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ARTICLE

GADAMERIAN HERMENEUTICS IN PRACTICE AS A PARADIGM FOR LEGAL INTERPRETATION AND ANALYSIS

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I. INTRODUCTION

The interpretation of laws is a question of hermeneutics and holds substantial philosophical significance. Understanding the role of interpretation and providing a meaningful methodology underlies not only all legal interpretation and research but the entire fabric of human understanding. The theory of understanding and hermeneutics presented in this Article is based on Hans-Georg Gadamer's *Truth and Method*,[1] which incorporates many of its ideas from Georg Hegel's *Phenomenology of Spirit*.[2]

The words that comprise laws cannot be meaningfully understood by their dictionary definitions but rather by an appeal to human nature and the preconceptions of the interpreter. Prejudice should be understood in a neutral Gadamerian sense, akin to a preliminary judgment before a full and finalized examination.[3] These prejudices form the perception with which the interpreter confronts legal texts. Through dialogue between the text and interpreter, new prejudices may replace prior ones, and meaning is obtained through an agreement between the interpreter and the text.[4]

The social or community element of understanding is traced from Hegel's formulation of *Geist* (spirit), which consists of consciousness, self-consciousness, reason, community, and religion.[5] Within reason, the creator of any work births something that is both a part of and distinct from

1. HANS-GEORG GADAMER, TRUTH AND METHOD (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 2004) (1960).

2. G. W. F. HEGEL, THE PHENOMENOLOGY OF SPIRIT (Michael Inwood trans., Oxford Univ. Press 2018) (1807).

3. GADAMER, *supra* note 1, at 273.

4. *See id.* at 269 (explaining how a text's meaning emerges only as a result of the initial prejudices, which are constantly revised to penetrate the meaning of the text and achieve understanding).

5. HEGEL, *supra* note 2, at 174–78.

the creator, existing for others to control and adopt as their own.[6] Thus, the work must be approached from a position separate from its creation.[7]

Jurists, like Emilio Betti, challenged Gadamer's hermeneutics, arguing his system did not resolve the epistemological justification for hermeneutics.[8] Rather, he argued that Gadamer's system only gives a descriptive explanation.[9] Betti believed that legal texts have autonomy and that an approach beginning with a preconception or prejudice often merely reaffirms those prejudices.[10] Betti's approach, which seeks to separate the interpreter from the text, tends to follow that of Friedrich Schleiermacher, who focuses predominantly on the text's author.[11] Under Schleiermacher's approach, an interpreter relies on two elements embedded within the text: the grammatical, involving the use of words and language,[12] and the psychological or technical, discovering the author's individuality.[13]

Betti and Schleiermacher's separation of the text from the interpreter provides a false aura of objectivity and gives the perception of legitimacy to legal judgments. Further, their approaches look at the text as a dead artifact,[14] gleaning meaning as if recreating a fossil to prove the existence of an extinct species. Although this approach is suitable for geology or biology, it contradicts how humans experience and understand written texts and each other.

In comparison, Gadamer's approach is a more accurate representation of the process of understanding and interpretation. Furthermore, Gadamer's

6. *See id.* at 161 (asserting when a person reads a work their "interest in this work, an interest posited through *their* original nature, is another interest than the *peculiar* interest of this work, which is thereby converted into something else").

7. *See* GADAMER, *supra* note 1, at 296 ("Every age has to understand a transmitted text in its own way, for the text belongs to the whole tradition whose content interests the age and in which it seeks to understand itself.").

8. EMILIO BETTI, HERMENEUTICS AS A GENERAL METHODOLOGY OF THE SCIENCES OF THE SPIRIT 59 (Mariano Croce & Marco Goldoni eds., Routledge 2021) (1962).

9. *Id.*

10. *Id.*

11. F.D.E. SCHLEIERMACHER, HERMENEUTICS: THE HANDWRITTEN MANUSCRIPTS 42 (Heinz Kimmerle ed., James Duke & Jack Forstman trans., Scholars Press for the Am. Acad. of Religion 1977).

12. *See id.* at 98 ("[U]nderstanding a speech always involves two moments: to understand what is said in the context of the language with its possibilities, and to understand it as a fact in the thinking of the speaker.").

13. *See id.* at 162–65 (suggesting an interpreter must consider the author's individuality and how that is expressed in the text to truly understand the text's meaning).

14. *See, e.g.*, Lars Vinx, *Foreword* to BETTI, *supra* note 8, at 10 (arguing texts should be interpreted for exactly what they are and not what the interpreters think they are based on their own experience).

paradigm, involving the meeting of the horizons of prejudices between the interpreter and the text, provides a workable method for resolving the hermeneutic circle and understanding the text.[15]

II. RESEARCH QUESTION AND ITS SIGNIFICANCE

This Article evaluates the descriptive accuracy of Gadamer's hermeneutics by posing the following question: How does legal interpretation follow the hermeneutic approach of negotiating prejudices between the interpreter and the text? The significance of this question is that it seeks to form a unified theory of legal interpretation distinct from the methodology often purported by jurists. Typical legal opinions follow the approach of Schleiermacher or Betti—the law is treated as an autonomous object to be examined.[16] In this sense, they treat the law as an oracle to be understood through its origin and the application of language skills. This approach is effectively identical to Schleiermacher's method discussed above. While Schleiermacher's methodology can be helpful in spotting mechanical mistakes in reading comprehension, it is insufficient to meaningfully interpret and apply legal texts.

Gadamer's hermeneutics, which seeks to describe the actual, practical process of interpreting a text, does not recreate the circumstances of its passage or the legislature that passed it.[17] Nor does it attempt to discern the intentions of specters of a bygone era. Rather, the focus is on the interpreter and the text itself.[18] Consequently, when a legal text provides insufficient guidance, it obtains its meaning from the pre-existing prejudices of the interpreter. As a corollary, the resulting interpretations are more direct and adaptive to the needs of contemporary life.

To demonstrate the difference between the textual justification of legal opinions and what actually motivates judicial decisions, this Article analyzes several judicial approaches to augmenting or interpreting the law. Additionally, this Article focuses on foreign laws to demonstrate the tension

15. *See* GADAMER, *supra* note 1, at 305 ("[U]nderstanding is always the fusion of these horizons supposedly existing by themselves." (emphasis omitted)). For a more detailed discussion of the philosophy of hermeneutics and the superiority of Gadamer's approach, see generally Konstantin Vertsman, *Hermeneutics for Legal Research and Analysis*, 53 ST. MARY'S L.J. 783 (2022).

16. *See, e.g.*, discussion *infra* Section VI.b (contending the majority opinion in *Dimaya* treats the law as a distinct and autonomous object).

17. *See* GADAMER, *supra* note 1, at 323 ("[One] has to take account of the change in circumstances and hence define afresh the normative function of the law.").

18. *Id.* at 390.

scholars and judges face when laws do not correspond to their values, which is particularly applicable in federalist systems like the United States. Likewise, the Gadamerian approach helps interpret domestic laws borrowed from foreign countries, which occurs in common law systems and in China with foreign-inspired laws, like the Chinese Anti-Unfair Competition Law (AUCL).[19]

This Article defines three forms of interpretation: the "bottom-up," "mezzanine," and "top-down" approaches. In the bottom-up approach, scholars have broad discretion to interpret vague laws, like enabling statutes, the common law, and the general clause of the AUCL.[20] In contrast, the mezzanine approach involves restrained rulemaking, found in cases establishing fundamental rights. Finally, courts apply the top-down approach when they act as the final filter, reviewing laws to prevent blatant injustice—exemplified by rational basis review and jurisprudence relating to agency deference. This Article demonstrates how these approaches intersect with Gadamerian hermeneutics and connect to the setting of the hermeneutic horizon. As such, it provides a more unified paradigm and offers an alternative perspective on standards of deference in judicial review.

III. BOTTOM-UP APPROACH TO INTERPRETATION

The bottom-up style of interpretation gives a governmental entity the authority to create rules under a broad mandate, like when agencies interpret enabling statutes and, more generally, when courts create law under the common law system. From a global perspective, civil law countries use the bottom-up approach to interpret general clauses.

A. *Federal Agencies*

In the United States, the most common example of the bottom-up approach is when Congress delegates legislative authority to agencies.[21] In

19. Law of the People's Republic of China Against Unfair Competition (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1993, amendments effective Jan. 1, 2019, and Apr. 23, 2019). For convenience, subsequent citations will simply reference this law as the AUCL.

20. *See, e.g.*, *id.* art. 2 (leaving room for courts to define what conduct is prohibited by the AUCL).

21. *See, e.g.*, Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." (omission in original) (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974) (internal quotation marks omitted))).

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,[22] the Supreme Court found that such delegation may be implicit or explicit; yet, to the extent delegation exists and is appropriate, courts must defer to it.[23] The Court has provided insight into how agencies should use delegated authority, requiring they follow statutory guidance.

The Court provided procedural guidance for agencies' legislative role in creating respected decisions. First, they must appreciate the scope of their discretion and reasonably exercise it.[24] Second, they must consider all aspects of the problem and rely on congressionally sanctioned factors.[25] Third, they must supply "reasoned analysis" for policy changes (which go beyond agencies' failure to "act in the first instance").[26] Fourth, they "must examine the relevant data and articulate a satisfactory explanation for [their] action[s] including a 'rational connection between the facts found and the choice[s] made.'"[27] In other words, agencies must have supporting evidence for their decisions unless inconsistencies may "be ascribed to a difference in view or the product of agency expertise."[28] In *United States v. Mead*,[29] the Court stated that the judiciary should respect agencies' interpretation of their enabling statutes based on the care, "consistency, formality, . . . relative expertness, and . . . persuasiveness" of their position.[30]

While agencies have broad discretion, it is not unlimited. Yet, if the standard is to be taken literally, these constraints are so deferential that it is unclear how any rational agency could run afoul of them.[31] The basic constraints can be paraphrased simply: an agency must understand what it is doing, do it, and then explain its reasoning with sufficient particularity to persuade a court that it behaved logically and for the public's benefit. If agencies are staffed with relatively competent bureaucrats, it should be

22. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

23. *See id.* at 844 (asserting a court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency").

24. Dep't of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891, 1916 (2020).

25. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

26. *Id.* at 42.

27. *Id.* at 43 (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

28. *Id.*

29. United States v. Mead Corp., 533 U.S. 218 (2001).

30. *Id.* at 228 (footnotes omitted) (citing Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944)).

31. *See* Harold M. Greenberg, *Why Agency Interpretations of Ambiguous Statutes Should Be Subject to Stare Decisis*, 79 TENN. L. REV. 573, 574 (2012) ("Under *Chevron*, agencies may bring political views to bear on statutory meaning; agencies may reverse or abandon long-standing regulatory schemes and, with the imprimatur of congressional authorization, adopt wholly conflicting policies.").

impossible for them to exceed their authority. However, judicial review implies that there is more at play. This extra element relates to the inevitable conflict between judicial prejudices and the administrative bureaucracy. The *Chevron* Court stated that it "does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation."[32] In practice, the Court inevitably combines its own construction with that of the agency, the litigants, and the amicus.

B. *Common Law*

Another example of a bottom-up approach is common law. By definition, common law refers to "[t]he body of law derived from judicial decisions, rather than from statutes or constitutions."[33] Thus, common law involves judicial lawmaking, similar to a legislature. This form of law-making follows its own evolutionary pattern and has a distinct role in the United States.

Professors Balganesh and Parchomovsky provide a helpful conceptual understanding of common law as a heuristic for legal analysis. They defend its conceptual architecture against legal realism and efficiency.[34] Further, they argue that common law functions as a means to both preserve stability and change the law, with these contradictory functions protecting the legal system's legitimacy.[35]

The goals of stability and change are achieved through a bifurcation of meaning between a "jural meaning," which is a core legal concept, and a "normative meaning," which is obtained from external experiences.[36] It is through an interaction of jural and normative meanings that subtle changes occur in the common law.[37] Balganesh and Parchomovsky list, in order of least to most direct, three types of change in common law: (1) a change in importance between normative and jural meanings; (2) a change where one concept is emphasized over another within a doctrine; and (3) an additive

32. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (footnote omitted).

33. *Common Law*, BLACK'S LAW DICTIONARY (11th ed. 2019).

34. *See* Shyamkrishna Balganesh & Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 U. PA. L. REV. 1241, 1242–43 (2015) (describing how "efficiency minded scholars see the common law system as a collection of rules that are in reality motivated solely by . . . wealth maximization").

35. *See id.* at 1244 ("Common law concepts are uniquely designed to accommodate the seemingly conflicting demands of stability and change.").

36. *Id.*

37. *Id.* at 1247.

change where a new concept is introduced.[38] These methods follow the same order in their difficulty of reversal. For example, an additive change is the most difficult to reverse because it would require a direct overruling of prior law.[39]

Balganesh and Parchamovsky view jural and normative meaning as indispensable to tethering theory to doctrinal constraints.[40] The problem with abstract policy theorizing is the impossibility of evaluating all outcomes.[41] Therefore, "common law concepts constitute heuristics that allow individuals and courts to reach satisfactory . . . decisions" that are grounded in the law.[42] In effect, Balganesh and Parchamovsky hint that even when there is no direct constraint on common law, something prevents courts from unrestrained policy-making.[43] Thus, they apply a reversion constraint by tethering themselves to the past.[44] This paradigm is helpful in that it links the past meaning to the present interpretation in a manner that resembles the hermeneutic linkage between historical texts and the contemporary prejudices of the interpreter. However, Balganesh and Parchamovsky fail to fully explain the creation of new law or how the law suddenly changes to prevent injustice.

C. *Civil Law General Clauses*

General clauses and residual clauses either generally prohibit some behavior or are included as a catchall at the end of a list of expressly prohibited behaviors. This allows courts to prohibit similar conduct falling outside the scope of the law.[45] In *Sessions v. Dimaya*,[46] a closely divided Supreme Court reiterated that these types of clauses might be

38. *Id.* at 1248–50.

39. *See id.* at 1293 tbl.1 (comparing the three mechanisms of change in common law systems).

40. *Id.* at 1304.

41. *Id.* at 1306.

42. *Id.* at 1308–09.

43. *See id.* at 1308 (arguing "[j]udges simply do not have the mental and material resources" to evaluate laws detached from textual or doctrinal guidance).

44. *See id.* at 1309 (contending courts continue to "embody at all times a core structural framework," allowing them to make decisions "across time, place, and context").

45. *See, e.g.*, Joseph T. Polonsky, *Not Cutting It: The Fourth Circuit's Misapplication of Section 4B1.2(a)(2) of the Sentencing Guidelines in* Mobley v. United States, 91 N.C. L. REV. 1437, 1460 (2013) (discussing how Congress likely includes catchall clauses to supplement punishment for violent crimes).

46. Sessions v. Dimaya, 138 S. Ct. 1204 (2018).

unconstitutional when involving severe penalties.[47] The Court concluded that vague laws violate the due process notion of "fair play and the settled rules of law"[48] and separation of powers.[49] Although due process concerns are equally applicable across cultures, it is unclear whether the 5–4 majority would have held together without the concern for separation of powers, especially considering the fragmented opinions detailed below. Consequently, some civil law countries see general clauses as a valid form of bottom-up lawmaking. Since textual approaches to interpreting or analyzing general clauses are utterly useless, they function similarly to common law.[50] That is, general clauses incorporate judicial decisions that produce rules and fill gaps as needed.[51]

French jurists realized as far back as 1899 that the judicial interpretation of the French Civil Code was a creative, rather than an analytical, endeavor, with entire doctrines being born out of interpretations of general clauses.[52] Similarly, the Swiss Civil Code of 1907 "directed the judge, in the absence of guidance by the text of the Code or another accepted method of construction, to decide according to the principles that he would have adopted as a legislator."[53] Concerning the methodology of judicial law-making, French jurist François Gény provided four rational and intuitive elements: (1) "the physical and psychological realities of a given situation"; (2) the historical and traditional circumstances; (3) principles derived from natural law; and (4) moral ideals for a particular civilization based on intuition rather than reason.[54] Despite attempts at providing a methodological basis for interpreting general clauses, courts still derive entire legal theories from a few general words.[55]

47. *See id.* at 1212–13 (quoting Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S 489, 498–99 (1982)) (acknowledging the Court is more lenient with civil penalties than with criminal).

