ARTICLE

SUBMARINE STATUTES

CHRISTIAN TURNER*

ABSTRACT

I define as "submarine statutes" a category of statutes that affect the meaning of later-passed statutes. A submarine statute calls for courts to apply future statutes differently than they would have otherwise. An example is the Religious Freedom Restoration Act, which requires, in some circumstances, exemptions for religious exercise from otherwise compulsory statutory requirements. A new statute can only be understood if its interaction with the Religious Freedom Restoration Act is also understood. While scholars have debated the constitutionality of some statutes like these, I argue that submarine statutes carry an overlooked cost. Namely, they add complexity to the legal background of which a legislator must be aware if he or she is sensibly to express an intention in a new piece of legislation. The thicker the legislative waters are with submarines, the more legislatures are called to make common-law-like surveys of the legal landscape in order to understand the legislation they draft. I discuss several options for controlling the cognitive cost submarines impose on future legislation, including quasi-constitutionalization, super-statutization, and segregation.

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* Associate Professor, University of Georgia School of Law.

I. Introduction

The Religious Freedom Restoration Act ("RFRA") imposes a serious and seriously unappreciated cost.[1] One can criticize or defend this statute on any number of grounds, substantive and procedural.[2] But I have in mind RFRA's membership in a class of legislative acts that exhibit a peculiar kind of congressional mischief. I call these statutes "submarine statutes."

While most statutes stand alone or work with a few other statutes to specify the law that will be used by courts to resolve disputes, submarine statutes lie in wait to affect the applications of later-passed statutes that are otherwise unrelated. For example, RFRA requires the federal government to exempt religious exercise from the mandates of future statutes when certain conditions are met.[3] New laws, therefore, have meaning only in light of what RFRA also says.

In short, the very meaning of a newly passed statute can be struck by the torpedo of a silent submarine that had been patrolling hidden in the depths. With each additional submarine, the cost to the legislature of passing a statute and achieving any given purpose rises. Moreover, the complexity of creating legislative meaning increases ever more with the number of invisible cross-references lying in wait. Because submarines like RFRA impose costs on the future business of legislation, those increased costs must be justified.

In this essay, I first outline what constitutes the category of submarine statutes. Second, I argue that submarine statutes impose complexity costs and that these costs, if great enough, compromise an implicit democratic principle of initial legislative intention. Finally, I consider whether these problems might be ameliorated if submarines are segregated as quasi-constitutional provisions or as members of a small class of so-called super-statutes.

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[1] 42 U.S.C. §§ 2000bb-1, 2000bb-4 (2012).

[2] *See, e.g.*, Marci A. Hamilton, *The Case for Evidence-Based Free Exercise Accommodation: Why the Religious Freedom Restoration Act Is Bad Public Policy*, 9 Harv. L. & Pol'y Rev. 129, 137–50 (2015) (critiquing the statute for being misleading and opaque, for resulting from dishonest lobbying, and for its negative consequences); Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 Fordham L. Rev. 883, 895–97 (1994) (arguing that RFRA importantly protects the ability to practice, and not just believe in, the religion of one's choice).

[3] *See infra* notes 10–13 and accompanying text.

II. What Makes a Submarine?

A. Criteria and RFRA

Submarine statutes work by altering the meanings of future legislative acts.[4] If time were made to run in reverse, such a statute could be understood as a very general amendment to a large class of prior statutes. Legislatures are legitimately empowered to do even great violence to the law that came before.[5] An amendment can clear away and obliterate the legislative work of the past; that is just democracy. But, alas, we are all growing older, not younger, and the prospective amendment today of a statute that is yet to be is not at all like a retroactive amendment of an existing statute. A submarine, unlike an ordinary amendment, can unexpectedly and substantially disrupt the legislative work of the future.

The problem I focus on here is not that passing such statutes is formally beyond the legislature's power. Perhaps a statute's submarine character would contribute to such a conclusion, but I take no position on that here.[6] Nor does anyone dispute that a later-passed act can specifically bar the use of the submarine. Formally, therefore, the submarine possesses no unusual or heightened authority over other statutes. But an ocean thick with submarines is a hazardous place for ordinary ships. And legislation passed in an environment thick with submarine statutes is a very uncertain creature. If the legal world is replete with exemptions and modifications scattered among the legislature's prior work, the meaning of a statute written today may pass beyond practical understanding, even in the ordinary and loose sense in which statutory text is thought to have meaning.

Take RFRA. It requires, roughly, exemptions from any federal law that substantially burdens religious exercise, unless the legal interference results from the least restrictive means of achieving a compelling governmental interest.[7] Lest there be any doubt, Congress made clear that such exemptions apply to all future statutes except those that specifically declare RFRA not to

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[4] RFRA, of course, applies to all statutes, past and present, unless specifically excluded. I focus here on submarines' effects on future acts of legislation. The obscuring effect of their retroactive applications as general amendments to the entire U.S. Code is related but not within the scope of this article.

[5] William Baude and Stephen Sachs, for example, do not share Jeremy Bentham's concern that "it is next to impossible to follow [a new statute] through and discern the limits of its influence." William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 Harv. L. Rev. 1079, 1098 (2017) (quoting Jeremy Bentham, Of Laws in General 236 (H.L.A. Hart ed., Univ. of London Athlone Press 1970) (1782)). Their acceptance of the retrospective damage and adjustments that can be caused by new statutes is unremarkable. Their reasoning that "[i]ntegrating new law with the old, even in a haphazard way, helps the legislature focus on particular issues and solve problems one at a time," *id.*, however, *is* remarkable and has implications for the submarine, the statute that amends future, not prior, statutes.

[6] For discussion of work that does focus on such questions and the implications of that work on the policy issues I wrestle with here, see *infra* Part III.A.

[7] *See* 42 U.S.C. § 2000bb-1 (2012); *see also* Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751, 2760–62 (2014).

be applicable.[8] What a new piece of legislation will mean in a future case therefore depends not only on its interpretation standing alone, but also on the interpretation of its coupled interaction with RFRA in a specific factual setting.[9]

For example, the Affordable Care Act ("ACA") requires, with various exceptions, employers' qualifying health insurance plans to cover certain services.[10] It specifically mandates coverage of that preventative care and screening for women that is identified in "comprehensive guidelines supported by the Health Resources and Services Administration."[11]

We now know that, because of RFRA, this provision sometimes does not mean what it apparently says. Unless the government meets the demands of strict scrutiny, it cannot require an employer to cover such identified services, whether contraception or mammograms, when doing so would conflict with the employer's religious beliefs.[12] Because the Affordable Care Act did not explicitly repeal or waive RFRA and because this section of the Act does not necessarily conflict with RFRA, the section's very meaning depends on what RFRA requires in each fact-intensive, religious scenario across a broad temporal and geographic range. What will the statute mean for future workers and employers, living in a world of religious and social practices different from our own? Who can say?

