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Statuory Interpretation, Democratic Legitimacy and Legal-System Values

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ARTICLES

STATUTORY INTERPRETATION, DEMOCRATIC LEGITIMACY AND LEGAL-SYSTEM VALUES

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I. Introduction: The Statutory Interpretation Debate

For the past fifteen years,[1] legal theorists have been locked in a seemingly irreconcilable debate over how courts should interpret statutes.[2] "Democratic legitimacy" lies at the heart of the impasse.[3]

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[1] *See* WILLIAM N. ESKRIDGE JR., DYNAMIC STATUTORY INTERPRETATION 1 (1994) (interest in statutory interpretation theory has surged since 1980); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 241 (1992) ("past decade has probably been the most fruitful in history for legal academics in the field of legislation."); William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction To The Legal Process* [hereinafter Eskridge & Frickey, *Introduction*], in HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW li, cxxviii (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) [hereinafter HART & SACKS] (identifying 1982 as the "annus mirabilis" of the debate); R. Shep Melnick, *Statutory Reconstruction: The Politics of Eskridge's Interpretation*, 84 GEO. L.J. 91, 91-92 (1995) (book review) (statutory interpretation of little interest until recently); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1076 (1992) ("The last ten years have been marked by an intense scholarly and judicial interest in statutory interpretation."). Seminal works that launched the current debate include: GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982); JAMES WILLARD HURST, DEALING WITH STATUTES (1982); Richard A. Posner, *Statutory Interpretation - in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983); Note, *Intent, Clear Statements and the Common Law: Statutory Interpretation*, 95 HARV. L. REV. 892 (1982) (authored by now-Professor Richard H. Pildes).

[2] *See, e.g.*, sources cited *supra* note 1; T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); T. Alexander Aleinikoff & Theodore M. Shaw, *The Costs of Incoherence: A Comment on Plain Meaning, West Virginia University Hospitals, Inc. v. Casey, and Due Process of Statutory Interpretation*, 45 VAND. L. REV. 687 (1992); William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799 (1985); Edward O. Correia, *A Legislative Conception of Legislative Supremacy*, 42 CASE W. RES. L. REV. 1129 (1992); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983) [hereinafter Easterbrook, *Domains*]; Frank H. Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4 (1984) [hereinafter Easterbrook, *Economic System*]; Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988) [hereinafter Easterbrook, *Original Intent*]; William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331 (1991) [hereinafter Eskridge, *Overriding*]; William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CALIF. L. REV. 613 (1991) [hereinafter Eskridge, *Reneging*]; William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) [hereinafter Eskridge, *Textualism*]; William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319 (1989) [hereinafter Eskridge *Spinning*]; William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PENN. L. REV. 1479 (1987) [hereinafter, Eskridge, *Statutory Interpretation*]; William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994) [hereinafter Eskridge & Frickey, *Equilibrium*]; William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) [hereinafter Eskridge & Frickey, *Practical Reasoning*]; William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal*

Process Era, 48 U. PITT. L. REV. 691 (1987) [hereinafter Eskridge & Frickey, *Post-Legal Process*]; Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989) [hereinafter Farber, *Legislative Supremacy*]; Daniel A. Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 MICH. L. REV. 2 (1988) [hereinafter Farber, *Legislative Inaction*]; Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137 (1990); A. Michael Froomkin, *Climbing the Most Dangerous Branch: Legisprudence and the New Legal Process*, 66 TEX. L. REV. 1071 (1988); Carlos E. Gonzalez, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585 (1996); Allan C. Hutchinson & Derek Morgan, *Calabresian Sunset: Statutes in the Shade*, 82 COLUM. L. REV. 1752 (1982) (book review); Donald C. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 MICH. L. REV. 672 (1987); Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1 (1988); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985); William D. Parent, *Interpretation and Justification in Hard Cases*, 15 GA. L. REV. 99 (1980); William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133 (1992) [hereinafter Popkin, *"Internal" Critique*]; William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541 (1988) [hereinafter Popkin, *Collaborative Model*]; Richard A. Posner, *Legislation and its Interpretation: A Primer*, 67 NEB. L. REV. 431 (1989) [hereinafter Posner, *Primer*]; Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1986-87) [hereinafter Posner, *Legal Formalism*]; Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 WASH. U. L.Q. 535 (1993); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761 (1989) [hereinafter Redish, *Common Law*]; Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984) [hereinafter Redish, *Abstention*]; Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1 (1991); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997) [hereinafter SCALIA INTERPRETATION]; Antonin Scalia, Speech on the Use of Legislative History at Various Law Schools (1985-1986) [hereinafter Scalia, *Speech*] (Justice Scalia appears to have entitled the speech "Equating the Excessive Use of Legislative History With Judicial Abdication"; *see Speech* at 8); Jane S. Schacter, *Meta-Democracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593 (1995); Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 VAND. L. REV. 715 (1992) [hereinafter Schauer, *Response*]; Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 7 SUP. CT. REV. 231 (1990) [hereinafter Schauer, *Plain Meaning*]; Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988) [hereinafter Schauer, *Formalism*]; Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409 (1990); Peter S. Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427 (1989); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989); Lawrence Tribe, *Judicial Interpretation of Statutes: Three Axioms*, 11 HARV. J.L. & PUB. POL'Y 51 (1988); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990); G. Edward White, *The Text, Interpretation, and Critical Standards*, 60 TEX. L. REV. 569 (1982); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597 (1991) [hereinafter Zeppos, *Textualism*];

The methods courts employ when interpreting statutes are democratically legitimate only if they are compatible with the courts' proper role in a representative democracy. The three dominant interpretive models (originalism, textualism and dynamism)[4] accept democratic legitimacy as their principal touchstone, but pose strikingly different visions of what makes statutory interpretation democratically legitimate.[5] Each model claims to be the sole repository of democratic legitimacy; but none has converted its critics. Unless supplemental principles can help bridge the ever-widening chasm between strict, textualist models and flexible, dynamic models, the prospects for consensus are dim.[6]

This Article reexamines the current debate and concludes that democratic legitimacy is not a sufficient litmus test by which to explain the differences among competing interpretive models nor to compare their viability. I argue that broader meta-principles[7], which I term "legal-system values," significantly influence current interpretive models and should be an integral focus of the statutory interpretation debate, but often are obscured by theorists' emphasis on democratic legitimacy.

Part II.A identifies and defines eight "legal-system values;" namely, that law be predictable in individual cases, replicable in similar cases, vertically coherent across time, horizontally coherent across related areas of law, responsive to society's needs and values, responsive to changes in society's needs and values, influential in shaping social values or morals, and fair and just in individual

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Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295 (1990) [hereinafter Zeppos, *Legislative History*]; Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353 (1989) [hereinafter Zeppos, *Candor*].

[3] *See infra* notes 96-97; *see also generally* discussion *infra* Parts II.C, II.D.

[4] *See infra* note 95 (explaining basis for grouping interpretive models into these three families).

[5] *See infra* Part II.C (conflicting democratic ideals underlie originalism, textualism and dynamism).

[6] As commentators refine and defend their conflicting visions of democratic legitimacy, they simply solidify their disagreements. By emphasizing a perspective other than democratic legitimacy, this Article seeks to provide criteria that will further distinguish the existing theories and move the debate forward. It remains to be seen whether, with these new criteria, one of the existing models might provide a basis for consensus. *See infra* Part III.

[7] By "meta-principles," I mean broad, overarching concepts that cut across the varied aspects of legal theory and are not confined to statutory interpretation theory.

cases.[8] Part II.B suggests that these values have long been accepted as the measure of the common law's legitimacy, but have been obscured by and subordinated in favor of "democratic" values as the touchstone for statutory law's legitimacy.[9] Consequently, the impact of legal-system values on statutory interpretation is murky.

Part II.C demonstrates that each of the modern interpretive models embraces different "democratic" values.[10] "Originalists" seek to implement the democratically elected legislature's original design, as embodied in a statute's text and history.[11] "Textualists" contend that the only democratically legitimate source of meaning is the actual statutory text, not any underlying ideas, intentions or purposes that have not cleared the hurdles of democratic lawmaking.[12] "Dynamic" interpreters counter that courts, as the legislature's constitutional partners, can preserve democratic values in varied and changing circumstances only by applying statutes in light of statutory text, history, post-enactment developments in law and society, and current public values.[13] These competing views of legitimacy provoke virulent disagreements concerning what objectives interpreters should pursue (textual meaning, legislative in-

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8 *See infra* Part II.A. As discussed *infra* at text accompanying note 28, some commentators might add other values or challenge the validity of some of these values.

9 *See infra* Part II.B.

10 *See infra* Part II.C.

11 *See infra* notes 132-151 and accompanying text (originalist methodology); notes 152-159 and accompanying text (democratic foundations of originalism).

12 *See infra* notes 109-122 and accompanying text (textualist methodology); notes 123-131 and accompanying text (democratic foundations of textualism). Most commentators agree that the Supreme Court, under the influence of Justice Scalia, has moved toward a more textualist interpretation. *See* ESKRIDGE, *supra* note 1, at 34 (Supreme Court in 1980's relied more on textual or plain meaning method); Eskridge, *Textualism*, *supra* note 2, at 641; Note, *supra* note 1 (rise of literalism in Supreme Court); Rasmussen, *supra* note 2, at 535; Schauer, *Plain Meaning*, *supra* note 2, at 249 (during 1989 term, Supreme Court relied more "on notions of plain meaning routinely derided in contemporary legal scholarship."); Schauer, *Response*, *supra* note 2, at 716 (same); Zeppos, *Textualism*, *supra* note 2, at 1598-99; Wald, *supra* note 2 (use of textualism increased during 1988 Supreme Court term); *cf.* Aleinikoff & Shaw, *supra* note 2, at 689 & n.5, 699-703 (move toward textualism is not as strong as others suggest; key is not whether the Court cites plain meaning, but whether it finds plain meaning to be dispositive in the face of a contrary apparent purpose); Eskridge & Frickey, *Equilibrium*, *supra* note 2, at 58 ("[T]he Court routinely followed the plain meaning in cases involving recently enacted statutes, but not in cases involving older laws."); Zeppos, *supra* note 1 (actual Supreme Court practice is more dynamic than most commentators have recognized).

13 *See infra* notes 162-184 and accompanying text (dynamic methodology); notes 185-198 and accompanying text (democratic foundations of dynamism).

tent, statutory purpose, best result)[14] and what sources (statutory text, legislative history, historical context, prior judicial interpretations, related statutes, current contexts, current public values)[15] interpreters may consider in applying statutes. The practical implications are obvious. Interpreters consulting different sources in search of different objectives may reach different results. This is particularly evident when the United States Supreme Court justices split over interpretive method,[16] and when the lower courts react

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[14] The objective is the goal the judge strives to achieve when she applies a statute. This goal reflects the judge's view of the legislative / judicial relationship, embodies the judge's task, and drives methodology. Objectives include textual meaning (textualism), legislative intent (originalist "intentionalism"), statutory purpose (originalist "purposivism"), and justice or the best interpretation (dynamism). *See infra* notes 110 (textualism), notes 132-133 (originalism), notes 137-139 (intentionalism), note 140 (purposivism), notes 162-164, note 168, note 194 (dynamism) and accompanying text.

[15] Much of the current debate turns directly on what sources a judge may (or should) consult in applying a statute. *See, e.g.*, Correia, *supra* note 2, at 1187-1197; Zeppos, *supra* note 1, at 1091-98 & 1138; *see also* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947) ("[T]he troublesome phase of construction is the determination of the extent to which extraneous documentation and external circumstances may be allowed to infiltrate the text on the theory that they were a part of it, written in ink discernible to the judicial eye."); Zeppos, *supra* note 1, at 1074-75 & n.4 ("What counts as a legitimate source of authority for interpreting a statute? The question is central to the debate among judges and scholars over the proper method of statutory interpretation . . . . Arguments for the retraction (textualism) or expansion (dynamic interpretation) of the canon of legitimate sources of authority correspond loosely to positions taken on the judiciary's role in a representative form of government."). *See infra* notes 111-121 (textualist), notes 138-151 (originalist), notes 163 (dynamic) and accompanying text. On the use of legislative history, *see infra* notes 120, 151.

[16] *See, e.g.*, Morse v. Republican Party of Virginia, __ U.S. __, 116 S. Ct. 1186 (1996) (Stevens, J.) (relying on congressional intent as discerned in legislative history) (Thomas, J., dissenting) (relying on literal reading of statutory text); Staples v. United States, 511 U.S. 600, 625 (1994) (Stevens, J., dissenting) ("Three unambiguous guideposts direct us to the correct answer to that question: the text and structure of the Act, our cases construing both this Act and similar regulatory legislation, and the Act's history and interpretation."); Deal v. United States, 508 U.S. 129, 146 (1993) (Stevens, J., dissenting) ("Between 1968, when the statute was enacted, and 1987, when textualism replaced common sense in its interpretation, the bench and bar seemed to have understood that this provision applied to [certain] defendants . . . . The contrary reading adopted by the Court today, driven by an elaborate exercise in sentence-parsing, is responsive to neither historical context nor common sense."); Keene Corp. v. United States, 508 U.S. 200 (1993) (Souter, J.) (if a statute's text is consistent, we will not reinterpret it unless there is a clearly expressed intent to institute such a change) (Stevens, J., dissenting) (purpose of statute); District of Columbia v. Greater Washington Board of Trade, 506 U.S. 125 (1992) (Thomas, J.) (using dictionary to interpret text); (Stevens, J., dissenting) (using history and purpose); United States v.

to the confusion caused by these splits.[17]

Wilson, 503 U.S. 329 (1992) (Thomas, J.) (using grammatical interpretation); (Stevens, J., dissenting) (stating that the majority reading is contrary to the statute's text, underlying policies, and legislative history); Chisom v. Roemer, 501 U.S. 380 (1991) (Stevens, J.) (stating that there is no evidence in the legislative history inducating that Congress intended "representatives" to exclude judges); (Scalia, J., dissenting) (the plain meaning of "representatives" excludes judges); West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83 (1991) (Scalia, J.) ("attorney fees" in 42 U.S.C. § 1988 excludes expert witness fees, under a literalist approach that compares the statute to similar provisions in non-civil rights laws); (Stevens, J., dissenting) ("attorney fees" in 42 U.S.C. § 1988 includes expert witness fees, in accordance with the purpose and history of the statute); United States v. Locke, 471 U.S. 84 (1985) (Marshall, C.J.) ("before December 31" means not later than December 30); (Stevens, J., dissenting) (purpose and intent was to permit filings before the end of the year, literal language is a scrivener's error); *see also* Patterson v. Shumate, 504 U.S. 753, 766-77 (1992) (Scalia, J., concurring) ("I trust that in our search for a neutral and rational interpretive methodology, we have now come to rest, so that the symbol of our profession may remain the scales, not the seesaw."). *See generally* Popkin, *"Internal" Critique*, *supra* note 2, at 1134-1139 (comparing interpretive approaches of Justice Stevens and Justice Scalia).

[17] A striking example of the uncertainty that the Supreme Court justices' conflicting methods have created in the lower courts occurred in Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture), 948 F.2d 134 (5th Cir. 1991), *as amended*, 995 F.2d 1274 (5th Cir.), *cert. denied*, 506 U.S. 821 (1992). In *Greystone*, the fifth circuit initially rejected the so called "new value" exception to Bankruptcy Code section 1129 (11 U.S.C. § 1129 (1994)) in *dicta* that relied heavily upon signals that the Supreme Court would interpret the Bankruptcy Code "textually". *See, e.g.*, United States v. Ron Pair, 489 U.S. 235 (1989). Shortly thereafter, the Supreme Court, in a case considering an unrelated Bankruptcy Code issue, rejected textual arguments in favor of an interpretation that drew upon prior practice under the former Bankruptcy Act. *See* Dewsnup v. Timm, 502 U.S. 410, 417 (1992). The new value exception was also an established practice under the former Bankruptcy Act. Just one month after *Dewsnup*, the Fifth Circuit withdrew the portion of its *Greystone* opinion that had addressed the "new value" question, and substituted in its place a short paragraph in which the court declined to decide the issue. In re Greystone III Joint Venture, 948 F.2d 134 (5th Cir. 1991), *as amended*, 995 F.2d 1274 (5th Cir.), *cert. denied*, 506 U.S. 821 (1992).

See also United States v. Marshall, 908 F.2d 1312 (7th Cir. 1990) (en banc) (Easterbrook, J.) (will not disregard unambiguous language); (Posner, J., dissenting) (flexible interpretation to avoid constitutional infirmity), *aff'd sub nom* Chapman v. United States, 500 U.S. 453 (1991). *See generally* Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949) (using different jurisprudential models to apply a murder statute to cave explorers who murdered and ate one of their group in order to survive); Symposium, *The Case of the Speluncean Explorers: Contemporary Proceedings*, 61 GEO. WASH. L. REV. 1754 (1992) (applying modern jurisprudential theories to Professor Fuller's speluncean explorers); *cf.* Rasmussen, *supra* note 2 (suggesting, in a hypothetical analysis of how cases might have been decided under different interpretive methods, that different interpretive methods will not, or at least will not always, lead to different results). *Greystone*, the cases cited in note 16, *supra*, and the virulence of the current debate, make clear that method matters.

Part II.D suggests that, while democratic legitimacy is fundamental to our understanding of the legal system, it cannot serve as the *singular* touchstone for statutory interpretation because democratic theory alone cannot break the current impasse, fully explain the differences among the competing interpretive models, or inherently ensure that law preserves legal-system values.[18]

Part III argues that legal-system values are integral to statutory interpretation theory and practice. Although theorists rarely address legal-system values comprehensively, Part III.A demonstrates that these values exert a strong influence on current interpretive models, and that each of the current interpretive models embraces different legal-system values.[19] Part III.B makes observations and suggestions concerning the reintegration of legal-system values and democratic legitimacy, with an emphasis on legal-system values, in statutory interpretation theory and practice.[20] Part IV summarizes my conclusions.[21]

II. The Search For Statutory Interpretation Values

This Part identifies the values that traditionally are thought to underlie our legal system (II.A) and drive statutory interpretation (II.B, II.C).

A. *Legal-System Values*

Law is the foundational mechanism of social interaction and the reflection of how a society organizes itself.[22] A legal system will

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In 1993, the National Conference of Commissioners on Uniform State Laws approved and recommended that the states enact the Uniform Statute and Rule Construction Act [hereinafter USRCA], 14 U.L.A. 59 (West Supp. 1995). It remains to be seen whether USRCA will be adopted by the states. The drafters' studious efforts to avoid embracing any particular theory of interpretation (*see* USCRA § 18 cmt. at 73, § 19 cmt. at 77; 14 U.L.A. 73, 77 (West Supp. 1995)), may impair legislators' ability to determine the implications of adoption. The USRCA is analyzed in Adrienne L. Mickells, *The Uniform Statute and Rule Construction Act: Help, Hindrance, or Irrelevancy?*, 44 U. KAN. L. REV. 423 (1995).

18 *See infra* Part II.D.

19 *See infra* Part III.A.

20 *See infra* Part III.B.

21 *See infra* Part IV.

22 *See, e.g.*, Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 845 (1935) ("Legal systems, principles, rules, institutions, concepts, and decisions can be understood only as functions of human behavior."). *See also, e.g.*, ROGER COTTERRELL, THE POLITICS OF JURISPRUDENCE: A CRITICAL INTRODUC-

be "good," "just," "fair," or "workable" only if it structures societal relations and resolves disputes well enough to earn the respect and adherence of the public and, thereby, to prevent societal collapse.[23] Throughout history,[24] and across legal systems,[25] theorists

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TION TO LEGAL PHILOSOPHY 114 (1989) ("[L]aw is the essential social technique available to harness coercion to make possible civilized [sic] co-existence of individuals within a society."); *id.* at 141 (analyzing the work of Lon Fuller: "[E]ven enacted law must find its roots in the conditions of human interaction."); *id.* at 229 ("Normative legal theory is . . . an effort to examine seriously how law can gain integrity as the means by which human beings impose reason, to the limits of their ability, on the otherwise chaotic conditions of their social existence."); *see also* John Dewey, *My Philosophy of Law*, in MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS 73, 76 (1941) ("[L]aw is through and through a social phenomenon; social in origin, in purpose or end, and in application."); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 694-95 (2d ed. 1985) ("If law means an organized system of social control, any society of any size and complexity has such a system, and lots of it. As long as the country endures, so will its system of law, coextensive with society itself . . . . The law, after all, is a mirror held up against life."); LON L. FULLER, THE MORALITY OF LAW 74 (rev. ed. 1977) ("Law has here been considered as 'the enterprise of subjecting human conduct to the governance of rules.'"); HART & SACKS, *supra* note 1, at 102 (the state is responsible for "'establishing, maintaining and perfecting the conditions necessary for community life to perform its role in the complete development of man.'"); *id.* at 148 ("Law is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living . . . ."); JOHN RAWLS, A THEORY OF JUSTICE 7 (1971) ("[T]he primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.").

[23] *See, e.g.*, Dan L. Burk & Barbara A. Boczar, *Biotechnology and Tort Liability: A Strategic Industry a Risk*, 55 U. PITT. L. REV. 791, 817 (1994) ("Law . . . involves the 'public ordering of private institutions' and the 'peaceful resolution of human disputes.") (*quoting* Steven Goldberg, *The Central Dogmas of Law and Science*, 36 J. LEGAL EDUC. 371, 372 (1986)) and Steven Goldberg, *The Reluctant Embrace: Law and Science in America*, 75 GEO. L.J. 1341, 1345 (1987)); FRIEDMAN, *supra* note 22, at 18-19 ("Every society governs itself and settles disputes. Every society, then, has a working system of law. . . . when we call law 'archaic,' we mean that the power system of its society is morally out of tune."); GRANT GILMORE, THE AGES OF AMERICAN LAW 1 (1977) ("Ever since the remote day when human beings began to live together in society, official organs of the state have been charged with the responsibility of deciding disputes . . . "); *id.* at 109-10 ("The function of law . . . is to provide a mechanism for the settlement of disputes in the light of broadly conceived principles on whose soundness, it must be assumed, there is a general consensus among us. If the assumption is wrong, if there is no consensus, then we are headed for war, civil strife, and revolution, and the orderly administration of justice will become an irrelevant, nostalgic whimsy until the social fabric had been stitched together again and a new consensus has emerged."); Soia Mentschikoff & Irwin P. Stotzky, *Law—The Last of the Universal Disciplines*, 54 U. CIN. L. REV. 695, 703 (1986) ("[L]aw bears a strong relationship to the ways people act, the ways people are organized, and the ways people use their intellectual and material resources. . . . [L]aw provides the maintenance aspect of order which is a precondition to any complex civilization."); *id.* at 706 ("[T]he most

have employed similar, functional meta-principles as criteria by which to measure how well law accomplishes these tasks.[26] These criteria, which I term "legal-system values,"[27] are that law be predictable, replicable, vertically coherent across time, horizontally coherent across related areas of law, responsive to societal needs and values, responsive to changes in society and in societal values, influential in fostering individual and societal growth and shaping values or morals, and fair and just in individual cases.[28] Some

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basic function of law is to settle disputes well enough so that society does not disintegrate, and so that the people whose law it is will follow its commands.").

