INTRODUCTION: LEGISLATING INTERPRETIVE STRATEGIES

Federal statutes do not come with instructions, but maybe they should. For as long as there have been statutes, lawyers and laymen have puzzled over their inevitable ambiguities. Gradually, case by case, courts have developed assorted tools of interpretation. Scholars, meanwhile, have conceived esoteric theories of how best to resolve statutory ambiguity. And the doctrine and the scholarship have become elaborate and sophisticated. But the very richness of this intellectual landscape has resulted in unpredictability and confusion. As theories and judges have multiplied, it has become ever more difficult to predict which judge will apply which theory to which case. After centuries of judicial and scholarly effort, "[t]he hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."[1]

The central, unquestioned premise in this field is that the judiciary is the proper branch to design and implement tools of statutory interpretation. Scholars have unreflectively assumed as much, which is why, almost uniformly, they have implicitly aimed their work at the courts. This Article challenges that assumption. It asks whether Congress can and should help select the tools for interpreting federal statutes. It concludes that Congress has the constitutional power to do so, and that it would be wise to exercise this power.

Before assessing the actual scope of Congress's power, it is important to grasp the potential breadth of the field. The hypothetical statutes at issue are all those that would purport to give interpretive instructions. The class includes prosaic, definitional provisions such as "for purposes of this Act, *X* shall mean *Y*," as well as interpretive instructions like "this Act shall be construed broadly." It also includes any codification or abrogation of a canon of interpretation. For example, courts traditionally apply the maxim *expressio unius est exclusio alterius* — expression of one thing is the exclusion of another.[2] But Congress might explicitly abrogate the maxim: "for purposes of this Act, the listing of several items shall not imply the exclusion of items not listed."[3] Indeed, Congress might codify a whole set of interpretive canons and make them generally applicable — a sort of user's manual for the United States Code.

These examples only scratch the surface of the possible. The category embraces statutes that endorse or abrogate discrete tools, like canons, but also statutes that endorse or abrogate entire theories of statutory interpretation, like textualism. Any tool that a court has ever brought to bear on a question of statutory interpretation, and any method of interpretation that a scholar or judge has ever expounded, Congress might approve or disapprove explicitly, by statute. "This Act shall be interpreted narrowly, despite its remedial purpose." "The Oxford English Dictionary shall be the official dictionary of the United States Code." "Stare decisis shall not apply in statutory cases." "This Act shall be interpreted in textualist fashion, in accordance with principles set forth in the scholarship of Frank Easterbrook." "Agency interpretation of this Act shall

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[1] HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

[2] *See, e.g.*, Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 730–31 (1989); Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 133–34 (1989).

[3] *Cf.* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

be conclusive and binding on federal courts." "Legislative history shall not be used to resolve ambiguity in any future act of Congress." "Ambiguous criminal statutes shall be construed against defendants." "Ambiguity in this Act shall be resolved by reference to the *I Ching*." Would any such statutes be both constitutional and constructive?

The constitutional question turns out to be as important as the answer, because it adds a vital and neglected dimension to the debate about statutory interpretation. To ask whether Congress may codify a particular interpretive method is precisely to ask whether the Constitution requires the method that is to be displaced. Many of the great scholars in the field — Laurence Tribe, Jerry Mashaw, and Cass Sunstein, for example — have suggested that some tools of statutory interpretation are "constitutionally inspired"[4] or "respectful of diverse aspects of the constitutional order"[5] or "traceable to central features of the constitutional structure."[6] Scholars who on any other question can be counted on for a definitive judgment — *constitutional, unconstitutional* — are uncharacteristically wooly in their constitutional claims about statutory interpretation. Their answers have been imprecise, because they have not asked the precise constitutional question: *could Congress abrogate the canon under consideration?* This inquiry proves essential in locating statutory interpretation under the constitutional firmament.

This Article concludes that Congress has constitutional power to codify some tools of statutory interpretation.[7] Congress has used this power in the past, but only sporadically and unselfconsciously, at the periphery of the United States Code. The power itself is vast, however, and could transform the landscape of statutory interpretation. Because this power has received minimal systematic analysis,[8] there is extraordinary potential for imprudent or unconstitutional overreaching. But used wisely, congressional power to legislate interpretive strategies may improve legislative-judicial communication and thus bring our legal system closer to its democratic ideal.

The interpretive status quo is cacophonous. Every judge and scholar has his own theory of how best to interpret statutes, and this diversity renders the interpretive project unpredictable. Each theory may have its own merits, and some may be better than others, but these differences ultimately may matter less than a central imperative of statutory interpretation: a single, predictable, coherent set of rules.[9] The Supreme Court,

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[4] 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-9, at 851 (3d ed. 2000).