Whether exemptions from the edicts of a new statute will be widespread or rare, relatively insignificant or striking closer to the heart of the statutory purpose, these things cannot be known in advance as they depend on the emergence of factual circumstances alongside evolving geographies of religious organizations, membership, doctrine, and practice. In a very real sense, we do not know what a new statute will actually do until the commands of RFRA are implemented in circumstances of unknown religious demands, unknown states of religious demographics, and unknown secular versus religious conflicts.[13]

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[8] 42 U.S.C. § 2000bb-3(b) ("Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.").

[9] *See* Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 253 (1995) ("[W]hat an extraordinary modification of governmental power it is! RFRA operates as a sweeping 'super-statute,' cutting across all other federal statutes (now and future, unless specifically exempted) and modifying their reach.").

[10] 42 U.S.C. § 300gg-13(a) (2012) (requiring health plans to cover without cost-sharing certain evidence-based care and, in addition, "with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph").

[11] *Id.*

[12] *See Burwell*, 134 S. Ct. at 2775–85 (finding a RFRA-based exemption from a mandate to cover certain forms of contraception).

[13] *Cf.* Emp't Div. v. Smith, 494 U.S. 872, 888 (1990) ("Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them."). *Smith* concerned the application of RFRA-like strict scrutiny as a matter of federal constitutional law, where congressional override is not possible. *See id.* at 907 (Blackmun, J., dissent-

Of course, all statutes are more like waves that break uncertainly on future shores than they are enduring judgments in waiting. RFRA's modifying influence is not responsible for all the uncertainty in these ACA provisions. But a legislator contemplating a statute like the ACA must take RFRA into account if he or she is to understand what a vote for the statute represents.

B. Identifying Submarines

RFRA is certainly not alone in purporting to affect the execution of future, otherwise unrelated statutes. Not all such statutes are submarines. Some have little effect on meaning. Others, though they affect meaning, and so fit my definition of submarine statutes, are sufficiently conspicuous that they are not subject to the critique I make in Part III.

First, some future-affecting statutes are not costly in the manner I have so far loosely described as complicating the task of ascertaining new statutes' meaning. For example, the Paperwork Reduction Act, the National Environmental Policy Act, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and the National Technology Transfer and Advancement Act all trigger analyses and duties upon regulatory implementation of federal statutes.[14] But they work like checklists, requiring that information be gathered, reported, and analyzed by agencies before a statute is transformed from text into executive action. At most, they require burdensome analysis to be performed within the framework of meaning created by the new statute.[15]

It is true that procedural requirements placed on agency action could be so onerous that they affect what an agency is willing to do to implement a statute.[16] In that sense, these "directed deliberation" statutes do indeed sub-

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ing). RFRA at least preserves the congressional power to override this standard. The argument I will make here concerns the costs imposed by piling up provisions that may need to be overridden.

[14] Unfunded Mandates Reform Act, 2 U.S.C. §§ 621–665, 1501–1571 (2012); Regulatory Flexibility Act, 5 U.S.C. §§ 601–612 (2012); National Technology Transfer and Advancement Act, 15 U.S.C. § 272 (2012); National Environmental Policy Act, 42 U.S.C. §§ 4321–4347 (2012); Paperwork Reduction Act, 44 U.S.C. §§ 3501–3520 (2012).

[15] *See, e.g.*, Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) ("The sweeping policy goals announced in § 101 of NEPA are thus realized through a set of 'action-forcing' procedures that require that agencies take a 'hard look' at environmental consequences, and that provide for broad dissemination of relevant environmental information. Although these procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." (citations and quotation marks omitted)).

[16] *See* Andrew L. Levy, *The Paperwork Reduction Act of 1980: Unnecessary Burdens and Unrealized Efficiency*, 14 J.L. & Com. 99, 99 (1994) (describing the Paperwork Reduction Act as part of a procedural framework requiring government agencies to consider the costs resulting from their actions generally and from information collection specifically); Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 Fla. St. U. L.

tly but substantively affect the meaning of the law in action. But prior legislation that imposes a somewhat standardized tax, in the form of procedural hurdles, on future statutory implementation tends to be more predictable than submarines. If a procedure-creating statute is predictably deregulatory, that may indeed act as a subtle limit on future congressional policymaking power, but this is not the problem on which I focus here. I do not count such statutes as submarines, because they do not pose difficulties for determining the meaning of future statutes.

Second, consider statutes that provide definitions or set policy that will affect a predictable and small or otherwise clearly defined and related category of statutes. The most obvious of these is probably the venerable Dictionary Act—appearing at 1 U.S.C. § 1 no less.[17] Because it provides definitions that courts should apply to terms used in future statutes, it is indeed a submarine statute. I do not see it as particularly problematic, though. First, when it comes to submarines, we can tolerate a few if they do not create complex interactions with future statutes. Trouble arises when there get to be too many such statutes and when their effects come to be too unpredictable. If the problem is the complexity of the body of pre-existing laws that could bear on the meaning of new statutes,[18] then having around a single Dictionary Act that does what it says on the tin does not add significant cognitive load to the act of legislation. The burden is lessened even further if, as is the case, its definitions are relatively easily displaced by context.[19] Indeed, it might make legislation less costly by narrowing the

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REV. 533, 536 (2000) (providing a chart showing each statute and executive order that a government agency must consider when adopting a rule to show the "enormity" of the "paralysis by analysis" problem); Helen Leanne Serassio, *Legislative and Executive Efforts to Modernize NEPA and Create Efficiencies in Environmental Review*, 45 TEX. ENVTL. L.J. 317, 319 (2015) (describing NEPA as a "procedural statute" requiring government agencies to take a "hard look" at the environmental consequences of their actions); *see also* William R. Sherman, *The Deliberation Paradox and Administrative Law*, 2015 BYU L. REV. 413, 458–59 (2015) (describing each of these statutes as "directed deliberation" statutes, requiring government agencies to consider specific factors in specific ways when interpreting and implementing laws and arguing they conflict with "open record" laws).

[17] The Dictionary Act of 1871 set out definitions for words that might be used in future legislation and otherwise provided interpretive guidance. It set out, for example, that singular terms would be interchangeable with plural ones and that masculine terms would mean either gender. It gave definitions for "insane person," "person," "officer," "oath," and "sworn." Dictionary Act of 1871, ch. 71, para. 2, 16 Stat. 431 (codified at 1 U.S.C. §§ 1–8 (2012)). More generally and since codification, all of the relatively brief Chapter 1 of Title 1 of the United States Code contains pan-Code definitions of such terms as "vessel," "vehicle," "company," "person," and "child." 1 U.S.C. §§ 1–8 (2012).

[18] The development of this complexity argument is taken up in Part III, *infra*.