[24] *See infra* notes 34- 58.

[25] Although this Article refers primarily to articulations of these legal system values in United States common law tradition, these same values underlie civil law systems, as mentioned *infra* at notes 35, 41, 47, 51, 53. The differences between statutes, common law judicial decisions, and comprehensive civil legal codes properly warrant differences in the manner in which these divergent types of law are applied. *See generally* WILLIAM D. BURDICK, THE PRINCIPLES OF ROMAN LAW (AND THEIR RELATION TO MODERN LAW) vii, 8-9 (1938) (distinguishing civil law, English common law and American law systems; distinguishing civil codes from statutes); Eskridge & Frickey, *Post-Legal Process*, *supra* note 2, at 692 ("Reasoning from a statute is not the same as reasoning from a judicial opinion. A court spells out a principled basis for its decision while legislatures often just offer imperative language and little explanation."); JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF LAW 186-87 (1927 ed.) (distinguishing civil codes from statutes); Mark DeWolfe Howe, *Introduction* xvii in OLIVER WENDELL HOLMES, JR., THE COMMON LAW (Mark DeWolfe Howe ed. 1963) (1881) ("the very process of the common law was experimental and inductive, where that of the Roman law was categorical and deductive."); RICHARD A. POSNER, LAW AND LITERATURE 259 (1990) ("Common law differs from statute law in a way highly pertinent to [interpretation]."); *cf.* CALABRESI, *supra* note 1 (arguing, essentially, that courts should employ common law methods to interpret obsolete statutes).

[26] *See infra* notes 28-53.

[27] This Article avoids the phrase "rule of law" values because that phrase has been used in so many contexts, toward so many conflicting ends, and in so many different formulations that its use here would by confusing.

[28] For other articulations of legal-system values, *see* FULLER, *supra* note 22, at 46-91 ("law's inner morality" requires that laws be general rules, promulgated, non-retroactive, clear, non-contradictory, not impossible for citizens to obey, constant through time, applied congruently with the declared rules); GRAY, *supra* note 25, at 305-07 (problem of morality of law is not only choosing what test, such as "greatest happiness of the greatest number, dictates of conscience, the will of God, the Freedom of Will, and Nature" but also whose good, the community or the larger world); Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 887 (1989) ("Law serves the goals of liberty (because of the predictability made possible by a legal system), equality (because like cases get treated alike in a legal system), substantive fairness (because the legitimate expectations of citizens are protected from disruption), procedural fairness (all get a chance to participate in adjudication), utility (legal systems' deference to the past does not leave decisionmakers always reinventing the wheel) . . . ."); Larry G. Simon, *The Authority of the Framers of the*

commentators might add other values or challenge the definitions of these values. The fundamental arguments advanced in this Article likely would benefit, not suffer, from such refinement. This Article re-integrates legal-system values in statutory interpretation and defines how these values operate in modern interpretive theories. I encourage advocates of competing interpretive models to carry this introduction forward. What is important is not unanimity, but rather, a recognition that some group of functional values (roughly as defined herein), which are significantly broader than the values embodied in democratic theory alone, are relevant to statutory interpretation.[29]

Legal-system values embody consequences that are desirable regardless of the form of law (judicial opinion, statute, civil code, constitution), nature of the legal system (common, civil, combination), or philosophy of law (law as the voice of the governed, command of the sovereign, or expression of high principles of natural law morality). All legal institutions,[30] forms of law,[31] and legal

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Constitution: Can Originalist Interpretation be Justified?, 73 CAL. L. REV. 1482, 1520 (1985) ("The principle [sic] virtues of the rule of law are that like cases are treated alike, that behavior can be chosen on the basis of predictable legal consequences, that the law is relatively stable and changes are reasonably predictable, and that its stability and predictability reduce the costs of enactment, enforcement, and dispute resolution.").

29 Some "other" values that are not expressly listed may fall within or relate closely to values that are listed. For example, the idea that laws should be published, *see* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 9, 11-12 (1974); FULLER, *supra* note 22, at 49-51; GRAY, *supra* note 25, at 163 (civil law), closely relates to predictability by suggesting that the law should be accessible to the public, not simply to the legal experts. The desire for laws that are clear (*see* BURDICK, *supra* note 25, at 33 and FULLER, *supra* note 22, at 63-65), advances similar values. The requirement that laws be applied objectively is a component of what makes law fair, replicable, and predictable. *See* MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 8 (1988). Other "values," such as maximizing wealth, utility or efficiency or fostering human flourishing might be considered aspects of laws' responsiveness to societal values in that they express commentators' particular views of what values society holds dear. *See infra* note 197; GEORGE P. SMITH, III, BIOETHICS AND THE LAW: MEDICAL, SOCIO-LEGAL AND PHILOSOPHICAL DIRECTIONS FOR A BRAVE NEW WORLD 200-01 (1993); Moore, *supra* note 28, at 887; *see also* HART & SACKS, *supra* note 22, at 102; Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1678 (1988).

30 These include legislatures, courts, executive and administrative departments and agencies, administrative tribunals, and the chief executive.

31 Forms of law include constitutions, treaties, statutes, judicial decisions, administrative regulations and rulings, and executive orders.

processes[32] must coalesce to achieve and preserve legal-system values in the legal system as a whole.[33] Thus, while the method used to apply statutes will differ from that used to apply common law, the method employed should preserve legal-system values.

Predictability relates to the ability of courts, legal advisors, and persons affected by the law to determine with a relatively high degree of probability (although rarely with absolute certainty) the likely result in a particular case.[34] Legal theorists stress the importance of predictability,[35] and seek to identify practices that foster

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[32] Legal processes include the legislative, judicial, administrative and executive processes by which law is made and applied.

[33] *See supra* note 25 and accompanying text; *infra* Part III.B. *Cf.* Simon, *supra* note 28, at 1489 (methods of constitutional interpretation must be measured by "what is good and just for individuals and society," including abstract values of democracy, freedom, equality and justice).

[34] *See, e.g.*, BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 33 (1924) ("[L]aw . . . must be satisfied to test the validity of its conclusions by the logic of probabilities rather than the logic of certainty."); *id.* at 44 ("[L]aw [is] that body of principle and dogma which with a reasonable measure of probability may be predicted as the basis for judgment in pending or in future controversies."). *See, e.g., also* Oliver Wendell Holmes, Jr., *The Path of Law*, 10 HARV. L. REV. 457, 457 (1897) ("The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts."); *id.* at 461 ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."). See also KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 6, 16 (1960) (results in individual cases must be reckonable); *id.* at 186, 215-17 (reckonability requires "reasonable regularity" rather than certainty); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 598 (1987) ("[T]he value of predictability is really a question of balancing expected gain against expected loss.").

[35] *See, e.g.*, Burnet v. Coronado Oil and Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J. dissenting) ("[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right."); COTTERRELL, *supra* note 22, at 133, 148, 192, 196-97 (importance of predictability to Franz Neumann, Lon Fuller, John Finnis, Karl Llewellyn, Jerome Frank); *id.* at 227-28 (problem of "predicting how doctrine will be interpreted by judges and other legal authorities faced with the task of applying it in new situations."). *See e.g., also* Holmes, *supra* note 32 (law is concerned more with prediction than morality); LLEWELLYN, *supra* note 34, at 6, 17-18, 178-99, 200-212; Moore, *supra* note 28, at 887; Antonin Scalia, *The Rule of Law As A Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (rule of law provides: consistency and the appearance of consistency, uniformity among the lower courts, predictability or the avoidance of uncertainty, judicial restraint, judicial armor against popular disapproval, separation of matters of law from matters of fact); Schauer, *supra* note 34, at 597-98 (predictability is important in planning and litigation). *See also infra* part III.A (predictability in textualism, originalism, dynamism). *Cf.* BURDICK, *supra* note 25, at 33 (predictability in civil law systems); Mary Ann Glendon, *Comment*, at 102-03 *in* Scalia, Interpretation, *supra* note 2 (struggle in civil law systems to maintain predictability in the face of increasing body of judicial decisions).

predictability.[36] A simple, clear statute might facilitate predictable results. For example, a person can predict that she might be fined if she is caught walking her dog in the park in disregard of an applicable statute that declares "No dogs shall be allowed in the park" and that imposes a fine on any person caught with a dog in the park.[37] Results are not always so easy to predict. For example, the

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[36] Some commentators advocate the use of "rules" to foster predictability. *See, e.g.*, JEREMY BENTHAM, THE THEORY OF LEGISLATION (C.K. Ogden ed. 1987) (advocating increased use of legislation); FULLER, *supra* note 22, at 157-59; LLEWELLYN, *supra* note 34, at 183; Posner, *Primer*, *supra* note 2, at 442 ("Rules can make law simpler, more predictable, more even-handed."); Scalia, *supra* note 35, at 1179; Simon, *supra* note 28, at 1525 (certain and stable rules promote efficiency by reducing costs and protecting reliance interests); Zeppos, *Textualism*, *supra* note 2, at 1635 ("Clear rules protect against arbitrary and capricious action and may provide notice of what is punishable or illegal conduct.").

Others suggest that established traditions and practices of judging or of the legal profession foster predictability. *See* CARDOZO, *supra* note 34 (reasonable predictability rests in the nature of the judicial process, which is constrained by history, tradition, and sociology, and by the belief that, if doctrine does not clearly govern, the judge would defer to the community standards and mores of the times); Cohen, *supra* note 22, at 843 (despite a "large realm of uncertainty in the actual law. . . . actual experience does reveal a significant body of predictable uniformity in the behavior of courts."); Eskridge, *Overriding*, *supra* note 2 (adherence to precedent); Farber, *Legislative Inaction*, *supra* note 2, at 12 n.46 (*stare decisis*); GILMORE, *supra* note 23, at 76-77 (for Justice Cardozo, predictability rests in philosophy, tradition, and sociology because "the judge, as least in a situation where he finds nothing else to guide him, is to take into account the effect of his decision on social or economic conditions."); LLEWELLYN, *supra* note 34, at 19 (listing fourteen aspects of judicial tradition that foster predictability); *id.* at 3-6, 17-61, 122, 198-212, 245, 422-23 (predictability arises from judicial traditions and training); ROSCOE POUND, 2 JURISPRUDENCE 452, 456 (1959) (judicial tradition makes justice "reasonably uniform and predictable."); Schauer, *supra* note 34 (adherence to precedent); Smith, *supra* note 2, at 414 (following precedent and other continuity with the past may promote predictability); *see also* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 (1992) (a rule favoring continuity over change serves predictability).

[37] This example is inspired by Professor H.L.A. Hart's "No vehicles in the park" hypothetical, which has been elaborated by Professor Schauer. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958) (discussing predictability of rules); Schauer, *Formalism*, *supra* note 2. My intentionally simple example probably could be deconstructed in some way. Please bear with it for now; the example assumes that the dog-walker read the statute; understood it; knew that it applied to this park, this dog, this dog-walker, and this time; knew she would be violating it; knew that it was generally enforced (unlike, for example, ordinances prohibiting pedestrians from crossing the street without a green light, which are enforced in some cities but not others); and had no excuse or exigency that might have led her to wonder whether it would be applied. She just walked her dog in flagrant violation of the prohibition. Some variations that may undermine predictability are raised *infra* in the text following this note. The application of different interpretive models to some of these examples is also discussed *infra*.

consequences of applying the "no dogs" statute to the first person caught trying to recover a runaway dog that has broken its leash and bounded into the park, the first person caught driving through the park with a dog in his car, or the first blind person caught traversing the park with her guide dog, are less clear.

Replicability, which is closely related to predictability and rests in fairness and equity, requires consistent results in similar cases and circumstances, but permits different results in dissimilar cases.[38] Thus, if the first person caught dog-walking in the park in flagrant disregard of the statute is fined, then the second person caught dog-walking in the park (with similar knowledge, understanding and intent) should be fined also, without regard to his race, gender, age, or relationship to the superintendent of parks. Nevertheless, according different treatment to the person chasing her runaway dog, the person with a dog in his car, or the blind person accompanied by her guide dog, would not violate replicability if the circumstances were deemed to be sufficiently different. The difficulty, of course, is fixing criteria for determining when different circumstances warrant different results under the statute.

Vertical coherence embodies the notion that particular rules or doctrines of law should not change suddenly and dramatically, but should evolve gradually, growing from their roots and building upon their ancestors.[39] Vertical coherence may also be termed

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38 *See, e.g.*, EISENBERG, *supra* note 29, at 10-12 (replicability is important because much dispute resolution and planning is by legal advice without judicial intervention; courts must use reasoning process that is replicable by lawyers); H.L.A. HART, THE CONCEPT OF LAW 159 (2d ed. 1994) ("[J]ustice is traditionally thought of as maintaining or restoring a *balance* or *proportion*, and its leading precept is often formulated as 'Treat like cases alike'; though we need to add to the latter 'and treat different cases differently.'") (emphasis in original); Moore, *supra* note 28, at 887 ("like cases get treated alike."); Schauer, *supra* note 34, at 595-97 (fairness, in the sense of replicability, requires that courts treat like cases alike); Simon, *supra* note 28, at 1523-25 (equality requires that "instances that are alike in relation to the purpose of the law must be treated alike."). *See infra* Part III.A (replicability in textualism, originalism, dynamism).

39 *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 227 (1986) (horizontal versus vertical consistency of principle); EISENBERG, *supra* note 29, at 47-49 (doctrinal stability is seen in stare decisis which serves support, replicability, objectivity, and reliance; the flip side of reliance is prevention of unfair surprise); *id.* at 49 (the law may be criticized "for failing to reason consistently over time."); ESKRIDGE, *supra* note 1, at 239 (under vertical coherence "the interpreter demonstrates that her interpretation is coherent with authoritative sources situated in the past: the original intent of the enacting legis-

"doctrinal stability."[40] It may be difficult to reconcile statutory law with vertical coherence because statutes often change existing law. Nevertheless, the nature and degree of change may disrupt stability. For example, a "no dogs in the park" statute would not be a shocking break from prior law if concerns for sanitation and the protection of small children had led to earlier statutes requiring that all dogs in a small park in the center of a large city be on leashes and that any person bringing a dog into that park clean up the dog's waste. The same statute might, however, be extremely jarring if it suddenly (and without apparent reason) prohibited dogs in a fifty thousand acre state forest that for generations had been a haven for hunters, fishers, hikers and their dogs.

Horizontal coherence requires that all of the legal rules (and perhaps principles as well) that are in force at any one time be consistent with each other,[41] and that each new rule be crafted

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lature, previous administrative or judicial precedents interpreting the statute, and traditional or customary norms."); Eskridge, *Overriding*, *supra* note 2, at 374 ("A reading of the text is vertically coherent if it is consistent with the statute's legislative history, its original design and purpose, and prior judicial interpretations of the text. . . . The Court desires vertical coherence because it suggests a rooted tradition from which the Court declares law and because citizens rely on the prior authorities in making decisions."); FULLER, *supra* note 22, at 79-81 (constancy of law through time); Simon, *supra* note 28, at 1520 (goal that "law is relatively stable and changes are reasonably predictable."). *See infra* Part III.A (vertical coherence in textualism, originalism, dynamism).

The distinction between vertical and horizontal coherence is suggested by Professors Dworkin and Eskridge. *See* DWORKIN, *supra*, at 227; ESKRIDGE, *supra* note 1, at 239-74; Eskridge, *Overriding*, *supra* note 2, at 373-74.

40 *See* EISENBERG, *supra* note 29, at 47-49.

41 *See, e.g.*, COTTERRELL, *supra* note 22, at 217 ("rational structure or systematic unity of . . . doctrine."); DWORKIN, *supra* note 39 (law as "integrity"); *id.* at 176 (law as integrity involves "a legislative principle, which asks lawmakers to try to make the total set of laws morally coherent, and an adjudicative principle, which instructs that the law be seen as coherent in that way, so far as possible."); *id.* at 184 ("Integrity is flouted . . . whenever a community enacts and enforces different laws . . . which cannot be defended together as expressing a coherent ranking of different principles of justice or fairness or procedural due process."); *id.* at 227 ("Integrity . . . commands a horizontal rather than vertical consistency of principle . . . ."); *id.* at 410-11 (Judges use law as integrity in a way that "unites jurisprudence and adjudication" and "makes the community's legal record the best it can be from the point of view of political morality."); EISENBERG, *supra* note 29, at 44 ("The . . . ideal . . . [is] that all the rules that make up the body of the law should be consistent with one another. Attainment of this ideal promotes predictability and evenhandedness and furthers the legitimacy of the law by demonstrating its formal rationality."); *id.* at 46-47 ("[A] criticism . . . aimed at showing that a legal rule is doctrinally wanting, because it is inconsistent with other legal rules . . . . reflects the ideal of systemic consistency.");

carefully to fit into the existing body of law.[42] Horizontal coherence may also be termed "systemic consistency."[43] For example, the "no dogs" statute might violate horizontal coherence if it were interpreted to prohibit guide dogs notwithstanding another statute that expressly required admittance of guide dogs to all public places.

"Responsivity," or "social congruence,"[44] requires that law be responsive to society and to societal change. The law should embody society's customs, choices, values, or morals,[45] and address so-

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ESKRIDGE, *supra* note 1, at 239 (under horizontal coherence "The statutory interpreter demonstrates that her interpretation is coherent with authorities and norms located in the present: the statute's contemporary purpose, other statutes now in effect and their statutory policies, and current values."); Eskridge, *Overriding*, *supra* note 2, at 374 ("A reading of the text is horizontally coherent if it makes the best sense of the statute as a whole, is consistent with interpretations of similar statutory provisions, and fits with current judicial and legislative policy presumptions . . . . The Court desires horizontal coherence because it makes current statutory law fit together into a seamless web of law and because it believes citizens will understand and accept such law better than checkerboard law."); GRAY, *supra* note 25, at 303 ("[I]t is a good thing in itself that the rules of the Law should be harmonious, and should be extended harmoniously."). *See also* BENTHAM, *supra* note 36, at 150-51 (horizontal coherence through legislation); BURDICK, *supra* note 25, at 33 (horizontal coherence in civil law); COTTERRELL, *supra* note 22, at 171 (analyzing Dworkin's law as integrity); Eskridge, *Statutory Interpretation*, *supra* note 2, at 1549-1550 (same). *See also infra* Part III.A (horizontal coherence in textualism, originalism, and dynamism).

42 *See, e.g.*, Eskridge & Frickey, *Equilibrium*, *supra* note 2, at 29 n.6 ("Stable equilibrium is the common law ideal, best exemplified at the Supreme Court level in admiralty cases. Even when the Court creates new admiralty rules, it is careful to demonstrate the consistency of the new rules with other developments in law and society."); LLEWELLYN, *supra* note 34, at 222 ("*The work of the job in hand, and even more the work of the job at large, must fit and fit into the body and the flavor of The Law.*") (emphasis in original).

43 *See* EISENBERG, *supra* note 29, at 44, 46-47.

44 *See* EISENBERG, *supra* note 29, at 44 ("[T]he body of rules that make up the law should correspond to the body of legal rules that one would arrive at by giving appropriate weight to all applicable social propositions and making the best choices where such propositions collide. Attainment of this ideal helps assure that disputes will be resolved under, and law will be based upon, the society's prevailing standards; harmonizes legal outcomes with the reasonable expectations of private actors; and furthers the legitimacy of the law by demonstrating its substantive rationality. Call this the ideal of social congruence."); *id.* at 46-47 (Criticism that a rule is "socially wanting, because it fails to give appropriate weight to applicable moral norms, policies, and experience. . . . reflects the ideal of social congruence.").

45 *See* EISENBERG, supra note 29, at 44, 46-47; *see, e.g.*, CALABRESI, *supra* note 1, at 51 (object of lawmaking is consistent treatment, while allowing majority preferences to prevail); BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 37 (1928) ("Law accepts as the pattern of its justice the morality of the community whose conduct is assumes to regulate."); Cohen, *supra* note 22, at 843 ("A truly realistic theory of judi-

ciety's needs.[46] For example, the statute prohibiting dogs in the city park might serve society's need for a safe and clean environment. The statute prohibiting dogs in the forest might serve to prevent the spread of rabies from the forest's wolves to the local dogs.

The law also must adapt to changes in society (such as new technology) and in social values (such as evolving views on controversial or divisive issues).[47] For example, at some time in the past

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cial decisions must conceive every decision as . . . a function of social forces . . . a product of social determinants and an index of social consequences."); COTTERRELL, *supra* note 22, at 25 ("The authority of [common] law is seen as a traditional authority. . . . It is the product of the community grounded in history."); *id.* at 27 ("The authority or legitimacy of common law . . . was seen as residing not in the political system but in the community."); *id.* at 28 ("The usual way of conceptualizing this apparently unchanging inheritance in classical common law thought is as *custom*"; in a sense, society *was* the structure of customs, relations, and obligations articulated in legal knowledge.) (emphasis in original); *id.* at 39, 42 (in historical jurisprudence, law is rooted in custom and "the common consciousness of the people," which evolves spontaneously as the culture evolves); *id.* at 154 (in sociological jurisprudence, the values that drive law are not timeless and universal, but are drawn from the time, place and particular legal system); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 67 (1977) ("If a theory of law is to provide a basis for judicial duty, then the principles it sets out must try to *justify* the settled rules by identifying the political or moral concerns and traditions of the community which . . . support the rules.") (emphasis in original); HOLMES, *supra* note 25, at, 36 ("The first requirement of a sound body of law is, that is should correspond with the actual feelings and demands of the community, whether right or wrong."); GRAY, *supra* note 25, at 282-301 (custom as a source of law). *Cf.* BURDICK, *supra* note 25, at 76, 181-83 (civil law rooted in customs and usages; unwritten custom and usage is as binding as written law because both are approved by the people). *See infra* Part III.A (societal values in textualism, originalism, dynamism).

