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Statutory Interpretation as “Interbranch Dialogue”?

James J. Brudney & Ethan J. Leib

ABSTRACT

Much in the field of statutory interpretation is predicated on “interpretive dialogue” between courts and legislatures. Yet, the idea of such dialogue is often advanced as little more than a slogan; the dialogue that courts, legislators, and scholars are imagining too often goes unexamined and underspecified. This Article attempts to organize thinking about the ways participants and theorists conceive, and should conceive, of interbranch dialogue within statutory interpretation.

The Article itself proceeds by using a dialogic and dialectical method. It first develops various positions against “interbranch dialogue.” By invoking arguments from textualism, public choice, and positive political theory, it advances the position that dialogue should not animate thinking in statutory interpretation.

With that auspicious start, the Article then explores in conceptual and descriptive terms what would count as true dialogic activity. Interbranch dialogue is not reducible to mere textual pronouncements or anticipatory signaling efforts. Rather, it is best understood as responsive communication between the two institutions, in which each party listens to, takes seriously, and values what the other party says and thinks, even if there is disagreement on particular interpretive outcomes or their implications. This communication may emerge in unscripted or unanticipated terms or it may flow more formally from mechanisms designed to generate responsive exchange. The Article highlights and examines numerous modes of dialogue that are initiated by the legislature and also by the courts, using examples from both federal and state levels.

The Article concludes by rehabilitating and rejuvenating the dialogue model in normative terms, drawing interbranch dialogue back to its legal process roots and revealing its links to more contemporary deliberative democratic theory.

AUTHORS

James J. Brudney is the Joseph Crowley Chair in Labor and Employment Law at Fordham Law School. Ethan J. Leib is the John D. Calamari Distinguished Professor of Law at Fordham Law School. Thanks to Corey Brettschneider and Andrew Kent for early leads and careful engagement about this project—and to Judge Frank Easterbrook and Sean Griffith, whose suspicion of the concept of interbranch dialogue really got us going. Participants in the 2017 Fordham Faculty Retreat helped us refine our subject. The Honourable Frank Iacobucci, Jeb Barnes, Seyla Benhabib, Aaron-Andrew



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TABLE OF CONTENTS

INTRODUCTION.....	348
I. THE METAPHOR AS MYTH	352
A. Political and Legal Institutions Issue Commands, Not Conversational Gambits.....	353
B. Institutions Signal; They Don't Converse	354
C. Institutions Are Signaling to Different Audiences, Seeking to Achieve Different Goals.....	355
D. Institutions Are Unstable Bodies	356
E. Institutions Have No Collective Intent So Cannot Meaningfully Chat	357
F. Institutions Risk Violating Their Role Responsibilities When Looking to Chat Rather Than Decide.....	359
II. THE METAPHOR IN ACTION	361
A. Defining Dialogue.....	362
B. Informal Dialogue: Signals versus Exchanges.....	365
C. Formal Dialogue: Invitations and Requests	372
D. Additional Interbranch Mechanisms	378
E. Proximate Equality and Institutional Identity.....	385
III. IN DEFENSE OF INTERBRANCH DIALOGUE.....	390
CONCLUSION	398

INTRODUCTION

It is not terribly controversial to say that “much interpretive theory and doctrine” in the field of statutory interpretation is predicated on “interpretive dialogue between courts and [the legislative branch].”¹ Indeed, judges, legislators, and scholars often imagine some kind of “interbranch dialogue” between courts and legislators. Yet it is not clear how seriously to take this unexamined and underspecified form of conversation among institutions.² This Article is an effort to explore the appropriate way to think about that dialogue, which does so much to shape the contours of theory and doctrine in statutory interpretation.

Outside the world of statutory interpretation, there is a fairly developed debate about interbranch dialogue among constitutional theorists,³ especially in Canada, the United Kingdom, Australia, and New Zealand.⁴ In those regimes, where legislative supremacy competes with judicial supremacy in matters of fundamental rights, interbranch dialogue between legislatures and courts has been a fruitful way to conceptualize how courts can protect rights without derogating from foundational democratic commitments.⁵ Within this framework,

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1. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation From the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 917 (2013).
 2. But see Jeffrey K. Tulis, *Deliberation Between Institutions*, in DEBATING DELIBERATIVE DEMOCRACY 200 (James S. Fishkin & Peter Laslett eds., 2003) (furnishing a short account of institutions engaging in “deliberation” together).
 3. See, e.g., LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988); Christine Bateup, *Reassessing the Dialogic Possibilities of Weak-Form Bills of Rights*, 32 HASTINGS INT’L & COMP. L. REV. 529 (2009); Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values With Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575 (2001); Kent Roach, *Sharpening the Dialogue Debate: The Next Decade of Scholarship*, 45 OSGOODE HALL L.J. 169 (2007).
 4. Some basis for grouping these jurisdictions together comes from Stephen Gardbaum. STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE (2013).
 5. For more analysis and critique of these efforts, see Christine Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 BROOK. L. REV. 1109 (2006); Aileen Kavanagh, *The Lure and the Limits of Dialogue*, 66 U. TORONTO L.J. 83 (2016); Jeremy Waldron, *Some Models of Dialogue Between Judges and Legislators*, 23 SUP. CT. L. REV. 7, 33–34 (2004). At least in Canada, the foundational article is Peter W. Hogg & Allison A. Bushnell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)*, 35 OSGOODE HALL L.J. 75 (1997).

some have taken up the project of getting more specific in delineating what interbranch dialogue can and should look like.⁶

In the U.S. setting, however, debate about interbranch dialogue is often preoccupied with the hoary “countermajoritarian difficulty” that structures so much thinking about constitutional law.⁷ The work “dialogue” is supposed to do within American constitutional law is mainly to reinforce legislative power to contest a judicial monopoly in rights-specification⁸ by celebrating weaker forms of judicial review.⁹

By contrast, given that legislatures have formal baseline supremacy in the statutory arena,¹⁰ “interbranch dialogue” might very well be a kind of standard

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6. Justice Frank Iacobucci, who served on the Supreme Court of Canada from 1991 to 2004, brought the idea of interbranch dialogue to the center of his constitutional jurisprudence. See Kent Roach, *A Dialogue About Principle and a Principled Dialogue: Justice Iacobucci's Substantive Approach to Dialogue*, 57 U. TORONTO L.J. 449 (2007). And Kent Roach has done some work expanding outward from constitutional law in Canada, showing the relevance of dialogic thinking within Canadian statutory interpretation. See Kent Roach, *Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures*, 80 CAN. BAR REV. 481, 507–17 (2001).
 7. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1985); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002). Indeed, already in Bickel's work, interbranch dialogue is introduced as a way to mitigate judicial supremacy in matters of constitutional rights. See BICKEL, *supra*, at 70–71; ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 91–92 (1970); Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 19–20 (1957).
 8. See Kavanagh, *supra* note 5, at 107 (“[T]he metaphor of dialogue was a useful reminder that protecting rights is not a ‘judge-only’ affair.”). Bickel often saw the Court as “beginning [the] conversations between the Court and the people and their representatives [that] are never, at the start, conversations between equals.” See BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS*, *supra* note 7, at 91. By contrast, dialogue about statutory interpretation might be initiated or dominated by legislators, routinely extend over many iterations, and feature the legislature as the ultimate authority. See *infra* Parts II–III. The default to the centrality of courts is also in evidence in Guido Calabresi's otherwise sophisticated typology of forms of review between the oversimplified poles of judicial and legislative supremacy. See Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80 (1991).
 9. See generally Rosalind Dixon, *Weak-Form Judicial Review and American Exceptionalism*, 32 OX. J. LEGAL STUDS. 487 (2012). The distinction between “strong-form” and “weak-form” judicial review is often credited to Mark Tushnet. See, e.g., Mark V. Tushnet, *New Forms of Judicial Review and the Persistence of Rights—and Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813, 837 (2003). Aileen Kavanagh had raised some questions about distortions attributable to overdrawing the distinction between strong and weak forms of review. See Aileen Kavanagh, *What's So Weak About “Weak-Form Review”? The Case of the UK Human Rights Act of 1998*, 13 INT'L J. CON. L. 1008 (2015).
 10. See *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 115 (1991) (Stevens, J., dissenting) (“In the domain of statutory interpretation, Congress is the master.”). See generally William N.

model.¹¹ Perhaps this should not be surprising: unlike in American constitutional law, federal and state judges interpreting statutes do not regularly get the final word on what the law means. Thus, turning to dialogue, imagining a back and forth in which neither branch enjoys a preemptive interpretive position, is a way to envisage joint policymaking in the statutory domain, which specifies and realizes so many rights and obligations.

Still, one could be forgiven for thinking that talk of dialogue is more mystifying than clarifying. Some questions that quickly come to mind: How can institutions really converse? Isn't this anthropomorphism of dialogue essentially misleading because, like man and ibex,¹² courts and legislatures speak different languages? Is there a real risk that taking the metaphor too seriously obscures institutional role responsibilities that require more focused attention on litigants and the public interest? Although some agree that "the temporal distance between different officials" in interbranch dialogue "does not . . . negate participation in the same" joint project of making and applying the law,¹³ it is worth asking whether the metaphor is just too thin as it seeks to capture legislative-judicial interactions over decades in which legislative membership changes every few years and court membership changes over time as well.

Perhaps we might do better abandoning the trope of "dialogue" in favor of a more traditional conception of the "separation of powers" in which each institution does its part, and the systemic consequences of those iterative actions and reactions serve to legitimate the polity in a less self-conscious and personalized way than the idea of "dialogue" invites.¹⁴ Finally, perhaps the overwhelming emphasis within statutory interpretation on federal law has made it harder to see how interbranch dialogue might actually work better at the state

Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319 (1989); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989).

11. See, e.g., ROBERT A. KATZMANN, *JUDGING STATUTES* 8 (2014) (discussing importance of "how Congress signals its meaning, and what Congress expects of those interpreting its laws"); VICTORIA NOURSE, *MISREADING LAW, MISREADING DEMOCRACY* 33 (2016) (emphasizing that judges must understand and respond to Congress's legislative rules and electoral incentives as part of the interpretive enterprise); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992) (arguing in favor of judicial "dialogue with other organs of government").
12. See newcanodin, *Don't Argue With an Ibex English Subs*, YOUTUBE (Feb. 12, 2011), <https://www.youtube.com/watch?v=v07Q9i2UpNk>.
13. DIMITRIOS KYRITSIS, *SHARED AUTHORITY: COURTS AND LEGISLATURES IN LEGAL THEORY* 83 (2015).
14. This vision might be gleaned from Tulis, *supra* note 2, at 207–10, though Tulis is ultimately convinced that "when separation of powers does work as designed, it has as its core the notion of inter-branch deliberation." *Id.* at 210.

level, owing to more similarity between elected judges and elected legislators, bringing their interactions closer informally, culturally, and professionally.¹⁵

In the face of such questions and criticisms, we attempt here to organize thinking about the ways judges, legislators, and scholars imagine, and should imagine, interbranch dialogue within statutory interpretation. The Article is ultimately an effort to vindicate the dialogue metaphor in both descriptive and normative terms. As we will show, interbranch dialogue is not reducible to mere pronouncements or anticipatory and strategic signaling efforts. Rather, it is best understood as *responsive communication* between the two institutions, acting through their representatives, in which each institution listens, learns, takes seriously, and enhances its understanding of statutory issues over time, even if there is disagreement on particular interpretive outcomes or their implications. This responsive interplay, in turn, should be viewed as part of the legal process tradition of institutional humility and deliberation in the production of law.¹⁶ The theme of interbranch dialogue thus weaves together old-school legal process with new-school deliberative democratic theory.

The Article proceeds as follows. Part I seeks to derail this project at its inception. We develop, in a dialectical manner,¹⁷ various arguments against a “dialogue” metaphor and model, advancing the position that, given our legal and political culture, no conception of dialogue should animate thinking in statutory interpretation. With that auspicious start, in Part II we define what we would count as true dialogic activity. We then review several dimensions of statutory interpretation that actually rely on some conception of meaningful interbranch dialogue. In descriptive terms, we highlight modes of dialogue that are initiated by the legislature and also by the courts, using examples from both federal and

15. For some analysis of how to think about the project of statutory interpretation by elected judges, see Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215 (2012). In this vein, it might be useful in a future paper to contemplate whether federal interbranch dialogue worked better or worse, or looked more or less like “real” conversation, in the days when Congress and the Supreme Court were in the same building and the days when Supreme Court judges were more often chosen from a pool of candidates with experience in, and deep institutional knowledge of, Congress.

16. On linking “dialogue theory” to legal process, see Roach, *supra* note 3, at 189. See also LON FULLER, *THE MORALITY OF LAW* 91, 134, 192 (1969) (understanding law as a “complex collaborative effort” rather than “one-way projection of authority,” with “reciprocal dependence” between legislative drafters and judicial adjudicators); Roach, *A Dialogue about Principle and a Principled Dialogue*, *supra* note 6, at 454, 458 (developing a connection between legislative-judicial dialogue). We elaborate on the connection between interbranch dialogue and the legal process tradition in Part III.

17. Hat tip to Henry Hart. See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

state systems. Part II also attends to how each institution's ongoing identity, and the operation of internal professional networks, contribute to the quality and continuity of the dialogue. Part III rehabilitates and rejuvenates interbranch dialogue in normative terms. We draw our conception of dialogue back to its roots in a legal process account of how best to have our political and legal institutions work together to promote our interests in a democracy and push it outside that etiology into more mainstream contemporary deliberative democratic thinking. In defending a version of interbranch dialogue, we identify some risks nondialogic accounts of statutory interpretation pose for the role responsibilities of legislators and judges.

To be sure, a fuller project of vindicating interbranch dialogue in statutory interpretation would ultimately need to consider other institutional actors, notably the executive, as part of more complex "trialogues."¹⁸ We focus in what follows, however, on legislatures and courts, because they are the primary interlocutors in the vision of dialogue that drives the enterprise of statutory interpretation, and also because many of our insights should be portable to dialogic activity among other branches of government.¹⁹

I. THE METAPHOR AS MYTH

There are several reasons to be skeptical that "interbranch dialogue" is anything more than a slogan. And there are a few reasons one might offer to caution against indulging in mythical metaphorical thinking. In this Part, we develop a cluster of arguments that together counsel against a dialogic account

18. The "executive" here could be the President (who can speak through various public statements including executive orders, veto statements, and, more recently, tweets), administrative agencies generally, or the Department of Justice specifically. For some careful thinking about these complexities in the United States, see Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 YALE J. INT'L L. 359 (2013). On European "trialogues," see Fabrizio Cafaggi, *On the Transformations of European Consumer Enforcement Law: Judicial and Administrative Trialogues, Instruments and Effects*, in JUDICIAL COOPERATION IN EUROPEAN PRIVATE LAW 223 (Fabrizio Cafaggi & Stephanie Law eds., 2017).

19. Foreshadowing our discussion in Part II, an analysis of agency-legislature interactions might include exploration of the uptake of testimony at congressional hearings by agency officials responsible for interpreting statutory text in order to appreciate when this is an element of responsive communication as opposed to mere signaling. Relevant agency-court interactions might include an interrogation of how to characterize operation of the *Chevron* deference framework, especially in settings of dynamic agency updating. See, e.g., *Smiley v. Citibank (S. D.)*, N.A., 517 U.S. 735, 742 (1996) (deferring to federal banking regulation that is inconsistent with prior agency interpretations, explaining that "change is not [per se] invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency").

of statutory interpretation.²⁰ Some of these arguments are familiar in the public choice, positive political theory, and textualist literature, but no one has strung all of them together in one place to try to undermine the metaphor of dialogue as utter mythology. In our view, there is value in presenting a strong case against “interbranch dialogue” to see if it is salvageable in Parts II and III, on both descriptive and normative levels.

**A. Political and Legal Institutions Issue Commands,
Not Conversational Gambits**

Although legislative-judicial back-and-forth over statutory meaning may be imagined as dialogue, most of what legislatures and courts do is make law. They are not in the business of talking to each other. To be sure, sometimes it is possible to make their utterances line up so that their pronouncements resemble a script or morality play:

J: Statute A means X.

L: No, J, statute A really means Y and Z, and statute B we are passing today now makes that clear.