[19] *See, e.g.*, Rowland v. Cal. Men's Colony, 506 U.S. 194, 199–201 (1993) (noting that the Dictionary Act itself provides that its definitions may be overridden by "context" and finding that several features of 28 U.S.C. § 1915 (providing that indigent prisoners may be excused from various court fees) make clear that its use of "person" does not include "associations" of individuals, despite the Dictionary Act's inclusion of "associations" within its definition of "person").

places a legislator needs to look for an overview of prevailing semantic meanings.[20]

Another statute that on its face was meant to affect future statutory meaning was the Defense of Marriage Act ("DOMA"), which prohibited the federal recognition of certain marriages. It provided: "In determining the meaning of any Act of Congress . . . the word 'marriage' means only a legal union between one man and one woman as husband and wife . . . ."[21] It was a submarine, but that fact was not among its many legal and moral demerits. Any future Congress which attempted to regulate using the word "marriage" would know that the legal definition of that term would be important to the resolution of disputes under the statute. It would have ready access to research to determine the background legal materials that specifically define it. While DOMA and a future such statute would be coupled, meaning that understanding the latter requires understanding the former, the marginal complexity load created by DOMA would be exceedingly modest.[22]

Another submarine statute that, unlike DOMA, I very much favor on policy grounds is more potentially problematic as a submarine: the Endangered Species Act. Section 7 of that Act provides that federal agencies shall "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . ."[23] This regulation is obviously aimed at agency implementations of federal law. While it does not explicitly declare that future laws will be nullified in applications that would "jeopardize the continued existence" of endangered species, it does mean that specific purposes a legislator has in mind in writing statutory text today might take on a different meaning as it runs up against the Endangered Species Act in a dispute tomorrow.[24]

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[20] At least some of the Dictionary Act's legislative history supports the inference that the aim of the act was simplicity rather than complicating entrenchment. *See* Emily J. Barnet, Hobby Lobby *and the Dictionary Act*, 124 YALE L.J.F. 11, 12 (2014) (noting that the Act's "purpose was 'to avoid prolixity and tautology in drawing statutes and to prevent doubt and embarrassment in their construction'" but that "courts have applied the Act inconsistently for the past century" (quoting CONG. GLOBE, 41st Cong., 3d Sess. 1474 (1871) (statement of Rep. Poland))).

[21] Pub. L. No. 104-199, § 3(a), 110 Stat. 2419, 2419 (1996), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

[22] That DOMA was codified in Chapter 1 of Title 1, with other pan-Code definitions, is an example of the segregation strategy for acceptable submarines that I describe in Part III (C).

[23] 16 U.S.C. § 1536(a)(2) (2012). As I discuss in Part IV (B), the very political salience of the ESA may be a reason to tolerate its submarine character.

[24] This unfolded in ferocious and near-absurd form in the saga of the Tellico Dam. The Tennessee Valley Authority fought to the Supreme Court and, after losing there, began to construct the Tellico Dam despite its likely effect on the endangered snail darter. *See generally* Elizabeth Garrett, *The Story of* TVA v. Hill*: Congress Has the Last Word*, *in* STATUTORY INTERPRETATION STORIES 58 (William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett eds., 2011). The frailty of our legal and factual prognostication is highlighted by both the failure of the dam to deliver on its economic promise and the post-dam discovery of other populations of snail darters. *See id.* at 90.

Of course, as with all submarines and as with all statutes, the ESA can be specifically overridden by a future statute.[25] As is the case with all statutes, it will not be interpreted to nullify a later-passed statute that directly conflicts with it, where there is no way to interpret the statutes harmoniously—*but only* where there is no way to interpret them harmoniously.[26]

These examples highlight a few important points. First, not all statutes that bear on future statutory implementation are submarines. Some impose only procedures and do not otherwise affect future statutory meaning. Second, not all submarine statutes are costly in the sense of imposing confusion and complexity on the business of legislation. Third, the peculiar cost of submarine statutes, as will be explored in more detail below, is just that—a cost. Whether they are worth their costs is a matter of policy judgment, but that cost must not be ignored.

III. The Problem of Submarines

A. Constitutionality

As with other legislative efforts to entrench power, we might object to submarines on constitutional grounds.[27] Indeed, perhaps the concern that submarines complicate future legislation can be grounded in some constitutional principle.

Because they do not obviously aggrandize Congress as an institution, submarine statutes are not clearly targets for separation of powers attacks. These statutes subtly increase the power of an enacting Congress at the expense of a future Congress, not another branch. A future Congress will bear the burden of legislating under, around, or through the submarine. Is this temporal shift of power constitutional?

Laurence Tribe thinks not. Writing specifically about RFRA, Tribe asserts that "[a]utomatically to give determinative weight in such circum-

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[25] *See* Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 102(c), 110 Stat. 3009–546, 3009–555 (1996) ("The provisions of the Endangered Species Act of 1973 and the National Environmental Policy Act of 1969 are waived to the extent the Attorney General determines necessary to ensure expeditious construction of the barriers and roads under this section.").

[26] So too, a later-passed statute will not be interpreted, without explicit references, to repeal or amend an earlier statute unless there is unavoidable conflict. *See, e.g.*, Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 662 (2007) ("While a later enacted statute (such as the ESA) can sometimes operate to amend or even repeal an earlier statutory provision (such as the [Clean Water Act]), repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest. We will not infer a statutory repeal unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary in order that the words of the later statute shall have *any meaning at all*." (internal citations and punctuation omitted) (emphasis added)).

[27] *See generally* Eric Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L.J. 1665 (2002) (surveying and rejecting constitutional grounds and policy arguments against statutes "that are binding against subsequent legislative action in the same form").

stances to previously enacted legislative 'rules' of construction would in a sense permit an earlier Congress to add to art. I's requirements for the enactment of laws by a later Congress."[28] Tribe goes on to argue that RFRA and the Dictionary Act should not be read as authoritatively guiding statutory interpretation and therefore should not automatically displace the other interpretive approaches courts might have taken in their absence.[29]

In contrast, Nicholas Rosenkranz has written in favor of both the constitutionality and the wisdom of laws that would explicitly control the judicial interpretations of all other statutes.[30] His defense of what I call submarine statutes and what he calls "prospective interpretive" statutes is, like Tribe's, formal. So long as a statute does not purport to forbid future legislative override, it does not exceed the bounds of the legislative power.[31] For example, even if one part of a statute asserts that some other part is unrepealable, when the asserting text is subject to ordinary repeal, then so, ultimately, is the nominally "unrepealable" text.

