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Interpreting Injunctions

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INTERPRETING INJUNCTIONS

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Injunctions are powerful remedies. They can force a person to act or refrain from acting, dictate policies that the government must adopt, or even refashion public institutions. Violations of an injunction can result in contempt.

Despite the importance of injunctions, courts have applied an astonishingly wide range of contradictory approaches to interpreting them. They have likewise disagreed over whether appellate courts should defer to trial courts' interpretations or instead review those interpretations de novo. Virtually no scholarship has been written on these topics.

This Article proposes that courts apply a modified textualist approach to injunctions. Under this scheme, courts would generally interpret injunctions according to the ordinary meaning of their language. When a provision in an injunction quotes or incorporates by reference an extrinsic legal authority, such as a statute or contract, however, courts would interpret that provision according to the methodology they would ordinarily apply to that extrinsic authority. This proposed approach ensures that injunctions provide regulated parties with adequate notice of the conduct proscribed, curtails judicial abuses of power, and aligns tightly with the procedural rules that govern injunctions in both federal and state courts.

This Article further proposes that appellate courts review trial courts' interpretations of injunctions de novo. Independent appellate review naturally aligns with the textualist goal of implementing the best reading of an injunction, promotes principles of notice, and prevents government overreach.

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INTRODUCTION

Injunctions are one of the most powerful remedies in the law.[1] They dictate behavior; parties who disobey injunctions face the prospect of contempt.[2] Over the past century, injunctions have grown only more

[1] F.W. Maitland, Equity 254 (A.H. Chaytor & W.J. Whittaker eds., 1929).

[2] Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 826–27 (1994) (discussing the distinction between criminal and civil contempt); see also Joseph Moskovitz,

powerful, evolving into new forms such as structural injunctions[3] and nationwide injunctions.[4] For these reasons, ascertaining the precise meaning of an injunction is critically important. Parties need to know what conduct an injunction requires or prohibits, and courts must be able to determine whether an injunction has been violated.

There is significant inconsistency, however, in how courts interpret injunctions. Courts at every level have employed a wide range of methods, including textualism, purposivism, intentionalism, and pragmatism. These different theories can easily lead to inconsistent interpretations of identical injunctions. The lack of a uniform approach to interpreting injunctions has also contributed to disagreement among appellate courts as to whether to defer to trial courts' interpretations of such orders. Some appellate courts review trial courts' interpretations of injunctions *de novo*, while others apply more deferential standards of review.[5] Deference makes more sense under some interpretive regimes than others.

One reason for this disarray is that theories of interpretation for injunctions are surprisingly underdeveloped. In contrast to the extensive bodies of work that discuss various approaches to interpreting the

Contempt of Injunctions, Civil and Criminal, 43 Colum. L. Rev. 780, 780–81 (1943) (explaining that the "distinction" between civil and criminal contempt "is made decisive in such vital matters as parties, procedure, evidence, judgments, and review").

[3] See Owen M. Fiss, The Civil Rights Injunction 4–5 (1978).

[4] See Michael T. Morley, Disaggregating the History of Nationwide Injunctions: A Response to Professor Sohoni, 72 Ala. L. Rev. 239 (2020) (explaining how nationwide defendant-oriented injunctions are a relatively recent phenomenon); see also Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417, 440 (2017) (tracing the rise of nationwide injunctions in the 1960s).

[5] Compare Abbott Labs. v. TorPharm, Inc., 503 F.3d 1372, 1382 (Fed. Cir. 2007) ("[I]nterpretation of the terms of an injunction is a question of law we review de novo."), with In re Managed Care, 756 F.3d 1222, 1234 (11th Cir. 2014) (concluding that a court should give "great deference" to a judge's interpretation of an injunction that he entered).

Constitution,[6] statutes,[7] regulations,[8] contracts,[9] and wills,[10] virtually nothing has been written about the proper method for interpreting injunctions.[11] Injunctions present several considerations that do not arise with regard to other legal instruments. For example, unlike statutes that typically apply to groups of people or entities, or even the general public, injunctions operate as targeted laws, imposing coercive legal obligations on particular named parties and their associates. Moreover, in contrast to virtually every other type of legal document, an injunction is typically interpreted by the same person—the trial judge—who entered the injunction in the first place.[12]

At first glance, these considerations do not uniformly point toward a single theory of interpretation. For example, on the one hand, one might support a purposivist approach to interpretation because injunctions are typically both drafted and interpreted by the same court. An injunction's author is in the best position to know the goals she was trying to accomplish and the most effective ways to promote them. On the other hand, because injunctions are targeted at particular individuals, a

[6] See, e.g., Jack M. Balkin, Living Originalism (2011); Keith E. Whittington, Constitutional Construction: Divided Power and Constitutional Meaning (1999); Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1997); Robert H. Bork, The Tempting of America: The Political Seduction of the Law (1990).

[7] See, e.g., Antonin Scalia, A Matter of Interpretation (2d ed. 2018); William N. Eskridge, Jr., Interpreting Law: A Primer on How to Read Statutes and the Constitution (2016); Robert A. Katzmann, Judging Statutes (2014).

[8] See, e.g., Cass R. Sunstein, *Chevron* as Law, 107 Geo. L.J. 1613 (2019); Kevin M. Stack, Interpreting Regulations, 111 Mich. L. Rev. 355 (2012).

[9] See, e.g., Omri Ben-Shahar & Lior Jacob Strahilevitz, Interpreting Contracts via Surveys and Experiments, 92 N.Y.U. L. Rev. 1753 (2017); Richard A. Posner, The Law and Economics of Contract Interpretation, 83 Tex. L. Rev. 1581 (2005).

[10] See, e.g., Kent Greenawalt, A Pluralist Approach to Interpretation: Wills and Contracts, 42 San Diego L. Rev. 533, 534 (2005); Joseph Warren, Interpretation of Wills—Recent Developments, 49 Harv. L. Rev. 689 (1936).

[11] No article specifically focuses on the unique interpretive concerns that injunctions raise. Professor Timothy Jost analyzed some of those issues in his work on modifying injunctions. See Timothy Stoltzfus Jost, From *Swift* to *Stotts* and Beyond: Modification of Injunctions in the Federal Courts, 64 Tex. L. Rev. 1101, 1104–05 (1986). Other pieces have briefly touched on the topic as it arises in particular contexts, such as abstention, see Matthew D. Staver, The Abstention Doctrines: Balancing Comity with Federal Court Intervention, 28 Seton Hall L. Rev. 1102, 1137–38 (1998), and anti-gang injunctions, see Beth Caldwell, Criminalizing Day-to-Day Life: A Socio-Legal Critique of Gang Injunctions, 37 Am. J. Crim. L. 241, 280–81 (2010).

[12] See, e.g., Steven Seidenberg, Fast-Forward: Federal Circuit Makes It Easier to Enforce Injunctions in Patent Cases, 17 ABA J. 16, 16 (Aug. 2011) ("[A] contempt proceeding is usually heard by the same judge who issued the injunction . . . .").

textualist approach would limit abusive enforcement by constraining the court's ability to impose sanctions.

This Article recommends two main principles to guide the interpretation of injunctions. First, it proposes that courts adopt a *modified textualist* approach to interpreting injunctions. Under this proposal, a court would construe most provisions within an injunction according to the ordinary meaning of their language.[13] A textualist approach ensures adequate notice to individuals subject to the injunction; reduces opportunities for judicial abuse of the contempt power; and is most consistent with both Federal Rule of Civil Procedure 65(d), which requires an injunction to "state its terms specifically,"[14] as well as its state analogues. Although a textualist approach presents the risk that individuals might try to circumvent injunctions by skirting the bounds of the prohibited conduct, courts can address this problem by modifying injunctions when necessary to prohibit such actions. This proposal reduces the risk of arbitrary or vindictive enforcement while still providing courts with flexibility to tailor injunctions over time to address unforeseen problems.[15]

We call the proposal "modified" textualism because we recognize an exception under which courts should depart from a pure textualist approach. Injunctions often draw on other legal authorities, such as statutes or contracts, that courts may interpret using approaches other than textualism. This Article proposes that a court should construe provisions within an injunction that quote or incorporate by reference an extrinsic

[13] For seminal discussions of textualism in statutory interpretation, see John F. Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1 (2001) [hereinafter Manning, Equity], and John F. Manning, Textualism and Legislative Intent, 91 Va. L. Rev. 419 (2005) [hereinafter Manning, Textualism].

[14] Fed. R. Civ. P. 65(d)(1)(B).

[15] In making this textualist proposal, we do not seek to engage with objections to the entire endeavor of textualism, such as whether the ordinary meaning of language can be derived without considering purpose driving that language. See, e.g., Richard A. Posner, The Problems of Jurisprudence 22–69 (1990); Richard H. Fallon, Jr., The Statutory Interpretation Muddle, 114 Nw. U. L. Rev. 269, 279 (2019); William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 321, 340–45 (1990). Instead, we rely on the work of the many others who have established that it is generally possible to determine the "ordinary meaning" of language independent of the lawmaker's intent or purpose. See, e.g., John F. Manning, What Divides Textualists from Purposivists?, 106 Colum. L. Rev. 70, 79 (2006) (arguing that ordinary meaning can be derived by reading text through the lens of a "community's shared conventions"); Jeremy Waldron, Legislators' Intentions and Unintentional Legislation, *in* Law and Interpretation 329, 339 (Andrei Marmor ed., 1995) (arguing that shared conventions inform the meaning of language).

legal authority according to the interpretive theory it would ordinarily apply to that type of authority. In contrast, when a provision restates or paraphrases an extrinsic legal authority in the issuing court's own language—and especially when the provision imposes prophylactic protections that go beyond the requirements imposed by that extrinsic authority—the court should apply a textualist interpretation. Although this approach loses some of the benefits of notice and constraint provided by textualism, it maintains consistency and coherence in the interpretation of those other legal authorities.[16]

Furthermore, although courts should apply a modified textualist approach in determining what an injunction means, non-textualist considerations should still play an important role in determining the proper *remedy* for violations. Not all violations of injunctions require contempt. A court has broad discretion to decline to hold a violator in contempt, for example, where that person's conduct was only a technical violation of the injunction or did not undermine the injunction's purpose. A court may likewise refuse to impose contempt sanctions when they would be against the public interest. Permitting courts to consider purposivist factors at the remedy phase would preserve a textualist approach to interpreting the terms of the injunction itself while capturing some of the benefits of non-textualist methods of interpretation.

Second, this Article argues that appellate courts should not defer to trial courts' interpretations of injunctions. Plenary review naturally aligns with the textualist premise that an injunction's text has a single, best legal meaning. De novo review also tends to ensure notice to the regulated parties by limiting the ability of an injunction's author to enforce her unexpressed intentions or underlying purposes. And it prevents judicial abuses more effectively than deferential review by creating a greater degree of oversight.

Moreover, the standard justifications for appellate deference do not warrant a more limited standard of review for trial judges' interpretations

[16] In other contexts, courts will sometimes apply special treatment to a legal provision that quotes an extrinsic legal authority. For example, courts generally apply *Auer* deference to agencies' interpretations of their own regulations, except for regulations that merely reiterate statutory provisions. See Gonzales v. Oregon, 546 U.S. 243, 256–57 (2006) (stating that deference under *Auer v. Robbins*, 519 U.S. 452 (1997), does not extend to agency rules that merely quote statutes).

of injunctions.[17] Legislatures have not passed sweeping laws that either grant trial courts unique judicial authority over the interpretation of injunctions or require appellate courts to defer to them. Furthermore, trial courts do not have special expertise in determining the ordinary meaning of language; an appellate court is just as capable as a trial court of resolving such issues. Indeed, the characteristics that would make a trial judge an expert on an injunction's meaning—being the judge who presided over the proceedings that led to the injunction and originally entered it—are precisely the same factors that create the greatest risk of abuse and accordingly counsel against deference.

Part I of this Article begins by explaining the fundamentals of injunctions, describing how they are entered and enforced. It then examines the wide range of interpretive methods courts have used to interpret them.

Part II begins building the case for a modified textualist approach to interpreting injunctions. It explains that textualism better promotes the values of providing notice and constraining government action than other methods of interpretation. It goes on to show that textualism also aligns well with the Federal Rules of Civil Procedure and analogous state provisions that require courts to clearly specify the terms of injunctions. This Part then addresses three major objections to a textualist approach. One is the practical argument that textualism makes it easier for parties to circumvent injunctions. Another is the prudential objection that a textualist approach may lead judges to enter unnecessarily broad injunctions to avoid such circumvention. Finally, this Part considers the philosophical argument that textualism is inapt because the "law" created by the injunction is really the intent of the drafter, and the terms of the injunction are merely evidence of that intent.

Part III more fully explores the contours of our proposal. It begins by suggesting that, although courts generally should interpret injunctions based on textualist principles, they should construe provisions in an injunction that quote or incorporate extrinsic legal authorities according to the interpretive methodologies the court would apply to those authorities in other contexts. This Part goes on to show why this modified textualist approach is appropriate not only for permanent injunctions, but for all other types of injunctions—including temporary restraining orders,

[17] See Paul Horwitz, Three Faces of Deference, 83 Notre Dame L. Rev. 1061, 1078 (2008) (identifying the two broad categories of justifications for deference: legal authority and epistemic authority).

preliminary injunctions, and consent decrees—as well. Finally, this Part recognizes that, although courts should adopt modified textualism to interpret injunctions, they still may consider non-textual factors in exercising their discretion as to whether to hold violators in contempt. This approach provides clarity about the meaning of an injunction, while mitigating some of the potential harshness of textualism by permitting courts to opt against punishing all violations of the text.

Part IV turns from the question of *how* to interpret injunctions to the issue of *who* should have power to ultimately determine their meaning. Building on the arguments developed in earlier Parts, it argues that appellate courts should determine the meaning of injunctions de novo, rather than mechanically adopting or deferentially reviewing trial courts' interpretations.

I. THE CURRENT APPROACH TO INTERPRETING INJUNCTIONS

This Part lays a foundation for the rest of the Article. It begins by providing an overview of injunctions and then discusses the various rules and doctrines that affect how courts interpret them.

A. Primer on Injunctions

An injunction is an equitable civil remedy. It is a judicial order commanding a person to take, or refrain from taking, a particular action.[18] Its purpose is to prevent a plaintiff from suffering irreparable harm—harm that cannot be adequately remedied by damages or some other legal remedy.[19]

Injunctions come in various forms. A permanent injunction is an injunction awarded after a trial to regulate the defendant's conduct indefinitely.[20] Courts may also award interlocutory injunctions to prevent

[18] Injunction, Black's Law Dictionary 520 (10th ed. 2014); 43A C.J.S. Injunctions § 1 (2004) ("An injunction is a judicial order requiring a person to do or refrain from doing certain acts.").

[19] The heart of the ongoing debate over nationwide injunctions—more properly called "defendant-oriented injunctions"—concerns whether a court must tailor an injunction to protect only the rights of the plaintiffs before it, or instead may expand the order to protect the rights of third-party non-litigants as well. See Michael T. Morley, Disaggregating Nationwide Injunctions, 71 Ala. L. Rev. 1, 28–29 (2019).

