NOTE

TEXTUALISM AS FAIR NOTICE

Perhaps the most intuitive and straightforward argument for textualism is that it promotes fair notice of the law. Textualism's emphasis on the primacy of the statutory text and its use of objective tools of construction suggest that much of the methodology is motivated by the long-recognized requirement that laws are legitimately enforced only when their subjects have fair notice of them. Yet, textualist judges and scholars have largely ignored this argument — rarely do they give more than a passing nod to fair notice. Instead, arguments for textualism tend to focus on the legislative process, democratic legitimacy, and judicial power — a focus that is natural and perhaps only reflects the classic preoccupation with the countermajoritarian difficulty.[1]

To be sure, few textualists would disagree that fair notice is an element of legal legitimacy. Indeed, most would readily recognize the importance of fair notice to the rule of law. Yet, the implications of the concept as an argument for textualism have never been fully theorized within the textualist literature. In fact, most interpretive methodologies ignore this valuable ground for support.[2] This oversight is a serious lost opportunity for textualism because fair notice squarely aligns with textualism's goal of approximating how the average, reasonable citizen would interpret a statute. Thus, fair notice deserves much more thorough treatment within the textualist literature.

This Note attempts to round out the textualist literature by more fully articulating the fair notice argument for textualism. To lay the groundwork for the argument, this Note first defines and articulates the fair notice principle, largely by reference to its development through Western legal culture. It then examines the existing arguments for textualism and the legal values they emphasize. In particular, it identifies the following three traditional arguments for textualism: (1) public choice, (2) judicial restraint, and (3) judicial competence. Upon demonstrating that these three arguments fail to account for the fair notice principle, this Note articulates the fair notice argument for

---

[1] *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

[2] Other methodologies' failure to consider fully the fair notice argument is beyond the scope of this Note. Yet, fair notice rarely receives any more than a cursory mention within statutory interpretation literature generally. This Note's narrow conclusion is that textualism should more aggressively justify itself on fair notice grounds. However, one of this Note's fundamental premises — that fair notice is an important ground of argument — carries the implication that all methods should seek to justify themselves on the basis of fair notice. Thus, even those who take issue with this Note's endorsement of textualism should agree that fair notice deserves a more prominent role in justifying all interpretive methodologies.

textualism. Finally, this Note integrates this fair notice argument with the traditional arguments to illustrate how, together, they provide a convincing and comprehensive argument for textualism.

I. THE CONCEPT OF FAIR NOTICE

From the inception of Western culture, fair notice has been recognized as an essential element of the rule of law. Most importantly, the American Founders and the Enlightenment thinkers who influenced them viewed fair notice as a requirement for fairness, legitimacy, and social utility. This concern for fair notice only increased as Anglo-American law developed through the nineteenth and twentieth centuries. As a result, fair notice is a crucial element of the modern rule of law. This Part will articulate the modern concept of fair notice by looking to its development in Western legal culture in general and American legal culture in particular. This account will illuminate the three core requirements of fair notice: the government must publicize its duly enacted laws; citizens must make themselves aware of those laws; and the publicized laws must be reasonably clear. This Part will also demonstrate how all three requirements occupy an important role in our modern conception of the rule of law. In doing so, it will lay the groundwork for demonstrating how fair notice provides a convincing argument for textualism.

A. The Promulgation Requirement

The most fundamental dictate of fair notice is that the government must inform its citizens of the laws to which it will subject them. Before a person can legitimately be held accountable under a rule, he must be told of the rule. Otherwise, the government could spring pain or punishment upon unwitting subjects who could have done nothing to avoid it. Thus, this element most obviously preserves a core aspect of fairness. Yet, it also promotes social efficiency by allowing people to order their behavior within an established legal framework. When people are confident that they are aware of the applicable laws, they will be more confident taking the business risks that drive our economy.

This element of fair notice can be traced back to the earliest days of Western culture. The concept first gained prominence in Athenian Greece when popular demand led to publication of the law. Following this initial publication, law promulgation became the standard practice, which in turn led to formal enactment of law.[3] And from this development came Solon's laws, the first instantiation of the modern rule

[3] Roscoe Pound, *Theories of Law*, 22 YALE L.J. 114, 117 (1912).

of law in Western culture.[4] Aspects of this legislation-based legal culture extended through the Roman Empire but eventually faded as legal thinkers became more concerned with aligning law with conceptions of natural right and less concerned with law's application to its subjects.[5]

The promulgation requirement regained prominence during the Middle Ages. This renewed emphasis is evident from the concern that the great twelfth-century legal philosopher Gratian had for the promulgation of law.[6] In the *Summa Theologica*, Saint Thomas Aquinas expanded on Gratian's treatment of the topic, spending an entire section discussing "[w]hether promulgation is essential to a law."[7] After recognizing objections, in true scholastic fashion, he said: "In order that a law obtain the binding force which is proper to a law, it must needs be applied to the men who have to be ruled by it. . . . Wherefore promulgation is necessary for the law to obtain its force."[8] These examples demonstrate how promulgation was initially recognized as a means for ensuring fairness.

Promulgation continued to carry importance in legal theory during the Enlightenment and the American Founding.[9] As it did, thinkers began to recognize its efficiency aspect as well. For instance, John Locke, one of the Enlightenment thinkers who most influenced the Founders,[10] emphasized the importance of promulgation for ensuring a fair and efficient society:

> The *legislative* or supreme authority . . . *is bound to dispense justice* and decide the rights of the subject *by promulgated standing laws, and known authorized judges*. . . . To avoid [the] inconveniencies which disorder men's properties in the state of nature, men unite into societies, that they may . . . have *standing rules* to bound it, by which everyone may know

---

[4] *See id.*

[5] *See id.* at 119–20 (identifying Cicero's writings as the relevant turning point from the Greco-Roman period of legislation to the "golden age of juristic law-making," *id.* at 120). Professor Pound's article provides an excellent account of the fluctuating importance afforded to the fair notice requirement throughout Western legal history. This fluctuation slightly undercuts the argument that the fair notice principle has been recognized throughout Western history. Yet, it is undeniable that the principle has its roots in the foundation of Western civilization — Greco-Roman democracy — and has experienced unceasing prominence since the early years of Anglo-Saxon rule in England. Therefore, for purposes of establishing its importance to the American legal system, suffice it to say that fair notice has been emphasized by all relevant cultures.

[6] R.S. MYLNE, THE CANON LAW 26–27 (1912) (quoting *Decretum Gratiani*).