J: Although you want statute A to now mean Y and Z, we think X remains relevant and precedential, so we are going to develop its logic further into statute B.

L: Really, J? Do we have to keep doing this? We have stuff to do other than grade your papers.

Although this looks like a conversation, courts and legislatures are not really talking to each other when doing their work. Indeed, if they are talking to anyone, they are talking to citizens through their internal deliberations and talking to posterity. Still, the better reading is that they are just talking in the idiom that comports with their institutional culture, and the two idioms do not routinely intersect. Both of those idioms, moreover, sound in command rather than as invitations into or participation in interbranch deliberation. In sum,

20. To the extent some have made an effort to cast doubt on the reality of interbranch dialogue among statutory interpretation scholars, Gluck & Bressman, *supra* note 1, at 914 n.28, identify Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 597–616 (2002); and Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 922–25 (2003), as holding the view that “dialogue simply does not exist.” But neither of these cited papers contains systematic engagements with the relevant question, nor does either focus any attention on “interbranch dialogue” as a trope, theory, model, or metaphor.

neither legislation nor judicial opinions are communications between the branches.²¹

B. Institutions Signal; They Don't Converse

Perhaps there are some marginal examples when the best reading of what these two commanding institutions are doing is directing their commands to each other rather than to subjects or litigants or interest groups. Nonetheless, it would be too fanciful to imagine these interactions as true conversation because the institutions do not really treat one another as coequals in a joint enterprise in these episodes:

L: Interpret remedial statute Q to be in derogation of the common law.

J: Generally, statutes in derogation of the common law will be narrowly construed unless you tell us very specifically, L, what to do with Q. Calling the statute remedial is not sufficient, because the common law is better reasoned than the hurriedly negotiated and often cynical deals that give rise to legislation like Q.

At best, the Ls and Js of the nation can be thought to be sending one another imperfect anticipatory signals, strategically communicating in a way to protect their own interests and domains against the other. These are the joint lessons of public choice theory and positive political theory: Institutions will protect themselves and their capital, and they will be anticipatorily responsive to other institutions that can divert policy from the acting institution's favored course.²² And such actions, based on self-protection and anticipatory responsiveness, are just signals and reminders, not true conversations. If a conversation requires some kind of joint project, these kinds of issuances have a different goal: They are at bottom self-involved.

21. The view that "courts are mistaken in thinking of legislation as a means of communication," Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 996 (2017), has been questioned by Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217 (Andrei Marmor & Scott Soames eds., 2011). Doerfler ultimately finds "[l]egislation as communication" to be the "standard picture" among legal theorists" because "[it] has intuitive appeal." Doerfler, *supra*, at 996 (citing Mark Greenberg, *The Moral Impact Theory of the Law*, 123 YALE L.J. 1288, 1296–97 (2014)).

22. See, e.g., LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1999); Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027 (2002); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992).

C. Institutions Are Signaling to Different Audiences, Seeking to Achieve Different Goals

Not only can serial pronouncements not amount to a dialogue or conversation but very often the presumptive speech acts that look like they are addressed to coordinate branches of government have different audiences and are not, upon inspection, really facing each other. To wit, imagine this “conversation:”

L: Murder is a crime.

J: We cannot read into L’s command a self-defense exception because that messes with the separation of powers. We can only enforce the text and the text does not authorize us to infer any excuse that pertains to self-defense. You are the legislature, L! If you want a self-defense exception, write it in! No one in this democracy wants judges to be too “activist,” writing in all kinds of nontextual exceptions.

On the one hand, there is a reading here in which J is giving L clear instructions (a command?) about how to write an effective command itself. Some might interpret this interaction as the beginning of a dialogue about getting murder laws written better and implemented in a more rational and democratic manner.

But it is not at all obvious that this is the best interpretation of the interaction. Rather, it may be that J has its own view about how to interpret statutes and its own views about what is best for democracy. That view is known as “textualism,” and part of that commitment is to make a show of enforcing texts literally, chastening the legislature for poor drafting.²³ Although J knows full well that L is not listening (or is indifferent about L’s listening), the relevant audience is not L at all. Instead, the interested public (including legal scholars and the media), the convicted defendant, and other jurists are the real audience here. Throwing the gauntlet down to the legislature is not really for the legislature’s benefit but is for the benefit of the justificatory apparatus that sustains textualism as an interpretive philosophy. The interaction is strategic but not in the conventional positive political theory sense, because it is not an anticipatory reaction to what the legislature may or may not do. Rather, it is a rhetorical strategy to sustain J’s own set of preferences by justifying them to people other than L.

23. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

And it is not only judges that may behave this way. Because of the presumptive finality of many judicial pronouncements, “legislators remain free to put on dog and pony shows for the amusement and delight of select constituencies.”²⁴ And legislators are mostly “interested in advancing favored policies, winning reelection, and gaining personal power within” the legislature.²⁵ They are not institutionally oriented toward nor able to engage in dialogue under modern conditions of internal professionalization and polarization.²⁶ Even more to the point, legislatures generally can be perfectly happy to rewrite their statutes when judges push the issue: as Keith Whittington observes, both courts and legislatures are “capable of getting what they want because they want different things.”²⁷ Courts want legal supremacy; legislatures want policy supremacy and can find workarounds for their policy goals when necessary.²⁸ Since they want different things, they are not in any joint project that requires dialogue.

D. Institutions Are Unstable Bodies

There is another problem with indulging in the myth of dialogue: the relevant institutions are always changing their membership. In the federal system, Congress changes official status and membership every two years, and even the “Roberts Court” changes its membership over the course of a few years. Thus, the idea that “Congress” and the “Roberts Court” are in conversation belies all the underlying personnel changes that disrupt thinking clearly about who is talking to whom. Consider this “dialogue”:

J (in 1989): L’s statute from 1964 requires plaintiffs to bear certain substantial burdens of proof.

L (in 1991): We are passing a new statute to make clear that J was wrong in 1989 about what we meant in 1964.

J (in 2000): Whatever else “you” meant in 1991, L, you aren’t the same people who passed the 1964 statute and you don’t get to say

24. Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1, 54 (1998).

25. Neal Devins, *Why Congress Does Not Challenge Judicial Supremacy*, 58 WM. & MARY L. REV. 1495, 1496 (2017).

26. *Id.* at 1498–500 (citing, inter alia, J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM 23–30 (2004); Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 233–42 (2013)).

27. Keith E. Whittington, *James Madison Has Left the Building*, 72 U. CHI. L. REV. 1137, 1146 (2005) (reviewing PICKERILL, *supra* note 26).

28. Devins, *supra* note 25, at 1516.

what “you” really meant then. So going forward, we can follow your new command, but stop pretending you have any epistemological priority about what the people within L meant in 1964.

It is not that it is impossible or wholly incoherent to make sense of a “continuing body” theory of a legislature or a court.²⁹ But there is something quite plausible about J-in-2000’s claim that L-in-1991 gets very limited epistemological priority about what L-in-1964 intended.³⁰ To be sure, nothing about this plausible claim disables L-in-1991 from establishing statutory law going forward. But looking back at eleven years of talking by J and L looks a lot less like a conversation when you realize that personnel changes disrupt the idea of dialogue, at least in a rich and personal sense.

E. Institutions Have No Collective Intent So Cannot Meaningfully Chat

The personal sense of conversation could, perhaps, be vindicated if there was a way to aggregate the various members of the institutions into a collective and unitary voice. But as many have shown, figuring out how to aggregate 535 minds on the federal level is tricky,³¹ the many minds problem also plagues state legislatures. This leads to a conclusion by some scholars who have looked carefully at the issue that “attributions to [legislatures] of legislative intent are reliably false.”³² And as Judge Easterbrook has written in *United States v. Mitra*, channeling Kenneth Shepsle,³³ “Congress is a ‘they’ and not an ‘it’; a committee lacks a brain (or, rather, has so many brains with so many different objectives that it is almost facetious to impute a joint goal or purpose to the collectivity).”³⁴ Although some have come up with ways to vindicate the idea of legislative intent notwithstanding the many minds problem (minds whose preferences together may “cycle” to produce intransitive and therefore incoherent policy choices),³⁵ it

29. But see Aaron-Andrew P. Bruhl, *Burying the “Continuing Body” Theory of the Senate*, 95 IOWA L. REV. 1401 (2010) (criticizing the idea that the Senate should be considered a continuing body with entrenched supermajoritarian rules).

30. On the epistemological priority of legislators about their own meaning, see Andrei Marmor, *The Pragmatics of Legal Language*, 21 RATIO JURIS 423, 434 (2008). For some serious doubts, see Doerfler, *supra* note 21, at 1033–37.

31. See Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

32. Doerfler, *supra* note 21, at 998.

33. See Shepsle, *supra* note 31.

34. 405 F.3d 492, 495 (7th Cir. 2005).

35. The classic citation for the cycling problem in social choice is KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963). Those who have tried to defend the coherence of legislative intent against the Arrowian impossibility theorem’s application to

is widely contended that talk of the collective intent of a legislature is a “misleading anthropomorphizing metaphor.”³⁶ And without intent, it is very hard to imagine a productive dialogue.

L: J, why do you make us work so hard to clarify our meaning? That case you decided last year is disrespectful of our right to determine statutory meaning because our conference report was clear that we rejected your interpretation ten years ago! We are now overriding that interpretation (again) in this committee report.

J: L, we don’t deny you have rights, but your right is to write statutes. We can’t assume what a subgroup of your membership writes in a report was read, let alone approved, by the whole membership. Some legislator on the floor said something inconsistent with that report and we can’t try to figure out what you as a body really meant.³⁷ Any of your nonstatutory utterances could be strategic. Heck, even your statutory pronouncements could be strategic. But at least then we have good reason to use as much legal text to make coherent sense of it, confabulating a fictive but pragmatic collective intent. Only statutes are the law.

L: Ugh. Can’t we let sleeping dogs lie and avoid the great legislative history debate? We thought we had an internal norm in which our reports or the legislation’s sponsors’ views are the best evidence of our intent.³⁸ These are “institutionalized intentions,” not a mistaken “collective understanding” which is to be properly dismissed because of the aggregation problems we all know about.³⁹

J: It would be more fair if you wrote that norm down somewhere, since you don’t all always act or talk like that is the rule, and that isn’t giving fair notice to those regulated by your laws.⁴⁰

legislatures include STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* 99 (2010); RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* (2012); and Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 429 (1988).

36. Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 777 n.7 (1999).

37. For a case in which the House Report’s interpretation of a statute conflicted with a meaning given during a colloquy on the Senate floor, see *Zuber v. Allen*, 396 U.S. 168, 183–86 (1969).

38. For support for this claim, see Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427, 448–49 (2005).

39. That distinction is further explained in RONALD DWORKIN, *How to Read the Civil Rights Act, in A MATTER OF PRINCIPLE* 316, 320–21 (1985).

40. See Doerfler, *supra* note 21, at 1010–20 (explaining why using formal and informal norms to derive collective intent presents real difficulties).

Sure, this is a kind of dialogue. J and L independently can be modeled as having shared agency and “we-intentions,”⁴¹ an invention by philosophers that can make sense rather than nonsense of “interbranch dialogue.” But the “dialogue” between J and L here is actually a useful caution against using too capacious an idea of dialogue. Only the text of the law communicates and speaks from the legislature in this conversation. And judges are not wrong to be suspicious of assertions of collective voices outside of the text of the law. Even if “interbranch dialogue” is sometimes a “useful fiction,”⁴² we should be restrained in our indulgence of the falsehood and acknowledge that it is a “defective discourse.”⁴³ We should certainly not transition from imperfect metaphor to “model” or “theory.”⁴⁴

F. Institutions Risk Violating Their Role Responsibilities When Looking to Chat Rather Than Decide

Finally, it may be that “interbranch dialogue” is not only descriptively misleading but also normatively troubling. To wit, attempting too much to communicate with a coordinate branch could be said to detract from everyone doing his or her job well. Legislatures ought to focus on their work of drafting and enacting laws, which are generally commands rather than conversational gambits. Courts should focus on interpreting those commands as best they can and issuing their own clear commands to litigants and citizens, without imagining some kind of grand systemic deliberation among different kinds of governmental actors who have very different goals and very different role responsibilities. Indeed, judicial logic, focused on precedent, is quite different from the logic of policy improvement that should dominate in the legislature. Moreover, legislatures may be said to have the “prerogative[] of obscurantism,”⁴⁵ whereas courts always seem bound by a requirement that they explain,

41. The large literature on joint intentions in groups can be represented by MICHAEL E. BRATMAN, *SHARED AGENCY: A PLANNING THEORY OF ACTING TOGETHER* (2014); Christopher Kutz, *Acting Together*, 61 *PHIL. & PHENOMENOLOGICAL RES.* 1, 3 (2000); John R. Searle, *Collective Intentions and Actions*, in *INTENTIONS IN COMMUNICATION* 401 (Philip R. Cohen, Jerry Morgan & Martha E. Pollack eds., 1990); and Scott J. Shapiro, *Massively Shared Agency*, in *RATIONAL AND SOCIAL AGENCY: THE PHILOSOPHY OF MICHAEL BRATMAN* 257, 270 (Manuel Vargas & Gideon Yaffe eds., 2014).

42. This is Doerfler’s reading of legislative intent, see Doerfler, *supra* note 21, at 1021, though he also thinks “abandoning discourse about legislative intent is not a serious option.” *Id.* at 1022.

43. *Id.* at 1021 n.217.

44. See Kavanagh, *supra* note 5, at 97, 101–02.

45. *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977).

rationalize, and justify their work-product.⁴⁶ These distinctions suggest that legislatures and courts may fundamentally be speaking different languages, and are responsive to different cultures of justification.

Imagining “dialogue” is also so vague and indeterminate that it may very well confuse courts about what they are supposed to do when: engage in their best readings with an assumption that legislators can engage them directly when they go astray or do their best tea-leaf reading with some constructed intent and delay the application of many of their judgments to invite further conversations with their legislative overseers?⁴⁷ Read a statute as creatively as possible to avoid invalidating the democratic will of the legislature or declare a statute’s incompatibility with fundamental norms and ask the legislature to revisit the statute and the norm?⁴⁸ There is actually a need for interpretive finality so that people can order their affairs, and too much orientation toward “dialogue” can delay that for too long in a world of discretionary review and vetogates.⁴⁹

Worse still, the trope of “interbranch dialogue” can serve to detract from or obscure the full institutional accountability of both legislatures and courts by imagining that other institutions are in some kind of joint project. Such a conception risks buck-passing, enabling occlusion of just who is responsible for what in a regime of otherwise separated powers. As Lord Bingham comments: “The business of the judges is to listen to cases and give judgment . . . I do not myself see it as the role of the judge to engage in dialogue.”⁵⁰ And it is also just fine for legislatures to agree with judicial gloss on statutes silently; it may be more efficient for legislatures not to “dialogue” and not to waste time on interbranch chatter.⁵¹ Ultimately, there is plenty of evidence that legislators are not carefully listening to judges more than episodically at best.⁵² This renders the efforts at

46. See Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699, 737, 742–43 (2013).

47. This kind of worry about indeterminacy is at the center of Kavanagh, *supra* note 5, at 97–99.

48. See *id.*

49. See *id.* at 117.

50. JOINT COMMITTEE ON HUMAN RIGHTS, MINUTES OF EVIDENCE, EXAMINATION OF WITNESSES (QUESTIONS 77–79), 2001–02 (UK).

51. See Kavanagh, *supra* note 5, at 112–14 (highlighting how “dialogue theory” perversely looks down on silent agreement among the branches).

52. See, e.g., Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory*, 80 GEO. L.J. 653, 662–65 (1992). Notice that if Congress isn’t actually carefully following what is going on in the courts, that casts some doubt on the earlier argument, see *supra* Subpart I.B, that institutions are anticipatorily reacting to the preferences of other institutions. See also Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislatures and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1055 (1991) (“[P]rompt legislative reaction to judicial interpretation is probably the exception . . . not the rule.”); Jane S. Schacter, *Metademocracy: The Changing*

“dialogue” both an incursion into a pure or formal separation of powers that would more fully preserve judicial independence,⁵³ and a waste of precious governmental resources.

The foregoing seems to us the best way to cast serious doubt on taking interbranch dialogue too seriously. Is anything left?

