justice Stevens’s in dissent, comes from those who were unsympathetic to the result and sympathetic instead to the policy of making the plaintiff “whole” that Justice Stevens in dissent saw as embedded in the statute.²⁵⁵ Moreover, one can also critique the opinion as being insufficiently realistic about the way Congress really works²⁵⁶—even though Congress adopted several other fee-shifting provisions around the same time,²⁵⁷ it seems

251. *Casey*, 499 U.S. at 115–16.

252. See T. Alexander Aleinikoff & Theodore M. Shaw, *The Costs of Incoherence: A Comment on Plain Meaning*, West Virginia University Hosps. Inc. v. *Casey*, and *Due Process of Statutory Interpretation*, 45 VAND. L. REV. 687, 689 (1992) (arguing that the result of *Casey* is a “[c]ourt-imposed incoherence, blind both to the manifest congressional purpose and to the real-world consequences of the literalistic reading”).

253. See Buzbee, *supra* note 1, at 189–93 (critiquing the “exclusively text-based comparisons of isolated statutory provisions” in the majority’s opinion in *Casey* and other cases as reflecting an “impoverished and politically unrealistic view of legislation and the legislative process”); cf. Bressman & Gluck, *supra* note 172, at 781 (finding that of the forty-one statutes the *Casey* Court cited, only four came from the Judiciary Committee, while the rest of the statutes came from other Committees).

254. See Buzbee, *supra* note 1, at 179 (arguing that the majority’s opinion reflected an “impoverished” view of legislation and the legislative process).

255. See *Casey*, 499 U.S. at 111 (Stevens, J., dissenting) (“This Court’s determination today that petitioner must assume the cost of \$104,133 in expert witness fees is at war with the congressional purpose of making the prevailing party whole.”).

256. See *id.* at 108–11 (Stevens, J., dissenting) (critiquing the majority’s inattention to the legislative history of the statute and Congress’s desire to require courts to shift fees in civil rights cases); Buzbee, *supra* note 1, at 179 (arguing that text-based comparisons of statutes ignore the reality that “Congress enacts laws in different periods, to be implemented by different agencies and administrations, against a different backdrop of case law, statutes, and agency regulation”); Aleinikoff & Shaw, *supra* note 252, at 693–98 (critiquing the majority’s ignorance of Congress’s “long-standing policy that successful civil rights plaintiffs be able to recover the costs of vindicating their rights” and its attempt to respond to Supreme Court cases intruding on that policy); see also *infra* Part IV.

257. See *supra* notes 242–248 and accompanying text.

plausible, perhaps likely, that no one in Congress at the time realistically considered the negative implication, because the relevant drafters may not have even been aware of those other fee-shifting provisions with their explicit reference to “experts.”

But as Professor (now, Dean) John Manning has pointed out, these sorts of arguments, based in either purposivism or subjective intentionalism, are precisely what a good textualist seeks to eschew.²⁵⁸ My point here is not to take sides in this debate, but simply to point out that none of the criticism takes textualism seriously as the driver of the decision. The so-called Meaningful Variation Canon²⁵⁹ is a staple of the textualist toolbox, and none of the critiques takes on the question of whether the decision might (or might not) represent an objective-reader approach to statutory interpretation.

So, I want to look at the case through the lens of textualism itself, focusing on the notion of objectified intent and the appropriately informed reader. We can in fact critique aspects of Justice Scalia’s reasoning—although, as we will see, not necessarily the result—as not being sufficiently textualist. By that, I mean that Justice Scalia may well have been too much of a subjective intentionalist, failing to focus on *objectified* intent.²⁶⁰ Now, I should back up to note that one almost trivially easy textualist argument would have been based on plain meaning, to say simply that an expert is not an attorney and so the term “attorney’s fee” does not include an expert’s fee. The problem was that that argument was precluded by a case two years earlier,

258. See Manning, *supra* note 225, at 443–45 (in the context of discussing Justice Stevens’s dissent in *Casey*, noting that textualists reject “the impulse to make the semantic details of a statute more coherent with its apparent animating policy—the impulse that underlines classic intentionalism . . .”).

259. See WILLIAM N. ESKRIDGE JR., INTERPRETING LAW 109 (2016).

260. See Manning, *supra* note 225, at 424 (arguing that textualists focus on objectified intent, “the import that a reasonable person conversant with applicable social and linguistic conventions would attach to the enacted words”). I want to emphasize again that my discussion focuses entirely on what I’m calling “Step Zero” of the *in pari materia* doctrine, whether two statutes are in fact “on the same subject,” i.e., whether two statutes should be treated as one for purposes of interpretation. I am not concerned with what I’m calling the application of the *in pari materia* doctrine, what the interpreter should do after determining that the two statutes are *in pari materia*.

Missouri v. Jenkins,²⁶¹ which had held that the same term, “attorney’s fee,” in the very same statutory provision, 42 U.S.C. § 1988, applied to more than just “attorney[s]” in a literal sense: it also covered the fees of paralegals, law students, and law clerks who had not yet passed the bar, none of whom were “attorney[s]” in the literal sense either.²⁶² The dictionary alone could thus not decide the case. And so, Justice Scalia’s best argument was rooted in the “statutory usage,” the Meaningful Variation Canon argument that comes from the inclusion of the specific term “experts” in those numerous other fee-shifting statutes.²⁶³

In essence, the question of whether it is appropriate to look to the other fee-shifting statutes (the “statutory usage,” as Justice Scalia called it)²⁶⁴ devolves to a question of whether § 1988 is *in pari materia* with those other fee-shifting provisions. For if so, it would be appropriate to treat them all as, in effect, one statute. But if not, there would be no reason to think that “statutory usage” should be consistent, any more than would the use of the term “attorney’s fee” in, say, German law or Nebraska law or even some other, non-legal sources.

How to treat “statutory usage” in *Casey* depends almost entirely on a characterization of the contours of the subject matter. Implicitly, the majority is focused on the attorneys’ fee provision itself. If the law of fee-shifting is the “subject matter,” then it makes perfect sense for the many fee-shifting provisions littered throughout the United States Code to be *in pari materia* with 42 U.S.C. § 1988. The logic goes something like this: (1) all fee-shifting provisions are on the same subject; (2) all statutory provisions on the same subject must be read as if they are part of one statute; (3) Section 1988 must thus be read in a way that renders it linguistically coherent with all other fee-shifting

261. 491 U.S. 274 (1989).

262. *Id.* at 285. See also Manning, *supra* note 225, at 442 (“Under modern textualism, of course, one could not say that the matter begins and ends with the conclusion that an ‘expert fee’ is literally not an ‘attorney’s fee.’”).

263. See *West Virginia U. Hosps., Inc. v. Casey*, 499 U.S. 83, 92 (1991) (“We think this statutory usage shows beyond question that attorney’s fees and expert fees are distinct items of expense.”).

264. *Id.*

provisions, including many that contain explicit references to experts; and (4) therefore, applying the Meaningful Variation Canon,²⁶⁵ the absence of an explicit reference to experts in Section 1988 means that experts are not included in Section 1988 (or, presumably, any time the term “attorneys’ fees” is used by itself).

The problem with that argument, though, is that one can just as easily characterize the “subject matter” of Section 1988 as anti-discrimination law (or, perhaps more broadly, civil rights law or even poverty law), not the law of fee-shifting. And, importantly, *nothing in an abstract notion of “subject matter” tells us which of these two categorizations is correct*. Indeed, one cannot even view either of the two categories (fee-shifting v. anti-discrimination law) as inherently narrower than the other. The category of fee-shifting covers numerous statutory provisions not in the category of anti-discrimination law, and vice versa. These two categories of subject matter are like overlapping circles in a Venn diagram, with Section 1988 in the intersecting space.²⁶⁶ How then to choose?