Rosenkranz also gives a structural justification for this formal stance. He observes that courts must inevitably resort to interpretive rules. Because there is not a constitutionally required and completely specified set of such rules, to say that Congress cannot make them is to say that courts have plenary power to do so themselves. This, he claims, would be "an untenable endorsement of imperial judging."[32] In any event, Rosenkranz argues, the polestar for assessing the constitutionality of a prospective interpretive statute is whether a later Congress can, as a formal matter, "exercise any and all legislative power" when it wishes.[33]

Not everyone agrees, however. Larry Alexander and Saikrishna Prakash believe that prospective interpretive statutes are unconstitutional.[34] Their argument is, first, that the constitutional criteria for congressional action cannot be altered by Congress. One Congress may not require future Congresses to "bark like seals prior to legislating."[35] But this conclusion rests, for Alexander and Prakash, on a supposition that the Constitution mandates that statutory interpretation be guided by a form of intentionalism.

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[28] 1 Laurence H. Tribe, American Constitutional Law § 2-3, at 125–26 n.1 (3d ed. 2000).

[29] *Id.*

[30] *See generally* Nicholas Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085 (2002).

[31] *See id.* at 2116–18.

[32] *Id.* at 2119.

[33] *See id.* at 2120.

[34] *See generally* Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 Const. Comment. 97 (2003).

[35] *Id.* at 105. While they may not be forced to bark like seals, no one has suggested a formal problem with the apparently mandatory enacting and resolving clauses set out by 1 U.S.C. §§ 101 and 102. Acts of Congress "shall" include: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled." 1 U.S.C. § 101 (2012). Resolutions "shall" include: "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled." *Id.* § 102.

> Rather than assuming that the constitutional founders created an elaborate structure for writing statutes but wholly failed to provide for a means of making sense of them, we think it far better to suppose that the founders contemplated that statutes (and the Constitution more generally) are to be construed consistently with the intentions of their authors.[36]

Once you accept that interpretations are to be guided by judicial derivations of legislative intent, then it follows that the actions of a prior Congress cannot dislodge an interpretation of a new statute but can at most inform our search for the drafters' intent.

One's view of the constitutionality of submarine statutes is inevitably bound to the theory of constitutional interpretation one assumes. Scholars can and should continue to converse about the fit of submarines, as a class of legislative action, with various possible constitutional commitments. Such dialogue is an indispensable part of the process of constitutional government. My own concern, however, is more basic, more agnostic as to interpretive theory, and goes to institutional policy rather than the formal drawing of lines of authority. Rosenkranz acknowledges that there might be a "potent policy objection[ ]" to prospective interpretive statutes on the ground that they "perhaps influence[ ] too much the work of future congresses."[37] But in focusing chiefly on formal constitutional problems, none of these discussants has grappled directly with the wisdom of legislating against a background of highly coupled legislative code.

B. Complexity: The Submarine's Peculiar Weapon

Law, like software code, is more easily understood when it is simple and modular.[38] As Henry Smith and Thomas Merrill have observed in the context of property law, bundling complexity inside discrete objects that expose only simple interfaces saves what would be high costs of interaction were our descriptions of things always in terms of basic components.[39] When land "ownership," for example, comes in just a few flavors (such as various fees simple, leases, and life estates) transaction is simpler than if a buyer had to make a de novo inventory of all possible claims and relationships that humans could imagine and construct with respect to a piece of land.

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[36] Alexander & Prakash, *supra* note 34, at 106.

[37] Rosenkranz, *supra* note 30, at 2120.

[38] *See, e.g.*, William Li et al., *Law Is Code: A Software Engineering Approach to Analyzing the United States Code*, 10 J. Bus. & Tech. L. 297, 297–98 (2015); Christian Turner, *Models of Law*, 2018 U. Ill. L. Rev. pt. III(C) (forthcoming 2018).

[39] *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 Yale L.J. 1, 8 (2000); *see also* Thomas W. Merrill, *Property as Modularity*, 125 Harv. L. Rev. 151, 155–56 (2012); Henry E. Smith, *Property as the Law of Things*, 125 Harv. L. Rev. 1691, 1693 (2012).

When separate instances of lawmaking are coupled, meaning only that they affect one another, understanding and making law is more difficult:

> The coupling of various parts of the U.S. Code creates nonlinearities that can make the code more challenging to parse and revise. In particular, a reader must now explore different "pathways" of references to fully understand a certain domain of law. Furthermore, revisions to any part of a chain of references could contribute to unknown, unintended downstream effects.[40]

A legislator attempting to enact policy does so with an understanding of the social environment, a mental model of the Supreme Court's practice with respect to the Constitution and other statutes, and models of his or her own institution's prior output.[41] The latter models mainly comprise overview-level understandings of the U.S. Code and certain principles concerning institutional functioning and the recognition of institutional outputs. The legislator will understand that he or she is legislating against a background but wants to identify a clear path to achieving a specific set of purposes and perhaps, with less certainty, more general purposes. The more extensive the cross-references that will bear on the meaning of the new statute, the harder that job becomes. Hidden cross-references are anathema.[42]

Now, I do not mean to suggest that the primary problem here is the unpredictability of future applications. Many statutes will have uncertain effects in future cases because they set out standards that depend on social factors that are subject to cultural and technological change.[43] The problem is not that the experience of the law will diverge from a narrow-bore zone of expected application or that we will be deprived of what could otherwise be a mechanical jurisprudence. As H.L.A. Hart put it:

> [W]e are men, not gods. It is a feature of the human predicament (and so of the legislative one) that we labour under two connected

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[40] Li, *supra* note 38, at 313; *see also* R. Barry Ruback, *Warranted and Unwarranted Complexity in the U.S. Sentencing Guideline*, 20 LAW & POL'Y 231, 376 (1998) (analyzing indicators of complexity, including cross-references to other guidelines).

[41] Turner, *supra* note 38, at pt. III(D).

[42] *See, e.g.*, Thomas F. Blackwell, *Finally Adding Method to Madness: Applying Principles of Object-Oriented Analysis and Design to Legislative Drafting*, 3 N.Y.U. J. LEGIS. & PUB. POL'Y 227, 284–85 (1999) ("Use of the Low Coupling pattern would suggest minimization of cross-references between sections. The High Cohesion pattern requires that the responsibilities of each object be strongly related and focused. These and other patterns could be used by the drafter to standardize treatment of similar drafting issues.").

[43] Consider, for example, the statutory fair-use test in the law of copyright. *See* 17 U.S.C. § 107 (2012). By the narrowest possible margin, the Supreme Court held that the use of a videotape recorder to time-shift television programs was a fair one, and partly for this reason, the soon-ubiquitous technology survived a copyright challenge to its existence. *See* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 447–56 (1984). Fair use now determines what may be shared by average users on the internet without the explicit permission of authors. Needless to say, the world in which it now applies is utterly alien to that of the fair-use test's codification.