[7] 2 ST. THOMAS AQUINAS, SUMMA THEOLOGICA pt. I-II, q. 90, art. 4, at 995 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1948).

[8] *Id.*

[9] For a brief but excellent account of the Enlightenment's influence on the Founding generation, see generally GORDON S. WOOD, REVOLUTIONARY CHARACTERS 11–28 (2006).

[10] MICHAEL P. ZUCKERT, LAUNCHING LIBERALISM: ON LOCKEAN POLITICAL PHILOSOPHY (2002) (describing Locke's influence on William Blackstone, the American Founders, and modern liberal political theorists).

> what is his. To this end it is that men give up all their natural power . . . that they shall be governed by *declared laws*, or else their peace, quiet, and property will still be at the same uncertainty, as it was in the state of nature.[11]

In this passage, Locke linked promulgation to efficiency by referring to the disorder that would take place in the absence of the rule of law.[12] The flip side of this warning against disorder is that knowledge of the law ensures confidence in one's liberty and property. This assurance then allows one to make confident decisions, to take calculated risks, and to coordinate with others — all things that lead to a wealthier and more stable society.

The Founders drew on these early concerns for fair notice when crafting the legal system they established through the Constitution. Most significantly, they enshrined the promulgation requirement in the Ex Post Facto Clauses.[13] By providing the heightened protection of constitutional prohibitions on ex post facto laws, the Founders made clear that they considered fair notice to be a fundamental element of the rule of law. In particular, the state ex post facto prohibition, which was one of only a few direct prohibitions on the states in the original Constitution, signals the weight the Founders placed on promulgation.

In addition, many of the Founders individually expressed concern for fair notice in general and promulgation in particular through their public writings and speeches. James Iredell, one of the Justices who later decided *Calder v. Bull*[14] — the first Supreme Court case to address the Ex Post Facto Clauses — provided one of the most impassioned defenses of those clauses at the Founding. Under the pseudonym Marcus, he responded to George Mason's criticism of the clauses with the statement that they are "worth ten thousand declarations of rights, if this, the most essential right of all, was omitted in

---

[11] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 83–84 (Richard H. Cox ed., Harlan Davidson, Inc. 1982) (1690).

[12] Modern legal theorists have also emphasized the promulgation principle as essential to the rule of law. In the modern American legal tradition, Professor Lon Fuller provides the most prominent argument for the promulgation aspect of fair notice. In *The Morality of Law*, he lays out his conception of the rule of law, which includes a fair notice requirement. In articulating his version of the requirement, he explains that failure to promulgate the law "does not simply result in a bad system of law; it results in something that is not properly called a legal system at all." LON L. FULLER, THE MORALITY OF LAW 39 (1964). Fuller thus presents a strikingly robust view of fair notice by denying any legal legitimacy in its absence. By his account, the very enterprise of law depends on citizens having knowledge of the laws that will govern them.

[13] U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); *id.* art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . .").

[14] 3 U.S. (3 Dall.) 386 (1798).

them."[15] Likewise, James Madison put forth a sweeping endorsement of the rule of law and the fair notice principle when explaining the Bill of Attainder, Ex Post Facto, and Impairment of Contracts Clauses: "Bills of attainder, *ex-post-facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. . . . Our own experience has taught us . . . that additional fences against these dangers ought not to be omitted."[16] Shortly after the Founding, Joseph Story echoed these sentiments in his *Commentaries on the Constitution*, in which he said: "Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact."[17]

Although the Supreme Court has applied the Ex Post Facto Clauses only to criminal laws,[18] the force of the Founders' concern for fair notice is not lost in other contexts. As a matter of elementary constitutional interpretation, it does not follow that fair notice has no importance in noncriminal contexts simply because the Supreme Court has read the Ex Post Facto Clauses as expressly prohibiting only retroactive criminal laws. Rather, that fair notice was important enough to be enshrined in the Constitution for at least one type of situation suggests that the concept should be respected — albeit in a less absolute sense — in other contexts as well. Furthermore, judges and scholars have long questioned whether the Court's limitation of the Ex Post Facto Clauses is historically and textually correct. In particular, Jus-

---

[15] James Iredell, *Answers to Mr. Mason's Objections to the New Constitution*, *in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 333, 368 (photo. reprint 2000) (Paul Leicester Ford ed., Brooklyn 1888). His full defense was as follows:

> My ideas of liberty are so different from those of Mr. Mason, that in my opinion this very prohibition is one of the most valuable parts of the new constitution. *Ex post facto* laws may sometimes be convenient, but that they are ever absolutely necessary I shall take the liberty to doubt, till that necessity can be made apparent. Sure I am, they have been the instrument of some of the grossest acts of tyranny that were ever exercised, and have this never failing consequence, to put the minority in the power of a passionate and unprincipled majority, as to the most sacred things, and the plea of necessity is never wanting where it can be of any avail. This very clause, I think, is worth ten thousand declarations of rights, if this, the most essential right of all, was omitted in them. A man may feel some pride in his security, when he knows that what he does innocently and safely to-day in accordance with the laws of his country, cannot be tortured into guilt and danger to-morrow.

Id.

[16] THE FEDERALIST No. 44, at 250 (James Madison) (Clinton Rossiter ed., 1999).

[17] 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1398, at 306 (photo. reprint 2001) (Boston, Little, Brown & Co. 3d ed. 1858).

[18] *See Calder*, 3 U.S. (3 Dall.) at 390–92 (opinion of Chase, J.) (applying the State Ex Post Facto Clause and holding that it only applies to criminal cases); *id.* at 396 (opinion of Paterson, J.); *id.* at 400 (opinion of Iredell, J.); *see also* Collins v. Youngblood, 497 U.S. 37, 41 (1990) ("Although the Latin phrase '*ex post facto*' literally encompasses any law passed 'after the fact,' it has long been recognized by this Court that the constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them.").

tice Johnson, in his famous footnote in *Satterlee v. Matthewson*,[19] presented a persuasive textual argument that the Constitution's placement of the State Ex Post Facto Clause — between prohibitions on bills of attainder (entirely criminal) and laws impairing the obligations of contracts (entirely civil) — suggests that the clause encompasses both civil and criminal laws.[20] Either way, the inclusion of the Ex Post Facto Clauses, as well as the prohibition on laws impairing the obligation of contracts, demonstrates that the Founders were particularly concerned with the fair notice principle.[21]

---

[19] 27 U.S. (2 Pet.) 380 (1829).