The answer for a textualist, I contend, ought to be found in the notion of the appropriately informed objective reader. And this is where I return to my earlier claim that the audience for many statutes is lawyers.²⁶⁷ While a fee-shifting provision might not be as far over on the lawyer side of my lawyer-client continuum as the rules of civil procedure,²⁶⁸ it is probably pretty close. The fee-shifting provision and its interpretation is likely to affect the civil litigator’s strategy (“Am I going to hire an expert?”),²⁶⁹ and while the interpretation may well ultimately

265. See ESKRIDGE, *supra* note 259, at 109.

266. Compare, e.g., *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 149–50 (1989) (finding the venue provision of National Bank Act of 1863 to be narrower than the venue provision of Securities Exchange Act of 1934), *with id.* at 159 (Stevens, J., dissenting) (highlighting that both statutes are narrow along one dimension: The National Bank Act only applies to banks but covers *all* causes of action, whereas Securities Exchange Act only applies to securities cases but covers all parties).

267. See *supra* Part III.C.1.

268. See *supra* text accompanying notes 187–192.

269. See *Casey*, 499 U.S. at 106–07 (Stevens, J., dissenting) (discussing how experts generally “save lawyers’ time and enhance the quality of their work

have an impact on the underlying substance of anti-discrimination law and thus on clients, that effect is secondary. The primary audience for the law is lawyers. But, we must slice our categories even more finely than that, since if I'm right that most statutes are read by lawyers, not clients, then denominating a category of "lawyers" as audience would mean that the *in pari materia* doctrine would resemble the nineteenth century notion that *all* law is part of a single whole and must thus all cohere.²⁷⁰ So, since audience—the appropriately informed reader—is what matters, the key is to subdivide the category of *lawyers* rather than abstractly subdivide the category of *law*.

Here, then, my claim is that Justice Scalia's opinion in *Casey* failed to focus sufficiently on objectified intent or the appropriately informed reader, but instead bled over to subjective intent. There is, however, a way to focus the inquiry on objective meaning, and, as I noted, it requires first determining the provision's audience and then determining what the law should expect that audience to know.²⁷¹

So, let us look a little closer both at the category of lawyers who might read Section 1988 and the category of lawyers that might read the other fee-shifting provisions Justice Scalia relied on.²⁷² First, the category of lawyers reading Section 1988 is likely limited to civil litigators.²⁷³ The question then is whether the category is more limited than that. My sense is that it is, that the category can be thought of as civil *rights* litigators. Notice now that I am making an empirical claim here, one based on the

product" and that in this case they were "necessary" and "essential" for the prosecution's case); *Friedrich v. Chicago*, 888 F.2d 511, 514 (7th Cir. 1989) ("To forbid the shifting of the expert's fee would encourage underspecialization and inefficient trial preparation, just as to forbid shifting the cost of paralegals would encourage lawyers to do paralegals' work.").

270. See *supra* Part II.B.

271. See *supra* Part III.C.3.

272. See *supra* notes 242–248 and accompanying text.

273. Cf. Annotation, *Construction and Application of Civil Rights Attorney's Fees Awards Act of 1976 (Amending 42 U.S.C.A. § 1988), Providing that Court May Allow Prevailing Party, Other than United States, Reasonable Attorney's Fee in Certain Civil Rights Actions*, 43 A.L.R. Fed. 243, § 3(b) (1979) ("[T]he purpose of the Civil Rights Attorneys' Fees Awards Act . . . is to encourage private enforcement of federal civil rights.").

sociology of legal practice. The category is, I contend, as a factual matter, limited to the kind of lawyers who bring or defend claims under 42 U.S.C. § 1983, claims that might result in fee-shifting under Section 1988; very few others would read § 1988.

If I am right about that, then some of Justice Scalia's statutory fee-shifting references work and others do not. The relevant dividing line should be between laws that civil rights attorneys would know about and those laws they would not know about. So, Justice Scalia's references to the fee-shifting provisions in numerous environmental statutes (Toxic Substances Control Act,²⁷⁴ Resources Conservation and Recovery Act,²⁷⁵ Endangered Species Act²⁷⁶) and others on energy (Natural Gas Pipeline Safety Act Amendment of 1976,²⁷⁷ Public Utility Regulatory Policies Act of 1978²⁷⁸), consumer protection (Consumer Product Safety Act²⁷⁹), tax (Tax Equity and Fiscal Responsibility Act of 1982²⁸⁰), and transportation (Regional Rail Reorganization Act of 1973,²⁸¹ Railroad Revitalization and Regulatory Reform Act of 1976²⁸²) would not be relevant, because civil rights litigators simply would not be familiar with those statutes at all. On the other hand, the Civil Rights Act of 1964²⁸³ and Equal Access to Justice Act (EAJA)²⁸⁴ should fit comfortably within the knowledge base of the audience of 42 U.S.C. § 1988 (i.e., lawyers litigating cases under § 1983). That is why Justice Scalia rightly emphasized the EAJA when he noted that the statutes whose fee-shifting provisions explicitly mention "expert[s]" "encompass diverse categories of

274. 15 U.S.C. §§ 2618(d), 2619(c)(2) (2018).

275. 42 U.S.C. § 6972(e) (2018).

276. 16 U.S.C. § 1540(g)(4) (2018).

277. 49 U.S.C. § 60121(b) (2018).

278. 16 U.S.C. § 2632 (a)(1).

279. 15 U.S.C. §§ 2060(c), 2072(a), 2073(a).

280. 26 U.S.C. § 7430(c)(1)(B) (2018).

281. 45 U.S.C. § 726(f)(9) (2018).

282. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, *repealed by* Technical Amendments to Transportation Laws, Pub. L. No. 103-429, 108 Stat. 4377 (codified as amended 45 U.S.C. § 854(g)).

283. 42 U.S.C. § 2000e-5(k).

284. 28 U.S.C. § 2412(d)(2)(A) (2018).

legislation, including tax, administrative procedure, environmental protection, consumer protection, admiralty and navigation, utilities regulation, *and, significantly, civil rights*” before mentioning the EAJA.²⁸⁵

Moreover, the fact that some of these laws were adopted right around the same time as Section 1988—in particular, the Toxic Substances Control Act, which Justice Scalia made a special point of noting was enacted a little more than a week before Section 1988—ought to be viewed as irrelevant from the perspective of the “appropriately informed” objective reader. After all, why would the “appropriately informed” reader of the Civil Rights Act be expected to know the Toxic Substances Control Act or when it was adopted? In the abstract, one could imagine an argument: readers of statutes should know *when* a statute was passed and should know other statutes adopted on or around the same time. The nineteenth century version of the *in pari materia* doctrine in fact had a variation of this idea with a rule that two statutes passed on the same day were to be viewed as *in pari materia*.²⁸⁶ But, this doctrine faded away in time,²⁸⁷ and probably with good right. These days, it is the rare individual who actually reads statutes. We all read codes now. Only where something in the codified version of a statute raises a red flag would one turn to the Statutes at Large, and even then, most of the time, one would not. True, Section 1988’s fee-shifting provision might be one such circumstance. But looking at the original Civil Rights Act Amendments of 1976 in the Statutes at Large²⁸⁸ is certainly

285. *West Virginia U. Hosps., Inc. v. Casey*, 499 U.S. 83, 89 (1991) (emphasis added).

286. JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION § 86, at 75, n. 4 (1882). This was a somewhat powerful doctrine particularly in an era when Congress passed a large number of statutes on March 3, the last day of the Congressional term. *Cf. The Significance of March 4*, UNITED STATES SENATE, <https://perma.cc/GNS5-X92B> (last visited Oct. 17, 2019) (noting that until 1933, March 4 was the first day of a Congressional term) (on file with the Washington and Lee Law Review).

287. *Compare, e.g.*, BISHOP, *supra* note 286, § 86, with SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 51.03, at 237–40 (7th ed. 2017) (noting that statutes passed on the same day should be construed together only if they relate to the same subject).