[5] Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 843 (1991).

[6] CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 156 (1990).

[7] This Article does not address statutes that purport to require methods of *constitutional* interpretation, which are far more problematic. Each branch has an independent obligation to read the Constitution in the best way it knows how. So even if Congress could, for example, forbid reference to legislative history in statutory interpretation, it hardly follows that Congress could forbid reference to *The Federalist Papers* in constitutional interpretation. *Cf.* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1591 (2000) (arguing that Congress may abrogate stare decisis by statute in constitutional cases, but only to the extent that stare decisis functions as a tool of judicial policy, not to the extent that precedent is used for the persuasiveness of its reasoning).

[8] *See* Alan R. Romero, Note, *Interpretive Directions in Statutes*, 31 HARV. J. ON LEGIS. 211, 212 (1994). The leading casebook devotes only a few pages to this vast topic, and even those pages present more questions than answers. *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 918–20 (3d ed. 2001).

[9] William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 67 (1994) ("The usefulness of the canons . . . does not depend upon the Court's choosing the 'best' canons for each proposition. Instead, the canons may be understood as conventions, similar to driving a car on the right-hand side of the road; often it is not as important to choose the best convention as it is to choose one convention, and stick to it.").

with its nine competing perspectives and its jurisdictional restriction to cases and controversies, will never be able to achieve this coherence alone.

Statutory interpretation is, in many ways, a field like civil procedure, or criminal procedure, or evidence. Like evidence and procedure, statutory interpretation is an area of judicial expertise. And like evidence and procedure, statutory interpretation was long assumed the exclusive province of the judiciary. On the other hand, all three fields demand, above all, internally coherent and consistent codes. These are notoriously hard for judges to develop case by case, and after years of effort, the results have been unsatisfactory.

In the fields of evidence and procedure, an innovative solution has been discovered: the federal rulemaking process. This process combines the expertise of the courts with the democratic legitimacy of Congress. It has harnessed the strengths of both branches and led, through collaboration, to the creation of coherent, unified codes: Federal Rules of Evidence and Procedure. These successes should be replicated, in Federal Rules of Statutory Interpretation.

The idea is not merely theoretical. Many legislatures have taken a far more active role than has Congress in the selection of interpretive methodologies. All fifty states and the District of Columbia,[10] as well as several other countries,[11] have interpretive codes, many of which give far more detailed instructions on interpretation than anything in the United States Code.[12] And Congress has just recently glimpsed the potential impact of this sort of legislation. The proposed Federalism Accountability Act