[20] See, e.g., Nw. Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 606 (N.D. Cal. 1983) (after a trial, permanently enjoining road construction in portions of a national forest), aff'd in part, vacated in part 764 F.2d 581 (9th Cir. 1985), rev'd sub nom. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

irreparable harm from occurring while a case is pending.[21] There are two types of interlocutory injunctions. The first is a preliminary injunction, which a court may issue to protect a plaintiff's rights for the duration of the case until it decides whether to issue a permanent injunction.[22] A court may enter a preliminary injunction only after providing all parties an opportunity to be heard.[23] The second type of interlocutory injunction is a temporary restraining order (TRO). A TRO is an emergency injunction that a court may award ex parte to prevent immediate, irreparable injury from occurring before the court has the opportunity to entertain a request for a preliminary injunction.[24] Courts may also enter consent decrees, which are injunctions based on the agreement of the parties.[25]

1. Awarding Injunctions

Plaintiffs with meritorious claims are not automatically entitled to injunctive relief. For example, to obtain a permanent injunction for a federal claim in federal court, a party must not only prevail on the merits but also show that:

(i) injunctive relief is necessary to prevent irreparable injury,
(ii) no adequate remedy at law exists,
(iii) the harm it will suffer without an injunction exceeds the hardship that an injunction would impose on the defendant, and

[21] See Winter v. Nat. Res. Def. Council, 555 U.S. 7, 22 (2008) ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction.").

[22] Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."); accord Benisek v. Lamone, 138 S. Ct. 1942, 1945 (2018) (per curiam); see Kevin J. Lynch, The Lock-In Effect of Preliminary Injunctions, 66 Fla. L. Rev. 779, 817 (2014) ("When a preliminary injunction is granted, it merely preserves the status quo long enough for a decision to be reached on the merits . . . ."); Morton Denlow, The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard, 22 Rev. Litig. 495, 507 (2003) ("Generally there are three purposes for granting a preliminary injunction: (1) maintaining the status quo, (2) preserving the court's ability to render a meaningful decision, and (3) minimizing the risk of error.").

[23] Fed. R. Civ. P. 65(a)(1).

[24] See, e.g., Fed. R. Civ. P. 65(b)(1) (authorizing TROs "without . . . notice to the adverse party" if the movant establishes that "immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard").

[25] Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 522 (1986) (explaining that a consent decree draws its force from "the agreement of the parties, rather than the force of the law upon which the complaint was originally based").

(iv) the injunction is consistent with the public interest.[26]

The requirements for obtaining a preliminary injunction or TRO are similar.[27] Courts have broad discretion in considering and weighing these factors to determine whether to grant relief.[28] Consent decrees, in contrast, generally rest primarily on the parties' consent.[29]

Courts also have broad discretion in fashioning the scope of an injunction. At one end of the spectrum, a court can issue a narrow injunction that prohibits the defendant from taking a specific action that

[26] eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006). These standards are only presumptive; Congress may change or eliminate them for a particular federal cause of action through clear statutory language. See Michael T. Morley, Enforcing Equality: Statutory Injunctions, Equitable Balancing Under *eBay*, and the Civil Rights Act of 1964, 2014 U. Chi. Legal F. 177, 190–94 [hereinafter Morley, Enforcing Equality]. Many states have similar standards for granting injunctions, see 43A C.J.S. Injunctions, supra note 18, § 42 (listing various states imposing similar requirements), although state courts may interpret and apply them differently than federal courts, see Michael T. Morley, Beyond the Elements: *Erie* and the Standards for Preliminary and Permanent Injunctions, 52 Akron L. Rev. 457, 465–68 (2018) [hereinafter Morley, Beyond the Elements].

[27] See Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 546 n.12 (1987) (noting the close relationship between the standards for preliminary and permanent injunctive relief); see also 42 Am. Jur. 2d Injunctions § 8, Westlaw (database updated 2021). To obtain a preliminary injunction, a party must show that he is "likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Nat. Res. Def. Council, 555 U.S. 7, 20 (2008). The only differences between this standard and the requirements for permanent relief are that the plaintiff must show only a likelihood of success on the merits rather than actual success, and the court need not separately consider whether an adequate remedy at law exists. Id. The requirements for obtaining a TRO and a preliminary injunction are the same, except the plaintiff seeking a TRO must also demonstrate that circumstances made it impracticable or impossible to notify opposing counsel. See Fed. R. Civ. P. 65(b)(1); S. Cagle Juhan & Greg Rustico, Jurisdiction and Judicial Self-Defense, 165 U. Pa. L. Rev. Online 123, 126 (2017) ("[W]hen considering motions seeking TROs, courts use the same factors as for PIs . . . .").

[28] See *Winter*, 555 U.S. at 32 ("An injunction is a matter of equitable discretion."); Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967) ("[I]njunctive and declaratory judgment remedies are discretionary . . . ."). Because trial courts have such broad discretion concerning injunctions, appellate courts typically review both the decision to enter such orders, as well as their scope, only for abuse of discretion. United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 323 (1961). Nevertheless, on some occasions, appellate courts have engaged in detailed line-by-line parsing of lengthy injunctions, adjusting them as required to ensure their validity, see, e.g., Hartford-Empire Co. v. United States, 323 U.S. 386, 410–35 (1945).

[29] In *Local No. 93*, 478 U.S. at 525–26, the U.S. Supreme Court held that a federal court may enter a consent decree if it has jurisdiction over the case, the decree "come[s] within the general scope of the case made by the pleadings," it "further[s] the objectives of the law upon which the complaint was based," and it does not affirmatively require "unlawful" action.

the court concludes is unlawful. At the other end, a court can issue a broad, prophylactic injunction that prohibits the defendant from engaging in otherwise legal conduct, if the court believes that such broader scope is necessary to prevent a continuation or "revival" of the defendant's illegal activity, or to otherwise protect the plaintiff's rights.[30] For example, to prevent one person from harassing another, a court could enter a narrow injunction specifically prohibiting such harassment. Or the court could instead issue a broader order prohibiting the defendant from coming within 200 feet (or some other distance) of the plaintiff if it concludes that the buffer zone is necessary to prevent either harassment or disputes over whether particular interactions constituted harassment.

Along the same lines, to prevent circumvention, a court may prohibit not only the specific types of illegal acts that the defendant committed in the past but also other acts "of the same type or class" as the offending behavior.[31] For example, if a court determines that it should enjoin a person from playing the radio too loudly, the court can extend the injunction to prohibit playing the television and other sources of noise too loudly, as well.[32]

Of course, there are limits on the breadth of an injunction that a court may enter. Courts award injunctions to remedy legal wrongs. Although a court may enter a prophylactic injunction that goes beyond prohibiting only unlawful conduct, the injunction still must be tied to the legal wrong

[30] Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 461 (1940); accord FTC v. Nat'l Lead Co., 352 U.S. 419, 430 (1957) ("[T]he Court is obliged not only to suppress the unlawful practice but to take such reasonable action as is calculated to preclude the revival of the illegal practices."); see also Tracy A. Thomas, The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief, 52 Buff. L. Rev. 301, 314 (2004) ("[T]here are two definitive attributes of the prophylactic remedy: it is (1) injunctive relief with a preventive goal, (2) that imposes specific measures reaching affiliated legal conduct that contributes to the primary harm.").

[31] Such broader relief is especially appropriate when the defendant has engaged in knowing and intentional wrongdoing. United States v. U.S. Gypsum Co., 340 U.S. 76, 89–90 (1950) (holding that people who willfully violate the law "call for repression by sterner measures than where the steps could reasonably have been thought permissible").

[32] Courts may also use injunctions to "cure the ill effects of the illegal conduct" by prohibiting the defendants from profiting from, or enjoying other benefits of, their past illegal activities. Id. at 88–89. For example, an injunction may cancel a contract executed as the result of a price-fixing conspiracy, even though the parties might have entered into the same contract without violating antitrust laws. See United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 724 (1944).

proved by the plaintiff. A court cannot, for example, enjoin "all possible breaches of the law," or even of an entire statute.[33]

Both federal and state law require courts to draft injunctions with specificity to ensure that parties understand their obligations. Typical is Federal Rule of Civil Procedure 65, which requires a court to "state the reasons" it issues an injunction.[34] Moreover, the injunction must "state its terms specifically" and "describe in reasonable detail" the acts restrained or required.[35] As one treatise puts it, an "ordinary person reading the

[33] Swift & Co. v. United States, 196 U.S. 375, 396 (1905); see NLRB v. Express Publ'g Co., 312 U.S. 426, 435–36 (1941) ("[T]he mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute," when that statute prohibits conduct "unlike and unrelated to that with which he was originally charged."). That said, some precedent suggests that when the Government wins an injunction against violations of federal statutes, it should get the benefit of the doubt about the proper scope of the order to ensure the law is adequately enforced. Local 167, Int'l Brotherhood of Teamsters v. United States, 291 U.S. 293, 299 (1934) ("In framing [the injunction's] provisions doubts should be resolved in favor of the Government and against the conspirators."); accord *Hartford-Empire*, 323 U.S. at 409 (suggesting that a court may "resolve all doubts in favor of the Government" in framing injunctions).

[34] Fed. R. Civ. P. 65(d)(1)(A). Forty-four states have promulgated provisions comparable to Federal Rule 65. See Ala. R. Civ. P. 65; Alaska R. Civ. P. 65; Ariz. R. Civ. P. 65; Ark. R. Civ. P. 65; Cal. Code Civ. Proc. § 65; Colo. R. Civ. P. 65; Conn. Gen. Stat. Ann. § 53a-206; Del. Ch. Ct. R. 65; Fla. R. Civ. P. 1.610; Ga. Code Ann. § 9-11-65; Haw. R. Civ. P. 65; Idaho R. Civ. P. 65; 735 Ill. Comp. Stat. Ann. 5/11-101; Ind. R. Trial P. 65; Kan. Stat. Ann. § 60-906; Ky. R. Civ. P. 65.02; La. Code Civ. Proc. Ann. art. 3605; Me. R. Civ. P. 65; Md. R. 15-502; Mass. R. Civ. P. 65; Minn. R. Civ. P. 65.04; Miss. R. Civ. P. 65; Mo. Sup. Ct. R. 92.02; Mont. Code Ann. § 27-19-105; Neb. Rev. Stat. Ann. § 25-1064.01; Nev. R. Civ. P. 65; N.H. Sup. Ct. R. 48; N.J. Ct. R. 4:52-4; N.C. R. Civ. P. 65; N.D. R. Civ. P. 65; Ohio R. Civ. P. 65; Okla. Stat. tit. xii, § 12-1386; Or. R. Civ. P. 79; R.I. Super. Ct. R. Civ. P. 65; S.C. R. Civ. P. 65; S.D. Codified Laws § 15-6-65(d); Tenn. R. Civ. P. 65.02; Tex. R. Civ. P. 683; Utah R. Civ. P. 65A; Vt. R. Civ. P. 65; Wash. Super. Ct. Civ. R. 65; W. Va. R. Civ. P. 65; Wyo. R. Civ. P. 65. Of the other six states, five—Iowa, New York, Pennsylvania, Virginia, and Wisconsin—have adopted similar requirements by common law. 205 Corp. v. Brandow, 517 N.W.2d 548, 552 (Iowa 1994); Jacquin v. Pennick, 49 A.2d 769, 772 (Pa. Commw. Ct. 1982); Rollins v. Commonwealth, 177 S.E.2d 639, 642 (Va. 1970); Dalton v. Meister, 267 N.W.2d 326, 330 (Wis. 1978); see also 67A N.Y. Jur. 2d Injunctions § 167 (2021) (gathering cases describing New York's specificity requirement for injunctions). Only New Mexico appears not to have adopted specificity requirements.

[35] Fed. R. Civ. P. 65(d)(1)(B)–(C). Wright, Miller, and Kane's treatise contends that the "requirement of 'reasonable detail' appears to be repetitious of the specificity requirement." 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure – Civil § 2955 (3d ed. 2013). Whether an injunction is sufficiently clear depends on a holistic reading of the order. An otherwise vague provision in an injunction may provide adequate notice when read in conjunction with the order's other provisions. Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 126 (1948) (noting that potentially vague provisions in an injunction must be "read . . . in light of the other paragraphs of the decree").

court's order should be able to ascertain from the document itself exactly what conduct is proscribed."[36]

According to the Court, these provisions require "explicit notice of precisely what conduct is outlawed," both to "avoid the possible founding of a contempt citation on a decree too vague to be understood"[37] and to facilitate appellate review.[38] The Court has urged courts to be especially careful to use "clear and guarded language" when drawing prophylactic injunctions against otherwise permissible conduct.[39] Still, despite Rule 65(d)'s specificity requirements, the Court has on occasion tolerated some ambiguity on the grounds that parties may petition the issuing court to modify or construe unclear terms in the injunction for them.[40]

Courts may modify or dissolve the injunctions they issue.[41] A modification or dissolution may be appropriate when the circumstances that prompted the court to issue the injunction change, the injunction

[36] Wright et al., supra note 35, § 2955; see also 13 William Moore, Federal Practice – Civil § 65.60[3] ("A court must frame its injunctions or restraining orders so that those who must obey them will know precisely what the court intends to forbid or require."). Rule 65 further provides that an injunction binds only the parties to a case, their officers and agents, as well as third parties acting in concert with them, if they have notice of it. Fed. R. Civ. P. 65(d)(2). One of the authors has argued that Rule 65(d)(2) is a substantive rule that exceeds the judiciary's rulemaking authority under the Rules Enabling Act, but the principles it codifies are consistent with both traditional equitable principles as well as the law of nearly all states. Morley, supra note 19, at 49 n.277.

[37] Schmidt v. Lessard, 414 U.S. 473, 476 (1974); see also Wright et al., supra note 35, § 2955 (explaining that this specificity requirement is "designed to protect those who are enjoined by informing them of what they are called upon to do or refrain from doing in order to comply with the injunction or restraining order").

[38] *Schmidt*, 414 U.S. at 477.

[39] Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 296 (1941). Interestingly, the Court has also suggested, "[A] judge himself should draw the specific terms of such restraint and not rely on drafts submitted by the parties." Id.

[40] Regal Knitwear Co. v. NLRB, 324 U.S. 9, 10, 15 (1945) (upholding validity of an injunction which specified that it applied not only to the named respondent but its "successors and assigns" as well, because "[i]f defendants enter upon transactions which raise doubts as to the applicability of the injunction, they may petition the court granting it for a modification or construction of the order"); see also McComb v. Jacksonville Paper Co., 336 U.S. 187, 192 (1949) (upholding broad injunction in part based on respondents' ability to "petition[] the District Court for a modification, clarification or construction of the order"); United States v. Crescent Amusement Co., 323 U.S. 173, 188 (1944) (suggesting that the "burden" of an injunction drafted in "general" terms can be "lightened by application to the court").

[41] See N.Y. State Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d 956, 967 (2d Cir. 1983) (Friendly, J.) ("The power of a court of equity to modify a decree of injunctive relief is long-established, broad, and flexible.").

proves to be unduly burdensome, or the injunction is ineffective at achieving its purpose.[42]

2. Enforcing Injunctions

Courts enforce injunctions through contempt.[43] Contempt may be criminal or civil.[44] The nature of the contempt is determined by "the substance of the proceeding and the character of the relief that the proceeding will afford."[45]

Criminal contempt punishes violations of injunctions[46] and is intended primarily to "vindicate the authority of the court."[47] Criminal contempt is a criminal offense.[48] In determining the proper penalty for criminal contempt, courts will consider the gravity of the violation, whether it was deliberate, the nature of the consequences, and the importance of deterring similar violations in the future.[49]

[42] Fed. R. Civ. P. 60(b)(5) (allowing a court to grant relief from an order when "applying it prospectively is no longer equitable"); see Rufo v. Inmates of Suffolk Cty. Jail, 502 U.S. 367, 383 (1992) ("[A] party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree. . . . [and] the proposed modification is suitably tailored to the changed circumstance."); cf. United States v. Swift & Co., 286 U.S. 106, 119 (1932) (holding that a district court may modify an antitrust consent decree upon a "clear showing of grievous wrong evoked by new and unforeseen conditions"); see generally 42 Am. Jur. 2d Injunctions § 288, Westlaw (database updated 2021) (summarizing the circumstances under which courts may modify or dissolve injunctions).