288. The Civil Rights Attorney’s Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641, 2641 (1976).

not the same as browsing the 1976 Statutes at Large until one comes across the same or similar (or dissimilar) terms that might help interpretation. The negative implication argument from, say, the Toxic Substances Control Act of 1976 might have some purchase from the perspective of *subjective intentionalism*, at least if one is unwilling to delve into the specifics of legislative history.²⁸⁹ After all, both statutes were passed by the same Congress almost simultaneously.²⁹⁰ Surely if we could anthropomorphize Congress into a single person, that fact would be relevant. But by itself, the fact that two statutes were passed a little more than a week apart is of very little relevance from the perspective of *objectified* intent or an appropriately informed reader. No reader of 42 U.S.C. § 1988 would know what other statutes were passed a week before. No one reads the Statutes at Large in order, and in any event, the fee-shifting provision in the Toxic Substances Control Act, though adopted only eight days earlier, was 600 pages before § 1988 in the Statutes at Large.²⁹¹

The question then is what might be relevant to an appropriately informed reader when trying to determine the meaning of words in a statute such as the fee-shifting provision in § 1988. Broadly speaking of course, background principles, relevant common law, the rules of English grammar and syntax, certain canons of construction, any number of possible categories. But how should a textualist determine whether the *in pari materia* doctrine applies, whether a second statute is in fact *in pari materia* with the statute to be interpreted, whether the fee-shifting provision in the Toxic Substances Control Act is relevant to § 1988? The answer, I contend, has to lie in the notion of the appropriately informed reader: A second statute is *in pari materia* with the statute to be interpreted if and only if the

289. Cf. Nelson, *supra* note 134, at 416 (arguing that textualism should best be understood as a preference for rules over standards rather than as a rejection of subjective intent).

290. See *Casey*, 499 U.S. at 88 (“In 1976, just over a week prior to the enactment of § 1988, Congress passed those provisions of the Toxic Substances Control Act.”).

291. Toxic Substances Control Act, Pub. L. No. 94-469, § 19(d), 90 Stat. 2003, 2041 (1976); The Civil Rights Attorney’s Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641, 2641 (1976).

appropriately informed reader would know that second statute. I want to emphasize again one thing about this approach: it is dependent on a sociological construction of audience,²⁹² and it is not necessarily going to yield the same answer over time. That might be enough to tank the idea in the minds of some textualists, but it is my contention that textualists are doing this implicitly all the time anyway—when determining whether two statutes are *in pari materia*—and so this approach simply makes explicit what needs to be explicit to apply textualism to the determination of whether two statutes are *in pari materia*.

Now, I suspect that this portion of the opinion, relying on, as Justice Scalia puts it, “statutory usage,” was not the driver of the decision.²⁹³ Rather, the fact that the word “expert” is not in the phrase “attorneys’ fees” and that the term “attorney” does not ordinarily include an expert was a far more important factor in the real rationale for the majority.²⁹⁴ But I raise this issue because it helps illuminate the key point underlying the same-subject determination. If textualism is to have a principled way to determine when one statute is on the same subject as another, then it requires identifying the relevant audience. It may be that some applications of textualism do not require this sort of identification of audience, but the same-subject determination does. And, even if you think my category for Section 1988, civil rights litigators, is either too narrow or too broad (or wrong on some other dimension), one still needs to answer the question of who Section 1988’s relevant audience is.

It is obviously not enough to say that the objective reader is the “person on the street” or that one must look to the “plain meaning,” since the question here is whether or not the interpreter should look to another statutory provision found

292. See *supra* notes 272–291 and accompanying text.

293. *Casey*, 499 U.S. at 88–92.

294. See *id.* at 99–100 (finding that expert services have never been included in an attorneys’ hourly rates). *But see* Manning, *supra* note 225, at 442 (“Under modern textualism, of course, one could not say that the matter begins and ends with the conclusion that an ‘expert fee’ is literally not an ‘attorney’s fee.’”). The 6–3 majority included three Justices who had dissented from *Missouri v. Jenkins*, the case that held that the term included paralegals, law clerks, etc. *Missouri v. Jenkins*, 491 U.S. 274, 274 (1989).

elsewhere in the United States Code. The question is completely orthogonal to one about “plain meaning,” and so “plain meaning” plays no role.²⁹⁵

E. Textualism’s Audience Problem

My claim raises several issues, both about textualism and about statutory interpretation in general. The first and most obvious is my claim that a textualist’s need to focus on audience necessarily requires thinking about lawyers and thus lawyering.²⁹⁶ As I noted, I suspect many textualists would resist this idea, in large part because of the way in which textualism’s notice rationale has been intertwined with the Benthamite notion that the law must be understood by the “person on the street.”²⁹⁷ It may be that we should broaden our conception of the relevant linguistic sub-community beyond a group of lawyers to include regulated parties as well. But, as I hope was clear from my example of the Civil Rights Act and the Securities Exchange Act,²⁹⁸ doing this might broaden the concept of “same subject matter” to the point that any statute anywhere is fair game for interstatutory cross-referencing, rendering the concept so capacious as to be unhelpful in constraining judges at all—in effect, a Whole Code Rule. It may well also be that, when thinking about a statute’s “shared context,” as Professor Solum has put it, one must incorporate not just the post-adoption statutory audience but also those participants in the legislative process who, although not drafters in literal terms, are in fact participants in the complex communicative process that results in legislation.²⁹⁹

295. Just to reiterate: one can of course look to the ordinary meaning of the term “attorneys’ fees” and conclude that the term excludes experts. The question here though is whether or not the “statutory usage,” as Justice Scalia put it, *id.* at 88, elsewhere in the United States Code can be viewed as relevant for understanding the term. On *that* question, the concept of “plain meaning” plays no role.

296. See *supra* Part III.C.

297. See *supra* notes 196–199 and accompanying text.

298. See *supra* Part III.C.1.

299. Conversation between Professor Larry Solum and author.

Second, as may be clear by now, the fundamental question Step Zero of the *in pari materia* doctrine asks of the textualist is, how much trans-statutory context is a judge permitted to draw on. Thought of narrowly, the question is one about statutory interpretation. Thought of broadly, though, it can also be thought of as a question of institutional choice. Federal judges are generalists, while outside of the elite appellate and Supreme Court bars, most lawyers are specialists.³⁰⁰ Indeed, most of the principles of statutory interpretation, like the principles embedded in trans-substantive areas of the law such as, say, administrative law or even some of the traditional common law subjects such as “property law,” are almost consciously and perhaps explicitly designed to transcend a single subject matter.³⁰¹ In some ways, then, my proposal may appear to undermine (or at least sit in tension with) the basic idea that there ought to be trans-substantive principles of statutory interpretation.³⁰² After all, the proposal draws boundaries based on lawyering practice groups that are not trans-substantive in the way Article III courts or the Supreme Court practice at an elite D.C. firm would be.³⁰³ This is all true.

My only real defense is that some lines must be drawn and that this is precisely what Step Zero of the *in pari materia* doctrine should be doing, determining when a trans-substantive principle of law applies and when it doesn't. Without some kind of limitation on the *in pari materia* doctrine, it amounts to a carte

300. See Neal Katyal & Morgan Goodspeed, *The Future of Appellate Advocacy? More Generalists, Fewer Appeals*, 54 DUQ. L. REV. 367, 367–69 (2016) (noting that appellate lawyers are the rare generalists, as lawyers continue to specialize, and that “[f]ederal judges are generalists”).

301. Cf. Evan J. Criddle, *The Constitution of Agency Statutory Interpretation*, 69 VAND. L. REV. EN BANC 325, 342 (2016) (“Trans-substantive norms also inform statutory construction. Interpretive norms are ‘trans-substantive’ if they are attentive to systemic concerns that transcend the specific statutory regime under review.”).

302. See William N. Eskridge, Jr., *The Dynamic Theorization of Statutory Interpretation*, 2 ISSUES LEGAL SCHOLARSHIP 2, 29 (2002) (“The new textualism presents itself as a trans-substantive theory: whatever the subject area, the statutory plain meaning must trump all other considerations (except when the result is just so unreasonable as to be absurd).”).