> handicaps whenever we seek to regulate, unambiguously and in advance, some sphere of conduct by means of general standards to be used without further official direction on particular occasions. The first handicap is our relative ignorance of fact: the second is our relative indeterminacy of aim.[44]

The problem of submarines, however, is that they might, either alone or in combination, create unmanageable complexity that will exist from the legislative point of view at the moment a new statute is conceived. This is not the usual and unavoidable legislative circumstance that, as humans "and not gods," legislators cannot be sure whether they will agree with the resolution of a future dispute in which the statutory language is interpreted and applied. Rather, the legislator will not know the meaning of what he or she is *now* doing.

The difference is as between two architects. One of them designs a building for a distinct purpose but with the knowledge that needs and uses will change over time. She takes aim with that immediate purpose in mind but also, with the aid of imagination and analysis, tries to achieve some flexibility in the design to respond to anticipated needs in the future. The building will almost surely become obsolete one day, but she at least knows what she is designing it to accomplish today. She, nonetheless, can never escape Hart's conundrum and is not so foolish to believe she can.

The second architect tries to draw plans to meet current needs but finds herself in a far more frustrating position. The builders will indeed work with her plans, but now suppose there are other, pre-existing plans and instructions that the builders are required to interpret as modifying the architect's plan. Some of these other instructions are known to the architect, some not, with the challenge and frustration increasing rapidly with the number of such other plans. Unless the architect takes account of these modifying plans, the result will be a building that is in fact designed by no one. Legislating in a complex informational environment similarly taxes a cognitive faculty other than imagination. Our second architect, like a legislator trying to take account of many submarine statutes, is surely not a god, but neither is she even truly the architect.

While submarine statutes stereotypically impose this sort of complexity-related cost, some might actually generate complexity-related savings. When statutes are passed that define characteristics of classes of statutes, it can help future legislators craft members of that class. Rather than re-invent the wheel, they can declare their new statute to be a member of the class and automatically inherit the characteristics previously defined as belonging to class members. Submarines can thus be part of an efficient, object-oriented

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[44] H.L.A. Hart, The Concept of Law 128 (2d ed. 1994).

design.[45] Such submarines enhance rather than detract from a legislator's understanding of her work.

Whether a statute is a potentially damaging submarine or part of an integrated class definition depends on whether the class is sufficiently intuitive and whether the statutes defining the class are sufficiently basic and general. Baude and Sachs convincingly argue, for example, that the basic federal criminal statutes defining important features of the class of federal criminal laws "free[s]" Congress rather than "tying [its] hands."[46]

C. Fit with the Initial, Individual Intention Thesis

If complexity is the potential consequence of submarine statutes, we are now ready to make a normative judgment arising from another commitment that I assert is foundational: As a matter of sound governance, we should desire first and foremost that legislative acts be the products of reason. To create reasoned products, legislators need to understand what the words they write mean. Of course, they will lack the authority to control the translation of that meaning into future action or even the evolution of that meaning in new semantic environments. They are not judges and juries. That is, again, not the issue. Rather, what they must at least understand is what they themselves, as individual legislators, mean upon legislating. They must have an initial, individual intention.

Whether one agrees with that statement because intention is implicit in reasoned decision-making, which is in turn implicit in the very concept of legislative action; whether one believes action with intention is necessary for recognizing legislative authority; or whether for some other reason, I find the principle to be clearly a part of the law we have.[47]

But the initial possible meanings of a law in a regime thickly patrolled by submarine statutes would be a most uncertain thing. A legislator reducing his intention to the words of a draft bill might introduce one zone of meanings in the minds of fellow legislators but then later find its semantic content had diverged immediately upon passage, through a cascade of interactions with all the submarine statutes. Like a grand old game of Plinko, a puck bouncing from place to place in a random walk,[48] the statute emerges into the world upon enactment not in isolation but as a product of interactions

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[45] *See supra* notes 38–39 and accompanying text.

[46] *See* Baude & Sachs, *supra* note 5, at 1101–02 (pointing to a federal criminal law background that includes rules covering conspiracy, "witness tampering, speedy trials, [and] the criminal jurisdiction of the district courts" (citations omitted)).

[47] The justifications vary, but rational basis review of legislation ultimately looks for the existence of a legitimate reason as a criterion of constitutionality. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 488 (1955). Reasonableness is otherwise scattered throughout our constitutional, statutory, and constitutional law as a basic criterion of legitimate decision-making.

[48] *See, e.g.*, Megan Garber, *How to Game Plinko*, ATLANTIC (Sept. 27, 2013), https://www.theatlantic.com/entertainment/archive/2013/09/how-to-game-plinko/280088/ [http://perma.cc/X3AC-VSS8].

with other statutes, whether or not even a single legislator had tracked its wandering path.

The intentionalist view of interpretation that Alexander and Prakash take is not necessary to appreciate this aspect of the submarine danger.[49] Many interpretive methodologies at the very least assume that legislators have acted with intentions, even those methodologies that do not direct adjudicators to search for them. We can divide the world of interpretive commitments in several ways, all corresponding to models of information flows among institutions together with secondary rules concerning the relative authority of those institutions.[50] For example, we can label as textualist the privileging by an interpreting institution of semantic meanings as they would have been drawn from the bare text by the drafters themselves or by the drafters' contemporary audience or principal. Alternatively, a textualist court might concern itself with how a modern reader might fairly interpret a document's words. We could even ask further about audience: whether the textual interpreter should be expert or lay in the field the text concerns, for example. And so the choice among interpretive techniques involves modeling authors and audiences and deciding to privilege one or more potential processors within that model as solely or jointly authoritative.[51]

For now, though, it is enough to observe that the interpretive landscape can also reasonably be described by the standard tripartite interpretive taxonomy (textualism, purposivism, and intentionalism) together with a time dimension.[52] Because our analysis of submarines concerns the problems of finding meaning in a complex environment of coupled texts and because the very things these schools of "isms" distinguish among are disparate conceptions of how meaning arises from a text, one might suspect that attitudes toward submarines are a function of methodological choice. This is not so. A crucial principle among virtually all interpretive schools is that a legislator who wants to accomplish some task ought to be able to do it, within the bounds of the Constitution, so long as he or she speaks plainly enough about that thing. Whether her intention or a hypothetical audience's interpretation of her output controls,[53] intention conveyed with plain enough speech ought to be recoverable under any of the dominant methodologies.[54]

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[49] *See supra* Part III.A.

[50] *See* Turner, *supra* note 38, at pt. IV(C).

[51] *See id.*

[52] *See, e.g.*, Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. Pa. L. Rev. 117, 123–24 (2009).

[53] For example, original public meaning originalism can be conceived as channeling the interpretation that reasonable readers among that electorate contemporary with authorship would have made. *See, e.g.*, Lawrence B. Solum, *Communicative Content and Legal Content*, 89 Notre Dame L. Rev. 479, 498 (2013).

[54] *See, e.g.*, Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress.").