[43] Gunn v. Univ. Comm. to End War in Viet Nam, 399 U.S. 383, 389 (1970) ("An injunctive order is an extraordinary writ, enforceable by the power of contempt.").

[44] See Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 443 (1986).

[45] Hicks v. Feiock, 485 U.S. 624, 631 (1988).

[46] Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 828 (1994) (explaining that contempt sanctions may "punish a prior offense").

[47] Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911).

[48] *Hicks*, 485 U.S. at 632. Accordingly, defendants in criminal contempt proceedings are entitled to the same constitutional protections that apply in other criminal prosecutions. Id. (holding, in a contempt case, that "criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings"). For example, defendants in criminal contempt proceedings have the rights to a jury trial (unless the punishment will be six months or less), Bloom v. Illinois, 391 U.S. 194, 210 (1968); to an attorney, Cooke v. United States, 267 U.S. 517, 537 (1925); and to have the prosecution prove its case beyond a reasonable doubt, *Hicks*, 485 U.S. at 632; *Gompers*, 221 U.S. at 444; see also U.S. Dep't of Justice, Criminal Resource Manual § 754 (2012).

[49] United States v. United Mine Workers of Am., 330 U.S. 258, 303 (1947).

Unlike criminal contempt, civil contempt does not seek to punish disobedience.[50] Instead, it aims either to force the violator to compensate those harmed by the violation ("compensatory contempt")[51] or to coerce the person violating the injunction to comply with it ("coercive contempt").[52] When used in the former way, the contempt order operates similar to a tort claim for damages.[53] Such orders must correspond to the complainant's "actual loss."[54] By contrast, when used to force compliance with an injunction, a civil contempt order may impose harsh measures, such as fines or imprisonment, until the contemnor agrees to obey the underlying order.[55] In choosing a coercive contempt remedy, the court must "consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired."[56] Once the contemnor has obeyed the underlying injunction, the court must lift a civil contempt order.[57]

[50] Id. at 332 (Black, J., concurring in part and dissenting in part); *Gompers*, 221 U.S. at 441–42.

[51] See Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 443 (1986) (citing *United Mine Workers*, 330 U.S. at 303–04).

[52] Id.; Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 828 (1994) ("The paradigmatic coercive, civil contempt sanction . . . involves confining a contemnor indefinitely until he complies with an affirmative command such as an order to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance." (internal quotation marks omitted)).

[53] *Bagwell*, 512 U.S. at 838 (stating that courts may use the compensatory contempt power to "enter broad compensatory awards . . . through civil proceedings"); Doug Rendleman, Irreparability Resurrected?: Does a Recalibrated Irreparable Injury Rule Threaten the Warren Court's Establishment Clause Legacy?, 59 Wash. & Lee L. Rev. 1343, 1379, 1390 (2002).

[54] *United Mine Workers*, 330 U.S. at 304.

[55] *Gompers*, 221 U.S. at 441–42. Although civil contempt may result in these harsh sanctions, fewer protections apply because it is not a criminal remedy. See Turner v. Rogers, 564 U.S. 431, 442 (2011) ("[W]here civil contempt is at issue, the Fourteenth Amendment's Due Process Clause allows a State to provide fewer procedural protections than in a criminal case."); *Bagwell*, 512 U.S. at 827 (holding that "[n]either a jury trial nor proof beyond a reasonable doubt" is necessary for imposing "civil contempt sanctions").

[56] *United Mine Workers*, 330 U.S. at 304.

[57] *Turner*, 564 U.S. at 442 ("[O]nce a civil contemnor complies with the underlying order, he is purged of the contempt and free."); see also *Gompers*, 221 U.S. at 442 (explaining that the respondent "can end the sentence and discharge himself at any moment by doing what he had previously refused to do").

B. The Challenge of Interpreting Injunctions

Enforcing injunctions requires interpretation.[58] To determine whether to hold a person in contempt under an injunction, a court must assess what the injunction means and whether the person has violated it.[59] A court also must interpret an injunction in determining whether to expand or contract its coverage. Courts have not agreed on a single approach to ascertaining injunctions' meaning, however. Over the years, they have variously applied textualism, purposivism, intentionalism, and pragmatism to interpret injunctions.

1. Textualism

Textualism requires a court to interpret legal documents according to the ordinary meaning of their text, read in context.[60] The central question under a textualist approach is how a reasonable person would understand an injunction's text.[61] As Justice Scalia put it, "first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies."[62] Under a textualist approach, a person may not be held in contempt unless her conduct violates the language of the injunction itself.

An early example of using textualism to interpret an injunction comes from the English Court of Chancery decision in *Marquis of Downshire v. Lady Sandys*.[63] The issue, in that case, was whether chopping down fir trees violated an injunction against chopping down trees "standing or

[58] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("Those who apply the rule to particular cases, must of necessity expound and interpret that rule."); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 53 (2012) ("Every application of a text to particular circumstances entails interpretation.").

[59] 1 Charles Fisk Beach, Jr., Commentaries on the Law of Injunctions § 261, at 272 (1895) ("[W]hether or not there has been a breach of an injunction must often turn upon the scope of its terms.").

[60] See Manning, Textualism, supra note 13, at 434 (stating that "modern textualists" look to the "ordinary meaning" of words and phrases, as well as "the relevant linguistic community's (or sub-community's) shared understandings and practices").

[61] Manning, supra note 15, at 76 (explaining that textualism counsels a court to interpret legal writings based on how "a reasonable person would use language under the circumstances").

[62] Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

[63] (1801) 31 Eng. Rep. 962.

growing for ornament" on various pieces of land.[64] The Court explained that, even if the defendant did not regard the fir trees as ornamental, the trees had been originally planted for that purpose.[65] The Court concluded that the injunction "by the terms" therefore prohibited the defendant's conduct.[66]

The U.S. Supreme Court has likewise applied textualism to interpret injunctions. One of the most striking examples is *United States v. Armour & Co*.[67] That case involved a consent decree that prohibited Armour, a meatpacking company, from distributing various food items.[68] The decree also barred Armour from owning any "capital stock or other interests whatsoever" in any business that dealt in those food items.[69]

Greyhound Corp., a motor carrier that distributed the food items listed in the decree, sought to acquire a controlling interest in Armour.[70] The Government opposed the acquisition, arguing that it would circumvent the decree's "purported purpose of separating the meatpackers from the retail food business."[71]

The Supreme Court concluded that the injunction did not prohibit the acquisition.[72] The Court acknowledged that the Government's overall aim in agreeing to the consent decree had been to achieve "structural separation" between meatpackers and the transportation companies that distributed food.[73] But, the Court explained, the decree did not "effect a complete separation" between meatpacking and distribution.[74] Instead, the decree prohibited only "particular actions and relationships not including the one here in question."[75] The Court emphasized that, if the parties had intended a different result, "they could have chosen language

[64] Id. at 962. The injunction prohibited the defendant "from cutting down or felling any trees or timber standing or growing for ornament . . . of the mansion-house and buildings at Ombersley Court" and other nearby locations. Id.

[65] Id. at 964.

[66] Id. at 963–64. Woodward v. Earl Lincoln (1674) 36 Eng. Rep. 1000, provides another example of textualism. There, an injunction quieted possession of property. The enjoined individual later assisted a magistrate who lawfully seized the property for restitution. The court held that this assistance violated the injunction. Id.

[67] 402 U.S. 673 (1971).

[68] Id. at 676.

[69] Id.

[70] Id. at 674, 676.

[71] Id. at 677.

[72] Id. at 683.

[73] Id. at 677.

[74] Id.

[75] Id. at 677–78.

that would have established the sort of prohibition that the Government now seeks."[76]

In adopting this textualist approach, the Court rejected the Government's argument that allowing the acquisition would lead to the same sort of anticompetitive behavior the decree sought to combat. The Court stated that, although such enforcement considerations might have justified the district court in entering a broader decree or even modifying the existing decree, they had no bearing on its meaning.[77]

2. Purposivism

Purposivism directs judges to construe legal documents in the way that will most effectively further the reasons for which they were issued.[78] For purposivists, the guiding consideration is the policy motivating a legal provision.[79] Under this theory, a court may apply a law more broadly than its text suggests if doing so advances the law's purpose.[80] Likewise, a

[76] Id. at 679.

[77] Id. at 681; see also United States v. Atl. Ref. Co., 360 U.S. 19, 23–24 (1959) (interpreting language in a consent decree based on its "normal meaning," rather than adopting "another reading" which "might seem more consistent with the Government's reasons for entering into the agreement in the first place"); Hughes v. United States, 342 U.S. 353, 356–57 (1952) (applying plain-meaning interpretation of consent decree). Justice Douglas' dissent in *Armour* employed a purposivist approach, instead. He declared that the "evil at which the decree is aimed is combining meatpackers with companies in other food product areas." *Armour*, 402 U.S. at 686 (Douglas, J., dissenting). That harm would occur, Justice Douglas said, regardless of whether Armour itself sold prohibited food products, or a company that dealt in such products acquired Armour instead. Id. at 687. Accordingly, he argued, despite the consent decree's narrow language, it should be given a broader construction to promote its underlying goals more effectively.

[78] See Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958) (concluding that courts should "[i]nterpret the words of the statute immediately in question so as to carry out the purpose as best it can"); Max Radin, A Short Way with Statutes, 56 Harv. L. Rev. 388, 407 (1942); see also Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945) (Hand, J.) ("[S]tatutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.").

[79] Manning, supra note 15, at 91 ("Purposivists give precedence to policy context." (emphasis omitted)).

[80] See, e.g., Int'l Longshoreman's & Warehouseman's Union v. Juneau Spruce Corp., 342 U.S. 237, 243 (1952) (applying a "looser, more liberal meaning" to the statutory term "district court of the United States" in order to include Alaska's territorial courts).

court may apply a law more narrowly than its text if a broader reading would not help achieve the law's goals.[81]

Purposivist interpretations of injunctions also have a venerable pedigree.[82] In the 1795 decision *Bolt v. Stanway*, the English Court of Exchequer relied on purposivism to expand the scope of an injunction.[83] There, the injunction prohibited the defendant from suing the plaintiff for money to satisfy a judgment that the defendant had obtained in an earlier suit against the plaintiff. To avoid the injunction, the defendant sued a sheriff who had already levied money from the plaintiff. The Court held the defendant in contempt.[84] Although the injunction's text had prohibited suits only against the plaintiff, the court reasoned that the suit against the sheriff nevertheless violated the injunction. As Baron Hotham wrote, the proceeding against the sheriff was "in sense and spirit[] a violation of the injunction."[85]

English courts also relied on purposivism to contract the scope of injunctions. An example comes from the 1732 decision *Morrice v. Hankey*.[86] There, Hankey sued Morrice for damages. While that action was pending, Morrice obtained an injunction that permitted Hankey to continue his existing case but prohibited him from bringing any new actions against Morrice. Hankey subsequently filed a writ of *scire facias* for an accounting of Morrice's assets.[87] The court held that, although filing the *scire facias* action contravened the injunction's terms, it did not

[81] See Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892) ("[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers . . . .").

[82] See 1 Edward M. Dangel, Contempt § 242 (1939) ("[I]t is the spirit and not the letter of the command to which obedience is required, and it must be obeyed in good faith according to its spirit.").

[83] Bolt v. Stanway (1795) 145 Eng. Rep. 965, 965; 2 Anst. 556, 556–57.

[84] Id.

[85] Id. at 965; 2 Anst. at 557; accord Chaplin v. Cooper (1812) 35 Eng. Rep. 7, 8; 1 V. & B. 16, 19; see also Axe v. Clarke (1779) 21 Eng. Rep. 383, 383–84; Dickens 549, 549–50 (concluding that requiring the sheriff to tender seized assets to satisfy a judgment violated an injunction prohibiting the plaintiff from recovering on that judgment); Robert Henley Eden, A Treatise on the Law of Injunctions 72–73 (1821) (agreeing that, when a court enjoins a person from suing to obtain someone else's property, and the sheriff has attached that other person's property, the enjoined party may not sue the sheriff to obtain the attached property). For another early example of purposivism, see St. John's College, Oxford v. Carter (1839) 41 Eng. Rep. 191, 192; 4 My. & Cr. 497, 497–98 (holding that a defendant violated an injunction prohibiting him from chopping wood in Bagley Wood by encouraging others to chop the wood).

[86] 24 Eng. Rep. 1006; 3 P. Wms. 146.

[87] Id. at 1006; 3 P. Wms. at 146–47.

actually violate the injunction. The court explained that the *scire facias* action was in form "a continuation only of the old [case] on the same record," since its aim was simply to identify the assets at issue in the earlier matter.[88]

The U.S. Supreme Court has also relied on purposivism to broaden and narrow the scope of injunctions. In the 1949 decision of *McComb v. Jacksonville Paper Co.*, for example, the Court used purposivism to expand an injunction beyond its text.[89] The injunction required employers to pay various employees certain hourly rates, provide overtime pay to people who worked more than 40 hours a week, and keep records on employees' work hours and pay.[90] In response, the employers devised a new system for compensating employees that did not take into account the number of hours they worked.[91] They also switched to awarding bonuses to employees instead of raises, so the base salaries by which employees' overtime pay was determined would not increase.[92] Additionally, the employers redesignated several employees as executive or administrative personnel so they would be exempt from the overtime requirements.[93] Although these acts were clearly designed to circumvent the injunction, the district court refused to hold the employers in contempt because they had not violated any specific provisions of the decree.[94]

The Supreme Court reversed.[95] It reasoned that subjecting parties to contempt only if an injunction clearly and specifically prohibited their conduct "would give tremendous impetus to [a] program of experimentation with disobedience of the law."[96] The Court further pointed out that, even if the district court had modified the injunction, the employers could have altered their conduct again to circumvent the restrictions.[97]

[88] Id. at 1006; 3 P. Wms. at 148. Although relatively rare today, injunctions prohibiting individuals from launching new legal proceedings were historically common. See Eden, supra note 85, at 68. Courts regularly applied purposivism in interpreting those types of injunctions to ensure that they did not unduly interfere with already pending actions. Id. at 69.

[89] 336 U.S. 187 (1949).

[90] Id. at 189.

[91] Id. at 190.

[92] Id.

[93] Id.

[94] Id.

[95] Id. at 195.

[96] Id. at 192.

[97] Id.

The Court acknowledged that, under its purposivist approach, the scope of the employers' obligations under the injunction was uncertain. But it reasoned that the employers "took a calculated risk" by attempting to circumvent the order[98] and should therefore face the consequences of violating it.[99] According to the Court, if the employers were unsure whether their conduct was permissible, they should have asked the district court for clarification.[100]

On the flip side of the coin, in *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc.*, the Court relied on purposivism to narrow the scope of an injunction.[101] Members of a milkmen's union had violently protested new retail dairy stores by smashing windows, setting off firebombs and stink bombs, wrecking milk delivery trucks, setting fires, assaulting store personnel and their suppliers, making threats, and even shooting someone.[102] This conduct resulted in an injunction prohibiting union members from "interfering [with], hindering or otherwise discouraging or diverting . . . persons desirous of or contemplating purchasing milk and cream."[103] One of the injunction's specific prohibitions barred the use of "signs, banners or placards, and walking up and down in front of said stores as aforesaid, and further preventing the deliveries to said stores of other articles which said stores sell through retail."[104]

By its terms, the injunction was not limited to violent protests; it prohibited picketing generally.[105] But Justice Frankfurter, writing for the majority, explained that the injunction "must be read in the context of its

[98] Id. at 193.