[20] *See id.* app. 1, at 687 (Johnson, J.) ("For by placing 'ex post facto laws' between bills of attainder, which are exclusively criminal, and laws violating the obligation of contracts which are exclusively civil, it would rather seem that *ex post facto laws* partook of both characters, was common to both purposes."); *see also* 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 324–51 (1953). *But see* John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1710 (2004) ("Yet (at least if Blackstone is to be believed), a reasonable person conversant with the relevant linguistic and cultural conventions would surely have understood [the Ex Post Facto Clause's] technical meaning to exclude retroactive civil statutes."). At the Convention, the delegates were split regarding whether ex post facto laws encompassed only criminal laws or civil laws as well. *Compare* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 640 (Adrienne Koch ed., 1966) ("Col: MASON moved to strike out from the clause (art I sect 9.) 'No bill of attainder nor any expost facto law shall be passed' the words 'nor any ex post facto law.' He thought it not sufficiently clear that the prohibition meant by this phrase was limited to cases of a criminal nature, and no Legislature ever did or can altogether avoid them in Civil cases."), *and id.* ("Mr. GERRY 2ded. the motion but with a view to extend the prohibition to 'Civil cases,' which he thought ought to be done."), *with id.* at 547 ("Mr. DICKENSON mentioned to the House that on examining Blackstone's Commentaries, he found that the terms, "ex post facto" related to criminal cases only; that they would not consequently restrain the States from retrospective laws in civil cases, and that some further provision for this purpose would be requisite." (footnote omitted)). In his *Commentaries*, Joseph Story includes civil and criminal retroactive laws under the general heading of ex post facto laws and acknowledges that "[a]s an original question," such a reading of the Constitution's ex post facto prohibitions would deserve "grave consideration." STORY, *supra* note 17, § 1345, at 240. But he then goes on to explain that the "current of opinion and authority" in the United States has settled on a definition of the clauses that includes only criminal laws. *Id.*

[21] Admittedly, this statement rests on somewhat shaky grounds from a textualist perspective. One might argue that the familiar *expressio unius est exclusio alterius* canon of construction would lead a textualist to the conclusion that the Founders only cared about fair notice in two particular areas of law: criminal law and contract law. *Cf.* Manning, *supra* note 20, at 1722–49 (arguing that the precision of the Eleventh Amendment's textual prohibition on suits against states by citizens of other states necessarily implies that suits against a state by citizens of that state are permissible under the Constitution); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003 (2009) [hereinafter Manning, *The Generality Problem*] (presenting a textualist critique of the Court's practice of inferring a free-floating federalism principle from various provisions of the constitutional text). This Note does not suggest that the Court should craft some free-floating fair notice principle or expand the traditional scope of the Ex Post Facto Clauses. Rather, this Note seeks to demonstrate that aspects of the constitutional text suggest that the Founders were concerned with the traditional fair notice requirement, which these clauses in fact demonstrate regardless of the concrete doctrine that flows from their prohibitions.

A number of modern Supreme Court doctrines further illustrate that the reach of the promulgation principle extends beyond criminal law and is deeply ingrained in our constitutional fabric. For instance, the Court has relied on the principle for its general presumption against statutory retroactivity.[22] In articulating this presumption, the Court has expressed concern that robust retroactive power would allow Congress "to sweep away settled expectations suddenly and without individualized consideration."[23] The Court also has relied on the promulgation element of fair notice in the Spending Clause context, where it has rejected the idea that legislative history can provide fair notice to a state that it is subject to an obligation by accepting congressional funds: "In a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds."[24] Thus, the notion that in a modern legal system the government has a responsibility to publish legal requirements can be traced from the earliest days of Western culture through modern American constitutional law.

B. The Citizen Knowledge Requirement

Modern articulations of fair notice have also connected promulgation directly to the law's subjects by requiring citizens to apprise themselves of the law as promulgated by the government. This citizen knowledge aspect of fair notice ensures that promulgation achieves its purpose. If citizens were not expected to educate themselves about the law's requirements, promulgation would be a futile exercise indeed. Furthermore, this aspect of fair notice encourages citizens to play an active civic role — and perhaps ultimately contributes to better laws, since knowledge of the law will lead citizens to make informed demands of legislators.

In the period after the American Founding, Jeremy Bentham was one of the most aggressive proponents of the citizen knowledge element of fair notice. In fact, Bentham's concern for promulgation far exceeded that of the early theorists, whose primary concern was mere public availability of the law. Bentham explained:

> To promulgate a law, is to present it to the minds of those who are to be governed by it in such manner as that they may have it habitually in their

---

[22] *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 270–71 (1994); *cf.* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 17 (1976).

[23] *Landgraf*, 511 U.S. at 266.

[24] Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455, 2463 (2006).

> memories, and may possess every facility for consulting it, if they have any doubts respecting what it prescribes.[25]

Thus, Bentham's version of promulgation suggests a duty to provide much more than mere publication; it suggests that the government should make an active effort to inform each individual of the law. Consequently, it also suggests a more active role for citizens themselves, who should make themselves available for and receptive to such information; it would be futile to require the government so forcefully to inform a nonreceptive citizenry of its laws. Bentham's statement recognizes that promulgation assumes receipt — that fair notice only works if citizens make themselves aware of the law.

This acknowledgment of the citizens' obligation is also reflected in the familiar common law rule, *ignorantia juris non excusat* — that ignorance of the law is no excuse.[26] With narrow exceptions,[27] criminal defendants generally cannot claim innocence on the grounds that they were not aware of the applicable law. This rule illustrates how the knowledge requirement derives from the promulgation requirement. While the government is required to announce a rule before applying it to citizens, citizens must also make themselves aware of the laws. Thus, citizens have no grounds to say that such application can occur only when they actually knew of the rule. In other words, we assume that citizens have a duty to know the law because their government has fulfilled its duty to inform them of the law. Indeed, the Supreme Court has repeatedly highlighted this aspect of fair notice and has even traced it to *Calder*, emphasizing how it functions as the flip side of the ex post facto prohibitions.[28]

C. The Clarity Requirement

Modern conceptions of fair notice have also recognized that clarity is necessary for citizens to apprise themselves of the promulgated law. This aspect of fair notice recognizes that it is not enough for the government to promulgate laws if those laws cannot easily be understood. It is impossible for citizens actually to fulfill their obligation to know the law when they cannot be sure what the promulgated law means.

---

[25] 1 JEREMY BENTHAM, *Essay on the Promulgation of Laws, and the Reasons Thereof*, *in* THE WORKS OF JEREMY BENTHAM 155, 157 (John Bowring ed., Edinburgh, William Tait 1843).