[46] *See, e.g.*, HOLMES, *supra* note 25, at 5 ("The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed."); Holmes, *supra* note 34, at 469 (law has social ends; a rule is not justifiable merely because it has been handed down through history); *id.* at 474 ("I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them."). *See also, e.g.*, Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).The sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law; for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument.
Id. at 609-10.

[47] *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 825 (1991) ("new procedures and new remedies to meet felt needs."); CALABRESI, *supra* note 1 (courts should draw upon

many persons with physical disabilities were "cared for" (at home, in institutions, or by personal assistants). Today's independent living movement, however, emphasizes giving persons with disabilities the tools to live independently outside of institutional care settings. As society's understandings and attitudes change, an old law prohibiting all dogs in the park may be amended to exempt guide dogs.

Some theorists also argue that the law is, or should be, used to create a dialogue that will foster individual and societal growth (economic, psychological or moral), and shape social values and morals, particularly in times of political or social turmoil.[48] By defi-

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common law processes and statutory sources to renovate and update statutes that could not be passed today); COTTERRELL, *supra* note 22, at 127 ("key questions about how law changes remain apparently impossible to address in modern positivist theory."); *id.* at 156-58 (sociological jurisprudence permits common law to adjust to changes in society). *See also, e.g.*, JEROME FRANK, LAW AND THE MODERN MIND 6 (1930) ("Our law would be strait-jacketed were not the courts . . . constantly overhauling the law and adapting it to the realities of ever-changing social, industrial and political conditions; although changes cannot be made lightly, yet law must be more or less impermanent, experimental and therefore not nicely calculable. *Much of the uncertainty of law is not an unfortunate accident; it is of immense social value.*") (emphasis in original); FRIEDMAN, *supra* note 22, at 18-19 ("[W]hen we call law 'archaic,' we mean that the power system of its society is morally out of tune."); *id.* at 694-95. *See also* GILMORE, *supra* note 23, at 14 ("[T]he society we live in continues to evolve and change - in response to technological developments, to shifts in patterns of moral or religious belief, to the growth or decline of population, and so on. The process by which a society accommodates to change without abandoning its fundamental structure is what we mean by law."); *id.* at 110 ("[T]he mechanism which the law provides is designed to insure that our institutions adjust to change, which is inevitable, in a continuing process which will be orderly, gradual, and to the extent that such a thing is possible in human affairs, rational."). *See also* HOLMES, *supra* note 25, at 32 ("The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow."); Abraham Lincoln, Notes of Argument in Law Case, 15 June 1858, in Collected Works of Abraham Lincoln 2:459 (Roy P. Basler ed. 1953) ("*[L]egislation* and *adjudication* must follow, and conform to, the progress of society.") (emphasis in original). *See also infra* note 78 (legislation as a means of keeping law current). *Cf.* GRAY, *supra* note 25, at 190-93 & nn.2-3 (civil law statutes can be overridden by custom and usage); *id.* at 193 (English statutes cannot be abrogated by disuse, but must be repealed).

[48] *See, e.g., infra* notes 49, 176-184; William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View From the Court*, 100 HARV. L. REV. 313, 331 (1986) ("I am convinced that law can be a vital engine not merely of change but of other civilizing change. That is because law, when it merits the synonym justice, is based on reason and insight. Decisional law evolves as litigants and judges develop a better understanding of the world in which we live."); COTTERRELL, *supra* note 22, at 127

nition, there is a tension between using law as a mirror to reflect society's current values and using law as a magnet to pull society forward toward new and "better" values advocated by a minority of the citizens. This tension may be expressed (in somewhat oversimplified terms) as a matter of timing. For example, viewing law as a mirror, advocates of a minority view might first seek to change society's understanding of disabilities (or, to use a historic example, of racial segregation), then seek to change the law to reflect society's changed views. Alternatively, viewing law as a magnet, advocates of a minority view might instead demand changes in the law, hoping that the debate will change society's views, but recognizing that the laws they demand will force society to accommodate the needs of persons with disabilities (or to desegregate) before a majority of citizens has come to accept these values. It is, of course, impossible to know in advance what values are desirable or whether society's views will change to reflect the minority's views.[49] These tensions, and the difficulty of relying exclusively upon the mirror or the magnet, are apparent when individuals' or groups' values match the majority's view on some issues and the minority's view on others. For example, at one end of the moral-political spectrum, a minority demands laws prohibiting abortion, even though polls show that a majority of Americans favor reproductive choice. At the other end of the spectrum, a minority demands recognition of

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("Natural law theory seems to become significant in debate at times when political and legal authority are under challenge . . . . In times of political turmoil or rapid political change . . . legal understanding seems to demand not merely technical guidance about the nature of valid law but moral or political theory. Questions as to what rules are valid as law become elements of ideological struggle."); WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 421 (2d ed. 1995) [hereinafter LEGISLATION] ("Law's agenda should not be determinacy, objectivity, or certainty (the legal process, pluralist hallmarks of statutory law), but rather 'edification.' . . . . [T]he main value of legal rules is constitutive: The formulation of rules is how we create and express shared values."); Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 15 (1986) ("law appears as generative of public values as it is dependent upon them."); Simon, *supra* note 28, at 1529-30 (value of change and unpredictability in law in maintaining society's openness to change and promoting individual growth, flexibility and creativity); *see also infra* note 191.

49 The reference to law as a "mirror" draws upon Justice Holmes' often-cited reference to law as "a magic mirror, [in which] we see reflected, not only our own lives, but the lives of all men that have been!" Oliver Wendell Holmes, Jr., Address to Suffolk Bar Association Dinner entitled "The Law" (Feb. 5, 1885). Legal historian Kermit Hall examines the role of law as a mirror of society in KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY (1989).

same-sex marriages, even though polls show that a majority of citizens oppose same-sex marriage. Religious groups may argue that moral criteria show that the majority is correct in opposing same-sex marriage, but wrong in favoring reproductive freedom, whereas civil rights groups may argue that individual freedom and equal rights criteria show that the majority is correct in favoring reproductive freedom, but wrong in opposing same-sex marriage.

Finally, society expects the law to produce results that are fair and just in individual cases. For purposes of this discussion, "fairness" is defined primarily by procedural standards such as notice and due process.[50] A procedural view of fairness emphasizes that, if the law's consequences are known and the laws are applied neutrally, persons affected can take steps to avoid violating the law. Thus, the "no dogs" statute is fair if it is applied without bias to anyone bringing a dog into the park. Procedural fairness may not, however, ensure substantive "justice," which, for purposes of this discussion, focuses on consequences.[51] The distinction between

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50 *See, e.g., Lassiter v. Dep't of Social Services*, 452 U.S. 18, 50 (1981); *McNabb v. United States*, 318 U.S. 332, 347 (1943) (Frankfurter, J.) ("The history of liberty has largely been the history of observance of procedural safeguards."); ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 123 (1975) ("[T]he highest morality almost always is the morality of process."); FULLER, *supra* note 22, at 157-59 (laws must be known and predictable; but this alone does not make laws moral); Fuller, *supra* note 17, at 631-37 (opinion of Keen, J.); HART & SACKS, *supra* note 1, at 153-54; Moore, *supra* note 28, at 887 ("[S]ubstantive fairness (. . . the legitimate expectations of citizens are protected from disruption), procedural fairness (all get a chance to participate in adjudication)").Procedural safeguards, such as clear notice, are deemed particularly critical in criminal cases because the consequences of a criminal conviction are too severe to permit the enforcement of vague laws under which defendant is not on clear notice that his conduct would be a violation. *See* CALABRESI, *supra* note 1, at 74-78; HART & SACKS, *supra* note 1, at 1374, 1376-77.

51 *Cf.* Amy Gutmann, *Can Virtue Be Taught To Lawyers?*, 45 STAN. L. REV. 1759, 1762 (1993) (lawyers "cannot know if and when they should be advocates without thinking about the larger social purposes of law, in particular about the central place of law in serving social justice in a constitutional democracy."); Blatt, *supra* note 2, at 799 ("Formal justice is associated with rules that are based on ascertainable facts, restrain official arbitrariness, and provide certainty. Substantive justice is associated with standards that direct courts to assess a particular fact situation in terms of the overall objectives of the legal order."); DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY 20 (1983) ("There is never a 'correct legal solution' that is other than the correct ethical and political solution to that legal problem."); *see also* Robert Brookins, *Mixed-Motives, Title VII, and Removing Sexism from Employment: The Reality and the Rhetoric*, 59 ALB. L. REV. 1, 131 (1995) ("law's broad goal of dispensing justice."); BURDICK, *supra* note 25, at 180-181 (distinguishing "law" and "justice" in Roman jurisprudence); DWORKIN, *supra* note 39, at 177 and 225 ("[P]ropositions of

fairness and justice is particularly important if the law or legal processes themselves might be biased or non-neutral in operation. This is, of course, one issue raised by critical legal scholars, who do not trust procedure to work in a fair and unbiased fashion to achieve substantive justice.[52] In the "no dogs" hypothetical, the law seems to be neutral (it simply prohibits all dogs) and seems to be capable of unbiased application. If the law is applied to prohibit guide dogs, however, non-neutrality may arise from the law's disparate impact on persons with disabilities. Although the law creates a mere inconvenience for able-bodied citizens, it may impair a blind person's freedom to live without assistance, particularly if that person must walk through the park several times each day to travel from one area of the city to another in the course of her job.

The eight values defined above reflect four core ideals; namely, doctrinal stability (or vertical coherence), systemic consistency (or horizontal coherence), social congruence (or responsivity)[53] and social value formation. At the intersection of these ideals lie three core objectives, namely, predictability, replicability, and

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law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."); Margaret G. Farrell, *Daubert v. Merrill Dow Pharmaceutical, Inc.: Epistemiology and Legal Process*, 15 CARDOZO L. REV. 2183, 2204-2205 (1994) ("Law is an effort to define the rightness of things . . . . The goal of law is not truth, but justice."); Fuller, *supra* note 16, at 637 (opinion of Handy, J.); GRAY, *supra* note 25, at 309 ("[N]o ideas, however just, that its courts refuse to follow are Law, and all rules which they follow and to which it enforces obedience are Law."); Mentschikoff & Stotzky, *supra* note 23, at 706-707 ("The aspirational aspects of law reflect the values we hold dear in our society, such as truth, freedom, and justice."); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 876 (1930) ("[T]he avowed and ultimate purposes of all statutes, because of all law, are justice and security."); Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 AMERICAN BAR ASSOCIATION REPORT 395, 399 (1906) ("Justice, which is the end of law, is the ideal compromise between the activities of each and the activities of all in a crowded world."); Calvin Woodard, *Thoughts on the Interplay Between Morality and Law in Modern Legal Thought*, 64 NOTRE DAME L. REV. 784, 799 (1989) (distinguishing corrective and distributive justice).

52 On critical legal studies, *see generally infra* note 181.

53 *Cf.* EISENBERG, *supra* note 29, at 43-49 (two common law models: "double coherence" model is based upon social congruence and systemic consistency; second model emphasizes doctrinal stability and "real world" considerations). Professor Eisenberg's common law values are strikingly similar to the "canons of good law" that Professor Bryce applied to Roman civil law. *See* BURDICK, *supra* note 25, at 32-33 (quoting Oxford Professor James Bryce: "No rules could better conform to the three canons of good law, that it should be definite, self-consistent, and delicately adapted to the practical needs of society."). *See also* Glendon, *supra* note 35, at 110 (German Constitu-

justice and fairness in individual cases.[54] The "easy" case is one is which the developed doctrine (doctrinal stability) points to a result that is consistent with surrounding areas of law (systemic consistency), and with both prevailing (social congruence) and desirable (social value formation) social values, morals, and choices. In such a case, the doctrine is stable and the results will be predictable, replicable, and acceptable by society as fair and just. "Hard" cases, which raise questions of justice and predictability, arise when the result seemingly dictated by existing doctrine is inconsistent with either the surrounding body of law (and thus violates systemic consistency), or society's prevailing norms (and thus violates social congruence), or some higher ideal or moral of justice (and thus violates the value formation ideal), or all three. In such a case, a result that is consistent with established, clearly defined doctrinal rules might be considered "fair," because the person affected had an opportunity to know the rule, and "predictable" in a "fairness" sense because the result was foreseeable.[55] Nevertheless, the result will not be considered to be either "just" in the individual case, or "predictable" in a "justice" sense because society may expect or urge a different result, notwithstanding the apparent letter of the law. For example, slavery is an easy case today because the law, predominating social values and higher ideals all oppose and prohibit slavery, but was a harder case when higher ideals opposed slavery but the law and/or prevailing social views permitted slavery. In contrast, the death penalty remains a hard case because, even if it is "legal" and may be supported by the majority of citizens, opponents assert that it violates higher ideals of justice and morality.[56]

The legal system is in a continual struggle to balance the in-

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tional Court's skill in maintaining continuity, predictability and stability without losing the ability to accommodate social and economic change).

[54] That is, doctrinal stability, systemic consistency, social congruence and social value formation are desirable because they foster results that are predictable, replicable, just and fair.

[55] *Cf.* EISENBERG, *supra* note 29, at 3 ("Easy [common law] cases are not cases that are controlled by relatively specific doctrinal rules, but cases in which a relevant doctrinal rule is supported by applicable social propositions."); *id.* at 49 (one may conclude that the court acted properly under doctrinal stability in applying a rule even if the rule does not satisfy social congruence and systemic consistency); Fuller, *supra* note 17, at 631 (opinion of Keen, J.); Symposium, *supra* note 17, at 1790 (opinion of Greene, J.).

[56] The specifics of how to achieve racial "equality" and "justice" also remain hard cases today.

herent tensions among these values. The law must be flexible enough to adjust to changes in society and achieve fair and just results in individual cases, but rigid enough to ensure predictability, replicability and doctrinal stability. This tension has been characterized as a struggle for order versus justice, or stability versus change.[57] The history of law has been the history of balancing these tensions.[58]

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[57] *See, e.g.*, CALABRESI, *supra* note 1, at 3-5 (continuity and change in the common law tradition); CARDOZO, *supra* note 34, at 16-17 ("[W]hen certainty is attained, we must remember that it is not the only good; that we can buy it at too high a price; that there is danger in perpetual quiescence as well as in perpetual motion; and that a compromise must be found in a principle of growth."); COTTERRELL, *supra* note 22, at 217 ("law" as stability, "politics" as means for change); *id.* at 227 (tension between stability and change); *id.* at 234 (impetus for change is in social, economic and political conditions); EISENBERG, *supra* note 29, at 44 (coherence of social congruence and systemic consistency may not be achievable); Frickey, *supra* note 2, at 1201 ("All public law suffers from an inherent tension between formal rules and justice in individual cases."); John Hasnas, *The Myth of the Rule of Law*, 1995 WIS. L. REV. 199, 213 (1995) ("The goal of the law is to provide a social environment which is both orderly and just. Unfortunately these two purposes are always in tension. For the more definite and rigidly-determined the rules of law become, the less the legal system is able to do justice to the individual. Thus, if the law were fully determinate, it would have no ability to consider the equities of the particular case. This is why even if we could reform the law to make it wholly definite and consistent, we should not."); HOLMES, *supra* note 25, at 32 ("The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow."); Hutchinson & Morgan, *supra* note 2, at 1769-70 ("formal justice" that requires like cases to be treated alike may be challenged by substantive justice, which requires that a bad result in one case should not be perpetuated in a new case); ROBERT E. KEETON, VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW 24 (1969) ("The judiciary is, . . . on the one hand a guardian of the law's continuity, stability, evenhandedness, and predictability and on the other hand a participant in creative evolution that keeps law contemporary and viable."); ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1923) ("Law must be stable and yet it cannot stand still."). *See also, e.g.*, Jennifer L. Radner, *Phone, Fax and Frustration: Electronic Commercial Speech and Nuisance Law*, 42 EMORY L.J. 359, 375-76 (1993) ("[O]ne goal of law is to balance stability and change in society."); Schauer, *Precedent*, *supra* note 34, at 589-91 (reliance on precedent is a risk averse practice that foregoes the possibility of an optimal result in a particular case in favor of reducing the possibility of bad results in a number of cases); *id.* at 602 ("stability comes only by giving up some of our flexibility."); *id.* at 604-05 (legal systems need some institutions that are creative and risktaking, others that are cautious, predictable and risk averse; precedent belongs to latter); Smith, *supra* note 2, at 438-39 (order versus sufficient indeterminacy to permit fact-responsive flexibility); G. EDWARD WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT (1978).

[58] This Article does not purport to resolve this tension. It seeks merely to re-integrate legal-system values and statutory interpretation and to formulate a preliminary conception of the relationship between legal-system values and statutory interpreta-

The next section suggests that these legal-system values have been obscured by the rhetoric of "democratic legitimacy" that shrouds statutory interpretation.

B. *From Legal-System Values to Democratic Legitimacy*

The United States legal system embraces both representative democracy[59] and common law traditions.[60] The statutory interpretation debate is rooted in the clash between these paradigms. Statutes are critical to representative democracy's notion of popular sovereignty, under which an elected legislature makes laws as the representative of the people.[61] Statutes create a challenge, however, for judges who are steeped in the common law traditions of stability, continuity, and coherence that come from the slow, incremental, case-by-case evolution of the law.[62]

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tion. The underlying balance among legal-system values will remain a driving force in the debate concerning the growth of law. *See infra* Part III.B.

59 *See* U.S. CONST. art. I, § 1 (legislative power vested in Congress); § 2 (House of Representatives elected by the people); § 3 and amend. XVII (senators elected by the people), art. II, § 1 (President elected by the people). *See generally* ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA ch. VIII, IX, 180 (1945 Henry Reeve text, as revised by Francis Bowen and corrected by Phillips Bradley) (1835) ("In America the people appoint the legislative and executive power . . . . The institutions are democratic, not only in their principles, but in all their consequences; and the people elect their representatives *directly*, . . . in order to ensure their dependence. The people are therefore the real directing power.") (emphasis in original); *see also infra* note 80.

60 *See generally*, CALABRESI, *supra* note 1; CARDOZO, *supra* note 34; BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); COTTERRELL, *supra* note 22; EISENBERG, *supra* note 29; FRIEDMAN, *supra* note 22; GILMORE, *supra* note 23; GRAY, *supra* note 25; Harry W. Jones, *The Common Law in the United States: English Themes and American Variations*, in POLITICAL SEPARATION AND LEGAL CONTINUITY (Harry Jones ed. 1976); HOLMES, *supra* note 25; LLEWELLYN, *supra* note 34; WHITE, *supra* note 57.

61 *See supra* note 59 and accompanying text.

62 *See, e.g.*, CALABRESI, *supra* note 1, at 73 (growth of common law through slow, conservative, judicial lawmaking); COTTERRELL, *supra* note 22, at 28, 44, 48, 106 (common law emphasizes continuity over change, gradual pace of development, piecemeal case-by-case development); GILMORE, *supra* note 23, at 5 ("Blackstone's celebration of the common law of England glorified the past: without quite knowing what we were about, he said, we have somehow achieved the perfection of reason. Let us preserve, unchanged, the estate which we have been lucky enough to inherit. Let us avoid any attempt at reform - either legislative or judicial - since the attempt to make incidental changes in an already perfect system can lead only to harm in ways which will be beyond the comprehension of even the most well-meaning and far-sighted innovators."); LLEWELLYN, *supra* note 34, at 40 (common law resists change). *See also supra* notes 39-40 (doctrinal stability); notes 57-58 (tension between stability and change); *infra* notes 75-78 (common law rigidity and legislative change); notes 81-82 (statutes may change common law); note 89 and accompanying text.

From the time of independence until the early 1900s, a "common law" perspective dominated United States legal philosophy. In the late 1700s and early 1800s, the newly independent states borrowed the common law from England and adapted and reworked it to suit their particular needs.[63] Professor Llewellyn lauded this period's "grand style," in which strong courts balanced order and justice by pursuing equity and good results in individual cases while also respecting precedent and demonstrating how each new decision fits into the existing law.[64] By the mid-1800s, however, a wild proliferation of cases, a dearth of digests, and a yearning for certainty contributed to the growth of formalism and to calls for increased codification of common law rules.[65]

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63 *See* Jones, *supra* note 60, at 91; FRIEDMAN, *supra* note 22, at 107-15 (adoption of common law, selective borrowing from English law); *id.* at 323-24 (publication of first case reports in late 1700s and early 1800s cemented common law and was accompanied by hope that American common law would grow out of cases); *id.* at 325 (publication of cases allowed states to develop their own common law and to draw upon other states' law to develop a vast, uniform common law); *id.* at 326-33 (publication of cases was soon followed by publication of treatises).

Earlier colonial statutes were primarily collections of rules borrowed from other jurisdictions, rather than comprehensive civil legal codes. *See* FRIEDMAN, *supra* note 22, at 90-93; GILMORE, *supra* note 23, at 5, 38-55. Several commentators have suggested that the adoption of the common law rather than civil law in the United States was by happenstance, based largely on the relatively wide availability of English precedents and Blackstone's COMMENTARIES and the relative scarcity of civil law sources in the English language. *See also* GILMORE, *supra* note 23, at 19-20; FRIEDMAN, *supra* note 22 at 93, 102, 26; BURDICK, *supra* note 25, at 35-37. Louisiana, whose citizens generally spoke French, adopted a civil code based on French models. *See* GILMORE, *supra* note 23, at 20-21.