[99] Id.

[100] Id. at 192. Justice Frankfurter—usually an avowed purposivist, see, e.g., Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 538–39 (1947)—joined with Justice Jackson to issue a strong textualist dissent. He declared that injunctions must be "explicit and precise." *McComb*, 336 U.S. at 195 (Frankfurter, J., dissenting). He believed that the injunction at issue lacked the "clearness of command" required for a court to conclude that the defendants had disobeyed it. Id. at 196. "Behind the vague inclusiveness of an injunction like the one before us," Frankfurter cautioned, "is the hazard of retrospective interpretation as the basis of punishment through contempt proceedings." Id. at 197. He further warned that holding respondents in contempt for violating vague or general injunction provisions would encourage courts to draft orders with "indefinite terms." Id. "To be both strict and indefinite" was "a kind of judicial tyranny." Id. at 195.

[101] 312 U.S. 287 (1941).

[102] Id. at 291–92.

[103] Id. at 308 (Black, J., dissenting).

[104] Id.

[105] Id.

circumstances."[106] According to the Court, interpreting the injunction more broadly to prohibit all picketing would "distort[] the meaning of things" by ignoring the violence that gave rise to it.[107]

3. Intentionalism

Intentionalism requires courts to interpret legal documents based on what the drafter subjectively intended the text to mean.[108] Unlike purposivism, intentionalism does not ask how to best serve the policy objectives that led to a legal provision's adoption, but rather how the drafter herself would interpret the document.[109]

In *Ex Parte Hobbs*, the Supreme Court relied on intentionalism to construe an injunction to determine whether the district judge had jurisdiction to enter it.[110] Under federal law at the time, only a three-judge district court could enter a preliminary injunction against the enforcement of state laws on constitutional grounds.[111] A single judge sitting alone, however, could enjoin state laws for any other, non-constitutional reasons. In *Hobbs*, several fire insurance companies sued in federal court, alleging that it was unconstitutional for the Kansas insurance commissioner to revoke their licenses.[112] At the start of the suit, however, the companies moved for a preliminary injunction on different, non-constitutional grounds, contending that the commissioner lacked

[106] Id. at 298 (majority opinion).

[107] Id. Justice Black, applying a primarily textualist approach, dissented, refusing to read such implicit limitations into the injunction. Rejecting Frankfurter's interpretation, Black stated, "I find not even slight justification for an interpretation of this injunction so as to confine its prohibitions to conduct near stores dealing in respondent's milk. Neither the language of the injunction nor that of the complaint which sought the injunction indicates such a limitation." Id. at 310 (Black, J., dissenting). Black's proposed methodology departed from textualism, however, because he argued that to interpret the injunction, the Court must consider not only the injunction itself, but also "the complaint, the answer, the evidence, the findings, and the decision and judgment of the Illinois courts." Id. at 307.

[108] See, e.g., United States v. Klinger, 199 F.2d 645, 648 (2d Cir. 1952) (Hand, J.) ("[W]hat we do, and must do, is to project ourselves, as best we can, into the position of those who uttered the words, and to impute to them how they would have dealt with the concrete occasion."), aff'd by an equally divided Court, 345 U.S. 979 (1953) (per curiam).

[109] Richard A. Posner, Statutory Interpretation—in the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 817 (1983) ("The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar.").

[110] 280 U.S. 168 (1929).

[111] 28 U.S.C. § 380 (1925) (current version at 28 U.S.C. § 2284 (2018)); Michael T. Morley, Vertical Stare Decisis and Three-Judge District Courts, 108 Geo. L.J. 699, 727–33 (2020).

[112] *Hobbs*, 280 U.S. at 170.

authority under state law to revoke their licenses.[113] The single judge hearing the case granted the preliminary injunction.[114]

The Supreme Court upheld the injunction. It rejected the argument that the district court lacked jurisdiction to enter the injunction because the judge had actually issued the injunction on the ground that the license revocation was unconstitutional. The Court explained that the "[j]udge knows at least what he intended and supposed himself to do."[115] And the district judge had stated that the "only question before him was the construction" of the state law.[116] Thus, the district court's apparent intentions controlled the Supreme Court's interpretation of the injunction.

4. Pragmatism

A pragmatic approach urges courts to interpret legal documents so as to reach the "best" outcome.[117] This theory counsels judges to consider the costs and benefits of various interpretations, as well as the extent to which they align with social values.[118] Pragmatists contend that, because most legal texts are indeterminate, courts should simply select the construction that achieves the greatest social benefit.[119]

One possible example of a court employing pragmatism in interpreting an injunction comes from *Schering Corp. v. Illinois Antibiotics Co*.[120] There, a consent decree forbade a company from selling an antibiotic reagent in a liquid "solution" form.[121] The company subsequently sold the

[113] Id. at 171.
[114] Id.
[115] Id. at 172.
[116] Id.
[117] See Ronald Dworkin, Law's Empire 95 (1986) (explaining that pragmatism counsels courts to "make whatever decisions seem to them best for the community's future, not counting any form of consistency with the past as valuable for its own sake"); Richard A. Posner, Law, Pragmatism, and Democracy 59–60 (2003) (arguing for legal interpretations that produce the best outcomes); Anita S. Krishnakumar, Dueling Canons, 65 Duke L.J. 909, 992 (2016) (explaining that pragmatism "posits only that judges should construe statutes by focusing on the practical consequences that will result from an interpretation and seeking the best result").
[118] Krishnakumar, supra note 117, at 993 (noting that pragmatists argue that interpretation should take into account both social context and more tangible consequences).
[119] Id. (noting that pragmatists argue that "the goal of statutory interpretation should be to produce the best results for society") (citing Richard A. Posner, The Problematics of Moral & Legal Theory 227 (1999); Richard A. Posner, The Problems of Jurisprudence 73–74 (1990)).
[120] 62 F.3d 903, 906 (7th Cir. 1995) (Posner, C.J.).
[121] Id. at 905.

reagent in a powdered form, which could easily be dissolved in water.[122] Although the sale of powder did not violate the literal terms of the injunction, the Seventh Circuit concluded that the injunction should be interpreted to prohibit it.[123] The court explained that a broad reading was necessary to prevent the company from circumventing the consent decree and thwarting the parties' expectations in entering into it.[124] It also noted that the broad interpretation would avoid inundating the courts with requests to modify injunctions.[125]

II. USING TEXTUALISM TO INTERPRET INJUNCTIONS

The jumble of different methods for interpreting injunctions creates a serious risk of uncertainty. Accordingly, we propose that courts apply modified textualism to construe injunctions. Under this approach, courts would generally interpret injunctions according to their ordinary meaning. The basic inquiry would be how a reasonable person would understand the text as it is written.[126] A person may be held in contempt for violating an injunction only if her conduct violates its language, read in context.[127]

We call this approach "modified" textualism because there is one circumstance in which courts should depart from a pure textualist interpretation. When a provision in an injunction quotes or incorporates by reference an extrinsic legal authority, such as a statute or contractual provision, the court should interpret that provision of the injunction by using whatever methodology it would otherwise apply to that extrinsic authority.[128] For example, if a court employs purposivism to interpret statutes, it should employ purposivism to interpret a provision in an injunction quoting a statute. This Part provides practical, theoretical, and doctrinal reasons why courts should use this modified version of textualism to interpret injunctions, then addresses potential objections. In

[122] Id.

[123] Id. at 907.

[124] Id.

[125] Id. at 906.

[126] Manning, supra note 15, at 76 (explaining that textualism counsels a court to interpret legal writings based on how "a reasonable person would use language under the circumstances").

[127] Although a court should generally employ textualism to determine the meaning of injunctions, we also propose that a court consider an injunction's purpose when determining whether to impose sanctions on a violator. See infra Section III.C.

[128] See infra Section III.A.

making this argument, we focus on permanent injunctions. We expand the argument to other types of injunctions in Part III.

A. Supporting a Textualist Approach to Interpreting Injunctions

Most arguments about interpretive methodology focus on statutory interpretation. But many of the primary arguments for textualism as a theory of statutory interpretation are inapplicable to injunctions. For example, a main justification for textualism is that it allows courts to most faithfully implement the will of the legislature.[129] Textualists emphasize that statutes do not embody a single purpose or intent. Legislatures are multimember bodies. They consist of officials elected by different constituencies seeking to protect or promote different interests.[130] These legislators rarely, if ever, share a single collective intent.[131] A statute is the product of compromise among these legislators, and the statutory text embodies that compromise.[132] Adhering to the text is therefore the best way of faithfully implementing the bargains that the legislators struck.

A second frequent argument for textualism is that the federal and state constitutions demand a textualist approach to statutory interpretation. These constitutions establish procedures such as bicameralism and presentment for the enactment of legislation,[133] and only the text of the law has gone through these constitutional processes.[134]

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[129] Manning, Equity, supra note 13, at 7 (arguing that textualism more faithfully implements legislative will than purposivism).

[130] See Heather K. Gerken & Ari Holtzblatt, The Political Safeguards of Horizontal Federalism, 113 Mich. L. Rev. 57, 87 (2014) (explaining how political minorities may use vetogates to block legislation).

[131] Frank H. Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 547 (1983) ("Although legislators have individual lists of desires, priorities, and preferences, it turns out to be difficult, sometimes impossible, to aggregate these lists into a coherent collective choice.").

[132] See id. at 546.

[133] U.S. Const. art. I, § 7. All states have a presentment requirement, see Jordan E. Pratt, Disregard of Unconstitutional Laws in the Plural State Executive, 86 Miss. L.J. 881, 910 (2017) ("Like the federal Constitution, all state constitutions require that, to become law, bills must either be passed by the legislature and approved by the governor, or enacted by the legislature over the governor's veto."), and forty-nine have bicameralism requirements, see Hillel Y. Levin, Stacie Patrice Kershner, Timothy D. Lytton, Daniel Salmon & Saad B. Omer, Stopping the Resurgence of Vaccine-Preventable Childhood Diseases: Policy, Politics, and Law, 2020 U. Ill. L. Rev. 233, 252 (discussing the "forty-nine states with bicameral legislatures").

[134] Antonin Scalia & John F. Manning, A Dialogue on Statutory and Constitutional Interpretation, 80 Geo. Wash. L. Rev. 1610, 1612 (2012) ("Nothing but the text has received the approval of the majority of the legislature and of the President, assuming that he signed it

These arguments do not directly translate to injunctions, however. A court construing an injunction is not acting as some other entity's faithful agent. An injunction is an order of the court, and courts typically enforce their own injunctions.[135] As a practical matter, the judge who interprets an injunction is ordinarily the one who entered it.[136] And because injunctions are usually entered by a single judge, they are not ordinarily the result of compromises among multiple people—even though opposing litigants may recommend language for the court to use. Nor do constitutions or other legal authorities prescribe processes, beyond a district judge's signature, through which an injunction's text must be approved.

Several other important considerations, however, strongly support textualism as the primary theory for interpreting injunctions. These factors include ensuring adequate notice of proscribed conduct, preventing arbitrary and vindictive judicial action, and ensuring consistency with procedural rules.

1. Notice

Textualism most effectively promotes the related goals of ensuring that individuals have adequate notice of the conduct that an injunction proscribes or requires, and that they are not unexpectedly punished for conduct an injunction could be read to permit.[137] A basic premise of our legal system is that a person should not be held accountable for violating the law unless she had reasonable notice of what the law required at the time of her actions.[138] People must have a fair opportunity to conform their behavior to the law's requirements.[139] Notice is an essential

rather than vetoed it and had it passed over his veto. Nothing but the text reflects the full legislature's purpose.").

[135] Baker v. Gen. Motors Corp., 522 U.S. 222, 236 (1998) ("Sanctions for violations of an injunction, in any event, are generally administered by the court that issued the injunction.").

[136] See Seidenberg, supra note 12, at 16 ("[A] contempt proceeding is usually heard by the same judge who issued the injunction . . . .").

[137] Note, Textualism as Fair Notice, 123 Harv. L. Rev. 542, 557 (2009) [hereinafter Fair Notice] ("[T]extualism by its very definition seeks to satisfy this dictate of fair notice . . . .").

[138] See Smith v. Goguen, 415 U.S. 566, 572 & n.8 (1974) (quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)).

[139] Carissa Byrne Hessick & F. Andrew Hessick, Procedural Rights at Sentencing, 90 Notre Dame L. Rev. 187, 210 (2014).

component of due process,[140] and it undergirds the Constitution's prohibitions on ex post facto laws.[141]

The law has long enforced these notice principles in the context of injunctions.[142] More than two hundred years ago, English courts explicitly recognized that a person cannot be held in contempt for violating an injunction that did not provide adequate notice of the prohibited acts.[143] The U.S. Supreme Court has consistently embraced this notice principle as well, holding more than a century ago that, because "contempt is a severe remedy," courts should not resort to it "where there is fair ground of doubt as to the wrongfulness of the defendant's conduct."[144] The Court has repeatedly reaffirmed this doctrine in the decades since, most recently in 2019.[145]

The requirement for adequate notice in injunctions is a close cousin of the rule of lenity, which directs courts to interpret criminal statutes "strictly."[146] Under the rule, courts must resolve ambiguous criminal statutes in the defendant's favor.[147] It rests in large part on the idea that people should not be punished for their actions unless they had clear notice that those actions are illegal.[148] Although the rule of lenity governs

[140] See United States v. Davis, 139 S. Ct. 2319, 2325 (2019) ("Vague laws contravene the 'first essential of due process of law' that statutes must give people 'of common intelligence' fair notice of what the law demands of them." (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926))).

[141] U.S. Const. art. I, § 9, cl. 3 (prohibiting Congress from enacting ex post facto laws); id. art. I, § 10, cl. 1 (prohibiting states from enacting ex post facto laws); see Bouie v. City of Columbia, 378 U.S. 347, 353–54 (1964).

[142] Charles Stewart Drewry, A Treatise on the Law and Practice of Injunctions 398 (1842) ("To be guilty of a breach of injunction, the party must have notice of it . . . .").

[143] See, e.g., Marquis of Downshire v. Lady Sandys (1801) 31 Eng. Rep. 962, 963; 6 Ves. Jun. 108, 109 (observing the duty of the courts to define an injunction's terms "with precision and accuracy" so that it "might be clearly understood by the parties"); Skip v. Harwood (1747) 26 Eng. Rep. 1125, 1125; 3 Atk. 564, 565 (discussing the importance of notice in an injunction).

[144] Cal. Artificial Stone Paving Co. v. Molitor, 113 U.S. 609, 618 (1885).

[145] Taggart v. Lorenzen, 139 S. Ct. 1795, 1802 (2019) ("'[B]asic fairness requir[es] that those enjoined receive explicit notice' of 'what conduct is outlawed' before being held in civil contempt . . . ." (quoting Schmidt v. Lessard, 414 U.S. 473, 476 (1974) (per curiam))).

[146] United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820); see 1 William Blackstone, Commentaries *88 ("Penal statutes must be construed strictly.").

[147] United States v. Davis, 139 S. Ct. 2319, 2333 (2019).

[148] See id. (observing that the rule of lenity "is founded on 'the tenderness of the law for the rights of individuals' to fair notice of the law" (quoting *Wiltberger*, 18 U.S. (5 Wheat.) at 95)); United States v. Bass, 404 U.S. 336, 348 (1971) (explaining that the rule of lenity arises in part from "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should" (quoting Henry J. Friendly, Mr. Justice Frankfurter and the Reading

criminal statutes, it also applies when a court construes a criminal statute that is being enforced civilly.[149] A statute has a single, consistent meaning that courts must apply regardless of the remedy being sought in a particular case.[150]

The rationale underlying the rule of lenity applies equally to injunctions.[151] Injunctions may be enforced through either civil or criminal contempt.[152] Criminal contempt is a criminal proceeding that subjects violators to most of the same types of punishments as criminal statutes.[153] This threat of punishment triggers the same concerns that motivate the rule of lenity.

