

THE FAIR NOTICE FICTION

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Jesse M. Cross*

The Supreme Court has now embraced a radical new direction in statutory interpretation, often interpreting statutes only in accordance with their original public meaning. According to the Court, this makes statutes readable for ordinary people, which puts people on notice about their legal obligations. The Court thereby claims that its approach promotes a specific value: fair notice to the public. This theory, which is remaking our statutory law, has generally evaded academic examination.

This Article takes up that critical project, providing a comprehensive academic study of fair notice in legislation. The idea of providing fair notice to the public through statutory text, it discovers, has always been a fiction. The reading of statutory text has always been a language game accessible only to legal elites. This language game makes rhetorical appeals to ordinary people, but in the context of unavoidably elite reading practices.

The Article documents this “fair notice fiction” in both present and past. For the present, it provides a novel study of federal statutory law. This study uncovers the two features that make this law inaccessible to ordinary readers: (1) its length, and (2) its non-transparent interconnectivity. Together, these features require any reader to possess a particular skill, termed “regime literacy,” which ordinary people do not possess and cannot reasonably acquire.

Next, the Article explores the history of fair notice. Through a study of ancient Rome, early England (1066–1800), and America (1787–present), it finds that fair notice always has been a fiction. For significant portions of this history, literacy was low, texts were scarce, and language barriers were rampant. As these obstacles faded, the sheer volume of statutory law became prohibitive.

Finally, the Article outlines a new, realistic version of fair notice. This version seeks to protect two distinct values embedded in fair-notice discussions: (1) public foreseeability, and (2) separation-of-powers principles. The Article explains how these values can be protected in ways that are actually meaningful for ordinary people.

INTRODUCTION

“We must determine the ordinary public meaning of [the law].”¹

With these words in the landmark case of *Bostock v. Clayton County*, the Supreme Court made it unmistakable: it had embarked upon a new direction in statutory interpretation. Going forward, the Court would regularly disregard a host of concerns that traditionally have influenced the interpretation of statutes. No longer would it need to dwell upon legislative intentions, statutory purposes, or substantive policy goals. In place of these myriad factors, the Court

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1. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020).

increasingly would prioritize a single concern: the original public meaning of statutes.²

According to the Court, this new direction in statutory interpretation is necessary because it protects a key value: fair notice to the public.³ By interpreting statutory terms in accordance with public meaning, the logic goes, the Court can give statutes the meaning that the public expects. In so doing, it makes the pages of the U.S. Code accessible to ordinary people.

The legal academy has largely accepted this line of argument. With remarkable swiftness, it has pivoted to sophisticated linguistic studies of original public meaning.⁴ In so doing, it has developed valuable new tools for unearthing more nuanced assessments of this meaning. And it has revealed important flaws in the intuitions of federal courts about what legal terms mean to ordinary people.

This scholarly work is important, but it also is worrisome. In many instances, it seemingly accepts the Court's elevation of fair notice (and the abandonment of many competing values in the service of it). Meanwhile, the concept of fair notice has received vanishingly little scrutiny in legislation scholarship, despite the many passing references to it throughout the years.⁵ Yet, this concept now suddenly bears tremendous weight within our legal system. The time is ripe, therefore, to examine this concept of fair notice in detail—asking what it actually protects, and what lessons it offers for statutory interpretation.

This Article takes up that project. It provides a novel, in-depth study of fair notice in statutory law. And it discovers that fair notice has always been a fiction. The reading of statutory text has consistently been a language game accessible only to legal elites, it turns out. This language game makes rhetorical appeals to ordinary people, but those references have always occurred in the context of elite reading practices. Ordinary people have never realistically been able to gain fair notice by reading statutes, in other words.

The Article documents this “fair notice fiction” for both past and present. For the present, it discovers two features that combine to make federal statutory law unavoidably inaccessible to ordinary readers: (1) its length, and (2) its non-transparent interconnectivity. Due to this combination of traits, readers must possess a particular competence to read modern federal statutes—one this Article terms “regime literacy.” This refers to the ability of a reader to locate relevant texts within a massive corpus. Ordinary people do not possess regime

2. *See infra* Part II.

3. *See infra* notes 25–26.

4. *See infra* notes 28–36.

5. The closest have been recent studies voicing skepticism of corpus linguistics. *See infra* note 37. In criminal law scholarship, there has been some discussion in the specific context of Title 18 (the criminal code). *See infra* note 38.

literacy for federal law, nor can they reasonably acquire it. The notion that ordinary people can read federal law, therefore, is wrong.

The Article then documents this “fair notice fiction” throughout legal history. Here, it provides a history of fair notice. Through a study of ancient Rome, early England (1066–1800), and America (1787–present), it finds that the bulk of the public has never gained notice by reading statutes. For significant portions of this history, literacy was low, texts were scarce, and language barriers were rampant. As these obstacles faded, the sheer volume of statutory law became prohibitive. For each of the studied periods, these factors combined to make it unreasonable for ordinary people to read statutory law.

Having documented this “fair notice fiction” in past and present, the Article concludes by asking: what would it mean to pursue a realistic, meaningful version of fair notice going forward? Such an approach would look to protect two distinct values that are embedded in the history of fair-notice discussions, the Article suggests. The first value is public foreseeability: i.e., the ability of the public to anticipate the laws that govern it. This should be protected via non-textual strategies, such as public education efforts. The second is the separation of powers, which ought to be protected via new commitments to defensible (but not necessarily public-oriented) interpretations of statutes.

The idea of fair notice has lived a fascinating life in our statutory law. Yet it has never borne the weight that the Supreme Court now places upon it. Nor should it. To protect the ability of ordinary people to read federal statutes is to protect a fiction.⁶ The sooner that courts and scholars confront this basic reality, the sooner we can transition to protecting values of substance in our society—and the better our legal system will be for it.

This Article proceeds in five Parts. Part I provides a background on the Court’s new commitment to original public meaning in statutory interpretation, and its defense of this approach via fair notice principles. Part II documents the traits of modern federal statutes that render them inaccessible to ordinary people. Part III provides a history of fair notice, mapping the various factors that have continually made statutory text inaccessible to ordinary people. Part IV explains what a modern, realistic commitment to fair notice might entail. A brief conclusion follows.

6. It might be wondered why this Article assumes that the fictitious quality of fair notice undermines the Court’s new reliance upon it. After all, there are many legal fictions that we accept in the law. However, legal fictions typically are permitted because they contribute to a legal standard that is believed to be normatively justified. The argument in this Article is that not only is the Court’s new interpretive standard (*viz.*, ordinary-reader meaning) fictitious; so is the normative justification offered for it (*viz.*, provision of fair notice).

I. BACKGROUND

Historically, American courts have taken into consideration a variety of concerns when interpreting statutes—concerns such as congressional intent,⁷ broad statutory purpose,⁸ evolving social norms,⁹ and substantive policy goals.¹⁰ Beginning in the 1980s, however, a burgeoning textualist movement (led by Justice Scalia) increasingly urged the abandonment of these concerns, preferring to focus exclusively on the plain meaning of statutory text.¹¹ In the Roberts Court era, this textualist methodology has quickly become the Court’s preferred method of statutory interpretation.¹² While shaped by the arrival of a conservative majority on the Court, this turn to textualism has been a broader bipartisan phenomenon, with Justice Kagan famously declaring: “We’re all textualists now.”¹³

In recent years, the Court has refined this textualism. Most notably, it has clarified the precise meaning that it seeks in statutory text: original public meaning.¹⁴ This has not always been the case; early textualists sometimes focused on other meanings, such as the meaning for an ordinary legislator.¹⁵ Nor are references to original public meaning in statutory interpretation wholly

7. See, e.g., John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 91 (2001) (explaining that “[t]he Marshall Court frequently emphasized that the federal judge’s constitutional duty was to adhere to the legislature’s intent”).

8. See, e.g., William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990 (2001) (identifying the role of purpose in early American statutory interpretation).

9. See, e.g., *id.*; William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1986) (discussing the role of evolving social contexts in statutory interpretation).

10. See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 109 (2010) (“Federal courts have long employed substantive canons of construction to interpret federal statutes.”).

11. See generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

12. See, e.g., Anita S. Krishnakumar, *Cracking the Whole Code Rule*, 96 N.Y.U. L. REV. 76, 97 (2021) (charting the rise of textualist concerns in Roberts Court opinions). *But see* Brnovich v. Democratic Nat’l Comm., 141 S. Ct. 2321, 2337–40 (2021) (incorporating considerations beyond statutory text).

13. Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 17, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg> [<https://perma.cc/T6JX-UP7B>] (at 8:29); see also *Yates v. United States*, 574 U.S. 528 (2015) (competing textualist opinions by Justices Kagan and Ginsburg). *But see* *West Virginia v. EPA*, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) (“It seems I was wrong. The current Court is textualist only when being so suits it.”).

14. See, e.g., *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020) (“This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.”); *id.* at 1755 (Alito, J., concurring) (“[O]ur duty is to interpret statutory terms to ‘mean what they conveyed to reasonable people at the time they were written.’” (quoting ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 16 (2012))) (emphasis omitted).

15. See *Chisom v. Roemer*, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting) (stating that “[w]e are to read the words of [the] text as any ordinary Member of Congress would have read them”).

new;¹⁶ Justice Holmes famously voiced similar ideas over a century ago.¹⁷ However, textualism's most prominent advocates (including on the Court) have today combined these trends, establishing ordinary people as the proper reference point for determining statutory meaning.¹⁸

As a result, the Court now consistently seeks original public meaning when interpreting statutes.¹⁹ In the landmark 2020 case of *Bostock v. Clayton County*, for example, all three opinions took recourse to original public meaning.²⁰ A study of the 2021 term found that, for the first time, the Court consisted of “a supermajority of Justices [who] clearly accept the primacy of ‘ordinary meaning.’”²¹ In this regard, the Court's statutory jurisprudence has largely converged with its constitutional jurisprudence, which also prioritizes original public meaning.²² This shift in the Court has influenced the rest of the judiciary as well, generating a broader phenomenon of original public meaning in statutory interpretation in the federal courts.²³

To justify this new commitment to original public meaning in statutory interpretation, the Court has pointed to a specific value that it ostensibly promotes: fair notice of the law.²⁴ By interpreting the law in accordance with the meaning assumed by ordinary people, the logic goes, the Court empowers

16. See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (stating that “[all persons] are entitled to be informed as to what the State commands or forbids” (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939))) (second alteration in original).

17. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417–18 (1899) (emphasizing “what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used”).

18. For an example of scholars noting this, see Kevin Tobia et al., *Progressive Textualism*, 110 GEO. L.J. 1437 (2022).

19. See, e.g., *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021) (“When called on to resolve a dispute over a statute’s meaning, this Court normally seeks to afford the law’s terms their ordinary meaning at the time Congress adopted them.”); *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (“In statutory interpretation disputes, a court’s proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself.”).

20. For commentators noting this, see, for example, William N. Eskridge, Jr. et al., *The Meaning of Sex: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 MICH. L. REV. 1503, 1520–21 (2021) [hereinafter Eskridge, *Meaning of Sex*]; Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265 (2020).

21. Kevin Tobia et al., *Ordinary Meaning and Ordinary People*, 171 U. PA. L. REV. 365, 369 (2022) [hereinafter Tobia, *Ordinary Meaning*].

22. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (“In interpreting this text, we are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931))) (alteration in original).

23. See Eskridge, *Meaning of Sex*, *supra* note 20, at 1510 (noting that “statutory interpretation in federal courts has shifted focus away from language production to language comprehension”).

24. See, e.g., *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020) (referring to “the right [of the people] to continue relying on the original meaning of the law they have counted on to settle their rights and obligations”); *Niz-Chavez*, 141 S. Ct. at 1482 (“[A]ffected individuals and courts alike are entitled to assume statutory terms bear their ordinary meaning.”); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1225 (2018) (Gorsuch, J., concurring in part) (“Perhaps the most basic of due process’s customary protections is the demand of fair notice.”); see also William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 340 (1990) (“[T]extualism appeals to the rule-of-law value that citizens ought to be able to read the statute books and know their rights and duties.”).

ordinary people to read statutes—and thereby to gain notice of the laws that govern them. As Justice Kavanaugh phrased it in his dissent in *Bostock*, the idea is that: “Citizens and legislators must be able to ascertain the law by reading the words of the statute.”²⁵ In this regard, Justice Barrett explains, textualists “view themselves as agents of the people rather than of Congress.”²⁶

As these explanations make clear, the prevailing theory of fair notice is premised on an assumption about ordinary people: that they can, and perhaps do, read statutes. In the words of one scholar, fair notice thereby assumes that it is not “too difficult for ordinary citizens to read and understand the law for themselves, without need to absorb distinctively legal training.”²⁷

In the few years since the Court has adopted this approach to statutory interpretation, legal scholars have issued a wave of scholarship aimed at refining our understanding of how ordinary people read texts. Various survey studies have been conducted to identify either specific word meanings or common interpretive practices among ordinary readers, for example.²⁸ These studies have uncovered a variety of ordinary reading practices, discovering that ordinary people interpret statutes via technical meanings,²⁹ in ways that do not track prevailing interpretive canons,³⁰ and in ways that add implicit terms to express statutory text.³¹ The Court has expressed some interest in this line of study.³²

This wave of scholarship also has included work in the burgeoning field of corpus linguistics, which uses computing technology to survey massive corpora of linguistic data in search of prevailing trends in linguistic meaning and usage.³³ Courts also have begun drawing on corpus linguistics,³⁴ as in the recent district court opinion striking down a mask mandate from the Centers for Disease

25. *Bostock*, 140 S. Ct. at 1825 (Kavanaugh, J., dissenting).

26. Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2195 (2017).

27. Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 333 (2019).

28. See generally BRIAN G. SLOCUM, *ORDINARY MEANING: A THEORY OF THE MOST FUNDAMENTAL PRINCIPLE OF LEGAL INTERPRETATION* (2015).

29. See Tobia, *Ordinary Meaning*, *supra* note 21, at 367 (“Modern textualists adopt a strong commitment to ordinary meaning and justify it with a claim about *ordinary people*: people understand law to communicate ordinary meanings. . . . [But] [l]aypeople often take laws to communicate legal—not ordinary—meanings”).

30. See generally Kevin Tobia et al., *Statutory Interpretation from the Outside*, 122 COLUM. L. REV. 213 (2022).

31. See generally Kevin Tobia & Brian G. Slocum, *The Linguistic and Substantive Canons*, 137 HARV. L. REV. F. (forthcoming Dec. 2023).

32. See Transcript of Oral Argument at 51–52, *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2020) (No. 19-511) (Justice Roberts hypothesizes that surveys would be particularly indicative of ordinary meaning).

33. See, e.g., Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788 (2018); Stefan Th. Gries & Brian G. Slocum, *Ordinary Meaning and Corpus Linguistics*, 2017 BYU L. REV. 1417 (2017); Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726 (2020); Tammy Gales & Lawrence M. Solan, *Revisiting a Classic Problem in Statutory Interpretation: Is a Minister a Laborer?*, 36 GA. ST. L. REV. 491 (2020); Eskridge, *Meaning of Sex*, *supra* note 20.

34. It also has been used in the Sixth Circuit and Utah state courts. See, e.g., *United States v. Woodson*, 960 F.3d 852 (6th Cir. 2020); *Fulkerson v. Unum Life Ins. Co. of Am.*, 36 F.4th 678 (6th Cir. 2022); *Richards v. Cox*, 450 P.3d 1074 (Utah 2019).

Control and Prevention,³⁵ and the Supreme Court has begun to discuss (and even use) it in oral arguments and opinions.³⁶

This wave of scholarship has not gone entirely without criticism, with several casting skepticism on the turn to corpus linguistics in particular.³⁷ Some also have offered passing skepticism about the feasibility of ordinary people reading statutes, primarily due to concerns about the accessibility of technical language.³⁸ Overwhelmingly, however, legal scholarship has been remarkably hospitable to the Court's turn to original public meaning and fair notice—refining the Court's vision rather than critiquing it.³⁹ As Part II will explain, however, the fair notice theory that anchors the Court's new statutory jurisprudence has a fundamental problem.

II. THE CURRENT STATE OF FAIR NOTICE

Fair notice theory proceeds upon a fiction. It assumes that ordinary people gain notice of the law by reading statutes. Due to structural features of modern federal law, however, ordinary people today cannot read statutory text. This is not attributable merely to the omnipresence of complex or technical language. Rather, it unavoidably results from two features of modern statutory law: (1) its

35. *Health Freedom Def. Fund, Inc. v. Biden*, 599 F. Supp. 3d 1144, 1178 (M.D. Fla. 2022), *vacated*, 71 F.4th 888 (11th Cir. 2023).

36. See Transcript of Oral Argument, *ZF Auto. US, Inc., v. Luxshare, Ltd.*, 142 S. Ct. 2078 (2022) (Nos. 21-401, 21-518); *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1174 (2021) (Alito, J., concurring) (discussing possible use of corpus linguistics analysis to evaluate canons); *Carpenter v. United States*, 138 S. Ct. 2206, 2238 (2018) (Thomas, J., dissenting) (using corpus linguistics analysis to identify association of “search” with “reasonable expectation of privacy”).

37. See generally Anya Bernstein, *Legal Corpus Linguistics and the Half-Empirical Attitude*, 106 CORNELL L. REV. 1397 (2021); Evan C. Zoldan, *Corpus Linguistics and the Dream of Objectivity*, 50 SETON HALL L. REV. 401 (2019); John S. Ehrett, *Against Corpus Linguistics*, 108 GEO. L.J. ONLINE 50 (2019).

38. See, e.g., Bernstein, *supra* note 37; Zoldan, *supra* note 37, at 435; Evan C. Zoldan, *The Conversation Canon*, 110 KY. L.J. 1, 30 (2022) (“Statutory language is not addressed to the public generally, even if its requirements govern the public.”). Skepticism of ordinary people reading statutes also appears in criminal law scholarship, particularly in lenity discussions. See, e.g., Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 365 (1994) (“Airplane thieves, no less than murderers and other types of thieves, are unlikely to consult statute books.”); David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 569, 585 (Samantha Besson & John Tasioulas eds., 2010) (“This is a fiction, of course, because most people most of the time have no idea when or where to look for changes in the criminal law.”); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 206 (1985) (“The rhetoric of fair warning is plausible and comprehensive, but in many contexts it is also shallow and unreal.”); *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (noting that “it is not likely that a criminal will carefully consider the text of the law”). These arguments differ from that advanced in this Article in that: (1) they typically argue that ordinary people are *unlikely* to read the laws, not that they are *structurally prohibited* from doing so, which has different implications for notice; and (2) they are arguments about the unique context of the criminal code, not the entirety of the federal law, where the Court is now pressing its fair notice arguments. (The criminal code is just one of fifty-four titles in the U.S. Code.)

39. For recent articles with a more critical posture, see Benjamin Minhao Chen, *Textualism as Fair Notice?*, 39 WASH. L. REV. 339 (2022); Alexander Zhang, *The Lost Promise of Fair Notice*, 99 N.Y.U. L. REV. (forthcoming 2024).

length, and (2) its non-transparent interconnectivity. This Part documents these two features of our statutory law, and it explains why they preclude ordinary people from reading statutes today.

A. Length

The length of federal statutory law is staggering. As of 2018, the United States Code was approximately 60,000 pages long.⁴⁰ That figure alone is daunting, yet it actually understates the volume of federal statutory law for several reasons.⁴¹ First, each page of the Code holds triple the words of a typical book page.⁴² Second, the Code includes only “general and permanent” laws,⁴³ so it omits large portions of federal law (such as all appropriations laws).⁴⁴ Consequently, the 22 million words the Code contained in 2010,⁴⁵ and the roughly 52.5 million words it may contain today,⁴⁶ are still under-representative of the true size of our federal statutory regime.

Perhaps the volume of federal law is better captured by the Statutes at Large, therefore, which publishes enacted laws sequentially. For the most recent decade available, the Statutes at Large is over 37,000 pages long.⁴⁷ That figure represents *only a single decade of federal lawmaking*.⁴⁸ The corpus of American federal statutory law is massive.

B. Types of Lengthy Texts

The length of federal statutory law obviously prevents ordinary people from reading the entire corpus of this law. As a result, it forecloses a certain type of public notice—the notice achieved by a comprehensive, individual reading of the laws. This highlights a fundamental difference between our statutory and constitutional law: reading a four-page Constitution is plausible, whereas reading a 60,000-page Code is not.

40. GPO Produces U.S. Code with New Digital Publishing Technology, GOVINFO, <https://www.govinfo.gov/features/uscode-2018> [<https://perma.cc/W4L8-SWTU>].

41. *Id.*

42. See DAVID SCHOENBROD, SAVING OUR ENVIRONMENT FROM WASHINGTON: HOW CONGRESS GRABS POWER, SHIRKS RESPONSIBILITY, AND SHORTCHANGES THE PEOPLE 244 n.3 (2005) (asserting that the Code has 875 words per page).

43. 2 U.S.C. § 285b(1) (2018).

44. On omitted provisions, see Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541 (2020).

45. See Michael J. Bommarito II & Daniel M. Katz, *A Mathematical Approach to the Study of the United States Code*, 389 PHYSICA A 4195 (2010).

46. This figure is suggested by multiplying the estimate of 875 words per page, see *supra* note 42, by the length of 60,000 pages.

47. U.S. GOV'T PUBL'G OFF., UNITED STATES STATUTES AT LARGE, <https://www.govinfo.gov/app/collection/statute> [<https://perma.cc/PA9s-93M5>] (length of 37,214 pages for 2005–2014).

48. See *id.*

Still, perhaps a less robust form of notice is possible. While individuals may not be able to read all federal statutory law, perhaps they can read specific rules of interest. Does this lesser version of notice remain available to ordinary people?

The answer depends on the structure of the legal corpus. Lengthy texts can be divided into three categories for this purpose. These categories vary significantly in their accessibility to ordinary readers.

First, a lengthy document might be a *partitioned text*. This refers to a long document that is partitioned into manageably brief, self-contained units. If statutory text is simply a long list of short, readable rules—none of which is structurally dependent on those that surround it—then the text becomes manageably accessible, at least in a limited sense. Readers might be able to locate specific rules of interest, and to read them with confidence that, at least regarding those particular domains, they understand the laws under which they live.

However, federal statutory law is not partitioned into self-contained units. Instead, it is a dense web of interconnected provisions. This is apparent from the myriad cross-references that populate nearly every federal statute. Consider the sheer volume of appearances in the U.S. Code of terms that Congress uses to cross-reference other provisions:

Term	Appearances in U.S. Code
Title ⁴⁹	77,998
Subtitle ⁵⁰	17,791
Section ⁵¹	61,039
Subsection ⁵²	23,187
Paragraph ⁵³	15,720
Subparagraph ⁵⁴	7,218

As these statistics make clear, federal law is densely self-referential and intertwined.⁵⁵

49. *Title*, OFF. L. REVISION COUNS. U.S. CODE, <https://uscode.house.gov/> [<https://perma.cc/G76C-P8EG>] (search in search bar for “title”) (77,998).

50. *Subtitle*, OFF. L. REVISION COUNS. U.S. CODE, <https://uscode.house.gov/> [<https://perma.cc/L2U4-98U4>] (search in search bar for “subtitle”) (17,791).

51. *Section*, OFF. L. REVISION COUNS. U.S. CODE, <https://uscode.house.gov/> [<https://perma.cc/6N4H-GKPX>] (search in search bar for “section”) (61,039).

52. *Subsection*, OFF. L. REVISION COUNS. U.S. CODE, <https://uscode.house.gov/> [<https://perma.cc/WNR6-XXZM>] (search in search bar for “subsection”) (23,187).

53. *Paragraph*, OFF. L. REVISION COUNS. U.S. CODE, <https://uscode.house.gov/> [<https://perma.cc/6DL7-FYEB>] (search in search bar for “paragraph”) (15,720).

54. *Subparagraph*, OFF. L. REVISION COUNS. U.S. CODE, <https://uscode.house.gov/> [<https://perma.cc/59EN-CWN2>] (search in search bar for “subparagraph”) (7,218).

55. These statistics are an imperfect proxy, of course; they capture non-referential uses of these terms, as well as use by codifiers in editorial notes. For an empirical analysis and documentation of transparent interconnectivity in the U.S. Code, see Bommarito & Katz, *supra* note 45, at 28–33.

This suggests that federal statutory law might belong to a second category: *transparently interconnected texts*. These are somewhat less accessible. Here, a reader is prevented from reading a single provision in isolation. Instead, the reader is required to engage in a more challenging literacy activity: they not only must read an isolated provision, but also must follow a thread of interconnections to locate and read all applicable provisions.

Still, *transparently interconnected texts* might not necessarily exclude ordinary readers, even within a lengthy corpus. After all, when statutory text is explicit about its interconnections (via cross-references), it empowers ordinary readers to follow those connections, and to thereby construct a full picture of the law. In this scenario, close-reading skills suffice to identify all relevant, interconnected texts. Consequently, while an interconnected statutory regime may expand the volume and complexity of relevant statutory text, it does not necessarily make that text the exclusive province of specialists.