303. See Katyal & Goodspeed, *supra* note 300, at 368 (describing appellate practices as more generalist).

blanche for courts to pick and choose helpful interpretive aids from wherever they find them. In other words, Step Zero of the *in pari materia* doctrine demands that the interpreter draw some lines. Doing so not only creates boundaries around a statute by delineating its “subject matter,” but also effectively draws a line between the general and the specific, a line determining in effect how much courts as generalists may draw upon the whole corpus of law to decide a case about a single statute. Thus, *any* determination of when interstatutory cross-referencing is appropriate will have the effect of cutting off some portions of the statutory corpus. By asking a textualist court to think of the problem through statutory audience and thus, as I have argued, through the lens of legal practice areas,³⁰⁴ this fact does not change. Moreover, since the proposal is based on a “constructive knowledge” standard, the proposal does not directly dictate precisely where the boundary between the general and the specific should be.³⁰⁵ If, taking *Casey* as an example, we expect the lawyer who litigates Section 1983 cases to know about the Toxic Substances Control Act’s attorneys’ fee provision, then the latter would be deemed to be *in pari materia* with Section 1988.³⁰⁶ In fact, if we think of the problem through the lens of a lawyer at the Solicitor General’s Office, DOJ Civil Appellate, or an elite appellate practice at a firm like Jones Day or O’Melveny & Myers, then expecting the lawyer to treat these two fee-shifting provisions as *in pari materia* doesn’t seem all that unreasonable. Surely an appellate specialist would research and look to the use of a similar term elsewhere in the law to help shed light on the term’s meaning.³⁰⁷ As I said, such an approach might expand the *in pari materia* doctrine to such a point that it starts resembling the nineteenth century notion that *all* statutes should cohere, which is not too different from not really having any limitations on statutory cross-referencing at all.³⁰⁸ The key point, though, is

304. See *supra* Part III.C.

305. See *supra* Part III.C.3.

306. *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 88 (1991).

307. See Katyal & Goodspeed, *supra* note 300, at 368 (describing appellate practice as more generalist).

308. See *supra* notes 286–287 and accompanying text.

that the relevant inquiry is the choice of statutory audience, combined with a determination of how much the law is going to expect those in that statutory audience to know.³⁰⁹ My own inkling is that a category like “civil rights litigator” is more appropriate than “appellate lawyer” for Section 1988’s audience, but that choice certainly shapes the result.³¹⁰

Moreover, the way in which one draws the lines could result in a self-reinforcing feedback loop.³¹¹ If the law tells lawyers to look elsewhere in the U.S. Code to understand the meaning of a law being interpreted, they will be more likely to do so. If the law says not to bother, they will not.

Relatedly, the determination of how much to expect of the audience, however defined, can thus have an impact on the costs of litigating a statutory-interpretation dispute. This point parallels the arguments about costs in the legislative-history debate, both decision costs in the narrow sense, but also to the extent that the question of costs includes litigation costs. The more broadly a court is willing to allow trans-statutory cross-references, the more lawyers will need to devote resources to finding such cross-references. This is precisely the fear that textualists have voiced about the use of legislative history, known as “Justice Jackson’s lament.”³¹² This dovetails back to a point I made earlier: the textualist who cares about decision costs should want a narrower *in pari materia* doctrine because a narrower *in pari materia* doctrine reduces decision costs and thus litigation costs.³¹³ In my 42 U.S.C. § 1988 example, that would counsel for

309. See *supra* Part III.C.

310. See *supra* Part III.D.

311. I am indebted to Professor Craig Green for this point.

312. See Richard A. Danner, *Justice Jackson’s Lament: Historical and Comparative Perspectives on the Availability of Legislative History*, 13 DUKE J. COMP. & INT’L L. 151, 152 (2003) (“[Justice Jackson] voiced his concern that the materials of legislative history were not readily available to all lawyers arguing cases before the Court.”); see also Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 70 (2018) (discussing the impracticability of Justice Jackson’s “committee reports only” compromise “in an era of unorthodox lawmaking characterized by omnibus legislation, emergency legislation, and massive last-minute amendments”).

313. See *supra* note 138 and accompanying text.

“civil rights litigators” rather than “appellate lawyers” as the proper audience. It would thus support my claim that Justice Scalia was correct to cite the attorneys’ fee provisions in the EAJA and the Civil Rights Act of 1964, but that he was wrong to cite the attorneys’ fee provisions in the array of other statutes on which he relied.³¹⁴

In sum, for a textualist to make a same-subject determination requires grappling with the question of statutory audience, because textualists care about interpretation from the objective-reader’s perspective. In many cases, I suspect it also means grappling with the world of lawyers, not just the world of law, and in many cases, it requires delineating subject matter based on the lines of legal practice.³¹⁵ As I noted before, I recognize that it is somewhat counter-intuitive to treat law’s audience as being lawyers rather than the regulated parties.³¹⁶ But, the basic idea is that even if the *law’s* audience is a regulated party, the audience for the *statutory language* is lawyers.³¹⁷

Just as importantly, even if you don’t accept the details of my argument, the fact that the same-subject determination requires far more than the known tools of textualism helps us understand one important facet of textualism, the importance of defining a statute’s “appropriately informed” reader in the relevant linguistic sub-community.

IV. Interstatutory Cross-Referencing and the Intentionalist Modality in Statutory Interpretation

A. Intentionalism and Purposivism

Subjective intentionalists who care about Congressional intent would likely view the question of whether two statutes are *in pari materia* differently from textualists whose focus is on

314. See *supra* notes 274–285 and accompanying text.

315. See *supra* Part III.C.

316. See *supra* Part III.C.2.

317. See *supra* notes 193–194 and accompanying text.

objectified intent and the appropriately informed reader.³¹⁸ If an interpreter cares about actual Congressional intent, one place to go of course is the legislative history. But I want to sidestep the legislative-history debate and assume that the legislative history says nothing useful about the relationship between the two statutes. In such circumstances, what should the committed intentionalist do to determine whether two statutes are *in pari materia*?

The answer most courts give, at least implicitly, is to have intentionalism bleed over to purposivism but to do so with a dash of imaginative reconstruction.³¹⁹ I want to emphasize here the differences between subjective intentionalism and purposivism as modalities of statutory interpretation. By subjective intentionalism, I mean what has traditionally been referred to as just plain “intentionalism,” a notion whose origins date back at least to Blackstone, who wrote that “[t]he fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made.”³²⁰

Intentionalism thus instructs the interpreter to focus on gleaning the actual subjective intent of the legislature at the time it adopted the statute. This approach has been subject to attack on many grounds, particularly the view that a collective body can have no intent.³²¹ But I want to ignore that critique here, since

318. See *supra* Part III.C.

319. See *supra* Part II (outlining what courts do to determine if statutes are *in pari materia*).

320. 1 WILLIAM BLACKSTONE, COMMENTARIES *59 (1803). Textualists have of course appropriated Blackstone as their own, and with some good right. See, e.g., Robert J. Pushaw, Jr., *Talking Textualism, Practicing Pragmatism: Rethinking the Supreme Court’s Approach to Statutory Interpretation*, 51 GA. L. REV. 121, 142 (2018) (arguing that “the Constitution’s structure supports textualism” based in part on James Wilson’s citation of “Blackstone’s textualist method of construing statutes”). But it is still probably fair to say that subjective intentionalism has played a role throughout the history of Anglo-American interpretation. See William N. Eskridge, Jr., *All About Words: Early Understandings of the ‘Judicial Power’ in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1002 (2002) (discussing Blackstone and the role of subjective intent of legislators in eighteenth century statutory interpretation).

321. See Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) (“A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have

my goal is simply to give those who are intentionalists tools for thinking about the same-subject determination when there is no evidence about specific legislative intent. After all, many—indeed, most—judges care about legislative intent in some measure, based on the presumption that the legislature is the primary policy-making body in our society and that the judge’s job is to be the legislature’s “faithful agent.”³²² For such interpreters, subjective intent matters.³²³

Intentionalism contrasts with purposivism.³²⁴ Though there is some overlap in the group of proponents of these two interpretive modalities, the two are distinct,³²⁵ and I want to be clear that my proposal in this Part is aimed at intentionalists, not

had, and often demonstrably did have, different ideas and beliefs.”); Kenneth A. Shepsle, *Congress is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239, 254 (1992) (“Individuals have intentions and purposes and motives; collections of individuals do not.”). *But see* Elizabeth Garrett, *Legislation and Statutory Interpretation*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 360, 363 (Keith E. Whittington & Daniel Kelemen eds., 2008) (citing MACKIE, DEMOCRACY DEFENDED (2003)) (“Although Arrow’s Theorem suggests that collective decision-making may lead to irrational outcomes and other social choice work points to the possibility of instability in collective bodies, neither demonstrates that all collective choice will be meaningless.”); CHRISTIAN LIST & PHILLIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS 4 (2011) (“Some talk of group agents may be metaphorical, to be sure, and some may misconceive reality. But often the ascription of agency to groups expresses a correct and important observation, both in common and in scientific discourse.”); MISREADING LAW, *supra* note 88, at 135–36 (“[M]achines do not have minds, nor does Congress—the only important question is “how” they decide. So, too, the question here is not whether Congress has a mind but how it decides and what it means by its decisions.”); Lawrence Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427, 449 (2005) (“Therefore, when judges speak of legislative intent and attribute reasons to the legislature as though it were a single individual with a mind of its own, they are simply doing what we all do when we talk about deliberative groups.”).