64 *See* LLEWELLYN, *supra* note 34, at 36-37, 223 (slow and incremental growth of common law developed in Grand Style); *id.* at 35-45 (describing the Grand Style); *id.* at 38 (Grand Style balanced certainty and justice). *See also* CALABRESI, *supra* note 1, at 3, 4 (nineteenth century approach to problem of continuity and change was to permit courts to play the dominant role; legislative role was mostly revisionary); FRIEDMAN, *supra* note 22, at 398 ("grand style" was a period of activist judges, who embraced equity and freedom from jury); GILMORE, *supra* note 23, at 34-35 (under pre-civil war policy-oriented jurisprudence, federal courts took into account judicial decisions, scholarly literature, and social and economic consequences).

65 *See* CALABRESI, *supra* note 1, at 247 (American Law Institute born of desire to reduce uncertainty and complexity of law; led to increased use of codes and statutes); FRIEDMAN, *supra* note 22, at 622 (Llewellyn's grand style, characterized by "wisdom-in-result," was replaced by formalism after 1900); *id.* at 409-10 (mid-1800s saw the publication of cases and creation of digests, but no real effort to collect and organize the jumble of statutory law); *id.* at 383-84 (1850 to 1900, formalism increased). *See also* GILMORE, *supra* note 23, at 64 (to formalists: "The idea of a body of law, fixed for all time and invested with an almost supernatural authority, is irresistibly attractive."); *id.* at 12 (post-civil war through World War I characterized by formalism); *id.* at ch. 3, 41-

Nevertheless, even as the popularity of statutes increased, proponents of both grand and formal styles continued to view statutes from a common law perspective; that is, primarily as a means of preserving the common law by organizing, clarifying and supplementing its rules and principles.[66] Concerned that statutes' invasive rules could undermine law's stability (and, perhaps, judge's power) by discarding common law traditions in favor of the whims of temporary legislative majorities, courts attempted to blunt the impact of statutes by weaving them gently into the fabric of common law.[67] A variety of techniques served this purpose quite well:

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67 (formalism resulted from search for fundamental rules that would embody entire fields of law, guide specific cases, and not change); *id.* at 59 (by late 1800s, lawyers were overwhelmed by a vast array of published opinions in precedent-based largely non-statutory system); *id.* at 69-71 (beginnings of codification in 1900s with commercial law statutes promulgated by National Conference of Commissioners of Uniform State Laws; willingness to embrace statutes for their certainty rather than attempting to integrate inconsistent case law). *See* SCALIA, INTERPRETATION, *supra* note 2, at 10-11 (nineteenth century codifications avoid common law pitfalls of unpredictable, retroactive law).

66 *See, e.g.*, CALABRESI, *supra* note 1, at 83-84 (nineteenth century codes codified common law; relatively easy to accept judicial common law role in interpretation; restatements were given the same force as the long-standing precedents they collected). *See also, e.g.*, FRIEDMAN, *supra* note 22, at 676 (restatements of 1920s and 1930s sought to reduce common law to "simpler but more systematic form;" restatements were "arrangements of principles and rules (the black-letter law) . . . . basically, virginally clean of any notion that rules had social or economic consequences."); *id.* at 405-08 (early codes reflected existing law; reform was not substantial change but organization of law into accessible format). *See also* GILMORE, *supra* note 23, at 15 (progressive codification; statutes restate common law); *id.* at 71-73 (codes of the early 1900s enshrined common law, purged of impurities of bad decisions; followed by restatements which did the same in the 1920s); LEGISLATION, *supra* note 48, at 515-31.

67 *See* FRIEDMAN, *supra* note 22, at 22 ("For a long time, the proud judges looked at statutes with great suspicion. Statutes were unwelcome intrusions on the law, and were treated accordingly."); Gonzalez, *supra* note 2, at 619 ("As a result, [of interpretive devices designed to narrow the impact of statutes] much of American law in the nineteenth century was shaped by the slow, accretional, decentralized common law method."); HURST, *supra* note 1, at 41-42 ([N]ineteenth-century decisions were likely to treat a statute as an isolated item. . . . From about 1820 to 1890 the growth of common law captured the ambition and imagination of judges and legal writers to the extent that they tended to identify this section as the true law compared with which legislation was marginal, exceptional, and indeed intrusive. They often expressed this attitude in unsympathetic reading of statutes, especially by invoking canons of construction which by their vagueness and diversity enlarged the judges' own freedom of choosing policy."); LEGISLATION, *supra* note 48, at 385 (late nineteenth century "common law formalists" saw common law as "a relatively closed, rational, objective system which brooked minimal interference from half-baked statutory trespassers."); Peter L. Strauss, *When The Judge Is Not The Primary Official With Responsibility To Read: Agency Interpretation And The Problem Of Legislative History*, 66 CHI.-KENT L. REV. 321, 341-42

"clear statement rules" taught courts to interpret statutes as consistent with the pre-existing common law absent an unambiguous statutory directive to change the common law;[68] a similar maxim urged courts to construe narrowly statutes "in derogation" of the common law;[69] formalist techniques limited statutes to their precise words;[70] some interpreters restricted statutes by viewing them not as "Law," but rather, as discrete bits of law's raw material, similar to judicial decisions, to be considered together with prior law and contemporary circumstances in deciding particular cases;[71] even the well-known "mischief" rule approached statutes from a common law perspective, urging courts to construe statutes as, essentially, gap-filling devices designed to alleviate harms not ade-

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(1990) (common law courts resisted statutory law's intrusion upon common law's "elegant uniformity"); *see also* Glendon, *supra* note 35, at 97 (English courts traditionally blended statutes into case law).

The ancient pedigree of the tension between common law and the invasion of statutes is apparent in Professor Burdick's reference to a 1557 book, "The Pleas of the Crown," in which Sir William Staunford quoted Justice Bracton, from the mid-thirteenth century, and Britton, from around 1300, to show what the common law was "before" statutes changed it. BURDICK, *supra* note 25, at 71-73, 81.

68 *See* Blatt, *supra* note 2, at 819-21; CALABRESI, *supra* note 1, at 83; HART & SACKS, *supra* note 1, at 137 (clear statement rule "forbids a court to understand the legislature as directing a departure from a generally prevailing principle or policy of the law unless it does so clearly.").

69 *See* Blatt, *supra* note 2, at 818 ("Statutes in derogation of the common law are to be narrowly construed."); 3 NORMAN J. SINGER, SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION § 61.01, at 172 (5th ed. 1992) ("[S]tatutes in derogation of the common law will be strictly construed . . . ."); Gonzalez, *supra* note 2, at 619 & n. 140 (same); LEGISLATION, *supra* note 48, at 385 (same, *citing* Blackstone's COMMENTARIES); GILMORE, *supra* note 23, at 62 ("Change can only be legislative and even legislative change will be treated with a wary and hostile distrust. A statute in derogation of the common law - and what statute is not? - will be strictly construed even if it cannot be set aside on constitutional grounds as beyond the power of the legislature to enact.").

70 *See* LLEWELLYN, *supra* note 34, at 39 (formal style saw statutes as invaders in common law); *id.* at 373-4 (formal style limits or eviscerates statutes); *id.* at 38, 39 (grand style and strict construction limit statutes).

71 *See* GRAY, *supra* note 25, at 124-25 (all law is judge made); *id.* at 170 ("It may be urged that if the Law of a society be the body of rules applied by its courts, then statutes should be considered as being part of the law itself, and not merely as being a source of the Law; that they are rules to be applied by the courts directly, and should not be regarded merely as fountains from which the courts derive their own rules . . . . And if statutes interpreted themselves, this would be true; but statutes do not interpret themselves; their meaning is declared by the courts, and *it is with the meaning declared by the courts, and with no other meaning, that they are imposed upon the community as Law.*") (emphasis in original); Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385 (1908). *See also* CALABRESI, *supra* note 1 (developing theory to overturn obsolete statutes using common law techniques).

quately addressed by the common law.[72]

Early on, when statutes simply collected, organized, clarified, and codified common law rules,[73] or covered distinct issues in the vast body of common law,[74] these tactics were more or less satisfactory. By the 1930s, however, three closely related factors had sown the seeds for the shift from a common-law-centered philosophy of statutory interpretation to a statute-centered philosophy of interpretation.

First, it had become clear to many that the common law simply could not keep pace. It moved too slowly to respond adequately to rapidly changing social needs and values.[75]

Second, the classical common law vision saw law as a pre-existing set of norms or principles (rooted in community needs and values, and embodied in custom, tradition, and common consciousness) that judges merely discovered, articulated and implemented.[76] The constitutional vision sees law as the articulation of

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[72] *See* Heydon's Case, Exchequer, 1584 30 Co. 7a, 76 Eng. Rep. 637 (ask first, what was the common law before the statute, what was the "mischief" for which the common law did not provide, what remedy does the statute provide, what is the "true reason" for the remedy, and how should the statute be enforced to "suppress the mischief, and advance the remedy."); 1 WILLIAM BLACKSTONE, COMMENTARIES 87 (1765) (for remedial statutes, consider "the old law, the mischief, and the remedy."); HART & SACKS, *supra* note 1, at 1111-1380.

[73] *See supra* notes 64, 66 and accompanying text.

[74] *See, e.g.*, CALABRESI, *supra* note 1, at 3, 184 n.1; GILMORE, *supra* note 23, at 27-28; *see also* DE TOCQUEVILLE, *supra* note 59, at 264 n.1, 281-82 (early to mid-1800's, federal legislature concerned primarily with international affairs)..

[75] *See, e.g.*, CALABRESI, *supra* note 1, at 5 (common law methods of slow, incremental development were not responsive to needs of twentieth century for greater structure and immediacy in law); COTTERRELL, *supra* note 22, at 33 (Common law thought could not accomodate explicit theory of societal or cultural change and therefore emphasized continuity rather than change.); *id.* at 43-44 (in the mid-nineteenth century Sir Henry Maine identified three means by which law could follow social change: "legal fictions (maintenance of legal forms while concealing the fact of their operation in new ways), equity . . . and legislation."). *See also, e.g.*, FRIEDMAN, *supra* note 22, at 22 ("What Parliament can do in a month's intensive work, a court can do only over the years - and never systematically, since the common law does not look kindly on hypothetical or future cases. It confines itself to actual disputes."); *id.* at 22 (common law adherence to pre-existing principle simply could not effect certain kinds of change, only legislature can); *id.* at 674, 675 (law reform). *See also* LLEWELLYN, *supra* note 34, at 40 (common law opposed to change; its inability to deal with social changes led to reduced reckonability).

[76] *See, e.g.*, COTTERRELL, *supra* note 22, at 25 (In classical common law thought: "[t]he authority of law is seen as a traditional authority. The judge expresses a part of the total, immanent wisdom of law which is assumed to be already existent before his decision. The judge works from within the law which is 'the repository of the experi-

society's needs and choices through deliberate lawmaking by democratic mechanisms and institutions.[77] The tension between these competing visions, which had simmered quietly beneath the surface of United States legal theory, boiled over under growing pressure to use law as a barometer of modern society and an engine for ordering social relations and driving social change.[78]

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ence of the community over the ages' . . . . Thus, even though he may reach a decision on a legal problem never before addressed by a common law court, he does so not as an original author of new legal ideas but as a representative of a collective wisdom greater than his own. He interprets and applies the law but does not create it, for the law has no individual authors."). *See also id.* at 27 (judge is representative of the community); *id.* at 46-47 (common law did not require citizen participation directly or through democratic institutions; thus legislation had no greater claim to legitimacy than judge-made law); *id.* at 150 (classical common law thought saw "legal process not as purposive, innovative and creative, but as passive, responsive and evolutionary."); GILMORE, *supra* note 23, at 61-62 (post-civil war courts accepted law as closed logical system; courts' job is to discover and state, not create, law); SCALIA, INTERPRETATION, supra note 2, at 4.

77 *See supra* note 59 and accompanying text; *infra* note 88 and accompanying text; *see also* COTTERRELL, *supra* note 22, at 37 (classical common law theory tension between judge-declared law and legislation); *id.* at 40 (legislation as deliberate lawmaking); *id.* at 52-82 (John Austin and Jeremy Bentham see law as the command of the sovereign but "treat legislation as central to law and judicial law-making as peripheral and . . . see the foundations of law in political power rather than in community."); *id.* at 83-117 (H.L.A. Hart and Hans Kelsen embrace "the ideal of democracy as government (directly or by means of representatives) by the people as individual citizens."); *id.* at 182 (evolution of legal theory from law imposed by sovereign to law as the result of democratic political power exercised by citizens).

78 *See generally supra* notes 48, 75; *infra* notes 162-164, 168, 176-179; BENTHAM, *supra* note 36; COTTERRELL, *supra* note 22, at 37-38 (legislation as "deliberate law-making by political authorities aimed at reshaping society or its legal traditions."); *id.* at 124 ("[T]he deliberate use of law as a steering mechanism in society. . . . presupposes that law can change rapidly and continuously but also that it does so not as a reflection of enduring principle but as a mechanism aimed at *creating* principles of social order. These principles are, however, time-bound; pragmatic principles for the moment and the context, quite unlike timeless principles of natural law."); *id.* at 157-66 (Pound saw value of legislation in "clarifying doctrine where it has become confused, consolidating it, and suggesting lines of development where none clearly emerges from the current case law" and helping to "move law forward in the light of modern social needs when other forces of legal development are failing."). *See also* LLEWELLYN, *supra* note 34.

The Uniform Commercial Code is the classic example of a legal realist inspired attempt to adapt law to social practice through legislation, *see* Uniform Commercial Code § 1-102(2)(a) (purpose to "simplify, clarify and modernize the law governing commercial transactions"), and to provide mechanisms by which the interpretation of the law will change as the underlying customs change. *Id.* at § 1-102(2)(b) (purpose to "permit the continued expansion of commercial practices through custom, usage and agreement.").

Third, a growing skepticism that courts could or did neutrally reveal (rather than make) law[79] coincided with a growing trust in the institutional competence of the legislature to make socially desirable policy choices by gathering, weighing, and sifting information and balancing competing interests in a grand pluralistic style of "deliberative" democracy.[80]

These factors paved the way for the hearty embrace of statutes as the preferred vehicle for law and social change, as dramatically evidenced in the New Deal.[81] Looking back at the New Deal and other changes to the legal landscape, it is apparent that statutes

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79 *See infra* notes 174, 217. *See also* SCALIA, INTERPRETATION, supra note 2, at 4, 10 (common law ceased to be "custom" and came to mean "judge-made;" prevailing view of common law as custom to be discovered by judges gave way to view of common law as what judges create).

80 *See, e.g.*, HART & SACKS, *supra* note 1, at 693-1007; Posner, *Primer*, *supra* note 2, at 433 (distrust of legislation was replaced by view of legislation as a progressive force in which a healthy pluralism would create optimum social policy); LEGISLATION, *supra* note 48, at 386-89 (realist and post-realist vision of government placed policymaking role in legislature not judiciary because beyond judicial competence; led naturally to New Deal view that social problems could be addressed through law). *See also* THOMAS B. CURTIS & DONALD L. WESTERFIELD, CONGRESSIONAL INTENT (1992) (recommending structural reforms to obviate influences and processes that impair Congress's ability to study and deliberate in the intended fashion).

A similar debate continues concerning whether the drafters of early state constitutions trusted legislators as the representatives of the people and protectors of liberty, or feared legislators as wielders of self-interested power. *See* Gordon S. Wood, *Comment*, at 51-53 in SCALIA, INTERPRETATION, supra note 2 (distrust of legislative tyranny and push for strong judiciary in late 1700's); *See generally* MARC W. KRUMAN, BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA (1997); GORDON S. WOOD, THE MAKING OF THE CONSTITUTION 14-20 (1987); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1969); *see also* Gonzalez, *supra* note 2, at 633-96 (tracing the evolution of popular sovereignty and separation of powers from the American revolution to the Constitutional Convention).

81 *See, e.g.*, CALABRESI, *supra* note 1, at 44 ("The statutorification of American law can . . . be dated from the New Deal."); GILMORE, *supra* note 23, at 14-15 (pre-civil war, most policy was made by courts; after civil war, legislature more active, idea that judges do not make but merely declare law became popular; by the 1930s extensive legislative efforts of the New Deal led some to believe that courts' influence was on the decline as legislation flowered to its full potential); Glendon, *supra* note 35, at 96-98; LEGISLATION, *supra* note 48, at 386-89 (by the 1930s, shift to view of law as "the creation and elaboration of social policy" led to New Deal embrace of social reconstruction statutes). *See also infra* note 82; Blatt, *supra* note 2, at 823-26 ("progressives" Ernst Fruend, John Chipman Gray, Roscoe Pound, accepted statutes and rejected narrowing devices and hostility toward statutes; James Landis, William Page and Jerome Frank went further, embracing interpretation that considered the equity of the statute). The use of law to drive social change, which began in earnest with the New Deal, flourished in the civil rights movement several decades later.

have changed in at least four significant ways since the time of the Constitution. First, the number of statutes has increased dramatically. Today, statutes are the predominant source of law in the United States.[82] Second, statutes have expanded beyond relatively narrow, specialized subject areas into virtually every field of law.[83] Third, statutes have become increasingly comprehensive. Not only do many statutes purport to cover entire subjects (*e.g.*, bankruptcy and taxation) rather than specific issues, but they do so through lengthy, complex, and highly particularized sets of rules, rather than the simpler, generalized guidelines of early statutes.[84] Fourth, and perhaps most significantly in terms of creating tensions between legislative law and the common law tradition, statutes today are far more likely than early statutes to alter the common law rather than merely to codify it.[85] The most explosive changes in each of these four areas occurred beginning with the social restructuring legislation of the New Deal, when avalanches of new federal statutes, designed to address rapid societal and technological

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82 *See, e.g.*, CALABRESI, *supra* note 1, at 1 ("The last fifty to eighty years have seen a fundamental change in American law. In this time we have gone from a legal system dominated by the common law, divined by courts, to one in which statutes, enacted by legislatures, have become the primary source of law."); COTTERRELL, *supra* note 22, at 21 ("Of course, modern law is predominantly *legislative* in origin.") (emphasis in original); Eskridge & Frickey, *Post-Legal Process*, *supra* note 2, at 691; Frankfurter, *supra* note 15, at 527; FRIEDMAN, *supra* note 22 at 686 (post-New Deal, "Even private law, so-called, was turning statutory. The lion's share of the norms and rules that actually governed the country came out of Congress and the legislatures, usually drafted in the office of the President or governor, or by their delegates and agents within the bureaucracy."); GILMORE, *supra* note 23, at 95 ("Between 1900 and 1950 the greater part of the substantive law, . . . was recast in statutory form. We are just beginning to face up to the consequences of this orgy of statute making."); Glendon, *supra* note 35, at 95; Gonzalez, *supra* note 2, at 619 ("Today, of course, statutes are the primary source of American law."); Hutchinson & Morgan, *supra* note 2, at 1753 ("The distinguishing feature of twentieth-century legal history has been the shift from the common law to statutes as the major source of law."); SCALIA, INTERPRETATION, supra note 2, at 13 ("We live in an age of legislation, and most new law is statutory law."); Zeppos, *supra* note 1, at 1076 (statutory law dominates our legal system).

83 *See supra* note 74 and accompanying text.

84 *See* CALABRESI, *supra* note 1, at 5 (new statutes more specific and detailed); *id.* at 74-78 (modern statutes are detailed, technical and specific; are necessary to maintain uniformity in complexity of laws; reflect resolution or compromise of complex conflicts among competing interests; and in some areas, such as criminal law, are necessary to provide forewarning of rules). *See also* FRIEDMAN, *supra* note 22, at 408-411; GILMORE, *supra* note 23, at 71-72.

85 *See* CALABRESI, *supra* note 1, at 5 (new statutes not simply codification of common law).

changes and the devastation that followed depression and war, descended upon the courts. Inevitably, as explosions of new statutes intruded upon the former domains of common law, increased in complexity, became the predominant source of law in the United States, and superseded judge-made law, interpretive methods designed to preserve the integrity of the common law against the invasion of statutes collapsed.[86] In their place, courts and commentators have embraced a statute-centered philosophy of interpretation.[87] This deference to statutes has been accompanied by an emphasis on democratic legitimacy as a new touchstone for statutory interpretation.[88] Democratic legitimacy is defined by the constitutionally-created relationship between the legislature that enacts statutes and the courts that apply statutes. The challenges in this new era are to determine the proper legislative / judicial relationship, and to identify interpretive techniques that are appropriate to that relationship, yet can be embraced by judges steeped in common law traditions.[89]

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[86] *See generally,* CALABRESI, *supra* note 1; FRIEDMAN, *supra* note 22; GILMORE, *supra* note 23; *see also* Radin, *supra* note 51, at 863; Frankfurter, *supra* note 15, at 527(discussing the growth and development of statutory law).

[87] *See, e.g.,* Glendon, *supra* note 35, at 97-98 (by mid-20th century, new tools necessary to deal with proliferation of statutes and administrative regulation); LEGISLATION, *supra* note 48, at 386 (common law formalism no longer works because "statutes have come to displace common law as the source of policy, law, and even principle."); *id.* at 384 ("The classical vision of the formal primacy but functional inferiority of statutes has become outdated in this century, the 'age of statutes.'"); Strauss, *supra* note 67, at 341-42 (in the twentieth century, and since 1940 in particular, statutes emerged first as common law's competitor, then as the foundational institution of law); *cf.* CALABRESI, *supra* note 1, at 7, 9-10, 16-19 (efforts to keep statutes up to date have included creation of administrative agencies, legislative reform, sunset laws, and courts' use of devices such as Constitutional barriers and "passive virtues" to invalidate statutes that do not fit the legal landscape); Gonzalez, *supra* note 2, at 619-20 (same).

[88] *See, e.g.,* Blatt, *supra* note 2, at 817 ("wrenching apart of common and statutory law," separation of law from politics, and turn toward the problem of judicial authority in statutory interpretation theory in the late nineteenth century); CALABRESI, *supra* note 1, at 5 (as statutes increased, courts deferred as honest agents committed to legislative supremacy); LEGISLATION, *supra* note 48, at 385-511; Arthur S. Miller, *Statutory Language and the Purposive Use of Ambiguity,* 42 VA. L. REV. 23, 24-25 (1956) (courts' historical mistrust of statutes has given way to judicial deference to legislative intent; deference is rooted in separation of powers); Popkin, *Collaborative Model, supra* note 2, at 543 (shift from embracing common law reason as superior to statutes to embracing legislative will over judicial reason; under legislative will model, "[A]ll statutory meaning is traced either to a legislative mandate or to a legislative delegation of authority to courts to determine the statute's purpose and fill legislatively created gaps through reasoned elaboration."); *see also infra* note 96.