II. THE METAPHOR IN ACTION

This Part develops a working definition of interbranch dialogue and then tests it against various ways that judges, legislators, and scholars talk about dialogue within the practices and doctrines of statutory interpretation. We distinguish between informal or unstructured dialogue, in which the two branches exchange responsive interpretive views in unscripted and often unanticipated ways, and more formal dialogue, in which a court or legislature invokes a mechanism consciously designed to generate responsive communication. We then consider a range of additional mechanisms that may generate dialogue between the branches. These mechanisms are more episodic, but they help fill out our descriptive project of showing how and when it might be sensible to talk about interbranch dialogue. Finally, we consider the importance of relative equality between judiciaries and legislatures (as some have argued that equality is a precondition for dialogue),⁵⁴ as well as the validity of thinking about the continuing identity of institutions over time.

In addition to addressing some of the thornier problems raised in Part I, this Part demonstrates how dialogue can and does occur in the modes we identify, rendering both plausible and relevant the model of interbranch dialogue for the practices and doctrines of statutory interpretation. Some modalities of dialogue

Structure of Legitimacy in Statutory Interpretation, 108 HARV. L. REV. 593, 605–06 (1995) (“[L]egislatures are frequently too busy, over-extended, or inert to respond to an objectionable judicial interpretation” and “there is little reason to believe that legislators systematically monitor judicial interpretations.”). But this indifference is not a universal phenomenon. See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 149–58 (1982) (providing examples of judicial-legislative “open dialogue”); Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 23–24 (1995) (same).

53. On the formalism/functionalism divide in separation of powers thinking, see Martin H. Redish & Elizabeth J. Cisar, “If Angels Were To Govern”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449 (1991); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 496 (1987). But for some evidence that the American framers contemplated some dialogue between the branches, see Deanell Reece Tacha, *Judges and Legislators: Renewing the Relationship*, 52 OHIO ST. L.J. 279 (1991).

54. See, e.g., Waldron, *supra* note 5, at 47; Hogg & Bushnell, *supra* note 5, at 79–80.

will be more congenial depending on whether one's interpretative preferences are textualist, intentionalist, or purposivist. But all interpretive approaches can admit some forms of dialogue. With this conceptual and descriptive foundation, we can address more directly the normative case for dialogue in Part III.

A. Defining Dialogue

Having cast substantial doubt on the possibility of interbranch dialogue in Part I, we might begin here by asking about what one might call the "Platonic form" of dialogue. Plato appears to have originated the term "dialogue" as a noun,⁵⁵ though he may have used the term directly in only a few of the works we know now as Plato's dialogues.⁵⁶ These dialogues are associated with a particular kind of conversation, shaped into a question-and-answer format, involving a dialectical exchange with the acquisition of knowledge—"the presentation of truths or at least the purification of error"—as its aim or endpoint.⁵⁷ Although the structured question-and-answer framework of the Platonic form does not map directly onto the complexity of our interbranch dialogue setting,⁵⁸ modern usage adapts some features of Plato's original idea.

Yet there are features about Platonic dialogues that actually sit in tension with the sort of dialogic activity that we suspect judges, legislators, and scholars are envisioning when they map judicial-legislative interactions as dialogue. To wit, there is an important sense in which the Platonic dialogue is sham dialogue.⁵⁹ One might say Socrates is not really seeking to learn anything; he is often manipulating the conversation for pedagogical or political ends rather than using the format of dialogue to enhance his own knowledge of his subjects.⁶⁰

Truly dialogic efforts cannot be systemically strategic or manipulative. Rather, one of the great theorists of "communicative action" (and ultimately of "deliberative democracy")—Jürgen Habermas—sees that at the center of meaningful dialogue must be taking your interlocutor seriously and aiming for

55. See Katarzyna Jazdzewska, *From Dialogos to Dialogue: The Use of the Term From Plato to the Second Century CE*, 54 GREEK, ROMAN, AND BYZANTINE STUD. 17, 19 (2014).

56. See *id.* at 23–24, 28, 34 (citing GORGIAS, 448D–449B, 471D; PROTAGORAS, 335B–336B).

57. See GEOFFREY ROCKWELL, *DEFINING DIALOGUE: FROM SOCRATES TO THE INTERNET* 160 (2003).

58. *But cf. supra* Introduction (discussing more formal dimensions of interbranch dialogue).

59. Thanks to Seyla Benhabib for this way of putting it.

60. See David L. Blank, *The Arousal of Emotion in Plato's Dialogues*, 43 CLASSICAL Q. 428, 428–30 (1993); E.L. Harrison, *Plato's Manipulation of Thrasymachus*, 21 PHOENIX 27, 30–35 (1967).

mutual understanding.⁶¹ This may be why deliberative democratic theorists are at times oriented toward design mechanisms that promote institutional learning through dialogue.⁶²

Although they are not without their critics,⁶³ one might also consult dictionaries as evidence of modern usage, to help unpack potential substantive meanings for this form of communication between the two branches. *Webster's Third International* defines dialogue as “an instance of conversational exchange” and “an exchange of ideas and opinions, *esp.* a serious colloquy conducted or presented to entertain or instruct.”⁶⁴ The *Oxford English Dictionary* similarly references “a conversation carried on between two or more persons; a colloquy” and “verbal interchange of *thought* between two or more persons.” That dictionary further defines dialogue in connection with “politics” as “discussion or diplomatic contact between the representatives of two nations, groups, or the like; hence *gen.* valuable or constructive discussion or communication.”⁶⁵ These definitions have shadows of both the Platonic form and the Habermasian ideal.

From these various contexts and definitions—ancient, political theoretic, and modern—one can begin to cobble together a workable conception of dialogue between legislatures and courts. Dialogue entails *responsive communication* of a certain kind, in which one party listens to, takes seriously, and values what the other party expresses and believes. It involves communication about substantive matters—ideas, thoughts, or opinions—between two or more parties, which can take place between representatives of groups or institutions.

61. See 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION—LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON* (Thomas McCarthy trans., 1981). Thanks to Ed Rubin for some guidance here.

62. See, e.g., JAMES S. FISHKIN, *WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION* (2009); David L. Ponet & Ethan J. Leib, *Deliberative Law*, in *THE OXFORD HANDBOOK OF DELIBERATIVE DEMOCRACY* 612 (André Bächtiger et al. eds., 2018); Charles Sabel, *Rethinking the Street-Level Bureaucrat: Tacit and Deliberate Ways Organizations Can Learn*, in *ECONOMY IN SOCIETY: ESSAYS IN HONOR OF MICHAEL J. PIORE* 113, 113–42 (Paul Osterman ed., 2012).

63. See *United States v. Costello*, 666 F.3d 1040, 1044 (7th Cir. 2012) (Posner, J.) (“Dictionary definitions are acontextual, whereas the meaning of sentences depends critically on context, including all sorts of background understandings.” (citation omitted)); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 67 (1994) (referring to dictionaries as “museum[s] of words . . . rather than a means to decode the work of legislatures”); James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court’s Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483 (2013) (evaluating and criticizing the Court’s pervasive dictionary culture in statutory interpretation decisions since 1987).

64. *Dialogue*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (unabridged) 623 (1986).

65. *Dialogue*, 4 THE OXFORD ENGLISH DICTIONARY 601 (2d ed. 1989) (emphasis added).

The last point—that groups or institutions can speak and participate in conversation—is supported by contributions from philosophy, psychology, and political science, as well as law. Lawrence Solan has explored how we routinely regard groups, whether formally constituted (national legislatures or city councils) or informally aggregated (neighborhood residents or married couples), as decisionmaking units imbued with a collective mental state.⁶⁶ When positive political theorists emphasize “the meaning that the legislature intended to convey,” they are relying on the idea of attributed group intent or purpose.⁶⁷

This group intent or purpose derives from the structural and functional realities of the legislature as a representative body. At the national level, senators or representatives essentially assign to subgroups of their colleagues (standing committees, conference committees, informal bipartisan coalitions, even majority and minority leaders) the principal responsibility for drafting a text and then explaining or elaborating on its meaning. There is a collective intent or purpose because the members who voted for the text are presumed to agree that the text they approved means what it says, and—in certain instances of ambiguity—what their authorized or designated colleagues said it means.⁶⁸

Appellate judges also express collective intent, albeit on a smaller scale, when joining an opinion authored by one of their colleagues. In doing so, members of an appellate panel or a supreme court express their support for an explanation or elaboration of the meaning of contested statutory text.

Debates will continue, of course, over whether institutions such as legislatures and courts can possess a collective intent.⁶⁹ But apart from associating ourselves with the respectable, perhaps predominant view that they can, sufficiently to make sense of the idea of interbranch dialogue, we will not dwell further on the issue. More important for present purposes than extending the debate over whether institutions are able to communicate a collective mental state is to focus attention on what really counts as forms of responsive communication between institutions.

66. See LAWRENCE M. SOLAN, *THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION* 89–97 (2010); Solan, *supra* note 38, at 437–49. See also MARGARET GILBERT, *SOCIALITY AND RESPONSIBILITY: NEW ESSAYS IN PLURAL SUBJECT THEORY* 41 (2000).

67. See Cheryl Boudreau et al., *What Statutes Mean: Interpretive Lessons From Positive Theories of Communication and Legislation*, 44 SAN DIEGO L. REV. 957, 961–62 (2007).

68. See James J. Brudney, *Intentionalism’s Revival*, 44 SAN DIEGO L. REV. 1001, 1007–08 (2007); James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 52–54 (1994) [hereinafter Brudney, *Congressional Commentary*]; McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 711–13 (1992).

69. Compare sources cited in Subpart I.E, with sources cited in this Subpart II.A.

As we illustrate below, these forms may involve exchanges communicated in purely textual terms, such as a court's textualist analysis followed by revised or adjusted legislative language. They also may be reflected in more purposive exchanges, as when a legislature uses a committee report or conference report to explain the meaning of complex text and a court response includes its understanding of legislatively expressed intent or policy.

B. Informal Dialogue: Signals versus Exchanges

Starting from our conceptual approach to dialogue as responsive communication in which each party takes seriously what the other party communicates (as opposed to, say, exclusively strategic posturing), interbranch dialogue entails some form of engaged and productive interaction between a legislature and a court. In this regard, consider possible distinctions between interbranch "signals" (discussed in Subparts I.B–C above) and more deliberative interbranch "exchanges."

Interbranch signals are statements by one branch conveying information or communicating authoritative preferences to the other branch. Typically, these signals neither invite nor anticipate interactive response. From the judicial side, the quotidian illustration is when high courts construe contested statutory text through published decisions. At the Supreme Court level, justices expect their interpretations to be followed by lower courts and parties in future cases. Although the Court does not ordinarily look for any response from Congress, it may occasionally delay an effective date to give Congress time to address the impact of its decision.⁷⁰

From the legislative side, "overrides" may be viewed as a form of signaling. In an override,⁷¹ Congress or a state legislature adds new text, signaling its authoritative preference for a different interpretation than a court gave to the original text. On one level, the legislature is "responding" to the court's decision.

70. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982); see also Richard M. Re, *The Doctrine of One Last Chance*, 17 GREEN BAG 173, 175 (2014) (discussing how the Supreme Court in *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 211 (2009) appeared to give the political branches one last chance to update the outdated and likely unconstitutional coverage formula under the Voting Rights Act).

71. See James Buatti & Richard L. Hasen, Response, *Conscious Congressional Overriding of the Supreme Court, Gridlock, and Partisan Politics*, 93 TEX. L. REV. 263 (2015); Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317 (2014); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991); Beth Henschen, *Statutory Interpretations of the Supreme Court: Congressional Response*, 11 AM. POL. Q. 441 (1983).

Yet the legislature does not ask the court for its views or seek any further judicial feedback other than to implement the legislature's most recent understanding of the law as amended.⁷²

Legislative "underwrites," actions evidencing an express endorsement of a judicial reading of statutory text,⁷³ may also be viewed as a form of legislative signaling. In identifying and codifying a judicial decision of which it approves, the legislature does not typically seek or expect any response from the judiciary. Underwrites indicate that signals between the two branches can be cordial as well as contentious. Still, these assertions of legislative authority, like the initial judicial interpretations that they embrace, can be understood as stand-alone statements rather than elements of an ongoing conversation.⁷⁴

Legal scholars, including the two of us, have sometimes been too casual in referring to overrides and underwrites as dialogue itself.⁷⁵ At the same time, the picture of legislative action as signal is incomplete in important respects. To wit, there can be a continually interactive set of iterations once the legislature responds to a judicial interpretation of its work product, whether in the form of disapproval or approval. Subsequent interpretive decisions by the judiciary often reflect a further exchange: a judicial expression of refinement or deviation rather than mere implementation of the adjusted text.⁷⁶ And legislative underwrites

72. The legislature may contend—in a purpose section or in legislative history—that it is correcting a judicial interpretive error and "restoring" the text's original meaning. *See, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(2), 105 Stat. 1071 (1991) (purpose statement). Alternatively, the legislature may maintain that it is simply establishing a new, prospective meaning. Whether the legislature's expressed intent is restorative or prospective, its override is not typically an invitation for courts to respond further.

73. *See* Ethan J. Leib & James J. Brudney, *Legislative Underwrites*, 103 VA. L. REV. 1487 (2017) (describing and analyzing the surprisingly frequent occurrence of underwrites at the federal and state levels).

74. At the state level, interpretive directions contained in legislative resolutions may be a form of interbranch signaling, too. For example, 2017 Oklahoma House Resolution No. 1004, approved by the House in May 2017, provides "THAT Oklahoma judges and specifically justices of the Oklahoma Supreme Court are directed not to interfere with this Legislature's right to clarify Oklahoma criminal law regarding abortion per Section 36 of Article V of the Oklahoma Constitution." H.R. Res. 1004, 56th Leg., 1st Sess. (Okla. 2017). The House resolution responds to two recent Oklahoma Supreme Court decisions invalidating state statutory provisions restricting access to abortions. *See* *Burns v. Cline*, 387 P. 3d 348 (Okla. 2016) (invalidating 2014 Okla. Sen. Bill No. 1848); *Burns v. Cline*, 382 P. 3d 1048 (Okla. 2016) (invalidating 2014 Okla. Sen. Bill No. 642). Although the legislature may hope the state supreme court will respond in future decisions, supervening federal constitutional dimensions of the abortion debate would seem to make this Resolution something other than a genuine request for dialogue.

75. *See, e.g.*, Hasen, *supra* note 26, at 208; Leib & Brudney, *supra* note 73, at 1494, 1499, 1521–22.

76. *See* Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511 (2009) [hereinafter

of lower court decisions do more than affix a seal of approval. They also inform other lower courts that conflicting interpretations should be abandoned, thereby fostering judicial consistency on matters of statutory meaning.⁷⁷

Less harmoniously, Congress has overridden consecutive Supreme Court decisions construing the same statutory text, in the process remonstrating with the Court for not following its earlier legislative instruction. For example, in the course of amending the Age Discrimination in Employment Act of 1967 (ADEA), Congress in 1978 overrode the Court's decision in *United Air Lines, Inc. v. McMann*,⁷⁸ and then in 1990 overrode the decision in *Public Employees Retirement System of Ohio v. Betts*.⁷⁹ In both instances, the Court had held that a pension plan established before the ADEA effective date but continuing for years or decades thereafter could not be deemed "a subterfuge to evade the Act or its purposes."⁸⁰ Congress's second override, addressing the *Betts* decision, was accompanied by committee report language that was surely meant to be responsive and edifying, albeit unusually harsh.⁸¹

Indeed, overrides may result in judicial replies that contribute to an ongoing, if somewhat combative, exchange between the branches.⁸² In recent

Widiss, *Shadow*]; Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859 (2012) [hereinafter Widiss, *Hydra*].

77. See Leib & Brudney, *supra* note 73, at 1527–28.

78. 434 U.S. 192 (1977).

79. 492 U.S. 158 (1989).

80. See S. REP. NO. 101-263, at 28 (1990), accompanying Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) (explaining Congress's override in 1978 of *McMann* and in 1990 of *Betts*).

81. See S. REP. NO. 101-263, at 29. It reads:

Once again, the Committee intends to overturn the erroneous interpretation of the Supreme Court The Committee regrets that the Supreme Court in *Betts* chose not to credit the language of the 1978 Conference Report, language that appeared in the Congressional Record and was overwhelmingly approved by both Houses of Congress. The Committee hopes that in the future the Supreme Court will take more seriously such expressions of legislative intent, particularly when they are subject to the same review and ratification as the language of the statute.