[26] *See* Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68 (1910) ("[I]nnocence cannot be asserted of an action which violates existing law, and ignorance of the law will not excuse."); *see also* United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 563 (1971) ("The principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation.").

[27] *See, e.g.*, Lambert v. California, 355 U.S. 225 (1957).

[28] *See Shevlin-Carpenter*, 218 U.S. at 68 (quoting Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.)).

Therefore, the clarity requirement gives meaning to the knowledge requirement, just as the knowledge requirement gives meaning to the promulgation requirement. In addition, the clarity requirement keeps the government in check by preventing it from intentionally publishing vague or incoherent laws under which it would have broader latitude to punish citizens.

The early Enlightenment thinker Samuel Pufendorf was one of the first to recognize this element of the fair notice requirement. Pufendorf wrote that "[c]ivil laws become known to subjects through clear and public promulgation, wherein two things should always be evident: first, that the laws come from the one who has supreme sovereignty in the state, and second, the meaning of the laws."[29] According to Pufendorf, fair notice requires not only that a law's subjects know that the law exists, but also that they know what the law means. The conjunction of these two requirements illustrates the way in which clarity is necessary if promulgation is to mean anything. This connection is illustrated in the infamous example of Nero placing his laws high on columns to prevent the citizens from knowing them.[30] There is no doubt that Nero promulgated the law, but his promulgation was worthless since none of his people could read it.

The Supreme Court has often relied on the clarity aspect of the fair notice principle in its ex post facto and due process cases. For instance, the void-for-vagueness doctrine ensures that citizens cannot be convicted under statutes that they could not fairly have understood as prohibiting their conduct.[31] Likewise, in close cases involving statutes that might reasonably be read to prohibit certain conduct, the Court often employs the rule of lenity to "break the tie" in favor of the accused.[32] In the First Amendment context, the overbreadth doctrine employs this aspect of fair notice by allowing a defendant to attack a law as unconstitutional "because it is unclear whether it regulates a substantial amount of protected speech."[33] And the Court has even relied on this aspect of the fair notice principle in limiting juries' power

---

[29] SAMUEL PUFENDORF, *On the Law of Nature and of Nations*, *in* THE POLITICAL WRITINGS OF SAMUEL PUFENDORF 93, 126–27 (Craig L. Carr ed., Michael J. Seidler trans., Oxford Univ. Press 1994) (n.d.).

[30] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989); *cf.* Flores-Figueroa v. United States, 129 S. Ct. 1886, 1895 (2009) (Scalia, J., concurring in part and concurring in the judgment) (comparing the use of legislative history for expanding criminal liability under a statute to Caligula's practice of writing laws in small characters and hanging them on high pillars).

[31] *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 732 (2000).

[32] *See, e.g.*, McNally v. United States, 483 U.S. 350, 359–60 (1987); McBoyle v. United States, 283 U.S. 25, 27 (1931) (Holmes, J.); *see also* United States v. Santos, 128 S. Ct. 2020 (2008) (Justices Scalia and Alito disputing the applicability of the rule of lenity).

[33] United States v. Williams, 128 S. Ct. 1830, 1845 (2008); *see also* Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494–95 (1982).

to impose punitive damages so excessive that the party could not have expected such liability.[34]

As this Part has demonstrated, the principle of fair notice is designed to ensure that those who are constrained and sometimes burdened by legal rules know clearly what the rules mean. Thus, the principle focuses intently on protecting individual citizens. Without respect for fair notice, a legal system lacks predictability, and an unpredictable legal system can place severe limits on productivity and perpetrate immense injustice against well-meaning individuals who confronted laws they could not understand. Given the importance of the fair notice requirement, from its role in the nascent stages of Athenian legislation to its centrality in modern legal theory and numerous constitutional law doctrines, it is undeniable that any method of interpretation should justify itself on fair notice grounds. Yet, few do. And most importantly, textualism does not. That persistent failure is what this Note considers next.

II. TRADITIONAL ARGUMENTS FOR TEXTUALISM

Despite the long tradition of recognizing fair notice as an essential element of the rule of law, textualism has failed to articulate the full extent to which fair notice is important to establishing textualism as the interpretational methodology most consistent with traditional notions of the rule of law. Although textualists will sometimes mention fair notice[35] — and likely rely on fair notice more than proponents of purposive methodologies — the principle is never a crucial aspect of their arguments for textualism. In this respect, textualists are missing an important argument for their method. This is not to say, however, that the traditional arguments for textualism are flawed or incomplete on their own terms, but only that they could benefit from an additional argument relying on fair notice. This Part will present a short taxonomy of these traditional arguments and explain how they vindicate a number of traditional legal values. In doing so, it will also demonstrate that the textualist literature is still missing at least one crucial argument for the method — namely, fair notice.

A. The Public Choice Argument

Perhaps the most prominent argument for textualism is based on public choice theory and the role of compromise within the legislative

---

[34] *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–75 (1996).

[35] *See, e.g.*, 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 3, 17 (Amy Gutmann ed., 1997) (comparing the use of legislative history to Nero's practice of placing edicts too high for citizens to see).

process.[36] This argument, most forcefully advanced by Judge Frank Easterbrook and Professor John Manning, posits that legislation is best understood as the result of compromise and that textualism is the methodology that best respects that compromise.[37] Because textualism requires judges to confine their interpretation of a statute to the final text of the statute, they argue, it ensures that judges do not disrupt the final product of legislative compromises and thereby preserves the integrity of the legislative process.

This argument for textualism is a direct response to purposive methods of interpretation, which seek to interpret statutes in light of their overarching goals or "spirit." The fountainhead of purposive methodology was the Legal Process school. The legal process theory, pioneered by Professors Henry Hart and Albert Sacks, begins from the premise that judges are faithful agents of the legislature. From that premise, it argues that judges should interpret statutes on the assumption that they are the product of "reasonable persons pursuing reasonable purposes reasonably."[38] This assumption leads legal process proponents to endorse an interpretive methodology that seeks to determine the goals of legislation and to apply those goals as they think a reasonable legislator would have wanted them applied.

According to textualists, such "generality-shifting"[39] approaches often disrupt legislative compromises by empowering judges effectively to read additional provisions into or existing provisions out of a statute and ignore the possibility that legislation does not pursue its goal at all costs. In fact, many textualists would reject the very notion that legislation can have a "spirit" beyond what is explicitly provided by the text.[40] Although the legislation might be aimed at a certain problem, to argue that the legislation's "spirit" suggests it should always be construed to eliminate that problem is to ignore the reality of the legislative process.[41] If a statute only resolves a problem to a limited extent, that limited solution is all that passed the prescribed lawmaking pro-

---

[36] For a helpful primer on public choice theory in general, see DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991).