322. *See, e.g.*, Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 112 (2010) (“The view that federal courts function as the faithful agents of Congress is a conventional one.”).

323. *See id.* (“[T]he classical approach to statutory interpretation[] claims that a judge should be faithful to Congress’s presumed intent rather than to the statutory text when the two appear to diverge.”).

324. *See* Garrett, *supra* note 321, at 361–66 (intentionalism), 369–72 (purposivism).

325. *See id.* (describing purposivism and intentionalism).

purposivists. In fact, as I alluded to earlier and will explain in more detail below, the current approach—ad hoc as it is—may well be a better way of thinking about the relationship between two statutes through a purposivist lens than would my proposal in this Part of this Article.

Purposivism has its roots in the so-called “mischief rule,” dating back at least to *Heydon’s Case* in 1584.³²⁶ Its most prominent modern expositors though are Hart and Sacks.³²⁷ The “mischief rule” is the notion that the interpreter must first identify the “mischief,” the problem in the state of the real world, that the legislature intended to correct when passing the statute and then “to make such construction as shall suppress the mischief, and advance the remedy.”³²⁸ Drawing on this way of thinking, Hart and Sacks famously added an explicit reference to the “reasonableness” of the legislators.³²⁹ Purposivists in the Hart and Sacks/Legal Process tradition are thus to assume in the course of determining a statute’s purpose that, “unless the contrary unmistakably appears, . . . the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.”³³⁰ Of course, intentionalists also care about statutory purpose at some level, but an intentionalist would identify purpose by focusing on evidence about the views of the actual enactors.³³¹ This would be distinct from the hypothetically

326. See *Heydon’s Case* [1584] 76 Eng. Rep. 637; 3 Co. Rep. 7 a.; see also *Elliot Coal Min. Co. v. Dir., Office of Workers’ Comp. Programs*, 17 F.3d 616, 631 (3d Cir. 1994) (“[A]dditional support for our parsing of the text of the Act . . . can be found in the ‘mischief’ rule, discussed in the venerable *Heydon’s Case*. . . . That canon of construction directs a court to look to the ‘mischief and defect’ that the statute was intended to cure.”).

327. See William N. Eskridge & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2042–43 (1994) (summarizing the contributions of Hart and Sacks to purposive statutory interpretation scholarship).

328. *Heydon’s Case* at 638.

329. See HENRY MELVIN HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1954) (“Why would reasonable men, confronted with the law as it was, have enacted this new law to replace it?”).

330. *Id.* at 1378.

331. See Garrett, *supra* note 321, at 369 (discussing broad goals of intentionalism).

“reasonable legislator” that a purposivist in the Legal Process tradition would use.³³²

If we focus then on the subjective intentions of the actual legislators, one might ask why other statutes should be relevant to the interpreter at all. This of course would naturally lead to the question of whether the specific lawmakers believed that the putatively *in pari materia* statute was “on the same subject” as the statute to be interpreted. One could also frame the question slightly differently and ask instead whether the legislators believed that the two statutes should be treated as one. The answer to these two questions might well be different. It is easy to imagine legislators viewing two statutes as being on the same subject in the abstract, but not wanting courts to treat them as one from the perspective of either textual/linguistic consistency or policy coherence. As we will see though, my proposal elides this distinction, in part because I am addressing circumstances when there is no evidence of legislative intent.

But there is the preliminary question of why, if at all, other statutes should be treated as relevant if one cares about subjective intent. As I noted, the most viable answer would of course be that the actual legislators thought the second statute was in fact relevant to the first. So, naturally, if there were evidence of specific intent, such as evidence from legislative history, a subjective intentionalist would presumably view that evidence as highly relevant to, if not dispositive on, the question of whether the second statute should be used when interpreting the first.

There might, however, be other considerations that a subjective intentionalist would take into account, particularly if there were no evidence of specific intent. And these other considerations seem to be at least one factor that courts are attempting to intuit when they seek to answer the question of whether two statutes are on the same subject. So, for example, courts that look to the placement of a provision within the United States Code,³³³ simultaneity of adoption,³³⁴ or just a broad

332. See *id.* (“[A]ll three foundational theories incorporate some purposive analysis. What distinguishes the theories is how the purpose is identified.”).

333. See, e.g., *United States v. Cowboy*, 694 F.2d 1228, 1234 (10th Cir. 1982)

intuitive sense that two laws are on the same subject,³³⁵ are often attempting to glean a subjective Congressional intent on the question of whether the statutes are *in pari materia*. But usually courts infer the relationship without any explicit evidence of specific intent, and so we can view these clues of subjective intent more as a probabilistic assessment of likely intent. Again, though, the key point is that this is a form of subjective intentionalism because its focus is on the statutory drafter, not (as textualists would) the statutory reader/audience.³³⁶ Of course, this approach can be criticized for assessing the probabilities wrongly. Perhaps proximity in the United States Code or simultaneity of passage or even intuitive subject-matter similarity do not really indicate anything about the legislators' actual views about whether the two statutes should be read as one. Perhaps it is always a statute-by-statute specific inquiry. But the courts grappling with a rationale for relying on indirect evidence of this sort are likely engaged in a process of searching for evidence of probable intent.

B. Interstatutory Cross-Referencing and the Legislative Process

If making a probabilistic assessment of legislative intent might appeal to a subjective intentionalist when there is no explicit evidence of actual legislative intent, how might a

(analyzing four neighboring statutory provisions in such a way as to have them “read together to reach a consistent result”).

334. See, e.g., *United States v. King*, 322 F.2d 317, 320 (3d Cir. 1973) (“When [the precursor of Section 191] was reenacted . . . , the forerunner of Section 192 was passed as a companion measure. This coincidence of enactment raises an inference that the two provisions should be read together as parts of a single legislative plan.”).

335. See, e.g., *Stevens v. C.I.R.*, 452 F.2d 741, 744 (9th Cir. 1971) (“Federal policy toward particular Indian tribes is often manifested through a combination of general laws, special acts, treaties, and executive orders. All must be construed *in pari materia* in ascertaining congressional intent.”).

336. See John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419–20 (2005)

[F]ederal judges long assumed that when a statute was vague or ambiguous, interpreters should seek clarification, if possible, in the bill's internal legislative history. . . . [T]extualism . . . is associated with the basic proposition that judges seek and abide by the public meaning of the enacted text.

subjective intentionalist do this? In particular, since the *in pari materia* question (through the intentionalist lens) asks whether the legislature viewed the two statutes as on the same subject, what ought an interpreter consider?

1. Congressional Committees as Proxy for Subject-Matter

My answer is that the interpreter should look to the lawmaking process. This approach draws on the ideas of much recent scholarship urging statutory interpretation to become more sensitive to the legislative process.³³⁷ To determine whether two statutes are on the same subject, one might then reframe the question around the organization of subject matter in the legislature itself.

One frame for this might be the United States Code, which is of course the place where Congress inserts almost all of its statutory language.³³⁸ The problem with the United States Code from the intentionalist perspective though is that it is the rare

337. See, e.g., KATZMANN, *supra* note 178, at 4 (“Our constitutional system charges Congress, the people’s branch of representatives, with enacting laws. So, how Congress makes its purposes known, through text and reliable accompanying materials constituting legislative history, should be respected lest the integrity of legislation be undermined.”); Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1123 (2011) (“It is time to take a serious look at statutory-interpretation theorists’ views of Congress and how these ideas stack up against the separation of powers.”); Gluck, *supra* note 26, at 182 (“In the absence of formalism, democracy demands at least some attention to Congress in statutory interpretation or an entirely different theory of justification yet to fully emerge.”); cf. McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 L. & CONTEMP. PROBS. 1 (emphasizing the importance of applying the organization of government to statutory interpretation as a means of determining legislative intent); Daniel B. 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, 1420 (2003) (“Legislation is the product of choices made by legislators pursuing aims within the structure of legislative institutions, rules, and norms.”).