Id.

82. One example of such an institutional exchange that has spanned decades and implicated a number of legislative initiatives involves whether federal statutes awarding to prevailing plaintiffs "costs" or "reasonable attorney's fees as part of the costs" should be understood as encompassing expert fees. The Court, in a series of divided decisions, has declined to read these textual provisions as incorporating coverage of, or full compensation for, expert fees. See, e.g., *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006) (construing Individuals with Disabilities Education Act of 2000 [IDEA]); *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83 (1991) (construing Civil Rights Attorney's Fees Awards Act of 1976); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987) (construing 28 U.S.C. § 1920 assessing costs in civil litigation). The majority in *Crawford* announced a requirement of

times, the Supreme Court has replied to override statutes in interactive ways that reassert its own interpretive heft. These include confining the reach of the override, thereby reviving aspects of its overridden interpretation as a form of “shadow precedent,”⁸³ and inferring from the override that it can approach on a clean slate identical but unamended language in a closely related statute.⁸⁴

In short, the distinction between unilateral signaling and dialogic exchange starts to break down when one considers the extended interplay that often accompanies legislative overrides and underwrites. Both types of laws signal responses to judicial decisions—rebukes or endorsements. But when the courts then engage those legislative responses with new decisions of their own, pointing in various directions—switching course to adhere, ironing out inconsistencies to conform, or limiting scope to constrain—the institutional signals can evolve into an interbranch exchange. This exchange reflects the deliberative acquisition by both institutions of new understandings about statutory meaning, even when the understandings are not always acquired in congenial circumstances.⁸⁵

Similar ongoing exchanges take place at the state level. One notable example involves an extended conversation about the meaning and application of Oregon’s statute codifying the method of statutory construction for courts to follow. The law provided that “[i]n the construction of a statute, the court shall pursue the intention of the legislature if possible.”⁸⁶ This succinct cardinal rule caused considerable confusion as to when it was appropriate to consult

“explicit statutory authority” in order to reallocate the burden of expert witness costs. *Crawford*, 482 U.S. 437. The dissenters in *Murphy* and *Casey* argued vehemently that Congress in its conference and committee reports (accompanying statutes enacted both prior and subsequent to *Crawford*’s “explicit authority” rule) had expressed a clear purpose to cover expert fees, but the majority in each decision relied on the absence of such an explicit reference in the enacted text. See *Murphy*, 548 U.S. at 308, 312–13 (Breyer, J., dissenting); *Casey*, 499 U.S. at 103, 108–11 (Stevens, J., dissenting). Congress overrode *Casey* as part of the 1991 Civil Rights Act, and members have been critical of *Murphy* in the years since it was decided. See, e.g., 160 CONG. REC. S5510 (daily ed. Sept. 10, 2014) (introducing bill that “clarifies Congress’ express intent” that parents prevailing under the IDEA should recover expert witness fees); 157 CONG. REC. S1833–34 (daily ed. Mar. 17, 2011) (same). For an in-depth discussion of this extended dialogue, encompassing additional statutes and court decisions, see PETER L. STRAUSS, LEGAL METHODS: UNDERSTANDING AND USING CASES AND STATUTES 526–59, 605–58 (3d ed. 2014).

83. See, e.g., *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 626–28 (2007). See generally Widiss, *Shadow*, *supra* note 76.

84. See, e.g., *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174–75 (2009). See generally Widiss, *Hydra*, *supra* note 76.

85. See Luc B. Tremblay, *The Legitimacy of Judicial Review: The Limits of Dialogue Between Courts and Legislatures*, 3 INT’L J. CONST. L. 617, 630–32 (2005).

86. OR. REV. STAT. § 174.020 (2017).

legislative history in pursuit of such an intention.⁸⁷ The Oregon Supreme Court, in its 1993 *Portland General Electric (PGE)* decision then construed the statute to establish a three-step methodology for determining legislative intent: legislative history was only to be consulted at stage two, after textual analysis revealed an ambiguity in the legislature's intentions.⁸⁸ In the years that followed, the Oregon Supreme Court's consistent application of its 1993 framework resulted in a strong textual turn for the court's statutory construction decisions—a marked increase in reliance on dictionary definitions of statutory terms as well as a noticeable drop in the court's reliance on legislative history.⁸⁹

In 2001, the Oregon legislature addressed the *PGE* framework by adding language to its cardinal rule, providing that the parties may offer legislative history in any case, whether there is ambiguity or not.⁹⁰ Although initially refusing to acknowledge the likelihood that the 2001 statute had altered its interpretive method,⁹¹ the Court in 2009 responded to the amendment in *State v. Gaines*,⁹² acknowledging the effect of the 2001 alteration on the *PGE* approach. The Court concluded that the statute now placed legislative history on par with the text and its linguistic context, and that the legislature intended to ease the rigid constraint *PGE* had placed on courts' permission to review otherwise pertinent legislative history.⁹³ In recent statutory cases following *Gaines*, the Oregon Supreme Court has regularly consulted legislative history.⁹⁴ And the

87. Compare *Morasch v. State*, 493 P.2d 1364, 1365 (Or. 1972) (gathering legislative intent from text and consulting legislative history when the text is ambiguous), with *State v. Leathers*, 531 P.2d 901, 904 (Or. 1975) (giving due consideration to legislative history in ascertaining intent regardless of whether text is ambiguous). See Jack L. Landau, *Oregon as a Laboratory of Statutory Interpretation*, 47 WILLAMETTE L. REV. 563, 566–67 (2011).

88. See *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 859 P.2d 1143, 1145–46 (Or. 1993).

89. See Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1779–80 (2010); Landau, *supra* note 87, at 568.

90. OR. REV. STAT. § 174.020 (1) (b) (2001) (“To assist a court in its construction of a statute, a party may offer the legislative history of the statute.”).

91. See Gluck, *supra* note 89, at 1783 n.115 (“Even a casual review of available online Oregon Supreme Court briefs . . . reveals a substantial number that addressed the possible conflict between the legislated rule and *PGE*.”).

92. 206 P.3d 1042, 1047–51 (Or. 2009).

93. See *id.* at 1050. The Court noted that the legislature “also intended the court to retain the authority to determine, as a discretionary matter, what weight, if any, to give that legislative history,” although it was no longer limited to considering such history in cases where it found the text ambiguous. *Id.*

94. See, e.g., *State v. McNally*, 392 P.3d 721, 728 (Or. 2017) (“To that end, we note that dictionaries do not tell the whole story of statutory interpretation. . . . Rather, context and legislative history also inform our view of the meaning of the words used.”); *Brown v. SAIF Corp.*, 391 P.3d 773, 792–93 (Or. 2017) (“More importantly, other legislative history confirms that, contrary to that court’s reading of the statute, the legislature affirmatively

dialogue may well continue in the future; legislators in 2013 introduced a bill to require that courts consider legislative history when construing a statute, specifying what types of materials constitute legislative history.⁹⁵

This protracted interbranch exchange in Oregon has turned out to be more cooperative than confrontational. Similar institutional exchanges addressing courts' interpretive methodology have been less amicable in some other states.⁹⁶ While judicial bristling over enacted canons is perhaps understandable given that legislatures are instructing courts in how to do their job, such resistance is offered as part of an informal yet consciously responsive communication between the two branches: In a word, it is dialogue.

There are also numerous examples of back and forth exchanges at the state level in which the two branches explicitly resolve their differences on substantive matters of statutory interpretation rather than methodology. In one instance, the California Supreme Court concluded that although an elderly parent was deemed "in need" of public assistance to the aged under the state welfare law, her adult children owed her no duty of support as a "poor person" under a separate civil code provision of state law.⁹⁷ The legislature then amended the civil code provision, replacing the words "poor person" with the words "any person in need."⁹⁸ Two years later, the California Supreme Court expressly noted that the legislature was responding to its earlier decision and held that the law now coherently imposed a duty of support on adult children to elderly persons receiving aid.⁹⁹

In another example, the Idaho Supreme Court and the Idaho legislature engaged in an extended exchange regarding when attorney's fees should be awarded in civil cases.¹⁰⁰ A 1976 Idaho law had committed the decision to award

intended that employers be authorized to deny combined condition claims when the medical conditions that they previously accepted ceased to be the major cause of the combined conditions."); *State v. Makin*, 381 P.3d 799, 801 (Or. 2016) ("In analyzing that [statutory] question, we employ our familiar methodology. We look to the text, context, and legislative history . . . to determine the legislature's intent.").

95. See S.B. 289, 54th Gen. Assemb., 1st Reg. Sess. (Or. 2013) (identifying "legislative history that may be offered by party includes, but is not limited to, floor speeches, testimony and member statements in committees, staff measure summaries, fiscal impact statements, revenue impact statements and budget reports").

96. See, e.g., Gluck, *supra* note 89, at 1785–97 (describing courts' hostile reactions to legislated interpretive rules in Connecticut and Texas).

97. See *County of San Mateo v. Boss*, 479 P.2d 654, 659 (Cal. 1971).

98. See California Welfare Reform Act of 1971, ch.578, § 3, Stats. 1971.

99. *Swoap v. Superior Court*, 516 P.2d 840, 846 (Cal. 1973). The court in *Swoap* went on to hold that the amended section was constitutional. *Id.* at 852. See LAURA LANGER, JUDICIAL REVIEW IN STATE SUPREME COURTS: A COMPARATIVE STUDY 36 (2002).

100. See *Hoffer v. Shappard*, 380 P.3d 681, 694–96 (Idaho 2016).

attorney fees to the sound discretion of the court,¹⁰¹ but a 1979 court rule limited judicial discretion to instances where a case was “brought, pursued, or defended frivolously, unreasonably, or without foundation.”¹⁰² In 1987, the legislature added an unrelated sentence to the attorney’s fee law, along with an enacted but uncodified statement of legislative intent that prevailing civil litigants be made whole for attorney’s fees “when justice so requires.”¹⁰³

In 2016, the Idaho Supreme Court in *Hoffer v. Shappard* announced that it “was unable to continue to ignore the clear intent of the Legislature by continuing to apply the court rule,” and that in the near future the courts of the state would apply the “when justice so requires” standard.¹⁰⁴ At the same time, the court delayed the effective date of its new ruling for five months, allowing the lower courts and the bar time to adjust and also allowing the legislature time to respond.¹⁰⁵ The legislature did respond, revising the law to match the “frivolously, unreasonably, or without foundation” language of the 1979 court rule.¹⁰⁶ Thus, after the court changed its institutional position in a conscious effort to conform to the legislature’s previously enacted expansive intent, the legislature altered *its* prior position to legitimize the court’s earlier constraining gloss on the statutory text.

Rather than describe in detail additional state law examples,¹⁰⁷ we hope we have amply illustrated how legislatures and courts engage in prolonged self-conscious dialogue about matters of statutory interpretation on a relatively unstructured and ad hoc basis. Returning for a moment to our earlier federal example involving Congress’s rejection of two Supreme Court decisions construing the same text, even these consecutive legislative overrides reflect responsive engagement.¹⁰⁸ As we observed, the second congressional override,

101. See IDAHO CODE ANN. § 12-121 (West 2018).

102. IDAHO R. CIV. P. 54(e)(2).

103. Act of April 1, 1987, ch. 263, § 1, 1987 Idaho Sess. Laws 555 (“It is the intent of the legislature of the state of Idaho that this act grant prevailing litigants in civil actions the right to be made whole for attorney’s fees and costs when justice so requires.”).

104. *Hoffer*, 380 P.3d at 696.

105. See *id.*

106. See IDAHO CODE ANN. § 12-121 (West 2018).

107. One more. In *Estabrook v. American Hoist & Derrick, Inc.*, 498 A.2d 741, 745, 748–50 (N.H. 1985), the New Hampshire Supreme Court reviewed constitutional objections to a state workers compensation law. It explored legislative history in detail, recognizing that the legislature had made changes to accommodate judicial concerns. Although the legislature’s good faith effort was not successful in the court’s view, it still engaged in a kind of responsive communication. See LANGER, *supra* note 99, at 35.

108. See discussion *supra* text accompanying notes 80–81, reviewing congressional responses to decisions in *United Air Lines, Inc. v. McMann*, 424 U.S. 192 (1977), and *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989).

again rejecting the Court's interpretation of what constitutes a "subterfuge" under the ADEA, was confrontational and somewhat surly on Congress's part.¹⁰⁹ Yet ultimately, Congress adjusted its statutory language to do what the Court had asked, clarifying the ADEA text by expunging entirely the word "subterfuge" and adding a new section that expressly required an employee benefit plan to comply with the ADEA regardless of the date of the plan's adoption.¹¹⁰

That an interaction may begin with a signal or command from a court, without a request for response or acknowledgement from the legislature, is not necessarily the end of the matter. One branch issuing a signal or command as to statutory meaning can and often does trigger an institutional response leading to further interbranch exchanges, with both court and legislature reiterating, modulating, or abandoning earlier seemingly directive expressions.

C. Formal Dialogue: Invitations and Requests

Beyond these relatively unstructured and informally developing conversations over time, more formal versions of interbranch dialogue can occur through express solicitation or invitation for an engaged response. A familiar example at the federal level is Supreme Court invitations to Congress to override the Court's statutory decisions.¹¹¹ One classic instance is *McCarty v. McCarty* in which the Court held that upon dissolution of a marriage, federal law precluded a state court from dividing military retirement pay pursuant to state community property laws.¹¹² At the end of his majority opinion, Justice Blackmun expressed concern about the policy implications of the law as written and construed, and he suggested that Congress consider a change:

We recognize that the plight of an ex-spouse of a retired service member is often a serious one Congress may well decide, as it has in the Civil Service and Foreign Service contexts, that more

109. See *supra* note 81 (quoting from Senate committee report); Brudney, *Congressional Commentary*, *supra* note 68, at 17 n.60 (describing extent of bipartisan support for second override).

110. See Older Workers Benefit Protection Act, Pub. L. No. 101-433, § 101, 104 Stat. 978, 978-81 (1990). These changes were fully responsive to the Court's twice-expressed position on whether an employee benefit plan may be exempt by virtue of its pre-ADEA (Age Discrimination Employment Act) adoption.

111. See Lori Hausegger & Lawrence Baum, *Inviting Congressional Action: A Study of Supreme Court Motivations in Statutory Interpretation*, 43 AM. J. POL. SCI. 162, 166 (1999) (identifying forty-two invitations to override in the 1986-1990 terms).

112. 453 U.S. 210, 232-35 (1981).

protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone.¹¹³

In 1982, Congress responded by passing the Uniformed Services Former Spouses' Protection Act, overriding the Court's decision by specifying that a state may treat veterans' "disposable retired . . . pay" as community property divisible upon divorce.¹¹⁴

The Court's strong invitation to override in *McCarty* is far from unusual. A leading study found that 7.8 percent of the Court's majority opinions in statutory decisions during the 1986–2000 terms—more than seventy majorities—included similarly strong invitations.¹¹⁵ In addition, majority opinions have included weaker invitations to override, in which the Court does not see a policy concern with its interpretation but recognizes that Congress may have wanted to do more than the text provides.¹¹⁶

Not every majority invitation results in an override statute such as occurred following *McCarty*. Still, Congress is more likely to override when the Court has invited such action.¹¹⁷ The causal link between invitations and overrides may be because the invitations themselves encourage Congress to act; alternatively, the invitations may reflect the Court's awareness that interest groups are already mobilizing in anticipation of its decision.¹¹⁸ Either way, the fact that these

113. *Id.* at 235–36.

114. Pub. L. No. 97-252, § 1002 (1982) (codified at 10 U.S.C. § 1408(c)(1) (2012)). See *Howell v. Howell*, 137 S. Ct. 1400, 1403 (2017) (summarizing this sequence of events). The Senate Committee Report makes clear that Congress was responding specifically to Justice Blackmun's invitation rather than more generally to the decision at large. See S. REP. NO. 97-502, at 1–3, 7–8 (1982), 1982 U.S.C.C.A.N. 1596, 1596–97, 1601–03. See generally H.R. REP. NO. 97-479, at 165–68 (1982) (Conf. Rep.).

