

# Indeterminacy by Omission: Who Decides Whether Regulation X Applies?

Morgan L. Weinstein

## *I. Introduction*

Juridical power derives in part from decision-making authority in sub-judicial spheres of influence. Application of certain laws may depend on the prior occurrence of particular acts. For example, a law granting assistance to a mortgage borrower who is in default may apply only in situations in which the borrower has submitted sufficient paperwork to their loan servicer. With regard to such a law, a failure to define who decides whether sufficient paperwork has been submitted creates a power vacuum and causes uncertain application of the law.

Regulation X of the Real Estate Settlement Procedures Act<sup>1</sup> contains this type of jurisdictional problem, which may be properly framed by critical legal studies, an academic movement that provides the following framework for analyzing the law: (1) the law creates and legitimizes power structures; (2) the law and legal reasoning are historically and socially contingent; and (3) legal reasoning is indeterminate, or subject to multiple, competing interpretations.<sup>2</sup> This article argues that Section 1024.41(b)(1) of Regulation X is problematically indeterminate, because it provides space for the government to claim a power that was not explicitly granted to it, specifically the power to determine whether a mortgage borrower in default has submitted a complete loss mitigation package to a loan servicer.

## *II. Indeterminacy and the Reproduction of Power Structures*

Critical legal studies posits that the law is both governed by and interpreted through the lens of power relations.<sup>3</sup> The process of interpreting the law constitutes either a production or reproduction of power, meaning that the law enables the powerful to interpret it in a manner most beneficial to them.<sup>4</sup> Additionally, new laws lend credence to the idea that the superstructure of the law, which is a codified abstraction, is somehow “real;” this “reification” imbues the law with the legitimacy of a neutral

---

· Special thanks to Matt Stannard for his advice and insight.

<sup>1</sup> Regulation X is part of the Consumer Financial Protection Bureau’s implementing regulations. *See generally* Real Estate Settlement Procedures Act (Regulation X), 12 C.F.R. pt.1024 (2015).

<sup>2</sup> Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 Yale L. J. 1, 6 (1984).

<sup>3</sup> *See* Singer, *supra* note 2, at 6 (providing that the law is a “mechanism for creating and legitimating configurations of economic and political power”).

<sup>4</sup> Peter Gabel, *Reification in Legal Reasoning*, in *CRITICAL LEGAL STUDIES*, p. 37 (James Boyle ed., 1992).

arbiter.<sup>5</sup> When existing laws are deemed insufficient, additional laws accumulate, because the legal system is designed to require its own expansion.<sup>6</sup>

Due in large part to these machinations of power within and upon the law, the law both depends on and seeks to mask its indeterminacy.<sup>7</sup> In this context, “indeterminacy” can be stated to mean that a competent adjudicator can use the existing body of legal rules to justify any of multiple, inconsistent decisions.<sup>8</sup> Indeterminacy is necessary for the law within the current legal framework, inasmuch as it provides flexibility and fluidity, making the law manipulable.<sup>9</sup> However, the very reason that indeterminacy is necessary is also why it becomes masked: the law derives authority from the belief of the governed that the law is consistently and fairly applied.<sup>10</sup>

Language is fundamental in reshaping the law, but is prone to ambiguity and vagueness.<sup>11</sup> Indeterminacy arises from individuals’ ability to subjectively interpret words, phrases, and concepts in statutory or common law.<sup>12</sup> Words like “fair” or “harassment” are difficult to judge.<sup>13</sup> Different people may find different compensation to be fair, and people may differ as to the threshold of what constitutes harassment.<sup>14</sup> More perniciously, specific laws or rules become indeterminate due to the *omission* of critical language, such as a designation of the arbiter of certain rights.<sup>15</sup> The omission of who determines the applicability of a mortgage borrower’s right to protection under Regulation X is a glaring example of this type of indeterminacy, because it enables a governmental agency to assume a power that was not created for it.<sup>16</sup>

---

<sup>5</sup> *Id.*

<sup>6</sup> *See id.*

<sup>7</sup> See Robert W. Gordon, *Some Critical Theories of Law and Their Critics*, in *THE POLITICS OF LAW*, 653 (Quintin Hoare & Geoffrey Nowell-Smith eds., 1971) (concluding that “Legal discourses don’t just mask the realities of power and life, but participate in constructing those realities”).

<sup>8</sup> See Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. Chi. L. Rev. 462, 462 (1987) (in part rejecting application of the theory).

<sup>9</sup> Singer, *supra* note 2, at 6.