48. *Id.* at 1212 (quoting Johnson v. United States, 576 U.S. 591, 595 (2015)).

49. *Id.* (citing Kolender v. Lawson, 461 U.S. 352, 358 n.7 (1983)).

50. Carl Baudenbacher, *Some Remarks on the Method of Civil Law*, 34 TEX. INT'L L.J. 333, 347 (1999).

51. *Id.*

52. Wolfgang Friedmann, *Legal Philosophy and Judicial Lawmaking*, 61 COLUM. L. REV. 821, 826 (1961).

53. *Id.*

54. *Id.* at 826–27. Note the reference to "intuition," which is generally connected to intuitive reasoning, like "common sense" or genius. *See* HEGEL, *supra* note 2, at 31 (noting how natural philosophizing is intuitive and flows with common sense and genius).

55. *See* Arthur Lenhoff, *On Interpretative Theories: A Comparative Study in Legislation*, 27 TEX. L. REV. 312, 316 (1949) (summarizing how general clauses in Germany caused "a revolutionary turn in a very important field of private law").

Turning to contemporary China and the AUCL's recent reformation, scholars vigorously debate the appropriateness of deciding disputes under Article 2[56] and Article 12.[57] More broadly, scholars disagree whether Article 2 is even a general clause. There are four distinct points of view, contending it is: (1) a general clause; (2) not a general clause; (3) a limited general clause; or (4) simply a legal concept.[58] Within those who accept that it is a general clause, there are three additional interpretations. First, that of Xie Xaoyao, who regards general clauses as a legal principle.[59] Second, Professor Zheng Youde, who sees general clauses as "abstract norms for identifying other elements of unfair competition" beyond the explicit prohibitions.[60] Finally, that of Professor Liang Huixing, who contends general clauses convey legislative values and provide general guidance.[61]

Unlike the United States, China's governmental power resides within the People's National Congress, with the final source of power given to the people. However, China still divides labor between government institutions.[62] This division, known as "functionalism," allocates national tasks to the governmental body most likely to execute them based on its organization, structure, procedure, and personnel.[63] Thus, the governmental entity most likely to maximize the benefit has the right of "renewal" of Chinese law.[64] Accordingly, Chinese courts do not have the same aversion to lawmaking as those in the United States.[65]

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56. AUCL, art. 2.

57. *Id.* art. 12.

58. Pei Yi & (裴轶) & Lai Xiaopeng (来小鹏), Fan Bu Zheng Dang Jing Zheng Fa Zhong Yi Ban Tiao Kuan Yu "Hu Lian Wang Tiao Kuan" De Si Fa Shi Yong (反不正当竞争法中一般条款与"互联网条款"的司法适用) [Judicial Application of General Provisions and "Internet Provisions" in Anti-Unfair Competition Law], He Nan Shi Fan Da Xue Xue Bao (Zhe Xue She Hui Ke Xue Ban) (河南师范大学学报(哲学社会科学版)) [J. HENAN NORMAL U. (PHIL. & SOC. SCIS.)], no. 4, 2019, at 60, 60.

59. *Id.* at 62.

60. *Id.*

61. *Id.*

62. Zeng Fengchen (曾凤辰), Fan Bu Zheng Dang Jing Zheng Fa Yu Zhi Shi Chan Quan Fa Guan Xi De Si Fa Zheng Ce De Jiao Yi Xue Zhan Kai (反不正当竞争法与知识产权法关系的司法政策的教义学展开) [Expanding on the Judicial Policy Doctrine on the Relationship Between the Anti-unfair Competition Law and Intellectual Property Law], Jiao Da Fa Xue (交大法学) [SJTU L. REV.], no. 2, 2021, at 157, 163.

63. *Id.* at 164.

64. *Id.*

65. *See, e.g.*, Sessions v. Dimaya, 138 S. Ct. 1204, 1212 (describing the vagueness doctrine as "a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial

The necessity of using Article 2 of the AUCL as a general clause arises from the Chinese People's Supreme Court's guidance,[66] the general difficulty of unfair competition law lagging behind innovation in business practices, and the need to avoid excessive legal rigidity.[67] The Chinese People's Supreme Court provided three conditions to meet before applying the general clause: (1) there should be no special provision for the related behavior;[68] (2) there must be an infringement of the rights of other operators; and (3) the challenged competition must be a violation of good faith, recognized ethics, and impropriety or accountability.[69]

Judge Yu argues that the general clause should be used to abstract common features from enumerated unfair behaviors to guide adjudication.[70] He views the general clause as a means to resolve the gap between the law and innovative business practices by maintaining flexibility for conduct that does not precisely match the AUCL's itemized prohibitions.[71] However, determining what constitutes unfair behavior requires applying principles of fairness, integrity, and business ethics on a case-by-case basis, causing contradictory judgments.[72] Further, the guidelines for judicial policies state that competitive behaviors cannot constitute unfair competition unless they violate "generally recognized business standards," which protect freedom and fairness.[73]

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branch, define what conduct is sanctionable and what is not" (citing Kolender v. Lawson, 461 U.S. 352, 358 n.7 (1983))).

66. Zeng Fengchen, *supra* note 62, at 164.

67. *Id.* at 164–65.

68. This matches the legal maxim: *Clausula generalis non refertur ad expressa*, meaning "[a] general clause does not refer to things expressly mentioned." *Clausula generalis non refertur ad expressa*, BLACK'S LAW DICTIONARY (11th ed. 2019).

69. Chen Bing (陈兵) & Xu Wen (徐文), You Hua 《Fan Bu Zheng Dang Jing Zheng Fa》— Yi Ban Tiao Kuan Yu Hu Lian Wang Zhuan Tiao De Si Fa Shi Yong (优化《反不正当竞争法》一般条款与互联网专条的司法适用) [Organizing General Provisions of the Anti-Unfair Competition Law and Judicial Application of the Internet Article], Tian Jin Fa Xue (天津法学) [TIANJIN LEGAL SCI.], no. 3, 2019, at 34, 43.

70. Yu Shi (于是), 《Fan Bu Zheng Dang Jing Zheng Fa》 Yi Ban Tiao Kuan Shi Yong De Fan Hua Kun Ju Yu Rao Xing Po Jie——Yi Zhong Gou "Er Wei Zhi Zheng Xia De San Yuan Mu Biao Die Jia" Biao Zhun Wei Jin Lu (《反不正当竞争法》一般条款适用的泛化困局与绕行破解——以重构"二维指征下的三元目标叠加"标准为进路) ["Anti-unfair Competition Law" Analysis of the Difficulties and Detours in the Expanded use of the General Clause—Reconstructed with Two Dimensions Layered on Three Goals], Zhong Guo Ying Yong Fa Xue (中国应用法学) [CHINESE APPLIED JURIS.], no. 4, 2020, at 112, 113.

71. *Id.*

72. *Id.* at 115.

73. *Id.* at 116.

As business ethics maintain a pivotal role in resolving disputes under the AUCL, the People's Supreme Court promulgated clarifying guidelines: the "business ethics of economic man."[74] This guidance is based on the ethical standards of market participants in a specific business field rather than a global sense of personal or social morality.[75] In other words, the economic man may neglect public welfare so long as he lives up to the ethical standards of his industry.[76]

From this guidance, Judge Yu infers three meanings: (1) business ethics differ from the morality of daily life, as profit is paramount; (2) fairness, integrity, and business ethics must be judged from the perspective of the economic man; and (3) the standards must be generally known and accepted and be applied to specific business fields.[77] Further, Judge Yu notes that the guidance has evolved from "recognized commercial standards and general understanding" to "economic man's business ethics" and then to the "ethical standards of business people generally recognized and accepted in a specific commercial field."[78] He criticizes these amorphous standards as forcing judges to guess the law's scope, effectively using uncertain terms to explain other uncertain terms.[79] Further, the broad range of hidden protections against unfair competition may cause improper interference with innovation and competition.[80]

This overview of general clauses, as exemplified by the AUCL, provides a strong example of bottom-up lawmaking. Additionally, this method of interpretation demands a combination of historical standards and contemporary value judgments and prejudices. With the AUCL, some attempt to separate or objectify judicial prejudices by using detached language, like the "business ethics of economic man," which presumptively differs from the personal ethics of judges. This creates a false sense of objectivity and fails to address the reality that the ethical input of judges is both inevitable and desirable.

74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 117.
79. *Id.*
80. *Id.* at 118.

IV. MEZZANINE APPROACH TO INTERPRETATION[81]

Courts applying the mezzanine approach neither create new doctrines from interpreting general language nor directly review the interpretations of other governmental entities. In the United States, this approach is used when courts identify penumbral rights or apply the doctrine of substantive due process. In some ways, it resembles the bottom-up approach, as courts create doctrine removed from textual guidance. However, the mezzanine approach also shares elements with the top-down approach because judicial review is triggered by an offensive statute rather than proactive judicial lawmaking.

In *Griswold v. Connecticut*,[82] the Supreme Court declared Connecticut's ban on the sale of contraceptives unconstitutional.[83] Although later cases primarily relied on substantive due process, *Griswold* based its holding on constitutional penumbras.[84] The Court believed the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[85] In turn, these guarantees created a "zone of privacy" found in

> [t]he right of association contained in the penumbra of the First Amendment . . . . The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the

81. While the mezzanine approach was called into question by *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), the Court was careful to narrowly circumscribe its holding to abortion. *See id.* at 2239 ("Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."). Thus, its discussion remains meritorious. Even cases like *Roe*, while overruled, are illustrative.

82. Griswold v. Connecticut, 381 U.S. 479 (1965).

83. *Id.* at 484–85.

84. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process As Separation of Powers*, 121 YALE L.J. 1672, 1795–97 (2012) ("The Court conspicuously declined to base its decision on the Due Process Clause. It nonetheless struck down the Connecticut law, basing its decision on 'penumbras, formed by emanations' of various provisions of the Bill of Rights that together imply a 'zone of privacy.'" (footnote omitted)).

85. *Griswold*, 381 U.S. at 484 (citing Poe v. Ullman, 367 U.S. 497, 516–22 (1961) (Douglas, J., dissenting)).

> Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[86]

After establishing a zone of privacy, the Court necessarily found that enforcing the Connecticut law would invade this zone, as the law would inevitably encroach upon protected freedoms.[87] The Court was particularly concerned with the prospect of police searching marital bedrooms for evidence of contraceptive use, which would be "repulsive to the notions of privacy surrounding the marriage relationship."[88] With these broad moral arguments, the Court demonstrated the law's absurdity while couching its holding in constitutional principles.

Building on *Griswold*, the Supreme Court prohibited some abortion restrictions in *Roe v. Wade*.[89] There, it emphasized the zone of privacy, as well as "the penumbras of the Bill of Rights."[90] The Court then narrowed the concept by stating that only those fundamental rights "implicit in the concept of ordered liberty" confer a "guarantee of personal privacy."[91] Specifically, personal privacy extends to "marriage; procreation; contraception; family relationships; and child rearing and education."[92] Additionally, the Court used the Fourteenth Amendment's restrictions on state action to incorporate abortion protections into fundamental privacy

86. *Id.* (quoting CONST. amends. III–IV, IX).

87. *See id.* at 485–86 (contending the only way to catch violators of the Connecticut law would be "to search the sacred precincts of the marital bedroom").

88. *Id.*

89. Roe v. Wade, 410 U.S. 113, 163–164 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

90. *Id.* at 152 (quoting *Griswold*, 381 U.S. at 484–85).

91. *Id.* (quoting Palko v. Connecticut, 381 U.S. 319, 325 (1937)) (internal quotation marks omitted).

92. *Id.* at 152–53 (citations omitted) (first citing Loving v. Virginia, 388 U.S. 1, 12 (1967); then citing Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541–42 (1942); then citing Eisenstadt v. Baird, 405 U.S. 438, 453–54 (1972); then citing *Eisenstadt*, 405 U.S. at 463–65 (White, J., concurring in the result); then citing Prince v. Massachusetts, 321 U.S. 158, 166 (1944); then citing Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925); and then citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

rights.[93] Finally, it held that restrictions "must be narrowly drawn"[94] to serve a "compelling state interest."[95]

Roe borrowed many ideas from *Griswold* and institutionalized them into constitutional jurisprudence. Notably, despite acknowledging the use of penumbras and constitutional amendments, *Roe* moved the basis of its decision to the Due Process Clause of the Fourteenth Amendment. Further, it narrowed personal rights to familial relationships and reproduction. Finally, it explicitly provided a test for fundamental rights—strict scrutiny. Rather than merely rejecting an absurd statute, as seen in *Griswold*, the Court created a new doctrine that prevented states from interfering in familial relationships and reproduction. Consequently, *Griswold* and *Roe* share elements from the top-down approach, where courts interpret general terms, and the bottom-up construction, where they create rules absent textual guidance.

In subsequent decisions, the penumbral approach continued to yield to substantive due process. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[96] the Court faced a similar question as *Roe*. However, it framed its analysis on reasoned judgment: "The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment."[97] The Court explained that the boundaries of constitutional interpretation could not be expressed in a simple rule.[98] While the justices acknowledged that the Court should not invalidate state policies based on disagreements, they also recognized that they must fulfill "the duties of [their] office."[99]

The Court emphasized its responsibility for making value judgments by citing Justice Frankfurter, who wrote: "'To believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed

93. *Id.* at 153.

94. *Id.* at 155–56 (first citing *Griswold*, 381 U.S. at 485; then citing Aptheker v. Sec'y of State, 378 U.S. 500, 508 (1964); then citing Cantwell v. Connecticut, 310 U.S. 296, 307–08 (1940); and then citing *Eisenstadt*, 405 U.S. at 460, 463–64 (White, J., concurring in the result)).

95. *Id.* at 155 (quoting Kramer v. Union Free Sch. Dist., 395 U.S. 621, 627 (1969)) (internal quotation marks omitted) (first citing Shapiro v. Thompson, 394 U.S. 618, 634 (1969); and then citing Sherbert v. Verner, 374 U.S. 398, 406 (1963)).

96. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

97. *Id.* at 849.

98. *Id.*

99. *Id.*

stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges."[100] Finally, the Court noted that "[e]ven when jurists reason from shared premises, some disagreement is inevitable."[101] The Court's explicit reference to reasoned judgment indicates that it engaged in self-reflection.

In *Lawrence v. Texas*,[102] the Court applied substantive due process to hold a sodomy prohibition unconstitutional.[103] In the words of Schleiermacher, the Court was both technical and psychological, seeking to understand the Founders' intent. Contradictorily, it also applied a Gadamerian method, interpreting the Fourteenth Amendment's text independently of the Founders. Both approaches are clear from the following excerpt:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[104]

The Court's justifications in *Lawrence*, and its creation of a new body of constitutional law in *Griswold*, *Roe*, and *Casey*, rely on its top-down role as a reviewer of legislation and its bottom-up function as a rule maker. Hence, in these circumstances, the Court's approach is mezzanine in nature. These interpretations also unavoidably juxtapose contemporary values and prejudices against historical precepts, even when those precepts are only generalized statements of principles found within the Constitution.