115. See Lawrence Baum & Lori Hausegger, *The Supreme Court and Congress: Reconsidering the Relationship*, in MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE 107, 112 (Mark C. Miller & Jeb Barnes eds., 2004). Baum and Hausegger define "strong" invitations as consisting of "statements that the statute as interpreted by the Court creates a problem, or saying that Congress can act if it disagrees with the Court . . . [or that] there is a need for Congress to consider action in response to the decision." *Id.* at 112. For instances drawn from their dataset of "strong invitations," see, for example, *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40–41 (1998); *Amchem Products Inc. v. Windsor*, 521 U.S. 591, 628–29 (1997); *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 110 (1993); and *Mansell v. Mansell*, 490 U.S. 581, 594 (1989).

116. See, e.g., *Cleveland v. United States*, 531 U.S. 12, 27 (2000) ("Absent clear statement by Congress, we will not read the mail fraud statute to place under federal superintendence a vast array of conduct traditionally policed by the States."). Even here, the Court, aware that its prior interpretation of the same criminal law statute had triggered an override, invites further institutional dialogue: "[A]gain, as we said in *McNally*, if Congress desires to go further, it must speak more clearly than it has." *Id.* at 20.

117. See Baum & Hausegger, *supra* note 115, at 112–13; Hausegger & Baum, *supra* note 111, at 167.

118. See Baum & Hausegger, *supra* note 115, at 113; Hausegger & Baum, *supra* note 111, at 167.

majority invitations are correlated with congressional action to reverse the Court's decision strongly suggests that the branches are routinely engaged in responsive communication.

There are also numerous instances of invitations to override issued by justices in dissent, and these too may be taken up by Congress.¹¹⁹ Although we focus on invitations in majority opinions because they reflect institutional positions, it is clear that dissenting justices communicate in their traditional institutional capacity as judges. Their interpretive analysis in a case-specific opinion is what generates congressional interest; that Congress responds with some frequency to these dissenters' invitations reinforces the fact that Congress is engaged with what the Court has to say.¹²⁰ Moreover, while we have discussed these invitations at the federal level, state courts also frequently invite legislatures to override their decisions.¹²¹

Courts may have a range of motivations for inviting overrides. They may be more comfortable allowing the legislature to supplant its interpretation by changing policy; or they may be uncertain of (or less interested in) the best course regarding a complex technical issue; or they may be hedging their bets in order to reduce criticism from the legislature and interest groups.¹²² But assuming that judges sometimes have multiple motives when issuing invitations, or that they

119. See, e.g., *Ledbetter v. Goodyear Tire & Rubber Co. Inc.*, 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting), *overridden* by Lilly Ledbetter Fair Pay Act of 1999, Pub. L. No. 111-2, 123 Stat. 5 (2009); *W. Va. Hosps., Inc. v. Casey*, 499 U.S. 83, 113-16 (1991) (Stevens, J., dissenting), *overridden* by 1991 Civil Rights Act § 113.

120. Indeed, there is evidence that overrides are generally more likely when the Court is not unanimous; the presence of a dissent may serve as an indication to Congress that the Court has perhaps reached a bad policy result. See Lori Hausegger & Lawrence Baum, *Behind the Scenes: The Supreme Court and Congress in Statutory Interpretation*, in *GREAT THEATER: THE AMERICAN CONGRESS IN THE 1990s* 224, 240-41 (Herbert F. Weisberg & Samuel C. Patterson eds., 1998).

121. For a very recent illustration, see *New Hampshire v. Blanchette*, No. 2016-0313, 2017 N.H. LEXIS 111 (N.H. May 15, 2017) (overturning conviction of county law enforcement officer based on ambiguity in state law barring individuals employed by correctional institutions from having sex with inmates, and inviting state legislators to clarify the law for future cases because both state and defense had presented plausible arguments). For an earlier example, see *In re Sarah K.*, 487 N.E.2d 241, 251 (N.Y. 1985) (inviting New York legislature to reexamine its private placement adoption statute following 13 years of operation, "for it appears that the well-founded concerns that engendered the law are not yet dispelled"). The statute was amended the following year in response to the request of the Court of Appeals. See Kaye, *supra* note 52, at 23-24 & n.129.

122. See Baum & Hausegger, *supra* note 115, at 120; Hausegger & Baum, *supra* note 111, at 170-74, 178-82. See also Nancy C. Straudt et al., *Judicial Decisions as Legislation: Congressional Oversight of Supreme Court Tax Cases, 1954-2005*, 82 N.Y.U. L. REV. 1340, 1363-65 (2007) (discussing Supreme Court justices' varied motivations for inviting overrides in tax law setting).

consider additional audiences besides the legislature, this does not diminish or detract from the court's expressed interest in eliciting a response from the legislature on matters squarely within the legislative domain. The branches can engage one another in dialogue based on multiple motivations and recognizing additional audiences, just as individuals do when participating in a dialogue.

Another example of formal interbranch dialogue, initiated by legislatures rather than courts, is requests for advisory opinions at the state level. In at least twelve states, justices are authorized to issue advisory opinions to the legislative or executive branches.¹²³ Typically, legislatures ask whether a prospective piece of legislation would pass constitutional muster, or they request the justices to clarify a previous ruling.¹²⁴

Advisory opinions are a structured mechanism of communication between legislatures and the justices of supreme courts. Unlike the "hard-form" judicial review that occurs in the federal constitutional setting, these opinions are nonbinding, based on the well-settled practice that justices issue them in their individual capacities rather than as courts of law.¹²⁵ The justices "do not speak ex cathedra, from the chair of judgment, but only as consultants . . . [and] however sound the opinion may be, it carries no mandate."¹²⁶ Although these opinions may eventually evolve into decisions that qualify as binding precedent, they themselves are not the final word. Accordingly, advisory responses to legislatures' requests for guidance or clarification are typically followed by legislative action that extends the interbranch conversation. Several examples highlight the nature of this ongoing dialogue, in which judicial responses and subsequent exchanges may reflect interbranch disagreement, harmonious collaboration, or even abandonment of interbranch engagement.

In 2002, the Alabama legislature was considering a bill that permitted certain sparsely populated municipalities to determine by "local option" election whether to permit the sale and distribution of alcoholic beverages.¹²⁷ Concerned

123. See Hans A. Linde, *Observations of a State Court Judge*, in JUDGES AND LEGISLATORS: TOWARDS INSTITUTIONAL COMITY 117, 120 (Robert A. Katzmann ed., 1988) (citing ROBERT T. ROPER ET AL., CONFERENCE OF STATE COURT ADM'RS & NATIONAL CTR. FOR STATE COURTS, 1984 APPELLATE COURT JURISDICTION GUIDE FOR STATISTICAL REPORTING: SUMMARY TABLES 34-45 (1984)). In two of those states, South Dakota and Florida, courts may issue advisory opinions in cases within their discretionary subject matter jurisdiction only to the governor. *Id.*

124. See MARK C. MILLER, JUDICIAL POLITICS IN THE UNITED STATES 245 (2015).

125. See Jonathan D. Persky, "Ghosts That Slay": A Contemporary Look at State Advisory Opinions, 37 CONN. L. REV. 1155, 1209 (2005); Mel A. Topf, *State Supreme Court Advisory Opinions as Illegitimate Judicial Review*, 2001 L. REV. MICH. ST. U. DET. C.L. 101, 106.

126. Opinion to the Governor, 174 A.2d 553, 554 (R.I. 1961).

127. See S.B. 539, 2002 Reg. Sess. (Ala. 2002).

that the bill might conflict with certain sections of the state constitution, the legislature requested an advisory opinion from the Alabama Supreme Court.¹²⁸ The justices issued their advisory opinion a short time later; they concluded that the statutory drafting by Alabama's legislature would, if enacted, be a violation of the state constitution.¹²⁹

Within just over a year, the Alabama legislature enacted a law substantially identical to its 2002 bill, except that the legislature added a provision acknowledging the advisory opinion but disagreeing with the conclusion the justices had reached about its statute's legal effect.¹³⁰ The legislature maintained that its new statute was constitutional "as a matter of law" under the power granted to it by a different section of the constitution.¹³¹ A qualified small municipality then scheduled a "local option" election, in which citizens voted by almost 3 to 1 to allow liquor sales. The town was sued by concerned citizens, but the Alabama Supreme Court held that the plaintiffs had not established an actual injury and therefore lacked standing to challenge either the election results or the new law's constitutionality.¹³² Thus, although the legislature sought guidance from the justices and understood how it had been advised, the legislature disagreed with that advice—and its statutory reply has remained in place.

Another example comes from Massachusetts. There, two at-will employees who worked at a local greyhound track were fired for refusing to work on Christmas Day. They sued, alleging religious discrimination. The Massachusetts Supreme Judicial Court (SJC) held that the applicable state religious rights statute, which protected "the practice of a creed or religion *as required by that creed or religion*,"¹³³ violated the First Amendment's Establishment Clause by preferring the religions or beliefs of an organized sect or church over those of an individual.¹³⁴ The Massachusetts House of Representatives then asked the SJC for an advisory opinion on a new bill that included amendments to the statute prohibiting religious discrimination in the workplace.¹³⁵ The justices responded that the proposed amendment would

128. See H.R. Res. 383, 2002 Reg. Sess. (Ala. 2002).

129. See Opinion of the Justices, 825 So.2d 109, 115–16 (Ala. 2002).

130. S.B. 362, 2003 Reg. Sess., 2003 Ala. Laws 1011. See also *Town of Cedar Bluff v. Citizens Caring for Children*, 904 So.2d 1253, 1255 (Ala. 2004).

131. See *Town of Cedar Bluff*, 904 So.2d at 1255.

132. See *id.* at 1259.

133. MASS. GEN. LAWS ch. 151B, § 4(1A) (2016) (emphasis added).

134. See *Pielech v. Massasoit Greyhound, Inc.*, 668 N.E. 2d 1298, 1302–03 (Mass. 1996).

135. See Opinion of the Justices to the House of Representatives, 673 N.E. 2d 36, 36 (Mass. 1996). The bill, responding to *Pielech*, added a sentence to § 4(1A) providing that "the words creed or religion means any sincerely held religious beliefs, without regard to whether such beliefs

remove the constitutional violation found in its prior *Pielech* opinion;¹³⁶ the legislature then amended the law using the precise language approved in the advisory opinion.¹³⁷ In this instance, dialogue resulted in agreement between the branches, as the legislature accepted and acted on the advice from the justices, using their actual language in its statutory drafting.

Finally, the New Hampshire Supreme Court, in a 1997 decision, invalidated the state's system for financing elementary and secondary education, and required remedial legislation to address the constitutional infirmity concerning property taxes and school funding.¹³⁸ In response, the legislature requested several advisory opinions on remedial legislation it proposed in 1998, 1999, and 2000. The justices in three separate advisory opinions opined that each of the proposed solutions was insufficient.¹³⁹ Following this extended back and forth between the branches, the issue of school funding equality identified by the Supreme Court remained unremedied.¹⁴⁰

Evidence suggests that in recent times, legislatures in states where advisory opinions are authorized have been requesting fewer advisory opinions than in earlier periods, and accordingly, courts are issuing fewer opinions.¹⁴¹ Still, the advisory opinion serves as a mechanism for dialogue and continues to be

are approved, espoused, prescribed, or required by any established church or other religious institution or organization." *Id.* at 36–37.

136. *See id.* at 37–38. The justices chose not to respond to a related request from the legislature as to whether a retroactivity clause for this new provision would be constitutional; they opined that a definitive answer would depend on the facts of each case. *Id.* at 38.

137. *See* MASS. GEN. LAWS ch. 151B, § 4(1A) (2016).

138. *See* *Claremont Sch. Dist. v. Governor (Claremont II)*, 703 A.2d 1353, 1354, 1360–61 (N.H. 1997).

139. *See* *Opinion of the Justices (School Financing)*, 712 A.2d 1080, 1086–87 (N.H. 1998) (opining that bill providing for a proportional tax rate minus a selective tax abatement for certain communities does not remedy the constitutional defect identified in *Claremont II*); *Opinion of the Justices (Tax Plan Referendum)*, 725 A.2d 1082, 1092 (N.H. 1999) (opining that bill providing for submission of school tax issue to the electorate in a referendum would be an unconstitutional delegation of legislative power); *Opinion of the Justices (Reformed Public School Financing System)*, 765 A.2d 673, 676–77 (N.H. 2000) (opining that new proposed bill retained a disproportionate property tax scheme that was found unconstitutional in *Claremont II*).

140. In some states, supreme court rulings on educational funding have led legislatures to make substantial changes in school finance and related educational reforms. *See* MILLER, *supra* note 124, at 246 (reporting changes by legislatures in Kentucky, Vermont, and Maine).

141. *See* Persky, *supra* note 125, at 1181–84 (comparing advisory opinion activity from 1990–2004 with activity from 1960–1973, and reporting that acceptance rate of advisory opinion requests has fallen from 89 percent to 81 percent, answer rate on advisory questions has fallen from 84 percent to 61 percent, and number of requests submitted to the justices has declined by more than half).

invoked with some frequency.¹⁴² Most relevant for our purposes, it provides a mechanism by which the legislature “can test the waters with borderline proposals without subjecting the public to reliance costs,” and the judiciary can respond to these proposals on an expeditious basis.¹⁴³ As our examples indicate, the results of these interbranch conversations may be respectful disagreement (as in Alabama), collaborative agreement (as in Massachusetts), or an inconclusive middle ground (as in New Hampshire). Whatever the results, though, advisory opinions at the state level reflect a conscious reciprocal engagement between the branches.

D. Additional Interbranch Mechanisms

We have discussed the principal informal and formal mechanisms that reflect ongoing responsive communication between legislatures and courts, what we think we can fairly call interbranch dialogue. Other modes of institutional expression may qualify as dialogue on a more occasional basis, depending on where they fall on the rough continuum between signals and exchanges. Some of these emanate initially from legislatures and others from the courts. We address them below, albeit in more summary fashion than the primary mechanisms analyzed in our two previous Subparts.

1. Legislated Canons of Interpretation

If canons of interpretation are a form of methodological common law, then enacted canons arguably indicate a displacement of that common law in relevant respects.¹⁴⁴ Beyond the extended dialogue over Oregon’s “pursue the intention of the legislature” canon described earlier,¹⁴⁵ there is a fair degree of consensus among state legislatures regarding the codification or rejection of certain canons.¹⁴⁶ Some of these codifications have led to extended interbranch exchanges in states

142. See *id.* at 1184 (reporting 143 advisory opinion responses between 1990 and 2004 in ten studied states).

143. *Id.* at 1203–04.

144. See generally Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341 (2010) (collecting and categorizing the statutory canons for all fifty states and the District of Columbia).

145. See *supra* text accompanying notes 86–96.

146. See, e.g., Scott, *supra* note 144, at 378, 429 (reporting that 26 states have codified the canon of consistency between statutes/in *pari materia*, and none have rejected it by code); *id.* at 402, 431 (reporting that twenty states have codified the canon that remedial statutes should be liberally construed while nineteen of those twenty states have codified a rejection of the canon that statutes in derogation of the common law should be strictly construed).

besides Oregon.¹⁴⁷ Yet while one might assume that judicial interpretation of statutes should be informed, if not influenced, by such prevailing patterns of codification,¹⁴⁸ these legislatively expressed preferences trench on an interpretive domain that tends to be zealously guarded by the courts for separation of powers reasons. Accordingly, they may engender little or no genuinely responsive interaction. Insofar as legislated canons and judicial reliance on common law canons often appear like two ships passing in the night, the concept of dialogue has less persuasive resonance here as a general matter—though exceptions appear from time to time.

2. Legislators' Amicus Briefs

Taking the federal level as our example, members of Congress often participate in amicus curiae briefs to the Supreme Court.¹⁴⁹ The briefs are efforts by legislators to explain the meaning of federal statutes and to support federal legislation under review by the Court, including when the executive branch does a less than adequate job of defending or enforcing the legislation.¹⁵⁰ Amicus participation by members of Congress may enhance the Court's appreciation for certain policy issues¹⁵¹ and also its understanding of legislative intent as expressed in the legislative history accompanying a particular statute.