By contrast, a third category is truly inaccessible to ordinary readers: *non-transparently interconnected texts*. Here, even if a legislative rule appears to stand in isolation, it in fact poses the threat of lurking interconnectivity. Such a text poses three problems:

- (1) *The interconnectivity problem*: The reader cannot assume that the rule exists in isolation.
- (2) *The non-transparency problem*: The reader cannot assume that the rule identifies all interconnected provisions.
- (3) *The length problem*: The reader cannot read the full text to locate all interconnected provisions.

In these instances, proper interpretation of each rule is contingent upon location of all interconnected provisions (problem #1), and close reading furnishes no strategy to locate these provisions (problems #2 and #3). As a result, an interpreter must possess an additional skill, beyond close-reading ability. This skill might be termed “regime literacy.” As used in this Article, regime literacy refers to the ability to locate the full regime of relevant texts within a massive corpus. It is a skill that relies upon *ex ante* knowledge, possessed by the reader, of where interconnected provisions exist. The specialist skill of regime literacy is a prerequisite to navigating texts that are both lengthy and non-transparently interconnected.

C. Non-Transparent Interconnectivity

Unfortunately for ordinary readers, non-transparent interconnections are omnipresent in federal statutory law. Consider an initial example from the

Medicare statute. A key provision (which provides the rule for outpatient physician payments) reads as follows:

- [E]ach such payment amount for a service shall be equal to the product of—
- (A) the relative value for the service (as determined in subsection (c)(2)),
 - (B) the conversion factor (established under subsection (d)) for the year, and
 - (C) the geographic adjustment factor (established under subsection (e)(2)) for the service for the fee schedule area.⁵⁶

Despite its technical language, this provision appears to be a model of clarity. It specifies a calculation formula, which entails multiplying three factors, and it cross-references those factors. Except there is a problem: eighty pages later, the statute adds a fourth multiplied factor.⁵⁷ Contrary to the plain language of this rule (which states that payment “shall be equal to the product” of three listed factors),⁵⁸ therefore, payment is not equal to the product of this formula. Interpreters cannot understand this, however, without knowing in advance where an interconnected provision looms in federal law.

Federal statutory law is filled with these non-transparent interconnections. To illustrate the point, this Part outlines eight common categories of non-transparent interconnectivity in federal law. While not an exhaustive catalogue, this Part nonetheless illustrates the pervasiveness of this feature in federal law.

1. *Appropriations*

Non-transparent interconnectivity often is created by appropriations statutes, which provide funding to carry out programs for the ensuing year. Scholars are increasingly recognizing the vital role played by these statutes.⁵⁹ When providing funds, these statutes can introduce new modifications or qualifications into funded programs.⁶⁰ These changes alter existing permanent law, yet they often are made in a non-transparent fashion.

These non-transparent changes take myriad forms. For example, appropriations statutes may extend programs that otherwise appear terminated in law. Consider the following provision from the Riegle Community Development and Regulatory Improvement Act of 1994 (RCDRIA), which states:

56. Social Security Act § 1848(b), 42 U.S.C. § 1395w-4(b) (2022).

57. *Id.* § 1395w-4(q)(6)(E).

58. *Id.* § 1395w-4(b).

59. *See, e.g.*, Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075 (2021).

60. *Id.* at 1092–96.

“Termination. This section is repealed, and the authority provided under this section shall terminate, on September 30, 2014.”⁶¹

This termination provision remains on the books today, unchanged. Yet it misleads. This is because appropriations laws have extended the specified termination date (eight different times).⁶² This is not an isolated occurrence; the same phenomenon occurred with the Office of National Drug Control Policy, for example, which for many years continued to be funded by appropriations despite being terminated and repealed by law.⁶³ To know whether these programs actually are terminated, the reader must know to read termination provisions in conjunction with appropriations statutes. In this regard, the reader must know to look not only outside the termination statute, but outside the U.S. Code entirely, as appropriations provisions are not included in the U.S. Code.⁶⁴

This is not even the lone example from the RCDRIA. Section 104(a), which establishes a fund to support certain financial institutions, provides that:

“The Fund shall be a wholly owned Government corporation in the executive branch and shall be treated in all respects as an agency of the United States, except as otherwise provided in this subtitle.”⁶⁵

Despite this plain language, however, the fund is not an independent government corporation. This is because an appropriations bill relocated the fund to the Department of the Treasury.⁶⁶ Only the reader who knows to read the RCDRIA in conjunction with appropriations laws will understand its current structure.

Appropriations law also can operate in the opposite direction: it can terminate programs (or portions of programs) that otherwise appear alive. An example of this is found in the Wild Free-Roaming Horses and Burros Act.⁶⁷

61. Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 114A(k), 108 Stat. 2160, 12 U.S.C. § 4713a(k).

62. See, e.g., Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, 136 Stat. 244 (“*Provided further*, [t]hat such section 114A shall remain in effect . . .”).

63. Office of National Drug Control Policy Reauthorization Act of 1998, Pub. L. No. 105-277, § 715, 112 Stat. 2681 (setting 2003 termination date that, except for temporary window when a 2006 update extended date to 2010, misled until repeal provision was removed in 2018). For further discussion of this example, see Cross & Gluck, *supra* note 44, at 1657. See also Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. G, § 421, 16 U.S.C. § 6809 note (extending section 810 of the Federal Lands Recreation Enhancement Act without modifying text).

64. *Frequently Asked Questions and Glossary*, OFFICE L. REVISION COUNS., <https://uscode.house.gov/faq.xhtml> [<https://perma.cc/DWZ8-CBD6>] (“Temporary laws, such as appropriations acts . . . are not included in the Code.”).

65. Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 104(a)(2), 108 Stat. 2160, 12 U.S.C. § 4703(a)(2).

66. Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act, 1995, Pub. L. No. 104-19, 109 Stat. 237.

67. Act of Oct. 25, 1978, Pub. L. No. 95-514, § 14(a), 92 Stat. 1803.

That law outlines a statutory scheme for handling wild horses, which declares that:

“The Secretary shall cause additional excess wild free-roaming horses and burros for which an adoption demand . . . does not exist to be destroyed in the most humane and cost efficient manner possible.”⁶⁸

For over a decade, however, Congress has included riders in appropriations laws specifying that no money may be used for killing of such horses.⁶⁹ In this way, Congress effectively has terminated one portion of the statutory regime—even while leaving that portion on the books. As a result, the Bureau of Land Management maintains massive facilities housing unadopted wild horses—a quite different statutory scheme from that appearing on the face of permanent law, which says the Secretary “shall” have such horses killed.⁷⁰ To understand it, the reader must know to read the authorizing statute in conjunction with various appropriations laws.

These appropriations examples are not anomalies. Consider the Hyde Amendment, the provision inserted into appropriations bills that bars agencies from using federal funds for abortions.⁷¹ The Hyde Amendment effectively modifies the authorizing statute for each agency, rendering the grant of authority and power to the agency narrower than it appears in authorizing law.⁷² Once again, however, the Hyde Amendment not only is absent from (and never cross-referenced in) each agency’s authorizing statute; as an appropriations provision, it is not located in the U.S. Code whatsoever.

2. *Overlapping Regulatory Authorities*

Overlapping regulatory authority, too, often creates non-transparent interconnectivity. This exists when a product or industry is potentially subject to regulation by multiple statutory regimes. In such situations, a regulatory statute can be misleading when read in isolation. Moreover, readers must be alert to provisions that outline the relationship between such multiple, conflicting regimes.

The Federal Food, Drug, and Cosmetics Act (FFDCA) alone provides many examples. Over a dozen different federal agencies administer more than

68. *Id.* § 1333(b)(2)(C).

69. *See, e.g.*, Department of the Interior Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88, 123 Stat. 2907 (“Appropriations herein made shall not be available for the destruction of healthy, unadopted, wild horses and burros in the care of the Bureau of Land Management or its contractors . . .”).

70. *See* U.S. GOV’T ACCOUNTABILITY OFF., GAO-09-77, BUREAU OF LAND MANAGEMENT: EFFECTIVE LONG-TERM OPTIONS NEEDED TO MANAGE UNADOPTABLE WILD HORSES 7–8 (2008) (describing holding facility policy and noting holding of 30,088 animals as of June 2008).

71. *See* EDWARD LIU & WEN SHEN, CONG. RSCH. SERV., IF12167, THE HYDE AMENDMENT: AN OVERVIEW (2022), <https://crsreports.congress.gov/product/pdf/IF/IF12167>.

72. *Id.*

thirty food safety laws, and not all of their interconnections are transparent.⁷³ For instance, the FFDCA includes a host of rules that apply to “any food,” such as when it states:

“The following acts and the causing thereof are hereby prohibited: . . . The introduction or delivery for introduction into interstate commerce of any food . . . that is adulterated or misbranded.”⁷⁴

Despite its plain language, however, this FFDCA prohibition does not actually extend to “any food.”⁷⁵ This is because the Poultry Products Inspection Act (PPIA) contains a provision declaring that poultry “shall be exempt” from some FFDCA coverage, in order to transfer that regulatory authority to the USDA.⁷⁶ To read the FFDCA is to misread it, therefore, unless one knows to read it in conjunction with the PPIA.

Another FFDCA example is found with biologics. The FFDCA authorizes and specifies the manner of regulating these products.⁷⁷ Yet a competing regulatory system exists under the Public Health Service Act (PHSA), and the PHSA specifies the manner in which these two regimes interact, stating that FFDCA requirements usually (but not always) apply.⁷⁸ In order to understand the FFDCA, therefore, a reader must know where to look outside of it.

Overlapping regulatory authority also is exemplified by federal disability compensation for veterans under Title 38.⁷⁹ For example, the program for “Peacetime Disability Compensation” provides that, with respect to veterans whose medical issues arose during peacetime:

“[A]ny [such] veteran who served for six months or more and contracts a tropical disease . . . shall be deemed [entitled to disability compensation, subject to certain conditions].”⁸⁰

If such a veteran served for only four months, would they be entitled to this disability compensation? It appears not: the veteran must have “served for six months.”⁸¹ Except that is incorrect. Under Section 1137 of the title, the seemingly distinct program for “wartime disability compensation” is extended

73. RENÉE JOHNSON, CONG. RSCH. SERV., RS22600, THE FEDERAL FOOD SAFETY SYSTEM: A PRIMER 1 (2016), <https://sgp.fas.org/crs/misc/RS22600.pdf> [<https://perma.cc/3TZ4-FWEL>].

74. Federal Food, Drug, and Cosmetic Act § 301(a), 21 U.S.C. § 331(a).

75. The FFDCA defines food simply as “articles used for food or drink for man or other animals,” among other things. *Id.* § 321(f).

76. *Id.* § 467f(a).

77. *See* 21 U.S.C. § 321(g)(1) (defining “drugs” in a manner that generally captures biologics).

78. Public Health Service Act, 42 U.S.C. § 262(f) (stating that FFDCA “applies to a biological product subject to regulation under this section, except that a product for which a license has been approved under subsection (a) shall not be required to have an approved application under section 505 of such Act”).

79. *See* 38 U.S.C. §§ 1101–76.

80. *Id.* § 1133.

81. *Id.*

to those disabled in peacetime as well.⁸² As a result, the above rule is displaced by one requiring only ninety days of service.⁸³ As one congressional insider remarked: “I don’t really know how a veteran would understand this if they tried reading the law.”⁸⁴

Even when a statute provides some acknowledgment of interaction with overlapping regulatory regimes, it can be of little assistance to ordinary readers. Consider various laws that empower the President to withdraw public lands and waters from further development.⁸⁵ These laws often specify that they are “subject to valid existing rights,” such as when the National Forest Management Act of 1976 states that:

“Any revision in present or future permits, contracts, and other instruments made pursuant to this section shall be subject to valid existing rights.”⁸⁶

Here, the reader must know that these “valid existing rights” include *statutorily created rights* and also must know where they are located—sometimes in the same statute,⁸⁷ but more often in different statutes, including the General Mining Act of 1872,⁸⁸ the Mineral Leasing Act of 1920,⁸⁹ and the Taylor Grazing Act of 1934.⁹⁰ The phrase “subject to valid existing rights” appears in the U.S. Code 186 times.⁹¹

Overlapping regulatory authority is incredibly common. Does someone want to understand regulation of milk products? They better know, when reading the FFDCA, to read it in conjunction with the PHS⁹² and the Fair Packaging and Labeling Act.⁹³ Want to understand fuel mileage standards? Better know, when reading the Clean Air Act, to read it in conjunction with the

82. *Id.* § 1137.

83. *Id.* § 1112.

84. Email from congressional staffer to author (Dec. 15, 2022, 12:47 PM EST) (on file with author).

85. *See, e.g.*, Antiquities Act of 1906, Pub. L. No. 59-209, 34 Stat. 225 (codified as amended 54 U.S.C. §§ 320301–03); Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 701(h), 90 Stat. 2743; National Forest Management Act of 1976, Pub. L. No. 94-588, § 6(i), 90 Stat. 2949 (codified as amended in scattered sections of 16 U.S.C.); 43 U.S.C. §§ 1331–56b.

86. National Forest Management Act of 1976, Pub. L. No. 94-588, § 6(i), 90 Stat. 2949 (codified as amended in scattered sections of 16 U.S.C.).

87. *See, e.g., id.*

88. General Mining Act of 1872, ch. 152, 17 Stat. 91–96 (codified as amended in scattered sections of 30 U.S.C.).

89. Mineral Leasing Act of 1920, Pub. L. No. 66-146, 41 Stat. 437.

90. Taylor Grazing Act of 1934, Pub. L. No. 73-482, 48 Stat. 1269 (codified as amended at 43 U.S.C. §§ 315–15r).

91. *Subject to Valid Existing Rights*, OFF. L. REVISION COUNS. U.S. CODE, <https://uscode.house.gov/> [<https://perma.cc/986Y-HV9V>] (search in search bar for “subject to valid existing rights”) (186).

92. 42 U.S.C. §§ 201–300.

93. 15 U.S.C. §§ 1451–61; *see also* Memorandum of Understanding Between the U.S. Food & Drug Admin. & the U.S. Dep’t of Agric.’s Agric. Mktg. Serv. & Foreign Agric. Serv. Related to the Export of Milk and Milk Prods., MOU 225-20-017 (Oct. 1, 2020), <https://www.fda.gov/about-fda/domestic-mous/mou-225-20-017> [<https://perma.cc/9UKB-KWKL>].

Energy Policy and Conservation Act.⁹⁴ Want to understand health insurance protections for elderly individuals across income brackets? Better know how the Medicare statute stacks in conjunction with the Medicaid statute.⁹⁵ Want to understand regulation of cigarette labeling and advertising? Better know, when reading the FFDCA, to read it in conjunction with the Federal Cigarette Labeling and Advertising Act and the Federal Trade Commission Act.⁹⁶ And so on.

3. *Regulatory Super-Statutes*

Non-transparent interconnectivity also emerges from statutes that are, in essence, regulatory super-statutes.⁹⁷ These statutes place cross-cutting limitations on the power of governmental actors when regulating. Such super-statutes can include the Administrative Procedure Act, the National Environmental Policy Act, the Endangered Species Act, the Religious Freedom Restoration Act of 1993, the Paperwork Reduction Act, and the Small Business Regulatory Flexibility Act, among others.⁹⁸ These laws create invisible fence-lines around the powers vested in regulators, notwithstanding the appearance of power vested by any particular statute.⁹⁹ One federal official estimated that 30% of the space in federal rules is spent discussing each agency's efforts to harmonize a specific statutory direction with these background super-statutes.¹⁰⁰

Consider the Migratory Bird Treaty Act of 1918 (MBTA) and its interaction with a regulatory super-statute.¹⁰¹ The MBTA informs a reader that:

94. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-336, VEHICLE FUEL ECONOMY: NHTSA AND EPA'S PARTNERSHIP FOR SETTING FUEL ECONOMY AND GREENHOUSE GAS EMISSIONS STANDARDS IMPROVED ANALYSIS AND SHOULD BE MAINTAINED (2010), <https://www.gao.gov/products/gao-10-336> [<https://perma.cc/7H9Z-N65W>].

95. Maria T. Peña et al., *Medicaid Arrangements to Coordinate Medicare and Medicaid for Dual-Eligible Individuals*, KFF (Apr. 27, 2023), <https://www.kff.org/medicaid/issue-brief/medicaid-arrangements-to-coordinate-medicare-and-medicaid-for-dual-eligible-individuals/> [<https://perma.cc/B9EH-XYEC>].

96. See 21 U.S.C. § 387 (FFDCA regulating tobacco products and advertising); 15 U.S.C. §§ 1331–40 (Federal Cigarette Labeling and Advertising Act regulating tobacco products and advertising); 15 U.S.C. § 45 (Federal Trade Commission Act regulating tobacco products and advertising).

97. The Court used this label in *Bostock* for one such statute, remarking: “RFRA operates as a kind of super statute, displacing the normal operation of other federal laws” *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020).

98. See generally William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001) (discussing the concept of super-statutes).

99. See, e.g., *Summary of the Administrative Procedure Act*, U.S. ENV'T PROT. AGENCY (Aug. 17, 2023), [https://www.epa.gov/laws-regulations/summary-administrative-procedure-act#:~:text=The%20Administrative%20Procedure%20Act%20\(APA,on%20notices%20of%20proposed%20rulemaking](https://www.epa.gov/laws-regulations/summary-administrative-procedure-act#:~:text=The%20Administrative%20Procedure%20Act%20(APA,on%20notices%20of%20proposed%20rulemaking) [<https://perma.cc/MSU9-9Z59>]; 5 U.S.C. §§ 551–559 (regulating rulemaking procedures including effective dates, publishing notices, and opportunities for the public to comment on proposed rules).

100. Telephone Interview with federal official (July 10, 2022).

101. 16 U.S.C. §§ 703–12.

“[I]t shall be unlawful at any time, by any means or in any manner, to . . . take . . . any migratory bird, [or] any part . . . of any such bird . . . included in the terms of [international] conventions.”¹⁰²

Does this rule prohibit an individual from keeping eagle feathers found on the beach? By its plain language, yes. An eagle is a migratory bird, it is covered by international conventions, and a feather is one “part” of such bird.¹⁰³ Congress seemingly went to great lengths to underscore the unequivocal nature of the rule, using the term “any”—a signal that a rule is without exception—a remarkable nine times.¹⁰⁴ Moreover, the rule is confirmed by a second federal statute: the Bald and Golden Eagle Protection Act (BGEPA),¹⁰⁵ which similarly prohibits this activity. An ordinary reader plainly would assume that this activity is uniformly prohibited.

Is this activity actually prohibited, however? Not necessarily. A regulatory super-statute—the Religious Freedom Restoration Act of 1993 (RFRA)—constrains agency power to burden a person’s exercise of religion,¹⁰⁶ and collection of bird feathers can be integral to the religious beliefs of certain Native American tribes.¹⁰⁷ The above command is subject to an implied exception, therefore—one not disclosed by its plain text, as it is the product of statutory interconnection. Federal regulatory statutes are almost always misleadingly incomplete in this way.

4. *Penalties*

Statutory penalties also can create non-transparent interconnectivity. Often, a statutory rule will be accompanied by a provision outlining the penalty for violating that rule. Yet other penalties are scattered throughout federal law, and these can supplement—or even override—the penalty attached to a rule. To avoid misinterpretation, a reader must locate all of these applicable penalty provisions and understand their interactions.

Consider the Patient Protection and Affordable Care Act (ACA).¹⁰⁸ The ACA inserted new health insurance rules into the Public Health Service Act (PHSA), such as the rule that employers offering health plans must inform

102. *Id.* § 703.

103. *See Migratory Bird Treaty Act of 1918*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/law/migratory-bird-treaty-act-1918#:~:text=The%20Migratory%20Bird%20Treaty%20Act,all%20protected%20migratory%20bird%20species> [https://perma.cc/8KWG-BL3Q]; 50 C.F.R. § 10.13 (2023).

104. 16 U.S.C. § 703.

105. 16 U.S.C. §§ 668–68c.

106. 42 U.S.C. §§ 2000bb–2000bb-4.

107. *See Other Fish and Wildlife Statutes*, U.S. DEP’T OF JUST. (May 15, 2015), <https://www.justice.gov/enrd/other-fish-and-wildlife-statutes> [https://perma.cc/X4FP-7EWZ].

108. *See Patient Protection and Affordable Care Act*, Pub. L. No. 111-148, 124 Stat. 119 (2010).

employees of modifications to their plans.¹⁰⁹ Alongside this provision, it included an attached penalty.¹¹⁰ There, it specified that:

“An entity . . . that willfully fails to provide the information required under this section shall be subject to a fine of not more than \$1,000 for each such failure.”¹¹¹

Can an entity be fined more than \$1,000 for each failure described in this provision? By the plain language of this provision, they cannot. However, the Affordable Care Act also added language into two other laws—ERISA and the tax code—where it required its PHSA provisions to be treated “as if included in” those other laws.¹¹² Consequently, violations of the PHSA rule additionally can trigger civil monetary penalties under ERISA¹¹³ and daily tax penalties.¹¹⁴ To know this, a reader must know to read the PHSA in concert with ERISA and the tax code.

The Medicare statute furnishes another example. Myriad penalties are attached to specific Medicare provisions, seemingly explaining the risks of violating the attached provision.¹¹⁵ But, contrary to what an ordinary reader might assume, a host of additional possible penalties are littered throughout federal law. Any prohibited behavior may also be subject to the penalties that apply to all Medicare provisions, for instance—penalties often located hundreds of pages away, under a different part of the statute.¹¹⁶ They also may be subject to penalties under Title XI of the Social Security Act, which are located outside the Medicare Title because they apply to multiple health laws.¹¹⁷ And they may be subject to penalties under the False Claims Act, which is not even located in the same title of the U.S. Code because it applies to all statements made to the government.¹¹⁸ Without the regime literacy to know where these provisions are located, a reader has no hope of locating them all.

This stacking (or replacing) of penalties is typical. And it is not limited to health care statutes. In the criminal code, for instance, the Alternative Fines Act (AFA) sets penalties broadly for felonies, misdemeanors, and other offenses.¹¹⁹ These penalties automatically trump those found in other statutes, unless the

109. Public Health Service Act § 2715, 42 U.S.C. § 300gg-15(d)(4).

110. *Id.* § 300gg-15(f).

111. *Id.*

112. *See* Employee Retirement Income Security Act of 1974 § 715, 29 U.S.C. § 1185d (providing PPACA requirements treated “as if included in” ERISA); I.R.C. § 9815 (treated “as if included in” tax code).

113. *See* 29 U.S.C. § 1185d.

114. *See* I.R.C. § 4980D.

115. *See, e.g.*, Social Security Act § 1806(b)(2)(B), 42 U.S.C. § 1395b-7(b)(2)(B).

116. *See id.* §§ 1395–95lll.

117. *See id.* §§ 1101–11.

118. 31 U.S.C. § 3729.

119. 18 U.S.C. § 3571.

competing statute exempts AFA coverage “by specific reference.”¹²⁰ By requiring “specific reference” to override the AFA, the statute sets a default rule: silence triggers interconnectivity. The reader must know to seek out provisions such as this, which often are located in different titles of the U.S. Code.

5. *Blended Amendatory and Freestanding Provisions*

Another congressional practice that generates non-transparent interconnectivity is the combined use of amendatory and freestanding provisions. Under this approach, Congress implements a new policy by dividing it up: one portion of the policy is inserted into an existing statute, while another portion is left in the newly enacted statute. As a result, the new policy is dispersed across multiple interconnected statutes.

Consider the 2010 financial reform statute known as “Dodd-Frank.”¹²¹ Section 612 of Dodd-Frank amended three laws to restrict conversions of certain banks.¹²² For example, it added to one statute a provision declaring that:

“A national banking association may not convert to a State bank or State savings association during any period in which the national banking association is subject to a cease and desist order . . . issued by . . . the Comptroller of the Currency with respect to a significant supervisory matter.”¹²³

This language sounds unequivocal: a banking association “may not” convert in the stated situations, and no exceptions are listed.¹²⁴ Parallel provisions inserted into the Revised Statutes¹²⁵ and the Home Owners’ Loan Act¹²⁶ are equally unequivocal. Yet all three are subject to exception. This is because freestanding language in Dodd-Frank declares that: “The [policy] under the amendments made by subsections (a), (b), and (c) shall not apply” in certain specified situations.¹²⁷ Dodd-Frank then imposes additional requirements onto the three

120. *Id.* § 3571(e). For discussion of another example from the criminal code, see *Computer Crime and Computer Security: Hearing on H.R. 1001 and H.R. 930 Before the Subcomm. on Crime of the Comm. on the Judiciary, 99th Cong. 36* (1985) (statement of John C. Keeney, Deputy Assistant Attorney General) (explaining potential irrelevance of 18 U.S.C. § 1030(a)(1) due to overlapping penalties in 18 U.S.C. §§ 793 and 794, 42 U.S.C. § 2275, and 50 U.S.C. § 783); see also *id.* at 176–77 (testimony of Charles Rowe, Publisher, Free Lance-Star) (noting additional penalty overlap with 5 U.S.C. § 552 and 18 U.S.C. § 1905).

121. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

122. *Id.* § 612.

123. *Id.*; 12 U.S.C. § 214d (stating the statute with the amended language).

124. 12 U.S.C. § 214d.

125. *Id.* § 35.

126. *Id.* § 1464(j)(6).

127. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

amendatory provisions as well.¹²⁸ The exception and additional requirements were left in Dodd-Frank itself, rather than accompanying the policy into its three new locations. As a result, readers must be alert to the fact that the amendatory policies are subject to exceptions and requirements located in Dodd-Frank.

The recent Infrastructure Investment and Jobs Act (IIJA) provides another example.¹²⁹ That law added money to a fund created by the Surface Mining Control and Reclamation Act of 1977 (SMCRA),¹³⁰ and it made targeted amendments to that Act.¹³¹ In freestanding provisions, it also provided a list of details about how the new funds must be spent—details that often extended or modified existing SMCRA rules (but without amending the SMCRA itself).¹³² A reader of the SMCRA must know, therefore, that rules governing disposition of some money in its dedicated fund are found in the IIJA, not in the SMCRA. And for readers of the IIJA, if the new funding is construed as extending the existing SMCRA program, then such funds would be subject to the myriad laws already governing disposition of SMCRA funds—a dense network of statutes that would bear upon it, though not cross-referenced.¹³³

The Affordable Care Act (ACA) also provides examples. That statute duplicated many of its new health insurance rules, adding them both as freestanding rules and as amendments to the PHSA. So, for instance, to understand the ACA prohibition on high premiums for people with preexisting conditions, one must know it is straddled across two duplicative provisions.¹³⁴

6. Definitions

Definitions provide yet another example. By using definitions in statutes, Congress regularly assigns unexpected meanings to seemingly ordinary terms. Such terms typically are not accompanied by cross-references to their definitions, and while those definitions may be conspicuously located in “Definitions” sections at the beginning or end of a statute, this is not always the case. As a result, a reader must possess the regime literacy needed to locate all applicable definitions, which may be scattered throughout federal law. A common lead-in phrase for definitions is used over 10,000 times in the U.S.

128. *Id.* § 612(e).

129. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021) (codified as amended in scattered sections of 23 U.S.C.).

130. *Id.* § 40701.

131. *Id.* §§ 40702–03.

132. *Id.* § 40701.

133. See generally U.S. DEP’T OF INTERIOR, GUIDANCE ON THE BIPARTISAN INFRASTRUCTURE LAW ABANDONED MINE LAND GRANT IMPLEMENTATION (May 20, 2022), <https://www.doi.gov/sites/doi.gov/files/bil-aml-guidance.pdf> [<https://perma.cc/R4FM-LGHP>].

134. Patient Protection and Affordable Care Act § 1312(c), 42 U.S.C. § 18032; Public Health Service Act § 2701(a), 42 U.S.C. § 300gg.

Code,¹³⁵ as is the term “Definition” itself,¹³⁶ which suggests the sheer volume of this challenge for ordinary readers.

Consider again the Medicare statute, which makes reference throughout to “hospitals.”¹³⁷ For instance, the rule that provides coverage for many emergency room services states:

“Payments shall also be made to any hospital for inpatient hospital services furnished . . . by the hospital . . . to an individual entitled to hospital insurance benefits . . . if . . . such services were emergency services”¹³⁸

To know whether an institution qualifies for these payments, a reader must know whether the institution is a “hospital.” The reader therefore must know that, nearly 700 pages away and slightly more than halfway into this 1,200 page title of law, there is a technical definition assigned to the term “hospital.”¹³⁹ Far from being a simple, colloquial definition of this seemingly ordinary term, the definition is several pages long, and it changes the term’s meaning depending on the portion of the statute in which it appears.¹⁴⁰ That default definition can also potentially be overridden by specific definitions scattered throughout the law—definitions that apply to specific subparagraphs,¹⁴¹ paragraphs,¹⁴² subsections,¹⁴³ sections,¹⁴⁴ and parts¹⁴⁵ of the statute. The phrase used to introduce such definitions appears 775 times in the Medicare statute alone.¹⁴⁶

As another example, consider the phrase “net capital gain,” which appears in the very first section of the Internal Revenue Code (IRC).¹⁴⁷ In Section 1222 of the IRC, the term is defined as referring to a very specific netting process of different types of capital gain—a meaning no ordinary reader would expect.¹⁴⁸ This Section 1222 is not labeled as a “Definitions” section, as its heading simply reads:

135. *The Term*, OFF. L. REVISION COUNS. U.S. CODE, <https://uscode.house.gov/> [<https://perma.cc/58S7-89YF>] (search in search bar for “the term”) (11,221).

136. *Definition*, OFF. L. REVISION COUNS. U.S. CODE, <https://uscode.house.gov/> [<https://perma.cc/76KU-3C3B>] (search in search bar for “definition”) (10,991).

137. Social Security Act § 1814(d)(1), 42 U.S.C. §§ 1395–95lll.

138. *Id.* § 1395f; *see also id.* § 1395n.

139. *Id.* § 1395x(e).

140. *Id.*

141. *See, e.g., id.* § 1395e(a)(4)(A) (defining “hospice coinsurance period”).

142. *See, e.g., id.* § 1395f(l)(3)(D) (defining “certified EHR technology,” “eligible hospital,” “EHR reporting period,” and “payment year”).

143. *See, e.g., id.* § 1395w-22(d)(3) (defining “emergency services”).

144. *See, e.g., id.* § 1395ww(d)(1)(B) (defining “subsection (d) hospital”).

145. *See, e.g., id.* § 1395w-22(a)(1)(B)(i).

146. *Social Security Act—TITLE XVIII (Health Insurance for The Aged and Disabled)*, GOVINFO, <https://www.govinfo.gov/app/details/COMPS-8768/> [<https://perma.cc/ERE4-TGZ8>] (download PDF then search for “the term”) (775).

147. I.R.C. § 1(h) (flush language).

148. I.R.C. § 1222(11).

“Other terms relating to capital gains and losses.”¹⁴⁹

Yet without knowing to look to Section 1222, a reader misreads Section 1.

Applicable definitions may exist outside the interpreted law, too. The Definition Act (which is located in Title 1 of the U.S. Code) applies to the entirety of federal law, for example.¹⁵⁰ As a result, it defines terms tens of thousands of pages away in the U.S. Code.

7. “Notwithstanding” Rules

Another common instance of nontransparent interconnectivity is created by “notwithstanding” rules. When Congress modifies existing legal provisions, but it either cannot locate those provisions with confidence or does not want to modify them directly, it will declare that its new rule applies “notwithstanding” the old one, while leaving the older provision on the books.¹⁵¹ As a result, the older provision exists unchanged in law—yet another provision has modified or eliminated it.

For example, the Employee Retirement Income Security Act of 1974 (ERISA) declares for each pension plan that:

“[B]enefits provided under the plan may not be assigned or alienated.”¹⁵²

Yet this is misleading. The Mandatory Victim Restitution Act (MVRA) provides that:

“Notwithstanding any other Federal law . . . a judgment imposing a fine may be enforced against all property or rights to property of the person fined”¹⁵³

As the Ninth Circuit recognized, a criminal defendant’s pension plan therefore may be garnished under federal law to compensate crime victims—despite the seemingly unequivocal language in ERISA prohibiting this.¹⁵⁴

The term “notwithstanding” appears over seven thousand times in the U.S. Code.¹⁵⁵ The broadest, most vague formulation of this language (“notwithstanding any other provision of law”) appears over two thousand

149. *Id.* § 1222.

150. 1 U.S.C. §§ 1–8. For an example from state law, see *Zoldan*, *supra* note 38, at 33 (discussing “reckless” as a hidden defined term in Indiana law).

151. See “*Notwithstanding Any Other Provision of Law*”: Does It Really Mean That No Other Provisions of Law Apply?, CRS LEGAL SIDEBAR (Feb. 10, 2016), <https://sgp.fas.org/crs/misc/notwith.pdf> [<https://perma.cc/QP2P-KGTE>] (explaining common uses).

152. 29 U.S.C. § 1056(d)(1).

153. 18 U.S.C. § 3613(a).

154. *United States v. Novak*, 476 F.3d 1041, 1049 (9th Cir. 2007).

155. *Notwithstanding*, OFF. L. REVISION COUNS. U.S. CODE, <https://uscode.house.gov/> [<https://perma.cc/TV5A-JE3U>] (search in search bar for “notwithstanding”) (7,183).

times.¹⁵⁶ These statistics do not even capture instances where Congress overrides older law without any acknowledgment, of course. Rather, they capture only those instances where Congress acknowledges it is likely altering an existing provision, yet it leaves that provision unchanged.¹⁵⁷

8. *Jurisdiction Channeling*

Nontransparent interconnectivity also is illustrated by instances of jurisdiction channeling. This exists when a plaintiff can challenge an agency action under multiple statutes, each with its own cause of action. In such situations, a reader may encounter a provision that seems to provide a relevant cause of action, but that provision actually may be trumped by another located elsewhere in federal law.

Imagine, for example, a plaintiff who wishes to challenge a pesticide registration. That plaintiff has access to a baseline cause of action under the Administrative Procedure Act (APA).¹⁵⁸ Where inconsistent, however, the APA provision is trumped by a cause of action in the Endangered Species Act (ESA).¹⁵⁹ That interconnection is somewhat transparent: the APA does signal that, while it is the default rule, it is not exclusive.¹⁶⁰ However, more interconnectivity awaits. This is true despite the ESA provision appearing unequivocal, declaring that:

“[A]ny person may commence a civil suit on his own behalf [with respect to such violations].”¹⁶¹

It adds with respect to jurisdiction that:

“The district courts shall have jurisdiction [over such actions].”¹⁶²

Yet the district courts may not have jurisdiction over this action. This is because the ESA provision is trumped by yet another cause of action: one under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).¹⁶³ That FIFRA provision sometimes grants exclusive jurisdiction to federal appeals courts, the ESA notwithstanding.¹⁶⁴ The ESA provides no textual indication of

156. *Notwithstanding Any Other Provision of Law*, OFF. OF L. REVISION COUNS. U.S. CODE, <https://uscode.house.gov/> [<https://perma.cc/GP6P-YXCN>] (search in search bar for “notwithstanding”) (2,221).

157. For another example, see *supra* notes 79–84 and accompanying text (discussing veterans’ disability benefits example).

158. See 5 U.S.C. §§ 702–06.

159. 16 U.S.C. § 1540(g)(1)(A).

160. See, e.g., 5 U.S.C. § 703.

161. 16 U.S.C. § 1540(g)(1).

162. *Id.*

163. 7 U.S.C. § 136n(b).

164. *Id.*

this. Instead, awareness relies solely on the reader knowing that, nine titles away in the U.S. Code, a provision not cross-referenced exists that overrides it.

This phenomenon of jurisdictional channeling can repeat in many combinations. Statutes such as the Clean Water Act,¹⁶⁵ Clean Air Act,¹⁶⁶ and Federal Power Act¹⁶⁷ each can trump in the manner of FIFRA. And statutes such as the Energy Policy and Conservation Act of 1975¹⁶⁸ can, in the manner described for the ESA, similarly be vulnerable to this channeling.

* * *

More examples abound. They abound with respect to major issues, such as the structure of the Affordable Care Act.¹⁶⁹ They abound with respect to minor details, such as the required delay period for implementing agency rules.¹⁷⁰ This Part has not even addressed the portions of federal law that, because of their dense interconnectivity, are regarded as “codes.” These include the tax code (Title 26),¹⁷¹ the bankruptcy code (Title 11),¹⁷² and the criminal code (Title 18).¹⁷³ That nontransparent interconnectivity defines these portions of federal law is obvious. Yet it is far more omnipresent in federal law than an exclusive focus on these codes would suggest.

In short, nontransparent interconnectivity is a defining feature of modern federal statutory law. This nontransparent interconnectivity, combined with statutory length, unavoidably precludes ordinary people from reading federal statutory law. When these features combine, any provision potentially is subject to modification by competing provisions that can be hidden anywhere in a 60,000-page document (or beyond). To navigate a text of that nature, one must know *ex ante* where to look for all relevant provisions. Otherwise, they will not be found.

This is why, within the legislative drafting office of the House of Representatives, conventional wisdom holds that it takes six years to become a fully competent drafter on a particular topic.¹⁷⁴ As one legislative drafter for Congress remarked: “Honestly, the amount of work required to make sure you

165. 33 U.S.C. § 1369(b)(1).

166. 42 U.S.C. § 7607(b)(1).

167. 16 U.S.C. § 8251(b).

168. 42 U.S.C. §§ 6201–422.

169. *See* King v. Burwell, 576 U.S. 473, 481–82 (2015) (explaining interlocking three-part structure of statute).

170. *See* 5 U.S.C. § 553(d) (regulating under APA); 5 U.S.C. § 801(a)(3) (regulating under Congressional Review Act).

171. *See* 26 U.S.C. §§ 1–9834.

172. *See* 11 U.S.C. §§ 101–1532.

173. *See* 18 U.S.C. §§ 1–6005.

174. *See* Jesse M. Cross, *The Staffer’s Error Doctrine*, 56 HARV. J. ON LEGIS. 83, 114 (2019).

actually know all the law on a topic is staggering.”¹⁷⁵ Regime literacy is necessary.

This dimension of statutory text cannot be eliminated by statutory interpretation. Every mainstream school of statutory interpretation insists that all provisions must be given effect.¹⁷⁶ Regardless of the interpretive methods that courts employ, therefore, federal statutes will remain the province of a legal elite with regime literacy. To pose the question of how ordinary people read federal statutes, therefore, is to engage in a speculative activity about a situation that does not exist—and that cannot plausibly exist.

D. Conclusion: Conceptualizing Statutory Law

This Part has outlined a novel understanding of federal statutory law. It has depicted this law as the purview of specialists and experts—a field with structural features that necessarily exclude participation by generalists. This is not how courts and scholars typically understand statutory law, however. To conclude, it is worth noting how the foregoing analysis urges us to reconceptualize this legal field. A final example can illustrate.

In the field of legislation, no object of study is more famous than H.L.A. Hart’s “No Vehicles in the Park” scenario.¹⁷⁷ In this hypothetical, a city ordinance is imagined that prohibits vehicles from a city park.¹⁷⁸ The hypothetical allows for consideration of a variety of interesting borderline applications. Is a bicycle prohibited? What about an ambulance, or a tank installed for a war memorial?

By inviting discussion around these questions, the Hart hypothetical provides exposure to a particular skillset. That skillset consists of close-reading practices: the careful parsing of word meaning, consideration of word relationships to immediately surrounding text, use of headings, and so on.

These skills are indeed necessary for any attorney who practices statutory law. When studies of legislation focus solely on that skillset, however, they can mislead readers about what is required to navigate modern federal legislation. If a reader encountered a question about the meaning of the term “vehicle” in the U.S. Code today, that question would not be resolved by application of close-reading techniques. Under the Dictionary Act, found at the beginning of Title 1 of the Code, the term “vehicle” is defined for all federal law.¹⁷⁹ Meanwhile, a rule prohibiting vehicles from federal parks likely would be inserted into Title 54 of the Code—i.e., into the very last title in the Code, nearly

175. Email from congressional staffer to author (June 29, 2022, 10:44 AM EST) (on file with author).

176. See Jesse M. Cross, *When Courts Should Ignore Statutory Text*, 26 GEO. MASON L. REV. 453, 456 (2019) (noting consensus on the rule against surplusage).

177. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

178. *Id.*

179. 1 U.S.C. § 4.

60,000 pages away from the Dictionary Act. If a reader of the U.S. Code encountered a question about the meaning of the term “vehicle” for the parks, therefore, that reader would need regime literacy to properly answer the question. Unlike close-reading skills, that is not something that ordinary people can possess.

III. THE HISTORY OF FAIR NOTICE

Part II argued that, today, it is a fiction to think ordinary people can read federal statutes. As this Part explains, this is not a new situation. To chronicle this fact, this Part looks at three relevant sites of legal history: ancient Rome, England (1066–1800), and America (1780s–present). In each instance, this Part discovers a stark reality beneath rhetoric about fair notice: most individuals could not gain notice via statutory text.

We can discern this because, in order to gain notice from statutory text, a confluence of factors must exist.¹⁸⁰ First, it requires readers who are literate and, particularly, those who are literate in the language used by their government. Second, it requires a government that actively collects the scattered laws of their regime into some centralized publication—and that publishes and disseminates those texts widely enough to reach the population. Third, it requires a sufficiently small volume of laws for everyday individuals to find them readable. As this Part explains, it is difficult to locate any period in which these factors converge.

Along the way, this Part also uncovers the intellectual history of fair notice as a legal aspiration—even as the studied societies fail to achieve that aspiration. Traditionally, it discovers, fair notice was understood as a concept with implications primarily for the legislature, not the judiciary. To the extent that fair notice was believed to have interpretive implications for the judiciary, however, it often was understood to generate the conclusion opposite of that assumed by textualists: that is to say, it was assumed to guide interpreters toward intentionalist methodologies, not textualist ones.

A. Ancient Rome

Discussions of fair notice often begin with ancient Rome. This is largely attributable to Justice Scalia, who repeatedly cited an anecdote from the Roman Principate to explain fair notice principles.¹⁸¹ As Scalia put it:

180. In the language of the Court, these factors are minimally necessary for “laws [to] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

181. See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes. 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.¹⁸²

Justice Scalia would repeat this example in articles,¹⁸³ books,¹⁸⁴ and court opinions.¹⁸⁵ Later conservative-leaning jurists would follow his lead, including Justice Barrett¹⁸⁶ and various circuit court judges.¹⁸⁷ Scholars describing the textualist position cite it as well,¹⁸⁸ as do those endorsing corpus linguistics.¹⁸⁹

Yet was Justice Scalia's account rooted in the realities of Roman history? At the outset, there are reasons for concern: the behavior he recounts historically is attributed to the emperor Caligula, not Nero.¹⁹⁰ This aside, however, the Scalia anecdote raises larger questions. Was fair notice of legislation actually made available to ordinary people in ancient Rome? How did notice operate in the period of Caligula's reign?

There are senses in which ancient Roman society was, as the Caligula story suggests, committed to basic ideas of fair notice in statutory law. Rome was a society that valued the written word,¹⁹¹ including in the law.¹⁹² This Roman

182. *Id.*

183. *Id.*

184. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 17 (Amy Gutmann ed., 1997) (“[Having legal meaning determined by intended legislator meaning] 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.”).

185. *Flores-Figueroa v. United States*, 556 U.S. 646, 658 (2009) (Scalia, J., concurring in part and concurring in the judgment) (“[Relying on legislative history] 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.’” (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *46)).

186. Barrett, *supra* note 26, at 2209 (“Fairness requires that laws be interpreted in accordance with their ordinary meaning, lest they be like Nero’s edicts, ‘post[ed] high up on the pillars, so that they could not easily be read.’” (quoting Scalia, *supra* note 184)) (alteration in original); see also Neil M. Gorsuch, *Law’s Irony*, 37 HARV. J.L. & PUB. POL’Y 743, 748 (2014) (citing in different context).

187. See *United States v. Vargas-Soto*, 35 F.4th 979, 990 (5th Cir. 2022) (Oldham, J.); *NetworkIP, LLC v. F.C.C.*, 548 F.3d 116, 122 n.5 (D.C. Cir. 2008) (Brown, J.); *Summa Holdings, Inc. v. Comm’r of Internal Rev.*, 848 F.3d 779, 781 (6th Cir. 2017) (Sutton, J.).

188. See, e.g., Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 352 n.13 (2005); Jane S. Schacter, *Text or Consequences?*, 76 BROOK. L. REV. 1007, 1010 n.16 (2011); Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 1020 n.213 (2017).

189. See Justin A. Miller, Comment, *Out of Many, One: Discovering the Shared Statutory Speech Community Through Corpus Linguistics*, 2018 BYU L. REV. 1119, 1137 (2019).

190. 4 C. SUETONIUS TRANQUILLUS, *THE LIVES OF THE TWELVE CAESARS* 41 (1686).

191. See, e.g., WILLIAM V. HARRIS, *ANCIENT LITERACY* 196 (1991) (“[I]t would hardly be an exaggeration to say that the culture was characterized by the written word.”).

192. See, e.g., ELIZABETH A. MEYER, *LEGITIMACY AND LAW IN THE ROMAN WORLD: TABULAE IN ROMAN BELIEF AND PRACTICE* 38–39 (2004) (“By the Late Republic . . . legal practice had embraced documents heartily.”). This included edicts and rescripts, which were forms of written law. ANDREW M. RIGGSBY, *ROMAN LAW AND THE LEGAL WORLD OF THE ROMANS* 88–89 (2010).

tradition dates back at least to the Twelve Tables, its foundational legal code.¹⁹³ Once an unwritten law, the Twelve Tables were recorded and displayed in ivory¹⁹⁴ or bronze¹⁹⁵ on the rostra beginning around 450 B.C.¹⁹⁶ This was part of a larger culture of posting written texts, which included proposed laws,¹⁹⁷ Senate proceedings,¹⁹⁸ and election slates.¹⁹⁹ Since at least 304 B.C., Roman historians suggested, this practice extended to important, celebrated instances of posting statutes.²⁰⁰

By the time of the Principate (which included Caligula's reign), the Roman government regularly posted its statutory texts for the public, even though not always required.²⁰¹ For some legislation, this might involve the posting of an inscription of the statutory text in a bronze sheet.²⁰² For edicts and other legislation, it might involve the display of statutory text in black on a whitened board called a tablet or *album*.²⁰³ Some laws also might occasionally be inscribed on marble slab²⁰⁴ or in stone,²⁰⁵ such as those engraved onto city walls.²⁰⁶ In

193. RIGGSBY, *supra* note 192, at 87, 89.

194. DIG. 1.2.2.4 (Pomponius, Enchir. 1S).

195. MEYER, *supra* note 192, at 26–27.

196. This text also was incorporated into civic education; Cicero remarked that Roman boys used to memorize the Twelve Tables in school (though he notes that the practice was discontinued). CICERO, ON THE REPUBLIC. ON THE LAWS. II.59 at 445 (Loeb Classical Libr. No. 213, Clinton W. Keyes trans., Harvard Univ. Press 1928); *see also* RIGGSBY, *supra* note 192, at 59.

197. MEYER, *supra* note 192, at 97–98; HARRIS, *supra* note 191, at 155 (“Several constitutional practices involving the written word which are clearly attested for the years after 200 B.C., such as posting of proposed laws, may well have begun long before.”).

198. *See* CLIFFORD ANDO, IMPERIAL IDEOLOGY AND PROVINCIAL LOYALTY IN THE ROMAN EMPIRE 166 (2000) (on Caesar instituting policy, and Augustus rescinding it).

199. *Id.* at 103.

200. *See* LIVY, HISTORY OF ROME, VOLUME IV: BOOKS 8–10 IX.46 at 351 (Loeb Classical Libr. No. 191, B. O. Foster trans., Harvard Univ. Press 1926) (purporting that Flavius published certain laws on whitened boards in the Forum and was celebrated); HARRIS, *supra* note 191, at 152–56 (discussing “[Cn. Flavius] publication of the civil law in 304 [B.C.]” but also suggesting story is problematic).

201. *See, e.g.*, MEYER, *supra* note 192, at 99 (noting that “the further stage of inscribing or posting [laws] is well attested, and most scholars would even go so far as to say that it was common” from at least second century B.C.).

202. *See, e.g.*, DECREE OF THE SENATE ON THE BACCHANALIA (186 BC) [hereinafter DECREE OF THE SENATE], https://droitromain.univ-grenoble-alpes.fr/Anglica/Bacchanal_johnson.htm [<https://perma.cc/RYT5-FX2R>] (“[Y]ou shall inscribe this on a bronze tablet.”); *see also* Callie Williamson, *Monuments of Bronze: Roman Legal Documents on Bronze Tablets*, 6 CLASSICAL ANTIQUITY 160, 160 (1987) (“Throughout the Republic and Empire . . . the Romans regularly had statutes, decrees, treaties, and edicts engraved on bronze tablets.”).

203. O. F. ROBINSON, THE SOURCES OF ROMAN LAW: PROBLEMS AND METHODS FOR ANCIENT HISTORIANS 31 (1997) (noting that “[a]ll legislation was normally published, that is posted, written in black on white-painted wood or engraved on stone or bronze”); MEYER, *supra* note 192, at 35–36 (noting posting on whitened boards known as *tabulae* or *alba*).

204. *See* Katell Berthelot, *Rabbinic Universalism Reconsidered: The Roman Context of Some Rabbinic Traditions Pertaining to the Revelation of the Torah in Different Languages*, 108 JEWISH Q. REV. 393, 411 n.44 (2018) (citing law from 100 B.C. permitting this form of publication).