V. TOP-DOWN APPROACH TO INTERPRETATION

At its core, the top-down approach is when courts review laws from different jurisdictions or divisions of government. This forces them to

100. *Id.* at 850 (quoting Rochin v. California, 342 U.S. 165, 171 (1952)) (internal quotation marks omitted).

101. *Id.* at 878.

102. Lawrence v. Texas, 539 U.S. 558 (2003).

103. *See id.* at 578 ("[I]ndividual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment.").

104. *Id.* at 578–79.

review laws not directly subject to their authority, as other reviewing bodies bear the primary responsibility of drafting, executing, and interpreting the laws. Thus, courts are highly deferential to the primary governmental body. In the United States, courts use the top-down approach for rational basis review and reviewing agency actions.

A. *Rational Basis Review*

Under rational basis review, courts uphold laws that are "rationally related to a legitimate governmental interest."[105] *United States Department of Agriculture v. Moreno*[106] is a classic example of this doctrine. There, the challenged statute prohibited food assistance for households comprised of unrelated, cohabitating residents.[107] The Court recited the rational basis test for equal protection cases and stated that the statute's disparate treatment was irrelevant to its stated purpose—stimulating the economy by purchasing farm surpluses.[108] After finding the governmental interest unpersuasive, the Court unearthed its hidden motivation: stopping "hippie communes" from receiving food stamps.[109] Based on this finding, the Court held "that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[110] However, the Court also stated that an independent public interest might have saved the statute.[111]

Despite *Moreno*'s focus on the statute's intended harm towards hippies, the Court was troubled by the potential harm towards other, more vulnerable groups.[112] It was particularly concerned about the effect of the statute in preventing indigent mothers from sharing housing costs.[113] Rather than harming hippies, the law hurt those it was designed to help. In

105. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973) (first citing Jefferson v. Hackney, 406 U.S. 535, 546 (1972); then citing Richardson v. Belcher, 404 U.S. 78, 81 (1971); then citing Dandridge v. Williams, 397 U.S. 471, 485 (1970); and then citing McGowan v. Maryland, 366 U.S. 420, 426 (1961)).

106. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

107. *Id.* at 534.

108. *Id.*

109. *Id.* (internal quotation marks omitted).

110. *Id.* (emphasis omitted).

111. *See id.* at 534–35 ("As a result, '[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment.'" (alteration in original) (quoting Moreno v. U.S. Dep't of Agric., 345 F. Supp. 310, 314 n.11 (D.D.C. 1972))).

112. *See id.* at 538 (noting the change would likely exclude those in desperate situations rather than those that would abuse the system).

113. *Id.* at 537–38.

effect, the Court found the law unjust for reasons entirely distinct from its proffered rationale—animus against hippies.[114] The Court refused to assume that the goal of the statute was to harm indigent mothers but could not hold the law unconstitutional under the highly deferential rational basis standard of review. As such, it found animus against a disfavored group and attributed that animus to the law to hold it unconstitutional. Because the Court could not deny enforcement of the law based solely on the Court's sense of morality, such attenuated reasoning was necessary.

Further, the difficulty of focusing on animus is demonstrated by other cases. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[115] the Court refused to invalidate a law excluding minorities from certain residential areas because it could not find discriminatory intent.[116] The Court explained that proof of discriminatory intent may be identified when typical factors "strongly favor a decision contrary to the one reached."[117] In that case, "statements by members of the decisionmaking body, minutes of its meetings, or reports" are "highly relevant."[118] Finally, "[i]n some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action."[119]

The absurdity of studying legislative debates or deposing members of legislative bodies was identified in *Virginia Uranium, Inc. v. Warren*.[120] Within the context of preemption, the Court acknowledged that regular inquiries into legislative intentions would prevent deliberation, debate, and testing of ideas, encouraging secrecy.[121] Requiring legislative members to appear in court would also be an inappropriate intrusion.[122] Further, such an

114. *Id.* at 538.

115. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

116. *Id.* at 264–65.

117. *Id.* at 267–68.

118. *Id.* at 268.

119. *Id.* (first citing Tenney v. Brandhove, 341 U.S. 367 (1951); then citing United States v. Nixon, 418 U.S. 683, 705 (1974); and then citing 8 J. WIGMORE, EVIDENCE § 2371 (McNaughton rev. ed. 1961)).

120. Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1906 (2019).

121. *See id.* ("[F]ederal judicial inquiries into state legislative intentions would be to stifle deliberation in state legislatures and encourage resort to secrecy and subterfuge.").

122. *See id.* (arguing peering into the mind of the legislature would require "depositions of state legislators and governors, and perhaps hale them into court for cross-examination at trial about their subjective motivations").

approach would create inconsistency, as identical language could be struck down based on the subjective intent of the decisionmakers.[123]

The Court took a more modern approach in *Romer v. Evans*.[124] There, Colorado citizens amended their constitution to eliminate political protections for homosexuals.[125] The Court focused on the unique position of homosexuals and their incapacity to seek protection against discrimination.[126] Further, it explained how the law uniquely disadvantaged homosexuals in private and governmental transactions.[127] However, the Court acknowledged that the amendment would be upheld "so long as it [bore] a rational relation to some legitimate end."[128]

The amendment's express purpose prohibited and overturned state and local anti-discrimination laws that protected homosexuals.[129] According to the Court, the rational basis test ensures that laws are not created to harm particular groups.[130] Referencing *Moreno*, the Court emphasized that harming an unpopular group is not a legitimate governmental interest.[131] Further, the Court held the amendment unconstitutional on two grounds: (1) it created "a broad and undifferentiated disability on a single . . . group";[132] and (2) its scope lacked a rational justification—leaving the only possible justification as animus toward homosexuals.[133] Additionally, the

123. *See id.* (contending "materially identical state regulations" may be stricken or upheld based on "the happenstance of judicial assessments of the 'true' intentions").

124. Romer v. Evans, 517 U.S. 620 (1996).

125. *See id.* at 624 (stating the amendment "prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons").

126. *See id.* at 627 ("The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination . . . .").

127. *Id.*

128. *Id.* at 631 (citing Heller v. Doe, 509 U.S. 312, 319–20 (1993)).

129. *See id.* at 626 ("The immediate objective of Amendment 2 is, at a minimum, to repeal existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation." (quoting Evans v. Romer, 854 P.2d 1270, 1284 (1993) (internal quotation marks omitted))).

130. *Id.* at 633 (quoting U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 181 (1980) (Stevens, J., concurring)).

131. *See id.* at 634–35 ("[A] bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." (omission in original) (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (internal quotation marks omitted))).

132. *See id.* at 632 (holding the amendment failed because it broadly debilitated a specific group).

133. *See id.* ("[I]ts sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects."). Notably, the constitutional amendment was passed by ballot initiative, making a common purpose impossible. *See id.* at 623 (acknowledging the amendment prompting litigation was adopted by Colorado voters in a

Court held that laws deny equal protection when they burden a particular group's access to governmental aid.[134]

In *Romer*, Justice Scalia, joined by Justices Rehnquist and Thomas, dissented because he believed the Colorado amendment was not driven by animus but to prevent changing community morals.[135] The dissent appealed to precedent and criticized the Court for analogizing homosexual denigration to racial or religious bias.[136] Furthermore, the dissent reframed the issue as barring homosexuals from obtaining preferential treatment rather than being denied equal protection.[137] Overall, *Romer* is a quintessential example of the constitutionality of laws hinging, in large part, on elements not explicitly addressed in the opinion.

Similarly, in *Trump v. Hawaii*,[138] the Court recited rules that appeared unnecessary to its ultimate conclusion. It denied a challenge to a presidential proclamation[139] that "placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate."[140] The agencies responsible for enforcing the order used a three-step system to determine which countries to target.[141] After evaluation, the agencies targeted Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen.[142] The two

statewide referendum). This approach of categorizing authorial intent to a group of people parallels Schleiermacher's belief that several authors may be viewed as a single "school." *See* SCHLEIERMACHER, *supra* note 11, at 56 (explaining how several authors may be viewed as students within a single school of philosophical thought).

134. *Romer*, 517 U.S. at 633 ("A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection . . . in the most literal sense.").

135. *See id.* at 636 (Scalia, J., dissenting) ("The constitutional amendment . . . is . . . a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through the use of the laws.").

136. *See id.* ("[T]he Court contradicts a decision, unchallenged here, pronounced only [ten] years ago and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias." (citation omitted) (citing Bowers v. Hardwick, 478 U.S. 186 (1986))).

137. *See id.* at 638–39 (contending the prevention of preferential treatment is not a violation of equal protection).

138. Trump v. Hawaii, 138 S. Ct. 2392 (2018).

139. Proclamation No. 9645, 82 Fed. Reg. 186 (Sept. 27, 2017).

140. *Trump*, 138 S. Ct. at 2404.

141. *See id.* at 2404–05 (discussing the process undergone to establish enabling procedures).

142. *Id.* at 2405.

bases of the challenge were that the proclamation exceeded presidential authority to regulate immigration and violated the Establishment Clause.[143]

The majority applied the rational basis test, finding that the proclamation "ha[d] a legitimate grounding in national security concerns, quite apart from any religious hostility."[144] Further, the Court explained that the proclamation limited its scope to countries previously designated as security risks and would be continuously reviewed to evaluate its necessity.[145]

Trump also gave rise to two separate dissenting opinions: one from Justice Breyer, joined by Justice Kagan, and another by Justice Sotomayor, joined by Justice Ginsburg. Justice Breyer focused on the Government's failure to follow the order because it did not adopt any guidance for issuing waivers and only granted two of the 6,555 applications.[146] Additionally, while the order did not apply to refugees nor place any restrictions on most student visas, the number of Syrian refugees and students dropped precipitously after the proclamation went into effect.[147] He also observed an exemplary case where a Yemeni child with cerebral palsy seeking medical treatment was denied a waiver.[148] Finally, Justice Breyer noted that a consular officer (in another case) filed an affidavit stating he lacked discretion and highlighting the "window dressing" nature of the proclamation's waiver process.[149] Accordingly, Justice Breyer would either have remanded the case to explore whether the order was a "Muslim ban" or have found sufficient evidence of anti-religious bias to set the order aside.[150]

Similarly, Justice Sotomayor maintained that the proclamation, masquerading under the guise of national security concerns, was really aimed at excluding Muslims from the United States.[151] Consequently, Justice Sotomayor, relying on President Trump's campaign speeches,[152]

143. *Id.* at 2406.

144. *Id.* at 2421.

145. *Id.* at 2421–22.

146. *See id.* at 2431 (Breyer, J., dissenting) (contending the Government's failure to comply with its own procedure and issue waivers indicates the proclamation was a thin veneer to disguise a darker purpose).

147. *See id.* ("While more than 15,000 Syrian refugees arrived in the United States in 2016, only [thirteen] have arrived since January 2018.").

148. *Id.* at 2432.

149. *Id.* at 2432–33 (internal quotation marks omitted).

150. *Id.* at 2433 (internal quotation marks omitted).

151. *Id.* (Sotomayor, J., dissenting).

152. *See id.* at 2435–36 (arguing President Trump's campaign speech demonstrated his intention to exclude Muslims from the United States).

would have struck down the proclamation as unconstitutionally motivated by anti-Muslim animus.[153]

B. *Agency Discretion*

Judicial review of agency interpretations requires courts to pass judgment on another governmental body's final decisions. The broad authority of an agency juxtaposed with the availability of judicial review presents an opportunity to evaluate the review process. Judicial deference to agency decision-making, however, depends largely on the persuasiveness of the agency's position rather than any doctrinal rule.[154]

When requested by the government,[155] courts grant wide deference to an agency's construal of the statute it administers, so long as the statute does not directly address the matter in dispute and the agency's interpretation "is based on a permissible construction."[156] If unclear, the question is whether the legislature explicitly left a gap for the agency to fill and delegated "authority to the agency to elucidate a specific provision of the statute by regulation."[157] Where authority is granted, agency "regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[158] Further, in cases where the delegation is implicit, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[159] However, in *King v. Burwell*,[160] the Court held this type of deference

153. *See id.* at 1233 ("[A] reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus.").

154. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) (granting deference to an agency's interpretation because it was "a permissible construction of the statute").

155. *See* HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n, 141 S. Ct. 2172, 2180 (2021) (declining to consider whether any deference is applicable because the government failed to request *Chevron* deference).

156. *Chevron, U.S.A., Inc.*, 467 U.S. at 843.

157. *Id.* at 844.

158. *Id.*; *see* 5 U.S.C. § 706(2) (allowing a reviewing court to "hold unlawful and set aside agency action[s], findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *see also* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect . . . , offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

159. *Chevron*, 467 U.S. at 844 (first citing INS v. Jong Ha Wang, 450 U.S. 139, 144 (1981); and then citing Train v. Nat. Res. Def. Council, Inc., 421 U.S. 60, 87 (1975)).

160. King v. Burwell, 576 U.S. 473 (2015).

inapplicable when implicit delegation is illogical due to the agency's lack of expertise in the relevant legal area or when deep, political significance is evident within the statutory scheme.[161]

Seventeen years after *Chevron*, the Court substantially narrowed its holding. In *United States v. Mead Corp.*,[162] the Court clarified that statutes are entitled *Chevron* deference when "Congress delegated authority to the agency . . . to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[163] A showing of delegation is demonstrated "by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent."[164] *Mead* also echoed the general *Chevron* rule: any regulation that receives *Chevron* deference is "binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute."[165]

For cases where an agency acts without exercising its lawmaking authority, deference is afforded if it construes the "statutory scheme it is entrusted to administer."[166] In this circumstance, the Court referenced several important factors, including "the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position."[167] In *Mead*, the Court held that the agency's rulings were not entitled to *Chevron* deference because they were closer to "policy statements, agency manuals, and enforcement guidelines," which fall outside *Chevron*'s domain.[168] Nonetheless, the agency deserved some deference because of the "'specialized experience and broader investigations and information' available to the agency"[169] and the "value of uniformity in its

161. *See id.* at 485–86 (describing the characteristics that give courts pause before granting deference).

162. United States v. Mead Corp., 533 U.S. 218 (2001).

163. *Id.* at 226–27.

164. *Id.* at 227.

165. *Id.* (first citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984); then citing United States v. Morton, 467 U.S. 822, 834 (1984); and then citing 5 U.S.C. §§ 706(2)(A), (D)).

166. *Id.* at 227–28 (quoting *Chevron, U.S.A., Inc.*, 467 U.S. at 844) (first citing Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980); and then citing Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978)).

167. *Id.* at 228 (footnotes omitted) (citing Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944)).

168. *Id.* at 234 (quoting Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000)).

169. *Id.* (quoting *Skidmore*, 323 U.S. at 139).

administrative and judicial understandings of what a national law requires."[170]

The Supreme Court helpfully elucidated lower levels of deference in *Kisor v. Wilkie*.[171] There, the Court went to great lengths to explain that deference is only granted when there is genuine ambiguity after applying the standard tools of interpretation.[172] Furthermore, courts should only defer to agencies when their interpretation is reasonable.[173] Otherwise, there should be no deference other than to agencies' "power to persuade."[174] However, in cases where agencies provide a reasonable reading of their own ambiguous regulations, courts should apply what is known as *Auer* deference.[175] *Auer* and *Skidmore* deferences are quite similar, as they both emphasize the persuasiveness of the agency's interpretation in judicial review.[176]

In *Kisor*, the Court held that, while *Auer* deference is the "general rule,"[177] it does not apply in cases where the agency's interpretation is not reflective of its "authoritative, expertise-based, 'fair[, or] considered judgment.'"[178] To apply *Auer* deference, the court must first exhaust its traditional tools of construction and find the regulation genuinely ambiguous.[179] Next, the agency's interpretation must be reasonable by falling within the "zone of ambiguity" identified by employing its interpretive tools.[180] Finally, the court should make a separate inquiry to determine whether the agency's

170. *Id.* (citing *Skidmore*, 323 U.S. at 140).