We therefore need not take a view here on the strengths and weaknesses of the interpretive "isms," because they all condemn the submarine. If your theory is, say, public meaning originalism (of whatever more particular flavor) on legitimacy grounds, you would be hard pressed to defend the unexpected intrusion of a submarine in resolving a case. The legitimacy of the statute would turn on its hypothetical acceptance—political ratification, essentially—by those who elect the legislators. What would those electors have thought, reading the statute's text, their legislators had accomplished? First, unless the electors believed the authors of the text acted individually with intention, they could hardly make a conventional interpretation at all. Without intention, a text is not a communication so much as it is just data arising from the natural world. It exists. It was caused by events. But it does not represent meaning conveyed by an utterer.[55]

Second, unless the electorate themselves took account of the submarine, they would interpret the statute not to mean what readers of both the statute and the submarine believed the statute would mean. In a submarine-thick legislating environment, the very reason we resorted to this sort of originalism—that we favored democratic accountability over judicial technocracy[56]—is lost. Voters would not be able to assign responsibility for laws, because they would not understand their meanings. Indeed, public meaning originalism only "works" in a world in which the legislators and their electorate both take account of the submarine.

Original Public Meaning Originalism and Awareness of Submarines	**Legislator aware**	**Legislator unaware**
Electorate aware	Good statute	Ratification of unreasoned product
Electorate unaware	No democratic ratification	Unratified, unreasoned product

The above is more a caricature of a method than a deep engagement. I hereby apologize to true originalists. My point is only to indicate that an interpretive theory that is at peace with torpedo-firing submarines, regardless of the costs they impose, is difficult to conceive. For inevitably, the primacy of a legislature's text, intentions, or purposes is upset when we wrongly assume their work was the product of the fully considered but unstated Dworkinian accounting for and accommodation of a background of subma-

[55] *See, e.g.*, JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 16–17 (1969) ("If I regard [the mark someone has made on a piece of paper] as a natural phenomenon like the wind in the trees or a stain on the paper, I exclude it from the class of linguistic communication, even though [it] maybe be indistinguishable from . . . written words.").

[56] *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 17–18 (Amy Gutmann ed., 1997).

rine statutes all jockeying to have a piece of the interpretive pie.[57] If a statute is passed that is unexpectedly semantically altered by submarines, it does not reflect individual legislators' intentions, and its claim to authority is thus weakened.

D. Courts or Legislatures?

Another way of considering the complexity problem posed by a proliferation of submarines is to imagine the position of a legislator in a legislature in which authorship of new laws is never on a clean slate. The conscientious legislator in this environment must now become a common law judge. The meaning of what is written today would depend on a body of unrelated statutes written in days gone by.

A legislature attempting to convey meaning will thus inevitably find itself in the position of Dworkin's Hercules,[58] laboring to make an interpretation of a body of statutory precedent before it can understand the likely force that new provisions would, even in the legislators' own minds, have. But that exercise is quintessentially judicial, and there is no guarantee that legislators are skilled at that kind of research (or at managing that research by others). Legislation is about relatively clean slates and producing new authority through the consensus of coalitions,[59] not the interpolation of a rich universe of precedent.[60]

Furthermore, the incentives for open, Herculean deliberation are skewed in the legislative context. Perhaps in trying to pass a statute, political considerations would rule out exempting the statute from all existing submarines or even just a specific submarine. It is easy to understand why, for example, it would be difficult explicitly to waive laws meant to protect majoritarian religious practices. The cost of legislation would include the cost of revealing a legislator's preferences on the subject matter of applicable submarines. For example, the Affordable Care Act's passage was notoriously tight. Debating the applicability of RFRA to various of its provisions would likely have derailed proceedings despite legislative agreement on the broader framework.[61]

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[57] *See* RONALD DWORKIN, LAW'S EMPIRE 311, 318–20 (1986).

[58] *See id.*

[59] Or, at least, slates not so severely obscured by coupled texts. Yes, I am aware all slates in government are a bit dirty. But I am suggesting an aspirational and general principle to which submarines do unusual violence.

[60] This notion, that legislators should not have to interpolate a statutory background in order to express meaning, concerns the business of supplying legislative materials for adjudication. It does not speak to the demand side, the judicial use of what is supplied. A legislature could assiduously avoid passing submarines while the judiciary could simultaneously and without contradiction treat statutes like judicial precedents, giving them weight beyond mere text but as sources of the principles to be used in a Dworkinian analysis. *Cf.* Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 12–13 (1936).

[61] The objection here is not that submarines remove the option to agree to ambiguity thereby removing a strategy to achieve the necessary consensus for passage. *See, e.g.*, Victoria

It is similarly easy to imagine situations in which a legislator's objective might be furthered by his or her colleagues' failure to recognize the applicability of submarines. In this case, agreement would be reached on passage but not on initial meaning. Because legislators, unlike judges, need not and typically do not support their enactments with reasoned argument, they are more able to avoid discussing important legal background that will affect the meaning of the words they enact. Judges, in contrast to legislators, do give reasons and are thus more likely to surface the degree to which their fitting and justifying took account of the pre-existing legal landscape. The nature and procedures of courts, therefore, help explain why their central feature—taking account and marshaling the implications of a large body of prior actions—is not as potentially destructive to their function as that activity would be to legislatures.

All that said, the creation of a taxingly complex interpretive background could also arise in courts, but there is less reason for concern. Let us consider a "judicial submarine." Imagine a Supreme Court ruling that all future, unrelated judgments the Court issues will count as precedent only in situations X, Y, and Z and only in sense Q. The authority of any later decision would only be calculable by also taking account of this ruling. Perhaps the closest we have to such a super-holding is *Marks v. United States*,[62] which sets out the way to interpret the holding of a fractured Supreme Court: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds."[63] This is indeed a statement concerning how lower courts should interpret future rulings of the Court and therefore a submarine. But while it creates some puzzles,[64] it does not combine with those future rulings substantively to produce guidance unanticipated by any of the authors of the future rulings. By its terms, the *Marks* holding tells lower courts to identify the authoritative meaning of a future precedent by identifying meanings explicitly communicated in that precedent by members of the Court, in a context in which the justices themselves will know that the

F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. Rev. 575, 596 (2002). Rather, the submarine injects in deliberations, on those occasions in which the submarine is identified, the need to resolve an issue that may be controversial even if no ambiguity would be created either by ignoring it or legislating around it. In such cases, there would be an incentive to ignore the submarine, which, even if a coherent approach, is hardly the legislative equivalent of Dworkinian fit and justification.

[62] 430 U.S. 188 (1977).

[63] *Id.* at 193 (internal quotation marks and ellipses omitted).