[37] *See generally* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983).

[38] HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958).

[39] Manning, *The Generality Problem*, *supra* note 21, at 2011.

[40] Textualists do not deny that statutes have purposes or that a statute's purpose can influence how a judge should interpret the statute. *See, e.g.*, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 84–85 (2006). Rather, a textualist would limit the use of purpose to interpreting ambiguous provisions of the statute, and certainly would never allow purpose to control precise or otherwise clear text. *See id.*; *see also* Manning, *supra* note 20.

[41] *See* Manning, *The Generality Problem*, *supra* note 21, at 2014 ("[F]avoring the legislative spirit or purpose over the plain terms of a statute . . . risks disregarding the fact that members of Congress must sometimes accept half a loaf in order to get legislation through a complex process with multiple veto points.").

cedures and thus all that can be democratically traced back to the will of the people.[42] This is not to deny the possibility that enough legislators might have voted for the more aggressive solution had they considered it. Instead, it is a simple point about democratic legitimacy: only the text that passed through the legislative process can possess the force of law. To say otherwise is to "make nonsense of the underlying process."[43]

By emphasizing the importance of compromise, this argument for textualism focuses on the importance of the legislative process for democratic legitimacy. This focus on the legislative process and democratic legitimacy looks backward, so to speak, to justify textualism as the method that most faithfully adheres to the legitimate democratic decisions made by the people's representatives in the legislature. Because our legal and political systems are based in large part on the notion that the people can be bound only by legitimate government action — most significantly, by legislation that adheres to set procedures[44] — this textualist argument seeks to ensure that judges will not bind parties to illegitimate law. Through its convincing refutation of the previously dominant purposive schools of interpretation and its grounding of textualism in democratic legitimacy, the public choice argument constitutes a crucial piece, but still only a piece, of a complete argument for textualism.

B. The Judicial Restraint Argument

Another argument for textualism focuses on the method's value in keeping judges from exceeding their legitimate role within the separation of powers. The leading proponent of this argument is Justice Antonin Scalia.[45] This argument is related to the public choice argument,

---

[42] Justice Thomas recently made this point in the context of implied preemption, which has to do with democratic legitimacy vis-à-vis states. He said that implied preemption is democratically illegitimate because it fails to recognize the inherent limits in legislation that necessarily result from compromise. *See* Wyeth v. Levine, 129 S. Ct. 1187, 1215–16 (2009) (Thomas, J., concurring in the judgment).

[43] Manning, *The Generality Problem*, *supra* note 21, at 2045.

[44] *See, e.g.*, Clinton v. City of N.Y., 524 U.S. 417 (1998) (holding that the line-item veto violated the bicameralism and presentment requirements of Article I of the Constitution); INS v. Chadha, 462 U.S. 919 (1983) (holding that the legislative veto violated bicameralism and presentment).

[45] This is not to suggest that Justice Scalia's sole argument for textualism is the judicial restraint point. Indeed, he also makes the legislative process argument. *See* Scalia, *supra* note 35, at 24–25, 35. He also alludes to the importance of fair notice. *See id.* at 17 ("[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated."). Nevertheless, the main thrust of Justice Scalia's argument is about the power of textualism to cabin judicial behavior within its proper bounds. Therefore, for purposes of this taxonomy, this Note will speak of Justice Scalia as a proponent of the judicial restraint argument for textualism.

in that it is concerned with preserving the will of the legislature, but it focuses more intently on preserving the legislature's will by constraining the behavior of judges. In particular, it argues that within the United States's system of separated powers, judges have a unique and dangerous role as the interpreters of the law. Although Congress and the Executive have almost exclusive lawmaking power,[46] the courts are charged with applying that law, a task that itself can become law declarative.[47] To prevent judges from slipping too far into that law-declarative realm, textualism limits their interpretive resources to the text of the statute and certain objective tools for interpreting the text.[48]

Like the public choice argument, this argument for textualism in large part is a response to purposive methodology. As described above, textualists view the purposive use of unexpressed legislative intent as illegitimate, but they also view it as dangerous to the separation of powers. As Justice Scalia has said, "The *practical* threat [of purposivism] is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field."[49] Indeed, textualists' fear is not only that purposivism *enables* judges to smuggle their own views into the law, but also that it *necessarily* leads them to do so.[50]

---

[46] This qualification is based on the fact that judicial common law–making power persists in a few confined areas of federal law. *See generally* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 607–742 (6th ed. 2009). The Supreme Court has crafted federal common law in multiple contexts. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (federal common law of foreign relations); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (federal common law in areas of unique federal concern); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) (federal common law of interstate disputes); Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918) (federal common law of admiralty); *see also* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245 (1996); Henry J. Friendly, *In Praise of* Erie — *And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 10–17 (1975); Note, *The Federal Common Law*, 82 HARV. L. REV. 1512 (1969).

[47] *Cf.* Teague v. Lane, 489 U.S. 288, 300–01 (1989) (plurality opinion) (recognizing judicial decisions as embodying a generative law declaration power).

[48] Some argue that textualists' use of these purported objective tools often empowers them to engage in the very judicial activism they claim to prevent. Others reject the idea that the use of interpretive canons can actually be a neutral exercise, based on the notion that "there are two opposing canons on almost every point." Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401 (1950). *But see* Scalia, *supra* note 35, at 27 ("Every canon is simply *one indication* of meaning; and if there are more contrary indications (perhaps supported by other canons), it must yield. But that does not render the entire enterprise a fraud — not, at least, unless the judge wishes to make it so.").

[49] Scalia, *supra* note 35, at 17–18.

[50] *See id.* at 18 ("When you are told to decide, not on the basis of what the legislature said, but on the basis of what it *meant*, and are assured that there is no necessary connection between the two, your best shot at figuring out what the legislature meant is to ask yourself what a wise and

By focusing on judicial restraint, this argument has a sideways-looking quality. It is concerned with the judiciary's relationship to its coequal branches within our governmental structure. As a result, it justifies textualism as the best way to preserve the separation of powers. In this sense, the judicial restraint argument indirectly focuses on the citizenry as well, since the fundamental basis for the separation of powers is to preserve greater individual liberty.[51] That said, it does not focus on the direct relationship between the law and individuals. Rather, it is concerned that illegitimate expansion of the judicial power will disrupt the separation of powers and facilitate abusive judicial behavior. As a result, this argument — while providing an important basis for textualism — also provides only one component of the full argument for textualism.