171. Kisor v. Wilkie, 139 S. Ct. 2400 (2019).

172. *See id.* at 2414 (explaining how *Auer* deference, while useful, is only applicable when "a regulation is genuinely ambiguous").

173. *See id.* at 2419 (contending an agency's interpretation must be reasonable).

174. *Id.* at 2414 (quoting Christopher v. Smithkline Beecham Corp., 567 U.S. 142, 159 (2012)) (internal quotation marks omitted); *see also Skidmore*, 323 U.S. at 140 ("The weight of such a judgment . . . will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it *power to persuade*, if lacking power to control." (emphasis added)).

175. *Kisor*, 139 S. Ct. at 2408 (first citing Auer v. Robbins, 519 U.S. 452 (1997); and then citing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945)).

176. *See, e.g.*, *id.* at 2424 (Roberts, C.J., concurring in part) (distinguishing *Auer* from *Skidmore*, as "there is a difference between holding that a court ought to be persuaded by an agency's interpretation and holding that it should defer to that interpretation under certain conditions").

177. *Id.* at 2414 (majority opinion) (quoting *Christopher*, 567 U.S. at 155) (internal quotation marks omitted).

178. *Id.* (alteration in original) (quoting *Christopher*, 567 U.S. at 155) (citing United States v. Mead Corp., 533 U.S. 218, 229–31 (2001)).

179. *Id.*

180. *Id.* at 2415–16.

interpretation is deliberative and through the appropriate channels,[181] implicates the substantive expertise of the agency,[182] and reflects a "fair and considered judgment."[183] If all of these requirements are satisfied, the agency is entitled to *Auer* deference, gaining significant flexibility in determining the meaning of its own rules.[184]

Despite the weak deference provided in *Kisor*, the justices had much disagreement. Justice Kagan wrote the majority opinion, joined by Justices Ginsburg, Breyer, and Sotomayor and partially joined by Justice Roberts. Additionally, Justice Roberts and Justice Gorsuch filed concurrences, joined by Justice Thomas and partially joined by Justices Kavanaugh and Alito. Justice Kavanaugh also drafted a concurring opinion, joined by Justice Alito. This split demonstrates the role of hermeneutics in determining the level of deference and the justices' perception of their role in evaluating agency decisions.

Justice Gorsuch's concurrence took issue with subordinating judicial judgment to political actors.[185] According to him, *Auer* should be overruled, and courts should use their independent judgment to evaluate an agency's persuasiveness under *Skidmore*.[186] Justice Gorsuch criticized the majority's reworking of *Auer* into a multi-step and multi-factor inquiry because it created uncertainty and deprived litigants of a neutral forum.[187] Finally, Justice Gorsuch observed that requiring courts to exhaust the rules of construction before applying *Auer* deference dramatically reduced its applicability.[188] Similarly, Justice Kavanaugh argued: "If a reviewing court employs all of the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation of the regulation at

181. *See id.* at 2416 (explaining the interpretation "must be the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views" (quoting *Mead Corp.*, 533 U.S. at 257–259, 258 n.6 (Scalia, J., dissenting))).

182. *Id.* at 2417.

183. *Id.* (quoting *Christopher*, 567 U.S. at 155) (internal quotation marks omitted).

184. *Id.* at 2418.

185. *Id.* at 2429 (Gorsuch, J., concurring) (quoting Southern Goods Corp. v. Bowles, 158 F.2d 587, 590 (1946)).

186. *Id.* at 2447 (quoting Gonzales v. Oregon, 546 U.S. 243, 269 (2006)) (citing *Christopher*, 567 U.S. at 159).

187. *Id.* at 2447–48.

188. *See id.* at 2448 (contending *Auer*'s narrow breadth ensures courts "will rarely, if ever, have to defer to an agency regulatory interpretation that differs from what they believe is the best and fairest reading").

issue. After doing so, the court then will have no need to adopt or defer to an agency's contrary interpretation."[189]

After *Kisor*, one may wonder whether *Chevron* deference survives. More fundamentally, one may ask whether a branch of government should review the decisions of another. This question is usually answered structurally. For example, it is answered by functionalism in China or federalism and separation of powers in the United States. However, the purpose of this review goes beyond simple error prevention since that could be accomplished through another layer of specialized review within the same department. Cross-governmental review, observed in top-down cases, reflects the incorporation of values and policies within a diverse population, which inevitably differs from values promoted by centralized agencies. Furthermore, it fosters unanimous consent rather than majority rule because the layers of review filter out close cases. Finally, cross-governmental review effectively sets the hermeneutic horizon for regulations, whether that horizon is referred to as the zone of privacy, as in *Griswold*, or the zone of ambiguity, as in *Kisor*.

VI. HERMENEUTIC APPROACH TO VAGUENESS: *SESSIONS V. DIMAYA*

Generally, a statute is unconstitutionally vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[190] Somewhat contradictorily, many cases tolerated vague statutes so long as they clearly prohibited the conduct for which the law was applied, even if the challenged statute was ambiguous for some other conduct.[191] The Supreme Court rejected this approach in *Johnson v. United States*.[192]

189. *Id.* (Kavanaugh, J., concurring in the judgment).

190. United States v. Williams, 553 U.S. 285, 304 (2008) (first citing Hill v. Colorado, 530 U.S. 703, 732 (2000); and then citing Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972)); s*ee also* Johnson v. United States, 576 U.S. 591, 595 (2015) ("Our cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." (citing Kolender v. Lawson, 461 U.S. 352, 357–58 (1983))).

191. *See, e.g.*, *Williams*, 553 U.S. at 304 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989)) (explaining how explicit guidance was never required for regulations prohibiting specific conduct).

192. *See* Johnson v. United States, 576 U.S. 591, 602 (2015) ("[O]ur holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." (emphasis omitted)).

Most recently, in *Sessions v. Dimaya*, the Court emphasized that vague criminal statutes violate the due process "required by both 'ordinary notions of fair play and the settled rules of law.'"[193] Additionally, the Court described the vagueness doctrine as a "corollary of the separation of powers," requiring Congress to define prohibited conduct.[194] The Court explained that allowing the judiciary to decide the scope of laws would force it to exercise legislative powers.[195]

The criminal statute at issue in *Dimaya* was 18 U.S.C. § 16, which defined a "crime of violence" as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.[196]

This definition was incorporated by 8 U.S.C. § 1101(a)(43)(F).[197] In turn, 8 U.S.C. § 1227(a)(2)(A)(iii) provided: "Any alien who is convicted of an aggravated felony at any time after admission is deportable."[198] Further, 8 U.S.C. §§ 1229b(a)(3) and 1229b(b)(2)(A)(iv) prevented the cancellation of removal proceedings and adjustment of immigration status for aliens convicted of an aggravated felony.[199]

The divided opinions in *Dimaya* engender various interpretations of the Court's holding and provide an opportunity to examine the hermeneutic process that drove its fragmentation. *Dimaya* split six ways. First, Justice Kagan wrote the majority opinion, joined by Justices Ginsburg, Breyer, Sotomayor, and Gorsuch as to Parts I, III, IV-B, and V. Second, Justice Kagan's opinion as to Parts II and IV-A, which Justice Gorsuch did not join. Third, Justice Gorsuch drafted a concurrence. Fourth, Justice Roberts penned a dissenting opinion, joined by Justices Kennedy, Thomas, and Alito. Fifth, Justice Thomas wrote a dissenting opinion, joined by Justices Kennedy and Alito as to Parts I-C-2, II-A-1, and II-B.

193. Sessions v. Dimaya, 138 S. Ct. 1204, 1212 (2018). (quoting *Johnson*, 576 U.S. at 595).
194. *Id.* at 1212 (citing *Kolender*, 461 U.S. at 358 n.7).
195. *Id.*
196. 18 U.S.C. § 16, *held unconstitutional by* Sessions v. Dimaya, 138 S. Ct. 1204 (2018).
197. *See* 8 U.S.C. § 1101(a)(43)(F) (defining "aggravated felony" as a "crime of violence" under "section 16 of Title 18 . . . for which the term of imprisonment at [is] least one year").
198. *Id.* § 1227(a)(2)(A)(iii).
199. 8 U.S.C. §§ 1229b(a)(3), 1229b(b)(2)(A)(iv).

And sixth, Justice Thomas's lone dissent. While the Court's split leaves the void-for-vagueness doctrine uncertain, the justices' reasonings offer insight for textual analysis and interpretation.

A. *Oral Arguments*

The Court held oral arguments on January 17, 2017, and October 2, 2017. The value of considering these separately from their corresponding opinions relates to the underlying function of memory and its hermeneutic significance. Gadamer conceptualized human memory as more than mere talent.[200] Rather, the partial recollection and forgetfulness of memory facilitate renewal, reappraisal, and *bildung*.[201] After briefing, the justices used the oral arguments to educate themselves—an effect even more pronounced during the second argument. Since seemingly less important details are often forgotten, the arguments allowed the justices to reaffirm, re-perceive, and recall the pertinent facts while undergoing an individual and social process of education or *bildung*. In effect, the oral arguments provide a contemporaneous glimpse of the hermeneutic dialogue and the tension among prejudices, which is more obscured in the cleanly written opinions. Furthermore, since the split opinions leave the vagueness doctrine unclear, the oral arguments serve as an additional source of prediction of future Supreme Court decisions.

In the January argument, Justice Kagan focused on the difficulty of determining whether a specific crime is an "ordinary case" under § 16(b).[202] For example, she asked the Government whether crimes like "vehicular flight" are violent.[203] Justices Kagan and Sotomayor pushed the argument to the extreme by considering possession of a sawed-off shotgun, which is classified as a violent crime despite not involving violence.[204] Similarly, Justice Sotomayor was concerned with burglary's historic categorization as violent while driving under the influence was not.[205]

Justice Alito inquired whether holding § 16(b) unconstitutional would create wide-ranging effects, and the Government responded by suggesting money laundering, hijack robbery, and the determination of whether

200. GADAMER, *supra* note 1, at 414.

201. *Id.* at 425.

202. Transcript of Oral Argument at 12, Sessions v. Dimaya, 138 S. Ct. 1204 (No. 15-1498) [hereinafter January Argument].

203. *Id.* at 13–14.

204. *Id.* at 15–16.

205. *Id.* at 15–16, 43–45, 49–50.

juveniles are subject to prosecution are all tied to the statute.[206] Justice Alito also considered whether the level of tolerable vagueness was different between civil and criminal statutes.[207] Similarly, Justice Breyer showed discomfort with the broad civil clauses frequently found within statutes, including those involving "moral turpitude, unfair competition, just and reasonable rates, public convenience[,] and necessity."[208] The Government's muddied argument that the Constitution required agencies to administer these broad clauses concerned Justice Breyer.[209] His worry was reinforced when the Government argued that an intervening step by an agency centralizes the bringing of cases and solves § 16(b)'s vagueness.[210]

During the October argument, the Court revisited many of these topics and raised new concerns. Justice Sotomayor addressed the level of protection afforded to aliens in removal procedures.[211] She implied that alien removal is arbitrary if based on a vague statute.[212] In contrast, the Government argued that certain constitutional provisions, like ex post facto protections, "do[] not apply in immigration proceedings."[213] However, as Dimaya's attorney explained, § 16(b) was used for both civil and criminal deportations; thus, it would be absurd to find it unconstitutionally vague in civil contexts but acceptable in criminal cases.[214]

Additionally, the discussion on vagueness in the civil and criminal contexts exceeded the January arguments. Justice Alito pressed Dimaya's attorney to answer whether similar language in a different context would be unconstitutionally vague.[215] Furthermore, Justice Alito stipulated that the

206. *Id.* at 20.

207. *See id.* at 39–40 ("Now, assuming that there is some sort of vagueness standard that applies in civil cases, I would have thought your answer would be that it's a sliding scale and that the . . . standard for civil cases is not the same as the standard for criminal cases.").

208. *Id.* at 36.

209. *See id.* at 37 ("I'd rather read it in a law review article than I would write those words which will suddenly become real.").

210. *See id.* at 51 (explaining how "immigration is vested in an administrative agency," which allows "centralized control over the bringing of the cases").

211. Transcript of Oral Argument at 5, Sessions v. Dimaya, 138 S. Ct. 1204 (No. 15-1498) [hereinafter October Argument].

212. *See id.* (asking if § 16(b)'s vagueness is arbitrary in the same way immigration officials deporting someone based on their appearance is arbitrary).

213. *Id.* at 13–14.

214. *See id.* at 53–54 (pointing out that granting different vagueness standards for civil and criminal matters under the same statute would create enforcement disparities and "make[] no sense").

215. *See id.* at 35 (questioning whether § 16(b)'s language, applied in the context of state licensure, would be unconstitutionally vague).

United States Code could be thoroughly pruned if it used the same standard for civil and criminal statutes.[216] Dimaya's attorney responded that the penalty's severity determines the level of protection.[217] Justice Gorsuch noted that many civil offenses have severe penalties, such as deportation or forfeiture.[218] Justice Sotomayor also questioned the difference between civil and criminal standards of vagueness.[219] Similarly, Justice Gorsuch thought that defining and applying broad statutes should be done by courts, not administrative agencies.[220]

Another new concern the justices discussed was whether the vagueness doctrine arises under procedural or substantive due process.[221] Justice Gorsuch stated that it was procedural.[222] In contrast, Justice Alito argued that it was substantive.[223] A similar disagreement arose between the Government, contending it was substantive,[224] and Dimaya's attorney, claiming it was, "for the vast majority of people," procedural because the "individual is given no notice."[225] However, Justice Alito pointed out that notice could be given "in some other way."[226]

The substantive versus procedural discussion demonstrates the difference between a top-down and bottom-up approach to judicial review. Justice Alito and the Government implicitly argued that the vagueness doctrine involved a judicially created mezzanine approach, while Justice Gorsuch and Dimaya's attorney contended that vagueness relates to a lack of notice or fairness—a top-down approach.

Finally, the Court revisited the January discussion on what constitutes an ordinary case under § 16(b). Justice Kagan noted the difficulty of establishing an ordinary case,[227] while Justice Gorsuch expressed concern

216. *Id.* at 36.

217. *Id.* at 38–39.

218. *Id.* at 39.

219. *See id.* at 41–42 (asking where to draw the line when determining the standard of vagueness in civil cases).

220. *See id.* at 61 ("This isn't an example where Congress has delegated authority to the [E]xecutive . . . .").

221. *Id.* at 50–52.

222. *See id.* at 30 (objecting to the Government's contention that it was substantive and arguing it has no substantive limitation).

223. *See id.* at 51 ("[H]ow is it procedural? I don't understand how you can say it's procedural right. You said . . . the statute is void for vagueness. That is certainly substantive.").

224. *Id.* at 29 ("[I]t feels like more of a . . . substantive due process limitation . . . .").

225. *Id.* at 52.