On the other hand, it is not clear that these amicus briefs function as responsive institutional communication, which is the way we defined interbranch dialogue in Subpart II.A. For one thing, legislators are communicating not in their traditional institutional capacities through approval of statutory text and related legislative history but as advocates or commentators reviewing an earlier legislative product.¹⁵² Further, members participate as individual legislators rather than as the institution of Senate or House. While individual participation on a large-scale bipartisan basis could be viewed as a proxy for some form of

147. See generally Gluck, *supra* note 89, at 1785–811 (reporting on extended exchanges that have occurred in Texas, Connecticut, Wisconsin, and Michigan).

148. See Scott, *supra* note 144, at 409.

149. See JUDITHANNE SCOURFIELD MCLAUCHLAN, CONGRESSIONAL PARTICIPATION AS AMICUS CURIAE BEFORE THE U.S. SUPREME COURT (2005); Neal Devins, *Measuring Party Polarization in Congress: Lessons From Congressional Participation as Amicus Curiae*, 65 CASE W. RES. L. REV. 933 (2015).

150. See MCLAUCHLAN, *supra* note 149, at 213.

151. See, e.g., *Wisconsin v. Mitchell*, 508 U.S. 476, 488 (1993) (citing congressional amicus brief, among others, as providing evidence that hate crimes “are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest”).

152. In this respect, amicus briefs may be more analogous to State of the Judiciary Addresses, discussed *infra* in text accompanying notes 161–166, than to invitations to override issued by individual dissenting justices, *supra* note 119.

institutional expression, lawmakers in today's polarized Congress rarely if ever file bipartisan amicus briefs.¹⁵³ Institutional counsel for the House or the Senate might file briefs, as they have defending congressional prerogatives in separation of powers disputes before the Court. Since the mid-1990s, however, members of Congress have ceased to cooperate across partisan lines on these institutional briefs as well.¹⁵⁴

Their status as post-enactment commentary, along with the lack of a consistently unified institutional voice, presumably help account for the fact that in empirical terms, amicus briefs filed by legislators are not especially influential on the Court.¹⁵⁵

3. Judicial Stays of Mandate

One mechanism a court may use to communicate with the legislature is to stay its mandate accompanying a decision that substantially alters prior statutorily created expectations. Delaying the effective date of such a decision invites the legislature to respond by adjusting the new statutory reality so as to minimize reliance costs for affected interest groups or members of the public. One example is the Idaho Supreme Court decision altering the standard for awarding attorney's fees we explored earlier: its announcement of a five month delay enabled the legislature to adjust the law.¹⁵⁶ Another instance, at the federal level, involved the Supreme Court in 1982 staying its mandate for six months so that Congress could have time to reconstitute the bankruptcy courts or otherwise repair operation of the bankruptcy laws.¹⁵⁷ Notwithstanding these

153. See Devins, *supra* note 149, at 933–35. In addition to the individual and partisan nature of these amicus briefs, members often do not review the briefs themselves, as most of the work related to amicus participation is done at the staff level. See MCLAUCHLAN, *supra* note 149, at 22. This, of course, is also true of drafting statutory text, but unlike amicus briefs, members vote on proposed statutory text, and they generally do so following a detailed explanation from relevant staff and having been lobbied from interest groups on both sides. See generally KATZMANN, *supra* note 11, at 14–22.

154. See Devins *supra* note 149, at 951–52 (reporting that in the Defense of Marriage Act case before the Supreme Court, the House Democrats filed an amicus brief criticizing the House counsel's defense of the statute; and in a case challenging the scope of the president's recess appointments powers, the Senate counsel was silent while Senate Republicans filed amicus briefs arguing against the executive branch position).

155. See MCLAUCHLAN, *supra* note 149, at 36, 210 (finding that the Justices rarely cite to congressional amicus briefs, and that members of Congress success rate before the Court (54 percent) is lower than the rate for the Solicitor General and many interest groups); Devins, *supra* note 149, at 935.

156. See *supra* text accompanying notes 100–106.

157. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982).

two examples of such judicially announced delay, we are doubtful that this judicial mechanism is used all that often.

An interesting corollary may be the executive branch delaying enforcement of a major judicially-created change in statutory scope, with the aim of allowing the legislature to respond to the court's decision. This is what occurred following the Supreme Court decision in *Garcia v. San Antonio Metropolitan Transit Authority*, which restored the applicability of federal statutory overtime protections for millions of police, firefighters, and other public employees.¹⁵⁸ Although the Court's decision became effective on April 15, 1985, when rehearing was denied, the Labor Department announced that local and state governments would not be required to comply until October 15, six months later.¹⁵⁹ In the interim, Congress enacted legislation that responded to *Garcia* by providing for compensatory time instead of overtime for public employees.¹⁶⁰

4. Judicial Presentations and Testimony to Legislatures

Presentations to the legislature by the chief justice of state supreme courts are a further indication at the state level that courts and legislatures converse on a frequent basis. More than forty states have used this mechanism to facilitate interbranch communications.¹⁶¹ Although chief justices typically discuss financial and administrative needs of the judicial branch, they also may raise issues of substantive law reform. For instance, in February 2017, the Chief Justice in Texas used his address to advocate for a bill aimed at overhauling Texas's bail system and also to point out that over the previous year more than 600,000 defendants had gone to jail for traffic, parking, and other minor offenses.¹⁶² Since his address, the state Senate approved a bail reform bill that is likely to allow more nonviolent offenders to be released while they await trial,¹⁶³

158. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

159. See Linda Greenhouse, *Court Is Assailed on Overtime Issue*, N.Y. TIMES (July 26, 1985), <http://www.nytimes.com/1985/07/26/us/court-is-assailed-on-overtime-issue.html>; Kenneth B. Noble, *U.S. Drafting Overtime Pay Code to Cover State and City Workers*, N.Y. TIMES (June 14, 1985), <http://www.nytimes.com/1985/06/14/us/us-drafting-overtime-pay-code-to-cover-state-and-city-workers.html>.

160. See Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 787 (1985).

161. See *Interbranch Relations*, NAT'L CTR. FOR ST. CTS., <http://www.ncsc.org/Topics/Court-Management/Interbranch-Relations/State-Links.aspx> [https://perma.cc/G2E7-88QV] (providing links to State of the Judiciary messages for 43 states).

162. See Nathan L. Hecht, Chief Justice of the State of the Judiciary in Texas, Address to the 85th Texas Legislature 7–8 (Feb. 1, 2017), <http://www.txcourts.gov/media/1437289/soj-2017.pdf> [https://perma.cc/U6XW-LLQL].

163. See Mike Ward & Brian Rogers, *Senate Approves Bail Reform Bill as Pressure Mounts for Harris County to Settle Lawsuit*, HOUS. CHRON. (May 4, 2017, 8:57 PM),

and the full legislature enacted a law requiring local courts to offer alternatives to jail time for individuals who cannot afford to pay traffic tickets and other minor fines.¹⁶⁴ There was pressure in Texas to deal with these issues before the Chief Justice's address,¹⁶⁵ but it seems plausible to infer that his communication helped encourage the legislature to act.

There have been other instances when annual addresses from a chief justice have raised issues of public policy for legislators to consider.¹⁶⁶ That said, as we noted above, the main thrust of these addresses seems to be on matters of judicial management and finances, and it is not clear how often the policy matters raised by the chief justices trigger a responsive exchange from the legislature.

At the federal level, Senate confirmation hearings in recent decades often involve exchanges between judicial nominees and legislators about the judicial role in interpreting statutes. These exchanges are most likely to occur for Supreme Court nominees;¹⁶⁷ while they at times appear to stem from instrumental or strategic motives, there are moments when genuine conversation seems to take place.¹⁶⁸

<https://www.houstonchronicle.com/news/houston-texas/houston/article/Senate-approves-bail-reform-bill-as-pressure-11122889.php> [https://perma.cc/T6Y6-7M4S].

164. See Ryan Kocian, *Texas Reforms Its System of Debtors' Prisons*, COURTHOUSE NEWS (June 20, 2017), <https://www.courthousenews.com/texas-reforms-system-debtors-prisons> [https://perma.cc/7RVX-XGL9].
165. See generally Leif Reigstad, *Texas Has a Debtor's Prison Problem*, TEX. MONTHLY (Aug. 19, 2016), <https://www.texasmonthly.com/the-daily-post/texas-debtors-prisons-problem> [https://perma.cc/MR3L-P99A].
166. See, e.g., Press Release, Patricia Breckenridge, Chief Justice of the Supreme Court of Missouri, *Missouri's Chief Justice Delivers 2017 State of the Judiciary Address* (Jan. 24, 2017), <https://www.courts.mo.gov/page.jsp?id=109214> (urging inter alia caution over proposals to change the state's tort law); Leigh I. Saufley, Chief Justice of Maine Supreme Judicial Court, *The State of the Judiciary: A Report to the Joint Convention of the First Regular Session 128th Maine Legislature* (Feb. 16, 2017), http://www.courts.maine.gov/maine_courts/supreme/speeches/SoJ-2018.pdf [https://perma.cc/4A9S-VGNM] (focusing inter alia on the addiction crisis and domestic violence).
167. Since the 1980s, a number of Senators on the Judiciary Committee have urged judges to pay attention to legislative history when interpreting federal statutes. See, e.g., *Nomination of Stephen G. Breyer to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 170–74 (1994) (remarks of Senator Grassley); *Nomination of Ruth Bader Ginsburg to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 223–25, 325–26 (1993) (remarks of Senator Cohen and Senator DeConcini).
168. See, e.g., *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (statement of Chief Justice John Roberts) (2005) (reporting that judges have the limited role of umpires, whose job is to see that everyone plays by the rules, and that “[n]obody ever went to a ball game to see the umpire”); *Confirmation Hearing on the Nomination of Elena Kagan to Be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 202–03 (2010) (statement of Justice Elena Kagan) (reporting that

Conduct by individual judiciary committee members in confirmation hearings is not directly attributable to Congress as an institution. Nonetheless, as was true for Supreme Court dissents urging Congress to override, individual legislators may engage judicial nominees in responsive communication. To be sure, this communication may be influenced by the realities of partisan alignment—as is also the case when a dissenting justice’s invitation to override may await a shift in institutional control.¹⁶⁹

5. Canons That Presume Interbranch Communication

Courts interpreting statutes invoke a range of canons that assume legislatures pay attention and will respond accordingly. One notable example is “clear statement” canons. In the federal system, if Congress wants a law to preempt an area of traditional state regulation, it must do so in a clear manner.¹⁷⁰ Similarly, if Congress wishes its statutes to apply extraterritorially, it must clearly say so.¹⁷¹ The recently popular “dog didn’t bark” canon also presupposes Congress is listening, in that a court will not find a dramatic change to have been made in a prior legal rule if the legislative history discloses that no member of Congress discussed any changes in the rule or even mentioned the rule.¹⁷² And the general principle of super-strong stare decisis for statutory decisions relies on the conceit that legislatures pay attention to court decisions and (in contrast to constitutional decisions) can change any interpretation they do not like.

Chief Justice Roberts’s umpire metaphor is correct in important respects, including the judge not having a team in the game and judges realizing that their role is a limited one because the real policymakers are in Congress and the executive branch; adding that the calls justices make are not easy ones and their exercise of judgment requires listening hard to each side and “cast[ing] each argument in the best possible light”); *Confirmation Hearing on the Nomination of Neil Gorsuch to Be Associate Justice of the Supreme Court of the United States Before the S. Comm. On the Judiciary*, 115th Cong. 155–56 (March 21, 2017) (exchange between Justice Neil Gorsuch and Senator Amy Klobuchar on whether Justice Gorsuch’s appeals court opinions suggest a strong inclination to replace *Chevron* deference with *Skidmore* deference or something else closer to de novo judicial review).

169. See *Ledbetter v. Goodyear Tire & Rubber Co. Inc.*, 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting) (recognizing Congress took several years to muster a political majority for the 1991 Civil Rights Act, and observing: “[o]nce again, the ball is in Congress’ court. As in 1991, the Legislature may act to correct this Court’s parsimonious reading of Title VII.”).

170. See *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2188–89 (2014); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

171. See *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

172. See *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 91 (2007); *Chisom v. Roemer*, 501 US 380, 396 & n.23 (1991); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting).

These and similar canons rely on the notion that legislatures will respond to signals sent by the judicial branch because it is aware of them as part of interbranch communication. There is modest empirical support for the proposition that Congress pays attention to some of these canons when it drafts laws.¹⁷³ Still, the fact that the legislature recognizes canons at a general level is not quite the same as its responding to specific judicial invitations or decisions. Put differently, the interaction initiated by courts through canons seems more like an instance of interbranch signaling than the responsive exchanges we have detailed earlier in this Part.¹⁷⁴

6. The Statutory Housekeeping Project

Finally, a project begun by Chief Judge Robert Katzmann in the 1990s arranges for circuit court decisions identifying federal statutes with drafting errors or gaps to be sent to offices of Congress, in the hope this will lead Congress to respond by fixing the mistakes that the courts have identified.¹⁷⁵ Congress's Office of Legislative Counsel has expressed appreciation for the chance to learn about these prior drafting errors,¹⁷⁶ so in one sense the project may be deemed an effective communicative exercise. But while the circuits continue to send published decisions to congressional committee and member offices, the offices rarely respond.¹⁷⁷ This may well be because the legislators or their staff are

173. See Gluck & Bressman, *supra* note 1, at 942 (reporting that 80 percent of staff involved in legislative drafting were familiar with presumption on preemption of traditional state regulation, and the presumption plays some role in drafting for 65 percent of those who were aware of it). But see *id.* at 943–44, 957 (reporting that majority of respondents did not view clear statement presumptions as necessarily pointing in any particular direction—even though that is their point as presumptions—and concluding that this majority view, combined with a broader lack of congressional awareness of most clear statement rules, undermines the argument that courts should invoke them as interpretive norms).

174. In the same way, the doctrine that courts may draw inferences from legislative silence regarding their prior statutory constructions also bears more resemblance to interbranch signaling than responsive communication. For an illustration of this point in a classic controversial case, compare *Girouard v. United States*, 328 U.S. 61, 74–75 (1946) (Stone, J., dissenting) (contending that Congress's failure to overturn three prior Supreme Court statutory decisions after considering such an override for six successive Congresses signals legislative approval), with *id.* at 69–70 (Douglas, J., majority) (holding that Congress's concededly conscious inaction was “as consistent with a desire to leave the problem fluid as . . . with an adoption by silence of the rule of those cases”).

175. See Robert A. Katzmann & Russell R. Wheeler, *A Mechanism for “Statutory Housekeeping”*: *Appellate Courts Working With Congress*, 9 J. APP. PRAC. & PROCESS 131, 133 (2007); Jeff Simard, Note, *Stimulating Dialogue Between the Courts and Congress: Sprucing Up the “Statutory Housekeeping” Project*, 99 MINN. L. REV. 1195, 1199–204 (2015).

176. See *id.* at 1216.

177. See *id.* at 1205–09, 1214–17.

comfortable with the appeals court resolutions. Whatever the explanation, we have elsewhere characterized the statutory housekeeping project as more of a one-way transmission belt than a genuine dialogue.¹⁷⁸

The mechanisms described in this Subpart represent a rich set of interactions between the legislative and judicial branches. The interactions are predicated on the reality that the two branches frequently converse with one another. As we have indicated, these particular communications, initiated by legislatures or courts, may often operate in practice as signals more than ongoing responsive exchanges. At the same time, their sheer volume and diversity reinforce the persuasiveness of the principal dialogic mechanisms described in Subparts II.B and II.C.

E. Proximate Equality and Institutional Identity

Several scholars suggest genuine dialogue between institutions requires that the parties be of comparable authority or power, if not actually equals.¹⁷⁹ The legislative and judicial branches are deemed formally “co-equal” under our separation of powers structure, but within constitutional law, judicial supremacy is a commonly held norm,¹⁸⁰ and courts are viewed as better equipped to protect core rights against legislative incursion.¹⁸¹ By contrast, when it comes to the meaning of statutes, while neither branch’s interpretive moves are necessarily the final word, legislatures often act to protect or reestablish rights after courts have found textual or canonical reasons to limit them.¹⁸²

Common wisdom suggests that “in the domain of statutory interpretation, Congress is the master.”¹⁸³ Although legislative acts—even acts approving or disapproving court decisions—remain subject to subsequent judicial constraint or expansion, courts tend to recognize and understand that in a democratic

178. See Leib & Brudney, *supra* note 73, at 1560.

179. See, e.g., Hogg & Bushell, *supra* note 5, at 79–80; Tremblay, *supra* note 85, at 630.

180. See Waldron, *supra* note 5, at 8 (describing the widely held position that “judges in their wisdom have little to learn and nothing to reconsider in light of the legislature’s amateurish observations about how best to understand constitutional structures and restraints”).