<sup>10</sup> Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 QLR 339, 340 (1996-1997) (finding that “claims of determinacy have a large role in explaining why citizens properly accede to law’s authority”).

<sup>11</sup> Language in legal discourse is “a particularly potent tool” for constructing social reality. Allan C. Hutchinson, *Waiting For Coraf: A Critique of Law and Rights* 114 (1995). Uncovering discursive markers of indeterminacy helps to demonstrate predictable outcomes of manipulation and oppression.

<sup>12</sup> Christopher L. Kutz, *Just Disagreement: Indeterminacy and Rationality in the Rule of Law*, 103 Yale L.J. 997, 1004-05 (1994).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Omission invites interpretation, which “emphasizes the linguistic indeterminacy” inherent in it. Austin Sarat, *Rhetoric and Remembrance: Trials, Transcription, and the Politics of Critical Reading*, 23 Legal Stud. Forum 355, 374-75 (1999).

<sup>16</sup> Thus, instead of being the result of politics, the law itself is “nothing more than the naked exercise of political power.” See John Hasnas, *Back to the Future: From Critical Legal Studies*

### III. Regulation X and the Problem of Omission

Regulation X, an attempt to protect consumers, may be recuperated as a new power of the government, because the law's indeterminacy renders it subject to an interpretation which would empower the Consumer Financial Protection Bureau to determine whether a loss mitigation package is complete.<sup>17</sup> Regulation X entitles residential mortgage borrowers to a review and evaluation for loss mitigation by their loan servicers, in an attempt to prevent foreclosure of their mortgages.<sup>18</sup> Only borrowers who have submitted a "complete loss mitigation application" are entitled to such review and evaluation.<sup>19</sup>

"Complete loss mitigation package" is defined as "an application in connection with which a servicer has received all the information that the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the borrower."<sup>20</sup> While this definition contains ambiguity in its reference to what would constitute "all the information," there is a more troubling lack of determinacy in the definition: the regulation is silent as to who decides whether a servicer has received all the information that the servicer requires.<sup>21</sup>

Two results seem likely, here.<sup>22</sup> The regulation may permit the servicer to determine whether they have received all required information.<sup>23</sup> More likely, the Consumer Financial Protection Bureau will contend that the servicer may make the initial determination, but claim that the Bureau has the right to look backward and take action where it believes that a servicer's request for additional information in any particular case was excessive or unnecessary.<sup>24</sup> In the latter scenario, a recently-formed component of the federal government may be viewed as consolidating its power, not for the purpose of protecting consumers, but instead with the goal of gaining additional authority to manage consumers and their affairs.<sup>25</sup>

---

*Forward to Legal Realism, or How not to Miss the Point of the Indeterminacy Argument*, 45 Duke L.J. 84, 91 (1995).

<sup>17</sup> The critique of such regimes of power allows the proliferation of resistance to the regime. John Caputo and Mark Yount, *Institutions, Normalization, and Power*, in *FOUCAULT AND THE CRITIQUE OF INSTITUTIONS*, 7-8 (John Caputo and Mark Yount eds., 1986). See also Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 *Legal Stud. F.* 327, 327 (1991) (criticizing Michel Foucault's methodology, but discussing the relationship between power and knowledge); Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in *LEFT LEGALISM/LEFT CRITIQUE passim* (Brown and Halley eds., 2002) (engaging in genealogy).

<sup>18</sup> 12 C.F.R. § 1024.41(a).

<sup>19</sup> 12 C.F.R. § 1024.41.

<sup>20</sup> 12 C.F.R. § 1024.41(b)(1).

<sup>21</sup> See *id.*

<sup>22</sup> Whether the lack of agency in the law "corresponds to a real division in reality" is less relevant than problematizing why consumers might "work so hard to maintain belief" in the wholeness of the law "in the face of their own doubts." See Duncan Kennedy, *A Semiotics of Critique*, 22 *Cardozo L. Rev.* 1147, 1189 (2001).

<sup>23</sup> See *id.*

<sup>24</sup> See *id.*

<sup>25</sup> See Singer, *supra* note 2, at 6.

#### *IV. Conclusion*

Indeterminacy is built into Regulation X from an invitation to interpret gaps in the law, namely within the statutory failure to define who determines whether a loan servicer has received all required information. This indeterminacy gives the government leeway to assert its authority to manage initial determinations in sub-judicial processes between consumers and their loan servicers. Section 1024.41, then, is not for the purpose of protecting consumers, but rather uses the guise of consumer protection to preserve and expand governmental power. If viewed as incomplete and purposefully inchoate, Regulation X may be used to demonstrate the means by which the law is interpreted through power.