226. *Id.*

227. *See id.* at 18 ("[T]here was no way to tell what that ordinary case was.").

about geographic inequities, as jurisdictions may define crimes differently.[228] In response, the Government explained how kidnapping is a violent offense even though it "can also be accomplished by trick."[229] In refutation, Justice Sotomayor explained how statutory rape, which the Government categorized as inherently violent, is typically accomplished through trickery.[230]

Relatedly, § 16(b) only covers crimes that "involve[] a substantial risk" of "physical force" during "the course of committing the offense."[231] But when is a crime completed for these purposes? Dimaya's attorney contended that the Government vacillated between arguments.[232] Ultimately, he concluded that its most consistent argument was that a crime is committed when its elements are satisfied.[233] For example, a burglary is completed when the burglar crosses the threshold.[234] Similarly, a "conspiracy to commit burglary" is completed when the agreement is forged.[235] The Government responded that—for § 16(b)—a crime is not completed when the elements are satisfied but when the crime ends, meaning a "[k]idnapping is not over until the victim is freed."[236]

B. *Majority Opinion*

Moving from oral arguments to the majority opinion, the justices' prejudices are clearly overlooked to attain a consensus. The majority began by providing background: Dimaya was a Philippine native who resided in the United States since 1992 and was twice convicted of first-degree burglary in California, resulting in immigration removal proceedings.[237] In the proceedings, the Judge and Board of Immigration Appeals held that

228. *See id.* at 21 ("[W]hat level of generality am I supposed to look at in terms of what the ordinary case is? Municipality, Orange County, state, California, the country? Or do I make that legislative choice too?").

229. *Id.* at 22.

230. *Id.* at 26–27.

231. 18 U.S.C. § 16(b).

232. *See* October Argument, *supra* note 211, at 33 ("[T]he government keeps shifting back and forth between two versions of what 'in the course of committing the crime' means.").

233. *Id.* at 34.

234. *Id.*

235. *Id.* at 48.

236. *Id.* at 58–59.

237. Sessions v. Dimaya, 138 S. Ct. 1204, 1211 (2018).

Dimaya's burglary was a crime of violence under § 16(b).[238] However, the Ninth Circuit found it unconstitutionally vague, joining a circuit split.[239]

The majority dialed in on the language of § 16(b), arguing that the words "by its nature" demand application when the crime is ordinarily violent, "not what happened to occur on one occasion."[240]

Turning to the constitutionality of this approach, the majority based its finding on two elements: (1) the methodological uncertainty of judicial risk assessment, which must be tied to hypotheticals; and (2) the unclear threshold level of risk.[241] Concerning methodological uncertainty, the majority questioned how it was to determine the conduct of an ordinary case: "But how . . . should a court figure that out? By using a 'statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?'"[242] Further, it noted that with burglary, one judge might imagine it unfolding with a violent police encounter, while another may see the burglar escaping without confrontation.[243] The majority deemphasized the second issue since, in *Johnson v. United States*,[244] this element was insufficient and merely compounded the ordinary case problem.[245] Likewise, the majority noted that there would not be a problem with applying qualitative standards to cases, but it would be unacceptable to apply them to "a judge-imagined abstraction."[246]

The majority opinion acknowledged and responded to Chief Justice Roberts's dissent, which focused on three grammatical differences in statutory text to distinguish *Johnson* from *Dimaya*.[247] First, § 16(b) used "in the course of committing the offense," which focuses on the temporal range of the crime, excluding consequences that would occur after the crime was completed.[248] Second, § 16(b) used "physical force," while the statute in

238. *Id.*

239. *Id.* at 1212.

240. *Id.* at 1217–18.

241. *Id.* at 1213–14.

242. *Id.* at 1214 (quoting Johnson v. United States, 576 U.S. 591, 597 (2015)).

243. *Id.*

244. Johnson v. United States, 576 U.S. 591 (2015).

245. *See Dimaya*, 138 S. Ct. at 1214 ("The problem came from layering such a standard on top of the requisite 'ordinary case' inquiry.").

246. *Id.* at 1215–16 (quoting *Johnson*, 576 U.S. at 598) (internal quotation marks omitted).

247. *See id.* at 1218 (arguing Chief Justice Roberts "points to three textual discrepancies between ACCA's residual clause and § 16(b)").

248. *See id.* at 1218–19 (quoting Brief for the Petitioner at 31, Sessions v. Dimaya, 138 S. Ct. 1204 (2018) (No. 15-1498) (internal quotation marks omitted) (contending Chief Justice Roberts "echoe[d] much of this argument").

Johnson used "physical injury."[249] And third, in *Johnson*, the statute included a "confusing list of exemplar crimes," which were contradictory and added further confusion to the residual clause.[250] Regarding the first argument, the majority did not see § 16(b)'s temporal range as limiting because it would only exclude remote scenarios, like those involving booby traps, and consequently, it would not narrow the ordinary case of the crime.[251] Likewise, the majority did not distinguish between physical force and physical injury because consequences flow from conduct, and physical force is defined as "force capable of causing physical pain or injury."[252] Despite the minor linguistic differences, the same crimes are likely to satisfy both statutes.[253] Regarding the last difference, the majority conceded that the examples provided by *Johnson* were unhelpful in clarifying the statute.[254] However, the majority did not believe that those examples caused the vagueness since "[i]t could simply have instructed courts to give up on trying to interpret the clause by reference to the enumerated offenses."[255]

Finally, the majority answered the Government's argument that § 16(b) had not produced the same difficulties as the statute at issue in *Johnson*.[256] The majority disagreed, pointing to the circuit split on crimes like burglary, statutory rape, evading arrest, residential trespass, unauthorized vehicle use, firearm possession, and abduction.[257] The only reason there were fewer cases under § 16(b) was because of its more limited use.[258] The majority contended that § 16(b) had the same objectionable features as the statute in *Johnson*.[259] Consequently, § 16(b) was unconstitutional (subject to

249. *Id.* at 1220–21 (internal quotation marks omitted).

250. *Id.* at 1221 (quoting Brief for the Petitioner, *supra* note 248, at 38) (internal quotation marks omitted).

251. *Id.* at 1219.

252. *Id.* at 1220 (quoting Johnson v. United States, 559 U.S. 133, 140 (2010) (internal quotation marks omitted)).

253. *Id.* at 1221.

254. *See id.* ("[T]he enumerated crimes were themselves too varied to provide such assistance." (first citing Brief for Petitioner, *supra* note 248, at 38–40; and then citing *Johnson*, 576 U.S. at 603–04)).

255. *Id.*

256. *Id.* at 1222.

257. *Id.*

258. *Id.* at 1222 n.12.

259. *See id.* at 1223 ("Because the clause had both an ordinary-case requirement and an ill-defined risk threshold, it necessarily 'devolv[ed] into guesswork and intuition,' invited arbitrary enforcement, and failed to provide fair notice." (quoting *Johnson*, 576 U.S. at 600)).

Justice Gorsuch's concurrence) because it created "arbitrary enforcement[] and failed to provide fair notice."[260]

From a hermeneutic perspective, the majority maintains an objectively mechanical tone. Namely, it purports to clerically apply precedent to a similar case.[261] Even when considering the oral arguments, only those relating to the indeterminacy and impracticability of the ordinary case made it into the opinion. In most other respects, the majority goes to great lengths to conceal its prejudices under the guise of objectivity and linguistic analysis. However, the other opinions fail to strike such a clerical tone and provide greater insight into the subjective factors motivating the justices' opinions.

C. *Justice Kagan's Concurrence*

Justice Kagan's concurrence—representing four justices—provided a less mechanical approach. She focused on the vagueness doctrine's fairness, the severe consequences in deportation cases, and responding to Justice Thomas's argument that § 16(b) may be saved by avoiding the ordinary case approach.

Justice Kagan revealed her concern—shared by at least three other Justices—that vague laws could be used against minorities. This background prejudice was presented in the following steps. First, she stated that the rule against vagueness is "essential" to due process and required by the "ordinary notions of fair play and the settled rules of law."[262] Second, the vagueness doctrine "guarantees that ordinary people have 'fair notice' of the conduct a statute proscribes."[263] Third, it "guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges."[264] Finally, Justice Kagan explained that the vagueness doctrine followed from the separation of powers insofar as it required that "Congress, rather than the [E]xecutive or [J]udicial [B]ranch, define what conduct is sanctionable and what is not."[265]

Within Justice Kagan's list, the first, second, and fourth steps all relate to basic legal principles; however, the third step shows Justice Kagan's concerns with arbitrary or discriminatory enforcement of laws by police

260. *Id.*
261. *See id.* (comparing the effects of § 16(b) to the ACCA's residual clause).
262. *Id.* at 1212 (quoting *Johnson*, 576 U.S. at 591, 595) (internal quotation marks omitted).
263. *Id.* (quoting Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972)).
264. *Id.* (citing Kolender v. Lawson, 461 U.S. 352, 357–58 (1983)).
265. *Id.* (citing *Kolender*, 461 U.S. at 358 n.7).

officers, prosecutors, juries, and judges. The fundamentally different nature of the third step demonstrates its underlying importance. Namely, it reveals Justice Kagan's primary concern: the discriminatory enforcement of laws. Yet, to present this prejudice, she uses a more theoretical and sanitized separation of powers argument, revealing her hermeneutic dialogue with the law. Rather than focusing on the underlying prejudice, she identifies an external justification—the Constitution.

Next, Justice Kagan justified her decision by discussing § 16(b)'s severe consequences. She relied on precedent holding that civil statutes have a more lenient standard of vagueness "because the consequences of imprecision are qualitatively less severe."[266] Then, relying on *Jordan v. De George*,[267] she argued that the severity necessitates a more stringent criminal standard.[268] However, Justice Kagan's assumption seems unwarranted since, while some aliens have lifelong connections to the United States,[269] many have tangential connections. Nonetheless, while Justice Kagan phrases her argument as a mechanical application of precedent, her assumptions demonstrate her prejudices engaging in a hermeneutic dialogue with the law.

Justice Kagan's concurrence also responded to Justice Thomas's argument that constitutional issues could be avoided by abandoning the categorical inquiry, contending such an approach would create a separate jury trial violation.[270] Justice Kagan further explained that the ordinary case approach is required for three separate reasons: (1) precedent; (2) the words "by its nature" within § 16(b); and (3) the lack of any words relating to the crime's circumstances or commission.[271] Finally, she stressed "the 'utter impracticability'—and associated inequities—of such an interpretation."[272] In this practical explanation, Justice Kagan further demonstrates her prejudice in believing that vague laws will be enforced improperly to the detriment of the disadvantaged.

266. *Id.* at 1212–13 (quoting Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 498–99 (1982)).

267. Jordan v. De George, 341 U.S. 223 (1951).

268. *Dimaya*, 138 S. Ct. at 1213 (quoting *Jordan*, 341 U.S. at 231).

269. As a case in point, it is likely that Dimaya himself, who spent twenty-six years in the United States, had lifelong connections to America. *Id.* at 1211.

270. *Id.* at 1217 (quoting Descamps v. United States, 570 U.S. 254, 267 (2013)).

271. *Id.* at 1217–18 (first quoting Taylor v. United States, 495 U.S. 575, 601 (1990); then quoting 18 U.S.C. § 16(b); and then citing *Descamps*, 570 U.S. at 267).

272. *Id.* at 1218 (quoting Johnson v. United States, 576 U.S. 591, 605 (2015)).

D. *Justice Gorsuch's Concurrence*

Justice Gorsuch provided more detail on the separation of powers justification, responding to Justice Thomas's historical arguments while leaving open the possibility that a method different from the ordinary case could theoretically salvage § 16(b).[273] In so doing, Justice Gorsuch prevented the majority from declaring § 16(b) unconstitutional in all cases. Furthermore, he disagreed with Justice Kagan's contention that alien removal proceedings require the strongest form of the void-for-vagueness doctrine. Rather, Justice Gorsuch believed that all cases, both civil and criminal, require a heightened standard.[274]

According to Justice Gorsuch, the void-for-vagueness doctrine is a key part of separation of powers because it prevents the merging of the Legislative and Judicial Branches.[275] To Justice Gorsuch, judicial power extends only to events, not future conduct.[276] Vague phrases abdicate the responsibility of the legislature, transfer legislative power to police and prosecutors through enforcement decisions, and avoid public debate among legislative representatives.[277] Furthermore, Justice Gorsuch believed that combining judicial and legislative power is dangerous.[278] According to him, vague laws can create arbitrary power, such as the crime of treason in English law.[279]

273. *See id.* at 1233 (Gorsuch, J., concurring in part and concurring in the judgment) ("While I remain open to different arguments about our precedent and the proper reading of language like this, I would address them in another case . . . .").

274. *See id.* at 1229 ("[A]ny suggestion that criminal cases warrant a heightened standard of review does more to persuade me that the criminal standard should be set above our precedent's current threshold than to suggest the civil standard should be buried below it.").

275. *See id.* at 1227 ("[I]f the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large[,][t]his would, to some extent, substitute the judicial for the legislative department of government." (alteration in original) (quoting Kolendar v. Lawson, 461 U.S. 352, 358 n.7 (1983)) (internal quotation marks omitted)).

276. *See id.* ("That power does not license judges to craft new laws to govern future conduct, but only to 'discer[n] the course prescribed by law' as it currently exists and to 'follow it' in resolving disputes between the people over past events." (alteration in original) (quoting Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 866 (1824))).

277. *See id.* at 1227–28 ("Nor is the worry only that vague laws risk allowing judges to assume legislative power. Vague laws also threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions." (citing Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972))).

278. *See id.* at 1228 (quoting Jordan v. De George, 341 U.S. 223, 242 (1951) (Jackson, J., dissenting)) (explaining the risks involved in handing lawmaking authority to judges and prosecutors).

279. *Id.* at 1223.

From a hermeneutic perspective, Justice Gorsuch's concern with the separation of powers doctrine should not be understood as pedantic fidelity to the American structure of government. Rather, it reflects much deeper prejudices. We must look beyond the broad rhetorical statements about the abdication of responsibility and Justice Gorsuch's questionable statement about the judiciary only being concerned with the past while simultaneously establishing precedent. Within the separation of powers discussion, Justice Gorsuch revealed one of his core prejudices—governmental persecution of political enemies. As such, he wrote that vague laws make it easier for the executive to persecute opponents, like the English King putting those he disliked to death for treason.[280] Justice Gorsuch's skepticism of executive discretion makes him engage in a hermeneutic dialogue with § 16(b) and conclude that it is the judiciary's responsibility to prevent excessive executive discretion to avoid the coalescence of judicial and legislative powers.

While Justice Gorsuch expressed limited agreement with Justice Thomas's abandonment of the ordinary case method, he could not accept the ultimate fact-based solution because the Government never made the argument and there were better alternative interpretations.[281] For example, he suggested that courts could apply § 16(b) only when the crime always involved physical force.[282] It remains unclear whether such a standard could exist because, from a basic grammatical reading, the word "risk" in § 16(b) directly contradicts the words "automatic" or "inevitable." Nonetheless, Justice Gorsuch left open the possibility that some other standard might be presented in future cases.[283]

Further, Justice Gorsuch took issue with Justice Thomas's claim that vagueness was not based on the Constitution as originally understood, explaining that it "serves as a faithful expression of ancient due process and separation of powers principles," which were core tenets for the Framers.[284] Justice Gorsuch explained that the words "without due process of law," found in the Fifth and Fourteenth Amendments, meant that the people

280. *See id.* ("Vague laws invite arbitrary power. Before the Revolution, the crime of treason in English law was so capaciously construed that the mere expression of disfavored opinions could invite transportation or death.").

281. *Cf. id.* at 1232 ("I have done so because no party before us has argued for a different way to read these statutes in combination . . . .").

282. *Id.* at 1233 (citing 10 OXFORD ENGLISH DICTIONARY 247 (2d ed. 1989)).