The rule of lenity should also apply when an injunction is enforced in civil proceedings. An injunction is a legal document with a particular meaning which should not change depending on the mechanism used to enforce it.[154] Moreover, although coercive contempt is not intended to punish, the mechanisms it uses to coerce compliance mirror punishment.[155] A court may impose fines, imprisonment, and other obligations to compel compliance with an injunction.

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of Statutes, *in* Benchmarks 196, 209 (1967))); see also United States v. Santos, 553 U.S. 507, 514 (2008) (plurality opinion) (stating that the rule of lenity "vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed").

[149] See Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."); United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 517–18 (1992) (plurality opinion) (applying the rule of lenity to a "tax statute . . . in a civil setting" because the statute "has criminal applications").

[150] See Clark v. Martinez, 543 U.S. 371, 380–81 (2005) (holding that, if a court must construe a statute's language a particular way in one setting, that interpretation carries over to other settings, and declaring that "[t]he lowest common denominator, as it were, must govern").

[151] Although the rule of lenity is a doctrine of statutory interpretation, a handful of courts have applied it when interpreting injunctions to decide whether to impose criminal contempt. See, e.g., Gates v. Pfeiffer, No. G039450, 2009 WL 693468, at *9 (Cal. Ct. App. Mar. 17, 2009) (citing Lopez v. Superior Court, 72 Cal. Rptr. 3d 929, 935 (Ct. App. 2008)) ("As a penal law, the restraining order was subject to the so-called 'rule of lenity,' which requires that ambiguities in penal laws be construed in favor of defendants.").

[152] See supra notes 44–45 and accompanying text.

[153] See supra notes 46–49 and accompanying text.

[154] Cf. *Leocal*, 543 U.S. at 11 n.8 (explaining that "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies").

[155] Taggart v. Lorenzen, 139 S. Ct. 1795, 1801–02 (2019) (justifying the rule of strict construction in a compensatory contempt case on the ground that coercive contempt can be a severe remedy); see also Shillitani v. United States, 384 U.S. 364, 369 (1966) (stating that

Textualism ensures, better than alternative theories, that defendants have notice about the range of conduct that an injunction mandates or prohibits.[156] It requires the court to determine how an ordinary person would understand the scope of the injunction from reading it.[157] This approach protects people from having to speculate about the motivation or intent behind an injunction and how those considerations might affect its interpretation.

Other methods of interpretation provide less notice. With purposivism, for example, the reach of an injunction depends on the policies underlying it.[158] Individuals subject to the injunction might not know those policies, or how far a court might choose to enforce them.[159] Compounding the problem is the fact that injunctions seldom seek to implement a single purpose. Instead, as with statutes, they are usually the product of multiple competing policies and values. One cannot always guess ex ante how a judge might balance those competing policies before engaging in conduct that possibly comes within the valence of the injunction.

Intentionalism raises similar concerns. Individuals can only guess at their precise obligations under an intentionalist approach, because they cannot infer exactly how a judge subjectively intended the injunction to apply in all situations. Intentionalism leaves people to speculate about how the judge would have wanted the injunction to apply to various sets of circumstances.[160]

The same problems arise for pragmatism. A pragmatic interpretation turns on how a judge views the relative costs and benefits of different

civil contempt constitutes "punishment," but that it has a different "character and purpose" than criminal contempt (quoting Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911))).

[156] See Fair Notice, supra note 137, at 557 ("Textualism as fair notice emphasizes the importance of interpreting laws as their subjects would fairly have expected them to apply.").

[157] See Manning, supra note 15, at 76 (explaining that textualism counsels a court to interpret legal writings based on how "a reasonable person would use language under the circumstances").

[158] See Hart & Sacks, supra note 78, at 1374 (concluding that courts should "[i]nterpret the words of the statute immediately in question so as to carry out the purpose as best it can").

[159] See Frank H. Easterbrook, The Role of Original Intent in Statutory Construction, 11 Harv. J.L. & Pub. Pol'y 59, 63 (1988) ("[L]aw is like a vector. It has length as well as direction. We must find both, or we know nothing of value. To find length we must take account of objectives, of means chosen, and of stopping places identified.").

[160] See Posner, supra note 109, at 817 (explaining that, under an intentionalist approach, "the task for the judge . . . [is] to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar").

possible interpretations at the time she interprets the injunction.[161] No one can reliably predict ex ante all the considerations that will inform the judge's thinking, much less how the judge will weigh those considerations in fashioning an interpretation.[162]

This is not to say that textualism avoids all uncertainty. Sometimes people can disagree about the ordinary meaning of a document's text. For example, suppose a court enters an injunction that "prohibits the use of a gun in connection with a protest." Does trading a gun for a sign to use at the protest violate the injunction? For many textualists, the answer would be no, on the grounds that the ordinary meaning[163] of the phrase "use of a gun" is to shoot it, instead of employing the gun for some other purpose—for example as an object to trade, a crutch, or artwork.[164] But others might conclude that the word "use" has a broader reach.[165]

But other interpretive approaches would generate uncertainties of their own. They require parties to speculate about a judge's motivations when entering an injunction or how a judge will weigh various competing policies in interpreting it. Textualism avoids these other types of uncertainty. By focusing the analysis on the ordinary meaning of language, textualism allows the meaning of injunctions to turn on considerations more accessible to enjoined parties than the judge's personal beliefs, preferences, and expectations.

2. Preventing Arbitrary Exercises of Power

Another fundamental aim of our legal system is to prevent the government from exercising its power arbitrarily and wrongfully against individuals.[166] One of the principal structural protections aimed at preventing the government from acting in this way is separation of

[161] Krishnakumar, supra note 117, at 993 (noting that pragmatists argue that interpretation should consider social context and practical consequences).

[162] Id. at 915 (noting that pragmatism "does not claim to promote predictability").

[163] See Manning, Textualism, supra note 13, at 434 (stating that "modern textualists" look to the "ordinary meaning" of words and phrases, as well as "the relevant linguistic community's (or sub-community's) shared understandings and practices").

[164] Smith v. United States, 508 U.S. 223, 242 (1993) (Scalia, J., dissenting) ("[T]o speak of 'using a firearm' is to speak of using it for its distinctive purpose, i.e., as a weapon. To be sure, 'one can use a firearm in a number of ways,' . . . including as an article of exchange, . . . but that is not the ordinary meaning of 'using' [it]." (footnote omitted)).

[165] The rule of lenity would point toward the narrower definition of use, of course.

[166] Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (quoting Zinermon v. Burch, 494 U.S. 113, 125 (1990)) (noting that protection from "arbitrary, wrongful government actions" is a core feature of due process).

powers.[167] No single government actor typically has the power to define the law, enforce it, and determine whether the law was violated. Rather, those powers are divided among Congress, the executive, and the courts. This dispersion of authority prevents individual government actors from vindictively or wrongfully depriving individuals of liberty and property.[168]

But these separation of power protections do not apply to injunctions.[169] The court plays both the legislative role of crafting the injunction and the judicial role of interpreting it; often, the same judge both enters and enforces the injunction.[170] Combining these roles creates the risk of "arbitrary control."[171] Moreover, common sense dictates that a person who writes a law is more likely to apply it in a way that he or she desires instead of according to its terms. It may be difficult for the judge who drafted an injunction to distinguish between the objective plain meaning of a text, what he or she subjectively intended that text to mean, and the personal desire to ensure the order is not circumvented. To make matters worse, the judge who enters an injunction may treat an alleged

[167] The Federalist No. 47, at 316 (James Madison) (Harvard Univ. Press ed. 2009) (praising separation of powers on the ground that "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny"); see INS v. Chadha, 462 U.S. 919, 959 (1983) ("[W]e have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.").

[168] See The Federalist No. 47 (James Madison); Rebecca L. Brown, Separated Powers and Ordered Liberty, 139 U. Pa. L. Rev. 1513, 1534 (1991) ("[S]eparation of powers [is] aimed at the interconnected goals of preventing tyranny and protecting liberty."); see also Ilan Wurman, Constitutional Administration, 69 Stan. L. Rev. 359, 368–69 (2017).

[169] Of course, injunctions predate modern conceptions of separation of powers. But the primary reason the Framers adopted separation of powers as a critical structural principle for the Constitution was to provide increased protection for individual liberty compared to the traditional English system. See Erwin Chemerinsky, The Assault on the Constitution: Executive Power and the War on Terrorism, 40 U.C. Davis L. Rev. 1, 16–17 (2006) ("Having endured the tyranny of the King of England, the framers viewed the principle of separation of powers as the central guarantee of a just government.").

[170] Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 840, (1994) (Scalia, J., concurring) ("That one and the same person should be able to make the rule, to adjudicate its violation, and to assess its penalty is out of accord with our usual notions of fairness and separation of powers.").

[171] Charles de Montesquieu, The Spirit of the Laws 174 (Thomas Nugent trans., 1873) (1748) (stating that, if those functions are united, "the life and liberty of the subject would be exposed to arbitrary control; for *the judge* would be then *the legislator*" (emphasis added)); accord The Federalist No. 47 (James Madison); see also Irving R. Kaufman, The Essence of Judicial Independence, 80 Colum. L. Rev. 671, 701 (1980) (arguing that separating the judiciary from the legislature is central to ensuring "impartial justice").

violation of it as a personal affront to the judge's authority. Injunctions, therefore, present an acute risk of abuse of power.

Employing textualism to interpret injunctions in contempt proceedings reduces these risks. Under a textualist approach, a judge may hold a person in contempt only when that person's actions violate the ordinary understanding of the injunction's language. Textualism makes it more difficult for judges to impose contempt based solely on their belief that a defendant's conduct should be punished.

Textualism's protections are especially appropriate since injunctions are aimed against particular litigants. Ordinarily, legislation affects large classes of people or the general public. Courts may shun aggressive interpretations of the law against certain disfavored parties because the same interpretation would typically extend to others, as well. These protections do not extend to injunctions. Textualism provides an alternative mechanism to ensure that courts treat enjoined parties fairly.

Courts must also be careful to avoid unfairly overbroad interpretations of injunctions against government agencies. Such structural injunctions raise the possibility of judicial interference with policy decisions and discretion entrusted to executive and administrative officials.[172] Textualism constrains this power, at least to some degree. It prevents the court from expanding an injunction's scope through the process of interpretation, thereby enabling the court to control—whether intentionally or unwittingly—a wider range of agency decisions and actions.

3. Consistency with Rule 65 and State Counterparts

A textualist approach is also most consistent with the state and federal rules prescribing the requirements for drafting injunctions. Recall that Rule 65, for example, provides that an injunction must "state its terms specifically" and "describe in reasonable detail . . . the act or acts restrained or required."[173] Forty-nine states have similar requirements.[174]

Rule 65(d)'s specificity and detail requirements suggest that a person may not be held in contempt for violating restrictions that do not appear

[172] Doug Rendleman, Preserving the Nationwide National Government Injunction to Stop Illegal Executive Branch Activity, 91 U. Colo. L. Rev. 887, 931 (2020) ("The structural injunction has faced criticism on two major grounds: federalism and separation of powers.").

[173] Fed. R. Civ. P. 65(d)(1)(B)–(C).

[174] See supra note 34.

on the face of the injunction itself.[175] These requirements promote the same objectives as textualism: ensuring notice and constraining the courts.[176] Rule 65 and its state-law analogues would be toothless if courts could expand injunctions beyond their text to cover additional acts.

The Supreme Court has consistently refused to enforce injunctions that are too vague or ambiguous to satisfy Rule 65.[177] These precedents suggest that a court may not satisfy the Rule's requirements by supplementing an injunction's text with details concerning the district judge's intentions about the injunction's meaning or the purposes underlying it.[178]

B. Objections

Despite the benefits of textualism, competing considerations might appear to counsel in favor of other methodologies. For example, one might object that textualism allows parties to circumvent injunctions too easily. An enjoined person could simply engage in conduct that is similar to that forbidden by the injunction but falls outside the injunction's text.

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[175] Wright et al., supra note 35, § 2955 (explaining that, since Rule 65(d)'s language "strongly suggests that only those acts specified by the order will be treated as within its scope and that no conduct or action will be prohibited by implication, all omissions or ambiguities in the order will be resolved in favor of any person charged with contempt").

[176] See, e.g., Schering Corp. v. Ill. Antibiotics Co., 62 F.3d 903, 906 (7th Cir. 1995); see also supra notes 120–25 (discussing *Schering*).

[177] See Schmidt v. Lessard, 414 U.S. 473, 476 (1974) (declining to enforce an injunction on the grounds it violated Rule 65(d), because the order was neither "'specific' in outlining the 'terms' of the injunctive relief granted," nor "describe[d] 'in reasonable detail . . . the act or acts sought to be restrained'"); see also Int'l Longshoreman's Ass'n v. Phila. Marine Trade Ass'n, 389 U.S. 64, 76 (1967) (overturning "unintelligible" injunction); Hartford-Empire Co. v. United States, 323 U.S. 386, 410 (1945); see also Atiyeh v. Capps, 449 U.S. 1312, 1317 (1981) (Rehnquist, C.J., in chambers) (staying order requiring prison officials to reduce prison population by "at least 250" by a particular date because it "falls short of this specificity requirement").

[178] In *Madsen v. Women's Health Center*, 512 U.S. 753, 808–09 (1994), Justice Scalia suggested in his concurrence that the injunction at issue should be read narrowly to satisfy the precision requirement. But in doing so, Justice Scalia did not suggest that a judge's intent could be used to cure an otherwise defective injunction. Instead, he effectively used the precision requirement as the basis for a substantive canon of interpretation, analogous to the constitutional avoidance principle. Cf. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 507 (1979) (declining to interpret a federal law in a way that would raise "difficult and sensitive questions" under the First Amendment). Under Justice Scalia's approach, courts should reject a broad interpretation of an injunction that would cause that injunction to violate Rule 65(d)'s "axiomatic requirement that its terms be drawn with precision." *Madsen*, 512 U.S. at 809.

Other methodologies, in contrast, more readily prevent circumvention because they allow a judge to extend an injunction beyond its text. Conversely, one might contend that a textualist approach encourages courts to draft injunctions too broadly, so as to encompass any potentially harmful act in which a defendant may engage.

Another argument against textualism is more philosophical. One might object that the true content of an injunction is determined by the intentions of the judge who enters the order, rather than its text. Under this view, just as courts often say that the goal of statutory interpretation is to determine the legislature's intent,[179] one might conclude that the proper way to interpret an injunction is by gleaning the entering court's intent. Neither argument, however, provides a sound basis for adopting a methodology other than textualism.

1. Achieving the Purpose of an Injunction

Courts typically enter injunctions to prevent one entity from violating either another party's rights or some other legal restriction.[180] A textualist approach to interpreting injunctions might appear ill-equipped to achieve this goal. Textualism requires a judge to interpret an injunction according to its text, rather than expanding its scope to achieve its purpose of preventing violations of rights or other underlying legal provisions. Consequently, parties can often circumvent an injunction by engaging in conduct that is similar or related to the acts forbidden by an injunction, but that falls outside the order's terms. For example, under a textualist approach, a party could circumvent an injunction forbidding the ringing of a bell by playing a recording of that bell.