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[10] *See* ALA. CODE §§ 1-1-1 to -16 (1999); ALASKA STAT. §§ 01.10.020–.065 (Michie 2000); ARIZ. REV. STAT. ANN. §§ 1-211 to -215 (West 1995 & Supp. 2001); ARK. CODE ANN. §§ 1-2-101 to -207 (Michie 1996 & Supp. 2001); CAL. GOV'T CODE § 9603 (West 1992) (pointing to subject-specific rules of construction in subject-specific codes); COLO. REV. STAT. ANN. §§ 2-4-101 to -402 (West 2000); CONN. GEN. STAT. ANN. §§ 1-1 to -3b (West 2000); DEL. CODE ANN. tit. 1, §§ 301–08 (1993); D.C. CODE ANN. §§ 1-301.41, .45, .47 (2001); FLA. STAT. chs. 1.01, 1.02, 1.04 (2001); GA. CODE ANN. §§ 1-3-1 to -3 (2000 & Supp. 2001); HAW. REV. STAT. §§ 1-1 to -32 (1993); IDAHO CODE §§ 73-101 to -114 (Michie 1999); 5 ILL. COMP. STAT. ANN. 70/0.01–/8 (West 1993 & Supp. 2001); IND. CODE §§ 1-1-4-1 to -6 (1998); IOWA CODE ANN. §§ 4.1–.13 (West 2001); KAN. STAT. ANN. §§ 77-201 to -206 (1997); KY. REV. STAT. ANN. §§ 446.010–.170 (Michie 1999); LA. REV. STAT. ANN. §§ 1:1–:17 (West 1987); ME. REV. STAT. ANN. tit. 1, §§ 71–74 (West 1989 & Supp. 2001); MD. ANN. CODE art. 1, §§ 1–32 (1996 & Supp. 2001); MASS. GEN. LAWS ANN. ch. 4, §§ 6–7 (West 1996 & Supp. 2001); MICH. COMP. LAWS ANN. §§ 8.3–.8 (West 1994); MINN. STAT. ANN. §§ 645.001–.49 (West 1947 & Supp. 2002); MISS. CODE ANN. §§ 1-3-1 to -79 (1998); MO. ANN. STAT. §§ 1.010–.090 (West 2000); MONT. CODE ANN. §§ 1-1-101 to -109 (2001); NEB. REV. STAT. ANN. §§ 49-801 to -806 (Michie 1995); NEV. REV. STAT. ANN. 0.010–.060 (Michie 1998); N.H. REV. STAT. ANN. §§ 21:1–:49 (2001); N.J. STAT. ANN. §§ 1:1-1 to -28 (West 1992); N.M. STAT. ANN. §§ 12-2A-1 to -20 (Michie 1998); N.Y. STAT. LAW §§ 71–424 (McKinney 1971 & Supp. 2001–2002); N.C. GEN. STAT. §§ 12-3 to -4 (1999); N.D. CENT. CODE §§ 1-02-01 to -42 (1987 & Supp. 2001); OHIO REV. CODE ANN. §§ 1.11–.62 (West 1994 & Supp. 2000); OKLA. STAT. ANN. tit. 25, §§ 1–36 (West 1987 & Supp. 2002); OR. REV. STAT. §§ 174.010–.590 (1999); 1 PA. CONS. STAT. ANN. §§ 1921–1952 (West 1995); R.I. GEN. LAWS §§ 43-3-1 to -32 (2000); S.C. CODE ANN. §§ 2-7-30 to -35 (Law. Co-op. 1986); S.D. CODIFIED LAWS §§ 2-14-1 to -32 (Michie 1992 & Supp. 2001); TENN. CODE ANN. §§ 1-3-101 to -112 (1994 & Supp. 2001); TEX. GOV'T CODE ANN. §§ 311.021–.032 (Vernon 1998); UTAH CODE ANN. §§ 68-3-1 to -14 (2000 & Supp. 2001); VT. STAT. ANN. tit. 1, §§ 171–177 (1995); VA. CODE ANN. §§ 1-10 to -17.2 (Michie 2001); WASH. REV. CODE §§ 1.12.010–.070 (1985); W. VA. CODE ANN. §§ 2-2-10 to -12 (Michie 1999); WIS. STAT. ANN. §§ 990.001–.08 (West 1998 & Supp. 2001); WYO. STAT. ANN. §§ 8-1-101 to -108 (Michie 2001). *See generally* 1A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 27.03 (5th ed. 1993) [hereinafter SUTHERLAND].

[11] *See, e.g.*, Acts Interpretation Act, 1901 (Austl.); Interpretation Act, R.S.C., ch. I-21 (1985) (Can.); Interpretation Act, 1978 (Eng.); Interpretation Act 33 of 1957 (S. Afr.). *See generally* INTERPRETING STATUTES: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1991).

[12] Moreover, it is common for other legal documents to include instructions for their own interpretation. Interpretive instructions can be found in contracts and even in constitutions. The United States Constitution, for example, was amended twice in its first decade with new rules for its own interpretation. *See* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be *construed* to deny or disparage others retained by the people." (emphasis added)); U.S. CONST. amend. XI ("The Judicial power of the United States shall not be *construed* to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." (emphasis added)).

of 1999,[13] on which the Senate Committee on Governmental Affairs reported favorably,[14] stood to shift the state-federal balance dramatically using nothing more than an interpretive rule — a stronger presumption against preemption of state law. Though the full Congress never voted on this bill, others like it will no doubt follow. As Congress discovers the potential for accomplishing substantive goals with interpretive rules, it will be essential to have analytical tools at hand to assess the constitutionality and the wisdom of such rules.

Part I of this Article shows how this inquiry adds an important dimension to any theory of statutory interpretation. Part II gives more shape to the category of interpretive statutes and creates a framework for analyzing their constitutionality. It draws distinctions within the broad category — such statutes may be definitional or interpretive, statute-specific or general in scope, static or dynamic — and explores whether these distinctions mark constitutional fault lines. It concludes that Congress does have power to mandate some interpretive strategies. Part III shows why some such mandates should be desirable — both as good public policy and as good politics — to a majority in Congress. It tentatively recommends a few illustrative interpretive statutes, though these specific prescriptions are secondary to the more general point: *some* interpretive statutes would be constitutional and wise. Part III also argues that the ideal implementation of an interpretive regime would be as a set of federal rules: the Federal Rules of Statutory Interpretation.

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[13] S. 1214, 106th Cong. (1999).
[14] *See id.*