283. *Id.*

284. *Id.* at 1224.

were entitled to the "customary procedures to which freemen were entitled by the old law of England."[285] His claim rejected Justice Thomas's argument that due process simply refers to whatever procedures the government is willing to tolerate.[286] Likewise, Justice Gorsuch rejected Justice Thomas's claim that, around the time of the United States' founding, aliens lacked due process rights. First, he dismissed the reference to the Alien Friends Act, which was oppressive toward aliens, as a historical anomaly.[287] Second, he explained that when Congress extends rights to new classes of people, they cannot be removed without due process, drawing a parallel between property rights and permanent residency.[288]

Drawing on Justice Thomas's historical theme, Justice Gorsuch argued for a more expansive view of due process than the majority. In particular, he observed that—to give fair notice—the common law required criminal indictments to provide "precise and sufficient certainty."[289] To illustrate the point that this requirement applied to statutes as well, Justice Gorsuch referenced a historical felony statute that was held unconstitutional because it failed to provide fair notice.[290] The statute prohibited the "stealing [of] sheep or other cattle"; yet, it did not explain what "cattle" included, meaning it "failed to provide adequate notice about what it did and did not cover."[291] Justice Gorsuch further noted that in both old English and early American laws, the requirement for proper notice applied to minor crimes and civil

285. *Id.* (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 28 (1991) (Scalia, J., concurring in the judgment)) (internal quotation marks omitted).

286. *See id.* ("Admittedly, some have suggested that the Due Process Clause does less work than this, allowing the government to deprive people of their liberty through whatever procedures (or lack of them) the government's current laws may tolerate." (citing *Dimaya*, 138 S. Ct. at 1243 n.1 (Thomas, J., dissenting))).

287. *See id.* at 1229 (describing the Alien Friends Act as "a temporary war measure, not one that the legislature would endorse in a time of tranquility" (citing Gregory Fehlings, *Storm on the Constitution: The First Deportation Law*, TULSA J. COMPAR. & INT'L L. 63, 70–71 (2002))).

288. *See id.* at 1230 ("Whether Madison or his adversaries had the better of the debate over the constitutionality of the Alien Friends Act, Congress is surely free to extend existing forms of liberty to new classes of persons—liberty that the government may then take only after affording due process." (citing Sandin v. Conner, 515 U.S. 472, 477–78 (1995))).

289. *Id.* at 1225 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *301) (internal quotation marks omitted).

290. *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *88).

291. *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *88) (internal quotation marks omitted).

cases, even in situations where the penalties were modest.[292] He then pointed out that while these courts "spoke in terms of construing vague laws strictly rather than declaring them void," voiding laws was often what they did.[293]

Moving on from history, Justice Gorsuch argued that the Constitution does not tolerate vague laws since, without fair notice as a means to protect against arbitrary power, the Constitution would be reduced to paper.[294] Additionally, Justice Gorsuch looked to penumbras from the Fourth and Sixth Amendments to justify the void-for-vagueness doctrine.[295] Despite this holistic reliance on the Constitution, he believed that vagueness was a procedural rather than a substantive requirement of due process.[296]

With respect to the current standard of vagueness, Justice Gorsuch explained that if the ordinary case analysis was required for § 16(b), *Johnson* was sufficient to find the statute unconstitutionally vague.[297] Justice Gorsuch reached this conclusion by presenting similar hypotheticals as the majority:

> Does a conviction for witness tampering ordinarily involve a threat to the kneecaps or just the promise of a bribe? Does a conviction for kidnapping ordinarily involve throwing someone into a car trunk or a noncustodial parent picking up a child from daycare? . . . Is the court supposed to hold evidentiary hearings to sort them out, entertaining experts with competing narratives and statistics, before deciding what the ordinary case of a given crime looks like and how much risk of violence it poses? What is the judge to do if there aren't any reliable statistics available? Should (or must) the judge predict the effects of new technology on what qualifies as the ordinary case? After all, surely the risk of injury calculus for crimes like larceny can be expected to change as more thefts are committed by computer rather than by gunpoint. Or instead of requiring real evidence, does the statute mean to just leave it all to a judicial hunch? And on top of all that may be the most difficult question yet: at what

292. *Id.* at 1226 (first citing McJunkins v. State, 10 Ind. 140, 145 (1858); then citing Drake v. Drake, 15 N.C. (4 Dev.) 110, 115 (1833); and then citing Commonwealth v. Bank of Pa., 3 Watts & Serg. 173, 177 (Pa. 1842)).

293. *Id.* at 1226–27 (citing Johnson v. United States, 576 U.S. 591, 613–15 (2015)).

294. *Id.* at 1227 (citing THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961)).

295. *See id.* (explaining how the Fourth and Sixth Amendments "presuppose and depend on the existence of reasonably clear laws").

296. *Id.* at 1233.

297. *See id.* at 1231 (comparing the similarities between § 16(b) and the statute in *Johnson*, concluding they are similar enough that both are unconstitutionally vague).

> level of generality is the inquiry supposed to take place? Is a court supposed to pass on the ordinary case of burglary in the relevant neighborhood or county, or should it focus on statewide or even national experience? How is a judge to know? How are the people to know?[298]

Justice Gorsuch lamented the uselessness of traditional canons of statutory interpretation, as textual, structural, and historical analyses could not resolve § 16(b)'s vagueness.[299] However, Justice Gorsuch appeared to narrow the scope of his opinion by noting that there was not a "preexisting body of law" to help guide the judiciary.[300] This reference appeared to limit his opinion's usefulness in challenging other vague laws, particularly the previously upheld standard relating to a "crime involving moral turpitude," as discussed in the oral arguments.[301] Finally, Justice Gorsuch clarified that his opinion is only related to the "residual clause" of § 16(b) and not the specific list of § 16(a).[302]

Considering the hermeneutic significance of Justice Gorsuch's opinion, we can extract several core concerns that go beyond the Constitution, the common law, and the text. As discussed above, Justice Gorsuch demonstrated concern with uncontrolled executive discretion and the potentially deadly consequences of allowing vague legislation. Second, he concluded that the void-for-vagueness doctrine was so fundamental that it was embedded in the Constitution despite not being explicitly enumerated, rejecting historical deprivations as anomalous rather than the general rule. Finally, Justice Gorsuch's concern about the geographical limits of an ordinary case, which he discussed in the October oral arguments, was included in his concurrence, demonstrating that his concern continued throughout his deliberation.

Further, Justice Gorsuch had a strong concern about the Executive Branch's ability to persecute its political opponents. He made this explicit by referencing England's treason prosecutions. Also, Justice Gorsuch had a latent concern about executive corruption or incompetence. He illustrated

298. *Id.* at 1232.

299. *See id.* ("You cannot discern answers to any of the questions this law begets by resorting to the traditional canons of statutory interpretation. No amount of staring at the statute's text, structure, or history will yield a clue.").

300. *Id.*

301. January Argument, *supra* note 202, at 31–33; October Argument, *supra* note 211, at 15–16.

302. *Dimaya*, 138 S. Ct. at 1233 (Gorsuch, J., concurring in part and concurring in the judgment) ("Our ruling today does not touch this list. We address only the statute's 'residual clause' where Congress ended its own list and asked us to begin writing our own.").

this by referencing the cattle statute. Perhaps local officials understood that the law only included specific animals, but they may have used the vague definition to harass or threaten some with severe criminal penalties. Finally, Justice Gorsuch's concern about racial discrimination may have influenced his decision. However, this concern—to the extent it existed—was presented less explicitly than Justice Kagan. Overall, Justice Gorsuch relied on a negotiation of values and prejudices to void a law that he regarded as nonsensical and dangerous.

E. *Chief Justice Roberts's Dissent*

In dissent, Chief Justice Roberts argued that § 16(b) was not unconstitutionally vague, even under the heightened criminal standard.[303] At its core, his opinion advanced that *Dimaya* was more similar to *Leocal v. Ashcroft*[304] than *Johnson*.[305] It is worth noting that there are significant differences between these cases. First, *Johnson* was decided eleven years after *Leocal*. Second, in *Leocal*, the Court concluded that driving under the influence (DUI) was not a "crime of violence" under § 16(b) without considering whether it was unconstitutionally vague.[306] And finally, *Leocal* and *Dimaya* involved § 16(b), while *Johnson* dealt with the Armed Career Criminal Act of 1984 (ACCA).[307]

Despite *Leocal* avoiding § 16(b)'s vagueness, Chief Justice Roberts believed that it helped his case.[308] According to the Chief Justice, *Leocal* set forth the elements of DUI, then concluded the elements did not create the minimum risk of force required by § 16(b).[309] Having established this basic premise, he carefully distinguished *Johnson* from *Dimaya*.

First, he contended that the ACCA used "potential risk" rather than "substantial risk," which, in his reckoning, "forced courts to assess in an expansive way the 'collateral consequences' of the perpetrator's acts."[310] By

303. *See id.* at 1234 (Roberts, C.J., dissenting) ("Because § 16(b) does not give rise to the concerns that drove the Court's decision in *Johnson*, I respectfully dissent.").

304. Leocal v. Ashcroft, 543 U.S. 1 (2004).

305. *See Dimaya*, 138 S. Ct. at 1235 (Roberts, C.J., dissenting) ("The Court holds that the same provision we had no trouble applying in *Leocal* is in fact incapable of reasoned application.").

306. *Leocal*, 543 U.S. at 4.

307. Johnson v. United States, 576 U.S. 591, 593 (2015).

308. *See Dimaya*, 138 S. Ct. at 1235 (Roberts, C.J., dissenting) ("*Leocal* thus provides a model for how courts should assess whether a particular crime 'by its nature' involves a risk of the use of physical force.").

309. *Id.* (quoting *Leocal*, 543 U.S. at 7).

310. *Id.* at 1236.

contrast, § 16(b) "call[ed] for a commonsense inquiry" limited to the elements of the offense.[311] Second, Chief Justice Roberts argued that the ACCA covered all offenses where "injury will result," while § 16(b) more narrowly applied to the use of physical force against another's person or property.[312] Third, he argued that § 16(b)'s use of "in the course of committing the offense" limited its scope, contrasting with the ACCA's broad language.[313]

Also, the ACCA was tied to a list of paradigm offenses through the word "otherwise," which made it even more confusing.[314] To illustrate this point, the Chief Justice called back to the Court's analysis in *Johnson*: "[A]s *Johnson* put it . . . , '[t]he phrase "shades of red," standing alone, does not generate confusion or unpredictability; but the phrase "fire-engine red, light pink, maroon, navy blue, or colors that otherwise involve shades of red" assuredly does so.'"[315] Chief Justice Roberts rejected the majority's solution of ignoring the list of examples since that would improperly expand the scope of the statute.[316] Finally, he explained that, in *Johnson*, the ordinary case method would have been insufficient to render the ACCA unconstitutionally vague.[317]

His primary focus on grammatical arguments appears detached and objective, as Chief Justice Roberts focused on the linguistic differences between the statutes to conclude that *Johnson* did not affect § 16(b). However, this technical reading remains substantively unpersuasive because it focuses on the mechanics of grammar while ignoring vagueness. This disingenuous strategy intentionally missed the more fundamental problem. As such, the majority stated that Chief Justice Roberts was "slicing the baloney mighty thin" by distinguishing between "serious potential risk" and "substantial risk."[318] Effectively, the textual comparison in Chief

311. *Id.*

312. *Id.* (emphasis omitted) (quoting *Leocal*, 543 U.S. at 10, n.7).

313. *See id.* at 1237 (internal quotation marks omitted) ("The 'substantial risk' of force must arise 'in the course of committing the offense.' . . . The ACCA residual clause, by contrast, contained no similar language restricting its scope." (quoting 18 U.S.C. § 16(b))).

314. *Cf. id.* at 1239 ("The 'substantial risk' standard in § 16(b) is significantly less confusing because it is not tied to a disjointed list of paradigm offenses.").

315. *Id.* at 1240 (alterations in original) (emphasis omitted) (quoting Johnson v. United States, 576 U.S. 591, 603 (2015)).

316. *Id.*

317. *Id.* at 1241.

318. *Id.* at 1215 (majority opinion).

Justice Roberts's dissent failed to address the underlying negotiation of prejudices undertaken to reach his conclusion.

However, a much less detailed part of his opinion presented a more practical reason motivating his dissent: the perceived need to remove dangerous aliens and to maintain the structure of federal criminal law in other areas. Specifically, Chief Justice Roberts was concerned that § 16(b)'s "language [was] incorporated into many . . . provisions of criminal law, including . . . racketeering, money laundering, domestic violence, using a child to commit a violent crime, and distributing information about the making or use of explosives."[319] Justice Alito voiced this practical concern in both oral arguments.[320]

F. *Justice Thomas's Joint Dissent*

In Justice Thomas's dissent, the parts joined by Justices Kennedy and Alito are, on their surface, simple arguments for replacing the categorical approach with the underlying-conduct approach, thereby avoiding the vagueness doctrine. Justice Thomas began by referencing First Amendment cases, which held that "a challenger must prove that the statute is vague as applied to him."[321] Then, Justice Thomas explained that § 16(b) was not vague as applied to Dimaya's burglary.[322] Additionally, burglaries were unanimously considered crimes of violence.[323] Despite the majority's contention that only 7% of burglaries are violent, Justice Thomas noted that § 16(b) only requires a risk of violence, which includes property damage.[324]

Next, Justice Thomas explained that the categorical approach created the same Sixth Amendment problem it attempted to avoid, as "a defendant has the right to have a jury find 'every fact that is by law a basis for imposing or

319. *Id.* at 1241 (Roberts, C.J., dissenting) (citing 18 U.S.C. §§ 25(a)(1), 842(p)(2), 1952(a), 1956(c)(7)(B)(ii), 1959(a)(4), 2261(a), 3561(b)).

320. *See* January Argument, *supra* note 202, at 20 (wondering the implications of holding § 16(b) unconstitutional); *cf.* October Argument, *supra* note 211, at 36 ("I mean, we might do—we might do a wonderful job of pruning the United States Code if we said that every civil statute that is not written with the specificity that is required by criminal statute is unconstitutionally vague . . . .").

321. *Dimaya*, 138 S. Ct. at 1250 (Thomas, J., dissenting) (first citing Holder v. Humanitarian L. Project, 561 U.S. 1, 18–19 (2010); then citing United States v. Williams, 553 U.S. 285, 304 (2008); then citing Maynard v. Cartwright, 486 U.S. 356, 361 (1988); and then citing Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., 455 U.S. 489, 495 & n.7 (1982)).

322. *Id.*

323. *Id.* (quoting United States v. Pinto, 875 F.2d 143, 144 (7th Cir. 1989)).

324. *Id.* at 1251–52.

increasing punishment,' including the fact of a prior conviction."[325] Further, the categorical approach created the very void-for-vagueness conundrum at issue in *Dimaya*.[326] Thus, according to Justice Thomas, the ordinary case approach, which was created to preserve the right to a jury, caused more problems than it was worth.[327]

Moreover, Justice Thomas explained that, in the immigration context, there is no Sixth Amendment right to a jury trial.[328] Even in criminal cases, the constitutional concerns could be resolved "if the Government included the defendant's prior conduct in the indictment, tried it to a jury, and [then] proved it beyond a reasonable doubt."[329] Next, Justice Thomas appealed to the constitutional avoidance canon, arguing a sentencing court need only understand the nature of the prior conviction rather than re-litigate the conviction itself.[330] Importantly, he noted this approach was already successfully implemented in the immigration context.[331]

Justice Thomas also made a textual argument for employing the underlying conduct approach over the ordinary case method. Section 16(b)'s reference to "'by its nature,' 'substantial risk,' and 'may'" was consistent with the underlying conduct method and should not "refer to the metaphysical 'nature' of the offense."[332] Rather, those keywords "mean only that an offender who engages in risky conduct cannot benefit from the fortuitous fact that physical force was not actually used during his offense."[333] Furthermore, "[t]he word 'involves' suggests that the offense

325. *Id.* at 1253 (quoting Apprendi v. New Jersey, 530 U.S. 466, 501 (2000) (Thomas, J., concurring)).