[89] *See supra* note 2 and accompanying text; *infra* notes 96-97 and accompanying

It is not surprising that democratic principles should be a powerful determinant of law's legitimacy. The very nature of our democracy presumes that the legal system and political system are inextricably linked. Law does not exist independently. Rather, law is the vehicle by which democracy operates; it is the expression of democratic ideals or choices.[90] Moreover, preservation of a "common law" vision has been especially problematic in the federal system, where there arguably is no pre-existing common law tradition.[91] A statute-centered, democracy-based legal philosophy reflects two fundamental changes from a common-law-based legal philosophy. First, it rejects the idea that law should be created by courts on an incremental case-by-case basis, in favor of the view that law should be created by democratic methods, through the legislature as the representative of the people. Second, it rejects the common law vision of law as a pre-existing set of customary norms, in favor of a democratic vision of law as the deliberate formulation of norms that reflect current social values, choices and policies.[92] These shifts embody an emphasis on democratic processes rather than law's substance, and on a political rather than a systemic measure of legitimacy.[93]

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text. *See also* Glendon, *supra* note 35, at 100-01 (comparing common law tradition's lack of skill in dealing with statutes to civil law tradition's lack of skill in dealing with judicial opinions and modern statutes).

90 *See supra* note 59 and accompanying text.

91 On the question of federal common law (which is beyond the scope of this Article), *see generally* City of Milwaukee v. Illinois, 451 U.S. 304 (1981); Erie Railroad v. Tompkins, 304 U.S. 64 (1938), *overruling*, Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842); GILMORE, *supra* note 23, at 34-36; Merrill, *supra* note 2, at 3; Redish, *Abstention*, *supra* note 2 (separation of powers precludes federal courts from creating doctrines that permit them to abstain from exercising jurisdiction vested in them); Redish, *Common Law*, *supra* note 2 (representative democracy mandates judicial deference to legislative policy judgments, absent constitutional infirmity; Rules of Decision Act precludes judicially created federal common law); SCALIA, INTERPRETATION, supra note 2, at 13 (there is no such thing as federal common law); *cf.* HART & SACKS, supra note 1, at 172-74 (there is no general proposition that courts cannot act until Congress passes a statute; federal decisional law governs until Congress displaces it); *see also* Rules of Decisions Act, 28 U.S.C. § 1652 (1982).

92 *See supra* notes 76-78 and accompanying text.

93 *See, e.g.*, *supra* notes 88-90; COTTERRELL, *supra* note 22, at 27, 36-37 (common law rooted in reason and tradition, independent of and transcendent of any political authority); *id.* at 225-26 ("The dichotomy is between, on the one hand, views of law . . . which understand it primarily or essentially as an expression of values derived from natural reason, community life, political history or some such source and, on the other hand, positivist approaches to law which treat it essentially as the regulatory expression of political power . . . . The change in lawyers' outlook necessary to accept

A democratic vision of law need not and should not, however, abandon legal-system values. Whether a legal system generates primarily common law, civil law, or the complex interaction of statutes and common law that characterizes United States law, "the law" it produces, I submit, should achieve (or strive to achieve) some measure of predictability, replicability, fairness, and justice through an articulated regard for doctrinal stability, systemic coherence, social congruence, and a social value formation dialogue. Yet, the current statutory interpretation debate contains no comprehensive analysis of how interpretive theory, in general, or any interpretive methodology, in particular, preserves these values. The principal focus, instead, has been on why competing models are or are not democratically legitimate, as a matter of constitutional law, democratic theory, or pragmatic reality. This may be due, in part, to an early assumption that statutes would inherently preserve legal-system values. Unlike the tangled web of judicial decisions that constitute the common law, statutes generally are orderly compilations of neatly indexed, broadly applicable rules, having definite jurisdictional reach. These characteristics of form, alone, may cloak statutes in an aura of certitude and imply that statutes embody "rules" that will be easy to locate and apply with predictable, replicable results. Moreover, those who embraced the New Deal's growing faith in a rational legislature elected by and responsive to the public, and engaged in thoughtful, deliberative, coherent policymaking, might have assumed that statutes would reflect societal needs and would be carefully crafted to fit into the

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the idea of legal doctrine as a deliberate political creation, theoretically unlimited in scope, was a switch from the classical common law emphasis on the *content* or substance of legal doctrine as its defining essence, to an emphasis on the *form* of law . . . . Positivist analytical jurisprudence admits that the making of law is a political act; that what determine the content of legal doctrine are legislatures' choices and judges' discretions . . . . Such a practice may - but, most importantly, *need not* - make any judgments about the fundamental rationality of the substance of legal doctrine (the consistency or appropriateness of its values, principles or underlying policy). Its obvious utility is a purely technical one.") (emphasis in original); *id.* at 227-28 ("If the substantive rationality of law, in classical common law thought, was assumed to lie in stable, enduring principles grounded in the community's values, a positivist outlook treats that rationality only as the pragmatic explanations of particular legislative policies of the moment and the temporary reconciliation of the content of numerous unrelated legislative interventions . . . . [which arises] merely as the requirement that a specific rule be traceable to some decision or procedure of an ostensibly authoritative governmental agency."). *See also* HALL, *supra* note 49, at ch. 16 (historical comparison of process-oriented versus substantive approaches to law).

surrounding body of law. The current impasse in the statutory interpretation debate demonstrates the failure of at least some of these assumptions. Statutes may not be the product of public-regarding deliberation and may not reflect society's concerns. They may not be consistent with myriad other statutes. Inconsistencies and intentional or unintentional ambiguities may undermine advisors' ability to predict how courts will interpret a statute. Consequently, interpretive theory must prove, not merely assume, that an interpretive method designed to preserve democratic processes and values in fact also preserves legal-system values. If interpreters embrace democratic legitimacy as the exclusive touchstone for statutory interpretation without this proof, they risk throwing out the baby (legal-system values) with the bath water (the nature and methods of common law).[94]

Parts II.C and II.D examine the impasse in the current statutory interpretation debate and demonstrate that democratic legitimacy cannot serve as a singular touchstone for statutory interpretation because it does not inherently preserve legal-system values.

C. *Democratic Legitimacy in Statutory Interpretation*

From a muddle of conflicting definitions and categorizations, three predominant current methods of statutory analysis emerge: originalism (comprising intentionalism and purposivism), textualism, and dynamism.[95] Analyses of the theoretical differences

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[94] As discussed *infra* at Part III.A, different interpretive models embrace different legal-system values.

[95] The interpretive debate has been complicated by conflicting ways of distinguishing and naming the divergent interpretive methods. This Article use these three categories because they accurately distinguish the different methodologies employed, particularly in terms of objectives pursued and sources consulted (intentionalism and purposivism are grouped together even though they pursue different objectives because both focus on the original legislation, consult similar sources, and employ similar processes), and because a consensus seems to be forming around this classification. *See, e.g.*, Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 204-05 (1980) (intentionalism, purposivism or modified intentionalism, and textualism); CALABRESI, *supra* note 1, at 216 n.30 (favoring dynamic approach over original legislative intent, plain meaning literalism, and original legislative purpose). *See* Correia, *supra* note 2, at 1139 ((1) textual interpretation; (2) analysis of legislative intent; and (3) incorporation of extra-legislative values."); *id.* at 1156, 1160-62 (although "legislative intent," seems to focus solely on intentionalism, and to exclude purposivism, Professor Correia's definition of legislative intent as the objective manifestation of policy, as expressed in the text and explained by legislative leaders,

among these models generally emphasize the models' conflicting visions of the democratically legitimate relationship between the legislature that enacts a statute and the courts that must apply it.[96]

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and his suggestion that legislators want courts to look to "purpose" encompass purposivism as well). *See also* ESKRIDGE, *supra* note 1, at 13-80 (distinguishing dynamism from "originalist" "archaeological" approaches of textualism, purposivism and intentionalism); Eskridge & Frickey, *Practical Reasoning*, *supra* note 2, at 324 ("The three main theories today emphasize (1) the actual or presumed intent of the legislature enacting the statute ('intentionalism'); (2) the actual or presumed purpose of the statute ('purposivism' or 'modified intentionalism'); and the literal commands of the statutory text ('textualism')."; proposing a fourth method, "practical reasoning"); Frickey, *supra* note 1, at 256 (old intentionalism, old purposivism, and new textualism); LEGISLATION, *supra* note 48, at 514, 603 (intentionalism, purposivism, textualism, and dynamism); William D. Popkin, *Law-Making Responsibility and Statutory Interpretation*, 68 IND. L.J. 865, 865 (1993) ("writer-based" focuses on will of legislature, "reader-based" focuses on views of court, and "text-based" rejects extrinsic aids to interpretation and looks exclusively at words of statute); Posner, *Primer*, *supra* note 2, at 441 ("the *formulaic* [essentially, textualism], the *mentalist* [essentially, intentionalism], and the *purposive* [purposivism]") (emphasis in original); Rasmussen, *supra* note 2, at 540 (declaring originalist models to be essentially dead and arguing that "The two most prominent theories of statutory interpretation today are textualism and dynamic interpretation."); Gene R. Shreve, *Symmetries of Access in Civil Rights Litigation: Politics, Pragmatism and Will*, 66 IND. L.J. 1, 3, 37 (1990) (intentionalism, plain meaning, political interpretation, and pragmatism); Zeppos, *supra* note 1 (originalism, textualism and dynamism); *cf.* GRAY, *supra* note 25, 176-77 ("Grammatical interpretation is the application to a statute of the laws of speech; logical interpretation calls for the comparison of the statute with other statutes and with the whole system of Law, and for the consideration of the time and circumstances in which the statute was passed."). These methods bear intriguing parallels to the classical methods of civil law interpretation, which are grammatical (like plain meaning), systematic (like Justice Scalia's contextual textualism), historical (like intentionalism), and teleological (like dynamism). Civil law methods are discussed in Glendon, *supra* note 35, at 99-101.

[96] *See, e.g.*, Gonzalez, *supra* note 2, at 590 ("Before deciding how the federal courts ought to interpret statutes, one must first discover the normatively proper institutional role of the federal courts and how the relationship between the federal courts and Congress ought to be structured."); *id.* at 626. *See also* Maltz, *supra* note 2, at 6-7 ("The task of the courts is to define the powers of government and the relationship of government units to the citizenry and to each other. This task is quintessentially political; thus it is political theory that provides the appropriate benchmark against which any method of statutory interpretation must be tested."); Schacter, *supra* note 2 (characterizing the competing models of statutory interpretation as competing models of democracy); *id.* at 593-94 ("To carry out its task, the court must adopt—at least implicitly—a theory about its own role by defining the goal and methodology of the interpretive enterprise and by taking an institutional stance in relation to the legislature."); *id.* at 597 ("The institutional essentialist conception [originalism] of the judicial role in statutory interpretation combines two critical, closely related components—one institutional (embodied in a theory about the respective roles of the legislative and judicial branches) and one frankly political (embodied in a theory of the legislative process and politics generally)."). *See* Zeppos, *Textualism*, *supra* note 2, at 1642 (Statutory interpretation requires a theory of the legislature); *see also* Frank-

This relationship is rooted in democratic theory.[97] Part II.C[98] argues that advocates of competing interpretive models embrace fundamentally different criteria by which to measure democratic legitimacy. It is these conflicting views of the democratically proper relationship between the courts and the legislature that originalists, textualists and dynamists cite in support of the different objectives they pursue,[99] the different sources they consult,[100]

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furter, *supra* note 15, at 533 (Judges "are under the constraints imposed by the judicial function in our democratic society . . . . [N]o one will gainsay that the function in construing a statute is too ascertain the meaning of the words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature."); Frickey, *supra* note 1, at 256 ("[T]he Justices are frequently debating statutory interpretation methodologies at a level of theory that far transcends the details of the case at hand, and that implicates the very question of the Court's interpretive role in a democracy."); Amy Gutmann, *Preface*, at vii, ix *in* SCALIA, INTERPRETATION, *supra* note 2 (interpreters' different views concerning what is democratic); Popkin, *"Internal" Critique*, *supra* note 2, at 1138 (critiquing Justice Scalia's approach from an internal perspective, which focuses on "determining the proper role of judging in statutory interpretation, rather than the impact of interpretation on substantive results."); SCALIA, INTERPRETATION, supra note 2, at 9-23, 25 (statutory interpretation as a venture in constitutional democracy); Wood, *supra* note 80, at 49 (judicial role as an issue of democracy).

Statutory interpretation may also require a theory concerning the relationship among the federal courts, Congress, administrative agencies, and the president. These considerations are beyond the scope of this Article. *See generally* Eskridge, *Overriding*, *supra* note 2 (interaction among three branches in statutory interpretation); Eskridge & Frickey, *Equilibrium*, *supra* note 2 (law is the equilibrium that arises from the interaction among competing branches of government); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989); Strauss, *supra* note 2; Strauss, *supra* note 67 (administrative agency interpretation); Symposium, *Statutory Interpretation and Environmental Law*, 5 N.Y.U. ENVIR. L.J. 292 (1996); Sunstein, *supra* note 2 (administrative agency interpretation); Zeppos, *Textualism*, *supra* note 2, at 1639-41 (textualism's impact on executive and administrative agencies); *see also* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984) (courts should defer to agency interpretations unless "Congress has directly spoken to the precise question at issue.").

97 *See supra* note 96 and accompanying text. As used herein, democratic theory refers broadly to both the structure and substance of democracy in the United States. In discussing democratic theory, this Article focuses on the federal system for simplicity. Most state constitutions allocate the powers of government among separate branches similar to the federal Constitution. *See* Gonzalez, *supra* note 2, at 676-88 (tracing early history of development of state constitutional balance of power among legislative and judicial branches). In some states, however, state court judges are elected directly by the citizens (which arguably affects the judiciary's accountability to the electorate).

98 *See supra* Parts II.C and II.D summarize arguments developed more fully in a manuscript on file with the author entitled "Crossed-Purposes: The Inevitable Problem of Statutory Interpretation" [hereinafter, Manuscript].

99 *See supra* note 14 and accompanying text.

and the different results they reach when interpreting statutes.[101]

Broadly (and somewhat simplistically) viewed, democratic theory entails three interdependent components, which this Article terms textual democracy, procedural democracy, and substantive democracy.[102] Textual democracy considers only what the text of the Constitution expressly provides concerning an issue; here, statutory interpretation.[103] Structural (or procedural) democracy draws upon process-oriented principles that inhere in the structure of the Constitution (such as popular sovereignty, majoritarianism, legislative supremacy, separation of powers, and checks and balances) to determine how different branches of government should interact to make political decisions.[104] Substantive democracy fo-

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100 *See supra* note 15 and accompanying text.

101 The discussion necessarily is generalized; some advocates of each model might use somewhat different methods.

102 This approach is developed in Manuscript, *supra* note 98. For recent discussions of competing theories of constitutional interpretation, *see generally* Symposium, *Fidelity in Constitutional Theory*, 65 FORDHAM L. REV. 1247 (1997); Symposium, *Originalism, Democracy, and the Constitution*, 19 HARV. J. L. & PUB. POL'Y 237 (1996); *see also* Brest, *supra* note 95, at 204-05, 229, 238 (criticizing originalist constitutional interpretation, including "strict textualism," "strict intentionalism," and "moderate originalism" (in which text is treated as "open-textured" and interpretation draws inferences from the "structure and relationships of government institutions"), and arguing in favor of "noriginalist" interpretation which he labels "adjudication" and which operates much like dynamic statutory interpretation to ensure that interpretation reflects correct values or beliefs, and "protect[s] fundamental values and the integrity of democratic processes."); Easterbrook, *Original Intent*, *supra* note 2, at 59 ("For constitutional interpretation, a debate rages among originalists who look to history and intent; structuralists who look to the problems at hand and the structure of the document; nonoriginalists who look to 'values' implicit in the document and say that anything achieving more of an identified value is permissible; and finally to those (inventionists?) who want to treat the Constitution as a sort of floating seminar and liberate judges to whatever Plato would do with the problem."); Charles Fried, *Sonnet LXV and the 'Black Ink' of the Framers' Intention*, 100 HARV. L. REV. 751, 754-55 (1987) (advocating allegiance to the text over the drafters' intentions in constitutional interpretation); Glendon, *supra* note 35, at 112 (textualism, structuralism, originalism); SCALIA, INTERPRETATION, *supra* note 2, at 37-44 (advocating "expansive" contextual "reasonable construction" over "strict construction," originalist construction, and flexible construction); *id.*, at 38 (original meaning, original intent, current meaning); Laurence H. Tribe, *Comment*, in SCALIA, INTERPRETATION, supra note 2, at 67-68 (dichotomy between what drafters intended to say and drafters' intended effects or consequences).

103 This is a formalist approach to constitutional interpretation. *Cf.* Brest, *supra* note 95, at 95 (strict textualism).

104 Compare Professor Brest's "moderate originalism" and Judge Posner's "structuralism," *supra* note 102. A structural approach essentially adopts an "internal" theory of democracy. *See infra* note 192; *see also* Schacter, *supra* note 2 (making a similar

cuses directly on the instrumental goals of democracy that are presumed to underlie the Constitution.[105] In essence, the express text of the Constitution (textual democracy), embodies a governmental structure in which decisionmaking powers are allocated among the branches of government (structural/procedural democracy), in a manner designed to achieve the instrumental goals of representational democracy (substantive democracy). Part II.C argues that each of the current interpretive models emphasizes a different one of these facets of democracy. Textualism rests principally on a textual reading of the Constitution;[106] originalism embraces structural/procedural democracy;[107] and dynamism emphasizes substantive democracy.[108]

1. Textualist Legitimacy

Textualism's Object and Methods. The textualist court's task is to find a clear mandate in the statutory language, then apply it to a specific case.[109] Leading textualists include Justice Antonin Scalia

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distinction in characterizing originalist models of statutory interpretation as "institutional essentialism").

105 Compare Professor Brest's "adjudication" and Judge Posner's "nonoriginalists" and "inventionists," *supra* note 102. Substantive democracy conforms essentially to political scientists' instrumental theories of democracy. *See generally infra* note 192; *see also* Schacter, *supra* note 2 (making a similar distinction in arguing that textualism and dynamism advocate different approaches to democratic legitimacy); Simon, *supra* note 28, at 1492-94, 1520-21 (suggesting that, if originalism in constitutional interpretation fails or is unjustifiable, then originalist views concerning the relationship of courts and the legislature cannot stand, but rather, that relationship must be based upon a determination of what relationship best promotes a good and just society).

106 *See infra* notes 123-131 and accompanying text.

107 *See infra* notes 152-159 and accompanying text.

108 *See infra* notes 185-199 and accompanying text. *Cf.* ESKRIDGE, *supra* note 1, at 108-09 (liberal theories adopt formalistic rule of law as law of rules; deliberative legal process theories adopt law as procedural integrity; normative theories adopt law as justice or right); *Schacter, supra* note 2, at 626-46 (textualism and dynamism as competing views of substantive democracy).

109 *See e.g.*, Blanchard v. Bergeron, 489 U.S. 87, 97-99 (1989) (Scalia, J., concurring in part); Green v. Bock Laundry Machine Co., 490 U.S. 504, 527-30 (1989) (Scalia, J., concurring); Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring); Begier v. IRS, 110 S. Ct. 2258, 2267 (1990) (Scalia, J., concurring); Pittson Coal Group v. Sebben, 488 U.S. 105, 113-19 (1988) (Scalia, J.); Citicorp Indus. Credit v. Brock, 483 U.S. 27, 40 (1987) (Scalia, J.); United States v. Locke, 471 U.S. 84 (1985) (Marshall, C.J.) (prior to December 31 means prior to December 31, not on December 31 or prior to end of year); United States v. Marshall, 908 F.2d 1312 (7th Cir. 1990) (en banc) (Easterbrook, J.), *aff'd sub nom* Chapman v. United States, 500 U.S. 453 (1991); *see also* LEGISLATION, *supra* note 48, at

and Judge Frank Easterbrook.

Because textualism views a statute's words as "the law," it focuses almost exclusively on determining what the *words* mean (rather than what the *drafters* may have meant).[110] A textualist judge (i) first seeks to give the words their original (as distinguished from current)[111] "ordinary meaning"[112] or "reasonable im-

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624 n. 2 (collecting textualist opinions of Justice Scalia, often with Justice Stevens dissenting); *id.* at 625 note 3 (collecting originalist opinions of Justices Stevens and Souter, often with Justice Scalia dissenting or concurring). *See generally* Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J. L. & PUB. POL'Y 87 (1984); Easterbrook, *Original Intent*, *supra* note 2; Easterbrook, *Domains*, *supra* note 2; SCALIA, INTERPRETATION, *supra* note 2; Scalia, *Speech*, *supra* note 2; *see also* Jeffrey A. Brauch, *The Danger of Ignoring Plain Meaning: Individual Relief For Breach of Fiduciary Duty Under ERISA*, 41 WAYNE L. REV. 1233 (1995) (advocating plain meaning interpretation of ERISA).

Modern textualism is analyzed in Eskridge, *Textualism*, *supra* note 2; Popkin, *"Internal" Critique*, *supra* note 2; Rasmussen, *supra* note 2; Wald, *supra* note 2; Zeppos, *Textualism*, *supra* note 2. *See also supra* note 12.

