THE *YOUNGSTOWN* CANON

Kristen E. Eichensehr

Congress can't agree on much these days, but in several recent instances, Congress has passed resolutions aimed at restraining the Trump Administration. President Trump, however, has vetoed Congress's efforts. He issued the first veto of his presidency to defeat a joint resolution that would have terminated the national emergency he declared relating to the southern U.S. border to pave the way for constructing a border wall. He issued another veto in April to block a joint resolution directing the withdrawal of U.S. armed forces from hostilities in Yemen. Congress did not override either veto. In litigation over the border wall, the Trump Administration has argued, "Congress's failed attempt to override the President's veto of its disapproval of the national emergency declaration does not have the force of law or an any way restrict authority Congress previously granted to the Executive." The first half of that sentence is correct as a matter of Supreme Court precedent. Legislative acts can only be binding law if they are passed by majorities of both houses of Congress and signed into law by the President, or enacted by a supermajority of Congress after a presidential veto. The vetoed joint resolutions were not. But is it really true that they cannot in *any* way cabin the executive?

This Article argues that in certain cases, courts and other entities can and should use vetoed bills when interpreting the scope of presidential powers. The Article proposes a *Youngstown* canon of interpretation, drawing inspiration from the insight in Justice Jackson's *Steel Seizure Case* concurrence that "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." The *Youngstown* canon would instruct that when Congress passes a bill or resolution by a majority of both houses and the President vetoes it, then the expressed congressional opposition to the President's view should be used to narrowly construe the underlying statutory or constitutional authority the President is claiming when that authority is ambiguous.[6] The *Youngstown* canon provides a way to take

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This Article draws on ideas I first set out in a blog post. Kristen Eichensehr, *What to Do with Vetoed Bills*, JUST SEC., Mar. 27, 2019, https://www.justsecurity.org/63380/what-to-do-with-vetoed-bills/.

into account congressional opposition to exercises of presidential power while also complying with the Supreme Court's decision in *INS v. Chadha*, holding that legislative acts that do not comply with bicameralism and presentment cannot be legally binding.[7] The canon steers a middle course between treating vetoed bills as legal nullities and equating them with enacted statutes. It instructs that the bills are legally relevant as an input into statutory or constitutional interpretation, without being legally binding.

The Article proceeds in three parts. Part I explains and defines the *Youngstown* canon and offers four normative justifications for its use. Part II explores the canon's practical application through several actual and hypothetical cases, including war powers, the National Emergencies Act, congressional action to block treaty termination, and the scope of federal preemption. Part III considers several likely concerns with the *Youngstown* canon and speculates about the possible consequences of its adoption.

JUDICIAL ADMINISTRATION

BIJAL SHAH*

A fundamental debate in administrative law surrounds the assertion that agencies are unconstitutional because they exercise discretion while implementing legislation. As a result, many commentators spanning from prior to the passage of the Administrative Procedure Act (APA) until the present day have argued that any exercise of discretion by an agency should be reviewable de novo*—a move that would ideally involve overturning* Chevron*, among other suggested measures—so as to shift some power from agencies rightfully back into the hands of courts. However, the debate surrounding the legitimacy of agencies has a blind spot. More specifically, while it focuses on the dangers of administrative power and the potential for agencies to tread on the constitutional branches, it ignores the possibility that courts may act as administrators and potential implications of this dynamic for judicial aggrandizement.*

This Article theorizes that there is a tipping point beyond which judicial intervention in the administrative state is no longer part and parcel of the judiciary's constitutional role, but rather, constitutes administration. Indeed, the concern that courts would be acting as administrators if assigned more powers of agency oversight animated the debates that preceded the Walter-Logan bill, which was the precursor to the APA. Although this tension has curiously been overlooked by scholars, it bears revisiting now.

This Article considers two definitional frameworks for the substantive judicial direction of agencies, which it calls "judicial administration." It hypothesizes that judicial administration is present in particularly intense judicial review of or involvement in agency action. First, this Article argues, cases from the early 1970s evinced a period of heightened judicial interest in ensuring administrative procedure and the protection of equal rights. These cases illustrate the

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Supreme Court making decisions that effectively narrowed or backed the agency into a certain policy, on the basis of due process or equal protection norms. A decade or so later, the advent of "hard look" review saw Court involvement in the minutiae of administrative expertise, which led to a doctrine that has, in some cases, resulted in the Court significantly influencing agencies toward substantive policies.

After illustrating its theory of judicial administration, this Article contemplates the idea under a theory of delegation. More specifically, it inquires as to whether judicial administration could infringe on Congress by interfering with the delegation of legislative power to agencies. Arguably, anti-administrativists have mischaracterized the nature of their own call. To the extent agencies serve legislative (or executive) functions, calls to dismantle the administrative state and instate the judiciary in its place are focused on reimbursing the wrong branch of government. At first glance, then, anti-administrativists are not solving a constitutional problem, but creating one.