[64] *See generally, e.g.*, Berkolow, *Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Repercolation After* Rapanos, 15 Va. J. Soc. Pol'y & L. 299 (2008); Joseph M. Cacace, *Plurality Decisions in the Supreme Court of the United States: A Reexamination of the* Marks *Doctrine After* Rapanos v. United States, 41 Suffolk U. L. Rev. 97 (2007); Linas E. Ledebur, *Plurality Rule: Concurring Opinions and a Divided Supreme Court*, 113 Pa. St. L. Rev. 899 (2009); W. Jesse Weins, *A Problematic Plurality Precedent: Why the Supreme Court Should Leave* Marks *over* Van Orden v. Perry, 85 Neb. L. Rev. 830 (2007).

ruling is fractured. And, in any event, the ultimate interpretation of such a split decision will be reviewable by the Court itself. In a nutshell, the *Marks* rule does not couple with future decisions in the way RFRA couples with all future statutes. Judges may need to emulate Hercules in order to gather the legal data that should guide their decisions, but they can write with authority.[65]

IV. Quasi-Constitutionalization and Super-Statutification

Despite the costs imposed by submarine statutes, there are strategies to reduce their costs and to help justify the possession by some statutes of greater than normal prospective influence. First, statutes might mimic in form or substance their hierarchically superior cousins: constitutional provisions. Second, some statutes may attain such levels of public and official ratification that they stand apart from ordinary statutes. Either way, causing submarine statutes to stand apart, so that they are recognized as basic or fundamental law, can point the way to controlling the complexity problem while allowing Congress some latitude to create statutory dependencies. In particular, RFRA's submarine character could possibly be justified under either of these theories.

A. Quasi-Constitutionalization

By rhetorically assimilating submarines with bodies of law that are well-recognized for creating dependencies but that are uncontroversial in that respect, a proponent can normalize their exceptional character. One way to do this is to quasi-constitutionalize them, by which I mean to use rhetoric that treats them like sources of constitutional principles. This makes mere statutes appear to be expected and background parts of the necessary universe of law's materials, the sort of basic laws of which any conscientious legislator should be aware and that do not impose substantial cognitive load. Rather than apparently and annoyingly creating an interfering static within the legislator's own institution, the submarine is made by rhetoric to stand apart. Then, despite the submarine's legislative origin and its actual and more modest claim to authority, its conflict and fit with the statutes it appears to regulate can be understood in the ordinary way we mediate statutory purposes and constitutional purposes. It, like the freedom of speech or equal

[65] There is a legislative equivalent to *Marks* that I find to be similarly unproblematic. 1 U.S.C. § 108 (2012) provides that a congressional repeal of statute *A* that had itself repealed statute *B* does not have the effect of re-enacting statute *B*. This provision only applies when legislators would understand that their repeal must either be read to have a reviving effect or not. It would seem unreasonable to suppose that their silence on this matter would reflect anything other than conscious resort to a default rule. Further, this repeal default is segregated into a Code Chapter concerned with the default interpretation of congressional actions (similar to the Dictionary Act's treatment of words), controlling cognitive cost as discussed in Part IV.B.

protection, is now part of the limited universe of rules a legislator understands will affect his or her work.

There is some, very casual, evidence that quasi-constitutionalization of submarines occurs. For example, in a recent oral argument concerning RFRA's effect on an Obamacare-derived regulation, Chief Justice Roberts produced the following slip of the tongue, conflating RFRA's provisions with those of the Constitution. When the Solicitor General noted that complying with RFRA by offering separate, contraception-only health coverage on ACA exchanges would require a change in federal law, the Chief Justice responded, "Well, the way constitutional objections work is you might have to change current law."[66] Of course, RFRA is not a part of the Constitution. The standards for religious exemptions it contains once were, however.[67]

The collision of legislative purposes with constitutional principles occurs in a context in which those principles, by virtue of being constitutional, are (a) hierarchically superior and (b) small in number. Their potential interference is further damped by the fact that they are administered by a court that must show some concern with preserving legislative power over public policy.

Substantively, constitutional limits usually arise from more basic principles of government and morality. While the lines they draw are debatable and cannot be intuited with precision, their bare applicability to a statutory provision often can. To the extent that is so, the initial intention of a legislator is more likely to take account of them. Hierarchically superior limits that are intuitive, at least with respect to subject matter if not in detail, do not pose the same risk as scattered and multitudinous provisions.[68]

Beyond these structural and substantive features that help to control the constitutional complexity problem, courts have helped by deploying several tools. For example, judicial review is mostly binary, with constitutional re-

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[66] Transcript of Oral Argument at 74, Zubik v. Burwell, 136 S. Ct. 1557 (2016) (No. 14-1418) [hereinafter *Zubik* argument]. The very idea that an otherwise and generally intransigent Congress might amend Obamacare to achieve a salutary purpose resulted in "(Laughter.)." *Id.*

[67] And I suppose they could be again if the Court saw fit to overrule *Employment Division v. Smith*, 494 U.S. 872, 878 (1990) (rejecting strict scrutiny of otherwise valid and neutral laws of general applicability that happen to burden religious exercise). But as Justice Breyer suggested in the oral argument in *Zubik*, the substantive difficulties of applying RFRA perhaps demonstrate the wisdom of foregoing judicial, individualized exception-creation in this area. *Zubik* argument, *supra* note 66, at 22–23.

[68] *See* Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1653–81 (2014) (comparing the Constitution's brevity and small scope to the length and expansiveness of state constitutions and noting the corresponding rates of revision of state constitutions). Versteeg and Zackin point out that the scope of state constitutions (and those of other nations) "has grown to such a degree that they now routinely cover topics far afield from fundamental rights and basic governmental structure," including the designation of state holidays, "a host of policy choices," the protection of many non-traditional rights, and substantive regulations. *Id.* at 1659–60. Entrenching so much policy in a hierarchically superior law where that law is subject to frequent revision creates a formal two-track system of legal regulation and change. The complexity implications of such a formalized system of submarines is well worth further analysis.

view resulting in either approval or invalidation. It is, in the main, a blunt instrument and therefore either gives full effect to congressionally generated meaning or none at all. When review becomes something in between, posing the risk of altering the statute's meaning from that which it would be if ascertained purely under an expected method of interpretation, it becomes controversial.[69] I do not mean to criticize the constitutional avoidance doctrine or to indicate that I believe in the possibility of an acceptable interpretive methodology that can be applied mechanically and without discretion. (I do not.) Rather, I do this only to indicate that (a) the use of even those submarines that are actual constitutional provisions can be controversial and (b) this controversy is quietest when constitutional submarines are blunt in effect and limited in number. In other words, they are least problematic when they generate minimal legislative complexity.

RFRA might be defended on such grounds. It modifies basic law concerning free exercise but does not create a new category of basic law. In that sense, it does not add to the subject-matter catalog of cross-references. A legislator with an initial intention would already be aware that religious exercise is a subject of applicable law. But RFRA does create, as did pre-*Smith* constitutional law, special difficulties in formulating a statute from an initial intention if the scale of potential exemptions is large and uncertain.