205. ROBINSON, *supra* note 203, at 31–32; ANDO, *supra* note 198, at 83 (quoting letter instructing contents to be “engraved on a pilaster of white stone in the most conspicuous place”).

206. *See* Natalie B. Dohrmann, *Laws on Walls Between the Rabbis and Rome*, HERBERT D. KATZ CTR. FOR ADVANCED JUDAIC STUD. BLOG (Dec. 4, 2018), <https://katz.sas.upenn.edu/resources/blog/laws-walls-between-rabbis-and-rome> [<https://perma.cc/9Q3Q-P5MJ>].

Rome, many of these statutory texts would be displayed at the Capitol;²⁰⁷ at the time of the great fire of A.D. 69, it was said that at least three thousand bronze tabulae were displayed there.²⁰⁸ In Rome or in the various provinces, they also might be displayed in or on temples,²⁰⁹ as well as agora or sanctuaries.²¹⁰

There was clearly some aspiration that, via such posting, statutory texts would be meaningfully accessible to the public. Binding rules might come with instructions to be posted in the most conspicuous part of the city,²¹¹ “where it can most easily be read”²¹² or “to be fastened up where it can very easily be known,”²¹³ for example. Edicts and laws sometimes (though not always) came with explicit instruction to publish in clear and legible letters.²¹⁴ Roman law eventually required these postings to occur for a minimum duration,²¹⁵ and in the Flavian period, municipal charters specifically had to be displayed “for the greater part of the day” each day.²¹⁶ Even the concern about elevated posting was deeply entrenched: dating back to at least the mid-second century B.C.,²¹⁷ Roman laws regularly specified the requirements of their own posting, including a requirement that laws not be posted excessively high.²¹⁸ One law from approximately 100 B.C. specified that it be posted “in such a way that the people shall be able to read them properly from ground level,” for example,²¹⁹ a

207. See, e.g., ANDO, *supra* note 198, at 86 (quoting Josephus that decrees “are engraved on bronze tablets on the Capitol”).

208. MEYER, *supra* note 192, at 26–27, 99 n.31; HARRIS, *supra* note 191, at 207.

209. MEYER, *supra* note 192, at 26–27 (noting they “were nailed up (*defigere*) in or on temples or *templā*”).

210. See, e.g., ANDO, *supra* note 198, at 82 (quoting Senate letter of 100 B.C. requiring law “be openly published in the cities in a sanctuary or agora” in province of Asia); *id.* at 85 (decree to be posted in sanctuary).

211. A. Caballos Rufino, *Monumenta Fatiscent. Meaning and Fate of Legal Inscriptions on Bronze: The Baetica, in LITERACY IN ANCIENT EVERYDAY LIFE* 289, 306 (Anne Kolb ed., 2018).

212. MEYER, *supra* note 192, at 26 n.30; see also HARRIS, *supra* note 191, at 215 (noting instructions to post “in clear and easy-to-read letters”); DECREE OF THE SENATE, *supra* note 202 (“you shall order it to be posted where it can be read most easily”); ANDO, *supra* note 198, at 99 (quoting statute from second-century B.C. directing to post “wherever it can most easily be read.”); see also *id.* at 116–17 (listing further examples).

213. HARRIS, *supra* note 191, at 161 n.58 (example from 186 B.C.); Rufino, *supra* note 211, at 306 (discussing examples); ANDO, *supra* note 198, at 83 (quoting letter instructing contents displayed “in the most conspicuous place”).

214. ANDO, *supra* note 198, at 103; Berthelot, *supra* note 204, at 411 (noting requirement to post in public place in “clear and distinct/visible letters”); HARRIS, *supra* note 191, at 215 (noting requirement to be “in clear and easy-to-read letters”).

215. These first required posting for three market days (or twenty-four days), see, for example, DECREE OF THE SENATE, *supra* note 202 (“You shall publish these decrees in public assembly for not less than three market days”); ANDO, *supra* note 198, at 99 (quoting statute from early second-century B.C.), a calculation that eventually was changed to thirty days, see Berthelot, *supra* note 204, at 410; ANDO, *supra* note 198, at 99–100. *But see id.* at 110 (suggesting thirty-day period functioned to allow cooling-off period for emperor).

216. ANDO, *supra* note 198, at 115.

217. RIGGSBY, *supra* note 192, at 89 (giving date and suggesting such clauses were the norm).

218. See Rufino, *supra* note 211, at 306 (discussing examples); ANDO, *supra* note 198, at 103 (same).

219. ANDO, *supra* note 198, at 82 (quoting Senate requirement to province of Asia); HARRIS, *supra* note 191, at 166 n.87 (noting same requirement in *Lex de provinciis praetoriis*); *id.* at 207 (quoting example from Claudius edict).

formulation that apparently became standard by the late Republic.²²⁰ While there is debate about whether these provisions were exceptional,²²¹ even their sporadic inclusion reveals some concern with public access to the law.

When Romans reflected on the values they sought via these public postings, they did speak of public notice.²²² Pomponius says that even the Twelve Tables had been inscribed and displayed at the rostra “so that the laws might be the more clearly understood.”²²³ Inscriptions of legal text were explicitly made in some provinces “so that the contents would be known.”²²⁴ Edicts might provide for copies to be posted in cities “in public where they will be most visible to those who wish to read,”²²⁵ or might note that they were published so they “may come as speedily as possible to the knowledge of all.”²²⁶ The jurist Ulpian voiced this goal in the second century, remarking:

By “public notice” is meant a notice in writing, clearly visible and easily read, in the open, for example, in front of the shop or the place of business, not hidden away but on display. Should the notice be in Greek or Latin? It depends on the locality; no one should be able to claim that he did not know what the notice said.²²⁷

Romans therefore regularly posted statutory texts, and they voiced the goal that such posting would make statutes accessible to the public, a goal they reinforced with specific publication rules.²²⁸

Yet the Roman goal of fair notice was largely fictitious. According to the central study on Roman literacy, during the period of Caligula’s reign, less than 10% of Romans were literate.²²⁹ Subsequent studies have added nuance to this assessment,²³⁰ but scholars have continued to endorse its core premise: the

220. ANDO, *supra* note 198, at 82. *But see* Williamson, *supra* note 202, at 164 (arguing that this requirement did not typically extend to bronze tablets).

221. See Jean-Louis Ferrary, *La Gravure de Documents Publics de la Rome re Publicaine et ses Motivations* [*The Engraving of Public Documents of Public Rome and its Motivations*], in SELBSTDARSTELLUNG UND KOMMUNIKATION [SELF-EXPRESSION AND COMMUNICATION] 59–74, 67–68 (R. Haensch ed., 2009) (cited in Berthelot, *supra* note 204, at 410 n.44).

222. See, e.g., Rufino, *supra* note 211, at 307 (discussing sources supporting idea that “their public display aimed to make their contents as widely known as possible”).

223. DIG. 1.2.2.4 (Pomponius, *Enchir.* 1S).

224. MEYER, *supra* note 192, at 100–01 n.40; *see also* ANDO, *supra* note 198, at 100 (citing texts from late Empire that directed to “bring it about through posted edicts that the decrees of Our August Majesty come to the knowledge of all peoples and of every province”). This was not always specified for documents posted in Rome, however.

225. Edict by Alexander Severus, *quoted in* ANDO, *supra* note 198, at 111.

226. Letter from Prefect of Egypt, *quoted in* ANDO, *supra* note 198, at 116.

227. DIG. 14.3.11.3 (Ulpian, *Ad Edictum* 28); *see also* ANDO, *supra* note 198, at 116 (quoting letter directing posting “lest anyone make the excuse that he acted in ignorance”).

228. ANDO, *supra* note 198, at 110–11.

229. HARRIS, *supra* note 191, at 22 (“The likely overall illiteracy level of the Roman Empire under the principate is almost certain to have been above 90%.”).

230. For an overview of these subsequent studies, see Rufino, *supra* note 211, at 291.

overwhelming majority of people in ancient Rome could not read.²³¹ For the ordinary person, it was indeed as though statutes were posted high on pillars; their text was wholly inaccessible.

Moreover, additional factors made statutory text inaccessible even for many within the small minority of Romans who were literate. First, significant numbers of Romans lived in rural areas.²³² For these Romans, centralized postings in urban spaces were unlikely to provide adequate notice.²³³ Perhaps literacy rates were lower among the rural population anyhow, and so this impediment did not independently exclude many.²³⁴ Yet Romans seemed to view it as posing a serious dissemination challenge.²³⁵ Meanwhile, even within urban spaces, the government's efforts at such dissemination often underwhelmed. As one scholar put it: “[U]nder the principate the choice [of posting location in Rome] did not often express much governmental interest in communicating directly with ordinary citizens.”²³⁶ Geographic hurdles thereby combined with limitations on printing technology to further render statutory text inaccessible even for many literate Romans.

Accessing older statutory texts was even more challenging. While an initial posting of the law may be helpful, people also need access to older laws. As previously noted, many laws were required to be posted for only thirty days.²³⁷ While postings on bronze typically were intended to endure as monuments,²³⁸ those on whitened wood were not.²³⁹ Even legal actors struggled to stay abreast

231. See, e.g., RIGGSBY, *supra* note 192, at 87 (“[M]ost scholars agree that the average Roman was poorly or not at all literate.”); Natalie B. Dohmann, *Can “Law” Be Private? The Mixed Message of Rabbinic Oral Law, in PUBLIC AND PRIVATE IN ANCIENT MEDITERRANEAN LAW AND RELIGION* 187, 192 (Clifford Ando & Jörg Rüpke eds., 2015) (noting that “the bulk of the law’s intended audience could not read.”); ANDO, *supra* note 198, at 101 (“Extant evidence does not suggest that many in the cities could have read complex texts, and literacy was undoubtedly lower in smaller communities.”).

232. See HARRIS, *supra* note 191, at 196 (“[I]n other places the written word was seldom or never seen, or if it was present it had very little direct effect: these were the environments inhabited by the majority of the population of the Roman Empire.”); *id.* at 35 (“[T]he majority of Greeks and Romans lived in villages or otherwise in the countryside.”).

233. See RIGGSBY, *supra* note 192, at 89 (discussing limited Roman notion of “publishing” law and challenges that imposed upon rural communities); *id.* at 79 (“Travel (often to Rome), lodging, and lost income would have been very burdensome for most.”).

234. See generally HARRIS, *supra* note 191 (positing that the lack of educational access in rural areas may have had this effect).

235. See Macrobius *Sat.* 1.16.34–35, *quoted in* ANDO, *supra* note 198, at 99 (quoting Rutilius that calculating postings in market days was effort to allow rural farmers to see them). This story likely is apocryphal. See *id.* (describing it as “probably incorrect”). But, its telling underscores these dissemination challenges).

236. HARRIS, *supra* note 191, at 208.

237. See Berthelot, *supra* note 204, at 410.

238. *But see* Rufino, *supra* note 211 (suggesting many bronze postings were meant to be melted and reused).

239. See ANDO, *supra* note 198, at 123 (“There can be no doubt, however, that bronze tablets were more permanent than texts preserved on boards, and that this fact was recognized in antiquity.”).

of (or even to access) the corpus of statutory law.²⁴⁰ For ordinary people, access to older laws could rely upon personal connections to elite actors with privileged access.²⁴¹ And it additionally could be quite costly.²⁴²

Language barriers added further hurdles. By the time of the Principate, Rome was vast and multilingual.²⁴³ A dozen or more languages were written throughout the empire, and even more were spoken.²⁴⁴ Not only was Greek a major competing language,²⁴⁵ but a host of other languages prevailed in individual provinces, including Aramaic,²⁴⁶ Nabataean,²⁴⁷ Etruscan,²⁴⁸ Oscan,²⁴⁹ Iberian,²⁵⁰ Lycaonian,²⁵¹ Getic,²⁵² Punic,²⁵³ Hebrew,²⁵⁴ and others. Roman thinkers grappled with how to navigate this hurdle, particularly with respect to Greek.²⁵⁵ Yet all options were flawed: either post in a language that few spoke (much less read) or post a translation that was at a level of remove from the actual statutory text. Interestingly, when Roman officials chose translation, they might also modify the text to suit its new audience—thereby further divorcing it from the initial text.²⁵⁶ In some instances, these challenges might be irrelevant, as not all in the provinces would be bound by every law issued from Rome.²⁵⁷

240. See MEYER, *supra* note 192, at 252 (quoting Digest passage noting that few laws were cited in court and attributing this to laws being either inaccessible or unknown); see also Simon Corcoran, *The Publication of Law in the Era of the Tetrarchs, Diocletian, Galerius, Gregorius, Hermogenian*, in *DIOKLETIAN UND DIE TETRARCHIE: ASPEKTE EINES ZEITENWENDE* 56, 57 (Alexander Damandt et al. eds., 2004) (discussing challenges of accessing imperial constitutions and rescripts).

241. See RIGGSBY, *supra* note 192, at 59–60 (noting reliance on mentors and authors and that “legal training of this sort required connections, not just money”); Corcoran, *supra* note 240, at 57 (noting Emperor travel “providing access otherwise only available in Rome or at major imperial residences”); RIGGSBY, *supra* note 192, at 89 (on importance of fortuitous access to a circulating manuscript copy).

242. See HARRIS, *supra* note 191, at 225 (“The books that were available were often poorly produced, and for most people’s pockets, though needless to say not for senators’, they were likely to be quite expensive.”).

243. See *id.* at 175 (“[M]any of the inhabitants of the Roman Empire spoke neither Greek nor Latin. This linguistic diversity is now perhaps more generally acknowledged than before, but its full extent is seldom if ever realized.”).

244. *Id.*

245. The Harris literacy study focuses on Graeco-Roman literacy, and therefore presumably captures this phenomenon partially. See generally HARRIS, *supra* note 191.

246. See MEYER, *supra* note 192, at 187.

247. *Id.*

248. See HARRIS, *supra* note 191, at 162.

249. *Id.*

250. *Id.* at 175.

251. *Id.* at 177.

252. *Id.*

253. *Id.*

254. *Id.* at 188.

255. For second-century jurist Ulpian on this choice, see *supra* note 227.

256. Berthelot, *supra* note 204, at 413 n.47.

257. On the personality (versus territoriality) of Roman law, see, for example, RIGGSBY, *supra* note 193, at 222. *But see id.* at 64 (on expansions of citizenship).

Yet this undoubtedly did render the law further inaccessible for even more individuals.²⁵⁸

Finally, the volume of Roman laws functionally put knowledge of the law beyond the reach of most ordinary people. While legislation may have been sparse in the early years following the Twelve Tables,²⁵⁹ this was not true as Rome headed into the Principate. By his time, Cicero was already able to observe that “innumerable” civil laws had been passed.²⁶⁰ Even though only a small percentage of the laws were displayed in bronze at the Capitol, there apparently were 3,000 such laws at the time of the fire of A.D. 69—a daunting number.²⁶¹ One scholar similarly has observed of municipal inscriptions:

Many legal inscriptions were far too unwieldy to have been designed with a reader in mind It has been calculated, for example, that the Flavian municipal law as displayed at Irni consisted of some ten tablet, with thirty columns of text in roughly 1500 lines. Each tablet was 57–8 cm high and 90–1 cm wide, and the whole inscription must have extended over some 9 metres; the text was inscribed in lettering 4–6 mm high.²⁶²

Not surprisingly, the volume of laws seemingly overwhelmed even Roman legal experts, much less ordinary citizens.²⁶³

This volume was paired with increasing complexity. The language of laws could be complicated, technical, and confusing.²⁶⁴ One scholar has noted that even scribes seemed to struggle with the content of some laws, “so it can easily be inferred how much harder it must have been for the general public.”²⁶⁵ Another has observed of Roman law: “Its scope and sophistication made it the territory of experts.”²⁶⁶ And this was before accounting for the need to navigate different types of law: the categories of law (statute, edict, rescript, etc.) had

258. See, e.g., MEYER, *supra* note 192, at 175 (noting provisions in Egypt posted in Latin); HARRIS, *supra* note 191, at 177 (noting various places where inscriptions in Greek or Latin existed, despite other local languages prevailing).

259. Peter Stein, *Interpretation and Legal Reasoning in Roman Law*, 70 CHI.-KENT L. REV. 1539, 1540 (1995).

260. Cicero *pro Balbo* 8.21.

261. See *supra* note 208. Specifically, these apparently were *senatus consulta* and *plebiscite*. See ANDO, *supra* note 198, at 123.

262. ALISON E. COOLEY, *THE CAMBRIDGE MANUAL OF LATIN EPIGRAPHY* 170–71 (2012); see also Williamson, *supra* note 202, at 162–63 (explaining the illegibility of further examples).

263. See *supra* note 240; Frederick W. Dingley, *From Stele to Silicon: Publication of Statutes, Public Access to the Law, and the Uniform Electronic Legal Material Act*, 111 L. LIBR. J. 165, 175 (2019) (“New *rescripta* . . . were numerous and unorganized. In court, the party with the most recent *rescript* in its favor often won Judges then had to sort through the mass of imperial laws to determine what that existing law truly was.”).

264. See Williamson, *supra* note 202, at 162 (“The style of statutes in particular was often complex and convoluted.”); HARRIS, *supra* note 191, at 165–66 (“They are written in a legalese rendered all the more opaque by the use of technical abbreviations.”).

265. Rufino, *supra* note 211, at 307–08.

266. RIGGSBY, *supra* note 193, at 4; see also *id.* (“Ordinary people might not have objections to any particular law or regulation, but they could feel that the whole system was just a little beyond their control.”).

complex and evolving interrelationships,²⁶⁷ and Roman choice-of-law principles could make multiple jurisdictions' laws relevant to various disputes.²⁶⁸

Due to widespread illiteracy, therefore, plus a variety of compounding factors, most in ancient Rome could not receive notice by reading statutory text. Instead, they used other strategies which scholars have chronicled. First, public readings supplemented written publication.²⁶⁹ Second, the government relied on the few who could read to act as intermediaries, spreading word of the law's contents throughout the community.²⁷⁰ Third, many laws simply were embedded in Roman or local culture, so socially literate individuals were able to comply without seeking out the law.²⁷¹

Meanwhile, posting of statutory text did accomplish various objectives, even if fair notice was not one of them. It allowed the literate elite in society to initiate conversations in the community about the law.²⁷² In so doing, it shifted additional power to that literate elite,²⁷³ even as it dispersed and realigned power within those elite, perhaps in liberalizing ways.²⁷⁴ It also allowed for textual preservation, and it limited opportunities for tampering.²⁷⁵ It bound the government to a linguistic formulation, limiting its ability to apply its laws arbitrarily.²⁷⁶ It gave those laws an imprimatur of officialdom, and perhaps even a majesty, that may have gained them respect in the community.²⁷⁷ Indeed, many scholars have concluded that laws were posted more for spectacle than for content dissemination: the impressiveness of the displayed texts was the

267. See, e.g., *id.* at 31 (on complex and evolving relationship of statutes to edicts).

268. See *supra* note 257; see also *id.* (noting negotiations and hybrid solutions to choice-of-law issues).

269. See, e.g., Williamson, *supra* note 202, at 164 ("In fact, the Romans usually relied on proclamation.").

270. See ANDO, *supra* note 198, at 101 (citing H. C. Youtie that "the imperial government did not expect that its subjects—or all its officials—would be literate: rather, it demanded that they have access to a literate person"); HARRIS, *supra* note 191, at 33–34 (noting that "illiterates and semi-literates were often able to make use of or benefit from the written word *through intermediaries*").

271. See MEYER, *supra* note 192, at 3 (noting that law was effective "because it was anchored fathoms deep in Roman culture").

272. HARRIS, *supra* note 191.

273. HARRIS, *supra* note 191, at 39 ("Written laws and administrative paperwork can in various ways assist men of power who know how to make use of them.").

274. See *id.* at 165–66 (suggesting "a certain widening of legal and hence political social power was in operation"); Dingley, *supra* note 263, at 173 (noting codification of Twelve Tables as result of plebian demands).

275. MEYER, *supra* note 192, at 2.

276. See RIGGSBY, *supra* note 193, at 88–89 ("Ancient accounts tend to see the Tables as a populist measure, since they limited the ability of the elite to apply the law arbitrarily . . ."); LITERACY & POWER IN THE ANCIENT WORLD 10 (Alan K. Bowman & Greg Woolf eds., 1994) ("[W]e must also consider the connections between the use of writing and a concern for accountability and redress for those controlled by the bureaucracy . . .").

277. See RIGGSBY, *supra* note 193, at 88 (noting some believe publication gave "gloss of 'objectivity' to rules composed by and (largely) for elites").

point.²⁷⁸ What it did not accomplish, however, was direct and widespread public notice of the substance of the law.

The reality of Roman society therefore undermines the myth, propagated by Justice Scalia, of ancient Rome as a halcyon period of fair notice for ordinary people. Interestingly, it also challenges Justice Scalia's assumptions about the relationship of fair notice to judicial interpretation.

For Justice Scalia, the Caligula anecdote instructs that courts should interpret statutes via textualist methodology.²⁷⁹ In this regard, he suggests, it offers a lesson about the judiciary.²⁸⁰ A study of ancient Rome offers two complications. First, the Caligula anecdote is about legislative and executive actors, not judicial ones. The lesson of the story, it seems, is that the lawmaker (Caligula) should not have cynically distributed laws in an inaccessible manner, thereby empowering the executive (also Caligula) to enforce penalties against an unwary public. The judiciary never appears. It is Scalia's innovation to imply that this anecdote has lessons for the courts.

Second, if fair notice naturally implies use of textualist methodology, as Scalia suggests, then we should expect Roman jurists to have consistently committed to that methodology. This would make sense given the Roman embrace (at least in theory) of fair notice. Yet that is not the case. Instead, there was a remarkable diversity of interpretive approaches in ancient Rome, even as commitments to fair notice remained strong. In addition to voices that called for attention to plain textual meaning,²⁸¹ one finds acceptance of dynamic statutory interpretation²⁸² and intentionalist principles.²⁸³ In ancient Rome, in other words, fair notice principles were not viewed as requiring a turn to textualist methodologies.

278. See, e.g., Rufino, *supra* note 211, at 307–08 (“Their impact derives merely from their public display.”); ANDO, *supra* note 198, at 124 (“The Senate clearly wished viewers to associate the magnificence of such texts with their city”); see also MEYER, *supra* note 192, at 2 (discussing the quasi-mystical authority attached to tablets).

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

280. *Id.*

281. See, e.g., NEIL DUXBURY, ELEMENTS OF LEGISLATION 137–38 (2013) (noting strand of uncompromising interpretation in *Digest*).

282. See, e.g., DIG. 1.3.13 (Ulpian 1), *quoted in* A. Arthur Schiller, *Roman Interpretatio and Anglo-American Interpretation and Construction*, 27 VA. L. REV. 733, 739 n.24 (1941) (“[W]henver this or that is provided by statute there is good opportunity for other rules which involve the same beneficial principle being supplied either by *interpretatio* or by magisterial ruling.”); Schiller, *supra*, at 735–37 (on dynamic interpretation of Twelve Tables). On role of principles of *aequitas* or equitable interpretation, see DUXBURY, *supra* note 281, at 27, 183 n.44; Schiller, *supra*, at 756.

283. See, e.g., DIG. 1.3.17. (Celsus 27) (“Knowing laws is not a matter of sticking to their words, but a matter of grasping their force and tendency.”); DIG. 1.3.18 (Celsus) (“Statutes ought to be given the more favorable interpretation, whereby their intendment is saved.”); DIG. 1.3.29 (Paulus) (“It is a contravention of the law if someone does what the law forbids, but fraudulently, in that he sticks to the words of the law but evades its sense.”); DIG. 50.17.96 (Marcianus) (“In ambiguous remarks one must most of all consider the intention of the man who made them.”).

B. England (1066–1800)

In modern-day discussions, fair notice also is often traced back to England.²⁸⁴ Yet, from at least to the Norman conquest through American independence, fair notice similarly was a fiction in England. This is illustrated by the histories of three English periods: the early medieval period, late medieval period, and early modern period.

1. Early Medieval Period: 1066–1300

Unlike ancient Rome, early medieval England (1066–1300) did not valorize written texts. In this period, England instead was deeply committed to oral practices.²⁸⁵ Prevailing practice, therefore, was to furnish verbal notice of the laws.²⁸⁶ This practice fit within a broader society in which reading was conceptualized fundamentally differently—as a verbal activity conducted aloud, not a private activity done visually and silently.²⁸⁷ For this society, fair notice need not entail personal reading of the law.

To provide this verbal notice, sheriffs were sent exemplifications of the statutes, along with writs ordering them to have new laws proclaimed throughout their counties.²⁸⁸ Criers then would verbally proclaim them throughout the land.²⁸⁹ Important documents were required to be publicly read aloud at regular intervals by sheriffs or other local officials.²⁹⁰ These readings typically were delivered in both Latin and the vernacular (English or French, as appropriate).²⁹¹ As explained further below, the vernacular readings typically were translations (and unofficial ones), thereby further removing them from

284. See, e.g., *Textualism as Fair Notice?*, *supra* note 39, at 544–45, 544 n.5 (arguing that fair notice “has experienced unceasing prominence since the early years of Anglo-Saxon rule in England”).