338. See *Researching Federal Statutes*, THE LAW LIBRARY OF CONGRESS, <https://perma.cc/NB35-NRAA> (last updated June 9, 2015) (last visited Oct. 3, 2019) (providing access to all of those statutes) (on file with the Washington and Lee Law Review).

legislator who actually thinks about the world through the organizational lens of the United States Code.³³⁹ Indeed, even among congressional staffers, a code-focused way of thinking about law seems limited primarily to the nonpartisan Legislative Counsel offices in each house of Congress.³⁴⁰

Instead, the primary lines of demarcation for subject matter in Congress itself are based on the committee structure.³⁴¹ Statutes generally come from a committee,³⁴² and with some exceptions (more on this below), much of the language was drafted either in a committee (i.e., by a staffer or lobbyist who provides it to the committee) or by a Legislative Counsel staffer

339. See Schultz Bressman & Gluck *Part II, supra* note 172, at 735 (discussing legislative methods of drafting, including “structural features like the centrality of committee jurisdiction, the type of statutory vehicle, the path the statute takes through Congress, and the requirement that statutes be “scores” for budgetary purposes—each of which affects how statutes are drafted and understood inside Congress”).

340. See generally *id.* at 739–47 (discussing the “central” role of Legislative Counsel in drafting legislation).

341. See Gluck, *supra* note 26, at 202 (citing Schultz Bressman & Gluck *Part II, supra* note 172, at 747–49) (“The organization of Congress into committees emerges from the Gluck-Bressman study as the most salient structural influence, and limitation, on how statutes are drafted and interpreted inside Congress.”); see also Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85, 87 (1987) (“The committee system and its division of labor . . . are so successful in parceling work that anyone interested in a particular subject easily obtains membership on the committee that deals with it.”); SCOTT ADLER, WHY CONGRESSIONAL REFORMS FAIL: REELECTION AND THE HOUSE COMMITTEE SYSTEM 3 (2002) (“In many ways congressional committees are the essential machinery that propels the legislative process.”); RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEE xiii (1973) (“[M]embers specialize in their committee’s subject matter, and hence . . . each committee is the repository of legislative expertise within its jurisdiction.”); cf. also DAVID C. KING, TURF WARS: HOW CONGRESSIONAL COMMITTEES CLAIM JURISDICTION 1 (1997) (“Jurisdictions are property rights over issues. They distinguish one committee from another; they attract legislators to certain panels, and they set boundaries on what politicians can and cannot do.”); KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION 1 (1991) (explaining that structural features of the legislature affect legislative outcomes).

342. See Robert A. Katzmann, *Statutes*, 87 N.Y.U. L. REV. 637, 648 (2012) (“Congressional committees have been central to lawmaking since the early nineteenth century.”).

whose primary responsibilities and expertise are tied to a committee.³⁴³

The implication of this fact for interstatutory cross-referencing is probably now clear: Congressional committees—perhaps even subcommittees—can serve as a proxy for interpreters trying to determine whether two statutes are on “the same subject.” The demarcating lines between one committee and another are precisely the way Congress thinks about and defines the subject matter of law when it produces, and then adopts, statutory language. I should reiterate that using congressional committees in this way is obviously just a proxy for making a probabilistic determination of congressional intent, and so I am assuming a lack of specific intent on the question. The key point is that thinking about similarity of “subject matter” through the lens of the legislative process gives a subjective intentionalist a connection between the same-subject determination and *the legislature’s own categories of subject matter*.

This idea, rooted as it is in the lawmaking process, is of course built on the backs of empirical work in both political science and law, particularly the seminal Gluck/Bressman study³⁴⁴ and the work of people like Judge Katzmann³⁴⁵ and Professors Nourse and Schacter.³⁴⁶ Indeed, in the specific context of the consistent-usage and meaningful-variation canons, Professor Gluck has made this very point, that the “whole act” and “whole code” rules should be abandoned.³⁴⁷ I want to

343. See Schultz Bressman & Gluck *Part II*, *supra* note 172, at 741 (finding that Legislative Counsel is the primary drafter of legislation).

344. See Schultz Bressman & Gluck *Part II*, *supra* note 172, at 725 (presenting the results of “the most extensive survey to date of 137 congressional drafters about the doctrines of statutory interpretation”).

345. See Katzmann, *supra* note 342, at 646–55 (providing a broad overview of the lawmaking process in Congress).

346. See Nourse, *supra* note 337, at 1177 (critiquing textualism, purposivism, and game theory as inconsistent with “dominant, evidence-based, institutional features of Congress”); see also Victoria F. Nourse and Jane S. Schacter, *The Politics of Legislative Drafting*, 77 N.Y.U. L. REV. 575 (2002) (case study of staffers from the Senate Judiciary Committee).

347. See Gluck, *supra* note 341, at 203 (“The idea that similar phrases mean the same thing across an entire statute or that variation of terms is meaningful even across multiple statutes does not comport with the structural separation of

emphasize though that because of that, it is rooted in subjective intentionalism as a modality in statutory interpretation.

2. Legislative Process for Textualists?

A textualist, whose theory of statutory interpretation is rooted in the objective reader, might still reject this approach to the same-subject determination for that basic reason. This would particularly be the case for the textualist who views the “person on the street” as the relevant objective reader. As I noted in Part III, this assumption seems to underlie much of the textualist approach.³⁴⁸ How, the textualist might ask, is the objective reader expected to know whether two statutes were drafted by the same committee? The drafting committee is generally nowhere to be found in the text. Indeed, the very premise of this whole portion of the Article is that we have no evidence of specific intent about the same-subject determination, whether in the text or even in the legislative history. Through the textualist lens, this is of course all true.

But even for the textualist, there may be a sliver of merit to opening up the sausage factory just this one little bit, especially when compared with the prospect of identifying the “appropriately informed” reader that I explained in Part III is necessary to an objective-reader approach to the same-subject determination.³⁴⁹ Or, perhaps worse yet, when compared with the prospect of a highly curtailed version of the *in pari materia*

committees and the lack of communication between them.”); *see also* Schultz Bressman & Gluck *Part II*, *supra* note 172, at 781 (noting that the *Casey* Court ignored the fact that most of the cross-referenced fees provisions had been drafted by other Committees).

348. *See supra* Part III (discussing the textualist approach); *see also, e.g.*, Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2144 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)) (arguing that judges should first determine the “best reading” of a statute by reading the statute “as ordinary users of the English language might read and understand” it).

349. *See supra* Part III (discussing the importance of identifying the “appropriately informed” reader in an *in pari materia* analysis).

doctrine that a “person on the street”-as-audience approach would necessitate.³⁵⁰

First, to the extent that what ultimately animates textualism is a preference for rules over standards,³⁵¹ creating demarcation lines rooted in the jurisdictional lines of congressional committees is relatively rule-like. It’s not perfect of course. Many statutes are drafted by multiple committees, the committees in the two Houses do not align in terms of their jurisdiction, and perhaps most importantly, committee jurisdiction can change over time: names will change, committees will be created, committees will disappear, etc.³⁵² So, my suggestion is by no means a true rule on the rule-standard continuum.³⁵³

At the same time, its rule-like nature does create a significant reduction in decision costs, thereby promoting another important value that textualists hold dear.³⁵⁴ Indeed, the committee demarcation approach to the same-subject determination might have lower decision costs than the approach rooted in the objective reader that I outlined in Part III.³⁵⁵

Second, an approach rooted in the demarcation lines of congressional committees could fit with an objective reader-focused view of statutory interpretation if one accepts the premise that an “appropriately informed” reader would be aware of congressional committees. This of course is highly controversial, and as an empirical matter, may well be false. But

350. See *supra* note 228.

351. See Nelson, *supra* note 134, at 348 (“Indeed, textualists themselves have acknowledged that the contrast between rules and more flexible ‘standards’ is important to their approach.”).