C. The Judicial Competence Argument

Another argument for textualism focuses on judicial behavior in a related but different manner from the judicial restraint argument. This argument is concerned with judicial competence — confining judicial behavior to those tasks that judges are best equipped to perform. As such, it is less concerned with democratic legitimacy and the separation of powers and more concerned with promoting efficient government. The leading proponent of this argument is Professor Adrian Vermeule.[52] He argues that textualism is best justified as a second-best solution, meaning that in a perfect world textualism might not be the most desirable method of interpretation, but in the world as it is, textualism is the best method. In other words, granting that judges are not well suited to determine the socially optimal result in every case, it is best to seek second-order social optimization by having judges do what they are most skilled at doing: interpreting the text of statutes.

This argument for textualism is a response to purposivism, but also to pragmatic methods of interpretation, specifically Judge Richard Posner's method.[53] Judge Posner begins from the premise that judges

---

intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean — which is precisely how judges decide things under the common law.").

[51] *See* THE FEDERALIST NO. 51, at 289 (James Madison) (Clinton Rossiter ed., 1999) ("[S]eparate and distinct exercise of the different powers of government . . . to a certain extent is admitted on all hands to be essential to the preservation of liberty.").

[52] *See generally* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY (2006).

[53] For an especially accessible articulation of his pragmatic method, see Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31 (2005). *See generally* RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003); RICHARD A. POSNER, OVERCOMING LAW (1995); Richard A. Posner, *What Has Pragmatism To Offer Law?*, 63 S. CAL. L. REV. 1653, 1657–58 (1990) (arguing that "[t]he judge is not a finder, but a maker, of

should seek to maximize social welfare, and from that premise, he argues that the best way for them to achieve this goal is to employ their "everyday" pragmatic sense along with social science analysis.[54] Although he resists calling his method strictly consequentialist,[55] the core of his method is focused on how judicial decisions affect the real world and suggests that judges' guiding light should be social optimization.

Professor Vermeule's argument for textualism accepts Judge Posner's premise and turns it on its head.[56] Professor Vermeule asks the pragmatic question of which judicial method would be most socially beneficial, based on his understanding of second-best effects, and decides that the answer is textualism rather than pragmatism. Pragmatism, he says, invites judges to conduct analyses that they are ill-equipped to conduct, and therefore risks grave unintended consequences. In the first-best world, it might be more desirable to have pragmatically minded judges, but in the second-best world (the one in which we live), judges are likely to predict inaccurately the results of their decisions. Consequently, interpretive methods should avoid giving them that opportunity. From this point, he moves to the question of what judges are best equipped to do, and he determines that they are best suited to interpret the texts of complex and technical legal documents. Therefore, he concludes that textualism is actually the method most likely to produce social optimization because judges can more predictably achieve their intended goal, allowing society to order itself more confidently and thus more efficiently.

Professor Vermeule's argument, by focusing on judicial competence, is centered on the judiciary's relationship with society at large. He cares most about maximizing judicial potential and allowing society to order itself efficiently around consistent judicial behavior. On

---

law," *id.* at 1657, and "interpretation is a creative rather than a contemplative task," *id.* at 1658). For an analogous account that focuses on the pragmatic consequences of an interpretive methodology, see Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636 (1999). *But see* John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 686 (1999) (responding to Professor Sunstein by arguing that "before testing whether a default rule promotes any particular interpretive value, we must first ascertain whether the Constitution *either* enjoins *or* permits the judiciary to recognize such a value as worthy of promotion").

[54] *See* Posner, *What Has Pragmatism To Offer Law?*, *supra* note 53, at 1664 ("In approaching an issue that has been posed as one of statutory 'interpretation,' pragmatists will ask which of the possible resolutions has the best consequences, all things (that lawyers are or should be interested in) considered . . . .").

[55] *See* POSNER, LAW, PRAGMATISM, AND DEMOCRACY, *supra* note 53, at 59–60 ("[D]espite the emphasis on consequences, legal pragmatism is not a form of consequentialism . . . . There are bound to be formalist pockets in a pragmatic system of adjudication, notably decision by rules rather than by standards. Moreover, for both practical and jurisdictional reasons the judge is not required or even permitted to take account of *all* the possible consequences of his decisions.").

[56] *See* VERMEULE, *supra* note 52, at 85 ("[E]veryday pragmatism is a perfectly valid version of consequentialism; indeed, it is the version I am suggesting here.").

these grounds, his argument provides a convincing defense of textualism, especially for those less inclined to accept formalistic and conceptual arguments and more inclined to accept consequentialist or at least practical arguments. Yet, his argument provides only one more piece of a comprehensive argument for textualism. Combined with the preceding two arguments, it presents a nearly complete defense, but at least one element is still missing. It is to that element — textualism as fair notice — that this Note now turns.

III. INCORPORATING FAIR NOTICE INTO TEXTUALISM

In the preceding taxonomy, this Note laid out the three mainstream arguments for textualism. Each has had considerable influence in legitimizing textualism and increasing its adoption by courts and scholars. In particular, the public choice and judicial restraint models have gained considerable purchase over the last two decades. Yet, these three arguments do not present a complete picture of textualism because they do not support the method from the perspective of the regulated parties. As mentioned above, the public choice argument focuses on the legislature and democratic legitimacy generally; the judicial restraint argument focuses on the judiciary's role within the separation of powers framework and the resultant effects on individual liberty writ large; and the judicial competence model focuses on the judiciary itself and encouraging judicial behavior that maximizes social utility. These are all important reasons for adopting textualism, but there remains one more important reason: textualism is the best method for ensuring that judges apply the law only to the extent that the subjects of that law had fair notice of it. This Part will articulate that argument for textualism and explain how its incorporation with the preceding arguments provides a comprehensive argument for textualism.

A. The Fair Notice Argument for Textualism

Textualism as fair notice emphasizes the importance of interpreting laws as their subjects would fairly have expected them to apply. The traditional concept of fair notice demands that no person be held to account under a law the content of which he was unable to know beforehand. By seeking to discern the most reasonable, plain meaning of a statute, textualism by its very definition seeks to satisfy this dictate of fair notice, and gives due respect to the three requirements of fair notice. It treats only clear and promulgated statutory text as law, and it assumes that citizens have read that text as reasonable people would. Thus, it is acutely concerned for the individual citizen, which further illustrates that textualism naturally dovetails with fair notice to elevate the individual as the most relevant actor within our democratic republic.