285. See generally M. T. CLANCHY, FROM MEMORY TO WRITTEN RECORD: ENGLAND 1066–1307, at 23 (3d ed. 2013) [hereinafter CLANCHY, FROM MEMORY TO WRITTEN RECORD] (describing oral and memory-based culture of medieval England).

286. Michael T. Clanchy, *Literate and Illiterate; Hearing and Seeing: England, 1066–1307*, in LITERACY AND HISTORICAL DEVELOPMENT 38, 64 (Harvey J. Graff ed., 2007) [hereinafter Clanchy, *Literate and Illiterate*] (“The usual way of publishing new laws and regulations was by proclamation.”); Dingley, *supra* note 263, at 179 (“Before and shortly after the time of the Norman Conquest, England’s government used verbal methods to inform their subjects about the law.”).

287. MEDIEVAL ENGLAND: AN ENCYCLOPEDIA 426 (Paul E. Szarmach et al. eds., 2017) (1998) [hereinafter MEDIEVAL ENGLAND] (noting that “reading normally meant reading aloud” to oneself or others); Clanchy, *Literate and Illiterate*, *supra* note 286, at 68 (noting that “reading was still primarily oral rather than visual”).

288. 1 STATUTES OF THE REALM xlv (Dawsons of Pall Mall 1963) (1810).

289. See Clanchy, *Literate and Illiterate*, *supra* note 286, at 65 (discussing role of criers shown in historical documents).

290. See *id.* (discussing laws required to be read aloud twice or four times per year).

291. *Id.* at 66 (“Public readings of documents were done in the vernacular as well as in Latin and might reach a wider audience that way.”); see also MEDIEVAL ENGLAND, *supra* note 287, at 426 (“In 1258, for example, the barons’ proclamation (‘Provisions of Oxford’) was sent to sheriffs in Latin, French, and English to be read aloud publicly in whichever language the audience would understand.”).

actual statutory text.²⁹² The writs sometimes might additionally require sheriffs to make and distribute physical copies of the law, but this was atypical.²⁹³ As Michael Clanchy has explained, this emphasis on verbal dissemination extended even to the Magna Carta, despite its legacy as a written document.²⁹⁴

Under Henry II²⁹⁵ and Henry III,²⁹⁶ the use of verbal communication went even further: promulgated rules sometimes were never written down at all.²⁹⁷ In this regard, it was a society driven by verbal and memory-based practices to an extent difficult to imagine today.

Even if the government of the eleventh and twelfth centuries had desired to disseminate laws textually, literacy rates would have posed a problem. While estimates vary,²⁹⁸ several accounts posit a literacy rate for the period as low as 5%,²⁹⁹ and even optimistic estimates suggest that only a relatively small minority could achieve the robust forms of literacy needed to comprehend statutory law.³⁰⁰ As in ancient Rome, therefore, a vast population of illiterate individuals may have relied upon the skills of the literate few in their communities to help

292. CLANCHY, FROM MEMORY TO WRITTEN RECORD, *supra* note 285, at 225 (“Publication presumably took the traditional form of vernacular announcements by criers working without official non-Latin texts.”).

293. 1 STATUTES OF THE REALM, *supra* note 288.

294. Clanchy, *Literate and Illiterate*, *supra* note 286, at 65 (“[E]ven [Magna Carta] was not officially enrolled in the royal archives, although it was proclaimed extensively and repeatedly. . . . [I]n theory at least, everyone in England should have heard Magna Carta read out, although it is unlikely that a sufficient number of copies were available.”); *see also* Dingley, *supra* note 263, at 179.

295. CLANCHY, FROM MEMORY TO WRITTEN RECORD, *supra* note 285, at 323 (“Henry himself was an energetic legislator, yet even his decrees were not written down in authoritative and officially authentic statutes. They seem to have been promulgated orally and then noted haphazardly by chroniclers.”).

296. *Id.* at 266 (discussing “Henry III’s government’s use of the spoken word for legislation”).

297. *See also id.* at 29 (quoting Glanvill that “although English laws are not written down, it does not seem absurd to call them laws”).

298. On the challenges of estimating literacy rates for the medieval period, *see id.* at 12–13.

299. *See, e.g.*, JUDY ANN FORD, JOHN MIRK’S FESTIVAL: ORTHODOXY, LOLLARDY AND THE COMMON PEOPLE IN FOURTEENTH-CENTURY ENGLAND 27 (2006) (positing range of 5–15%) (citing Susan Crane, *The Writing Lesson of 1381*, in CHAUCER’S ENGLAND: LITERATURE IN HISTORICAL CONTEXT 202 (Barbara A. Hanawalt ed., 1992)); HEATHER BLATT, PARTICIPATORY READING IN LATE-MEDIEVAL ENGLAND 9 (2018) (“Conservative estimates suggest perhaps as little as 5 per cent of the overall population could read. . . .”); Christopher Cannon, *Class Distinction and the French of England*, in TRADITIONS AND INNOVATIONS IN THE STUDY OF MEDIEVAL ENGLISH LITERATURE: THE INFLUENCE OF DEREK BREWER 48–59, 51–52 (Charlotte Brewer & Barry Windeatt eds., 2013) (noting that “few people were literate in any meaningful sense”).

300. Clanchy occasionally gives some optimistic statements. *See, e.g.*, CLANCHY, FROM MEMORY TO WRITTEN RECORD, *supra* note 285, at 49 (“[M]any – perhaps most – people in thirteenth-century England had to read from time to time. . . .”). Clanchy here charts the rise of “literate ways of doing business.” *Id.* at 296. Even using the possession of a seal as a proxy for literacy, Clanchy observes “[s]carcely anyone apart from rulers and bishops possessed seals in 1100,” and that by 1300 while all freemen may have had them, most serfs likely did not. Clanchy, *Literate and Illiterate*, *supra* note 286, at 47; *see also* A COMPANION TO CHAUCER AND HIS CONTEMPORARIES 304 (Laurel Amtower & Jacqueline Vanhoutte eds., 2009) (noting that “numbers have ranged from approximately 50 per cent of the male population to considerably lower”); BLATT, *supra* note 299, at 9 (reporting that even optimistic accounts for urban areas posited only that “perhaps as much as 50 per cent of the male population could read English”); Cannon, *supra* note 299, at 52 (suggesting that optimistic accounts must be based on thin notions of pragmatic or minimal literacy).

render documents accessible.³⁰¹ This likely combined with cultural absorption of legal standards to educate the public about laws they might not read, yet needed to obey.³⁰²

Even among the literate minority, meanwhile, language barriers often were prohibitive. Prior to 1485, the statute rolls were written in either French or Latin.³⁰³ The Magna Carta had been written in Latin³⁰⁴ and copies were sent to sheriffs in Latin and French.³⁰⁵ Pre-conquest statutes, however, had been written in Old English.³⁰⁶ To read contemporary statutory law, therefore, one needed to be literate in three separate languages.

Yet few were, of course. French was limited mostly to the newly installed Norman elite,³⁰⁷ at least in the early years after the conquest.³⁰⁸ Even when it expanded to other sectors of elite society, French often was limited to a colloquial spoken fluency,³⁰⁹ and it remained a language known only to a relatively small class even in the century after 1250.³¹⁰ Meanwhile, Latin was a written language,³¹¹ not a spoken one.³¹² Learned via schooling (formal or

301. CLANCHY, FROM MEMORY TO WRITTEN RECORD, *supra* note 285, at 45 (citing idea of “collectively literate” society).

302. *See* Dingley, *supra* note 263, at 180 (stating people “learn[ed] its rules as they learned the rules of sword play” (quoting 2 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 416 (4th ed. 1936))).

303. 1 STATUTES OF THE REALM, *supra* note 288, at xxi. Sometimes, publications would alternate between the two languages even during a single king’s reign, see *id.* at xl–xlii, or within a single document, see CLANCHY, FROM MEMORY TO WRITTEN RECORD, *supra* note 285, at 210 (describing the Provisions of Oxford of 1258 as “recorded in a novel mixture of Latin and French”).

304. *See* CLANCHY, FROM MEMORY TO WRITTEN RECORD, *supra* note 285, at 222.

305. *Id.* at 221; *see also* Anthony Musson, *Magna Carta and Statutory Law*, in THE CAMBRIDGE COMPANION TO MEDIEVAL ENGLISH LAW AND LITERATURE 54–65, 59 (Candace Barrington & Sebastian Sobceki eds., 2019) (arguing that it “was issued to the barons in Anglo-Norman French, as a contemporary 1215 version implies, and other copies in vernacular French were circulated during the thirteenth century through their inclusion in chronicles, cartularies and legal collections”). *But see* CLANCHY, FROM MEMORY TO WRITTEN RECORD, *supra* note 285, at 222 (speculating that English copies must have existed for public readings in English, though none are extant).

306. CLANCHY, FROM MEMORY TO WRITTEN RECORD, *supra* note 285, at 18.

307. *See* MEDIEVAL ENGLAND, *supra* note 287, at 426 (“Versions of Anglo-Norman French became the language of power and prestige, the imposed public discourse of the subjected Anglo-Saxons and the ruling Normans.”); CLANCHY, FROM MEMORY TO WRITTEN RECORD, *supra* note 285, at 201 (citing French as “the language of the gentry . . . and of the king’s court”).

308. CLANCHY, FROM MEMORY TO WRITTEN RECORD, *supra* note 285, at 215 (“French remained the language of the influential group immediately around the king for more than two centuries . . .”); *id.* at 216 (“French could never compete with English as the mother tongue of those outside the king’s court . . .”).

309. *Id.* at 202 (detailing evidence for such individuals possessing “a knowledge of colloquial French which required extending and refining”).

310. *Id.* at 209–11.

311. *See* Clanchy, *Literate and Illiterate*, *supra* note 286, at 47 (“Elementary instruction in reading and writing started from Latin because that was the traditional language of literacy and sacred Scripture.”); CLANCHY, FROM MEMORY TO WRITTEN RECORD, *supra* note 285, at 188 (noting its “special status as the traditional language of literacy”).

312. *See id.* at 23 (“Latin remained the principal language of record, long after it had ceased to be anyone’s mother tongue, across the whole medieval millennium from 500 to 1500.”); *see also* MEDIEVAL ENGLAND, *supra* note 287, at 426 (“Latin remained the dominant bookish language for learning and theology, despite a strong tradition of OE intellectual writing.”).

informal), it was limited to those with education.³¹³ Consequently, Latin was not accessible for the mass of English society who could not afford education³¹⁴—individuals whose access probably depended upon the unlikely receipt of a clergy education.³¹⁵ And while the Anglo-Saxon population did continue to speak English,³¹⁶ the Old English of the pre-conquest laws already was archaic.³¹⁷ Indeed, as vernaculars, English and French were not even yet standardized to an extent that could empower widespread textual literacy in them.³¹⁸ (This assumes that the Old English statutes remained in effect, of course—something that also was unclear.³¹⁹) In sum, the notion that any sizeable portion of this population could not only read,³²⁰ but could read with the fluency required to understand statutes across three languages, is far-fetched.³²¹

For those who were literate, and were literate in the correct languages, additional barriers still precluded notice. For example, it could be challenging to acquire physical copies of statutes.³²² A few statutory compilations for specific kings' reigns did circulate,³²³ but this was an era of manuscripts—a period before the printing press.³²⁴ Few therefore existed, and manuscripts

313. CLANCHY, FROM MEMORY TO WRITTEN RECORD, *supra* note 285, at 218 (“Latin was a uniform prescribed language, articulated by its grammar and learned through schooling . . .”). Latin therefore may have been accessible for elites such as the barons and gentry. *See id.* at 237. And local government officials (such as sheriffs) may have possessed a limited pragmatic literacy in it. *Id.* at 238.

314. *Id.* at 243 (noting that “the problems for a serf’s family were paying for instruction and doing without the labour of the child concerned”).

315. *See id.* at 242–44 (describing this education process and speculating that it may have led to only “one in a thousand” being fully literate); *see also* Dingley, *supra* note 263, at 179 (noting that “few English people, outside the clergy, spoke” Latin).

316. *See* MEDIEVAL ENGLAND, *supra* note 287, at 426 (“English continued to be the spoken language of the villages.”); CLANCHY, FROM MEMORY TO WRITTEN RECORD, *supra* note 285, at 203 (noting that “throughout the whole period from 1066 to 1307 English had remained the commonest spoken language”).

317. CLANCHY, FROM MEMORY TO WRITTEN RECORD, *supra* note 285, at 213 (“In some parts of England written Anglo-Saxon, which was as much a royal and clerical language as Latin was, may have appeared almost as foreign and archaic to local people.”).

318. *See* Clanchy, *Literate and Illiterate*, *supra* note 286, at 47 (“Neither Middle English nor French was sufficiently standardized, or well enough established as a literary language, to become the basis of elementary instruction in reading and writing until well after 1300.”).

319. *See* CLANCHY, FROM MEMORY TO WRITTEN RECORD, *supra* note 285, at 29–30 (explaining possible monarchical strategy to treat their authority as ambiguous). The 1189 limit on legal memory would not be established in case law until at least 1290. *See id.* at 44.

320. For populations already relying on literacy in other languages, it would require even more. *See id.* at 199 (“Hebrew was used as a language of record by the Jews who arrived in the twelfth century.”).

321. *Id.* at 208 (“When [around 1250] Roger Bacon remarks that ‘we speak English, French and Latin’, he means by ‘we’ his educated readers and not the masses. Nor probably were the great majority bilingual either, as English was their mother tongue.”) (footnote omitted). For a summary of the different types and levels of literacy scholars have studied in medieval England, *see*, for example, BLATT, *supra* note 299.

322. Clanchy, *Literate and Illiterate*, *supra* note 286, at 64 (stating that “documents were . . . relatively rare”).

323. CLANCHY, FROM MEMORY TO WRITTEN RECORD, *supra* note 285, at 29 (describing *The Laws of Edward the Confessor* and *The Laws of Henry I*).

324. *See* Clanchy, *Literate and Illiterate*, *supra* note 286, at 64 (noting “documents were bound to be relatively rare until printing made their automatic reproduction possible”).

could differ in their wordings, defying the sort of linguistic precision assumed by any commitment to textual fair notice.³²⁵ Even for texts as vital as the Magna Carta, scribes would modify or insert language to clarify the law.³²⁶ As Clanchy again explains: “This was because reading aloud compelled both reader and listener to make immediate sense of the text. Insistence on absolute literal accuracy is a consequence of printing, compounded by photocopying and computing.”³²⁷ For similar reasons, punctuation and abbreviations were inserted with the goal of assisting verbal recitation, not visual reading.³²⁸ This further undermined any serious ability of the public to achieve notice via statutory text in the years 1066–1300.

2. *Late Medieval Period: 1300–1500*

In the period of 1300–1500, several changes in English society seemed to create new possibility for wider reading of statutes. First, the nation increasingly spoke the same language. During the 1300s, a multilingual society gradually was transformed into a predominantly monolingual one, with English unmistakably as the predominant language.³²⁹ This would not resolve all language issues; English still was rapidly evolving, and it likely still had significant regional variations.³³⁰ Still, it became gradually more plausible for texts to be issued in a single language shared by a sizeable portion of the general public.

England also was transitioning to a culture of written records, including in the law. By 1300, distribution and display of legal texts had become more common, often supplementing the traditional practice of verbal proclamation.³³¹ And the invention of the printing press (around 1450) created new possibility for widespread textual dissemination beginning in the second

325. CLANCHY, FROM MEMORY TO WRITTEN RECORD, *supra* note 285, at 106 (noting “individual manuscript volumes are not uniform objects like printed books”).

326. See Clanchy, *Literate and Illiterate*, *supra* note 286, at 66 (“Not only did scribes make mistakes which were overlooked, they also inserted emendations which in their judgement made better sense of the text.”).

327. *Id.*

328. *Id.* at 70 (“The system of punctuating and abbreviating words in Latin works was likewise intended primarily to assist someone reading aloud, rather than a person silently scrutinizing the page.”).

329. See CLANCHY, FROM MEMORY TO WRITTEN RECORD, *supra* note 285, at 203 (noting that English “emerged in the fourteenth century . . . to take its place as the principal language of literature”); MEDIEVAL ENGLAND, *supra* note 287, at 427 (“By the 15th century . . . English had emerged as the language of both official and familiar writing and reading.”).

330. See CLANCHY, FROM MEMORY TO WRITTEN RECORD, *supra* note 285, at 207 (noting these factors for eleventh-century author Jocelin).

331. See Clanchy, *Literate and Illiterate*, *supra* note 286, at 65–66 (explaining that “by 1300 there had been a significant change, as considerable emphasis was now being put on seeing the document as well as hearing it”); see also Musson, *supra* note 305, at 59 (noting continued examples of oral recitation). On early precedent and controversy in 1279 of Magna Carta posting, see Clanchy, *Literate and Illiterate*, *supra* note 286, at 65. See also Dingley, *supra* note 263, at 180; Musson, *supra* note 305, at 59.

half of the fifteenth century.³³² The government made use of this technology soon thereafter, with printed promulgation of statutes via session publications beginning in 1484.³³³ By the late fifteenth century, conditions seemed vastly improved for ordinary people to receive notice of the laws via statutory text.

Yet a variety of factors continued to thwart that goal through 1500. First, while literacy rates may have improved, they remained a problem. Although a culture of literacy (or, at least, familiarity with authoritative written documents) had begun in the late medieval period,³³⁴ most ordinary people likely still could not read by 1300³³⁵ nor by 1400.³³⁶ At least one estimate has suggested that a majority of the population was literate by 1500,³³⁷ but even if correct, this likely captures only an “ability to recognize the written words of the best-known prayers,” as one scholar put it.³³⁸ That would be inadequate for the comprehension of statutes, a relatively challenging literacy task. And many estimates for sixteenth-century literacy were significantly lower, as discussed below. Mass literacy was still centuries away.

Second, even as England transformed into a monolingual society that primarily spoke English,³³⁹ the statute rolls continued to be recorded alternately in Latin and French until 1485.³⁴⁰ Prior to 1485, therefore, laws were issued in languages that were mostly inaccessible for the governed populace.³⁴¹

Third, the compilation practices for English statutes made them essentially inaccessible. Until the invention of the printing press in the mid-1400s, the persistence of manuscript culture made mass circulation of statutory texts improbable.³⁴² And early printings in the late 1400s did not immediately open up access to the nation’s legal regime. Session publications would appear

332. 1 STATUTES OF THE REALM, *supra* note 288, at xlv (noting the printed distribution of statutes around this time).

333. *Id.*

334. CLANCHY, FROM MEMORY TO WRITTEN RECORD, *supra* note 285, at 1 (“Printing succeeded because a literate public already existed; that public originated in the twelfth and thirteenth centuries.”).

335. Clanchy, *Literate and Illiterate*, *supra* note 286, at 47 (using possession of seals as a proxy for literacy).

336. See MEDIEVAL ENGLAND, *supra* note 287, at 426 (“It is estimated that by 1400 at least 30 percent of the English population, including most of the nobles and gentry, were able to read and often write in English and perhaps French or Latin.”). *But see* F.R.H. DU BOULAY, AN AGE OF AMBITION: ENGLISH SOCIETY IN THE LATE MIDDLE AGES 118–19 (1970) (giving estimate of 30% of male population).

337. Derek Brewer, *The Social Context of Medieval English Literature*, in 1 THE NEW PELICAN GUIDE TO ENGLISH LITERATURE: CHAUCER AND THE ALLITERATIVE TRADITION 23 (Boris Ford ed., 1982) (contending that “[p]robably more than half the population could read, though not necessarily also write, by 1500”), *quoted in* CLANCHY, FROM MEMORY TO WRITTEN RECORD, *supra* note 285, at 13.

338. CLANCHY, FROM MEMORY TO WRITTEN RECORD, *supra* note 285, at 13.

339. See CLANCHY, FROM MEMORY TO WRITTEN RECORD, *supra* note 285, at 203 (noting that English “emerged in the fourteenth century . . . to take its place as the principal language of literature”).

340. 1 STATUTES OF THE REALM, *supra* note 288, at xxi. *But see id.* at xxiv (noting that, in and after Henry VI’s reign, “many Bills, in the Form of Acts, are entered on the Parliament Roll in English” even though “originally published in French”).

341. See *id.* at xxi.

342. See *id.* at xxxvi.

consistently from 1484 onwards,³⁴³ but these provided only recent statutes, and accessing the full legal regime was nearly impossible. Only two official compilations were issued in the fifteenth century.³⁴⁴ Issued in 1482 and around 1497, neither collection included statutes before 1312, and each provided the statutes through 1483 only in French and Latin, thereby sharply limiting the ability of the general public to read them.³⁴⁵ Through a confluence of factors, therefore, it remained improbable for ordinary people to read statutory law throughout the fourteenth and fifteenth centuries.

Perhaps due partly to this reality, a new fiction about public notice also had emerged in England by this period.³⁴⁶ According to this fiction, it was assumed that the public had notice of the legislature's activities—and so it was believed fair to hold the public accountable to statutes even if texts had not yet been promulgated or had been destroyed.³⁴⁷ This fiction prevented the government from needing to commit to concrete steps that would furnish the public with notice. Fair notice thereby assumed the exact opposite of its typical implication: notice, it was believed, made statutory text unnecessary.³⁴⁸

3. *Early Modern Period: 1500–1800*

In the period of 1500–1800, notice via text remained implausible for most people. The issue of illiteracy persisted. Estimates typically agree that England remained a minority-literate society into the early 1500s,³⁴⁹ with some putting the literacy rate as low as 10%.³⁵⁰ For the mid-1600s, estimates typically posit a

343. *Id.* at xxi, xlv.

344. *See id.* at xxv.

345. *Id.* The overview provided here does not include published abridgements of statutes.

346. *See, e.g.*, EDWARD COKE, *THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND CONCERNING THE JURISDICTION OF COURTS* 26 (London: M. Flesher, 1644) (“Although proclamation be not made in the County, every one is bound to take notice of that which is done in Parliament: for as soon as the Parliament hath concluded anything, the law intends, that every person hath notice thereof, for the Parliament represents the Body of the whole Realm: and therefore it is not requisite that any Proclamation be made, seeing the Statute took effect before.”); PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 38 n.21 (2008) (citing sources of the idea in 1400s and 1500s).

347. *See, e.g.*, Dingley, *supra* note 263, at 180 (“Parliament represented the entire body of England, the courts argued, so any of its enactments were presumed to be instantly known by all English citizens.”).

348. This idea would subsequently appear in America, *see, for example*, 1 SAMUEL MARCH PHILLIPPS, *A TREATISE ON THE LAW OF EVIDENCE* 316 (London: A. Strahan, 5th ed. 1822); *Gardner v. Collector of Customs*, 73 U.S. (6 Wall.) 499, 507 (1867). And it continues to be cited by Supreme Court Justices, *see Barrett, supra* note 10.

349. FORD, *supra* note 299, at 27 (suggesting approximately 50% of population could read into the 1500s, while also suggesting “lay literacy remained essentially confined to the nobility, government officials, and townspeople”); DU BOULAY, *supra* note 336, at 118–19 (suggesting 40% of male population could read by 1540).

350. *See* DAVID CRESSY, *LITERACY AND THE SOCIAL ORDER: READING AND WRITING IN TUDOR AND STUART ENGLAND* 15–18, 159–63 (1980) (positing male literacy of 10–20%, and female rate lower); Jo Ann H. Moran Cruz, *England: Education and Society*, in *A COMPANION TO BRITAIN IN THE LATER MIDDLE AGES* 451, 466 (S. H. Rigby ed., 2008) (suggesting that, in 1500, it did not exceed 10%–25% of the adult male population); EUAN CAMERON, *THE EUROPEAN REFORMATION* 227 (2d ed. 1991) (“Even in the most

minority-literate society as well,³⁵¹ and perhaps a rate as low as 30%.³⁵² Entering into the 1700s, estimates have suggested literacy rates of approximately 35% by 1700³⁵³ and perhaps 60% by 1760.³⁵⁴ By 1800, one estimate suggested a rate of 60% among women, and only 40% among men.³⁵⁵ While the variations in these figures reveal uncertainty about the precise percentage in a society in which literacy likely was expanding, they also attest to the persistence of a significant portion of society—likely a majority, and potentially a sizeable one—that could not read statutes in an era before the full arrival of mass literacy.