110 *See supra* note 109 and accompanying text; *see, e.g.*, Easterbrook, *Original Intent*, *supra* note 2, at 60 ("The words of the statute, and not the intent of the drafters, are the 'law.'"); SCALIA, INTERPRETATION, supra note 2, at 17-18 ("It is the *law* that governs, not the intent of the lawgiver.") (emphasis in original); Tribe, *supra* note 2, at 51 ("[O]ur search in statutory interpretation . . . must be not for a subjective, unenacted intent but for an objective, enacted meaning of a legal text."); *see also* Oliver Wendell Holmes, Jr., *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899) ("We do not inquire what the legislature meant; we ask only what the statute means."); *see generally* Aleinikoff, *supra* note 2, at 29-30; ESKRIDGE, *supra* note 1, at 34 ("[F]or these 'new textualists,' the beginning, and usually the end, of statutory interpretation should be the apparent meaning of the statutory language."); LEGISLATION, *supra* note 48, at 628 ("Textualism, or plain meaning, posits that the court's role is to give the statutory text is [sic] plain or best meaning."); Wald, *supra* note 2, at 282 (Justice Scalia "asserts the primacy of statutory *text*. The words of a statute are not just the most authoritative, but the only *definitive* source of congressional intent. The task for courts is not to determine the meaning of a 'statute' by reference to events and statements that preceded, or even occasionally followed, the statute's enactment. Rather, the courts' job is to determine what particular 'words' mean within the four corners of the statute itself. To accomplish this, judges are to depend exclusively on their own knowledge, perhaps with the aid of a dictionary, to determine the meaning of words in statutes, supplementing 'ordinary usage' only by reference to the context in which the words are found within the statutes themselves.") (emphasis in original).

111 *See* ESKRIDGE, *supra* note 1, at 42 (textualism as a form of originalism); Gutmann, *supra* note 96, at vii (textualism emphasizes original meaning of text); *but see infra* notes 114, 121 (textualists may not always employ "original" meaning).

112 *See, e.g.*, *Bock Laundry*, 490 U.S. at 528 (Scalia, J., concurring) ("The meaning of terms on the statute-books ought to be determined, not on the basis of what meaning can be shown to have been understood by a larger handful of the members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it). . .

port,"[113] (ii) may consult textual aids, such as dictionaries and grammar books, if the meaning is contested or not readily apparent,[114] (iii) may read the words "holistically" in the context of the structure and language of the entire statute if grammatical and definitional aids do not resolve the question,[115] (iv) if the answer re-

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") (emphasis in original); Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting) When interpreting a statute, "first, find the ordinary meaning of the language. . . "); SCALIA, INTERPRETATION, supra note 2, at 16 ("[W]hen the text of a statute is clear, that is the end of the matter."); Scalia, *Speech*, *supra* note 2, at 15 ("most plausible objective import"); *see also* Holmes, *supra* note 110, at 417 ("[W]e ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used."); *see generally* Eskridge & Frickey, *Equilibrium*, *supra* note 2, at 74 & n. 211 (Scalia usually follows ordinary rather than literal meaning); Popkin, *"Internal" Critique*, *supra* note 2, at 1140-1142.

Textualism's ordinary meaning is distinguishable from "literalism," which would not permit the use of commonly understood or technical meanings. *Cf. Field v. Mans* 116 S. Ct. 437 (1995) (ordinary meaning of fraud); *Nix v. Hedden* 149 U.S. 304 (1893) (interpreting "tomato" according to its ordinary meaning as a vegetable, not its botanically accurate meaning as a fruit absent evidence that any technical meaning in the trade was other than ordinary meaning); Schauer, *Plain Meaning*, *supra* note 2, at 234 n. 6 (textualism may use a technical meaning understood by a smaller linguistic community affected by a statute rather than the literal or ordinary meaning that would be understood by the larger community); *id.* at 239-40, 738-39 (discussing literal, plain and "lawyer's" meaning). Textualism also differs from a more flexible "plain meaning" rule. *See, e.g.*, Wald, *supra* note 2, at 284-85 (old "plain meaning" rule established a hierarchy under which interpreter looks first to text, then, if text is not plain, to legislative history; new textualism does not permit interpreter to go beyond the text). *See generally* SCALIA, INTERPRETATION, supra note 2, at 23.

113 *See* Easterbrook, *Original Intent*, *supra* note 2, at 60 ("reasonable import"); *id.* at 65 ("We should look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of words."); *see also* SCALIA, INTERPRETATION, supra note 2, at 20 ("objective import").

114 That is, the words are capable of more than one ordinary meaning. *See, e.g.*, MCI Telecommunications Corp. v. American Tele. & Tel. Co., 512 U.S. 218 (1994) (Scalia, J.) (interpretation based on the weight of dictionary authority); *see also* Eskridge & Frickey, *Equilibrium*, *supra* note 2, at 74-75 & nn. 211-213 (use of dictionaries and dictionary shopping); A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 71 (1994); Lawrence Solan, *When Judges Use the Dictionary*, 68 AM. SPEECH 1 (1993); Note, *Looking it Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1447-48 (1994) (suggesting that Justice Scalia's use of dictionaries shows no apparent relation between the age of dictionary and of the statute; raising the issue of dictionary shopping or definition shopping).

115 *See, e.g.*, United Savings Association v. Timbers of Innwood Forest, 484 U.S. 365, 371 (1988) (Scalia, J.) ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme - because the same terminology is used elsewhere in a context that makes its meaning clear . . . or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law. . . ."); *In re Sinclair*, 870

mains unclear,[116] might either "put the statute down" (and look to other sources of governing law) because a statute that does not clearly cover a situation simply does not apply,[117] or interpret the words in a manner consistent with similar phrases in other statutes,[118] (v) and might consult "textualist" interpretive canons,[119]

F.2d 1340, 1344 (7th Cir. 1989) (Easterbrook, J.) (context); Easterbrook, *Original Intent*, *supra* note 2, at 61; SCALIA, INTERPRETATION, supra note 2, at 16, 23; *see also* ESKRIDGE, *supra* note 1, at 42 (describing Scalia's approach as "holistic textualism;" "Scalia's goal in statutory interpretation is to produce text-based interpretive closure even when the statutory provision being interpreted is itself ambiguous. He accomplishes this through reference to three different contexts: textual authorities (dictionaries) and established traditions (case law) in place when the statute was written; the text of the statute as a whole, as well as related statutory provisions; and statutory clear statement rules setting forth policy presumptions that will govern absent clear textual contradiction."); *id.* at 228-29 & nn. 108-116 (holistic interpretation); Eskridge, *Textualism*, *supra* note 2, at 660-662 (textualists determine plain meaning by looking at the whole statutory scheme and considering how the word or phrase is used elsewhere in the same statute, how it is used in other statutes, and how the possible meanings fit within the statute as a whole, and relying on the interaction of different statutory schemes); Popkin, *"Internal" Critique*, *supra* note 2, at 1142-48.

116 Justice Scalia generally will not go beyond the context of the statute unless its ordinary meaning produces absurd results. *See* ESKRIDGE, *supra* note 1, at 45-47 (discussing Justice Scalia's approach to absurd results).

117 *See* Easterbrook, *Domains*, *supra* note 2, at 540-41 (statutes are compromises, interpretation beyond their express terms may upset the balance; stronger presumption against gap filling in private interest than public interest legislation); *id* at 544 ("[U]nless the statute plainly hands courts the power to create and revise a form of common law, the domain of the statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process. Unless the party relying on the statute could establish either express resolution or creation of the common law power of revision, the court would hold the matter in question outside the statute's domain. The statute would become irrelevant, the parties (and court) remitted to whatever other sources of law might be applicable."); Easterbrook, *Original Intent*, *supra* note 2, at 65 ("put the statute down" if it does not clearly apply).

118 *See, e.g.*, *Bock Laundry*, 490 U.S. at 528 (Scalia, J., concurring) ("The meaning of terms on the statutebooks ought to be determined, not on the basis of what meaning can be shown to have been understood by a larger handful of the members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated - a compatibility which, by a benign fiction, we assume Congress always has in mind.") (emphasis in original); Pierce v. Underwood, 487 U.S. 552 (1988) (Scalia, J.) (considering use of the word "substantial" in other statutes); SCALIA, INTERPRETATION, supra note 2, at 16-17 (compatibility with prior law); *see also supra* note 115; Aleinikoff, *supra* note 2, at 30 & nn. 52-53 (citing cases); ESKRIDGE, *supra* note 1, at 229 & nn. 115-16; Popkin, *"Internal" Critique*, *supra* note 2, at 1148-52; *cf.* Tribe, *supra* note 2, at 51, 53, 54 (three axioms: "language first;" "[i]nterpreting a public law is not the same thing as implementing the private bargains that led to the law's enact-

(vi) but will not consult sources "external" to the statute, such as legislative history or public values, to determine meaning,[120] and

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ment;" and "[s]tatutory interpretation should not overlook the ways in which the very enactment of a law might alter the surrounding legal landscape.").

119 *See, e.g., Chisom*, 501 U.S. at 404 (Scalia, J. dissenting). Justice Scalia opined:I thought we had adopted a regular method for interpreting the meaning of language in a statute: 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. If not - and especially if a good reason for the ordinary meaning appears plain - we apply that ordinary meaning.*Id.*; SCALIA, INTERPRETATION, supra note 2, at 25-29 (textualist canons; distinguishing "presumptions"); *see also* Alienikoff & Shaw, *supra* note 2, at 687-89 (contrasting textualist canons and purposivist canons); Aleinikoff, *supra* note 2, at 38-39 (use of canons by textualists); ESKRIDGE, *supra* note 1, at 323-33 (canons); Eskridge, *Textualism*, *supra* note 2, at 664-66 (textualist canons); *id.* at 628 & nn. 24-25 (purpose can trump plain language); Eskridge & Frickey, *Equilibrium*, *supra* note 2, at 97 (Rehnquist court canons); *see generally* Symposium, *A Reevaluation of the Canons of Statutory Interpretation*, 45 VAND. L. REV. 525 (1992); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

120 *See* Patterson v. Shumate, 504 U.S. 753, 766 (Scalia, J., concurring); Pierce v. Underwood, 487 U.S. 552 (1988) (Scalia, J.); Cardoza-Fonseca, 480 U.S. at 452-53 (Scalia, J., concurring) (refusing to consider legislative history where language is clear); SCALIA, INTERPRETATION, supra note 2, at 29-37; Scalia, *Speech*, *supra* note 2 (castigating the use of legislative history).

On the use of legislative history in statutory interpretation, *see generally* Aleinikoff, *supra* note 2, at 30-31; Maxwell L. Chibundu, *Structure and Structuralism in the Interpretation of Statutes*, 62 U. CIN. L. REV. 1439, 1459 (1994) ("The use (or "abuse") of legislative history is at the core of contemporary debate over statutory interpretation . . . "); Correia, *supra* note 2; DICKERSON, *supra* note 29, at 137-97; Reed Dickerson, *Statutory Interpretation: Dipping Into Legislative History*, 11 HOFSTRA L. REV. 1125 (1983); ESKRIDGE, *supra* note 1, at 207-38 (rise and decline of legislative history; textualists' rejection of legislative history); Eskridge, *Textualism*, *supra* note 2; William N. Eskridge, Jr., *Public Values In Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989); Frickey, *supra* note 2, at 249 (Professors Hart and Sacks did not consider legislative history off limits in interpretation, but cautioned that it should be consulted last, and then only as an aid in selecting among the plausible overall purposes that had already been identified); Farber & Frickey, *supra* note 2, at 446 ("In American public law, the traditional response to criticisms about the reliability of legislative history has sounded largely in confession and avoidance—that is, agreement that legislative history is not some simple transcription of legislative intent, but faith that courts can, and should, sort the wheat from the chaff."); HURST, *supra* note 1, at 53-54 (look to text first, consider legislative history only if text is indeterminate); Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380; Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371; George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 322-23 (1995) ("The principal debate in statutory interpretation has revolved around textualism's general repudiation of approaches that rely on legislative history as indicia of statutory intent."); Wald, *supra* note 2 (because Congress has chosen to express its will through legislative history, that history is authoritative; ignoring it risks violating the spirit if not the letter of separation of powers); Patricia M. Wald,

(vii) will not (admittedly) create rules or make policy choices.[121] For a textualist considering the "no dogs in the park" hypothetical, "no dogs" means "no dogs," including runaway dogs, riding-in-the-car dogs, and guide dogs.[122] If this result is undesirable, it is up to the legislature to amend the statute.

Textualism and Democracy. Textualists base their approach almost exclusively on textual democracy.[123] The Constitution separates the legislative, judicial and executive powers,[124] and grants to Congress the exclusive power to "make all Laws."[125] Those laws are embodied in federal statutes.[126] Article I, sections 1 and 7, require that federal statutes be passed by both chambers of Congress (bicameralism) and presented to the President (presentment) before they become law.[127] The courts have no role in this enactment

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Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 IOWA L. REV. 195 (1983); Zeppos, *Textualism*, *supra* note 2; Zeppos, *Legislative History*, *supra* note 2; Dep't of Justice, Report to the Attorney General, Using and Misusing Legislative History: A Re-Evaluation of the Status of Legislative History in Statutory Interpretation (Jan. 5, 1989); *see also infra* notes 149, 151.

121 *See, e.g.*, SCALIA, INTERPRETATION, supra note 2, at 16-18, 23. Doubts that Justice Scalia is always true to his method, and suggestions that his approach may be driven by ideological considerations are expressed in Aleinikoff & Shaw, *supra* note 2, at 713; Eskridge, *Textualism*, *supra* note 2, at 668, 676; Schauer, *Response*, *supra* note 2, at 731; Zeppos, *Textualism*, *supra* note 2, at 1634 (Suggesting that Scalia "fails to practice textualism sincerely and consistently.").

122 With respect to the dog in the car, a textualist might obviate the result suggested by the apparent, literal meaning of "no dogs" by concluding that the dog is "in the car" not "in the park." This would succeed if it is the equivalent of arguing that I am "in Hawai'i" not "in (though surrounded by) the Pacific Ocean," but not if it is the equivalent of arguing that I am "in Hawai'i" not "in the United States."

123 *See* Manuscript, *supra* note 98 (arguing that textualist approach is not consistent with structural/procedural or substantive democracy).

124 *See* U.S. CONST. art. I, § 1 ("All Legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."), art. II ("The executive Power shall be vested in a President of the United States of America."), art. III ("The Judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

125 *See* U.S. CONST. art. I, § 8, cl. 18 ("enabling clause" grants to Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers [i.e., the powers expressly granted to Congress under article I, §8] all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof.").

126 This assumes the "laws" in article III, section 2, means the same thing as "Laws" in article I, § 8.

127 *See* U.S. CONST. art. I, §1, §7. Federal judges are appointed, whereas Congress and the president are elected. U.S. CONST. art. I, § 2, cl. 1 (election of House of Representatives); U.S. CONST. amend. XVII (election of Senate); U.S. CONST. art. II,

process. Textualists rely heavily on separation of powers, bicameralism and presentment to restrict judicial inquiry to the actual text of the statute, because the text is the only "law" that has been approved by both chambers and presented to the president.[128]

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§ 1, cl. 2 (election of President); U.S. CONST. amend. XII (election of President); art. II, § 2 (appointment of federal judges).

128 *See, e.g.*, Thompson v. Thompson, 484 U.S. 174, 191-92 (1988) (Scalia, J. concurring); In re Sinclair, 870 F.2d 1340, 1343-44 (7th Cir. 1989) (Easterbrook, J.); Continental Can Co. v. Chicago Truck Drivers, 916 F.2d 1154, 1157 (7th Cir. 1990) (Easterbrook, J.); SCALIA, INTERPRETATION, supra note 2, at 35; Scalia, *Speech*, *supra* note 2, at 15-16 (separation of powers supports refusal to consult legislative history or consider unenacted legislative intents); Starr, *supra* note 120, at 375; *see also* Aleinikoff, *supra* note 2, at 22-23 ("Unenacted intentions, no matter how resolutely stated in legislative materials, cannot be authoritative because they have not been adopted according to constitutionally prescribed procedures. . . . Thus, accepting the 'plain meaning' of a statute is said to serve legislative supremacy because it purportedly requires understanding statutory language in the way the legislature wanted it to be understood."); Ronald Dworkin, *Comment* at 27 *in* SCALIA, INTERPRETATION, supra note 2 (Justice Scalia's textualism is rooted in majoritarian democracy); ESKRIDGE, *supra* note 1, at 34 ("The pitch for textualism is that it is the most concrete evidence we have of the preferences that are supposed to count for article I, section 7 purposes."); *id.* at 118 ("Scalia reasons from the Constitution's separation of powers that all Congress is charged with doing is enacting statutory texts, and that the text alone - not any concomitant expectations - is binding on the coordinate branches. Moreover, any inquiry based on legislative intent is inconsistent with the bicameralism and presentment requirements of article I, section 7, which posits that the only legitimate statute is one approved in the same textual form by both chambers and presented to the president."); Eskridge, *Textualism*, *supra* note 2, at 623 n. 11 (new textualism driven by public choice theory, strict separation of powers, and conservative ideology); *id.* at 671 (textualist constitutional arguments: "(1) The bicameralism and presentment requirements of Article I, (2) the concept of sereration of powers and its collorary that judicial discretion must be cabined, (3) the general constitutional concept that our nation is a democracy and its collorary that statutory interpretations should be democracy-enhancing."); HART & SACKS, *supra* note 1, at 1195-96 (considering whether bicameralism and presentment mean that only words can be law); Rasmussen, *supra* note 2, at 563-64 (rationale for textualism: only text has gone through law making process; public choice theory; restrict judicial discretion); Popkin, *"Internal" Critique*, *supra* note 2, at 1167-70 (Scalia relies on strict separation of powers to prohibit judicial lawmaking); Tribe, *supra* note 102, at 75 (bicameralism and presentment require courts to honor text over unenacted intents); Zeppos, *Textualism*, *supra* note 2, at 1636 (textualism takes a "formalist approach to separation of powers."); Zeppos, *Legislative History*, *supra* note 2, at 1300-1304 (textualist view of representative government); Zeppos, *supra* note 1, at 1113 & n.146 (only the text goes through the Article I lawmaking process). *See generally* Symposium, *The Jurisprudence of Justice Antonin Scalia*, 12 CARDOZO L. REV. 1583 (1991).

Justice Scalia does not use strict textual interpretation for other constitutional questions. *See generally* SCALIA, INTERPRETATION, *supra* note 2, at 37-41 (rejecting "strict construction" in favor of originalist "reasonable construction" that accords "words and phrases an expansive rather than narrow interpretation" in light of their con-

Textualism employs this form of "textual supremacy" to limit both legislative and judicial powers.[129] By restricting the courts to the statutory text, textualism seeks to prevent the courts from exercising undemocratic lawmaking authority. Textualists fear that, if judges are permitted to consider sources external to the text, they will selectively embrace whatever legislative history or plausible intents or purposes suit their personal preferences.[130] Textualism's

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text). Professor Zeppos has noted Justice Scalia's tendency toward an originalist, purposivist examination of constitutional history and "tradition" in Constitutional interpretation, and has suggested a lack of integrity in Justice Scalia's rejection of the established "tradition" that judges look beyond statutory text to determine the purpose, policy or intent in interpreting statutes. *See* Zeppos, *Textualism*, *supra* note 2, at 1630-33.

129 *See supra* note 128 and accompanying text, *infra* notes 130, 131 and accompanying text. *See, e.g.*, Aleinikoff, *supra* note 2, at 32 (Textualism is not "dedicated to or grounded on legislative supremacy. It is instead a political strategy for disciplining both judges and legislators."); *see also* Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 946 (1983) ("The very structure of the Articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of separation of powers. . . .").

130 *See, e.g.*, Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting) ("Section 2 of the Voting Rights Act is not some all-purpose weapon for well-intentioned judges to wield as they please . . . ."); Easterbrook, *Original Intent*, *supra* note 2, at 62 (originalism "increases the discretion, and therefore the power, of the court."); *id.* at 59 (honest agent considers only the statutory text); Easterbrook, *Economic System*, *supra* note 2, at 60 (Judges should "be honest agents of the political branches. They carry out decisions they do not make."); Easterbrook, *Domains*, *supra* note 2, at 550-51 (judges rarely have the skills to undertake the task originalism requires); SCALIA, INTERPRETATION, supra note 2, at 10-11, 17, 18, 22 (judicial lawmaking violates democratic principles; "legislative intent" is "handy cover for judicial intent."); Scalia, *Speech*, *supra* note 2, at 11-14; Starr, *supra* note 120; *see also* Aleinikoff, *supra* note 2, at 23 ("By restricting courts to the language of the statute, textualism attempts to prevent the creative judicial lawmaking that can occur when judges consult legislative materials and the social context of the statute."); ESKRIDGE, *supra* note 1, at 118 ("Scalia believes that judges' discretion needs to be tightly constrained, and that focusing on statutory text is more constraining than other methods."); Philip P. Frickey, *Faithful Interpretation*, 73 WASH. U. L. Q. 1085, 1086 (1995) (textualists fear that willful judges could circumvent "objective" meaning); Popkin, *"Internal" Critique*, *supra* note 2, at 1136; *id.* at 1161-1173 (Justice Scalia's approach is based on the desire to restrain the judiciary in order to serve the "rule of law values" of equal treatment and avoidance of retroactive law, and separation of powers; acknowledging that Justice Scalia relies on bicameralism and presentment to butress his refusal to consider legislative history, but arguing that Justice Scalia's approach is based on "restraint" values rather than the Constitution); Taylor, *supra* note 120, at 322-23 ("Textualists have argued that . . . courts may selectively emphasize certain parts of that history . . . which skew judicial interpretation of statutory intent. Textualists find particularly troubling the judicial lawmaking that occurs in the guise of statutory interpretation, whereby judges invoke malleable legislative history in accordance with their own policy preferences. On separation of powers grounds, textualists insist that the role of the judge is to

refusal to implement unclear legislative commands also restricts legislative power because it prevents Congress (and special interest groups that press their causes in Congress) from influencing statutory interpretation through non-textual statements (particularly in the legislative history) of intent, purpose, or policy, that are not "law" unless Congress was willing and able to enact them formally as part of the statute.[131]

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decide the law, not make it, and the appeal to legislative history permits judges to exercise an inappropriate degree of discretion."); Zeppos, *supra* note 1, at 1081 ("By limiting the courts to textual sources, textualism seeks to eliminate value choice in judging: the text alone will dictate a result."); *id.* at 1086-87 (textualism constrains judges by limiting their inquiry to the text); Zeppos, *Textualism*, *supra* note 2, at 1618-19 (textualism limits judicial discretion by prohibiting selective reference to legislative history); *id.* at 1638-39 (textualism seeks to restrain judges from shaping policy or making law responsive to society); *cf.* HURST, *supra* note 1, at 51 ("Judges also frequently command respect for the statutory text by declaring that its 'plain meaning' must govern. However, we encounter the formula often in contexts where it seems invoked to avoid acknowledging judges' policy preferences. We are entitled to regard it with some skepticism as a reliable canon of judicial self-restraint.").