181. See Kent Roach, *Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience*, 40 TEX. INT’L L.J. 537, 543 (2005); Waldron, *supra* note 5, at 42.

182. Among recent examples one might point to the Lilly Ledbetter Fair Pay Act of 2009 override of *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007); the Americans With Disabilities Act (ADA) Amendments Act of 2008 override of *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002); and the 1991 Civil Rights Act override of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), and numerous other decisions.

183. *Casey*, 499 U.S. at 115 (1991) (Stevens, J., dissenting).

republic, the legislature has and should have controlling influence over statutory meaning. This may help explain why even justices associated with textualism defer to the legislature's design, purpose, or plan to help resolve the meaning of inconclusive text.¹⁸⁴

That said, overrides, underwrites, invitations to override, and requests for advisory opinions all exemplify an ongoing conversation, a “[d]ialogue [that] presupposes difference and disagreement.”¹⁸⁵ Importantly, these mechanisms often reflect interactive exchanges and adjustments over longer periods, not simply one-off expressions of interbranch difference. At a provisional endpoint in any such extended interaction, legislatures and courts may find themselves in disagreement with one another, even on heated terms. While the provisional final word generally reflects the legislature's understanding of what its enacted words and policies mean,¹⁸⁶ there are occasions when the court's understanding effectively controls the legislative disposition of an institutional disagreement.¹⁸⁷ Still, this interbranch discord is essentially dialogic in that it involves “reciprocal respect for, and responsiveness to, opposing arguments regarding the issue addressed.”¹⁸⁸

Because interbranch dialogue can encompass communications extending over years or decades, it implicates the question of whether legislatures and

184. See, for instance, Chief Justice Roberts's majority opinions in *King v. Burwell*, 135 S. Ct. 2480 (2015), and *Bond v. United States*, 134 S. Ct. 2077 (2014). See generally Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 64, 66 (2015).

185. Waldron, *supra* note 5, at 9. Even underwrites may exemplify this conception, inasmuch as the Court is not estopped from construing an underwrite in ways that constrain or alter Congress's understanding of what it had endorsed. See, e.g., Leib & Brudney, *supra* note 73, at 1496 n.18, 1502, 1543 (describing Congress's 1972 underwrite of *Griggs*, as well as its subsequent underwrite in 1991 responding to the Court's 1989 decision in *Wards Cove*, 490 U.S. 642).

186. Examples include (1) the 1991 Civil Rights Act override of *Casey*, 499 U.S. 83 (1991), establishing that prevailing plaintiffs in civil rights actions may recover the costs of expert fees; (2) the override in the same Act of *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991), establishing the extraterritorial jurisdiction of Title VII; and (3) the 1994 Riegle Community Development and Regulatory Improvement Act override of *Ratzlaf v. United States*, 511 U.S. 571 (1994), establishing a broad definition of “structuring” violations under the federal money-laundering statute.

187. Congress overrode the *Betts* decision (discussed *supra* at text accompanying notes 78–81) in the Older Workers Benefit Protection Act of 1990, but did so in part by expunging the word “subterfuge” from the text of the ADEA, thereby honoring, albeit grudgingly, the Court's insistence that this term did not mean what repeated legislative history explanations said it meant.

188. See Tulis, *supra* note 2, at 201.

courts should be thought of as having ongoing identities.¹⁸⁹ The fact that these institutions' membership, official statuses, and political valences may change with time does not mean they lack institutional continuity. For legislatures, considerations of democratic legitimacy demand that the public be able to elect new members at regular intervals, and that new and old members be amenable to updating or reforming legislative policies. But even legislatures with new political majorities are often circumspect about abandoning or rejecting previously enacted policies, given the risks of upsetting the electorate's established or entrenched reliance interests.¹⁹⁰

Judicial respect for legislative continuity over time is reflected in the longstanding canon that disfavors repeals by implication.¹⁹¹ This canon has been embraced with particular fervor by the Court in recent decades.¹⁹² It privileges vertical coherence, or consistency of a statutory scheme over time, based on the presumption of a "fixed and persistent institutional legislative will."¹⁹³ Similarly, the principle of super-strong stare decisis for statutory decisions evinces an appreciation for legislative continuity and consistency. Because Congress and state legislatures have a reasonable opportunity to alter earlier judicial interpretations of their statutory text, their failure to do so receives special weight; this in turn enables legislatures to rely on judicial precedents when building on an existing statutory scheme.¹⁹⁴

189. See *supra* Subpart I.D. This question is distinct from whether the Senate is a "continuing body" in a way that the House is not, because only one-third of its members are replaced in a regular election cycle. See Bruhl, *supra* note 29. Although authority to enact introduced bills, consent to judicial nominations, or vote on articles of impeachment lapses when the Senate adjourns at the end of a legislative session, both the Senate and House retain their institutional identities over time. Their roles continue as participants in dialogue with the judiciary and the executive, even as the details of this dialogue may be altered by transitions from one session of Congress to another.

190. See Mark Tushnet, *Legislative and Executive Stare Decisis*, 83 NOTRE DAME L. REV. 1339 (2008).

191. See, e.g., *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 133 (2003); *Morton v. Mancari*, 417 U.S. 535, 549–50 (1974); *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 350 (1963); *Wood v. United States*, 41 U.S. 342, 343 n.3 (1842). For discussion, see Karen Petroski, *Reauthorizing the Presumption Against Implied Repeals*, 92 CALIF. L. REV. 487 (2004).

192. See *id.* at 539–40 (appendix of Supreme Court cases addressing implied repeals from 1809 to 2003 discloses that in 41 of 42 decisions from 1981 to 2003, the Court ruled against implied repeals).

193. *Id.* at 524.

194. See Leib & Brudney, *supra* note 73, at 1537–38. See also *Smith v. Robinson*, 468 U.S. 992, 1026 (1984) (Brennan, J., dissenting) (noting that the canon against implied repeals "preserve[s] the intent of later Congresses that have already enacted laws that are dependent on the continued applicability of the law whose implicit repeal is in question").

Members of Congress also understand and are committed to the idea of an ongoing institutional identity. One example involves the system of permanent standing committees, created by the membership in the earliest days of the Republic to shape the priorities and agenda of each chamber.¹⁹⁵ In contrast to our British parliamentary forebearers, the American standing committee approach involves bills being reviewed and reported by committees with permanent subject matter jurisdiction and presumptively continuing leadership and membership.¹⁹⁶ Another illustration is when legislative floor managers engage in structured colloquies that are meant to bring forward committee explanations and justifications from earlier bills as reflecting the intent of later versions.¹⁹⁷

Continuity of the Supreme Court as an institution is not seriously contested. Unlike Congress which is reconstituted in formal terms every two years, the Court retains its unbroken identity over time. Despite changes in membership, and scholarly or media conceptions of a Burger Court, a Rehnquist Court, and a Roberts Court, bedrock notions of *stare decisis* and respect for the rule of law reinforce the Court's identity as a unitary institution across decades and even centuries.¹⁹⁸

Membership changes in both branches often result in considerable political or ideological shifts. One party may wrest control of the Senate or House from another, and one wing of the Court may cause a shift in jurisprudential priorities. But as important as these individual developments are from a policy perspective, they do not affect the institutional continuity of the two branches.

Finally, it is worth noting that institutional continuity in Congress and the Court extends beyond those occupying primary membership.¹⁹⁹ As an institution, Congress includes thick professional networks that process relevant information and manage the flow of communication. Legislative staff for standing committees

195. See generally DAVID T. CANON ET AL., 1 COMMITTEES IN THE U.S. CONGRESS, 1789–1946 at xxxviii (2002); WILLIAM L. MORROW, CONGRESSIONAL COMMITTEES 14–15 (1969).

196. See James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CALIF. L. REV. 1199, 1221 (2010) (describing British parliamentary committee structure, “which to this day relies on standing committees that lack permanent subject matter jurisdiction [and] that are without continuing membership”).

197. See, e.g., 134 CONG. REC. S8692 (daily ed. June 28, 1988) (colloquy between Senators Metzenbaum and Durenberger incorporating, as part of explanation for 1988 bill about to be approved by Senate, conference report discussions from earlier bill describing how advance notice requirements for plant closing and mass layoffs would operate in practice). Maybe these structured colloquies are most like Platonic dialogues!

198. See, e.g., PETER CANE, RESPONSIBILITY IN LAW AND MORALITY 167 (2002) (“In social and political discourse, institutions such as the Supreme Court of the United States . . . are commonly treated as abstract entities with continuing identity over time.”).

199. We are grateful to Jeb Barnes for articulating and emphasizing this point to us.

and individual members engage regularly (on their principals' behalf) with interest groups and executive agency personnel, addressing judicial precedent among other factors that help shape the bills that become laws. These staff members, along with professional drafters in legislative counsel offices, also participate in drafting statutory text and committee reports that analyze and respond to court decisions. In addition, analysts in the Congressional Research Service (CRS) provide summaries of existing and proposed law, including caselaw, all of which informs the lawmaking process.

The Court too is aided by its own professional network, albeit a thinner one that consists primarily of law clerks but also of research librarians and lawyers (notably in the Solicitor General's office). Their research, briefs, and oral arguments are meant to enhance the justices' ability to interpret and apply statutes by better understanding what Congress has said and meant. In sum, interbranch dialogue, although focused primarily on the principal elected or appointed actors from each branch, also incorporates the reality that both institutions are porous as well as bounded, and that their porosity further contributes to the quality and continuity of the dialogue, leading to deliberative learning over time.

We have examined interbranch dialogue in a number of settings, in an effort to demonstrate its conceptual plausibility, descriptive feasibility, and pragmatic complexity, whatever one's preferred interpretive method. As we have shown, there are variations at both federal and state levels in terms of which branch initiates conscious attempts at bilateral communication, in the number of institutional exchanges that contribute to this dialogue, and in whether the interactions end in mutually agreeable resolution or continue with dissonant expressions of interpretive understanding. These and other variations illustrate that when it comes to comprehending and applying statutory text, neither branch predictably possesses the last word. If anything, their comparable levels of authority and complementary rationality and policy expertise assure that their continuing exchanges can give rise to what Henry Hart and Albert Sacks referred to as "reasoned elaboration."²⁰⁰

200. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 145–51 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (suggesting that legal decisionmaking must be informed by normative considerations—such as values, purposes, and policies—that are immanent in all legal materials, and also by a commitment to principles of basic fairness that can be inferred from these materials or imputed to policymakers throughout the legal system).

III. IN DEFENSE OF INTERBRANCH DIALOGUE

Having just described and explored the various ways one can realistically think about interbranch dialogue between legislatures and judiciaries, addressing along the way many of the challenges against thinking in dialogic terms we introduced in Part I, we are poised to offer a more clearly normative gloss here. Now that we have established how interbranch dialogue goes well beyond just posturing and signaling, and that productive dialogue takes place under conditions considerably less restrictive than its critics suggest, it is easier to understand why the metaphor has been powerful within statutory interpretation for so long. Indeed, even efforts that can look strategic through one lens can be usefully seen as dialogic when refracted through another; that mixed motives are possible does not vitiate dialogue, deliberation, and learning among institutions. And getting more careful about defining what counts as dialogue, as we have in Part II, helps parry many of the critiques that center on problems of unilateral signaling, collective intent, or the impersonality of conversation among institutions and their membership. Yet apart from our particular conception of dialogue, built on the foundation of actual institutional practices and assumptions, a normative commitment to dialogue might be sustained by other conceptions as well.

Thus, we conclude by reinforcing why interbranch dialogue is properly at the center of thinking about statutory interpretation by judges, legislators, and scholars. Specifically, what has not already been directly addressed in Part II are potential rebuttals to the concerns about role responsibility we developed in Subpart 1.F: that dialogue can threaten institutions by distracting them from their primary obligations in a government of separated powers. Here, we put front and center the ways interbranch dialogue supports institutions' appropriate humility, leverages their comparative institutional competence, and harnesses the benefits of deliberative engagement on matters of law and policy. Conversely, the risks attendant to institutional hubris, the losses associated with insensitivity to institutional competence, and the costs to policy refinement of refusals to engage deliberatively in interbranch interactions all reinforce the importance of interbranch dialogue as something more than a slogan. Indeed, even those who remain skeptics about the conception of interbranch dialogue we expose in Part II might still see some benefits in a fallback position: that the coordinate branches ought to act "as if" they are in dialogue.²⁰¹

201. See KWAME ANTHONY APPIAH, *AS IF: IDEALIZATION AND IDEALS* (2017).

Most importantly, thinking dialogically tends to promote appropriate humility within each branch. This may seem counterintuitive, as the metaphor of dialogue can be used in a way to aggrandize the power of one branch or another rather than to diminish it.²⁰² In some hands, the use of dialogic thinking has been a way to prop up judicial supremacy²⁰³—and in others (especially within constitutional law debates) as a way to double down on legislative authority.²⁰⁴ Yet, when properly conceived and calibrated, thinking of statutory interpretation as dialogue helps the two branches retain their respective proximately equal status. While we emphasized this on a descriptive level in Part II, here we spotlight its normative valence.

When a legislature imagines itself in conversation with downstream implementers and interpreters, far from increasing its power as some fear, the legislature is made aware that it needs judicial partners to make its policies effective. Such thinking helps the legislature remember how critical communication is, not only to those affected and coerced by its law but to judges as well. So too, judges who remember that policy development in areas of statutory law must be achieved together with legislators are more likely to approach their task with an appropriate comportment to the job than those who imagine that they are in conversation with no one but themselves.

The dialogic legislator and judge ultimately have a more deliberative vision of their roles in a system of coordinate branches of government. To be sure, it may be possible with other methods of institutional design to generate the requisite humility without a dialogic approach to statutory interpretation. But interbranch dialogue remains a useful, powerful, and coherent way to generate the right kind of mentality and sensitivity, so essential to rational and deliberative policy development.

This point trades on a conception of “deliberative democracy,” an account of the legitimacy of democratic politics that, in part, evaluates a state’s right to rule based on how well its decisionmaking can be said to be deliberative.²⁰⁵ There is an anti-elitist strain of this account of democratic legitimation that is not only consistent with practices of interbranch dialogue but may very well require it.²⁰⁶

202. See Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 241–49, 256–57 (1983).

203. See, e.g., CALABRESI, *supra* note 52.

204. See, e.g., Waldron, *supra* note 5, at 47.

205. See Ethan J. Leib, *Can Direct Democracy Be Deliberative?*, 54 BUFF. L. REV. 903, 903–04 (2006).

206. On the elitist and non-elitist versions of deliberative democracy, see ETHAN J. LEIB, *DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT* 31–35 (2004); Leib, *supra* note 205, at 912; and David L. Ponet & Ethan J. Leib,

Indeed, to the extent one branch of government is too often left with the last word, it is hard to stimulate the requisite form of deliberation necessary to make sure that force of the better argument prevails over sheer power, a core desideratum of deliberative democratic legitimation.²⁰⁷ This is part of why a “stay in your lane” conception of the separation of powers, like the “systemic turn” in deliberative democratic theory,²⁰⁸ tends to ignore the benefits that can accrue from deep deliberative engagement across institutions.