The volume of English law also was increasingly prohibitive. Even in the 1100s and 1200s, the volume of statutes and papal decretals had begun to cause problems.³⁵⁶ By the 1500s, it was common for prominent legal figures to lament this quality of the law.³⁵⁷ By 1593, for example, Francis Bacon could remark that: “[The laws are] so many in number that neither common people can half practise them, nor the lawyer sufficiently understand them.”³⁵⁸ In response, the government embarked on repeated efforts in the late 1500s and early 1600s to authoritatively reduce and organize the statutory law, but none of these efforts came to fruition.³⁵⁹ The Rump Parliament in 1648, for example, appointed a committee to examine how the statutes “may be reduced into a compendious way and exact method for the more safe and clear understanding of the people,” but nothing came of the project.³⁶⁰

sophisticated of towns ‘literacy’ may not have exceeded 30 per cent, while between 5 and 10 per cent may have been nearer the norm.”); Eltjo Buringh & Jan Luiten Van Zanden, *Charting the “Rise of the West,”* 69 J. ECON. HIST. 409 (2009) (suggesting rate of 16% in 1500s).

351. See REBECCA JEAN EMIGH ET AL., ANTECEDENTS OF CENSUSES FROM MEDIEVAL TO NATION STATES: HOW SOCIETIES AND STATES COUNT 150 (2016) (positing for 1660, 61% of men and 31% of women were literate). *But see* Buringh & Van Zanden, *supra* note 350, at 434 (positing 53% by the mid-1600s).

352. CRESSY, *supra* note 350, at 211 (1640 estimate); David W. Galenson, *The Settlement and Growth of the Colonies: Population, Labor, and Economic Development*, in 1 THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES 193 (Stanley L. Engerman & Robert E. Gallman eds., 1996) (“In the mid-seventeenth century . . . only one-third of adult males in England [were literate].”).

353. EMIGH ET AL., *supra* note 351, at 151 (suggesting 43% literacy rate for men and 27% for women).

354. *Id.* at 150.

355. Amy J. Lloyd, *Education, Literacy and the Reading Public*, GALE https://www.gale.com/binaries/content/assets/gale-us-en/primary-sources/intl-gps/intl-gps-essays/full-ghn-contextual-essays/ghn_essay_bln_lloyd3_website.pdf [<https://perma.cc/5MRD-QA9B>].

356. See CLANCHY, FROM MEMORY TO WRITTEN RECORD, *supra* note 285, at 109–110 (explaining that authors therefore began attempting to produce *summae*, which were compilations of these works, but which often exacerbated confusion rather than ameliorating it).

357. See, e.g., BARBARA J. SHAPIRO, LAW REFORM IN EARLY MODERN ENGLAND: CROWN, PARLIAMENT AND THE PRESS 41 (2019) (quoting Lord Keeper Puckering that the laws were “so many and great that they are fitly to be termed *elephantinae leges*?”); *id.* (noting Lord Keeper Thomas Egerton lamenting to Parliament in 1597 that “the number of Laws already made is very great”); The Diary of Samuel Pepys (Apr. 25, 1666) (reporting statutory reformer lamenting laws’ “obscurity through [a] multitude of long statutes”).

358. Paul H. Kocher, *Francis Bacon on the Science of Jurisprudence*, 18 J. HIST. IDEAS 3, 4 (1957).

359. See MICHAEL ZANDER, THE LAW MAKING PROCESS 477 (quoting Lord Justice Kerr) (8th ed. 2020).

360. Henry Thring, *The Improvement of the Statute Law*, QUARTERLY REVIEW, Jan. & Apr., 1899, at 172–73.

By the early 1700s, statistics can be put to this statutory volume. English statutory law by 1714 was over 8,700 pages long (and on pages that held over 1,100 words per page).³⁶¹ This issue would only worsen throughout the 1700s: the session volumes for just one decade of lawmaking (1787–1796) contained 6,988 pages, for example, including 2,012 pages of general acts with broad applicability.³⁶² Against this backdrop, Lord Hardwicke would remark in 1756 that: “[O]ur statute books have of late years increased to such an enormous size, that no lawyer, not even one of the longest and most extensive practice, can pretend to be master of all the statutes that relate to any one case that comes before him.”³⁶³

These challenges were exacerbated by compilation practices. From 1508 onward, compilations periodically were published,³⁶⁴ sometimes even by the king’s printers.³⁶⁵ Yet they had myriad flaws. First, these publications were piecemeal.³⁶⁶ Compilations covered only specific reigns or time periods,³⁶⁷ and they mistakenly overlooked or omitted statutes.³⁶⁸ Second, when publications translated early statutes into English,³⁶⁹ the translations often had errors and inconsistencies,³⁷⁰ including insertion or omission of full sentences contrary to the untranslated text.³⁷¹ Third, compilations were inconsistent, containing “innumerable” disagreements over wording even with non-translated statutes.³⁷² Fourth, compilations’ arrangements could be puzzling and haphazard, undermining efforts by any ordinary person to navigate them.³⁷³ Fifth, they sometimes included repealed or obsolete statutes, thereby leaving

361. 1 STATUTES OF THE REALM, *supra* note 288 (providing the nine substantive volumes of the Statutes of the Realm).

362. *Report from the Committee for Promulgation of the Statutes, 5th December 1796*, in 16 GREAT BRITAIN, COMM. APPOINTED TO THE STATE AND CONDITION OF THE COUNTRIES ADJOINING TO HUDSON’S BAY 119, 123 (1803).

363. Lord Hardwicke, Speech on a Militia Bill in the House of Lords (1756), in GEORGE HARRIS, 3 THE LIFE OF LORD CHANCELLOR HARDWICKE 59 (London: William Stevens, 1847).

364. 1 STATUTES OF THE REALM, *supra* note 288, at xxi (citing Berthelet publications in 1531 and 1532).

365. *Id.* at xxiii (noting 1618 and 1676 publications by king’s printers).

366. *See id.* at xxi–xxviii (surveying and discussing collections published through 1800).

367. *See id.*

368. *See, e.g., id.* at xxii (noting omissions from 1534 edition); *id.* (noting omissions of pre-1556, 1576, and 1587 publications); *id.* at xxiii (omissions from Rastall version and Pulton 1618 publication); *id.* at xxiv (problems in Hawkins 1735 edition); *see also id.* at xxv (inappropriately included statutes in Hawkins, Cay, Ruffhead, and Pickering publications).

369. *See id.* at xxi–xxviii.

370. *See, e.g., id.* at xxiii (on Pulton 1618 version); *id.* at xxiv (on Hawkins 1735 and Cay 1758 editions).

371. *Id.* at xxv (noting that the volumes would include versions “which were equally repugnant to the Old Printed Copies and to the Record”); *see also id.* (noting “essential Variances in the Translation, not only from the Sense of the French Text, but also from the former English Edition”).

372. *Id.* at xxv. This problem sometimes existed for session publications, too. *See id.* at xlv (sessional Publications from Henry VII).

373. *See, e.g., id.* at xxii (noting 1534 publication failed to arrange in chronological order); *id.* (noting “The Great Boke of Statutes” from around 1541–1548 “differs in some Particulars” from Berthelet publication); *id.* (describing 1556 publication as not arranged with chronological accuracy and arranged “in a very confused Manner”).

the reader unsure which laws actually remained in force (a problem that Edward Coke particularly lamented).³⁷⁴

As early as the 1500s, governmental authorities repeatedly voiced frustration with this state of affairs, and multiple reform efforts were initiated.³⁷⁵ The most notable of these was undertaken by Francis Bacon in the 1590s and early 1600s, following similar efforts by his father in the 1560s and 1570s.³⁷⁶ Bacon called not only for digests that would enable the continual revision and updating of the law to remove conflicting provisions and obsolete material.³⁷⁷ He also sought further reforms, as he recognized that, in the face of a massive and unorganized corpus of statutory law, there was no realistic ability of the public to read statutory text.³⁷⁸

Despite the repeated efforts of Bacon and others, however, no significant law reform efforts were achieved in the years of 1500–1800. At the dawn of the nineteenth century, therefore, several official inquiries would observe that, in the words of one: “[N]o complete Collection has ever been printed containing all the Matters, which at different Times, and by different Editors, have been published as Statutes.”³⁷⁹ An 1800 Select Committee would add: “[I]t is clear that many of our Public Statutes . . . were unknown to the most learned Men of former Times.”³⁸⁰

Given these compilation shortcomings, consider the situation of an individual in the late 1700s who needed access to statutes issued prior to 1509. To view these statutes, a reader needed six separate publications from various decades.³⁸¹ Moreover, all extant translations contained “Many Errors and Inconsistencies” and “there [were] many antient Statutes of which no Translation ha[d] ever yet been printed.”³⁸² The notion that some governing statutes for England had, by 1800, literally never been translated into English is remarkable. And the idea that ordinary people gained notice via statutory text,

374. EDWARD COKE, *THE FOURTH PART OF THE REPORTS OF SIR EDWARD COKE*, KT. ix–x, <https://lawlibrary.wm.edu/wythepepia/library/ReportsOfSirEdwardCoke1738Pt4.pdf> [<https://perma.cc/GXX3-32NY>] (“[T]o omit all those [laws] that be repealed, that none by them be deceived . . . [would be] a necessary Work and worthy of singular Commendation.”).

375. See SHAPIRO, *supra* note 357; 1 *STATUTES OF THE REALM*, *supra* note 288, at xxvi–xxviii (chronicling these efforts).

376. 1 *STATUTES OF THE REALM*, *supra* note 288, at xxvi; SHAPIRO, *supra* note 357, at 40.

377. See ZANDER, *supra* note 359.

378. See 13 FRANCIS BACON, *THE WORKS OF FRANCIS BACON* 65 (James Spedding et al. eds., Cambridge Univ. Press 2011) (1857).

379. 1 *STATUTES OF THE REALM*, *supra* note 288, at xxv; see also *Report from the Committee Upon Temporary Laws, Expired or Expiring, 12th May 1796*, in 14 *Reports From Committees of the House of Commons* 34, 36 (1803), quoted in Dingley, *supra* note 263, at 181 (“[I]here is no authentic and entire publication of the statutes.”) (emphasis in original).

380. *First Report*, in *REPORTS FROM THE SELECT COMMITTEE, APPOINTED TO INQUIRE INTO THE STATE OF THE PUBLIC RECORDS OF THE KINGDOM* 19 (1800), quoted in Dingley, *supra* note 263, at 181.

381. 1 *STATUTES OF THE REALM*, *supra* note 288, at xxv.

382. *Id.*

even for ancient laws which required this sort of herculean textual archaeology to access, is preposterous.

There also were limitations on dissemination. Copies of statutes³⁸³ and statutory compilations³⁸⁴ still existed only in very limited numbers.³⁸⁵ Even by 1803, a committee report could conclude that: “The Distribution of [statutory] Volumes is confined within a very limited circle of Persons.”³⁸⁶ As that report chronicled, distribution practices were calculated to reach only essential governmental figures, not the broad public.³⁸⁷

Into and throughout the eighteenth century, therefore, statutory text remained inaccessible to ordinary people. By the turn of the century, this fact was assumed by key legal theorists. Such theorists repeatedly asked: how should fair notice theory be squared with these English statutory realities?

On such author, William Blackstone, argued that legal theory could (and should) evolve to fit these realities.³⁸⁸ The essence of notice, in his opinion, was foreseeability: that the public can anticipate the law to be applied, and thereby can avoid being unduly surprised by its application.³⁸⁹ He expressly did not care whether this was achieved by individuals reading statutory text, remarking: “[T]he manner in which this notification is to be made, is matter of very great indifference.”³⁹⁰ For statutory law, he found it acceptable that some acts of Parliament were communicated to the public only *viva voce*.³⁹¹ To Blackstone, the idea of fair notice was simply that “whatever way is made u[s]e of, it is incumbent on the promulgators to do it in the mo[s]t public and perspicuous manner.”³⁹²

This theory was contrasted by Jeremy Bentham, who remained committed to the idea of notice furnished via statutory text.³⁹³ Yet he understood that, in his contemporary England, this form of notice was available only to a narrow class of elites.³⁹⁴ For Bentham, it was clear that law was accessible to “nobody

383. Clanchy, *Literate and Illiterate*, *supra* note 286, at 66 (noting that “[b]y 1300 there should have been hundreds of copies of Magna Carta in existence”).

384. See Musson, *supra* note 305, at 58 (describing these early “bespoke compilations”).

385. At the beginning of this period, copies otherwise had to be sought at sheriff’s offices. See *id.* (describing “the sheriff’s office where copies of the Great Charter and other legislation were deposited”).

386. *Report from the Committee for Promulgation of the Statutes*, *supra* note 362, at 119.

387. *Id.* (noting that “[t]he Distribution of [statutory] Volumes is confined within a very limited circle of Persons,” detailing receiving officials, and noting total number “very little exceeds Eleven hundred”).

388. 1 WILLIAM BLACKSTONE, COMMENTARIES *45.

389. As he puts it: the goal is to avoid situations where “it is impo[ss]ible that the party could fore[s]ee that an action, innocent when it was done, [s]hould be afterwards converted to guilt by a [s]ub[s]equent law; he had therefore no cau[s]e to ab[s]tain from it.” *Id.* at *46.

390. *Id.* at *45.

391. *Id.*

392. *Id.* at *46.

393. See 7 JEREMY BENTHAM, *Rationale of Judicial Evidence, in THE WORKS OF JEREMY BENTHAM* 226–311 (John Bowring ed., Edinburgh: William Tait 1843).

394. *Id.* at 232 (referring to this group as “Judge & Co.”); see also Dean Alfange, Jr., *Jeremy Bentham and the Codification of Law*, 55 CORNELL L. REV. 58, 61 (1969).

but a few Lawyers.”³⁹⁵ Consequently, he asked the question: what changes would be necessary to make notice via statutory text a plausible reality for ordinary people?³⁹⁶

Realizing this goal, he answered, required a fundamental remaking of our sources of law.³⁹⁷ First, it required a complete abolition of the common law.³⁹⁸ Second, it required a complete redesign of statutory law.³⁹⁹ This law would need to be converted from a set of scattered statutes into a comprehensive, organized code.⁴⁰⁰ The volume of this law also would need to be dramatically reduced, in order to make it even somewhat manageable for the general public.⁴⁰¹ As he put it: “Scarce any man has the means of knowing a twentieth part of the laws he is bound by. Both sorts of law are kept most happily and carefully from the knowledge of the people: statute law by its shape and bulk; common law by its very essence.”⁴⁰² Any code would need to truncate the law in order to make it functionally accessible for the public. Such a code also would need to be partitioned into self-contained subunits (i.e., not interconnected), thereby further making its length manageable for ordinary people.⁴⁰³ In this regard, he recognized the lengths required to make statutory text the vehicle for fair notice: a radical remaking of statutory and common law. (To Bentham’s mind, therefore, the primary ramifications of public notice were for legislatures, not courts.⁴⁰⁴ Meanwhile, while he did think that courts should attend to the text and should eschew commentaries,⁴⁰⁵ he was explicit that courts should prioritize intent when it cleaved from plain text.⁴⁰⁶)

395. JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES: A CRITICISM OF WILLIAM BLACKSTONE’S COMMENTARIES ON THE LAWS OF ENGLAND 68–69 (1928) (on accessibility of the common law).

396. See 3 JEREMY BENTHAM, *General View of a Complete Code of Laws*, in THE WORKS OF JEREMY BENTHAM, *supra* note 393, at 205.

397. *Id.*

398. 5 JEREMY BENTHAM, *Truth versus Ashburst*, in THE WORKS OF JEREMY BENTHAM, *supra* note 393, at 231 (“What way, then, has any man of coming at this dog-law [i.e., common law]? Only by watching their proceedings: by observing in what cases they have hanged a man, in what cases they have sent him to jail . . .”) (emphasis omitted).

399. BENTHAM, *supra* note 398, at 207.

400. See generally *id.*

401. See *id.* at 207.

402. BENTHAM, *supra* note 398, at 235; BENTHAM, *supra* note 398, at 207 (referring to “too great extent” as one of four major defects of style in law); *id.* (noting that, through English experience, “we have learned that another important quality in this style is brevity”) (emphasis omitted); *id.* at 208 (describing English statutory law as marked by an “unbearable prolixity”).

403. Bentham’s version of this partitioning is one anathema to our equal protection of laws, as it proposes to divide the code’s provisions by social class. See BENTHAM, *supra* note 398, at 208.

404. See *id.* at 209 (“I have endeavo[r]red to throw the burthen upon the legislator, that the yoke may be lightened for the people.”).

405. *Id.* at 210 (suggesting that “all men should be required to pay no regard to such comment[aries]” and that “neither should it be allowed to be cited in any court of justice in any manner whatsoever”).

406. *Id.* (“Whatsoever the legislator had in view and intended to express, but failed to express, either through haste or inaccuracy of language, so much it belongs to the judges in the way of interpretation to supply.”).

Blackstone and Bentham thereby adopted quite different views of fair notice. Yet they shared a premise: fair notice via statutory text did not exist in England.

C. *America (1787–Present)*

After the Founding, Americans faced a dauntingly complex legal landscape. First, state law was impossibly challenging. States typically had enacted “reception provisions” that retained English law, including statutory law, so all the challenges of determining English law discussed in Section B applied in the states.⁴⁰⁷ The volume of British statutes cited was tremendous,⁴⁰⁸ plus these statutes were largely inaccessible,⁴⁰⁹ and their interaction with competing state laws often was unclear.⁴¹⁰ The result, as Charles Cook has observed, was that: “[D]iscovering what English laws were actually binding was a daily problem of the first magnitude which affected nearly everyone and heavily taxed the legal system.”⁴¹¹ (Later, the situation in Louisiana would be even worse: a reception provision preserved over 20,000 inaccessible Spanish laws dating back to A.D. 693 and written in Spanish,⁴¹² as well as some French law.⁴¹³)

Most states also preserved colonial law, which similarly was challenging to locate.⁴¹⁴ As the compiler of New Jersey’s colonial statutes put it, these statutes “by their very Number”⁴¹⁵ overwhelmed researchers, and copies were so scarce that “it became difficult to know what the law was.”⁴¹⁶ Even if located, Cook has observed, these session law publications also were extremely difficult to navigate.⁴¹⁷

407. See CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* 3–7 (1981); see also James Maxeiner, *A Government of Laws Not of Precedents 1776–1876: The Google Challenge to Common Law Myth*, 4 BRIT. J. AM. LEGAL STUD. 137, 166–67 (2015) (describing state strategies for incorporation of British law).

408. See ELIZABETH GASPAR BROWN, *BRITISH STATUTES IN AMERICAN LAW 1776–1836*, at 203–355 (1964). A search of these pages for “S.L.,” the citation used for references to the Statutes at Large, returned 1,108 results. *Id.* The author notes that some listings may be duplicative, as they are divided into relevant subject-matter headings. *Id.* at 203–04.

409. See *id.* at 28 n.11 (quoting one pair of commentators who described them as “contained in a great number of volumes” and as generally unavailable to American audiences).

410. Caveats existed for laws deemed repugnant to state constitutions, thereby creating complex conflict-of-law questions. See COOK, *supra* note 407, at 3.

411. Charles M. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform* 7 (1974) (Ph.D. dissertation, University of Maryland) (on file with author).

412. *Id.* at 81, 87.

413. *Id.*

414. John W. Head, *Codes, Cultures, Chaos, and Champions: Common Features of Legal Codification Experiences in China, Europe, and North America*, 13 DUKE J. COMPAR. & INT’L L. 1, 63 (2003).

415. COOK, *supra* note 407, at 7.

416. *Id.* at 6 (noting that with the pamphlet publications “[coming] ‘into the hands of only a few’ and [being] ‘easily lost’ . . . ‘a complete set was rarely to be found’”).

417. *Id.*

In addition to incorporating British and colonial laws, states had enacted their own laws in increasing volumes.⁴¹⁸ By the 1790s, some states had enacted over 1,700 statutes⁴¹⁹ and had accrued over a thousand pages of session laws.⁴²⁰ As one commentator remarked in 1786, only if the laws were “reduced as to bulk . . . would [they] be adopted to every man’s information.”⁴²¹ And locating these statutes could be difficult: they often were scattered across multiple publications that might not even be obtainable,⁴²² and compilations (if they existed) might be partial or incomplete.⁴²³ Differing state laws created thorny choice-of-law questions, too, which many noted made law the province of a lawyerly elite.⁴²⁴ The result was that, as Georgia’s statutory compilers remarked in 1800, there often was “great uncertainty in municipal regulations of the State.”⁴²⁵ The jurist Zephaniah Swift similarly lamented of Connecticut law in 1795: “[I]n no country is it more arduous and difficult to obtain a systematic understanding of the law.”⁴²⁶

Atop this legal system—with its tangle of inaccessible British, colonial, and state law—the Constitution had added a new federal government. While its restructuring of the federal government did show some commitment to fair notice principles,⁴²⁷ the Constitution ultimately made no effort to remedy the core challenges inhibiting notice at the Founding. With respect to statutory volume, the Constitution was counterproductive: it created a new federal government with expanded legislative powers, leaving decisions about volume to Congress.⁴²⁸ This federal law would be binding on the public, not merely on the states, a shift that made federal laws increasingly consequential for ordinary

418. *Id.* at 8 (noting “increasing corpus of statute law”).

419. *See* Maxeiner, *supra* note 407, at 208 (“In the 1790s James Wilson in Pennsylvania and John F. Grimké in South Carolina each reported dealing with over 1700 statutes in their respective states.”).

420. COOK, *supra* note 407, at 7–8 (citing almost 1,000 pages of session laws by 1789 in Massachusetts, and over 1,200 pages by 1786 in Maryland).

421. *Id.* at 16 (emphasis omitted); *see also id.* at 8 (quoting a Massachusetts lawyer in 1801 that “the multiplication of statutes” had produced “mystery and perplexity”).

422. *Id.* at 6–7.

423. *Id.*; *see also* Erwin C. Surrency, *The Publication of Federal Laws: A Short History*, 79 L. LIBR. J. 469, 469–70 (1987) (“[Shortly after 1789], many states had not provided for a method of systematically publishing their own laws . . .”).

424. *See* COOK, *supra* note 407, at 10, 14.

425. *Id.* at 6.

426. *Id.* at 5.

427. Most notably, the written Constitution gave concise public access to the nation’s higher law. The prohibition on ex post facto laws, U.S. CONST. art. I, § 9, cl. 3, also furnished protection Blackstone deemed essential. 1 WILLIAM BLACKSTONE, COMMENTARIES *46. And the Constitution did not automatically retain laws from the old federal government, though it preserved statutes that created contracts and engagements against the government, U.S. CONST. art. IV, and Congress would re-enact fragments of the prior statutory regime, *see, for example*, Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 (retaining Northwest Ordinance of 1787). *See also* Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335 (2005) (discussing constitutional provisions supporting fair notice).

428. This challenge already had existed under the Articles of Confederation, of course.

people.⁴²⁹ Regarding compilation challenges, the Constitution was silent—unlike some state constitutions, which in subsequent decades sometimes would require codification.⁴³⁰ Nor did it address challenges of statutory dissemination—another issue that state constitutions increasingly would confront, such as with publication requirements.⁴³¹ While the Founders knew these challenges could erode notice, their Constitution was mostly silent on them.⁴³² If fair notice were to be achieved in American statutory law, therefore, that development would depend on subsequent efforts.

At a minimum, any such development would require major improvements in the organization and distribution of law, given the status of state law (as described above). It therefore is worth examining the evolving history of statutory organization and distribution after the Founding. That history included three partially overlapping phases: (1) piecemeal distribution, (2) compilation, and (3) codification. Did any of them make notice realistically possible for the American public?

1. *Piecemeal Distribution*

Throughout the 1700s, state and federal laws often were disseminated in piecemeal fashion. Here, governments provided access either to: (1) individual statutes shortly after enactment, or (2) laws from individual legislative sessions shortly after those sessions.⁴³³ These approaches had obvious shortcomings, as they failed to provide individuals with comprehensive access to the corpus of laws that governed their daily lives. Moreover, the specific methods of providing piecemeal notice suffered from further limitations.

Throughout much of the eighteenth century, piecemeal notice was provided primarily by oral readings of new laws.⁴³⁴ As Alexander Zhang has

429. See U.S. CONST. art. I, § 1 (granting Congress “legislative [p]ower[.]”); *id.* art. I, § 8, cl. 18 (granting Congress the necessary and proper power to “make all Laws” within its assigned fields); *id.* art. VI, cl. 2 (making federal statutes “the supreme Law of the Land”).

430. See Maxeiner, *supra* note 407, at 224–25 (identifying provisions requiring codification of areas of law in the Indiana Constitution of 1816, the Alabama Constitution of 1819, the Missouri Constitution of 1820, the New York Constitution of 1846, the Kentucky Constitution of 1850, the Maryland Constitution of 1851, the Indiana Constitution of 1851, Ohio Constitution of 1851, and the Reconstruction Arkansas Constitution of 1868).

431. See, e.g., KAN. CONST. art. II, § 19 (1861) (“The Legislature shall . . . provide for the speedy publication of [acts]; and no law of a general nature, shall be in force until the same be published.”); see also WIS. CONST. art. VII, § 21 (1848); LA. CONST. art. III, § 19; MD. CONST. art. III, § 29 (1864); IND. CONST. art. IV, § 28 (1851); IOWA CONST. art. III, § 27 (1846); ALA. CONST. art. I, § 9 (1868).