Textualism's entire analytical framework is set up to reach the interpretation of the text that most accurately reflects how citizens would understand it. First, textualism looks to the plain text of the statute and asks whether the plain meaning of the text unambiguously resolves the case. If it does, then the textualist stops there and applies the text according to that clear meaning. For example, if a textualist were asked whether a statute stating that "no dogs are allowed in the park" prohibits bringing a cat into the park, he would say clearly not.[57] He would read the statute, which by its plain terms does not apply to cats, and stop there. Any reasonable person would do the same because the scope of the prohibition — though perhaps not clear as applied to all circumstances — is clear as applied to this circumstance. To read the term "dogs" to include "cats" would require the reader to move from the text itself to the potential purposes behind the prohibition, or perhaps into the realm of desirable policy. At that point, however, the reader's interpretation would no longer reflect the most widely shared and commonsense interpretation of the text. Rather, it would reflect the judgment of *that* particular reader. The same is true when a judge employs purpose or bald policy to stray from the text of a statute — he potentially subjects citizens to his own personal interpretation of the rule, rather than the most widely shared and reasonable interpretation.

Second, if the text of the statute is ambiguous, particularly if the meaning of a single word is unclear, the textualist will employ objective tools, such as dictionaries, that provide relevant, accepted definitions to resolve the ambiguity. The use of dictionaries and other tools of common usage is premised on the idea that those resources are most likely to reflect how the average person — not necessarily the average lawyer, judge, or legislator — would understand the word.[58] Because the goal of such sources is to approximate the common understanding of a word or phrase, those sources aid textualists in discerning how an average, reasonable person would read a statute. It is worth noting that these tools have no relationship to the subjective intent of the law's author. This is not a problem — and in fact is a benefit — for textualists, since legislative intent is of no concern to the textualist. Rather, the textualist is concerned with the law's recipient: the person

---

[57] This classic example can be found in many explanations of textualism, *see, e.g.*, Manning, *The Generality Problem*, *supra* note 21, at 2010, and was first employed by Judge Easterbrook in his seminal article, *Statutes' Domains*, *supra* note 37, at 535.

[58] *See* United States v. LaBonte, 520 U.S. 751, 757 (1997) (using dictionaries to determine the "ordinary meaning" of "maximum"). As prominent textualists have explained, however, recourse to dictionary definitions typically does not itself resolve the entire interpretive question — the defined word must still be understood in its context. *See, e.g.*, John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2456–59 (2003).

it now governs. Consequently, these tools of common usage also serve to promote fair notice by seeking to approximate the meaning that the law's average, reasonable subject would give to its words.

Third, textualists read statutory terms and provisions within their contexts. It is elementary linguistic theory that words and phrases only make sense in context, by reference to related words, phrases, and shared linguistic practices.[59] From this understanding, it is clear that citizens subject to a law will naturally interpret the meaning of the law's provisions within the context of that law, or sometimes within the area of law in which that rule exists. In more general terms, people will seek to make sense of a rule by reference to its surroundings. Likewise, textualists seek to make sense of statutory text by reference to neighboring provisions and related statutes.[60] In more difficult applications of the "no dogs in the park" prohibition, a textualist might look to see if other public ordinances, such as leashing laws or pet restrictions, offer a definition of "dog." Thus, by respecting context, the textualist again best approximates the common method by which individuals discern meaning from written words.

Fourth, when ambiguity cannot be resolved by the use of definitional tools or simple attention to context, the textualist turns to traditional canons of construction. This aspect of the textualist framework is crucial to the fair notice principle.[61] Canons of construction are formal articulations of rules that the average person uses to discern the meaning of a phrase. One of the most commonly employed canons is *expressio unius est exclusio alterius*, which dictates that the express inclusion of one thing signals the exclusion of all other things. This rule is one individuals use all of the time in everyday life, just without such formal articulation. In the "no dogs in the park" example, the commonsense logic of the *expressio unius* canon is what leads the average person to the conclusion that "no dogs" does not apply to cats. It also helps answer more difficult questions. Consider a slightly different example, in which the park's rule requires that "all dogs must be kept on a leash at all times." Now, imagine someone is fined for bringing her dog into the park in a handbag. She might argue that a fair reading of the prohibition would allow "pursing" a dog instead of leashing it because both restrain the dog's movement. Keeping dogs

---

[59] *See generally* LUDWIG WITTGENSTEIN, THE BLUE AND BROWN BOOKS (1958).

[60] *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 67 (1994) ("[S]tatutory text and structure, as opposed to legislative history and intent (actual or imputed), supply the proper foundation for meaning.").

[61] *See* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 943 (1992) ("[T]wo interrelated values that are served [by the canons of construction] are predictability and fair notice."). That said, whether the canons provide much clarification is also controversial. *See, e.g.*, Llewellyn, *supra* note 48, at 401–06.

under control, she might say, is the discernible purpose of the prohibition, and her actions kept her dog under control. A textualist, however, would disagree because the use of "on a leash" carries the negative implication that other forms of restraint do not satisfy the rule. This specific language might reflect the rulemaker's judgment that leashes are the best type of canine restraint, but either way the underlying purpose makes no real difference to a fair notice textualist. All that matters is that the most reasonable reading of the rule, in light of the *expressio unius* canon, is that leashes are required. Because the most natural reading of the prohibition is that it strictly requires a leash, the dog owner had fair notice that she needed to use a leash.

The canons also facilitate fair notice in a more general way. By establishing predictable, objective rules for interpreting statutes, the canons empower citizens to predict more accurately how judges (or at least textualist judges) will interpret statutes. Thus, as textualism becomes a more widely applied method of interpretation, its fair notice function will only strengthen. Of course, canons require application and such application cannot be completely mechanical. Consequently, the use of canons will not ensure perfect consistency and predictability. Yet, the use of canons will ensure greater consistency and predictability than would result from the use of legislative history or unarticulated, underlying purposes. At the least, the use of canons can bind courts within a smaller range of possible interpretations than purposivism would allow.

Although some might argue that purposivism and the use of legislative history also respect fair notice, or perhaps even better respect fair notice, such arguments fail to recognize the importance of textualism's focus on the citizenry. One might argue that the purposivist rule that statutes should be interpreted as written by reasonable legislators pursuing reasonable ends reasonably adheres to fair notice because it seeks to construct how a reasonable person would perceive the reasonable goals of the statute. Indeed, this is not too far from the textualist fair notice argument. The crucial distinction, however, is that textualism focuses intently on the *subject* of the law, rather than the *author* of the law. Instead of placing the onus on the law's subject to construct the purpose of the legislator, textualism places the onus on the judge to construct the most reasonable interpretation by the subject. By doing so, textualism focuses on the most relevant actor — the citizen who will be held accountable under the law. In contrast, purposivism shifts the focus from the receiver of the law to the giver of the law, and thus is once removed from the core fair notice concern. Moreover, the textualist method, by keeping the focus on interpretation, rather than intention, is able to employ objective tools of interpretation, whereas reconstruction of intention is inherently a subjective guessing game.