326. *Id.* ("The categorical approach was an 'unnecessary exercise,' I explained, because it created the same Sixth Amendment problem that it tried to avoid." (quoting James v. United States, 550 U.S. 192, 231 (2007) (Thomas, J., dissenting) (internal quotation marks omitted))).

327. *Cf. id.* (arguing "the ordinary-case approach soon created problems of its own," meaning the Court should abandon its application).

328. *See id.* at 1256 ("But even assuming the categorical approach solved this Sixth Amendment problem in criminal cases, no such problem arises in immigration cases.").

329. *Id.* at 1256–57 (citing Johnson v. United States, 576 U.S. 591, 634 (2015) (Alito, J., dissenting)).

330. *Id.* at 1257 (quoting Nijhawan v. Holder, 557 U.S. 29, 42 (2009)).

331. *See id.* at 1257–58 (finding immigration judges are already instructed "to determine such conduct based on 'any evidence admissible in removal proceedings,' not just the elements of the offense or the record of conviction" (quoting *In re* Babaisakov, 24 I. & N. Dec. 306, 307 (B.I.A. 2007))).

332. *Id.* at 1254.

333. *Id.*

must *necessarily* include a substantial risk of force."[334] To support this proposition, Justice Thomas noted that "the other aggravated felonies . . . that use the word 'involves' employ the underlying conduct approach."[335] Finally, he argued that since § 16(a) listed the specific elements of the crimes, its language must cover something more to avoid redundancy.[336] Thus, the underlying-conduct approach must apply.[337]

Justice Thomas ended his joint dissent by addressing a problem that none of the litigants raised: the application of the ordinary case method to § 16(b).[338] Furthermore, the Government's use of the categorical approach was not merely an oversight. In the October argument, Justice Ginsburg expressly asked the Government why "a crime of moral turpitude" was not pursued as an alternative deportation ground.[339] The Government answered that it was not pursued "because the immigration [J]udge did not apply the categorical approach, which has since been determined to be the right way to look at crime involving moral turpitude."[340] Nonetheless, Justice Thomas explained that the Government's failure should not determine the case because they could have decided it on other grounds, avoiding the vagueness issue.[341] Finally, he dismissed any argument for stare decisis because, according to him, the majority overruled *Leocal* in reaching its decision.[342] Justice Thomas also reiterated his concern that the Court's ruling would "lead[] to the invalidation of scores of similarly worded state and federal statutes."[343]

Viewed from a hermeneutic perspective, Justice Thomas's prejudice was for an outcome that preserved public safety and resulted in the deportation of criminals, as he was not overly concerned with due process rights.

334. *Id.* at 1255 (first citing THE NEW OXFORD DICTIONARY OF ENGLISH 962 (2001); then citing RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1005 (2d ed. 1987); and then citing OXFORD AMERICAN DICTIONARY 349 (1980)).

335. *Id.* (citing 8 U.S.C. § 1101(a)(43)(M)(i)).

336. *Id.* at 1256.

337. *See id.* (concluding the underlying conduct approach must apply because it was the only "workable" option).

338. *See id.* at 1258.

339. October Argument, *supra* note 211, at 30–31.

340. *Id.* at 31.

341. *See Dimaya*, 138 S. Ct. at 1258 (Thomas, J., dissenting) ("This Court's 'traditional practice' is to 'refus[e] to decide constitutional questions' when other grounds of decision are available, 'whether or not they have been properly raised before us by the parties.'" (alteration in original) (citing Neese v. S. Ry. Co., 350 U.S. 77, 78 (1955))).

342. *Id.*

343. *Id.* at 1259.

Accordingly, he approached § 16(b) by considering whether its elimination would allow dangerous felons to remain in the United States. When his prejudice clashed with § 16(b)'s language, Justice Thomas negotiated within the text's horizon, seeking alternative interpretations to achieve his preferred outcome. However, the text was not persuasive enough to overcome his preconception. Yet, through this engagement, Justice Thomas modified his interpretation, satisfying his desire for justice while allowing the text to express itself in a satisfactory manner.[344]

G. *Justice Thomas's Dissent*

The portion of Justice Thomas's dissent where he speaks only for himself contains three main arguments: (1) the vagueness doctrine is inconsistent with the original meaning of due process; (2) aliens are not entitled to use the vagueness doctrine to fight deportation; and (3) § 16(b) does not raise a separation of powers problem.[345] After making these arguments, Justice Thomas contended that the void-for-vagueness doctrine should be applied on a case-by-case basis, similar to lenity in the antebellum period—where courts would refuse to give effect to a law rather than striking it down in its entirety.[346] Alternatively, even if vagueness continued, laws should not be regarded as facially vague if they have an "unmistakable core that a reasonable person would know is forbidden."[347] According to Justice Thomas, both the ACCA and § 16(b) fulfill this core notice requirement.[348] To better understand how Justice Thomas's interpretation of the vagueness doctrine differed from the rest of the Court, we will take each significant departure in turn.

344. *See* HEGEL, *supra* note 2, at 6 (explaining how, for a work to have existence in actuality, others will seek to experience it and turn it into their work, such that consciousness will experience both the individual author and all the individuals within the work); *see also* GADAMER, *supra* note 1, at 423 (noting it is through the process of understanding that the interpreter becomes incorporated within the object of interpretation).

345. *Dimaya*, 138 S. Ct. at 1242, 1245, 1248 (Thomas, J., dissenting).

346. *See id.* at 1250 ("If the vagueness doctrine has any basis in the original meaning of the Due Process Clause, it must be limited to case-by-case challenges to particular applications of a statute. That is what early American courts did when they applied the rule of lenity." (citing Johnson v. United States, 576 U.S. 591, 613 (2015) (Thomas, J., concurring in the judgment))).

347. *Id.* at 1252 (quoting City of Chicago v. Morales, 527 U.S. 41, 112 (1999) (Thomas, J., dissenting)) (internal quotation marks omitted).

348. *Id.*

First, Justice Thomas believed that the original meaning of due process was extremely limited.[349] He followed the "law of the land" view, which merely required some constitutional or statutory authority "before depriving someone of life, liberty, or property."[350] While he recognized that "the Court rejected this view" in 1856, he believed there remained textual and historical support because there was little evidence of vagueness being used to nullify laws before the nineteenth century.[351] The historical approach was to "invoke[] the rule of lenity and decline[] to apply vague penal statutes on a case-by-case basis."[352] While "early American courts declined to apply vague or unintelligible statutes as appropriate in individual cases, they did not wholesale invalidate them as unconstitutional delegations of legislative power."[353] The lenity approach was narrow, used only for penal statutes, and was eventually abrogated.[354] However, the broader void-for-vagueness doctrine, emerging at the same time as substantive due process, was broadly used to invalidate laws.[355] Consequently, the vagueness doctrine is another form of "constitutionaliz[ing] rules that were traditionally left to the democratic process."[356]

Second, Justice Thomas made a textual argument, contending the separation of powers and non-delegation doctrines do not reside in the Due Process Clause but "in the Vesting Clauses of Articles I, II, and III."[357]

349. *See id.* at 1242 ("The Due Process Clause requires federal statutes to provide certain minimal procedures . . . .").

350. *Id.* at 1242–43 (quoting Nelson v. Colorado, 137 S. Ct. 1249, 1264 n.1 (2017) (Thomas, J., dissenting)) (internal quotation marks omitted).

351. *Id.* at 1243 (citing Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855)).

352. *Id.* (citing Johnson v. United States, 576 U.S. 591, 611–14 (2015) (Thomas, J., concurring in the judgment)).

353. *Id.* at 1250 (citing *Johnson*, 576 U.S. at 613–16, 616 n.3 (Thomas, J., concurring in the judgment)).

354. *Cf. id.* at 1244 ("[L]enity is a tool of statutory construction, which means States can abrogate it—and many have." (first citing Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 752–54 (1935); and then citing Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 582 (1989))).

355. *Id.* (citing *Johnson*, 576 U.S. at 615 (Thomas, J., concurring in the judgment)).

356. *Id.* (first citing Williams v. Pennsylvania, 579 U.S. 1 (2016); then citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996); then citing Foucha v. Louisiana, 504 U.S. 71 (1992); and then citing Montgomery v. Louisiana, 577 U.S. 190 (2016)).

357. *Id.* at 1248 (first citing Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 67–68 (2015) (Thomas, J., concurring in the judgment); and then citing Hampton v. Mow Sun Wong, 426 U.S. 88, 123 (1976) (Rehnquist, J., dissenting)). 358. *Id.* (citing *Ass'n of Am. R.Rs.*, 575 U.S. at 68 (Thomas, J., concurring in the judgment)).

Furthermore, Dimaya did not argue that § 16(b) was an improper delegation of power, and Justice Thomas explained a proper reading of § 16(b) would be that it "merely authorizes the Executive Branch to exercise a power it already has."[358] Namely, the power to deport aliens.[359] Justice Thomas also answered the concern that tasking the courts with interpreting meaningless laws wrongfully delegates legislative power to the judiciary.[360] In response, Justice Thomas pointed to the Founder's understanding that the interpretation of vague texts was "an exercise of core judicial power."[361] Additionally, courts were to clarify vague terms as they arose in specific cases.[362] In early United States cases, even if courts declined to interpret an unintelligible statute, "they did not wholesale invalidate them as unconstitutional delegations of legislative power."[363]

Finally, Justice Thomas argued aliens are not entitled to the vagueness doctrine or even due process rights when challenging deportation proceedings.[364] Justice Thomas arrived at this conclusion based on the Alien Friends Act.[365] In this regard, he noted the Federalists argued that deporting aliens did not implicate life, liberty, or property.[366] Furthermore, Justice Thomas acknowledged that the vagueness doctrine did not apply in immigration cases until 1950, and even there, the challenged statute was found to be constitutional.[367]

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358. *Id.* (citing *Ass'n of Am. R.Rs.*, 575 U.S. at 68 (Thomas, J., concurring in the judgment)).

359. *See id.* at 1249 ("[T]here is some founding-era evidence that 'the executive Power' includes the power to deport aliens." (citation omitted) (quoting U.S. CONST. art. II, § 1)).

360. *See id.* ("[A] statute could be so devoid of content that a court tasked with interpreting it 'would simply be making up a law—that is, exercising legislative power.'" (quoting Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 339 (2002))).

361. *Id.* at 1249–50 (first citing Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 117–20 (2015) (Thomas, J., concurring in the judgment); and then citing Phillip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 303–10 (1989)).

362. *See id.* at 1250 ("Courts were expected to clarify the meaning of such texts over time as they applied their terms to specific cases." (first citing Hamburger, *supra* note 361, at 308–09; and then citing Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 526 (2003))).

363. *Id.* (citing Johnson v. United States, 576 U.S. 591, 613–17, 616 n.3 (2015) (Thomas, J., concurring in the judgment)).

364. *See id.* at 1245 ("Even assuming the Due Process Clause prohibits vague laws, this prohibition might not apply to laws governing the removal of aliens." (citing *Johnson*, 576 U.S. at 621 n.7 (Thomas, J., concurring in the judgment))).

365. *Id.*

366. *Id.* at 1246–47.

367. *See id.* at 1247 ("[F]or more than a century after the founding, it was, at best, unclear whether federal removal statutes could violate the Due Process Clause. And until today, this Court had never deemed a federal removal statute void for vagueness.").

Justice Thomas's reasoning is extraordinarily interesting from a hermeneutic perspective. Chiefly, he relied on nineteenth-century law to support his conclusions. This period of American history included slavery, discrimination, and countless other abuses abhorrent in contemporary society. By drawing inspiration from a historical period punctuated by institutionalized discrimination, Justice Thomas narrowed the horizon of the question. Since the horizon did not recognize discriminatory enforcement, he operated under a much narrower framework.

One of the problems with Justice Thomas's reasoning is that § 16(b) was written by a more recent legislature for use and interpretation in contemporary times, making discrimination a relevant consideration for statutory construction, irrespective of the Due Process Clause's history. To resolve this concern, Justice Thomas bifurcated his interpretation, limiting the interpretation of § 16(b) to the immigration judge and the Constitution to its Framers.

VII. HERMENEUTICS: FUNDAMENTAL QUESTION OF APPLICATION

Every law must be interpreted in a manner consistent with the interpreter's sense of fairness. This realistic constraint returns our discussion to the methodology of hermeneutics, which is inherent in the interpretation of laws. Gadamerian hermeneutics is the negotiation of meaning between the interpreter and the text. Several conclusions from the discussion above illustrate this principle. First, the original intent of the lawmaker is irrelevant. Second, the role of external review is to create new dialogue rather than to fix mistakes. Third, *bildung* forms a core component of legal interpretation. The following discussion explains this process in practice.

A. *The Three Conclusions*

First, the original intent of the drafters is irrelevant. The problem of focusing on their intent is well illustrated by the top-down model. For example, when courts conduct rational basis review to ferret out legislative animus, they assume that all laws are constitutional unless the lawmakers had bad intentions. However, this approach drives Schleiermacher's technical interpretation to absurdity.[368] In contrast, a Hegelian or Gadamerian approach would blame bad laws on the judges who interpret

368. *See* SCHLEIERMACHER, *supra* note 11, at 162 ("Reconstructing the overall coherence of the text is not completed until all details are treated.").

them. The blame must rest with the interpreters because—after realizing the laws are bad—they apply them anyway.[369] In other words, judges cannot absolve themselves of responsibility by "wash[ing] [their] hands" of the injustices being committed.[370] If interpreters do not approve of laws, they cannot simultaneously find them unjust and execute them.

This constraint was also observed by Roscoe Pound. In his own words: "In a developed legal system when a judge decides a cause he seeks, first, to attain justice in that particular cause, and second, to attain it in accordance with law . . . ."[371] Pound noted that this basic fact was often denied in the 1800s, as many believed judges should apply facts to a defined legal formula, obtaining a mechanically correct result; yet, this approach was never used in practice.[372] Nonetheless, Pound identified numerous cases where judges recognized the law demanded an inapposite result.[373] However, sacrificing an individual case for the greater principle is ultimately untenable, as a series of similar sacrifices will eventually undermine the principle itself.[374] In either case, the law is effectively bound to contemporary morality or values: "Current moral ideas are drawn upon continually, although seldom consciously. Usually they play their most important role in the process of interpretation."[375] Accordingly, Pound concluded that, since culture and values are integrated in the interpretation, judges should engage in self-reflection and explain "whereto they decide causes and whence their details are derived; if we induce the self-examination that will for the most part show them how far they may act upon these ideal pictures with assurance."[376]

Second, the role of external review is to create new dialogue rather than fix mistakes. Internal review creates a unified final decision (even in split

369. Compare this observation to the often repeated and celebrated quote from the Supreme Court: "I think it appropriate to emphasize the distinction between constitutionality and wise policy. . . . But as I recall my esteemed former colleague, Thurgood Marshall, remarking on numerous occasions: 'The Constitution does not prohibit legislatures from enacting stupid laws.'" N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 209 (2008) (Stevens, J., concurring).

370. *Matthew* 27:24 (King James) ("When Pilate saw that he could prevail nothing, but that rather a tumult was made, he took water, and washed his hands before the multitude, saying, I am innocent of the blood of this just person: see ye to it.").

371. Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV 940, 940 (1923).

372. *Id.* at 940, 942.

373. *See id.* at 942 (recognizing judges "struggled painfully . . . to unshackle the law from [mechanical] decisions and their consequences").