131 *See, e.g.*, Blanchard v. Bergeron, 489 U.S. at 98-99 (Scalia, J., concurring); Easterbrook, *Domains*, *supra* note 2, at 548-49 (gap filling allows originalists to extend the life of a long gone legislature and to avoid enactment and presentment; courts should limit the power of the legislature by not permitting Congress to rely on courts to fill gaps Congress did not have the political courage or power to enact).

Textualism's desire to restrain the legislature draws on public choice / social choice theories, which, as applied to the legislative process, suggest that legislation is the product of strategic, self-interested, interest-group pressured, behavior by legislators rather than of any optimistic pluralist ideal in which legislation translates majority preferences into law, or weighs and balances competing preferences to achieve a compromise that furthers the public good. *See, e.g.*, Easterbrook, *Domains*, *supra* note 2, at 547-48 (using public choice / social choice (Arrow's theorem) to debunk intentionalism's search for legislative intents or statutory purposes); Farber & Frickey, *supra* note 2, at 423-24 (explaining and criticizing the use of public choice theory to support textualism; arguing that public choice theory is compatible with "a flexible, pragmatic approach in which legislative intent plays an important role."); Taylor, *supra* note 120, at 322-23 ("Textualists have argued that legislators and staff may manipulate legislative history through calculated insertions. . . which skew judicial interpretation of statutory intent."); Zeppos, *Textualism*, *supra* note 2, at 1617 (textualism limits the ability of special interest groups to influence interpretation through statements inserted in legislative history); *id.* at 1637-38 (considering textualism's potential impact on legislative process); Zeppos, *Legislative History*, *supra* note 2, at 1302-03 (legislative history is written by staff who may be influenced by special interest groups, and is not enacted by Congress); Zeppos, *supra* note 1, at 1085-86 (textualists build on public choice). *See also supra* note 128. On public choice, social choice, rational choice theories, *see infra* notes 211-212 and accompanying text.

2. Originalist Legitimacy

Originalism's Object and Methods. Originalists view statutes as expressions of legislative policy choices.[132] The judge's task is to discover and implement those policy choices as the legislature's good faith agent.[133] Originalists believe that textualism may actually frustrate the legislature's design, particularly when a statute is applied in circumstances not expressly contemplated by the legislature, because the statute's words will not always convey the full import of the legislature's policy choices.[134]

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132 *See, e.g.*, HART & SACKS, *supra* note 1, at xiii; LEGISLATION, *supra* note 48, at 385-406.

133 *See, e.g.*, Osburn v. Bank of the United States, 22 U.S. (Wheat.) 738, 866 (1824) (courts' job is to "giv[e] effect to the will of the Legislature."); DICKERSON, *supra* note 29, at 8 ("[A]ny conflict between the legislative will and the judicial will must be resolved in favor of the former."); Eskridge & Frickey, *Practical Reasoning*, *supra* note 2, at 325 ("The most popular grand theory is probably intentionalism. Under this view, the Court acts as the enacting legislature's faithful servant, discovering and applying the legislature's original intent."); Langevoort, *supra* note 2, at 672 ("[T]he courts are the 'faithful agents' of the enacting legislature, and . . . their role is therefore limited to determining and carrying out the legislative intent of that body."); LEGISLATION, *supra* note 48, at 385-406; *id.* at 386-87 (in originalism "the role of courts in a democratic society should be the elaboration and application of statutory policy, rather than the direct creation of public policy."); *id.* at 387-89 (policy making role lies in legislature not judiciary because it is beyond judicial competence); *id.* at 390 (law as policy creation); Maltz, *supra* note 2, at 13;, Merrill, *supra* note 2, at 33-39 (pre-emption of state law to effect Congressional policy); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 286-89 (1985); Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907) ("The object of genuine interpretation is to discover the rule which the law-maker intended to establish; to discover the intention which the law-maker made the rule, or the sense which he attached to the words wherein the rule is expressed."); Sunstein, *supra* note 2, at 415 ("According to the most prominent conception of the role of courts in statutory construction, judges are agents or servants of the legislature. On the agency view, courts should say what the statute means, relying on its language, structure, and history. . . . The judicial task is to discern and apply a judgment made by others, most notably the legislature."); Wald, *supra* note 2, at 301 ("When a statute comes before me to be interpreted, I want first and foremost to get it right. By that, I mean simply this: I want to advance rather than impede or frustrate the will of Congress."); Zeppos, *supra* note 1, at 1078 ("[O]riginalism resolves interpretive questions in statutory cases by asking how the enacting Congress would have decided the question.").

134 *See, e.g.*, Aleinikoff, *supra* note 2, at 23-24 ("Unlike textualism, which sees the words of the statute as 'law,' intentionalism locates statutory law beyond, or behind, the statutory language. The actual words used by the legislature may be strong evidence of its intent, but they are merely windows on the legislative intent (or purpose) that is the law."); Schauer, *Formalism*, *supra* note 2, at 532-33 (Professors Dworkin, Llewellyn, Fuller, Hart and Sacks all show concern that literalism may be inconsistent with the true "rule" underlying the statute's words); Schauer, *Plain Meaning*, *supra*

Originalists[135] find the legislative will through either "intentionalism" or "purposivism."[136] Intentionalists (including Professors Edward O. Correia and Earl M. Maltz (in a modified form)) seek to apply statutes in light of the legislature's original intent.[137]

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note 2, at 236-37 (questions arise not when the words are unclear, in which event there is no choice between meaning and purpose, but when words are clear but seem to conflict with purpose); Wald, *supra* note 2, at 303 ("[T]here frequently is no better way to *gut* words of their intended meaning than by simply reading them literally.") (emphasis in original).

135 *See, e.g.*, Aleinikoff, *supra* note 2, at 21 (under originalism "the meaning of a statute is set in stone on the date of its enactment, and it is the interpreter's task to uncover and reconstruct that original meaning."); *id.* at 22 ("The archeological metaphor conceives of statutory meaning as determined on the date of the statute's enactment."); DICKERSON, *supra* note 29, at 126 ("[W]hen the court performs its cognitive function the critical time is the date of enactment, not the present."); ESKRIDGE, *supra* note 1, at 9 ("The 'original intent' and 'plain meaning' rhetoric in American statutory interpretation scholarship and decisions treats statutes as static texts and assumes that the meaning of a statute is fixed from the date of enactment."); *id.* at 338 & n.5 ("[The] vision of judges carefully digging through layers of historical statutory sediment . . . led Charles Curtis to describe originalist theories as archaeological."); Eskridge, *Statutory Interpretation*, *supra* note 2, at 1480 ("Theoretically, these 'originalist' approaches to statutory interpretation assume that the legislature fixes the meaning of a statute on the date the statute is enacted. The implicit claim is that a legislator interpreting the statute at the time of enactment would render the same interpretation as a judge interpreting the same statute fifty years later."); *see also* Zeppos, *supra* note 1, at 1077 ("[I]t seems clear that commentators believe that the Court primarily uses originalism to interpret statutes."); *cf.* Robert H. Bork, Jr., *We're All Originalists Now*, Wall St. J., April 5, 1988 ("principal tenet" of originalism: "When interpreting a legal document, be it a statute, regulation or the Constitution itself, one must abide by what its writers originally intended it to mean.").

136 *See, e.g.*, DICKERSON, *supra* note 29, at 83 ("It is common to classify approaches to interpreting statutes as either 'objective' or 'subjective.' This dichotomy is usually explained in terms of whether the pursuer of meaning is preoccupied with the statute itself (an objective legal writing) or with the actual, and therefore subjective, intent of the legislature."); *id.* at 88 (comparing intent and purpose); LEGISLATION, *supra* note 48, at 628 ("Intentionalism posits that the court's role is to give the statute the meaning most consistent with the intentions of the enacting legislature. Purposivism . . . posits that the court's role is to attribute to the statute the meaning most consistent with the general reasons why the enacting legislature believed the statute should be adopted."); *see also supra* note 13.

137 *See, e.g.*, BLACKSTONE, *supra* note 72, at 59 ("[I]nterpret the will of the legislator . . . by exploring his intentions at the time when the law was made."); HURST, *supra* note 1, at 32 ("The standard criterion for proper interpretation of a statute is to find 'the intention of the legislature.'"); Eskridge & Frickey, *Practical Reasoning*, *supra* note 2, at 325; Maltz, *supra* note 2 (modified intentionalist approach); 2A SINGER, *supra* note 69, at §45.05 ("'[T]he intent of the legislature' is the criterion most often recited."); Zeppos, *supra* note 1, at 1077-1078; *see also* Maltz, *supra* note 2, at 3 ("The Supreme Court has generally proclaimed that ascertaining legislative intent is the touchstone of statutory interpretation.").

In this subjective inquiry, the court first seeks to determine the legislators' actual intent.[138] Absent evidence that the legislature actually considered and resolved the problem presented, the court may scan the statute's context and history to "imaginatively reconstruct" what the legislature would have decided if it had actually considered the issue.[139] Judge Richard A. Posner is the leading modern

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138 Intentionalists first scour the statute and its history to determine whether the legislature had a specific intent that was not clearly reflected in the statute's words. *See, e.g.*, Maltz, *supra* note 2 (to reflect actual legislative intent, courts should apply the plain meaning of the text; if text is unclear, consider those aspects of legislative history most likely to reveal majority of legislators' intent); *id.* at 18 ("[J]udges should see statutes as embodying the legal rules upon which a majority of the legislators agree, rather than the policies underlying those rules."); Posner, *supra* note 1, at 819-20 (where legislation is a compromise, the court should attempt to implement the actual compromise); Zeppos, *Candor*, *supra* note 2, at 360 ("[A]sk how the enacting legislature resolved (or would have resolved) the particular interpretive problem."); *see also* Correia, *supra* note 2 (proposing an intentionalist theory designed to serve legislative meta-intents that statutes be effective, legislative policymaking be maximized, judicial policymaking be minimized; proposing a hierarchy of presumptions and extra-legislative values judges should consult to implement unclear commands); *cf.* Easterbrook, *Original Intent*, *supra* note 2, at 60 ("This method incorporates a principle of original intent - intent of the subjective variety. Its fundamental assumption is that whatever Congress thinks is law. The role of the judge is to figure out the mental pattern of the legislature. This usually appears through the words of the statute. There is enough shared agreement about words that the writing conveys a single, controlling meaning.").

139 *See* Cabell v. Markham 148 F.2d 737, 739 (2d Cir.) (Hand, J.) ("But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."), *aff'd*, 326 U.S. 404 (1945); Posner, *supra* note 1, at 817 ("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."); POSNER, *supra* note 25, at 218 ("A legal intentionalist holds that what you are trying to do in reading a statute or the Constitution is to figure out from the words, the structure, the background, and any other available information how the legislators whose votes were necessary for enactment would probably have answered your question of statutory interpretation if it had occurred to them."); *id.* at 229, 256-57 (interpretation is not limited to text or to applications actually foreseen by legislators); POSNER, *supra* note 133, at 289-90 (where statutes are deals, they should be limited to the express terms of the deal to avoid expanding it to cover things about which the parties did not reach agreement, or attributing to it some broader social purpose it did not have); *see also* Aleinikoff, *supra* note 2, at 24-26, 33 (analyzing imaginative reconstruction); Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370 (1947); ESKRIDGE, *supra* note 1, at 22-23 (imaginative reconstruction as search for what pivotal voter would have done if presented with the question); Eskridge, *Textualism*, *supra* note 2, at 630 ("The goal of the inquiry is not only to retrieve specific legislative consideration of the issue (if such occurred), but also to recreate the general assumptions, goals, and limitations of the enacting Congress. Through this imag-

advocate of imaginative reconstruction.

Purposivists use a more objective approach in which the court first reviews the statute, its context, and history to discern the statute's original purpose, then applies the statute in light of that underlying purpose.[140] Leading practitioners of purposivism include

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inative process, the Court seeks to 'reconstruct' the answer the enacting Congress would have given if the interpretive issue had been posed directly.'"); Frickey, *supra* note 1, at 251-52 (analyzing imaginative reconstruction); HART & SACKS, *supra* note 1, at 1378 ("In determining the more immediate purpose which ought to be attributed to a statute . . . a court should try to put itself in imagination in the position of the legislature which enacted the measure."); Sunstein, *supra* note 2, at 428-29 ("It is often suggested that in hard cases, the meaning of the statute should be derived by ascertaining the intent of those who enacted it. This approach is similar to purposive interpretation, but here the goal is not to look at a general legislative aim or purpose, but instead to see more particularly how the enacting legislature would have resolved the question, or how it intended that question to be resolved, if it had been presented.").

For example, Judge Posner would use his "sophisticated intentionalism" to rewrite the "plain" language in *United States v. Locke* ("before December 31" means not later than December 30) (*cited supra* note 16) to serve the legislature's probable intent to set an end-of-the-year deadline. *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 267-68 (1990); POSNER, *supra* note 25, at 256-57.

[140] *See, e.g.*, HART & SACKS, *supra* note 1, at ch. 4-7; *id.* at 148-50, 1149-71 (identify the purpose of the statute, then interpret in way most consistent with that purpose); *id.* at 1374-80 ("1. Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; and then 2. Interpret the words of the statute immediately in question so as to carry out the purpose as best it can, making sure, however, that it does not give the words either—(a) a meaning they will not bear, or (b) a meaning which would violate any established policy of clear statement."); *id.* at 162, 1156, 1411, 1415 (law is purposive); *see also* Aleinikoff & Shaw, *supra* note 2, at 689 (advocating a purposive, pragmatic approach under which "the meaning imposed upon a statutory text bears, at a minimum, a plausible connection to some practical purpose that makes sense in our legal system"); Aleinikoff, *supra* note 2, at 24, 34 (analyzing HART & SACKS legal process purposivism); ESKRIDGE, *supra* note 1, at 25-26 (same); Eskridge & Frickey, *Equilibrium*, *supra* note 2, at 27, 31 (same); Eskridge & Frickey, *Post-Legal Process*, *supra* note 2, at 694-98 (same); Frickey, *supra* note 1, at 248-50 (same); FULLER, *supra* note 22, at 145-51 (law is purposive); *id.* at 146 ("A statute is obviously a purposive thing, serving some end or congeries of related ends."); EVA H. HANKS, MICHAEL E. HERZ, & STEVEN S. NEMERSON, ELEMENTS OF LAW 267-290 (1994) (analyzing purposivism); LEGISLATION, *supra* note 48, at 531-576 (same); Maltz, *supra* note 2, at 18 (same); Redish, *Common Law*, *supra* note 2, at 784-85 (purposive canons); Sunstein, *supra* note 2, at 426 (purposivism popular in the 1950s and 1960s); Zeppos, *Textualism*, *supra* note 2, at 1600-02, 1606-1614 (analyzing purposivism).

For precursors of Hart & Sacks's purposivism, *see* Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1947); Radin, *supra* note 51; Max Radin, *A Short Way With Statutes*, 56 HARV. L. REV. 388 (1942); Llewellyn, *supra* note 119; Pound, *supra*, note 133 at 381 ("[W]hat the law-maker meant by assuming his position, in the surroundings in which he acted, and endeavoring to

Justice John Paul Stevens and the late Professors Henry M. Hart, Jr. and Albert M. Sacks.

Despite these different objectives, intentionalist and purposivist methodologies are quite similar.[141] Under both, the judge (i) first examines the statutory language, because the text is the best evidence of the legislature's intent or the statute's purpose,[142] (ii) honors the language if it is clear and is consistent with other evidence of legislative intent or statutory purpose,[143] (iii)

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gather from the mischiefs he had to meet and the remedy by which he sought to meet them, his intention with respect to the particular point in controversy.").

141 Note how Blackstone's formulation speaks of intent, but looks also to purpose. *See* BLACKSTONE, *supra* note 72, at 59 ("The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law.").

142 *See, e.g.*, United States v. American Trucking Ass'ns, Inc., 310 U.S. 534, 543 (1940); Caminetti v. United States, 242 U.S. 470, 490 (1917); Aleinikoff, *supra* note 2, at 23-24.

143 "Plain meaning" intentionalists will look beyond the text only if it is unclear. *See, e.g.*, Correia, *supra* note 2, at 54 (plain meaning unless ambiguous); HURST, *supra* note 1, at 48 ("[O]rdinarily courts give prime weight to the statutory text."); *id.* at 55 ("Judges in the United States routinely stipulate that before they will consider evidence of legislative intent outside the words of the statute they must be persuaded that the words taken in themselves are of uncertain meaning. They commonly declare this rule with a finality that appears to make it a test of the competence of any extrinsic evidence: 'If the language be clear it is conclusive. There can be no construction where there is nothing to construe.'" (*quoting* United States v. Hartwell, 73 U.S. (6 Wallace) 385, 396 (1868)); Posner, *Legal Formalism*, *supra* note 2, at 189 ("If the orders are clear, the judges must obey them.").

Others, however, (particularly Justice Stevens) will review the statute's history and context to determine whether the language is clear, and will conclude that it is ambiguous if it conflicts with other evidence of intent or purpose. *See, e.g.*, BFP v. Resolution Trust Corp., 511 U.S. 531, 570 (1994) (Souter, J., dissenting) (absent any "indication that doing so would frustrate Congress' clear intention or yield patent absurdity, our obligation is to apply the statute as Congress wrote it."); Deal v. United States, 508 U.S. 129, 146 (1993) (Stevens, J., dissenting) ("Between 1968, when the statute was enacted, and 1987, when textualism replaced common sense in its interpretation, the bench and bar seemed to have understood that this provision applied to [certain] defendants . . . . The contrary reading adopted by the Court today, driven by an elaborate exercise in sentence-parsing, is responsive to neither historical context nor common sense."); District of Columbia v. Greater Washington Board of Trade, 506 U.S. 125, 136-37 (1992) (Stevens, J., dissenting) ("[I]f we were to decide this case on the basis of nothing more than the text of the statute itself, we would find no pre-emption. . . . I would not decide this case on that narrow ground, however, because both the legislative history of ERISA and prior holdings by this Court have given the suppression provision a broader reading."); Chisom v. Roemer, 501 U.S. 380, 395-96 (1991) (Stevens, J.); West Virginia University Hospitals v. Casey, 499 U.S.

chooses among plausible interpretations if the statute either is ambiguous,[144] fails to address the problem presented (*i.e.*, contains a

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83, 83-102; 103-16 (1991) (Scalia, J., literalist approach which compared language of civil rights statute to language of non-civil rights statutes; Stevens, J., dissenting, purpose of statute and history of civil rights laws); Kaiser Aluminum and Chemical Corp. v. Bonjorno, 494 U.S. 827, 835 (1990) (O'Connor, J.) ("The starting point for interpretation of a statute 'is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'") (*quoting* Consumer Products Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)); United States v. Wilson, 503 U.S. 329, 337 (1992) (Stevens, J., dissenting) ("Today's rigid interpretation of the remedial statute is not supported by the text, legislative history, or underlying policies of the statute. In Crandon v. United States, 494 U.S. 152, 158 (1990), this Court said that '[i]n determining the meaning of [a] statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.' The Court has failed to do this today.") (alteration in original); United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. . . . Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."); Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892) ("familiar rule that 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;" reading legislative history to exclude foreign clergy from coverage of statute prohibiting any person from assisting or encouraging the immigration of foreigners to "perform labor or service of any kind in the United States."); Heydon's Case, 3 Coke 7a, 76 Eng. Rep. 637 (Court of Exchequer 1584) (purpose is discerned by seeking mischief legislature sought to remedy; court should determine what was the common law, for what mischief and defect it did not provide, what remedy the legislature appointed to cure the defect, true reason for the remedy; court should suppress the mischief and advance the remedy).

See also infra notes 144, 151 (use of legislative history to confirm textual meaning).

144 *See, e.g.*, BLACKSTONE, *supra* note 72, at 61 (interpret in light of statute's "reason and spirit" where words are ambiguous); Schauer, *Plain Meaning*, *supra* note 2, at 232, 238 (contrasting indeterminate language with determinate language that conflicts with purpose, policy or intent); *see also* Green v. Bock Laundry Machine Company, 490 U.S. 504, 508-09 (1989) (Stevens, J.) ("We begin by considering the extent to which the text . . . answers the question before us. Concluding that the text is ambiguous . . . , we then seek guidance from legislative history and from the [statute's]. . . overall structure."); *see also supra* note 143.

"Ambiguity" may also arise when a literal reading, uninformed by history and context, would produce an absurd result, or perhaps simply a harsh result. *See, e.g.*, Conroy v. Aniskoff, 507 U.S. 511, 518 n. 12 (1993) (Stevens, J.) ("In his 11 page opinion concurring in the judgment, Justice Scalia suggests that our response to respondents' reliance on legislative history 'is not merely a waste of research time and ink,' but also 'a false and disruptive lesson in the law.' *Post*, at 519. His 'hapless law clerk,' *post*, at 527, has found a good deal of evidence in the legislative history that many provisions of this statute were intended to confer discretion on trial judges. That, of

gap),[145] or expressly delegates a problem to the courts to resolve,[146] but (vi) makes these choices only "interstitially,"[147] (v) firmly roots these choices in legislative policy mandates (as embodied in intent or purpose,)[148] and (vi) to avoid unrestrained judicial

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course, is precisely our point: It is reasonable to conclude that Congress intended to authorize such discretion when it expressly provided for it and to deny such discretion when it did not. A jurisprudence that confines a court's inquiry to the 'law as it is passed,' and is wholly unconcerned about 'the intentions of the legislators,' *post*, at 519, would enforce an unambiguous statutory text even when it produces manifestly unintended and profoundly unwise consequences. Respondent has argued that this is such a case. We disagree. Justice Scalia, however, is apparently willing to assume that this is such a case, but would nevertheless conclude that we have a duty to enforce the statute as written even if fully convinced that every Member of the enacting Congress, as well as the President who signed the Act, intended a different result. Again, we disagree.") (modifications in original); Keene Corporation v. United States, 508 U.S. 200, 222 (1993) (Stevens, J. dissenting) ("[A] reading that is faithful not only to the statutory text but also to the statute's stated purpose is surely preferable to the harsh result the Court endorses here."); United States v. Locke, 471 U.S. 84, 123 (1985) (Stevens, J., dissenting; "prior to December 31" was scrivener's error, Congress meant prior to end of year); Schauer, *Plain Meaning*, *supra* note 2, at 238 (describing the provision considered in *Locke* as "a quite plainly mistakenly drafted procedural requirement").