Others have argued that the availability of legislative history eliminates any fair notice problem with using such statements when inter-

preting statutes,[62] but such arguments are overstated. There is a decent point to be made that the availability of legislative history reduces the notice problem attendant with its use. However, the idea that this availability eliminates all notice problems falls short. Legislative history may be available, but it is not promulgated as law in the U.S. Code because it is not duly passed by both houses of Congress and signed by the President. Therefore, it fails to satisfy the traditional promulgation element of fair notice.[63] Moreover, the use of legislative history does not yield the same consistency and predictability as does the use of the canons. First, the use of legislative history often does not yield a single, predictable interpretation. There are often contradictory floor statements by two or more legislators, just as a statute often evinces cross-cutting purposes that cannot be extended without conflict. The canons sometimes appear to conflict, but such conflict does not necessarily prevent definitive answers, since meta-canons govern situations in which more specific canons conflict.[64] In addition, context clues, such as statutory structure, will often indicate a discernible meaning.[65] The same cannot be said for reconciling contradictory pieces of legislative history. Second, the canons are set, universal rules, whereas legislative history is specific to the statute. To have fair notice of a statute's legislative history, individuals must investigate the legislative record of each law, but to have fair notice of the canons individuals must only learn them once.

B. A Comprehensive Argument for Textualism

This Note has sought to make clear that the fair notice argument for textualism is not intended to supplant the other arguments, but rather to supplement them — for it is important to justify a method of interpretation on all relevant grounds. It might be that some grounds are more important, or that some arguments are more independently persuasive, than others. Yet, there are a variety of relationships within our legal system that are relevant to statutory and constitutional interpretation. Interpretive methodologies, therefore, should be justified according to all of those relationships, and textualism can be convin-

---

[62] *See* Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 367, 372 (2005); *cf.* Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 984–85 (2004) (rejecting the idea that textualism provides any meaningful fair notice benefit over other methods of statutory interpretation).

[63] *Cf.* Scalia, *supra* note 35, at 17 (comparing the use of legislative history to Nero's practice of "posting edicts high up on the pillars, so that they could not easily be read").

[64] *Cf. id.* at 27 (explaining that conflict between canons only means that one of the two must yield and suggesting that determination of which canon must yield is not an arbitrary exercise).

[65] *See id.* at 26 (describing the *noscitur a sociis* canon).

cingly justified on at least the four grounds that this Note identifies.[66] This section weaves fair notice together with the three traditional arguments to craft a comprehensive argument for textualism. By articulating these conceptual connections, this comprehensive picture of textualism will illuminate the way in which textualism emphasizes the importance of the individual citizen within our democratic republic. Thus, this section will further illuminate the inherent fair notice value of textualism.

By comprehensive argument, it is not only meant that the cumulative force of the specific arguments is persuasive, but also that the arguments can be woven together to provide a cohesive framework for justifying textualism. One could view the arguments for textualism as occupying their own isolated spheres, each sphere being an aspect of our legal system that warrants satisfaction by any legitimate interpretive method. However, one could also view the different arguments as working together to cover most facets of the legal system. In fact, such a cohesive explanation of textualism is the most accurate picture of the method, since textualism should not be aimed at satisfying only one facet of the legal system, but instead should seek to satisfy all elements. Textualists do not limit its use to certain circumstances; they advocate for its application in all circumstances.

Thus, this view of the four arguments as operating together to form a seamless, coherent argument for textualism most fully articulates the importance of the method. The result of the legislative process is a discrete text that represents the manifestation of the People's will, which must be respected by judges who will adhere to that will through faithful application of the text's commands. This faithful application not only ensures that the People's will controls, but it also preserves the balance of governmental authority struck by the separation of powers — one of the key structural protections of individual liberty. In addition, faithful adherence to the legislature's commands ensures that parties to a suit will be bound by the law as they would have reasonably interpreted it. And ensuring consistency of the law's application and restraining the judiciary within its institutional capacity promotes social utility by increasing predictability and decreasing flawed judicial meddling.

---

[66] This Note leaves open, for the time being, whether there are additional grounds on which textualism can or should be justified. One possible ground is that the Constitution requires or prefers textualism. *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001); *see also* John F. Manning, Response, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648 (2001). *But see* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001).

Importantly, attention to the citizenry as the source and subject of the law is constant throughout this linked framework, further illuminating the inherent fair notice value of textualism. Moreover, this concern with the citizenry demonstrates how textualism preserves the core purpose of democratic republicanism. Through representative government, we seek to ensure that the People themselves retain responsibility for the rules that will apply to them. But representation alone is not enough to ensure this democratic principle. Rather, constraints on the representative government are also necessary. One variety of restraint in our system is the responsibilities our Constitution places on government officials. Under our Constitution, legislators bear a responsibility to their constituents; the Executive bears the responsibility to enforce the law against citizens in a predictable and consistent fashion; and the judiciary has a duty to interpret statutes with consistency and as citizens might expect. Textualism holds officials to these obligations. In doing so, it elevates the protection of the People themselves as the paramount concern of our legal system.

IV. CONCLUSION

This Note has presented an argument for textualism that scholars and judges have largely ignored. Textualism as fair notice illuminates what makes textualism intuitively attractive to so many people: it seeks to approximate how a clear and promulgated law's subject would reasonably understand its meaning and predict its application. By satisfying the core elements of fair notice — promulgation, citizen knowledge, and clarity — textualism thus vindicates the primacy of the citizen within our democratic republic. Moreover, it succeeds in promoting social utility and fundamental fairness by creating a system in which judicial interpretation is more predictable. As a result, citizens can reliably act without fear of personal liability and with confidence in their business decisions.

This Note has also sought to situate this fair notice argument within the broader methodological perspective of textualism. In doing so, it has illustrated the comprehensive manner in which textualism — with the fair notice argument — satisfies the multiple points of legitimacy within our legal system. It may be that there remain other persuasive arguments for textualism; if so, they will only further broaden and strengthen this comprehensive picture of textualism. Regardless, it is important to recognize that fair notice has an important role to play as a principal argument for textualism. Indeed, it has an important role to play throughout the American legal system. Hopefully, this role will no longer be ignored.