Non-textualist methods of interpretation largely avoid this problem. Purposivism allows judges to depart from an injunction's text when necessary to achieve its purposes.[181] Intentionalism ensures that an injunction sweeps as broadly as the judge intended, regardless of whether

[179] See, e.g., Malley v. Briggs, 475 U.S. 335, 342 (1986) ("[O]ur role is to interpret the intent of Congress in enacting [42 U.S.C.] § 1983 . . . .").

[180] See, e.g., United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953) ("The purpose of an injunction is to prevent future violations" of the underlying legal provisions.); cf. Cont'l Ill. Nat'l Bank & Trust Co. v. Chi., Rock Island & Pac. Rye Co., 294 U.S. 648, 676 (1935) (noting that an injunction may be issued "for the purpose of protecting and preserving the jurisdiction of the court 'until the object of the suit is accomplished and complete justice done between the parties'" (quoting Looney v. E. Tex. R.R. Co., 247 U.S. 214, 221 (1918))).

[181] See supra note 77.

its text actually embodies that intent.[182] And pragmatism would permit judges to interpret injunctions to achieve the best policy outcomes, regardless of the orders' textual limitations.

It is true that textualism prohibits courts from holding a person in contempt for acts that violate the spirit of an injunction. But this is a feature of textualism, not a bug. The ability to impose contempt sanctions for violating an injunction's spirit creates the problems concerning inadequate notice and potential for judicial abuse that textualism seeks to avoid. Moreover, textualist courts can prevent this type of circumvention by modifying injunctions to close loopholes. A court may modify its injunctions either *sua sponte* or at a party's request.[183] Modification is appropriate where subsequent developments demonstrate that the injunction is not effectively achieving its purposes or a party is circumventing its restrictions.[184] Thus, a court does not need to stretch an injunction's language to prevent circumvention.[185]

2. The Risk of Overly Broad Injunctions

A second objection is that textualism might lead courts to issue overly broad injunctions. Under a textualist approach, a court cannot interpret an injunction beyond its terms to encompass conduct that the court meant to forbid. These constraints may lead a court to use broad terms or a lengthy list of terms with similar and overlapping meanings to maximize the likelihood that the injunction actually covers the conduct that the court wished to prohibit. Such sweeping language may unnecessarily enjoin "too much" conduct.

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[182] See supra notes 108–09 and accompanying text.

[183] See, e.g., Chi. Bd. of Educ. v. Substance, Inc., 354 F.3d 624, 632 (7th Cir. 2003) (Posner, J.) (describing an injunction as "appallingly bad" and ordering its modification sua sponte); W. Water Mgmt., Inc. v. Brown, 40 F.3d 105, 109 (5th Cir. 1994) (recognizing a district court's authority to modify injunctions sua sponte with prior notice to the parties). See generally Wright et al., supra note 35, § 2961 (noting the "universally recognized principle that a court has continuing power to modify or vacate" an injunction).

[184] See Jost, supra note 11, at 1109 (explaining how courts can use their power to modify injunctions to address unexpected changes in circumstance); see, e.g., Chrysler Corp. v. United States, 316 U.S. 556, 560 (1942) (modifying injunction in light of the parties' actions).

[185] See United States v. Armour & Co., 402 U.S. 673, 681–82 (1971) (refusing to interpret a consent decree beyond its "four corners," and declaring that the Government should instead ask the trial court to modify the decree if it is not achieving its intended purposes). Requiring a textualist approach would also incentivize judges to craft injunctions more precisely, to accurately embody their intended proscriptions and promote their goals.

While textualism may give courts an incentive to issue broader injunctions, such detail can help ensure adequate notice to enjoined parties. Moreover, other doctrines limit courts' ability to issue overly broad injunctions. Traditional equitable principles require injunctions to be tailored to preventing violations of the underlying legal restrictions.[186] Even prophylactic injunctions must be tailored with that goal in mind.[187] A court generally may not go substantially beyond enjoining the harm at issue in a lawsuit to prohibit unrelated conduct, as well. Within the scope of those constraints, however, it seems desirable for an injunction to be as clear and specific as possible to minimize the potential for interpretive disputes.

3. The Nature of an Injunction

A different argument against the use of textualism to interpret injunctions focuses on the nature of injunctions. One might say that an injunction "actually" consists of what the entering judge intended, rather than what the order's written terms state. Under this approach, the text of the injunction is simply evidence of what the injunction requires. From this perspective, intentionalism or purposivism would be better suited than textualism to interpret injunctions.

This argument, however, seems to be based on an incorrect view of injunctions. No one would contend that a litigant is bound by a judge's subjective, unexpressed intentions, unless and until the court enters an injunction. Since the entry of the order is necessary to impose legal obligations on a party, it is unclear why the court's subjective, unexpressed intentions would gain any greater legal effect at that point. It is the written order itself, rather than the judge's intentions, that creates legal obligations. No new legal duties arise independent of the order.

A separate, but related, argument in favor of intentionalism is that, when courts construe legal texts, they act as agents of the drafters, and performing that role faithfully requires them to carry out the drafters' desires.[188] When a court enforces a statute, for example, it is acting as the agent of the legislature, and therefore should carry out the legislature's

[186] See supra notes 31–33 and accompanying text.

[187] See id.

[188] This argument does not go to the nature of an injunction. Instead, it is an argument about the court's role in interpreting injunctions. In other words, the argument does not claim that an injunction *is* the intent of the drafter; rather, it claims that, to perform their role as agent honestly, courts should seek to implement the drafter's intent.

wishes.[189] Building on this argument, some contend that courts should consider the text of a statute only because it is the best evidence of legislative intent.[190]

This faithful agent theory does not establish that courts should use intentionalism. All major theories of interpretation operate on the premise that courts should act as faithful agents when interpreting the words of others.[191] The question is which theory is best at achieving that goal. Textualists argue that textualism is better than the alternatives at implementing the court's role of being a faithful agent.[192] Because of difficulties in ascertaining a drafter's actual intent at the time of drafting, focusing on the text is the best way to effectuate the policies of the drafter.[193]

III. REFINING THE SCOPE OF THE PROPOSAL

So far, the discussion has focused on explaining why textualism is generally the best method for interpreting injunctions. But some important refinements are in order. This Part begins by explaining why courts should apply "modified" textualism when interpreting injunctions. Specifically, it explains that, when a provision within an injunction quotes or incorporates by reference an extrinsic legal authority, the court should construe that provision according to the interpretive approach it would ordinarily apply to authorities of that nature. This Part then goes on to contend that courts should apply this modified textualist approach to all

[189] See Amy Coney Barrett, Substantive Canons and Faithful Agency, 90 B.U. L. Rev. 109, 112 (2010) (discussing the faithful agent theory of interpretation).

[190] Anita S. Krishnakumar, Backdoor Purposivism, 69 Duke L.J. 1275, 1284–85 (2020).

[191] Richard H. Fallon, Jr., Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Roles of Values and Judgment Within Both, 99 Cornell L. Rev. 685, 686 (2014) ("A central ambition of most theories of statutory interpretation is to ensure that judges act as faithful agents of the legislature . . . ."); Frank H. Easterbrook, Judges as Honest Agents, 33 Harv. J.L. & Pub. Pol'y 915, 915 (2010) ("The honest-agent [theory] is not controversial.").

[192] Manning, Equity, supra note 13, at 16 & n.65 ("[A] faithful agent's job is to decode legislative instructions according to the common social and linguistic conventions shared by the relevant community."); Frank H. Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 Harv. J.L. & Pub. Pol'y 61, 63 (1994); see also Fallon, supra note 191, at 687 ("In textualists' estimation, courts best act as faithful agents by enforcing the fair meaning of the words that the legislature enacted.").

[193] See Easterbrook, supra note 191, at 922 (describing difficulties in identifying the desires of drafters); Krishnakumar, supra note 190, at 1334–35 ("[M]any textualists take the view that the enacted text is the best available evidence of Congress's intent and that close attention to the text is the only way to accurately effectuate that intent.").

types of injunctions, including permanent injunctions, preliminary injunctions, TROs, and consent decrees. It concludes by establishing that, while modified textualism is the proper way to determine an injunction's meaning, a court may still consider whether the defendant's conduct contravened the injunction's purpose or undermined its goals in deciding whether to hold the defendant in contempt.

A. Extrinsic Legal Authorities

Injunctions often quote, paraphrase, or incorporate by reference other legal sources such as constitutional clauses, statutes, regulations, and contracts.[194] Different considerations apply to interpreting each type of legal document.[195] As a result, courts often use—and many commentators advocate—a variety of theories when interpreting such authorities. A judge who thinks that textualism should control the interpretation of injunctions might conclude, for example, that purposivism is the appropriate method for interpreting statutes.

This divergence presents a conundrum. Applying textualism to interpret extrinsic legal sources when they are quoted in an injunction, while also applying a different method when interpreting those same sources directly, could lead to inconsistency and incoherence. The interpretation of a legal authority, such as a statute, could change depending on whether it occurred in a contempt proceeding or a different setting.

Inconsistencies could even arise within the same case when a court issues an injunction to enforce a particular legal provision. For example, assume that one section within an injunction quotes a statute. If a court applies textualism to that part of the injunction, it might construe the incorporated statutory language more narrowly than it would interpret the same language in the statute itself, resulting in underenforcement. Conversely, applying conflicting methodologies could also lead a court to interpret a legal provision more broadly when it appears in an injunction than when the court directly interprets that provision itself.

[194] See, e.g., In re W.R. Grace & Co., 475 B.R. 34, 95–96 (D. Del. 2012) (discussing injunction incorporating statutes relating to asbestos claims); In re S.N., No. E055823, 2014 WL 185651, at *4 (Cal. Ct. App. Jan. 16, 2014) (discussing injunction incorporating statutes relating to gang violence).

[195] See, e.g., Richard H. Fallon, Jr., The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation, 82 U. Chi. L. Rev. 1235, 1237 (2015) (explaining how different theories are appropriate for interpreting various types of texts).

Such interpretive inconsistency would subject the defendant to greater restrictions under the injunction than the underlying provision itself actually imposes.

For example, suppose the Smith Act provides, "No vehicles are permitted in the park."[196] Paul seeks an injunction prohibiting Dan from bringing a motorcycle into the park. The court thinks that the text of the Act applies to all vehicles, but the Act's purpose was to prohibit only motor vehicles. Applying purposivism as its preferred approach to statutory interpretation, the court concludes that Paul is entitled to an injunction, because prohibiting a motorcycle falls within the Act's purpose. It issues an injunction that bars Dan from violating the Smith Act, quoting the Act's prohibition.

Dan subsequently brings a bicycle into the park. Because the bicycle is not motorized, Dan did not violate the Smith Act itself under the judge's purposivist interpretation. But if a court used textualism to interpret the injunction, it would conclude that Dan violated the provision within the injunction that quotes the Act, because a bicycle is within the ordinary meaning of the word "vehicle." By changing the interpretive methodology it uses to construe the language at issue, the court could hold Dan in contempt for violating the injunction, even though his acts would not have violated the statute that the injunction is purportedly enforcing.

This potential divergence in interpretations of the same statutory language creates a risk of uncertainty for entities subject to injunctions. It is also incoherent. The meaning of a legal provision does not change when it is incorporated into an injunction;[197] the injunction is simply a mechanism for enforcing that extrinsic authority. Thus, a court should apply the same methodology to interpret a legal provision, regardless of whether it is construing the provision itself or language from the provision that is quoted or incorporated by reference into an injunction.[198]

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[196] See H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 607 (1958) (first proposing this famous example).

[197] Cf. Clark v. Martinez, 543 U.S. 371, 380 (2005) ("It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern."); Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004) (explaining that, if a statute has criminal and civil applications, courts "must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context").

[198] See, e.g., Matter of Rimsat, Ltd., 98 F.3d 956, 965 (7th Cir. 1996) (interpreting an injunction that quoted § 543(b) of the Bankruptcy Code by construing that provision of the Code).

This principle means that, even though a court should generally apply textualism to injunctions, it should interpret provisions within an injunction that quote or incorporate an extrinsic legal authority with whatever interpretive theory it would ordinarily apply to that type of authority. For example, if a court would use purposivism to interpret a statute, it should use purposivism to interpret provisions of an injunction that quote or cite that statute. Textualism would still apply, however, where a court chooses to state a party's legal obligations in its own words, paraphrase the underlying legal authority, or impose prophylactic restrictions that go beyond that underlying authority. In such cases, textualism remains the appropriate interpretive approach because, rather than merely incorporating a pre-existing extrinsic source of legal obligations, the court is choosing to craft its own.

This recommendation leads to the uncomfortable conclusion that a court may have to apply different methodologies to different provisions within an injunction. This approach aligns with the Supreme Court's directive on how to interpret regulations that incorporate underlying statutory provisions, however. Ordinarily, a court must defer under *Auer v. Robbins* to a federal agency's interpretation of its own regulations.[199] But in *Gonzales v. Oregon*, the Court held that this deference does not extend to an agency's construction of regulations that merely reiterate or quote statutory provisions.[200] Rather, a court must construe such regulations in the same manner it would interpret the underlying statutes.[201] In other words, the approach that a court must apply to

[199] Auer v. Robbins, 519 U.S. 452, 461–62 (1997) (holding that an agency's interpretation of its own regulation that reflects its "fair and considered judgment on the matter in question" is "controlling unless 'plainly erroneous or inconsistent with the regulation,'" even if the agency adopted that interpretation without notice-and-comment rulemaking and communicated it in an amicus brief (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989))); see also Kisor v. Wilkie, 139 S. Ct. 2400, 2418 (2019) (holding that *Auer* deference "enables the agency to fill out the regulatory scheme Congress has placed under its supervision," but cautioning that "th[e] Court has cabined *Auer*'s scope in varied and critical ways"); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) (providing that, when a regulation's "meaning . . . is in doubt," the agency's interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation").

[200] Gonzales v. Oregon, 546 U.S. 243, 257 (2006) ("An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language."). But see Hanah Metchis Volokh, The Anti-Parroting Canon, 6 N.Y.U. J.L. & Liberty 292, 311 (2011) ("[T]he fact that a statute and a regulation use the same words should not always lead to the conclusion that they mean the same thing.").

[201] *Gonzales*, 546 U.S. at 257.

interpret statutory language does not change simply because an agency incorporates that language into a regulation.[202] The same reasoning applies to statutory language and other legal authorities that a court incorporates into an injunction.

To be sure, applying a method other than textualism to interpret certain provisions of an injunction loses the benefits of textualism for those provisions. And applying different interpretive methodologies to different provisions within an injunction can be confusing and complicated. While no perfect solutions exist, applying this modified or hybrid form of textualism appears to best balance all of the competing considerations. This approach incorporates textualism as a default rule to promote notice to the enjoined party, limit opportunities for judicial abuse, and comply with Rule 65 and its state analogies.[203] Yet it allows provisions within injunctions that quote or incorporate by reference extrinsic legal authorities to be interpreted by whatever methodology the court would ordinarily use to construe those authorities, to preserve their meaning and ensure that they are interpreted consistently.

The risks of departing from a textualist approach when construing outside authorities are limited. Unlike an injunction, which is drafted by the court, those other legal sources will have been drafted by someone else—be it a constitutional convention, legislature, agency, testator, or even the parties themselves. Similarly, unlike injunctions, those documents generally do not target the enjoined individual. Additionally, at least some precedent for applying such a hybrid approach exists in the Court's approach to interpreting federal regulations.[204] Finally, when an injunction incorporates an extrinsic legal provision, it should be understood as imposing whatever legal obligations that extrinsic provision creates. If the court wishes to impose legal obligations that differ from those established by some extrinsic authority, it may craft its own language for the injunction, rather than merely quoting or incorporating that authority by reference. Thus, courts should apply a modified textualist approach to interpret injunctions.