That having been said, formalist proposals for increasing judicial administration are not necessary invalid. To the extent agencies' actions implicate constitutional values, which include the fair and just implementation and enforcement of the law, the judiciary is uniquely equipped and perhaps even required to take substantive control of these interests. Alternatively, the development of expertise is extra-constitutional and therefore belongs to no particular branch, nor arguably agencies themselves. The direction of administrative policies borne of expertise becomes, then, a functional matter, best assigned to the branch of government whose processes and ideologies suit stakeholders best. In other words, judicial administration may feasibly be justified under a formalist or a functionalist theory.

Congressional Rules of Interpretation

Jarrod Shobe

Many scholars have argued that Congress should adopt federal rules of statutory interpretation to guide judicial interpretation. This Article uses a novel dataset to show that Congress has already adopted thousands of rules of construction, but has chosen to do so on a statute-by-statute basis in a way that has gone mostly unnoticed by scholars and judges. The dataset was developed by using computer code to search the U.S. Code for certain phrases indicating a rule of construction and then hand-checking and classifying each of them. These rules not only show that Congress is capable of creating interpretive rules, but also calls into question a number of judicial canons of construction. Canons are judicially-created interpretive presumptions that are generally intended to approximate congressional intent, but this Article shows that Congress is able to include language to the same effect directly in its statutes. For example, one of the most important substantive canons of interpretation is the federalism canon, which generally presumes that a federal statute does not preempt state law. Yet Congress includes hundreds of rules of construction in the U.S. Code that directly address this same issue. They generally take the following form: "Nothing in this section shall be construed to limit any prior, current, or future efforts of any State to establish any alternative to tort litigation." Or even more generally, "Nothing in this section shall be construed to preempt any State law." Similarly, other canons like the presumption against implied repeal, presumptions of consistent usage, and many others are addressed directly by Congress in enacted statutes. This Article's findings raise a novel question: Why do courts continue to apply these judicial presumptions when Congress has shown itself capable of writing them directly into a statute when it wants to? This Article argues that because Congress has shown itself capable of including rules of construction in statutes, we should rethink whether judicial canons are still a useful way of approximating congressional preferences or if judges should leave it to Congress to explicitly state how it wants its statutes interpreted.

A LOWEST COST AVOIDER THEORY OF CONSTITUTIONAL LAW

Aaron Tang[1]

When it comes to the Supreme Court and our Constitution, Americans these days can't seem to find much common ground.[2] But here are two propositions with which everyone agrees: The Supreme Court gets the Constitution wrong in some awfully important cases. And those errors cause significant harms to whomever is on the losing end.

Constitutional law scholarship has traditionally offered two very different kinds of responses to these felt truths. One camp of thinkers—call them judicial optimists—believes that the Supreme Court's errors can be fixed and its harms undone, if only the Justices would adopt the correct theory of constitutional interpretation. (Unsurprisingly, subscribers to this view often have just the right theory on offer.) A second camp of thinkers—call them judicial pessimists—argues that judicial errors and harms are inevitable. A leading proponent of this position has accordingly called for "taking the Constitution away from the courts" altogether.[3] But optimists have a chilling response: without judicial review, won't our elected officials err just as badly and harm the people just as much—or worse?[4]

In this Article, I hope to chart a new path between these positions. Judicial optimists, I want to suggest, are right that courts can play a positive role in facilitating the resolution of constitutional disputes between discordant groups in our pluralistic society. But the pessimists are also right that no existing interpretive theory is capable of revealing the one, correct answer to many difficult and important constitutional controversies. So long as the Justices are in the business of determining the meaning of our Constitution, they will often get it wrong.

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[2] Consider the heated debate over the confirmation of Justice Brett Kavanaugh; how the Supreme Court's public approval rating hovers just around 50%; and how 49% of Americans believe the Supreme Court should base rulings on what the Constitution "means in current times," while 46% believe rulings should be based on its original meaning. *See* Jeffrey M. Jones, "Americans Still Closely Divided on Kavanaugh Confirmation," Gallup, October 3, 2018; Gallup Poll, "Supreme Court," online at https://news.gallup.com/poll/4732/supreme-court.aspx; Jocelyn Kiley, "Americans divided on how the Supreme Court should interpret the Constitution," Pew Research, July 31, 2014.

[3] Mark Tushnet, *Taking The Constitution Away From The Courts*, 1999.

[4] *See, e.g.*, Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. Ill. L. Rev. 673, 683.

How, then, should the Supreme Court decide constitutional disputes? The key is to give up our obsession with the unattainable goal of getting every hard constitutional case "right," and to focus instead on what happens after the Court issues a ruling that might be wrong.