352. See David C. King, *The Nature of Congressional Committee Jurisdictions*, 88 AM. POL. SCI. REV. 48, 48 (1994) (“Jurisdictions are *not* rigid institutional facts that rarely change. Rather, they are turbulent battle grounds on which policy entrepreneurs seek to expand their influence.”).

353. Plus, as I explain below, “unorthodox lawmaking” and different types of laws make this proposal an incomplete tool at best. See *infra* Part IV.B.3 (discussing “unorthodox lawmaking” in more detail).

354. See *supra* note 132 and accompanying text.

355. See *supra* Part III (discussing the “objective reader” approach to the *in pari materia* analysis). Naturally, an approach that assumed a “person on the street” as the objective reader would have significantly lower decision costs, but at what I suspect almost all judges would view as the unacceptable cost of allowing virtually no interstatutory cross-referencing.

thinking about this proposal through the lens of the “appropriately informed” reader again brings into focus the question of who exactly that person is and what the law should expect that person to know.³⁵⁶ Again, if the textualist’s focus is on the objective reader, the same-subject determination necessarily requires an answer to the question of who that objective reader is and thus what that person knows.³⁵⁷ My sneaking suspicion is that most textualists would recoil at the thought that the law should expect any objective reader to know which congressional committee(s) a particular law came through. The whole inquiry would likely be anathema to most textualists. But understanding why can help shed light on the question of how elastic textualism might be, not only as to the same-subject determination, but also in general.

For if I am right that the same-subject determination forces out into the open the question of statutory audience in the theory underlying the textualist modality of statutory interpretation, then it also forces open the question of why it would be inappropriate to think the statutory audience should know the committee origins of a given statute. I want to reiterate that I believe most textualists would view the inquiry as illegitimate. The reasons why are not hard to enumerate: (1) Committees and/or committee jurisdiction demarcation lines are not in the text of the law and so nothing about the committees passed through the Article I, Section 7 process to become law; (2) requiring courts (or expecting an objective reader) to know which committee(s) a law went through would increase decision costs; and (3) as an empirical matter, those who read statutes do

356. See, e.g., Nourse, *supra* note 337, at 1147

Sophisticated textualists . . . sometimes bow to the relevant ‘interpretive community’ but define that community not as the people, but as expert lawyers. Shifting the inquiry to a ‘relevant community’ has the important virtue of noticing that there is an audience for statutes, but it raises its own ambiguities: how are we to determine the relevant audience?

357. Cf. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2144 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)) (positing “ordinary users of the English language” as the relevant reader).

not know which committee (or even, with the exception of revenue bills, which house of Congress!) a statute came from.

Though there may not be satisfactory answers to these objections (in which case I refer the textualist to Part III), I reiterate that the question is comparative. Recall that the same-subject determination is the way in which a court determines the appropriateness of interstatutory cross-referencing, and we are positing that neither the text nor the legislative history contain explicit clues to help make the determination. One answer then is of course for the textualist to conclude that therefore the two statutes are not *in pari materia*, that (in essence) the context of Statute A, the statute being interpreted, does not include the other statute, Statute B. That's reasonable enough, but of course, as I noted in Part III, that would mean that Justice Scalia was wrong in *Casey* on textualist grounds. So, I don't think any textualist is willing to cut him or herself off from relying on other statutes when there is no explicit textual evidence that the two statutes are *in pari materia*.

But I think there are at least partial answers to the objections laid out above. To the first objection—that committees are not in the text that became law—the answer lies in an oft-made critique of textualism, one that intentionalists level at textualism all the time when defending the use of legislative history: the linguistic (and substantive) canons that textualists are more than willing to rely on³⁵⁸ didn't pass through the Article I, Section 7 process either. Since most textualists recognize that communication depends on the relevant interpretive community,³⁵⁹ the question is not what did or did not pass through the Article I, Section 7 process, what is or is not law. Instead, the question is what tools or evidence a court is permitted to use in interpreting the law (the words that did pass

358. See generally SCALIA & GARNER, *supra* note 13 (listing fifty-seven “canons,” none of which went through the Article I, Section 7 process to become law); GORSUCH, *supra* note 148, at 132.

359. See Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 533–34 n.2 (1983) (“Wittgenstein showed that no system of language can be self-contained and that meaning thus must depend in part on logical structure and understandings supplied by a community of readers.”).

through the Article I, Section 7 process),³⁶⁰ and the same-subject determination asks whether one can look to a different statute. All my suggested criterion—look to the statutory origins, which we know are generally found in committees—does is to help make that determination. It simply assists the reader in the task of knowing whether or not the broader context of Statute A, the statute to be interpreted, includes Statute B, the putatively *in pari materia* statute.

To the second potential objection—that requiring interpreters to know the committee(s) from which a law came will increase decision costs—the question is again comparative: increased decision costs compared with what? Professor Manning has praised Justice Scalia’s decision in *Casey* as a paragon of textualism because of Justice Scalia’s reliance on “statutory usage” rather than legislative history.³⁶¹ But the decision is based on a romp through the United States Code.³⁶² The decision costs could have been reduced significantly if the Court had limited itself to statutes that had passed through the same committees as 42 U.S.C. § 1988. Knowing the committee from which a law came is, literally, a single piece of information that, as a practical matter, is now easily available for virtually all laws on Congress.gov, Lexis, and Westlaw.³⁶³

Just as importantly, I want to emphasize that the *in pari materia* doctrine can be a purely textualist tool (as it was for Justice Scalia in *Casey* and for the Court in *Wachovia Bank*). The same-subject determination is simply the method for ensuring that judges are not given free rein to pick and choose their friends

360. See MISREADING LAW, *supra* note 88, at 66 (“Most importantly, we need to stop talking about legislative history and start talking about *evidence* of legislative *decisions*.”).

361. See *supra* Part III.D; see also John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 93–95 (2006) (praising Justice Scalia’s opinion in *Casey* as textualist because of its reliance on “statutory usage” and contrasting it with a purposivist approach that looks to “contextual cues that reflect policy considerations”).

362. See *supra* notes 274–285 and accompanying text.

363. See, e.g., *Committees of the U.S. Congress*, CONGRESS.GOV, <https://perma.cc/Y9TP-XA2K> (last visited October 7, 2019, 4:30 PM) (listing the committees of Congress and linking to legislation that originated in each committee).

wherever they can find them elsewhere in the United States Code.³⁶⁴ In other words, a same-subject determination based on a concrete, easily verifiable, non-manipulable rule-like criterion like Congress's committee structure *reduces* judicial discretion in the game of interstatutory cross-referencing, thereby furthering a key goal of textualism.³⁶⁵

The third objection—that statutory interpreters do not typically know which Congressional committee a law came from—may well be correct. But an objection based on what the objective statutory reader knows is precisely the grounds on which my big-picture claim in Part III of this Article is premised; either way, a textualist needs to answer the question of what the “appropriately informed” interpreter knows.³⁶⁶ Since viewing the objective statutory interpreter as the hypothetical “person on the street” would permit far too little interstatutory cross-referencing for even the dyed-in-the-wool textualist,³⁶⁷ the objection cannot be based solely on the fact that the “person on the street” lacks knowledge about congressional committees. My own sense is that the proposal I outlined in Part III—making the same-subject determination on the basis of legal practice areas, a proposal rooted in actual statutory readers who are generally lawyers with some specialization—more accurately reflects what the sophisticated textualist should seek: the appropriately informed reader is one who knows about other statutes based on the dividing lines of legal practice, since the appropriately informed

364. Cf. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 142 (1983) (“It sometimes seems that citing legislative history is still, as my late colleague Harold Leventhal once observed, akin to ‘looking over a crowd and picking out your friends.’” (quoting a personal conversation with Leventhal)); *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J. concurring in judgment) (citing Leventhal quip).

365. See *supra* note 133. But see Gluck, *supra* note 26, at 177 (“Even formalist-textualist judges, it turns out, crave interpretive flexibility, do not want to be controlled by other courts or Congress, and feel the need to show their interpretive actions are democratically linked to Congress.”).