Whatever contemporary theoretical gloss helps to reaffirm the importance of interbranch dialogue on matters of statutory interpretation, there is a clear lineage here that traces back to the “Legal Process” consensus,²⁰⁹ which remains relevant even as it has been coopted by many and potentially superseded by more state-of-the-art discourse. At its core,²¹⁰ legal process-oriented thinking (1) rejects a formalistic view of law that would treat it as science and deduction, in favor of an acknowledgement that many sources of law are purposive efforts at policymaking; (2) embraces heightened attention to comparative institutional competence in figuring out how to design policy and good governance;²¹¹ and (3) emphasizes a synthesis of principle and democratic processes, with the aspiration that the “twin

Fiduciary Law's Lessons for Deliberative Democracy, 91 B.U. L. REV. 1249, 1252 (2011). Although the routine contrast is between “populist” and “elitist” versions of deliberative democracy, the elitist visions usually imagine that deliberation happens within one supreme branch—usually the judiciary or the legislature—and rarely appreciate that interbranch deliberation is one excellent way to promote deliberative democracy. See JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT* 3 (1994); AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 8 (1996); JOHN RAWLS, *POLITICAL LIBERALISM* 231–40 (expanded ed. 1993). See generally JOHN UHR, *DELIBERATIVE DEMOCRACY IN AUSTRALIA* (1998) (exploring deliberative democracy’s capacity to improve the legislative branch in particular); JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999) (exploring how deliberation helps legitimize specifically the legislative branch).

207. See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1996); Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* (James Bohman & William Rehg eds., 1997).]

208. For a critique of the systemic turn, see Ponet & Leib, *supra* note 62.

209. The *locus classicus* is HART & SACKS, *supra* note 200. The “new legal process” school, nomenclature attributable to Robert Weisberg, *see* Weisberg, *supra* note 202, develops some of the latent themes in the work of Hart and Sacks. See William N. Eskridge, Jr. & Philip P. Frickey, *The Making of The Legal Process*, 107 HARV. L. REV. 2031 (1994); Daniel B. Rodriguez, Review, *The Substance of the New Legal Process*, 77 CALIF. L. REV. 919 (1989). This is not the place to perform an exhaustive history or bibliography of the legal process tradition.

210. This tripartite summary is distilled from Eskridge & Frickey, *supra* note 209, at 2032–33.

211. This feature is probably the one most distinctively associated with the school. It is often traced to Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1934*, 49 HARV. L. REV. 68, 90–91, 94–96 (1935).

sources of legitimacy [a]re mutually reinforcing.”²¹² These three tenets coalesce to underwrite a dialogic approach to statutory interpretation,²¹³ one made more salient through modern deliberative democratic theory.

Rather than rehashing some of the difficulties with different kinds of formalisms from a broadly realist perspective that the legal process school carries forward,²¹⁴ it is worth drawing out a feature of the law-as-policy message in the first tenet adumbrated above that even neoformalists might be able to appreciate. Seeing law as purposive in its nature—laws try to do things and coordinate various actors in society—might enable some formalists to acknowledge that both making law and interpreting law cannot be wholly disaggregated from the underlying policies that legislators and judges are trying to promote. What this recognition enables is yet another way through the challenge to dialogic thinking that ties it too neatly to intentions. If one is skeptical that collective bodies and institutions can have the kinds of intentions that could make conversation or dialogue meaningful (as many formalists would be), perhaps it remains possible to imagine purposes or plans being communicated to-and-fro among institutions. Although formalists will constrain what kinds of evidence should be probative to divine the relevant purposes, they can at least identify judicial opinions and legislative preambles as articulating formal purposes and model ways to bring them into conversation with one another. Perhaps one need look no further than Chief Justice Roberts’s opinion in *King v. Burwell* to see a relatively formalistic judge²¹⁵ identifying a legislative purpose or scheme to resolve the case.²¹⁶ Purposes are not intentions and paying attention to them can still be useful for formalists and pragmatists alike.

The second tenet about comparative institutional competence is usually focused on figuring out which institution is the right one to decide when they do

212. Eskridge & Frickey, *supra* note 209, at 2033.

213. It is likely that Popkin’s “collaborative model of statutory interpretation” is traceable to the dimensions of the legal process tradition we specify here. See William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541 (1988). But that is a thesis for another day; although we clearly find “collaboration” to be a productive modality of interbranch dialogue, there are more adversarial forms of reciprocal engagement that we would identify as importantly “dialogic.” The link from legal process to dialogic thinking in the statutory interpretation theories of Bickel & Wellington, *supra* note 7, and CALABRESI, *supra* note 52, is already explored in Weisberg, *supra* note 202.

214. For a sophisticated defense of formalism, see John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685 (1999).

215. It is fairly conventional to identify Roberts as a formalist on separation of powers issues and statutory interpretation. See, e.g., Joseph Landau, *Roberts, Kennedy, and the Subtle Differences That Matter in Obergefell*, 84 FORDHAM L. REV. 101 (2015); Steven L. Winter, *John Roberts’ Formalist Nightmare*, 63 U. MIAMI L. REV. 549 (2009).

216. See *King v. Burwell*, 135 S. Ct. 2480, 2492–94 (2015).

not agree on an outcome. But it just as importantly seeks to ascertain “how the different institutions can [deliberate together] most productively.”²¹⁷ Not only, then, do institutions set in motion purposes and plans, but institutions can also have distinctive characters, characteristics, and competencies that can work synergistically with others. The insight of legal process theory is that these different characters, characteristics, and competencies can be brought together usefully, not always but often, to promote the “reasoned elaboration” of legal norms and principles.²¹⁸ Far from speaking in different tongues as the skeptics of dialogue might maintain,²¹⁹ law often just *is* the voices from different institutions all coming together to develop and contour policy, linking it to principles over which they can contest openly and dialogically.

A third tenet of the legal process tradition, also linked to “reasoned elaboration,” emphasizes the need for the law’s reasonableness. This dimension of legal process further underscores the importance for the possibility of dialogue, because legal process advocates see the interrelations of the divided powers of the legislature and judiciary brought into a unified purposive project to be the best hope to sustain the law’s substantive reasonableness.²²⁰ The “dynamic interaction of different institutions creates public policy,” and understanding that interaction dialogically supplies opportunities for helping the relevant institutions to work jointly rather than at cross-purposes. Even when the interaction is adversarial, orienting communicative acts toward dialogue during relative contestation is still likely to be productive, legitimating, and, ultimately, stabilizing.²²¹ It is easier to learn from someone who is calibrating pronouncements to be properly heard; it is easier to hear when a speaker thinks about how the message is likely to be processed. Our vision of

217. Eskridge & Frickey, *supra* note 209, at 2033.

218. See HART & SACKS, *supra* note 200, at 145–52 (“The Process of Reasoned Elaboration of Purportedly Determinate Directions” and “The Reasoned Elaboration of Avowedly Indeterminate Directions”); see also *id.* at 161–67 (“The Interrelationships of the Major Lawmaking Institutions in a Unitary System”).

219. See newcanodin, *supra* note 12.

220. See, e.g., LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 123 (1940).

221. One can also see this idea in an “agonistic” strain of the modern project of deliberative democracy, which seeks to harness strong difference to stabilize and legitimate the state. See generally BONNIE HONIG, *POLITICAL THEORY AND THE DISPLACEMENT OF POLITICS* (1993) (arguing the conflict serves a central role in promoting democratic freedom). Although there was a time when the project of deliberative democracy seemed to aim for consensus and harmony, and “agonism” was a critique of deliberative democracy. See, e.g., Chantal Mouffe, *Deliberative Democracy or Agonistic Pluralism?*, 66 SOC. RES. 745 (1999), there is now a compatible strain of deliberative democracy that incorporates many of the central lessons of agonistic political theory. See, e.g., Andrew Knops, Response, *Debate: Agonism as Deliberation—On Mouffe’s Theory of Democracy*, 15 J. POL. PHIL. 115 (2007).

interbranch dialogue supported by the tenets of legal process theory pays homage to the “reciprocal dependence” of legislatures and judiciaries in their “complex [joint] effort,”²²² and helps each institution be both receptive to learning and also more likely to be heeded by its coordinate branch.²²³

Admittedly, formalists of the sort we conjured in Part I may be underwhelmed and want to stick with their hard separation of powers rhetoric; they may think it more likely to orient role responsibility properly.²²⁴ But from a legal process perspective, appreciating that legislatures and judges work together to effectuate policy—and using interbranch dialogue as one important proxy for that form of coordination and deliberation—is a better way of guaranteeing that each institution keeps in proper perspective its distinctive and limited characters, characteristics, and competencies. It is easy to exalt or distort them when the institutions remain self-involved. And formalists, from the standpoint of deliberative democratic theory, might be too optimistic that every branch just keeping its proverbial head down and “staying in its lane” is conducive to policy learning and coordination. Formalists have more faith in the contest for and the assertion of power; deliberative democratic theorists, even those that bring contestation to the center (so-called “agonistic deliberative democrats”), value deliberation that is actually calibrated to communicate and take account of others’ opinions and values.²²⁵ Still, it is our view that textualists and formalists would do better to internalize the benefits of a dialogic posture.

222. FULLER, *supra* note 16, at 91, 134, 192.

223. We doubt this argument is guilty of the various fallacies Adrian Vermeule diagnoses in theories that draw on a “many-minds-are better” ethos. See Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1 (2009). Most importantly, we are not seeking to vindicate interbranch dialogue for solely epistemic reasons (as the text above makes clear), nor are we looking to maximize the input of various minds. Rather, our legal-process-inspired deliberative account of interbranch dialogue celebrates the interaction of different institutions with different competencies, because it frames and orients the thinking of each branch productively and because it helps branches promote reasoned elaboration as part of their constructive engagement. We suspect this account would make it through Vermeule’s “filters” for finding useful rather than deficient “many minds” arguments. Thanks to Tom Merrill for special insights here.

224. Some of these judicial formalists who want to minimize the pull of legislative will may be Blackstonian in spirit, “wish[ing] to preserve the common law as an entirely self-sufficient, closed system of authority.” Weisberg, *supra* note 202, at 232. For this type of formalist, the lack of interest in dialogue would be motivated by a largely antidemocratic sentiment. Without denying the democratic credibility of the common law, see Matthew Steilen, *The Democratic Common Law*, 10 J. JURIS. 437, 471–84 (2011) (arguing that the common law is consistent with the principles of deliberative democracy), we do not take it to be our burden to convince those without some basically modern view about the democratic authority of legislation.

225. See sources cited *supra* note 221 (exploring the “agonistic” strain of deliberative democracy).

A final reason it is desirable to adopt a model of interbranch dialogue in statutory interpretation stems not from legal or political theory but, ironically perhaps, from political science. Although political science is a natural home for the kind of strategic, neoinstitutional, public choice, positive political theory, and rational choice perspectives on the separate branches of government that lead to skepticism about the possibilities for interbranch dialogue,²²⁶ there is also an important strain of thinking about public law and public policy that uses some of these methodological approaches with a different bottom line about the ways different branches of government should be conceptualized. Consider Jeb Barnes:

Contemporary American policymaking does not feature branches of government that adhere to well-defined judicial, legislative, and executive functions; it features a bramble of overlapping policymaking forums . . . Instead of rejecting this state of affairs as violating the standard view of the separation of powers, we should consider rejecting the idea that branches of government should adhere to preassigned, narrow roles when making policy, and examine the more pressing issue of whether—and under what conditions—the complex American system of separate institutions sharing power promotes core democratic values, such as encouraging diverse voices to participate in the shaping and reshaping of national policy.²²⁷

While somewhat resonant of legal process theory²²⁸ and a kind of “institutional” deliberative democratic theory, this window into interbranch interaction is derived from a positive story about the formal understanding of interbranch interaction by the Framers of the U.S. Constitution,²²⁹ an empirical understanding about functional settlements and delegations among

226. See *supra* Part I. For some of these accounts and their influence on thinking about statutory interpretation, see Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases*, 6 J.L. ECON. & ORG. 263 (1990); Edward P. Schwartz, Pablo T. Spiller & Santiago Urbizondo, *A Positive Theory of Legislative Intent*, 57 LAW & CONTEMP. PROBS. 51 (1994).

227. Jeb Barnes, *Adversarial Legalism, the Rise of Judicial Policymaking, and the Separation-of-Powers Doctrine*, in MAKING POLICY, MAKING LAW, *supra* note 115, at 35, 48–49.

228. To be fair, legal process theory, because of its apparent commitment to different competencies of different institutions, can be read to be more supportive of the separation of powers than Barnes (as Barnes himself intimates). See *id.* at 40 (citing Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978)). But Barnes is right to highlight that institutional competence “is a relative and probabilistic concept that must be assessed on a case-by-case basis.” *Id.*

229. *Id.* at 38–40.

the branches;²³⁰ an evaluative assessment of what conduces to efficacy in policymaking;²³¹ a realistic and pragmatic understanding of how reciprocally engaged policymaking may be more majoritarian and democratic than a rigid view of the separation of powers;²³² and, finally, a more realistic and less stylized account about the substance of legislative-judicial interaction that is not purely strategic.²³³ These arguments all owe their genesis to study in political science rather than political theory.

Not only does this perspective from within political science reinforce the normative import of the kind of dialogic thinking we have been exploring here for judges and legislators,²³⁴ but it might end up being a useful frame for doing more careful scholarship going forward. Too often, political scientists and legal scholars have built their models and performed their institutional analyses by developing theories of policymaking and doctrinal development that concentrate on singular institutions.²³⁵ These studies pay attention at times to the interface among the branches, but something is lost by not seeing a more fully integrated picture of interbranch dialogue in developing law.²³⁶

The inability to incorporate a robust interbranch perspective may be due to professional norms of subfield specialization²³⁷ or to implicit assumptions among political scientists and legal scholars about competition among the branches.²³⁸ Whatever the explanation, modeling many—though not all—of the branches' interactions as a form of dialogue may promise richer study of policymaking and law in our complex regime. Without ignoring strategic, ideological, and other institutional factors that clearly also motivate institutional actors,²³⁹ bringing the interactions into the center of study, treating the dialogues themselves as relevant units of analysis, will pay dividends to our understanding

230. *Id.* at 41.

231. *Id.* at 42.

232. *Id.* at 43–47; see also Neal Devins, *Is Judicial Policymaking Countermajoritarian?*, in MAKING POLICY, MAKING LAW, *supra* note 115, at 189.

233. See Lawrence Baum & Lori Hausegger, *The Supreme Court and Congress: Reconsidering the Relationship*, in MAKING POLICY, MAKING LAW, *supra* note 115, at 107.

234. See ROBERT A. KATZMANN, COURTS AND CONGRESS 1 (1997); Jeb Barnes & Mark C. Miller, *Governance as Dialogue*, in MAKING POLICY, MAKING LAW, *supra* note 115, at 202.

235. See Robert A. Katzmann, *Foreword* to MAKING POLICY, MAKING LAW, *supra* note 115, at ix.

236. See Jeb Barnes & Mark C. Miller, *Putting the Pieces Together: American Lawmaking From an Interbranch Perspective*, in MAKING POLICY, MAKING LAW, *supra* note 115, at 3.

237. *Id.* at 5.

238. *Id.* at 3–4. In previous work, we have sought to prove that within statutory interpretation, practices of “legislative underwriting” show a collaborative spirit, counterbalancing focus on adversarial “legislative overriding.” See Leib & Brudney, *supra* note 73.

239. Barnes & Miller, *supra* note 236, at 11 (acknowledging a multiplicity of motivations that can be accommodated by the interbranch perspective).

about how lawmaking and interpretation really happen. To be sure, not every action and reaction is interbranch communication, as we have made clear. But knowing when a real policy conversation is underway, and what the conditions for those conversations are, will improve our understanding of political and legal institutions and may improve our governance, accordingly.²⁴⁰

CONCLUSION

The idea of “interbranch dialogue” can be used as a slogan. We have tried to identify the strongest arguments against taking “interbranch dialogue” too seriously, and we recognize they raise challenges to mainstream statutory interpretation, which may often take such dialogue for granted. To rehabilitate the model of interbranch dialogue, we have sought to be more precise and even circumspect about what can reasonably be taken to count as meaningful reciprocal mutual engagement. Having set forth and examined a diverse range of such responsive engagements, we have then extrapolated from our examples to argue for the metaphor’s considerable explanatory value.

While we have proposed and sought to apply a rough definition of dialogue, we recognize the limitations in settling on a fixed definitional approach. Our deeper aim is to demonstrate the enduring plausibility of interbranch dialogue as well as its continuing importance—descriptively and normatively—in the doctrines, practices, and theory of statutory interpretation. In the final analysis, although we might caution judges, legislators, and scholars to be more careful about their usage going forward, we believe that retaining the model of interbranch dialogue in statutory interpretation is both warranted and desirable.

240. See Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1130 (1995); Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1121 (1990).