[202] Id.
[203] See supra Section II.A.
[204] See supra note 200 and accompanying text.

B. Extending the Theory to All Types of Injunctions

To this point, our argument has focused on permanent injunctions. Injunctions come in many forms, however, including not only permanent injunctions, but temporary restraining orders (TROs), preliminary injunctions, and consent decrees, as well.

This Section argues that textualism should apply to injunctions of all types. It begins by demonstrating that a single interpretive theory should apply to all injunctions, regardless of their temporal duration. It then establishes that the same theory should likewise extend to consent decrees created by the parties, as well.

1. Permanent v. Interlocutory Injunctions

Despite the temporal differences among temporary restraining orders ("TROs"), preliminary injunctions, and permanent injunctions, the same interpretive theory should apply to all of them, for two reasons. *First*, permanent injunctions are virtually identical to both types of interlocutory injunctions. The primary difference among the three types of orders is the time frame for which each remains in effect. Permanent and interlocutory injunctions are governed by nearly the same elements.[205] Both are issued by trial courts against a defendant to enforce the plaintiff's legal rights or prevent violations of certain legal restrictions. Both oblige a defendant to act, or refrain from acting, and both are subject to modification or vacation on similar grounds.[206] More importantly, a court may hold a person in contempt for violating either an interlocutory injunction or a permanent injunction. Interlocutory injunctions thus present the same notice and risk-of-abuse considerations that support modified textualism for permanent injunctions.

Nothing about the transitory nature of an interlocutory temporary injunction calls for a different interpretive approach. The interim nature of temporary injunctions goes only to the timeframe in which a person is subject to obligations; it does not change a person's duty to comply with the obligations those orders create or the consequences for failing to do so.

[205] See supra note 27.
[206] See supra note 42 and accompanying text.

Second, applying different interpretive methods to interlocutory and permanent injunctions would have odd and undesirable results.[207] If a plaintiff won a preliminary injunction, a court would not necessarily be able to simply confirm or extend the order through a permanent injunction if different interpretive methodologies applied to different types of injunctions. Applying a different theory to permanent injunctions could affect the injunction's scope and, accordingly, require the parties to change their conduct. If a court wished to impose the same conditions as those in the interlocutory injunction, it may have to modify the injunction's terms—an inefficient and counterintuitive requirement, to say the least.

One might argue that, since TROs are issued *ex parte* and often drafted in emergency situations under extreme time pressure,[208] courts should be willing to construe them more liberally. The harried circumstances under which some TROs are created may cause courts to draft them imprecisely, or in a way that inadequately prevents irreparable injury. Thus, one might say, a more flexible method of interpretation should apply.

But the circumstances under which TROs are often drafted support a textualist approach even more strongly. Because courts may issue TROs *ex parte*, the parties to be enjoined may not be afforded an opportunity to explain their position or hear the judge's explanation for the order. Textualism combats these problems to some degree by providing greater notice to the restrained parties and constraining the judge's discretion in enforcing the order.

2. Injunctions v. Consent Decrees

Consent decrees are hybrids of injunctions and contracts.[209] Like contracts, they are agreements struck by the parties.[210] But they are

[207] Cf. Morley, Beyond the Elements, supra note 26, at 477 (discussing "[t]he need for consistency between the standards for preliminary and permanent injunctions").

[208] Fed. R. Civ. P. 65(b)(1).

[209] Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 519 (1986) (holding that consent decrees are "hybrid[s]" that can be characterized as both contracts and judgments). But see Thomas M. Mengler, Consent Decree Paradigms: Models Without Meaning, 29 B.C. L. Rev. 291 (1988) (arguing that a consent decree cannot be treated either as a traditional contract or court order).

[210] *Local No. 93*, 478 U.S. at 519 ("[B]ecause their terms are arrived at through mutual agreement of the parties, consent decrees also closely resemble contracts.").

adopted as injunctions by the court, and they are enforceable through the contempt power.[211]

One might argue that, because consent decrees derive from contracts, courts should interpret them using the same methodology they would apply to other contracts. The Supreme Court advocated this approach in *United States v. ITT Continental Baking Co*.[212] The Court declared that a consent decree "is to be construed for enforcement purposes basically as a contract."[213] Accordingly, courts may look to the "circumstances surrounding the formation of the consent order," as it would with other contracts, instead of focusing only on the text of the decree.[214]

ITT Continental Baking adopted the wrong interpretive approach. Courts should interpret consent decrees the same way they would other types of injunctions, rather than treating such orders as contracts, for several reasons. First, although a consent decree arises from the parties' consent, it is fundamentally a court order.[215] Violating a consent decree is not simply a breach of contract. To the contrary, such acts subject a violator to the possibility of contempt, raising the same notice and risk-of-abuse concerns as other injunctions. Accordingly, consent decrees should be construed according to the same principles as other injunctions. Indeed, as the dissent in *ITT Continental Baking* explained, that had been the law before the majority's decision.[216]

Second, applying a distinct interpretive methodology only to consent decrees would create uncertainty and raise the information cost of accurately determining their meaning. It may not always be apparent from

[211] See, e.g., EEOC v. Local 580, Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers, 925 F.2d 588, 594 (2d Cir. 1991).

[212] 420 U.S. 223 (1975).

[213] Id. at 238.

[214] Id.

[215] See *Local No. 93*, 478 U.S. at 518 (agreeing that a "consent decree looks like and is entered as a judgment").

[216] *ITT Continental Baking*, 420 U.S. at 247 (Stewart, J., dissenting) (accusing the majority of "proclaim[ing] a new rule of construction for consent orders or decrees" that was "totally at odds with our previous decisions" and "directly contrary" to precedents allowing a court to consider only the "four corners" of a consent decree); see also United States v. Armour & Co., 402 U.S. 673, 682 (1971) ("[T]he scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it."); United States v. Atl. Refin. Co., 360 U.S. 19, 23–24 (1959) (interpreting language in a consent decree based on its "normal meaning," rather than adopting "another reading" which "might seem more consistent with the Government's reasons for entering into the agreement in the first place"); Hughes v. United States, 342 U.S. 353, 356–57 (1952) (applying plain-meaning interpretation of consent decree).

the face of a court order whether it is a consent decree, especially to third parties who are subject to it.[217] And if federal courts treated consent decrees as contracts subject to state-law principles of contract interpretation,[218] it might not be apparent which state's law applies.[219] Indeed, in a few cases, the meaning of the decree itself might even change based on completely unrelated developments in state contract law. Treating consent decrees differently from other types of injunctions would therefore create unnecessary uncertainty.

Third, the fact that multiple parties contribute to the creation of consent decrees supports a textualist approach. A court may enter a consent decree only if the plaintiff, the defendant, and the court itself agree to its terms. Each of those entities has its own set of interests, goals, and responsibilities. Because a consent decree reflects a compromise among multiple parties,[220] it does not embody a single purpose, intent, or policy.[221] Textualism requires courts to respect and enforce that compromise.[222]

Complications can arise, of course, if a consent decree quotes from, or cites to, a separate settlement agreement. A settlement agreement is

[217] See Fed. R. Civ. P. 65(d)(2).

[218] Alternatively, federal courts could create a body of federal common law principles for interpreting consent decrees. Creating such a unique interpretive regime distinct from the law governing other types of injunctions seems unnecessarily duplicative, complicated, and burdensome. And any such body of federal common law is likely to be plagued with the same inconsistencies and indeterminacy as the law governing constitutional and statutory interpretation.

[219] Differences in contract law among the states could substantially impact a consent decree's proper interpretation. For example, states differ on whether contracts must be construed in light of an implied duty of good faith and fair dealing; states that have recognized such a duty have adopted different approaches on how to construe and apply it. See Richard A. Bales, The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Reconciliation, 77 B.U. L. Rev. 687, 751 (1997) ("[S]ome but not all states imply a duty of good faith and fair dealing into every contract . . . ."); Thomas A. Diamond & Howard Foss, Proposed Standards for Evaluating When the Covenant of Good Faith and Fair Dealing Has Been Violated: A Framework for Resolving the Mystery, 47 Hastings L.J. 585, 590 (1990) ("[A]uthorities differ about the methodology for determining whether conduct violates the covenant [of good faith].").

[220] *Armour & Co.*, 402 U.S. at 681.

[221] Id. at 681–82 ("[T]he decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve.").

[222] See Manning, supra note 15, at 70–71, 74 (advocating for textualism because legislation embodies a compromise); see also Easterbrook, supra note 159, at 63 (noting that a non-textualist interpretative approach ignores that "laws are born of compromise").

simply a contract.[223] Under our recommended approach of modified textualism, a court would therefore interpret provisions within the consent decree that quote from, or otherwise incorporate, the settlement agreement based on whatever methodology it would ordinarily apply to contracts. It would apply textualism to the decree's other provisions. Courts can eliminate the need for such a complicated approach in at least two ways.

Most basically, the fact that the parties are able to resolve their dispute through a settlement agreement may be a reason for a court to refuse to enter a consent decree, as well.[224] Alternatively, the parties and court may ensure that the same interpretive theory applies to the entire decree by including *only* substantive provisions that quote from, or otherwise incorporate, the settlement agreement. Modified textualism allows the parties themselves to determine whether differing interpretive theories would apply to different parts of the decree, based on how they draft it.

C. Non-Textual Considerations at the Remedial Stage

Although modified textualism is the appropriate method for interpreting injunctions, non-textual considerations—such as the policies motivating the injunction—still have a role to play at the remedial stage, when the court decides whether to impose contempt sanctions. A court's decision whether to hold a violator in contempt is separate from its threshold determination that the injunction has been violated. Courts have broad equitable discretion over the imposition of contempt sanctions.[225] In exercising that discretion, a court may consider, among other things, the nature of the violation, the need to deter future violations, mitigating factors, and whether the defendant's conduct frustrated the injunction's purposes or undermined its goals.[226] A court need not hold a violator in

[223] See Michael T. Morley, Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases, 16 U. Pa. J. Const. L. 637, 663–64 (2014).

[224] Id. at 682–88.

[225] See, e.g., Islamic Inv. Co. of the Gulf (Bah.) Ltd. v. Harper, 545 F.3d 21, 25 (1st Cir. 2008) (explaining that "even if all of [the] conditions [for contempt] are satisfied, the trial court retains a certain negative discretion . . . to eschew the imposition of a contempt sanction . . . in the interests of justice"); Trials, 45 Geo. L.J. Ann. Rev. Crim. Proc. 569, 683 (2016) ("Courts have broad discretion in finding civil contempt and in imposing sanctions . . . .").

[226] See United States v. United Mine Workers of Am., 330 U.S. 258, 303 (1947) ("In imposing a fine for criminal contempt, the trial judge may properly take into consideration the

contempt if it concludes that contempt would not advance the policies underlying the injunction or would be inconsistent with the judge's purposes or intent when she entered it.

Under our recommended approach, a party could not be held in contempt unless its conduct violated the ordinary meaning of the injunction. In other words, modified textualism determines the injunction's outer boundaries.[227] Allowing the court to consider purposivist and other such factors at the remedial stage, however, provides an additional protection against overbroad injunctions. Once a contempt motion has passed through a textualist sieve, applying purposivism would only work to a respondent's advantage, shielding it from liability for engaging in acts that, while contrary to the injunction, do not actually further its purposes or threaten the values underlying it.[228]

Applied in this manner, purposivism would be a one-way ratchet: it could be used only to narrow, and never expand, the scope of a respondent's liability under an injunction. Considering such non-textual factors in deciding whether to impose contempt is an appropriate exercise of courts' traditionally broad equitable remedial discretion. Indeed, American courts applied a comparable approach when enforcing criminal laws in the late eighteenth century.[229] A hybrid approach of textualism at

extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future."); e.g., United States v. Henderson, No. CR 10-117 BDB, 2012 WL 787575, at *3 (N.D. Okla. Mar. 9, 2012) ("In exercising that discretion, the Court will consider factors such as the egregiousness of the violation, the extent to which the disclosure maligned Petitioner's reputation, and any countervailing considerations that might have supported the disclosure or that militate against imposition of the severe sanction of contempt.").

[227] See, e.g., Angiodynamics, Inc. v. Biolitec AG, 946 F. Supp. 2d 205, 213 (D. Mass. 2013) ("The text of a court order determines its power over parties. To allow parties to independently deduce the purpose of a court order and determine what acts would be most in line with the purpose—regardless of the text—would make this court irrelevant.").

[228] See, e.g., Navajo Nation v. Peabody Coal Co., 7 F. App'x 951, 956 (Fed. Cir. 2001) (affirming trial court's refusal to hold a party in contempt for violating an injunction, because the party's actions "did not thwart a purpose behind any of the [trial court's] orders" (citing In re Dual-Deck Video Cassette Recorder Antitrust Litig., 10 F.3d 693, 694–95 (9th Cir. 1993))).

[229] The original form of the rule of lenity specified that courts could not extend a criminal statute beyond its text, but could narrow the statute in favor of defendants by considering its purpose. See, e.g., State v. Norfolk S. R.R. Co., 82 S.E. 963, 966 (N.C. 1914) ("It is an ancient, but just and equitable, doctrine which extends a penal statute beyond its words in favor of a defendant, while holding it tightly to its words against him."); 1 William A. Hawkins, Treatise of the Pleas of the Crown, ch. 30, § 8, at 77 (1st ed. 1712) ("Penal Statutes are construed

the interpretation stage and purposivism at the remedial stage draws on the strengths of each theory while minimizing the drawbacks of each methodology when applied individually.

IV. APPELLATE REVIEW OF TRIAL-COURT INTERPRETATIONS

A separate, but related, question from the proper method for interpreting injunctions is how appellate courts should review trial courts' interpretations of them. Appellate courts have disagreed on the proper standard of review. Some courts have concluded that an injunction's meaning is a question of law that the appellate court should review *de novo*, like most other questions of law.[230] Other appellate courts, in contrast, have deferred to trial courts' interpretations, at least when the trial judge who interpreted the injunction is the same one who issued it.[231]

This Part proposes that appellate courts review injunctions *de novo*. Plenary appellate review promotes the same interests that support textualism as a theory for interpreting injunctions. It is also more effective than a deferential approach at ensuring that the judiciary correctly

strictly against the Subject, and favuorably and equitably for him."). The rule thus called for different methods of interpretation: textualism to prevent the extension of criminal statutes and purposivism to narrow them.

Such blending of methodologies is uncommon, if not disfavored, today, because each method of interpretation rests on a different set of assumptions and principles. Our proposal avoids this difficulty by permitting courts to consider purpose and other non-textual methods only at the remedial stage, after the court has determined that the text of the injunction has been violated.

[230] Abbott Labs. v. TorPharm, Inc., 503 F.3d 1372, 1382 (Fed. Cir. 2007) ("[I]nterpretation of the terms of an injunction is a question of law we review de novo.").