432. THE FEDERALIST NO. 62, at 411 (James Madison) (“It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood . . .”).

433. See Surrency, *supra* note 423, at 471.

434. Alexander Zhang, Encountering Legislation in Early America 35 (Jan. 26, 2023) (unpublished manuscript) (on file with author) (observing that it was part of colonial custom and political culture to read statutes out loud—even to the point of ritualization).

documented, each of the thirteen original colonies had enacted laws requiring public reading of new statutes by 1790.⁴³⁵ In this regard, early American notice not only was partial and fragmented. It also was verbal, not textual.

Particularly in the late 1700s, however, newspaper publication took hold as a prominent form of piecemeal notice.⁴³⁶ As early as 1744, state legislatures sometimes required this publication,⁴³⁷ as did the predecessors to the federal Congress.⁴³⁸ For its part, Congress provided for newspaper publication from 1789⁴³⁹ through 1875.⁴⁴⁰ This method of distribution was viewed throughout the early nineteenth century as the government's primary effort to provide notice to the public.⁴⁴¹

Newspaper publication had several additional shortcomings, however. First, it could be inaccurate⁴⁴² (perhaps even intentionally).⁴⁴³ Consequently, as one Senator observed, newspapers “are relied on by no one who understands the importance of getting the exact text of a law.”⁴⁴⁴

Second, newspaper circulation was limited. The federal statute in 1789 required publication in only three newspapers.⁴⁴⁵ In newspapers of average circulation, this would have reached under 2,000 homes⁴⁴⁶ in a society of over five million residents.⁴⁴⁷ Subsequently, Congress would expand the number of newspapers only modestly: it provided in 1799 for publication in at least one (but not more than three) newspapers in each state,⁴⁴⁸ and in 1846 for publication in two (“and no more”) newspapers per state.⁴⁴⁹ The express

435. *Id.* at 11–12.

436. *See* Surrency, *supra* note 423, at 470.

437. *Id.* at 40.

438. *Id.* at 44–46 (noting practice in Second Continental Congress and Congress of the Confederation).

439. Act of Sept. 15, 1789, ch. 14, § 2, 1 Stat. 68.

440. Act of June 20, 1874, ch. 328, 18 Stat. 85 (ending newspaper publication).

441. *See generally* Zhang, *supra* note 39; *see also* Surrency, *supra* note 423, at 471 (“Publishing federal laws in newspapers was the most expedient method of getting the laws to the public . . .”).

442. *See* Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008, 1009 (1938) (speculating that this was why Resolution of February 18, 1791, permitted publishers to correct by original rolls).

443. *See* Act of Apr. 20, 1818, ch. 80, § 3, 3 Stat. 439 (addressing “intentional omission”); *see also* Dwan & Feidler, *supra* note 442, at 1009 n.8 (suggesting the passing of the Act of April 20, 1818, indicated problems with prior publications).

444. Zhang, *supra* note 39, at 19 (quoting Senator Eugene Casserly).

445. Act of Sept. 15, 1789, ch. 14, § 2, 1 Stat. 68.

446. CLARENCE S. BRIGHAM, JOURNALS AND JOURNEYMEN: A CONTRIBUTION TO THE HISTORY OF EARLY AMERICAN NEWSPAPERS 20–21 (1950). Even the most popular three newspapers would reach fewer than 8,000 homes. *Id.*

447. *See Pop Culture: 1800*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/fast_facts/1800_fast_facts.html [<https://perma.cc/H2PD-YZ46>] (1800 census reporting 5,308,483 residents).

448. Act of Mar. 2, 1799, ch. 30, § 1, 1 Stat. 724; *see also* Act of Apr. 20, 1818, ch. 80, § 1, 3 Stat. 439; Surrency, *supra* note 423, at 470 (“As the Secretary interpreted the statute, however, several newspapers within the same state could be designated publishers.”).

449. Act of Aug. 8, 1846, ch. 101, § 2, 9 Stat. 76, 77. From 1842 to 1846, Congress instead required publication in two (but not greater than four) “of the principal newspapers published in the city of

limitation on the maximum number of newspapers used, presumably a cost-saving measure,⁴⁵⁰ reveals the government's limited interest in pursuing statutory notice.⁴⁵¹ Moreover, officials regularly viewed publication contracts as a tool of partisan patronage, awarding them to newspapers with minuscule circulations.⁴⁵² Such distribution fell far short of reaching the bulk of the population, even if newspapers sometimes did circulate beyond their immediate recipients.⁴⁵³ And it relied on purchase of a commercial product for citizen access to the law.⁴⁵⁴ Not surprisingly, one Senator consequently estimated that under 5% of his constituents ever had read a law in a newspaper.⁴⁵⁵

Piecemeal publication also occurred via distributions of session laws (i.e., publications of statutes from a single legislative session). These publications were increasingly used at the state level through the late eighteenth and very early nineteenth centuries, as discussed above.⁴⁵⁶ Unlike early newspaper publication, these provided laws in a slightly delayed—but somewhat less piecemeal—format.⁴⁵⁷ Still, they provided only a small fraction of the corpus of binding statutory law. And their dissemination was scattered and inadequate, with commentators regularly noting that their extremely limited availability precluded them from accomplishing any goal of robust public notice.⁴⁵⁸

2. *Compilations*

The second phase in statutory dissemination, the phase of compilations, had fully commenced by the 1810s. These compilations gathered enacted statutes, or at least a set of them, into a single publication.⁴⁵⁹ Such a compilation

Washington for country subscribers, giving the preference to such papers as have the greatest number of permanent subscribers and the most extensive circulation." Act of Aug. 26, 1842, ch. 202, § 21, 5 Stat. 523, 527.

450. On Congress's weighing of cost concerns in publication, see Zhang, *supra* note 39, at 25–30; Surrency, *supra* note 423, at 471.

451. Such statutes often specified a rate to be paid to the newspaper publisher. See, e.g., Surrency, *supra* note 423, at 471.

452. See Zhang, *supra* note 39, at 15 ("Secretaries of State could—and very often did—choose partisan newspapers that had tiny circulations."); Surrency, *supra* note 423, at 470 ("A House committee, which examined this publishing practice in 1820, indicated that the papers had not been selected on a geographical basis, for two newspapers in the same city received printing contracts."); W.A. Katz, *An Episode in Patronage: Federal Laws Published in Newspapers*, 10 AM. J. LEGAL HIST. 214 (1966).

453. On such circulation, see Zhang, *supra* note 39, at 52–53, 65–66 (on publications in communal spaces such as post offices and pubs).

454. Adding to the commercial dimension, if private individuals wanted copies beyond those in newspapers, they often were required to pay a fee. See, e.g., Act of Sept. 15, 1789, ch. 14, § 6, 1 Stat. 68, 69.

455. See Zhang, *supra* note 39, at 18 (quoting statement of Sen. Justin Morrill).

456. See Surrency, *supra* note 423, at 470–72.

457. Katz suggests that federal newspaper printings transitioned in the early nineteenth century from publication as statutes passed to end-of-session compiled printings. See Katz, *supra* note 452, at 215.

458. See, e.g., Zhang, *supra* note 39, at 18–19 (quoting legislators on the law publications' unavailability to the public).

459. See, e.g., COOK, *supra* note 407, at 7.

might be enacted as binding law, or it might simply be a helpful but non-authoritative publication.

Each of the original thirteen states had produced at least one compilation by 1800,⁴⁶⁰ and half the states (nine of eighteen) had enacted binding compilations by 1815.⁴⁶¹ At the federal level, Congress first authorized a non-binding compilation of all federal laws in 1795 (known as the “Folwell edition”),⁴⁶² and it would provide for several additional non-binding compilations through the 1840s.⁴⁶³ These official compilations were sometimes supplemented by private compilations⁴⁶⁴ (potentially with congressional assistance).⁴⁶⁵ The costs of such private printings often were placed upon the printers, however, again ensuring that access would be limited to paying customers.⁴⁶⁶

These various compilations were useful to practicing lawyers, but they were of minimal use to the broader public. Non-binding compilations could not provide the public with genuine statutory notice, as they lacked authoritativeness. Moreover, even binding compilations did not address fundamental length or organization problems. Typically, they presented the entire corpus of enacted statutes chronologically (except for those repealed or obsolete).⁴⁶⁷ That corpus continued to grow, and with increasing speed. Maryland’s legislative output began to double in the mid-1810s, for example,⁴⁶⁸ and New York’s annual session law pamphlets often exceeded 500 pages.⁴⁶⁹ As a result, compilations presented an overwhelming volume of laws, and with little indication of how the compiled statutes assembled into contemporary law. In its first edition, the Folwell edition already was 1,681 pages.⁴⁷⁰ The Bioren & Duane edition from 1815 was 3,502 pages,⁴⁷¹ and its final edition in 1845 was

460. Maxeiner, *supra* note 407, at 280.

461. COOK, *supra* note 407, at 25.

462. Act of Mar. 3, 1795, ch. 50, 1 Stat. 443. The volume appeared two years later. Surrency, *supra* note 423, at 474. On the half measures Congress took to make collected laws available prior to the Folwell edition, see *id.* at 471–72.

463. On these, see Surrency, *supra* note 423, at 474–79.

464. Dwan & Feidler, *supra* note 442, at 1009; COOK, *supra* note 407, at 28.

465. See Resolution of Feb. 18, 1791, 1 Stat. 224 (giving permission for private printers to compare versions against the original rolls, and directing the Secretary of State to annex to any resulting editions a certificate that they were so compared).

466. See, e.g., *id.* (providing that “such collation and correction be at the expense of the said Andrew Brown, or such other printer”).

467. See COOK, *supra* note 407, at 25 (“Instead of a systematic arrangement, the tried and true chronological organization was used.”).

468. *Id.* at 62.

469. *Id.* at 131–32.

470. 1 THE LAWS OF THE UNITED STATES OF AMERICA (Richard Folwell ed., 1796) (497 pages); 2 THE LAWS OF THE UNITED STATES OF AMERICA (Richard Folwell ed., 1796) (576 pages); 3 THE LAWS OF THE UNITED STATES OF AMERICA (Richard Folwell ed., 1796) (608 pages).

471. LAWS OF THE UNITED STATES OF AMERICA, FROM THE 4TH OF MARCH, 1789, TO THE 4TH OF MARCH, 1815 (1815–1816).

9,225 pages.⁴⁷² Not surprisingly, federal officials therefore often relied upon collections of the laws into single-subject compilations—compilations not typically made accessible to the general public.⁴⁷³ Meanwhile, state compilations also regularly had page counts into the thousands.⁴⁷⁴ The notion that an ordinary person in 1845 could take over ten thousand pages of accrued statutory law and assemble it into a present-day governing regime was patently false. In this sense, the accrual of statutory law in a democracy predictably made compilations inadequate to render genuine notice to the broader public.

Commentators observed this, repeatedly noting in the compilation era that statutory volume rendered the law inaccessible. Charles Cook has documented this extensively.⁴⁷⁵ Prominent legal figures lamented the “voluminous pages of the statute book”⁴⁷⁶ and the “evils resulting from an indigestible heap of laws.”⁴⁷⁷ The compiler of South Carolina’s laws remarked in 1822 that the state’s laws were “wholly out of reach of an ordinary capacity,”⁴⁷⁸ and another prominent South Carolinian added that: “[I]t is often next to impossible, on account of the actual condition of our laws, to ascertain what the law is.”⁴⁷⁹

Along with statutory volume came interconnectivity challenges. As one commentator observed in the *Charleston Courier* in 1825: “Our laws . . . after the first provision, are commonly enacted in detached parts, and by references from one act to another. This frequently embarrasses, not only the plain unlettered citizen, but the attorney and judges.”⁴⁸⁰ Governor Yates of New York similarly observed that: “[P]rinciples contained in different statutes applicable to the same subject, are distributed in so many volumes as to make an investigation difficult and extremely laborious, almost without the reach of the citizen unless he is a professional character.”⁴⁸¹ These hurdles similarly afflicted federal law: as Zhang has documented, Congress regularly enacted expository legislation that effectively clarified or modified earlier laws—even while leaving the text of those laws unchanged.⁴⁸² Interconnectivity challenges abounded.

472. LAWS OF THE UNITED STATES OF AMERICA, FROM THE 4TH OF MARCH, 1789, TO THE 3RD OF MARCH, 1845 (John B. Colvin & Benjamin Brown French, eds., 1815–1845). While an index was included to guide readers, the index was described by a House report as “voluminous and perplexing” and “made upon wrong principles.” H. R. REP. NO. 20-47 (1829).

473. See Surrency, *supra* note 423, at 473–74.

474. As two examples: the North Carolina compilation of 1821 was 1,653 pages, LAWS OF THE STATE OF NORTH-CAROLINA (Henry Potter et al. eds., 1821) and the Massachusetts compilation of 1836 was 1,007 pages, THE REVISED STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS (Theron Metcalf & Horace Mann eds., 1836).

475. See *infra* notes 476–479.

476. COOK, *supra* note 407, at 72 (quoting John Rodman).

477. *Id.* (quoting James Kent).

478. *Id.* at 121 (quoting Benjamin James).

479. *Id.* at 121–22 (alteration in original) (quoting Thomas Grimke).

480. *Id.* at 62.

481. *Id.* at 137.

482. See generally Zhang, *supra* note 434.

Some commentators realized that, ultimately, this problem was a by-product of democracy. As William Gardiner remarked in 1826: “The frequency of popular elections, the minute representation of sectional interests, and the Athenian fondness for novelty among us . . . have given rise to a very mischievous fertility of legislation.”⁴⁸³ This tension—between democracy and fair notice—is one that would recur throughout the ensuing century. In this clash, democratic principles consistently prevailed.

Had compilations been competent to deliver notice, moreover, they would have been limited by dissemination shortcomings. Consider the federal examples. The Folwell edition printing of 4,500 copies meant fewer than one copy per every 1,180 people.⁴⁸⁴ The Bioren & Duane edition of 1815 was published in only 1,000 copies, which meant fewer than one per every 8,430 people.⁴⁸⁵ The Little, Brown & Company printing authorized in 1845 (i.e., the initial *Statutes at Large*) similarly was for only 1,000 copies.⁴⁸⁶ These were not disseminations calculated to provide notice to the bulk of the general public.⁴⁸⁷

State law disseminations also could be minimal. Again consider South Carolina. There, Governor Bennett remarked in 1822 that such publications were found only “in the libraries of the learned and affluent, where they are accessible to a very small portion of the community,” such that even state courts lacked access to them.⁴⁸⁸ The governor in 1823 would add: “None but the scientific lawyers can point out . . . the laws that are in force, upon many . . . important subjects.”⁴⁸⁹

These publications also continued to suffer from other flaws that inhibited access. The index to the federal Bioren & Duane edition was described by a House report as “voluminous and perplexing” and “made upon wrong principles,”⁴⁹⁰ for example, and the edition also mistakenly included a thirteenth amendment that was not ratified.⁴⁹¹

In the era of compilations, therefore, statutory text remained beyond the grasp of ordinary readers. As Charles Cook aptly summarized: “The layman

483. As quoted in COOK, *supra* note 407, at 62.

484. See Act of Mar. 3, 1795, ch. 50, 1 Stat. 443; *Pop Culture: 1800*, *supra* note 447.

485. Act of Apr. 18, 1814, ch. 69, 3 Stat. 129.

486. Resolution of Mar. 3, 1845, No. 10, 5 Stat. 798, 798–99.

487. See Katz, *supra* note 452, at 215 (“Copies of the laws were rarely sufficient, and the short supply resulted in reenactment [of newspaper publication laws] . . .”). In 1818, Congress did provide for publication of 11,000 copies of laws since last publication. Act of Apr. 20, 1818, ch. 80, § 4, 3 Stat. 439, 439–40. Still, this was an update, not a full compilation, and it amounted to only approximately one copy for each 833 residents, assuming steady population growth between 1810 and 1820. See *Pop Culture: 1810*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/fast_facts/1810_fast_facts.html [<https://perma.cc/MV52-2A48>] (1810 census reporting 7,239,881 residents).

488. COOK, *supra* note 407, at 124 (quoting Thomas Bennett).

489. *Id.* at 125 (quoting John Wilson).

490. H. R. REP. NO. 20-47, at 4 (1829).

491. 1 SUPERINTENDENT OF DOCUMENTS, CHECKLIST OF UNITED STATES PUBLIC DOCUMENTS 1789–1909, at 964 (3d ed. 1911).

faced insurmountable problems in gaining more than a superficial understanding of the law that applied to his situation without professional aid, even if he had a copy of his state's latest [compilation], which was unlikely."⁴⁹²

3. *Codifications*

These problems would persist into the third era of statutory dissemination: the codification phase. Codifications were efforts to rearrange the myriad laws into a single, binding, comprehensive code, organized by subject matter.⁴⁹³ They also attempted to condense the law, insofar as they sought to combine overlapping provisions and remedy conflicting ones. Some sought improvements beyond this, too. But they all varied from compilations in their effort to authoritatively reorganize statutory law into more accessible configurations.

Given the state of early American law, codification likely was a necessary prerequisite to ordinary people reading the law. Without some exhaustive restatement of statutory law, American jurisdictions asked the impossible of the public: to track down the full breadth of British statutes, colonial enactments, and state legislation (and to assemble them into a comprehensive, coherent regime). Until these myriad sources were reduced to an authoritative text, fair notice plainly was a fiction—even before federal legislation was considered. Binding compilations did perform this reduction, but by the time they were enacted, asking the public to read these was again to ask the impossible: the volume of statutory law had exploded, and asking ordinary readers to manually assemble the laws from compilations was absurd. However, codifications presented a new opportunity. They promised to be comprehensive, transparent, and navigable. While no guarantee of fair notice, their advocates at least proposed—for the first time—a vision that could make it realistic.

Officials and commentators recognized this promise.⁴⁹⁴ Codification was held out as a remedy to the “indigestible heap of laws” accumulating in the United States, as Kent put it, who sided with Bacon that revision and codification were necessary “whenever there has arisen a vast accumulation of volumes, throwing the system into confusion and uncertainty.”⁴⁹⁵ Acting on these aspirations, the codification movement began in earnest in the 1820s and 1830s.⁴⁹⁶ Though not embraced by all states, several did enact codifications of

492. COOK, *supra* note 407, at 27.

493. Surrency, *supra* note 423, at 474.

494. As the Governor of Louisiana put it in 1808, there was an aspiration with codification that: “[A] want of information as to the laws in force, heretofore a source of general embarrassment, will no longer exist.” As quoted in Cook, *supra* note 411, at 106.

495. 5 JAMES KENT, COMMENTARIES ON AMERICAN LAW 475 (1844); *see also* COOK, *supra* note 407, at 51.

496. There were precedents before this—most notably, the Virginia enactment of 1803, which could be considered a codification.

their statutory law (or portions of it) throughout the subsequent decades of the 1800s.⁴⁹⁷

Yet codification ultimately was no remedy for the barriers to notice. This was illustrated by the most famous of the state codifications: the civil procedure code enacted by New York in 1848.⁴⁹⁸ Known colloquially as the “Field Code” in honor of its creator, David Dudley Field, this Code undoubtedly was a drastic improvement in rendering the law more accessible.⁴⁹⁹ Still, it had 391 sections, which were interconnected into “a lattice of reasoned principles,” as one commentator put it.⁵⁰⁰ As errors in the Code emerged, moreover, the state legislature began to revise and expand this already-expansive Code. Subjected to the messy sprawl of democracy, it continued to grow—blossoming to 473 sections within a year and reaching ten times its initial size before its eventual repeal in 1877.⁵⁰¹ And this was just for one narrow domain of legislation (*viz.*, state civil procedure).

At the federal level, the codification experience mirrored that of the Field Code. Congress enacted the Revised Statutes in 1874, its first official codification. As with the Field Code, even the initial publication of the Revised Statutes presented a daunting volume of law. The Revised Statutes were over a thousand pages, and with roughly triple the words per page of a typical book.⁵⁰² It therefore presented an ordinary reader with the equivalent of a three-thousand-page tome of dense legal rules.

As with the Field Code, moreover, the legislature soon lost faith in the Revised Statutes. Troubled by the many errors found in the first edition,⁵⁰³ it declared that the updated 1877 version was not authoritative for enactments subsequent to the 1874 edition.⁵⁰⁴ Further supplements in 1880⁵⁰⁵ and 1890⁵⁰⁶ similarly were made only “*prima facie* evidence of the laws” in the courts. They would operate as no more than unofficial compilations and rearrangements of the law, in other words. Ordinary people seeking authoritative statutory text were thrust back into the messy, voluminous world of non-codified law.

Congress thereby established a pattern in the decades after enactment of the Revised Statutes: the Revised Statutes were authoritative, but supplements to it were not, so federal law was spread across the Revised Statutes and various

497. Notable examples included: Mississippi codifying in 1824, Louisiana codifying its civil procedure and civil law in 1825, New York codifying in 1828, with additional partial codifications in 1848 and 1881, Georgia in 1860, South Carolina in 1872, and California, the Dakotas, Idaho, and Montana.

498. COOK, *supra* note 407, at 191.

499. *Id.* at 192.

500. COOK, *supra* note 407, at 191.

501. *Id.* at 193.

502. *See* Act of Dec. 1, 1873, 43 Stat. 18 (1,092 pages).

503. *See* Dwan & Feidler, *supra* note 442, at 1014–16.

504. Act of Mar. 9, 1878, ch. 26, 20 Stat. 27.

505. Act of June 7, 1880, No. 44, 21 Stat. 308.

506. Act of Apr. 9, 1890, ch. 73, § 3, 26 Stat. 50.

scattered post-1874 enactments.⁵⁰⁷ This was the state of federal law until Congress attempted its next codification in 1926: the United States Code.⁵⁰⁸ There, a familiar process repeated itself—but before initial enactment even could occur. As Congress assembled early drafts of the Code in 1926, it began work under the impression that it could muster support for an authoritative version of the Code.⁵⁰⁹ However, some in Congress proved reluctant to endorse a Code that would immediately become binding law. Consequently, the final 1926 version of the U.S. Code instead declared that: “The matter set forth in the Code . . . shall establish prima facie the laws of the United States.”⁵¹⁰ As Representative Ramseyer explained:

To be absolutely certain about what the law is, you would still have to go through the numerous statutes at large and prove up what the law is; that is, if any question should arise as to that particular section that you are presenting to the court being the law, then you would have to bring in the acts and prove it up.⁵¹¹

As with other codifications, even if the U.S. Code had been authoritative, its volume would have undermined its ability to give meaningful notice. The statutory text of the 1926 Code was over 1,700 pages (again, published in highly condensed format).⁵¹² The full document, as inserted into the *Statutes at Large*, was over 2,400 such pages.⁵¹³ Even if the Code had been binding law, therefore, it would have presented an inaccessibly long document. It was not binding law, however—creating a trap for unwary generalists who assumed it to be authoritative.

Federal law would continue in this condition until 1947, when Congress first enacted a title of the Code as authoritative law.⁵¹⁴ This began the gradual process of Congress formally enacting individual titles of the Code, thereby converting them from unofficial restatements of federal law into authoritative documents.⁵¹⁵ Today, half of the 54 titles of the Code are enacted into law, and

507. William L. Burdick, *The Revision of Federal Statutes*, 11 AM. BAR ASS'N J. 178, 179 (1925).

508. *See id.* at 178–79.

509. Frederic P. Lee & Middleton Beaman, *Legal Status of the New Federal Code*, 12 AM. BAR ASS'N J. 833, 834 (1926).

510. Act of Dec. 7, 1925, Pub. L. No. 69-440 § 2(a), 44 Stat. 777.

511. Lee & Beaman, *supra* note 509, at 837 n.27; *see also* U.S.C., Preface v (1926) (statement of Rep. Roy Fitzgerald) (“It is prima facie the law. It is presumed to be the law. The presumption is rebuttable by production of prior unrepealed Acts of Congress at variance with the Code.”).

512. *See* Act of Dec. 7, 1925, Pub. L. No. 69-440, 44 Stat. III (indicating the text of statutes of the Code covers approximately 1,700 pages).

513. *See id.* (containing over 2,400 pages).

514. 1 U.S.C. § 204.

515. *See Positive Law Codification*, OFF. L. REVISION COUNS. U.S. CODE, <https://uscode.house.gov/codification/legislation.shtml> [<https://perma.cc/EM8M-7QQC>].

half are not.⁵¹⁶ This is a distinction unknown even to many lawyers and academics today, much less to ordinary readers.⁵¹⁷

As Congress gradually enacted pieces of the Code into law, the volume of federal statutory law continued to expand beyond the grasp of any ordinary reader. Jarrod Shobe has chronicled this growth, finding that the number of pages in the *Statutes at Large* steadily increased from roughly 1,000 pages per year in 1973 to over 3,000 in 2009.⁵¹⁸ The U.S. Code expanded equally dramatically, exploding from its initial length of around 1,700 pages to around 60,000 pages by 2018.⁵¹⁹ As a result, both codification structure and statutory volume have easily disqualified ordinary people from reading statutory law in these decades.