The history of Supreme Court constitutional decisions—and, more importantly, what happens in their wake—teaches us a simple fact. Some groups are able to undo the harms produced by adverse Supreme Court rulings, while others aren't. This shouldn't be surprising; not all harms are equally easy to fix. Or in the language of law and economics, some groups are able to avoid the harms they suffer from an adverse Supreme Court ruling at a lower cost than others.[5]

Constitutional law should take account of this fact. If virtually everyone agrees that neither the Supreme Court nor our lawmakers will get every hard constitutional question right, we may as well ask if there is a way to minimize the error costs—i.e., the harms—that are created when either one gets the Constitution wrong. One way to do that is for the Court to decide close cases systematically in the direction that would maximize the odds of both sides getting what they want—the winning side by virtue of the Court's decision and the losing side by virtue of other, sub-constitutional means to avoid their harms. This is a lowest cost avoider theory of constitutional law: in hard constitutional cases, the Supreme Court should rule against the group that can avoid the harms of an adverse decision at the lowest cost.

[5] *See* George L. Priest, "The rise of law and economics: a memoir of the early years," in Francesco Parisi and Charles K. Rowley (eds.), *The Origins of Law and Economics* 369 (noting that Guido Calabresi's "best cost-avoider" theory of law and economics "has been widely adopted in judicial decisions").

Testing Ordinary Meaning: An Experimental Assessment of What Dictionary Definitions and Linguistic Usage Data Tell Legal Interpreters
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Within legal scholarship and practice, among the most pervasive tasks is the interpretation of texts. And within legal interpretation, perhaps the most pervasive inquiry is the search for "ordinary meaning." Legal interpretation—of contracts, statutes, wills, trusts, deeds, patents, regulations, treaties, and constitutions—regularly includes evaluation of how ordinary people would understand the text. Theorists and practitioners often treat the search for ordinary meaning as an empirical inquiry, aiming to discover facts about how ordinary people would understand language. To discover ordinary meaning, interpreters increasingly recommend as evidence a relevant term's dictionary definition or its pattern of usage across various sources in an English-language corpus. However, the most central question about these sources of evidence remains open: Do these popular methods accurately reflect ordinary meaning?

To assess this question, this paper develops and employs a novel method of "experimental jurisprudence." A series of experimental studies (N = 4,162) reveals systematic divergences among the verdicts delivered by modern concept use, dictionary use, and corpus linguistics use. For example, today people apply the concept of a vehicle differently from the way in which they apply modern dictionary definitions or modern corpus linguistics data concerning vehicles. The same results arise across levels of legal expertise—participants included 230 "elite-university" law students (e.g. at Harvard and Yale) and 98 United States judges—and across various terms and phrases, including "vehicle," "labor," "weapon," "carrying a firearm," and "tangible object."

The paper elaborates several implications of these results. First, the results provide insight into what dictionaries and corpus linguistics suggest to legal interpreters. Drawing on insights from linguistics and psychology, I distinguish between "prototypical" and "broad" senses of the same term. For example, a car is a prototypical vehicle, while airplanes, bicycles, and canoes are less prototypical vehicles. An extensive criterion would include all of those entities as vehicles, while a prototypical criterion would include only cars. This distinction about language is well-known, but the experiments show that the distinction also illuminates ordinary meaning's sources of evidence. That is, dictionaries and corpus linguistics often track only one of these criteria—dictionaries tend to track the broad criterion and corpus linguistics the prototypical one.

Second, I identify several fallacies of interpretation that are supported by the results. As one example, consider "The Non-Appearance Fallacy," the mistaken assumption that the non-appearance of some use in a corpus indicates that this use is outside of ordinary meaning. Arguments committing this fallacy have great rhetorical strength: Across thousands of sources in our corpus, we could not find even one example of an

airplane referred to as a “vehicle,” therefore the ordinary meaning of “vehicle” does not include airplanes. However, as the experimental results indicate, ordinary meaning sometimes diverges from ordinary use: People’s full understanding of language is not always reflected in recorded speech and writing, especially their understanding concerning non-prototypical category membership.

Third, I evaluate the findings’ significance for different theories of legal interpretation. First I consider certain formalist, textualist, and originalist views that are committed to the existence of a single ordinary meaning of terms like “vehicle” and phrases like “carrying a firearm,” one which is outcome-determinative without reference to further context, textual purpose, or even type of law (e.g. criminal vs. contract). The data suggest that popular methods of dictionary-use and corpus linguistics carry serious risks of diverging from ordinary understanding—conservatively estimated, 20-35%. And in some circumstances, even judges’ use of these methods carried extremely large divergence rates—between 80-100%. The results shift the argumentative burden to theorists and practitioners that rely on these tools to determine legal outcomes: In light of the data, these views must articulate and demonstrate a reliable method of interpretation.

Finally, I consider the results from the perspective of interpretive theories that are uncommitted to, or even skeptical of, the notion of a single “ordinary meaning” that determines legal outcomes across a range of cases and contexts. On these views, the findings illuminate two different criteria that are often relevant in interpretation: a more extensive criterion and a more narrow, prototypical criterion. Although dictionaries and corpus linguistics can help us assess these criteria, a hard legal-philosophical question remains: Which of these two criteria should guide the interpretation of terms and phrases in legal texts? Insofar as there is no compelling case to prefer one, the results suggest that dictionary definitions, corpus linguistics, or even other more scientific measures of meaning may not be equipped in principle to deliver simple and unequivocal answers to inquiries about the ordinary meaning of legal texts.