374. *Id.*

375. *Id.* at 948.

376. *Id.* at 958.

judicial opinions), as the majority sets a specific rule based on the relevant hermeneutic dialogue. An additional layer of review within the same structure may fix mechanical mistakes but fails to test prejudices between two distinct organizations. This phenomenon is illustrated when courts and agencies, each having final responsibility for the interpretation, clash with one another.

As this Article contends, bottom-up interpretations cause similar clashes between the Executive, Legislative, and Judicial Branches because of overlapping interpretive authority. In the mezzanine and top-down approaches, there are similar clashes between the Supreme Court, state courts, and agencies. In *Dimaya*, we observed a highly fragmented Court, predominantly using a top-down approach, but with several justices applying a mezzanine or bottom-up style of review. Although all addressed separation of powers, the majority believed courts and agencies were usurping legislative power, while the dissenting justices believed courts were arrogating executive authority.

Finally, acculturation stands as a core principle of interpretation because it has a direct effect on the prejudices of the interpreter. As observed in *Dimaya*, prejudices dominate when the text provides limited guidance outside the hermeneutic horizon. These prejudices form through individual life experiences and the cultural interaction of society. The merging of these concepts form the essence of Hegel's *Geist*.[377] Significant acculturation occurs in law school, including both behavioral acculturation, involving the adoption of external aspects of culture, and psychological acculturation, involving cultural ideologies.

The American Bar Association (ABA) recognized acculturation's significance through its reluctance to accredit foreign law schools.[378] In 2012, the ABA Council of the Legal Education Section rejected foreign accreditation with zero votes in favor, fifteen against, and two abstentions.[379] Notably, the rejected policy would have merely allowed the accreditation of foreign law schools that imitated their United States counterparts.[380] Despite efforts by a famous Chinese University, Peking University of Transnational Law, the ABA recognized that "it would be

377. *See* HEGEL, *supra* note 2, at 177 (describing how *Geist* moves, transforms, and co-exists as both an individual consciousness and a community so that elements of each fold into one another).

378. Mark Hansen, *Final Call: Section Won't Accredit Non-U.S. Law Schools, but Foreign Lawyers Can Be Admitted*, ABA J., Oct. 2012, at 62, 62.

379. *Id.*

380. *Id.*

difficult to acculturate students educated at foreign law schools in the culture, values[,] and ethics of the American legal system."[381] This observation linked acculturation with the ability to interpret and practice law. Furthermore, as the ABA did not consider academic standards, it necessarily determined that the importance of acculturation was paramount.

B. *The Foreign and Domestic Scholar*

To uncover how an interpreter can declare behavior unlawful, one must bifurcate the problem into the following questions. First, how would a foreign scholar—coming from a distinct tradition and culture—interpret a California statute? Second, how would a Californian interpreter analyze a general or residual clause?

In responding to the first question, it is tempting to guess that the foreign scholar would interpret it without reference to the underlying material. However, this is too simplistic an understanding, as the foreign scholar is a legal scholar, not a fiction writer.

The horizon of the interpretation is set by the question posed to the text. As an example, if we assume that the statute comports with California's concepts of fairness, the foreign scholar would ask: How do I apply California's understanding of fairness to obtain a just result? The foreign scholar must believe the outcome is just because understanding is only complete if the outcome is reasonable—this is the resolution to Gadamer's hermeneutic circle. Without it, the foreign scholar would lack the commonality necessary to interpret the text.

Having established the need for a just result, the foreign scholar would enter the hermeneutic circle under a top-down approach, applying understandings and prejudices in light of values or sympathies. First, the foreign scholar would identify the just party. Then the foreign scholar would apply California law, determining whether it reinforces the scholar's judgment. In effect, the foreign scholar would form a prejudice in favor of one party, then test it against the law. If the law supports the prejudice, the foreign scholar will easily apply it. To borrow an insight from *Warren*: the

381. *Id.*; *see also* Carole Silver, *Globalization and the Monopoly of ABA-Approved Law Schools: Missed Opportunities or Dodged Bullets?*, 82 FORDHAM L. REV. 2869, 2891 n.95 (2014) (finding among the three reasons provided for not allowing certification of foreign law schools, reasons one and three are related to practical concern of efficient deployment of ABA resources, while the second is that "[i]t would be difficult, if not impossible, to acculturate students in foreign law schools in the culture, values, and ethics of the American legal system").

foreign scholar searched through the text believing the answer "must be in there somewhere."[382]

Alternatively, the foreign scholar's prejudice may not be supported by the law. In that case, the foreign scholar is faced with two separate questions. First, is the prejudice correct despite being challenged? Second, if the foreign scholar follows the prejudice, ignoring the text, how will the scholar justify this decision?

With respect to the first question, the foreign scholar is engaged in the hermeneutic process of questioning the text. Ideally, the prejudice will yield, merging the scholar's horizon with the text. This merging replaces the scholar's prejudices with new ones. That is, the foreign scholar undergoes *bildung*. Alternatively, the text may lack persuasiveness and flexibility, yet require a conflicting interpretation.

If the text fails to convince the foreign scholar, justice and the text are in direct conflict. On the one hand, the foreign scholar could conclude that justice is beyond the law's horizon. Hence, the mistake is in the horizon, which may be narrowed to avoid perceived injustice. For example, the foreign scholar may narrow the analysis to whether the plaintiff is in the proper jurisdiction or whether the defendant has monopolistic power. In other words, the scholar limits the horizon until reaching a technical, detached result. Under this approach, the foreign scholar risks inequity by distorting and perverting the law.

Alternatively, the foreign scholar may fight the law. But how can the foreign scholar justify replacing the text with personal prejudices? In this circumstance, the foreign scholar could try to force a round peg into a square hole, but this will likely damage both the peg and the hole.

At this point, we should take a brief detour and consider a neglected question underlying our foreign scholar's dilemma. Why would the law appear unjust despite the shared humanity across cultures? It is possible that the law is corrupt or that the foreign scholar merely fails to see its wisdom. Alternatively, the foreign scholar's perception may result from a language barrier or a distorted understanding of the local legal system. Thus, the foreign scholar may interpret a law that does not even exist.

Irrespective of whether the perceived injustice is actual or distorted, the foreign scholar engages in a similar analysis. For example, take a hypothetical criminal statute that defines burglary as: (1) entering a dwelling at night; (2) for the purpose of committing a felony therein. Assume the

382. Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1901 (2019).

foreign scholar misunderstood the prohibition, failing to include the second element. Without it, the law becomes nonsensical.

Faced with a nonsensical law, the foreign scholar would most likely reject the law and refuse its enforcement. However, if the foreign scholar lacks authority or the absurdity is less obvious, the scholar must either add an element or narrow the first to prevent injustice. In so doing, the foreign scholar will effectively draft a new law. However, the old law would provide the basic horizon. While the new law still relates to entering a dwelling, the horizon is narrowed to exclude benign entry. Thus, the two laws yield similar results because the unjust version sets the hermeneutic horizon. Accordingly, the foreign scholar's sense of justice should force a just result.

Despite achieving similar results, this issue deserves further explication. In the above example, the foreign scholar sets the horizon of the distorted law, concretizing it with a personal and communal sense of justice. While the new law's criminal prohibition may be different from the original, it still restricts wrongful behavior. However, not all distortions are harmless.

Taking another example, imagine the foreign scholar misunderstands domestic unfair competition law, only considering federal law while neglecting state law, civil procedure, and administrative law. Federal law sets a narrow horizon of enforcement under the Lanham Act for direct competitors,[383] a "direct purchaser" requirement for private enforcement of antitrust violations,[384] and no private enforcement under the Federal Trade Commission Act (FTCA).[385] Without considering state law, the horizon for these laws is impermissibly narrow, meaning the scholar enforces a new, distorted law that is insufficiently comprehensive in its scope. At this point, we must turn to the Californian interpreter and consider the legislative role of courts.

Now, imagine a Californian interpreter who lacks any legal guidance beyond a general clause, similar to Section 5 of the FTCA.[386] This hypothetical interpreter would know the value California attaches to

383. *See generally* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014) (holding a version of direct competition is required for Lanham Act claims, subject to very limited exceptions).

384. *See generally* Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019) (holding the direct purchaser requirement continues to exist in anti-trust law, so the monopolist cannot structure its internal organization to shield itself from deserving plaintiffs).

385. Baum v. Great W. Cities, Inc. of N.M., 703 F.2d 1197, 1208–09 (10th Cir. 1983).

386. *See* 15 U.S.C. § 45(a)(1) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.").

property, competition, and fairness, along with the rights and responsibilities of businesses. In combination, the Californian interpreter would make the relevant judgment, incorporating some modern principles of competition observed by the interpreter. Additionally, the judgment would incorporate the Californian interpreter's idiosyncratic and communal or acculturated sense of justice and the morphing of those to conform with the community. In effect, the interpreter's determination would be a mixture of the observation of law in practice and an estimation of both communal and personal values. Since the interpreter was acculturated in California, the results should be similar whether interpreting a general clause or a law containing highly detailed rules of decision. However, consideration of federalism and historicism changes this analysis.

While the Californian interpreter reflects many legal values, there are some distinctions that create gaps. The first gap relates to federalism. Namely, the federal portion of California laws comes from other regions, creating gaps between the interpreter and the sense of justice of outside scholars. Second, because there may not be a consensus at a law's adoption, the law is unlikely to match the interpreter's personal sense of justice, forcing a similar hermeneutic debate as that undertaken by the foreign scholar. Third, California law includes old principles, like business ethics and common law rules, that an interpreter may consider unjust. Although this may create differences that the Californian interpreter finds objectionable, the interpreter will likely have a relatively close horizon with the law.

In summary, the fundamental distinction between the Californian interpreter and the foreign scholar is between their horizons. The Californian interpreter is more likely to properly maintain the law's horizon, reducing the risk of distortion. The ultimate domination of the Californian interpreter's personal and communal sense of justice effectively eliminates the law's details. However, the horizon's distortion risks permitting odious behavior because the prohibition of such behavior may fall outside the horizon of the law. In this respect, understanding foreign law is valuable because it properly sets the scope for legal regulations. This is particularly important in the United States, where state law often incorporates federal law.[387]

387. *See generally* Jim Rossi, *Dynamic Incorporation of Federal Law*, 77 OHIO ST. L.J. 457 (2016) (discussing dynamic incorporation of federal law and its potential to exceed the intended scope of state legislatures).

The prior discussion yields a few additional points. First, it is easier for the Californian interpreter to arrive at a judgment without guidance from the law compared to a foreigner interpreting a detailed California law. Second, local prejudices hardly differ from community prejudices.

Professor Xie touched on the first point, noting that Chinese judges use general terms within the AUCL to avoid applying specific clauses and understanding the essence of the disputes.[388] This observation is predictable from a hermeneutic perspective. In our discussion of the foreign scholar struggling to apply California law, there is a conflict between the apparently unjust law and the scholar's sense of justice. Ideally, foreigners will resolve this struggle by meeting horizons and replacing their old prejudices with new ones. In effect, the dialogue will generate *logos*, transcending both the scholar and the text.[389] Therefore, the conflict or disequilibrium forces the foreign scholar to go beyond the individual and the text, creating a new understanding. By contrast, the Californian interpreter was not pressed in the same manner, engaging in self-reflection without confronting an adversarial text.

Second, a lack of guidance is unlikely to produce different judgments. This observation, albeit in tension with the first, may provide an additional implication. Namely, predictability does not justify highly detailed laws. Where interpreters fail to reach an agreement with laws, they will enforce their personal prejudices, either distorting or clarifying the texts.

This manipulation creates a continually expanding and distorted system. Professors Balganesh and Parchamovsky's three methods of changing common law, as discussed above, provide a sanitized example of this phenomenon.[390] While their discussion relates to common law, when the text appears to irreconcilably conflict with justice, their methods have similar implications for statutory law.

Overall, the convenience of legislating within the United States tends to produce a proliferation of new, highly detailed laws. However, the effectiveness of these laws comes from shared values rather than their innate power. This observation provides an additional implication for federalism

388. Xie Xiaoyao (谢晓尧), Fa Lü Wen Ben Zu Zhi Ji Shu De Fang Fa Wei Ji—Fan Si "Hu Lian Wang Zhuan Tiao" (法律文本组织技术的方法危机—反思"互联网专条") [Crisis of Methodology for Legal Texts Organization—Reflection on the "Internet Special Article"], Jiao A Fa Xue (交大法学) [SJTU L. REV.], no. 3, 2021, at 9, 9.

389. GADAMER, *supra* note 1, at 361.

390. *See* discussion *supra* pp. 493–94 (referencing Balganesh and Parchamovsky's methods of changing common law).

and globalism, as different populations often have different values. To the extent these differences are substantial, changes in wording would not resolve the fundamental cultural tension. Jurisdictional diversity may create counterintuitive systems and gaps between the values expounded by courts and the underlying reasoning by judges as they resolve disputes. *Dimaya* provided an illustrative example of this phenomenon.

VIII. CONCLUSION AND INSPIRATION

This Article outlined a dimensionally different method of analysis for legal opinions and texts. It was inspired by Gadamer and opposes Schleiermacher's traditional analytical method, which focuses on the grammatical insight gleaned from textual prose and augmented by legislative intent. The difference between Gadamer and Schleiermacher is profound in both the interpretation and evaluation of texts.

In the United States, this Article suggests the Supreme Court should simplify the method of declaring laws unconstitutional. The current structure applies different levels of scrutiny depending on whether the law is: (1) bad; (2) bad with discriminatory intent; or (3) bad insofar as it implicates a fundamental interest. This methodology is absurd considering the hermeneutic reality of interpretation. Rational basis review presumes laws are valid.[391] This standard forces courts to search for authorial animus to justify elimination of laws perceived to be unjust.[392] Alternatively, strict scrutiny looks for a compelling governmental interest and the narrow tailoring of the law to meet those interests.[393] This structure allows bad laws to exist, provided the governmental interest is sufficiently compelling. The last fifty years prove that this system is unworkable. From a hermeneutic perspective, no bad law should exist because it creates a contradiction—lawmakers create bad laws, and courts must enforce them. Taking such reasoning at face value reflects an unsatisfactory, despondent situation.

In China, the inspiration focuses on the effect of granting legislative authority to courts rather than legislative bodies or administrators. By granting such broad authority, the government builds a framework of unpredictability, as the inconsistent horizons of litigants and courts ensure

391. *See supra* Part V.A (recognizing the near-impossibility of finding laws unconstitutional under rational basis review).

392. *E.g.*, U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973) (finding authorial animus against hippies to hold the disputed law unconstitutional).

393. *See supra* Part IV (discussing strict scrutiny's development as a standard of review).

disparate results. As observed in this Article's introduction, the AUCL has vastly different meanings between scholars. Thus, an expectation of uniformity and predictability is misguided. China may consider centralizing enforcement or providing further legislative guidance to clarify the hermeneutic horizon. In so doing, courts retain flexibility while the government maintains uniformity and prevents statutory distortion.

Finally, I leave open the question of how hermeneutic prejudices and their negotiation are altered by attorneys or other texts. While this Article demonstrates that prejudices yield judgments of one form or another, this outcome may be undesirable to some. So, what can be done to alter them? When approaching legislation, the texts may be amended to obtain different results. However, the results may be changed by other means, as interpreters may modify their prejudices or change their methodology.

Admittedly, individual and societal prejudices are not easily changed. Likewise, interpretive methodologies are themselves a form of prejudice. Thus, attorneys and litigants often waste time arguing about legal doctrines because a sudden *bildung* during a lawsuit is unlikely. As a corollary, *bildung* should be paramount in legal education and acculturation.