In sum, it is difficult to locate any period in American history when ordinary people could gain notice from statutory text across federal and state law. This conclusion has been reached without even considering literacy rates, which only raise further concern. Only 78% of adults are literate today, and only 46% can read at a sixth-grade level.⁵²⁰ Persistent racial disparities make these literacy numbers even more disconcerting.⁵²¹ While some estimates for earlier periods are more optimistic,⁵²² these contemporary assessments underscore the continued impracticality of assuming that ordinary people can gain notice by reading federal law. This is before even considering factors such as the extraterritorial reach of American statutory law, which only worsens the

516. See *id.* (noting there are currently 27 positive law titles in the Code).

517. See, e.g., Tobias A. Dorsey, *Some Reflections on Not Reading Statutes*, 10 GREEN BAG 2D 283, 287 (2007) (“[N]owadays the Code is what we cite to, quote from, and interpret.”).

518. Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 830 (2014).

519. Compare U.S. GOV'T PUBL'G OFFICE, *GPO Produces U.S. Code with New Digital Publishing Technology*, GOV INFO (Sept. 23, 2019), <https://www.govinfo.gov/features/uscode-2018#:~:text=GPO%20Produces%20U.S.%20Code%20with%20New%20Digital%20Publishing%20Technology,-Help&text=GPO%20has%20taken%20a%20major,technology%20for%20XML%2Dbased%20publishing> [<https://perma.cc/C8PD-4L2E>] (stating the 2018 edition of the USC is approximately 60,000 pages), *with* Act of Dec. 7, 1925, Pub. L. No. 68-440, 44 Stat. III (indicating the text of statutes of the Code covers approximately 1,700 pages).

520. See INST. EDUC. SCIENCES, *COMPARISON CHARTS OF STATE AND COUNTY ESTIMATES PROGRAM FOR THE INTERNATIONAL ASSESSMENT OF ADULT COMPETENCIES* 4, 8, <https://nces.ed.gov/surveys/piaac/skillsmap/src/PDF/STATE.pdf> [<https://perma.cc/9LYN-C54Q>] (reporting that an estimated 22% of adults have literacy skills at or below a level one and 46% have literacy skills at or below a level three); *Literacy Gap Map*, BARBARA BUSH FOUND. FOR FAM. LITERACY (2013), <https://map.barbarabush.org/#:~:text=What%20does%20adult%20literacy%20look%20like%20in%20your%20state%3F,of%20a%20sixth%2Dgrade%20level> [<https://perma.cc/EX33-EC2H>] (estimating level three as equivalent to a six-grade reading level).

521. See *Highlights of PIAAC 2017 U.S. Results*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/surveys/piaac/national_results.asp [<https://perma.cc/DVL4-8BAK>] (reporting finding that 36% of Black adults were illiterate and that 77% could not read at a sixth-grade level); *Literacy Gap Map*, *supra* note 520; *120 Years of American Education: A Statistical Portrait*, NAT'L CTR. FOR EDUC. STAT. 9 (Thomas D. Snyder ed., 1993) (noting that nearly 80% of the Black population reported they were unable to read or write in the 1870 census, a number that decreased only to 44% at the 1900 census).

522. See, e.g., Galenson, *supra* note 352, at 193 (suggesting for colonial period “adult male literacy in New England was near 90 percent, and free adult males in Pennsylvania and Virginia had literacy rates near 70 percent”).

dilemma of this law governing populations that do not read English.⁵²³ Today, as throughout our legal history, it is a fiction to assume ordinary people can gain notice of their legal regime by reading statutory law.

IV. REALISM IN FAIR NOTICE

As this Article has explained, fair notice in statutory law has always been a fiction. The reading of statutory text has always been a language game accessible only to legal elites. When today's Supreme Court defends its pivot to original public meaning by asserting that it is protecting fair notice, therefore, it does not cite a value that is (or has ever been) an active part of our legal system. When the Court does this, it should stop being treated as though it preserves a value of substance for ordinary people.

It is important to identify and criticize these situations where the fair notice fiction is strategically used to support radical legal innovations. At the same time, however, it also is worth moving beyond critique to ask: what would it mean to pursue a realistic, meaningful version of public notice? This Part explores that question.

A. Bentham, Blackstone, and Beyond

A turn to realism might naturally seem to entail a particular approach to fair notice. After all, notice is supposed to be achieved by private individuals reading statutory texts. Today, structural features of these texts prohibit individuals from reading them.⁵²⁴ A realist approach therefore would look to change our statutory texts, removing the structural barriers that inhibit public reading. In so doing, it would convert fiction into reality—empowering ordinary people to read our statutes and gain notice of their legal obligations.

This too quickly commits to a particular brand of realism, however—and not necessarily a desirable one. This is the lesson taught by other fields that have successfully transitioned to more realist practices.⁵²⁵ Before committing to concrete reforms, these fields have illustrated, disciplines benefit by confronting the shibboleths that have shaped them.⁵²⁶ In particular, it benefits a discipline

523. See Ryan M. Scoville, *U.S. Foreign Relations Law from the Outside In*, 47 *YALE J. INT'L L.* 1, 8–24 (2022) (discussing this challenge).

524. See *supra* Part III.

525. In particular, this Part draws upon the model from access-to-justice scholarship. On its realist revolution, see, for example, Emily S. Taylor Poppe, *Institutional Design for Access to Justice*, 11 *U.C. IRVINE L. REV.* 780, 783 (2020) (“A burgeoning movement among scholars and practitioners seeks to incorporate this empirical reality [regarding civil legal problems] into our understanding of access to justice.”).

526. For challenges regarding the role of counsel, see, for example, Rebecca L. Sandefur, *Legal Advice from Nonlawyers: Consumer Demand, Provider Quality, and Public Harms*, 16 *STAN. J. C.R. & C.L.* 283, 286 (2020) [hereinafter *Nonlawyers*] (arguing that “the evidence provides clear support for efforts to expand legal advice provision beyond the traditional source of licensed attorneys”); Rebecca L. Sandefur, *Access to What?*, 148 *DÆDALUS* 49, 50 (2019) [hereinafter *Access*] (arguing that lawyers are “only part of the solution”).

to question whether it can justifiably remain committed to a long-assumed *means* of accomplishing its values,⁵²⁷ or whether it should reorient to prioritize only those *ends* or values themselves.⁵²⁸

Applied to fair notice, this recommends a re-examination of our long-assumed commitment to text-based notice. Traditionally, notice discussions have assumed that individuals receive notice by means of a direct reading of statutory text. A realist approach asks: are we truly concerned with protecting this means of receiving notice, or simply its underlying ends?

If we prefer a “means-specific approach,” we would indeed want statutory text to directly furnish notice to private individuals. As Part IV.B explained, this approach has had noteworthy defenders, including Jeremy Bentham.⁵²⁹ As he illustrated, reformers adopting this approach must ask: how must we transform our statutory corpus in order to make it readable for ordinary people?

If we prefer a “means-agnostic approach,” by contrast, we might look to preserve the fundamental values of notice, regardless of whether they are accomplished via private individuals reading statutory text. This approach was endorsed by Blackstone, who contended that fair notice need not rely on statutory text.⁵³⁰ The goal is to identify and protect the values that underlie fair notice, he suggested, and to worry less about any particular method of protecting them.⁵³¹ Under this approach, reformers must ask: what values are we attempting to protect via notice, and what strategies can protect those values today?

Adopting the analytic framework of other realist disciplines thereby reveals a hidden choice. Do we revamp statutory text to comport with fair notice? Or do we expand discussions of fair notice beyond the text?

Of these two options, only the latter seems realistic or desirable today. As Bentham recognized, a genuine pursuit of text-based notice would require a wholesale redesign of our statutory law.⁵³² As the American experience has shown, it also likely would require severe constraints on democratic lawmaking going forward, so as to prevent a return to current lawmaking practices.⁵³³ In these regards, a text-based approach creates a troubling tension between democracy and fair notice.

527. For scholars taking this approach to access to counsel, see, for example, Tonya L. Brito, *The Right to Civil Counsel*, 148 *DÆDALUS* 56 (2019) (emphasizing importance of right to counsel); Tonya L. Brito et al., *What We Know and Need to Know About Civil Gideon*, 67 *S.C. L. REV.* 223, 225 (2016) (same).

528. See, e.g., Sandefur, *Nonlawyers*, *supra* note 526, at 285 (arguing for “a broader approach to access to justice, which recognizes that achieving justice is not the same as receiving a specific type of service, such as the services of a lawyer”).

529. See *supra* notes 393–406 and accompanying text.

530. See *supra* notes 388–92 and accompanying text.

531. *Id.*

532. See *supra* notes 396–406 and accompanying text.

533. See, e.g., *supra* notes 500–01 and accompanying text (recounting quick explosion in length of the Field Code after enactment).

When confronting this tension, Americans have consistently prioritized democracy. For the Founders, this meant giving Congress broad lawmaking flexibility—an alternative to placing draconian limits on the statutory texts they could produce.⁵³⁴ For subsequent legislators, it has meant legislating with an eye toward achieving substantive goals, regardless of the style and volume of the resulting statutory texts.⁵³⁵ For the contemporary Congress, it also has meant an unwillingness to use scarce legislative resources on codification efforts, despite the clarity these provide.⁵³⁶ Repeatedly, in other words, governmental officials have acted on the belief that text-based fair notice ought to give way to democratic objectives.

And how could they not? Popular political movements abound for substantive policy goals, whereas there is little public interest in statutory readability.⁵³⁷ Only in tax law have we seen any popular calls for statutory brevity and readability,⁵³⁸ and even there, commentators have sometimes assumed these to be a veneer for deeper substantive policy goals.⁵³⁹ In short, curbing democracy to promote notice seems an unwise tradeoff, one both leaders and the public have regularly found unacceptable.

For these reasons, the “means-agnostic approach” seems the only reasonable option today. Under such an approach, what matters is that the method (whatever it may be) accomplishes the underlying goals of fair notice.

To pursue this approach, it is necessary to ask: what are the goals beneath our modern discussions of fair notice? In modern legal discourse, this Part posits, the concept of fair notice operates as shorthand for two sets of values. First, it embodies the value of public foreseeability, as Blackstone identified. Second, it also refers to separation-of-powers principles that are independent of foreseeability. A modern approach to notice would look to protect each.

534. See *supra* notes 428–31 and accompanying text (chronicling constitutional decisions giving Congress broad lawmaking flexibility).

535. See *supra* Part IV.C.3 (describing legislator decisions during codification era prioritizing substantive goals over concerns of textual style and volume).

536. See Cross & Gluck, *supra* note 44, at 1630–32 (quoting members of Law Revision Counsel on lack of legislator interest in codification efforts in the face of limited policymaking time and resources).

537. See, e.g., Robert W. Gordon, *Book Review*, 36 VAND. L. REV. 431, 434 (1983) (reviewing CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT, A STUDY OF ANTEBELLUM LEGAL REFORM* (1981)) (“[C]odification controversy never took the form of organized political action backed by significant interest groups” and was preoccupation of “a small elite of academically minded lawyers . . .”).

538. See, e.g., Josh Barro, *The Tax Code Can Be Simpler. But Not Three Pages.*, N.Y. TIMES (Nov. 13, 2015), <https://www.nytimes.com/2015/11/15/upshot/a-three-page-tax-code-not-exactly-simple.html> (“All the Republican presidential candidates say they want to make the tax code simpler.”).

539. See, e.g., Gene B. Sperling, *The Republican Tax Plan Isn't About Simplification*, THE ATLANTIC (Nov. 30, 2017), <https://www.theatlantic.com/politics/archive/2017/11/republicans-are-falsely-claiming-their-tax-bill-will-simplify-the-code/547127/>.

B. *Foreseeability*

According to Blackstone, one goal of fair notice policy is to avoid undue surprise in the enforcement of laws.⁵⁴⁰ Modern scholars likewise have noted this goal in the criminal law context.⁵⁴¹ Indeed, this concern remains today—and not just for criminal law.⁵⁴² This directs us to concern ourselves with active investments in informing the public about the content of laws, regardless of the shape that education takes.⁵⁴³

Today, this should lead to an increased focus on *intermediaries*. Dating back to ancient Rome, as Part III.A explained, ordinary people have relied on literate intermediaries to read, translate, and explain laws to them.⁵⁴⁴ Similarly, modern citizens often rely on various intermediaries with regime literacy (and other legal expertise) to educate them about their legal obligations.⁵⁴⁵ A realistic approach to notice would look to protect and promote this chain of communication: from the legislature, to intermediaries, to the public.

In statutory interpretation, such an approach might adopt a decreased concern with the accessibility of legal meaning for ordinary people, and a heightened concern with accessibility for intermediaries. For example, it would counsel courts to have a greater tolerance for technical or legal meanings in statutes.⁵⁴⁶ Such meanings likely are accessible to the individuals who actually read statutes—individuals who, by communicating forward the substance of those statutes, provide real-world notice to the public.

At the same time, this approach also would focus on the broader question: how can we make informed intermediaries more widely available to the public? In discussions across a variety of fields, legal scholarship already is engaging

540. See *supra* notes 389–92 and accompanying text.

541. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 368 (1990) (describing notice in lenity context partly as an effort at “avoiding unfair surprise”); Jeffries, *supra* note 38, at 206 (1985) (“[Under some conventional wisdom,] the rationale of notice is nicely comprehensive. It [unites various penal] doctrines in a common front against unfair surprise.”).

542. On extension to civil law in the void-for-vagueness context, see Albert C. Lin, *Refining Fair Notice Doctrine: What Notice Is Required of Civil Regulations?*, 55 BAYLOR L. REV. 991, 995 (2003); Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1176 (2013).

543. Again, the criminal law scholarship is ahead of legislation scholarship. See Jeffries, *supra* note 38, at 211 (“The issue . . . is not the hypothetical construction of ‘lawyer’s notice.’ The concern is, rather, whether the ordinary and ordinarily law-abiding individual would have received some signal that his or her conduct risked violation of the penal law.”).

544. See *supra* Part III.A.

545. As Zoldan has put it: “[E]ven statutes that act on members of the public are often addressed primarily or exclusively to subject-matter experts who intermediate between the law and the public itself.” Zoldan, *supra* note 38, at 31–32.

546. On the conflict between technical and ordinary meanings in recent Supreme Court jurisprudence, see William Eskridge Jr. et al., *Textualism’s Defining Moment*, 123 COLUM. L. REV. (forthcoming 2023); Anita S. Krishnakumar, *Textualism in Practice* (July 29, 2023) (unpublished manuscript) (SSRN); Tobia, *Ordinary Meaning*, *supra* note 21.

with dimensions of this question.⁵⁴⁷ Realistic fair notice discussions should build upon these debates in the effort to think holistically about how to make intermediaries with regime literacy more readily available to ordinary people.

This would entail a shift in fair notice discussions. For example, the relevant dimension of the Affordable Care Act (ACA) would not be the question of how ordinary people read phrases such as “Exchange established by the State” in the statute.⁵⁴⁸ Instead, discussions would revolve around features such as the ACA’s “Navigator” program, which designated individuals and organizations to help ordinary people navigate the new insurance landscape created by the law.⁵⁴⁹ These actors manage statutory complexity—for example, steering people toward the proper insurance program, which often requires understanding the interconnected regimes of myriad state and federal laws. The Navigator program was not designed to help people read statutes, but it was designed to help them foresee and understand (and, literally, navigate) new changes in the legal regime.⁵⁵⁰ A realistic approach to notice would inquire into what factors impacted the program’s success (including in the courts), and it would consider the extension of such programs into new domains.

Agency practices also can provide a model for intermediaries looking to expand foreseeability. Today, agencies regularly issue guidance to educate regulated sectors about anticipated enforcement practices.⁵⁵¹ They also answer inquiries from regulated actors, explaining how they intend to enforce provisions and empowering private entities to understand how to comply.⁵⁵² These practices place agencies in stark contrast to the federal courts, where prohibitions on advisory opinions preclude this sort of *ex ante* public education about the requirements of the law.⁵⁵³ A serious commitment to fair notice might look to capitalize on this agency practice in multiple ways: by expanding it both within and beyond agencies, by requiring it in certain instances, by shifting more decision-making onto agencies (and away from courts), and by showing greater

547. See, e.g., Sandefur, *Nonlawyers*, *supra* note 526 (advocating for expanded role of non-lawyer intermediaries to solve civil justice problems); Sandefur, *Access*, *supra* note 526, at 50 (same); John O. McGinnis & Steven Wasick, *Law’s Algorithm*, 66 FLA. L. REV. 991 (2014); Chen, *supra* note 39, at 361–62 (considering which portions of criminal law require assistance to gain notice); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 400 (1994) (same).

548. See *King v. Burwell*, 576 U.S. 473, 509 (2015) (Scalia, J., dissenting) (critiquing majority interpretation as “departing from the ordinary meaning of the terms of the law”); see also Anya Bernstein, *Legal Corpus Linguistics and the Half-Empirical Attitude*, 106 CORNELL L. REV. 1397, 1416 n.81 (2021) (“Justice Scalia’s dissent in *King v. Burwell* . . . uses the lay speaker version of textualism.”).

549. Patient Protection and Affordable Care Act § 1311(i), 42 U.S.C. § 18031.

550. Louise Norris, *What Is a Health Insurance Navigator?*, VERYWELL HEALTH (Dec. 3, 2022), <https://www.verywellhealth.com/health-insurance-navigator-5198376> [<https://perma.cc/PZ9F-WM6L>].

551. See GOV’T ACCOUNTABILITY OFF., GUIDANCE DOCUMENTS FROM FEDERAL AGENCIES, <https://www.gao.gov/assets/670/669721.pdf> [<https://perma.cc/ZJ6L-NMRA>].

552. See *id.*

553. U.S. CONST. art. III, § 2 (case-or-controversy requirement).

deference to agency interpretations of law.⁵⁵⁴ Such reforms could expand availability of agency or agency-like informational services, which today are often available only to larger and more powerful actors.⁵⁵⁵

Moving forward, computing technologies also will likely operate as increasingly important intermediaries. Even today, the most common method by which people research the law is via Google search.⁵⁵⁶ This begs the question: should a concern with foreseeability lead the government to more aggressively deploy interactive Internet tools that might function as intermediaries? At a minimum, this could entail posting versions of statutory text with hyperlinks that guide readers to non-transparent interconnections and other relevant context. If more ambitious, it could extend to technologies such as artificial intelligence and chatbots.⁵⁵⁷ Such technologies would use the Internet not only as a document dissemination tool, but also as an interactive interlocutor.⁵⁵⁸ Such use undoubtedly comes with myriad perils, and perhaps these do not justify the benefits. In a world where individuals increasingly rely on such resources in other domains, however, it may at least be worth considering what role the government can play in introducing accurate and responsible versions of this technology for those seeking to understand and comply with the law.

Investment in these sorts of real-world practices seemingly holds significantly greater promise for promoting foreseeability than reforms of statutory text.⁵⁵⁹ If the goal is truly to promote foreseeability, they should become more regular parts of our statutory regime.

C. *Separation of Powers*

Beyond emphasizing foreseeability, fair notice also has played a broader role in the field of legislation. Often, it is viewed as the key factor that keeps the public in view of courts when they interpret statutes. This is particularly evident when statutory interpretation is characterized as torn between two commitments: to the legislature (for democratic reasons) and to the public (for

554. For the Court staking out the opposite position, see *Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting) (suggesting revived nondelegation doctrine necessary to constitutional structure “designed to protect . . . fair notice”).

555. See also Jodi L. Short, *In Search of the Public Interest*, 40 YALE J. REGUL. 759, 830 (forthcoming 2023) (discussing barriers to participation by ordinary individuals and need “to bolster public participation in the administrative process”); Zoldan, *supra* note 38, at 35–36 (discussing plain language materials issued by agencies). On the imperative to equalize access-to-justice services, see, for example, Sandefur, *Access*, *supra* note 526, at 51.

556. Tobia, *Ordinary Meaning*, *supra* note 21, at 413–14.

557. See Joshua D. Blank & Leigh Osofsky, *Automated Agencies*, 107 MINN. L. REV. 2115, 2118 (2023) (studying the phenomenon that, “[t]hrough chatbots, virtual assistants, and other automated tools, federal agencies are increasingly relying on artificial intelligence to help the public understand and apply the law”).

558. On the government’s current use of the Internet as a document dissemination tool, see, for example, congress.gov; govinfo.gov.

559. *But see* Robinson, *supra* note 427, at 336–37 (discussing abolition of common law penal doctrines and rule of lenity as elements of the legal system that suggest a policy that non-textual notice is insufficient).

notice reasons).⁵⁶⁰ Yet our system also imposes further obligations upon courts—including one that arguably entails direct connection with the public. Once fair notice stops operating as a shorthand for all public-regarding obligations of courts, this value becomes more visible.

What is this additional principle? It emerges from the fact that the Constitution establishes a federal government in which governing power is divided across a set of rivalrous elites.⁵⁶¹ That division embodies an anti-tyranny principle: it reduces the power of any single actor to a subset of governance, thereby requiring multiple actors to act in concert to achieve governmental action. In this way, it protects values traditionally associated with the rule of law and with separation of powers.

In statutory cases, this principle operates by confining the judiciary to the task of *interpretation*. As Justice Kavanaugh expressed the idea in his dissent in *Bostock*:

If judges could rewrite laws based on their own policy views . . . the critical distinction between legislative authority and judicial authority that undergirds the Constitution’s separation of powers would collapse, thereby threatening the impartial rule of law and individual liberty. As James Madison stated: “Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for *the judge* would then be *the legislator*.”⁵⁶²

When judges step outside the task assigned to them, in other words, it raises concerns that separation-of-powers principles are being violated. For the courts, concerns therefore arise when rulings are not recognizably anchored in acts of interpretation.

Under some accounts, this principle binds courts directly to the public. According to this view, courts must handle statutory cases in ways that recognizably engage in acts of interpretation, or else risk eroding public confidence that rule of law and separation of powers values are being respected.⁵⁶³ In this way, the argument goes, the public is assured that they do not live under an offending government because they can see judicial actors hewing to this task of their office.⁵⁶⁴ Of course, this idea might warrant its own

560. See, e.g., Barrett, *supra* note 10, at 113 (fleshing out the debate between whether courts, throughout statutory interpretation, are agents of the legislature or the public).

561. See, e.g., THE FEDERALIST NO. 51 (James Madison) (“Ambition must be made to counteract ambition.”).

562. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1824 (2020) (Kavanaugh, J., dissenting).

563. By “public legitimacy,” I refer here to what also is commonly termed “sociological legitimacy.” See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795–96 (2005); see also William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 10 (2015) (observing that, for the Court, “procedural regularity [in the form of reasoned opinion-giving] begets substantive legitimacy”).

564. See Douglas Keith, *A Legitimacy Crisis of the Supreme Court’s Own Making*, BRENNAN CTR. FOR JUST. (Sept. 15, 2022) <https://www.brennancenter.org/our-work/analysis-opinion/legitimacy-crisis-supreme-courts-own-making> [<https://perma.cc/26EC-XZEC>] (“[O]ne way that judges enhance their legitimacy is by

realist critique, insofar as it assumes a connection between judicial reasoning and public legitimacy.⁵⁶⁵ Still, it raises the possibility of another public-directed value in statutory interpretation—one that notice discussions have obscured.

If this is indeed a public-directed value, then protection of it hinges upon courts issuing accessible and convincing statutory interpretations. This would not necessarily require courts to apply original public meaning in statutory cases, however. Ordinary people can recognize intentionalist interpretations as acts of interpretation. So, too, they can recognize interpretations that utilize secondary sources (such as legislative history), or that draw upon technical meanings of terms, as acts of interpretation. All these approaches seek to capture the element of interpretation that Ronald Dworkin refers to as “fit”—the match between a proposed interpretation and the materials it claims to interpret.⁵⁶⁶ It is when that “fit” becomes too thin that courts risk compromising their direct connection with the public, eroding trust that they are respecting rule of law and separation of powers. There is ample room to say that such acts are a direct violation of a public trust, without taking recourse to fair notice or ordinary meaning.

CONCLUSION

The idea of fair notice has lived a remarkable life in our statutory law. However, it cannot bear the weight that the Supreme Court now places upon it. Today, as throughout our legal history, to protect the ability of ordinary people to read federal statutes is to protect a fiction. We should ask more of our legal system—demanding instead that it protect meaningful, current values in our society. The sooner we do this in statutory law, the better our legal system will be for it.

‘render[ing] judgments through written opinions that explain their reasoning,’ as the chief justice has said . . .”).

565. For an argument that they are public-directed but work via intermediaries, see Michael L. Wells, “*Sociological Legitimacy*” in *Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011, 1031–32 (2007).

566. RONALD DWORKIN, *LAW’S EMPIRE* 239 (1986).