B. Super-Statutification

Even if they are not attached remora-like to the small body of constitutional provisions, some submarine statutes might achieve a level of prominence and a basic quality that distinguishes them from the mass of the U.S. Code. Here, I rely on the work of William Eskridge and John Ferejohn.[70] They define as "super-statutes" those that (a) are designed to change substantially a principle or principles underlying prevailing regulation, (b) do in fact achieve that through a process "of evolution and debate" that causes the new principle to "'stick[ ]' in the public culture in a deep way, becoming foundational or axiomatic to our thinking," and (c) are ultimately given "expansive, imperial interpretation."[71] The examples they give include those whose names and general purposes are known to many: the Sherman Antitrust Act of 1890, the Civil Rights Act of 1964, and the Endangered Species Act.[72]

There are elements of this definition that would mark out acceptable submarines: namely that they attain in the minds of the public and in judicial

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[69] *See, e.g.*, Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1578 (2000) (surveying criticism that the constitutional avoidance doctrine "supplants an otherwise-preferable reading of [a] statute in all cases in which it makes a difference").

[70] William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

[71] *Id.* at 1219, 1230–31.

[72] *Id.* at 1231–46; *see also supra* notes 23–24 and accompanying text.

interpretation a fundamental and intuitive status. Such statutes have, by definition, joined the pantheon of socio-legal axioms and therefore would not substantially add to the cognitive load facing a legislator attempting to act on an initial intention. Given the extreme difficulty of amending the Constitution, it is not surprising that moments of unusual deliberation and consensus would be reflected in "statutory" rather than "constitutional" moments, in which "higher lawmaking . . . altering the normative foundations of public discourse" occurs through formally ordinary but culturally extraordinary means.[73]

There is, however, a problem. Eskridge and Ferejohn recognize that this special status is not born with the statute. Rather, only over time and after bearing the badges and scars of judicial contest and public deliberation does a statute become (and, they argue, should become) a source of basic principle to be used in a common-law manner.[74] My concern is not with ex post judgments concerning the constitutionality of submarine statutes, but instead with the wisdom of adopting them in the first place. If super-statutory status is only attained over time, then it cannot be relied upon when considering a submarine statute at its inception—even if that statute might prove in time not to be costly.

Perhaps submarine statutes that aspire to super-statutory status could be justified if they contain a sunset clause. If a legislature intends to alter or create a basic principle, one for which there is clamor and which appears to reflect deep and intuitive legal understandings, then maybe that is an indication that the submarine should be given a shot. Either the projection that the submarine will bear unusually low cost will come to pass or it will fail to come to pass in advance of the sunset date.

C. Submarine Segregation

At the very least, to preserve contemporary legislative supremacy and wrest power from dead hands, we should catalog submarine statutes in a separate volume. Like the Constitution itself, they would stand apart as controlling the environment in which a new legislative initiative would be interpreted. Unlike the Constitution, though, they can be decommissioned by a legislature aware of them. Again, there may be political economy reasons to suspect that the positive act of waiver would impose political costs and that the past is thereby constraining the present. But discrete cataloging would at least "get the dragon out of [its] cave" so we can count its scales.[75]

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[73] *See* Eskridge & Ferejohn, *supra* note 70, at 1269.
[74] *See id.* at 1216, 1231, 1247.
[75] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

V. Conclusion

RFRA's particular demerit is not, as far as I have been able to gather, nearly so common that the complexity danger has tipped over into semantic crisis.[76] Indeed, RFRA's seeming rarity as a true submarine that has been adjudicated to have a controversial effect on a later-passed statute may obscure the very problem with submarine statutes. Even if one finds RFRA tolerable because of its perceived benefits, its submarine character should be recognized and kept deviant.

The demand for submarine statutes, though, could grow. Consider a proposal by former presidential candidate Senator Marco Rubio (R-FL): "It is for this reason that I have proposed that Congress establish a national regulatory budget, which would require that new, costly regulations be offset by the repeal of other existing regulations."[77] It was an odd proposal to be set amidst other points Rubio made supporting greater, rather than lesser, congressional control over agency rule-making. This "regulatory budget" would potentially restrain an agency even from enacting regulations clearly contemplated in later-enacted statutes and therefore clearly intended by the enacting congress. Of course, a new statute that Congress desires be given effect without regard to other statutes can include a general or specific waiver. But that is the very problem with submarine statutes. They require Congress when doing anything new to contemplate and keep track of their existence, to anticipate whether they might present a problem, and to enact specific waivers that themselves have political economy effects.

Of course, a court could come to the rescue by observing a fundamental incompatibility and giving overriding effect to the later-passed statute. And it could do so in less than truly fundamental situations when it recognizes a complexity-caused irrationality.[78] Perhaps it would not be completely candid

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[76] Baude and Sachs helpfully collect and discuss a few more examples that I would characterize as submarines, though their costs are likely low on grounds given above. Baude & Sachs, *supra* note 5, at 1099–104.

[77] Marco Rubio, *A Step Toward Freedom: Reduce the Number of Crimes*, Brennan Ctr. for Justice (Apr. 27, 2015), https://www.brennancenter.org/analysis/step-toward-freedom-reduce-number-crimes [https://perma.cc/S523-VVER]. This suggestion has moved beyond a mere proposal. In the opening days of his presidency, President Trump issued an executive order requiring just this sort of one-for-two promulgation. *See* Exec. Order No. 13,771, 82 Fed. Reg. 9339, 9339 (Jan. 30, 2017). Because it is an executive order, it raises issues that are distinct from those under study here, but it nonetheless illuminates a way that the Executive Branch can create legal background against which statutory meaning will be worked out.

[78] Some judges would eschew this sort of fix. Emblematic of their disinclination is this passage from a recent dissent: "If a statute needs repair, there's a constitutionally prescribed way to do it. It's called legislation. To be sure, the demands of bicameralism and presentment are real and the process can be protracted. But the difficulty of making new laws isn't some bug in the constitutional design: it's the point of the design, the better to preserve liberty. Besides, the law of unintended consequences being what it is, judicial tinkering with legislation is sure only to invite trouble." Perry v. Merit Sys. Prot. Bd., 137 S. Ct. 1975, 1990 (2017) (Gorsuch, J., dissenting). While a great deal is left unjustified in this statement, it reflects the hesitation some judges would have with the judicial rationalization approach to submarines.

as it did so, in pursuit of systemic effectiveness. For someone, like me, who prefers candor, this would not be an optimal response to unaccounted-for legislative costs.

Whether the costs of submarines are controlled by legislative forbearance, by constitutional adjudication, or by courts' less than candid interpretation, the issues discussed here provide a reason to view these statutes with special attention to the legislative complexity they create. Even if the problems I have highlighted should not invariably be fatal to the creation or application of submarine statutes, they should counsel care.