[231] See, e.g., In re Managed Care, 756 F.3d 1222, 1234 (11th Cir. 2014) (concluding that an appellate court should give "great deference" to a judge's interpretation of an injunction that he entered); Schering Corp. v. Ill. Antibiotics Co., 62 F.3d 903, 908 (7th Cir. 1995) ("When the district judge who is being asked to interpret an injunction is the same judge who entered it . . . , we should give particularly heavy weight to the district court's interpretation."); Hensley v. Bd. of Educ. of Unified Sch. Dist. No. 443, Ford Cnty., 504 P.2d 184, 188 (Kan. 1972) ("When the same trial judge who entered an injunction order hears a later contempt proceeding based on violation of that injunction the interpretation . . . will generally be followed by the appellate court."); see also Salazar v. Buono, 559 U.S. 700, 762 (2010) (Breyer, J., dissenting) (stating that "the construction given to an injunction by the issuing judge . . . is entitled to great weight" (quoting Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 795 (1994) (Scalia, J., concurring in judgment in part and dissenting in part))). It should be noted that Justice Scalia's endorsement of deferential review is at least somewhat in tension with his concern that allowing the judge who entered an injunction to determine whether that injunction was violated is a recipe for abuse. See Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 840 (1994) (Scalia, J. concurring).

interprets the text of injunctions. Finally, the traditional reasons in favor of appellate deference do not justify deferential review of trial courts' interpretations of injunctions.

A. Promoting Textualism's Goals

The very interests that support textualism to interpret injunctions—providing notice, preventing judicial abuse, and ensuring compliance with rules that require courts to draft injunctions with specificity—support *de novo* appellate review of their meaning. *De novo* review is more effective than deference at ensuring that an injunction provides enjoined parties with adequate notice of the conduct that the order requires or prohibits. Plenary review requires an appellate court to provide its own independent interpretation of an injunction.[232] The court looks at the injunction with fresh eyes, free of the possible biases, implicit assumptions, and personal knowledge of authorial intent with which a document's author reads it.

Allowing appellate courts to adopt the interpretation they deem most accurate ensures that an injunction is reasonably clear to third parties other than its author. In articulating its understanding of the injunction, an appellate court will often flesh out the order's meaning and provide details about how it will operate in the future.[233] Moreover, this type of careful evaluation of the injunction's language is more likely than a deferential standard of review to detect ambiguities, vagueness, or other potential shortcomings. In contrast, when an appellate court accords deference to the trial court's interpretation of an injunction, its task is not to ascertain the order's meaning. Instead, the appellate court must simply determine whether the trial court's interpretation falls within an acceptable range.[234] This review is unlikely to entail the same level of rigorous evaluation of the injunction's language and is less likely to result in an opinion fleshing out its details. Accordingly, deferential review is far less effective in

[232] See Henry J. Friendly, Indiscretion About Discretion, 31 Emory L.J. 747, 758 (1982) (stating that plenary review is necessary to achieve consistency in the law).

[233] See id.; Ass'n of Cmty. Orgs. for Reform Now ("ACORN") v. Ill. State Bd. of Elections, 75 F.3d 304, 306 (7th Cir. 1996) (observing that the interpretation of an injunction "clarifies . . . the injunction").

[234] Chad M. Oldfather, Error Correction, 85 Ind. L.J. 49, 55 (2010) ("[D]eferential standards . . . mean that reversal often does not follow from an appellate court's conclusion that it would have implemented the applicable law differently were it the decision maker in the first instance.").

ensuring adequate ex ante notice to defendants of the conduct an injunction requires or proscribes.

For similar reasons, *de novo* review also helps prevent abusive enforcement of injunctions. Injunctions create an acute risk of abuse because the judge who interprets and enforces an order is often the same person who entered it. That concentration of power can easily result in applications that reflect the judge's unarticulated intentions or understanding rather than a fair interpretation of the injunction's text. More concerningly, a judge may treat an alleged violation of an injunction that he or she entered as a personal affront.

De novo appellate review ameliorates this problem because the appellate court's interpretation trumps that of the trial court. The appellate court does not have the same personal investment or stake in the order that could lead to biased interpretation or enforcement. Deferential review is far less effective in curtailing abuse because the appellate court must uphold any of a range of potential interpretations.

Plenary review also gives trial courts greater incentive to be more careful and precise in their language. If trial judges know that appellate courts will carefully scrutinize an injunction's language rather than upholding any reasonable interpretation, they are more likely to craft their orders precisely and clearly, as required by Rule 65 and its state-law analogues.[235]

De novo review would also result in a more coherent textualist approach to interpreting injunctions. Textualism posits that most texts have a single best interpretation.[236] But because they are human, judges may occasionally err in trying to ascertain that meaning. A judge may erroneously conclude that one reading of an injunction is more faithful to the text than a different interpretation. Appellate courts may be less likely

[235] Cf. Jeffrey M. Surprenant, Comment, Pulling the Reins on *Chevron*, 65 Loy. L. Rev. 399, 420 (2019) ("[E]mploying a *de novo* review would encourage both legislative drafters and their agency helpers to write clear statutes that will withstand judicial scrutiny."); Laurence H. Silberman, *Chevron*—The Intersection of Law & Policy, 58 Geo. Wash. L. Rev. 821, 824 (1990) (stating that *Chevron* should lead Congress to be more careful in drafting laws when it wants to avoid delegation).

[236] Anita S. Krishnakumar, Textualism and Statutory Precedents, 104 Va. L. Rev. 157, 204 (2018) ("Textualist judges, particularly in the post-Scalia era, tend to presume that there is a correct, definitive answer to every (or nearly every) interpretive question . . . ."); see also Christine Kexel Chabot, Selling *Chevron*, 67 Admin. L. Rev. 481, 509 (2015) ("[T]extualists assume Congress has provided a single, objectively determinable meaning in statutory text.").

to commit these errors than trial courts.[237] Unlike trial judges, appellate judges do not have to make decisions alone in the trenches but enjoy time to reflect and deliberate with their colleagues.[238] They also have the benefits of, among other things, the trial court's interpretation and more briefing of the issues by the parties.[239] A deferential review scheme would limit the power of the appellate courts to correct trial courts' errors by directing them to uphold interpretations that do not reflect the best reading of an injunction's text. By contrast, plenary review would empower appellate courts to ensure that injunctions are given their best textual interpretation.[240]

B. Against Deference

Appellate courts defer to other entities' legal conclusions for two basic reasons.[241] Most basically, the law may require the appellate court to defer.[242] Alternatively, an appellate court may defer to another's interpretation for epistemic reasons, if the court believes that the other interpreter is more likely to reach a correct result.[243] Neither of these rationales requires appellate deference to trial courts' interpretations of injunctions.

First, laws often require courts to defer to interpretations rendered by others.[244] For example, *Chevron* deference requires courts to defer to reasonable agency interpretations of statutes that they administer.[245] The Court's current justification for *Chevron* deference is that a statutory grant

[237] William Ortman, Rulemaking's Missing Tier, 68 Ala. L. Rev. 225, 246 (2016) (identifying various "structural epistemic advantages" that "reduce the likelihood of legal error" by the appellate courts).

[238] See Marin K. Levy, Visiting Judges, 107 Calif. L. Rev. 67, 139 (2019) (noting the pressures faced by district judges and not appellate judges).

[239] See Ortman, supra note 237, at 247–48

[240] In arguing that appellate courts should review interpretations *de novo*, we do not mean to say that appellate courts should review *de novo* the decision to impose contempt for violations. An injunction's proper interpretation is a question of law. It is distinct from the subsequent question of whether to hold a person who has violated the injunction in contempt. Decisions about whether to impose contempt sanctions on violators depend on a myriad of factors. See supra note 226 and accompanying text. An appellate court should overturn that decision only if it constitutes an abuse of discretion. Perez v. Danbury Hosp., 347 F.3d 419, 423 (2d Cir. 2003) (reviewing a "finding of contempt under an abuse of discretion standard").

[241] Horwitz, supra note 17, at 1078.

[242] See id. at 1078–85.

[243] See id. at 1085–90.

[244] See id. at 1072–78.

[245] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

of authority to a federal agency to administer or enforce a federal law by promulgating regulations implicitly includes the primary power to interpret that law.[246] Accordingly, courts must defer to agencies' interpretations of such laws.[247] The Court has invoked similar reasoning to justify *Auer* deference,[248] which requires courts to defer to agencies' interpretations of their own regulations.[249]

This authority-based rationale does not apply to injunctions. No statutes currently in force require appellate courts to defer to lower courts' interpretations of injunctions. Nor is there a historical practice from which one can infer an implicit obligation to defer.[250] The issue did not even arise in eighteenth century England, because litigants could not appeal the Chancellor's decisions concerning equitable relief.[251] Thus, there is no authority-based rationale for requiring appellate courts to defer to trial courts' interpretations of injunctions.

Appellate courts also sometimes defer to conclusions rendered by others who are better-positioned to know about the issues at stake.[252] These sorts of epistemic reasons underlie appellate deference to trial courts' findings of fact. Because the trial court listens to the witnesses, observes their demeanor, and immerses itself in the evidence, it is in a

[246] See Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996) ("We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency . . . ."); see also Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 515 (1989) (providing a similar justification for *Chevron* deference).

[247] *Smiley*, 517 U.S. at 740–71.

[248] Auer v. Robbins, 519 U.S. 452 (1997).

[249] See Kisor v. Wilkie, 139 S. Ct. 2400, 2412 (2019) (plurality opinion) ("We have explained *Auer* deference (as we now call it) as rooted in a presumption about congressional intent—a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities."). A closely related justification for deference to agencies that the *Kisor* Court identified is that interpreting federal laws necessarily involves policy decisions which Congress has empowered agencies to make. Id. at 2413. There is no comparable assignment of policy-making authority to federal trial courts. More importantly, contempt proceedings are held after an alleged violation of an injunction has occurred. Allowing trial courts to implement policy considerations when interpreting an injunction at that late point would acutely raise the notice and abuse problems outlined earlier.

[250] Cf. Grupo Mexicano de Desarrollo, SA v. Alliance Bond Fund, Inc., 527 U.S. 308, 318 (1999) (explaining that federal courts' equity powers are limited by the historical practices of the English Court of Chancery).

[251] Bray, supra note 4, at 446 ("There was no appeal from the Chancellor . . . .").

[252] Horwitz, supra note 17, at 1085 ("The second basic justification for judicial deference is not grounded on the legal authority of the institution to which the courts defer, but rather on its epistemic authority.").

better position to draw correct factual conclusions than an appellate court reviewing a cold record.[253] Some appellate courts have invoked these reasons to defer to trial courts' interpretations of the injunctions they enter.[254] As the Seventh Circuit put it, "when the document is an order, the court . . . that issued it is, sensibly enough, considered to have special insight into its meaning."[255]

Deference, for this reason, would make sense under an intentionalist theory of interpretation, because the injunction's meaning would depend on the factual question of what the trial judge intended when she entered it. And the trial judge herself is in the best position to know what she meant. The Supreme Court recently invoked this line of reasoning in *Kisor v. Wilkie* to justify *Auer* deference, which requires a court to defer to an agency's interpretations of regulations that the agency itself promulgated.[256] The Court stated that, as the entity that drafts a regulation, an agency "will often have direct insight into what that rule was intended to mean," and "know what it was supposed to include or exclude or how it was supposed to apply to some problem."[257]

But these sorts of epistemic considerations provide much less support for appellate deference under a textualist theory of interpretation. Textualism requires courts to interpret legal provisions based on how a reasonable person would understand their text. That determination does not require any special expertise. The relevant inquiry is how an ordinary person, not a specialist, would understand the text. This is not to say that the trial court's determination is useless to a textualist. Trial judges are presumptively reasonable people who are informed about the circumstances surrounding the injunctions they issue, and their interpretations accordingly are evidence of how a reasonable person might interpret those texts.[258] From a textualist perspective, however, a

[253] See United States ex rel. Graham v. Mancusi, 457 F.2d 463, 469–70 (2d Cir. 1972) (Friendly, J.) ("It would still be for the judge who saw and heard the witnesses at the trial or, better, another judge who would see and hear them without having been exposed to the illegal evidence, to determine where the truth lay—not for appellate judges reading a cold record."); see also Brown v. Plata, 563 U.S. 493, 555 (2011) (Scalia, J., dissenting) ("[H]aving viewed the trial first hand [the trial judge] is in a better position to evaluate the evidence than a judge reviewing a cold record.").

[254] See, e.g., Emps. Ins. of Wausau v. Browner, 52 F.3d 656, 666 (7th Cir. 1995).

[255] Id.

[256] 139 S. Ct. 2400, 2412 (2019).

[257] Id.

[258] John F. Manning, Textualism and the Role of The Federalist in Constitutional Adjudication, 66 Geo. Wash. L. Rev. 1337, 1355 (1998) (arguing that textualists can consider

trial judge does not occupy a privileged position in determining an injunction's ordinary meaning that would warrant deference.

One might argue that, even if appellate courts should not give strong deference to trial-court interpretations of injunctions, the trial court's expertise entitles it to a lesser type of non-binding deference, akin to *Skidmore* deference.[259] On this view, appellate courts should defer only to the extent that they find a trial court's interpretation persuasive, based on considerations such as the reason for the trial court's interpretation, the thoroughness of the rationale supporting that decision, and the consistency of the trial court's interpretation over time.[260] But this softer deference also is not warranted.

To start, as noted above, the expertise of a trial court is not central to determining the meaning of an injunction under a textualist approach. Textualism asks how non-experts would understand the injunction's terms. Moreover, appellate review is one of the major ways to combat the threat of vindictive or otherwise abusive interpretations. De novo review empowers appellate courts to assess for themselves whether the trial court's interpretation is correct. Affording even non-binding deference would weaken that check, granting trial courts have more leeway and thereby increasing the odds of abuse.

CONCLUSION

Injunctions are among the most powerful tools in a judge's arsenal. They can impose significant obligations, which courts may enforce through the contempt power. Because structural protections such as separation of powers do not apply to injunctions, they present a significant opportunity for judicial abuse.

To minimize these concerns, courts should employ modified textualism to interpret injunctions. A textualist approach would result in parties having more notice of their obligations under injunctions. Instead

other people's interpretations of a statute, because "the way reasonable persons actually understood a text" can be useful evidence of the text's meaning, particularly "if those persons had special familiarity with the temper and events of the times that produced that text"); see also Kent Greenawalt, The Nature of Rules and the Meaning of Meaning, 72 Notre Dame L. Rev. 1449, 1451 (1997) (discussing the evidentiary value of other people's interpretations of a text).

[259] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[260] Id.; cf. Kristin E. Hickman & Matthew D. Krueger, In Search of the Modern *Skidmore* Standard, 107 Colum. L. Rev. 1235, 1238 (2007) ("*Skidmore*'s sliding scale encompasses three zones or 'moods' reflecting strong, intermediate, and weak or no deference.").

of turning on the unspoken goals or policies of the issuing judge, the defendant's duties would depend only on the ordinary understanding of the injunction's terms. Textualism would also combat the threat of judicial abuse, because the terms of the injunction would define the circumstances under which a judge could hold a person in contempt. A textualist approach is also most consistent with rules, such as Federal Rule of Civil Procedure 65(d)(2) and its state analogues, which require courts to draft injunctions with specificity.

We recommend a "modified" form of textualism, however, to address the difficult case where certain provisions within an injunction quote or incorporate by reference an extrinsic legal authority such as a statute or contractual provision. A court should interpret such terms in injunctions according to whatever interpretive methodology it would ordinarily apply to authorities of that nature, rather than textualism. Thus, a court might apply different interpretive theories to different provisions within an injunction. This modified textualism ensures that courts interpret legal provisions consistently, regardless of whether the court is construing the provision directly, or instead determining its meaning as it appears in an injunction. While modified textualism should determine an injunction's meaning, the court may still take purposivist concerns into account at the remedial stage in deciding whether to hold a defendant who violated an injunction in contempt. The same reasons that support adopting modified textualism as the proper theory for interpreting injunctions also suggest that appellate courts should review trial courts' interpretations *de novo*. Plenary review would tend over time to increase the clarity of injunctions and reduce the threat of abuse by providing robust appellate oversight of trial judges' interpretations.