366. See *supra* Part III.

367. See *supra* Part III (noting that the objective appropriately informed reader of most laws is not the “person on the street”).

reader is a lawyer who practices in the area that the statute to be interpreted is in.

But I return to the textualist at this point to reinforce the key idea: there is no abstract notion of “subject matter” if one believes, as most textualists purport to, that statutory interpretation must be viewed through the lens of the objective reader. Rather, because the “appropriately informed” reader is going to vary from statute to statute, one must make a determination of who the “appropriately informed” reader of the particular statute being interpreted is and what that person knows (or, perhaps more precisely, what the law is going to expect that person to know). Virtually all interpreters expect statutory readers to know, for example, that statutes often have a definitions section. Even textualists generally agree that the definitions section of a statute overrides the “plain meaning” of a term.³⁶⁸ Why? As I said earlier, because the “appropriately informed” reader is expected to scour the statute to look for a definitions section if there is one. All judges, including textualists, expect the objective reader to know enough to look for a definitions section in a statute, no matter where in the statute (or even in the code) the definitions section might be. But, why would we expect the reader to do this? In large part because even the textualist understands that the “person on the street” is not the relevant reader for the interpretive task. Lawyers know to do this, but most laypeople do not.³⁶⁹

Defending this “committee jurisdiction” proposal to textualists though is not my goal. As I said, this idea is clearly rooted in the intentionalist modality of statutory interpretation.³⁷⁰ So, I want to return to the proposal through the

368. See *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018) (unanimous decision relying on statutory definition contrary to ordinary meaning); see also GORSUCH, *supra* note 148, at 142–43 (praising *Digital Realty Trust*). But see *Gustafson v. Alloyd Co.*, 513 U.S. 561, 573–74 (1995) (rejecting statutory definition in favor of dictionary definition); James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court’s Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 557–58 (2013) (noting this point); Gluck, *supra* note 26, at 206 (criticizing this practice).

369. See generally Anuj C. Desai, *Textualism Step Zero* (unpublished manuscript) (on file with author).

370. See *supra* Part IV.A.

lens of an intentionalist. The proposal is premised on the fact that, for those involved in the lawmaking process, “committee jurisdiction [is] a fundamental organizing and interpretive principle.”³⁷¹ Importantly, since the *in pari materia* doctrine, whether applied in its linguistic or its policy-coherence sense, is fundamentally asking about coherence *across* statutes, it matters that the “division of Congress into committees creates drafting ‘silos,’”³⁷² and that there is a “*lack of communication across these committees during the drafting process.*”³⁷³

Thus, as a first cut, an intentionalist should conclude that any two statutes that came out of different committees are necessarily *not in pari materia* with each other. But my proposal goes further, positing that any two statutes that did come out of the same committee should, at least as a rebuttable presumption, be treated as *in pari materia* with each other. That, I admit, is a tougher sell in purely intentionalist terms, but it does have a couple of advantages. First, as I noted above, it is relatively rule-like: even intentionalists put some stock in decision costs, even if reducing them isn’t an explicit goal. Second, it comports with what at least a significant proportion of drafters believe.³⁷⁴

3. Congressional Committees in a World of Diminished Committee Power

My emphasis on committees does run up against a few trends in the federal legislative process over the past few decades, such as the rise in omnibus legislation and the increase in bills driven by congressional leadership outside of the committee structure.³⁷⁵

371. Schultz Bressman & Gluck *Part II*, *supra* note 172, at 747.

372. *Id.*

373. *Id.* at 749 (emphasis added); *see also id.* at 750 (discussing “[d]ifferent drafting practices and manuals”).

374. *See* Schultz Bressman & Gluck *Part II*, *supra* note 172, at 749–50 (stating that forty-three percent of respondents say “presumption of consistent usage applies across statutes in related subject-matter areas precisely *because* the same committee is drafting”). To be sure, this evidence is limited to the presumption of consistent usage and thus to the textual version of the *in pari materia* doctrine.

375. *See generally* Elizabeth Garrett, *Attention to Context in Statutory*

An omnibus statute does not inherently undermine my proposal as long as the relevant title of the statute came from a committee. In order to apply my proposal to an omnibus statute, the interpreter would simply have to treat the relevant title as its own statute, determine which committee it came from, and then make the same-subject determination on that basis. To be sure, omnibus legislation pushes on the broader notion of coherence across statutes that animates the *in pari materia* doctrine.³⁷⁶ But by itself, the fact that the portions of law being interpreted were passed simultaneously with other provisions on unrelated topics, provisions that originated in some other committee (and/or even the other house of Congress) does not change the basic premise of my proposal, that defining subject matter through the lens of the lawmaking process requires a focus on the committee level.³⁷⁷ Importantly, what matters is *that* a particular committee played a role in the relevant statutory language, not how extensive a role the particular committee played: the same-subject determination, unlike other aspects of statutory interpretation, is in both theory and practice a binary variable, an on-off switch, and so is amenable to the relatively rule-like presumption I am proposing, notwithstanding subtleties of the legislative process that minimize the relative importance of committees in the development of the final product of statutory language.

The rise of legislation driven by and originating with party leadership though does undermine my proposal. If a particular statute never touched any congressional committee, then there is simply no way to connect that statute to a committee. It is

Interpretation: Applying the Lessons of Dynamic Statutory Interpretation to Omnibus Legislations, 2 ISSUES IN LEGAL SCHOLARSHIP 1 (2002) (exploring the effect of omnibus legislation on traditional canons of statutory interpretation).

376. See *id.* at 2 (“I will discuss the effect of omnibus lawmaking on canons of construction, including coherence canons.”); *id.* at 6 (noting the difficulty of embedding coherence into statutory interpretation in the context of omnibus legislation in particular).

377. Although I am purposely avoiding any discussion of statutory interpretation at the state level, the fact that most states have a single-subject rule for legislation, a rule with at least a little bite, see Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 UTAH L. REV. 957, 1005–23 (1999), might diminish this problem at the state level.

difficult for me to know precisely how to respond to this phenomenon, except to say that, if committees were to become a shell of their former selves and lose their role in lawmaking, then it would be unreasonable for a subjective intentionalist to use committees as the demarcation lines for subject matter. That is the fate of a proposal tied to the realities of the lawmaking process: it depends on the realities of that process! When that process changes, so too should a subjective intentionalist's approach to interpreting statutes.

V. Conclusion

Statutory interpretation practice abounds with interstatutory cross-referencing; and yet statutory interpretation theory has largely ignored it. Courts have always looked for interpretive assistance outside of the four corners of a statute being interpreted, including elsewhere in the statutory corpus. The *in pari materia* doctrine is one of the most powerful methods for using other statutes because it allows an interpreter to draw on another statute's text, purpose and/or jurisprudence. Applying the doctrine not only helps courts understand how to interpret a particular statute but also helps maintain coherence across statutes.

To keep coherence within manageable bounds, however, courts seek such coherence only among statutes that are "on the same subject;" and so determining whether two statutes are on the same subject becomes a crucial preliminary step in this vital method of interstatutory cross-referencing.

What I hope to have shown is that this crucial first step in interstatutory cross-referencing can be tied to statutory interpretation theory and that thinking about it through the lens of statutory interpretation theory can help give courts better tools for making that determination.

Just as importantly, though, I hope to have shown that thinking about interstatutory cross-referencing through the lens of modern approaches to statutory interpretation helps us better understand those approaches themselves. In particular, it lays bare the fact that textualism requires a more robust theory of statutory audience. While textualists can answer many

interpretive questions by eliding the question of audience or by implicitly assuming the statutory reader is just a reasonably intelligent layperson, neither answer is of any help in determining when interstatutory cross-referencing is appropriate. My proposed solution to the problem—focus on sub-communities of legal practice as the relevant linguistic communities—will probably not satisfy most textualists, in large part I suspect, because it runs counter to the Benthamite strand in textualist thinking. But as I hope I made clear, I am not tied to any particular delineating lines for what constitutes the relevant linguistic community. Rather, the point is that a textualist approach to determining whether to engage in interstatutory cross-referencing requires a careful consideration of statutory audience and thus an equally careful delineation of the statutes' relevant linguistic communities. Textualism needs a better theory of statutory audience, and thinking about the dilemma of interstatutory interpretation is a good first place to start.