145 *See supra* note 143 and accompanying text; *see also* Landgraf v. USI Film Products, 511 U.S. 244 (1994) (considering legislative history where language does not expressly resolve the question); Redish, *Common Law*, *supra* note 2, at 764 n. 14 ("[N]o statutory or constitutional framer could ever foresee all of the problems, or the changed future circumstances, that time and experience inevitably generate . . . . Our system (not only of interpretation but of statutory and constitutional lawmaking) presupposes flexibility in the courts to accommodate language reflecting core historical purposes to the perceived needs of changing interpretive contexts."); Zeppos, *supra* note 1, at 1078 ("Originalism accepts that there will be questions left unresolved by Congress but requires that these gaps be filled by faithful execution of Congress's [sic] desires.").

146 *See, e.g.*, HART, *supra* note 38, at 131-32 (when law is unclear judge must use discretion to make a choice and engage in creative or legislative activity); Miller, *supra* note 88, at 39 ("In cases where the legislative language is of a high level of abstraction, the power is to do more than legislate interstitially; it is a cession of almost complete legislative power."); Redish, *Common Law*, *supra* note 2, at 794 (court may engage in "creative lawmaking pursuant to a clear legislative delegation").

147 *See, e.g.*, Eskridge & Frickey, *Practical Reasoning*, *supra* note 2, at 378 n. 206; James Landis, *A Note on Statutory Interpretation*, 43 HARV. L. REV. 886, 893 (1930) ("[J]udicial legislation shall concern itself only with the interstitial tissues of the body politic and not its gristle"); Miller, *supra* note 88, at 35-36 (judicial lawmaking is interstitial).

148 *See, e.g.*, Correia, *supra* note 2, at 1146-48 (court policymaking but within scope of policy making authority Congress gives it); Frankfurter, *supra* note 15, at 535-44 (process of construction begins with statute's words, construed in light of the audience to which they are directed, then considers the context, which requires a focus not on the legislature's or legislators' "intent" but on the purpose and policy revealed by the ends to be achieved and "mischief" to be cured); HURST, *supra* note 1, at 54

policymaking, consults only the text and those historical[149] sources that are deemed to provide credible evidence[150] of the original legislative design. To originalists, legislative history, used properly, is a powerful tool both for confirming an apparently plain meaning and for determining legislative intents and statutory purposes where the language is unclear.[151] In the "no dogs" hypothetical, for example, the legislative history might reveal an actual legislative

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(Intent with recognition of statute as part of continuing process of policy development); *id.* at 46 ("Those who would properly apply a statute must seek to fulfill the substance of its policy within the framework of its text—an effort that calls for wisdom in not exalting either to the exclusion of regard for the other.").

149 Originalists do not consider post-enactment events (except perhaps subsequent amendments of the same statute that help explain it), or current policies, values or norms. *See, e.g.*, Correia, *supra* note 2, at 1159-60 (legislature does not want courts to consider post enactment history); Farber & Frickey, *supra* note 2, at 465-68 (and sources cited therein); Sunstein, *supra* note 2, at 415 ("Background norms, policy considerations, indeed all 'outside sources,' are immaterial."); Zeppos, *supra* note 1, at 1078-79 (discussing the originalist approach of Judge Learned Hand). On legislative history, *see supra* note 120 and accompanying text; *infra* notes 150-151 and accompanying text.

150 Several commentators have attempted to rank different types of legislative history according to their relative credibility. *See* Eskridge, *Textualism*, *supra* note 2, at 636-40; HART & SACKS, *supra* note 1, at 1253-54; Maltz, *supra* note 2, at 24-28; Scalia, *supra* note 2, at 18; *see also* Zeppos, *supra* note 1, at 1091-98 (cataloguing Supreme Court's references to various types of legislative history during 1980-90). On the use of legislative history, *see generally supra* note 120; *infra* note 151. *See also* Correia, *supra* note 2, at 1153-60, 1191-92 (legislature wants courts to determine intent based on items legislature would consider reliable; use good faith to apply if truly ambiguous; most reliable sources are constitution, legislative policy in other statutes, common law); Frankfurter, *supra* note 15, at 541 ("If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded.").

151 *See, e.g.*, Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 170-71 (1993) (Stevens, J.) ("Both parties argue that the plain language . . . is dispositive. . . . We shall first review the text and structure of the statute and its 1980 amendment, and then consider the text and negotiating history of the Convention."); Public Citizen v. Department of Justice, 491 U.S. 440 (1989) (majority relies on legislative history; concurrence rejects legislative history where the plain meaning is not absurd); INS v. Cardoza-Fonseca, 480 U.S. at 432 & n. 12 ("[T]he plain language of this statute appears to settle the question before us. Therefore, we look to the legislative history to determine only whether there is 'clearly expressed legislative intention' contrary to that language, which would require us to question the strong presumption that Congress expresses its intent through the language it chooses."); *see also* Eskridge, *Textualism*, *supra* note 2, at 626-36 (legislative history to verify meaning); Farber & Frickey, *supra* note 2 (value of legislative history); *id.* at 437-52 (legislative history to discern legislative intent); Wald, *supra* note 120, at 197-99 (1982-83 term; Court generally checks legislative history to confirm its reading of a statute's "plain meaning"); Wald, *supra* note 2, at 289 (reliance on legislative history to confirm meaning in 1988-89 term); *id.* at 291-93 (legislative history to clarify ambiguity or fill gap); *id.* at 293 (legislative history to determine purposes of statute); *id.* at 294-97 (legislative history to

intent to penalize persons who fail to prevent their dogs from wandering into the park, which would result in a fine to the runaway dog's owner. The statute's history and context might reveal a purpose to promote a safe and clean park, which would result in no fine to the owner of the dog in the car.

Originalism and Democracy. Originalism embraces a "structural" view of democracy.[152] Structural democracy focuses primarily upon ensuring that governmental institutions act within their respective spheres of competence and democratic authority.[153]

In the arena of statutory interpretation, "legislative supremacy"[154] has long been the mantra of structural democracy and the defining core of institutional accountability.[155] Legislative

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avoid absurd or implausible result); *cf.* DICKERSON, *supra* note 29, at 164 (problems of legislative history). *See also supra* notes 120, 150.

152 *See, e.g.*, HART & SACKS, *supra* note 1, at 4 ("institutional settlement" means that a decision is legitimate and should not be disturbed if it reflects the "duly arrived at result of duly established procedures . . ."). *See* ESKRIDGE, *supra* note 1, at 142 (centrality of process as legitimizing theme in legal process theories; emphasizing interaction of different institutions each acting within their own particular competence); LEGISLATION, *supra* note 48, at 397-98 (centrality of process to purposivism); Schacter, *supra* note 2 at 595 (originalism as "institutional essentialism").

153 *See* HART & SACKS, *supra* note 1, at 163-66 (institutional competence). Procedural democracy is essentially the equivalent of political scientists' "internal" theories of democracy. *See infra* note 192; *see also* Schacter, supra note 2, at 598 (applying a similar analysis and characterizing originalism as institutional essentialism, which essentially embraces internal democracy).

154 On legislative supremacy, *see generally* Correia, *supra* note 2, at 1129 (concept of legislative supremacy remains elusive); *id.* at 1141-1142 (expansive conception of legislative supremacy highly deferential to legislative authority; narrow conception states that courts must follow a unambiguous legislative command that is constitutional); Eskridge, *Legislative Supremacy, supra* note 2, at 343 ("The more deeply one considers legislative supremacy, the more complex and ambiguous it becomes. . . ."); Farber, *Legislative Supremacy, supra* note 2; Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767 (1991); Maltz, *supra* note 2.

155 *See, e.g.*, Correia, *supra* note 2, at 1132-33 & nn. 6-14, 1139-45 (positivist and normative bases for legislative supremacy); DICKERSON, *supra* note 29, at 9 n.6 ("In the United States, legislative supremacy is expressly written into the federal and state constitutions.", *citing* U.S. CONST. art. I, § 1); HURST, *supra* note 1; Maltz, *supra* note 154, at 767 ("[The] idea that the legislature has legitimate authority to make laws, and that the judiciary must respect that authority in making its decisions- embodies one of the most basic premises underlying the American political system."); Schacter, *supra* note 2, at 594 ("Our legal culture's understanding of the link between statutory interpretation and democratic theory verges on the canonical and is embodied in the principle of 'legislative supremacy.'"); SINGER, *supra* note 69. Accountability requires that each governmental institution performs its constitutionally assigned role (and only its assigned role). In (perhaps overly) simplistic terms, originalists assume that the struc-

supremacy, which derives from the nature of Congress (majoritarian), and the courts (non-majoritarian),[156] and process-oriented principles that inhere in the structure of the Constitution (including separation of powers),[157] requires that the unelected judiciary act as a good faith agent to implement the elected legislature's policy choices, as embodied in statutes.[158] This proceduralist

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ture of governmental institutions is designed to achieve some normative good, and that, if legislatures and courts perform their constitutionally assigned roles (and only their assigned roles), the normative ends of democracy naturally will ensue.

156 *See generally* Correia, *supra* note 2, at 1132-40 (legislative supremacy is good because the legislature is politically accountable to the majority); Gonzalez *supra* note 2, at 633-96; Gutmann, *supra* note 96, at vii (intent of legislature is presumed to be democratic because legislature is accountable to the majority); Maltz, *supra* note 2, at 7-9; LEGISLATION, *supra* note 28, at 481-82; Redish, *Abstention*, *supra* note 2; Redish, *Common Law*, *supra* note 2; *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962) (coining the term "countermajoritarian difficulty" in the context of constitutional judicial review); JOHN HART ELY, DEMOCRACY AND DISTRUST 181-82 (1980) ("representation-reinforcing" use of judicial review not to enforce substantive values in the Constitution, but rather to reinforce procedural values).

157 Legislative supremacy derives from separation of powers. *See* U.S. CONST. art. I, § 1 ("legislative powers" are vested in Congress), art. I, § 8 (power to make all "Laws" is vested in Congress), art. III, § 1 (judicial power is vested in the courts). *See, e.g.*, Aleinikoff, *supra* note 2, at 23 ("Getting closer to what the legislature actually intended is thought to serve the goal of legislative supremacy better [than textualism]."); Maltz, *supra* note 2, at 6-9 (legislative supremacy requires deference to statutes not because of majority rule, which is not strictly reflected in our political system, but because the legislature has been granted the political power to prescribe law under the Constitution); Maltz, *supra* note 154; Merrill, *supra* note 2, at 32-33 (separation of powers requires originalism); *cf.* Correia, *supra* note 2, at 54 ("There are sound reasons for caution in looking beyond the statute book for evidence of the legislature's intention. Separation of powers values are at stake. Short of constitutional limitations, the legislature is entitled to set public policy. The words it votes onto the statute books are its prime means and its deliberately chosen means to define public policy and to consider authority and impose limitations on others who will translate policy into particular action.").

158 *See, e.g.*, ESKRIDGE, *supra* note 1, at 14 ("If the legislature is the primary lawmaker and interpreters are its agents, then requiring interpreters to follow the legislature's intentions constrains their choices and advances democracy by carrying out the will of the elected legislators."); *id.* at 108-09 (deliberative theories focus on institution with competence and legitimacy to make choices through proper political processes); Eskridge & Frickey, *Practical Reasoning*, *supra* note 2, at 326 ("If the legislature is the primary lawmaker and courts are its agents, then requiring courts to follow the legislature's intentions disciplines judges by inhibiting judicial lawmaking, and in so doing seems to further democracy by affirming the will of elected representatives."); Farber, *Legislative Supremacy*, *supra* note 2, at 281 & n.3; ("judges are subordinate to legislatures in the making of public policy"); *id.* 281, 284, 287 (strong conception of legislative supremacy is a complete specification of the judicial role; weak conception views supremacy as a constraint on judicial action); Maltz, *supra* note 154, at 769 (idea that

approach gives originalism the appearance of neutrality and objectivity: as long as the courts act as honest agents of the legislature, their decisions are unassailable because they merely implement democratic choices, as articulated through legislative processes, and because the legislature can "correct" judicial "errors."[159] Originalism if effective, however, only if it is correct in its assumptions that legislation reflects democratic choices, that legislation embodies discernible intents or purposes, and that interpreters can neutrally and objectively discern and apply legislative intents or statutory purposes. These assumptions, together with originalism's apparent objectivity, have been devastatingly assaulted by the application of public (social/rational) choice theory, hermeneutics, and critical legal theory to the problems of interpretation.[160] Consequently, both textualists and dynamists argue that subjective intentionalism is clearly dead and that even the more objective purposivism is unworkable in practice.[161]

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the legislature has legitimate authority to make laws, and that the judiciary must respect that authority in making its decisions embodies one of the most basic premises underlying the American political system); Merrill, *supra* note 2, at 19-24 (separation of powers and legislative supremacy are designed to restrain lawmaking powers of courts); POSNER, *supra* note 133, at 286-93 (courts should honor imaginatively reconstructed legislative intent); Redish, *Common Law*, *supra* note 2, at 794 (court's proper role is "(1) attempting to apply specific language of statute's text to a set of facts; (2) deciding a legal question that, although not explicitly covered by the text, must be resolved, one way or another, before the statute may be applied to a specific set of facts to which the text concededly applies; or (3) engaging in creative lawmaking pursuant to a clear legislative delegation"); *id.* at 794 (If court engages in any other than these three tasks: "it is engaged in naked legal creation, unguided and unauthorized by legislative directive. One may debate whether such a practice is, in the abstract, either undemocratic or inconsistent with our constitutionally-dictated system of separation of powers. It is clearly rendered undemocratic, however, when the practice has been legislatively prohibited, as it has been for the federal courts by the Rules of Decision Act. Under this circumstance, then, the practice of unauthorized legal creation by the federal judiciary effectively amounts to a form of judicial civil disobedience to legislative will."); Schacter, *supra* note 2, at 594 (legislative supremacy "seeks to limit the role of judges to ascertaining and then effectuating the legislative will"); Zeppos, *supra* note 1, at 1079 ("This is the main attraction of originalism: it claims to curb policymaking by an unelected, life-tenured judiciary."); *id.* at 1079-80 ("Unless the pedigree of the result can be tied to the enacting legislature, the judge is free to roam the legal-societal landscape and render pure policy decisions. According to [intentionalism], such a judicial role can not be reconciled with our democratic form of government."); Zeppos, *Legislative History*, *supra* note 2, at 1363 (Proposing a "fact-finding" model that honors legislative supremacy).

159 *See supra* note 158 and accompanying text.

160 *See infra* notes 209-217 and accompanying text.

161 *See, e.g.*, Gutmann, *supra* note 96, at ix (rejection of subjective intent); Eskridge,

3. Dynamic Legitimacy

Dynamism's Object and Methods. Dynamic interpreters view statutes, like all law, as tools for responding to society's needs.[162] To adapt statutes to particular circumstances and changing needs, courts consult "dynamic" sources of interpretation in addition to the statutory text and history. Dynamic sources include post-enactment developments in law and society, presumed legislative "meta-policies" that transcend and may contradict the specific purposes of the statute being interpreted, and "extra-legislative" public values that are found by determining what society values rather than simply by examining legislation.[163] These considerations, applied with particular concern for consequences, allow statutes to evolve

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Statutory Interpretation, *supra* note 2, at 1507 ("legislative intent is incoherent"); SCALIA, INTERPRETATION, *supra* note 2, at 16-23; Schacter, *supra* note 2, at 598; Rasmussen, *supra* note 2, at 540 (intent of legislature is not used anymore in overturning a statute's plain meaning.); Zeppos, *supra* note 1, at 1087 (originalism "has no serious defenders in the academy").

162 *See, e.g.*, Aleinikoff, *supra* note 2, at 58 ("Law is a tool for arranging today's social relations and expressing today's social values; and we fully expect our laws, no matter when enacted, to speak to us today."); CALABRESI, *supra* note 1, (developing a theory of common law interpretation under which courts may overturn statutes that no longer reflect the current social needs and consensus); Farber, *Legislative Inaction*, *supra* note 2, at 19 (dynamists use public values to interpret statutes in light of their current usefulness); Rasmussen, *supra* note 2, at 542 (dynamic interpretation responds to society's current needs); Zeppos, *supra* note 1, at 1081 (dynamists consider public values to make law more responsive to societal needs; judiciary must be "responsive to the current needs of society and to how statutory law affects people today"). *See also infra* note 164.

This view also drives some dynamists' suggestion that courts should be attentive to the preferences of the current legislature as well as those of the enacting legislature. *See, e.g.*, Eskridge, *Overriding*, *supra* note 2, at 334-335 (courts should be attentive to new situations, new values, and current legislative preferences); ESKRIDGE, *supra* note 1, at 75 (courts should be attentive to current political policies); *cf.* Johnson v. Transportation Agency, 107 S. Ct. 1442, 1472-73 (1987) (Scalia, J., dissenting) (criticizing majority for relying on the "patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant").

163 *See, e.g.*, Eskridge, *Statutory Interpretation*, *supra* note 2 (elaborating on the types of changed circumstances, meta-policies, and current public values that may affect interpretation); Farber, *Legislative Supremacy*, *supra* note 2, at 309 (court should consider current values and consequences, but only if statute is unclear); Rasmussen, *supra* note 2, at 542 (dynamism holds as a "core notion that the Court should expressly consider sources other than the statutory text" and that "these sources should reflect the current needs of society"); Zeppos, *supra* note 1, at 1074 ("dynamic theories urge that statutory cases be decided on the basis of public values or practical considerations"); *see also* DWORKIN, *supra* note 39 (courts should use interpretive community's principles and policies to attain the best result when interpreting open tex-

"dynamically" in response to varied and unforeseen circumstances and to changes in law and society, rather than to remain forever entombed in their drafters' original visions.[164] For example, a court asked in 1997 to determine whether a "no dogs" statute enacted in 1950 prohibits guide dogs, might consider (in addition to the text and history) whether subsequent statutes require the admission of guide dogs to public places, whether a "perceived" legislative meta-policy of providing safe access and enjoyment of the park by all citizens (including those with guide dogs) overrides the statute's specific purpose of prohibiting all dogs, and whether current public values require an exception for guide dogs.

Judge Guido Calbresi and Professors T. Alexander Aleinikoff, Ronald Dworkin, William N. Eskridge, Jr., Philip P. Frickey, and Cass R. Sunstein advocate various forms of dynamic interpretation. Some of Judge Richard A. Posner's work also advocates a form of dynamism. These dynamic theories vary based upon when and for what purposes they permit courts to consult dynamic sources. These differences separate dynamic theories into (roughly) three groups, which this Article terms "originalist," "updating," and "creative."[165]

As its name implies, "originalist dynamism" is quasi-originalist and quasi-dynamic. "Originalist" dynamists (including Judge Pos-

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tured statutes); DWORKIN, *supra* note 45 (same); *see also supra* note 13, *infra* notes 164, 173.

164 *See supra* note 162, *infra* notes 167, 171-175, 179 and accompanying text; *see also* Eskridge, *Statutory Interpretation*, *supra* note 2; ESKRIDGE, *supra* note 1, at 48 ("[S]tatutory interpretation is multifaceted and evolutive rather than single-faceted and static, involves policy choices and discretion by the interpreter over time as she applies the statute to specific problems, and is responsive to the current as well as the historical political culture."); LEGISLATION, *supra* note 48, at 603-613; Farber, *Legislative Inaction*, *supra* note 2, at 19 (debate focuses on "the extent to which legal texts gain their meaning and authority from the circumstances of their making, and the extent to which their authority derives instead from their current place in the fabric of law and their current usefulness to society."); Zeppos, *supra* note 1, at 1080 & n. 35 ("These theories tend to view statutory interpretation as more dynamic and envision an active policy making role for the judge."); *id.* 1081-84 (discussing dynamic interpretation); *id.* at 1081 ("Public values theorists are explicitly normative. With an emphasis on present-minded considerations, they see an active and important role for the judiciary in making government more responsive to societal needs. In this respect, the dynamic theorists reject the fear of judicial policymaking that explains originalism.").

165 It is difficult to categorize these theories precisely because dynamic theories overlap and some of these theories are still evolving.

ner and Professor Farber)[166] use dynamic sources to clarify ambiguities and fill gaps only when originalist sources (the statutory text and legislative history), taken together, are indeterminate.[167] In the absence of a clear intent, the interpreter seeks the best result by pragmatically considering current values and the consequences of alternative interpretations.[168] The "no dogs" statute probably is sufficiently clear to be enforced by originalist dynamists without consulting dynamic sources (unless, of course, they conclude that applying the statute to one of the hypothetical dogs would lead to an absurd result).

"Updating dynamists" consult dynamic sources primarily to adapt aging statutes to changed circumstances. Statutes may be updated at a simple definitional level or a complex holistic level. Simple "definitional updating" applies the current meaning of a statute's words, rather than their original meaning, when the meaning has changed.[169] This approach is quasi-textual and may

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166 *See generally* Farber, *Legislative Supremacy*, *supra* note 2; Posner, *Primer*, *supra* note 2; Posner, *Legal Formalism*, *supra* note 2; POSNER, OVERCOMING LAW 11-13 (1995) (creative role for the judiciary); *see also* LEGISLATION, *supra* note 48, at 628 (Judge Posner's approach is dynamic); HANKS, HERZ & NEMERSON, *supra* note 140, at 263 (Professor Farber's approach is "mildly dynamic").

167 *See, e.g.*, Farber, *Legislative Supremacy*, *supra* note 2 at 317-18 (advocating a "weak conception" of legislative supremacy in which the judge is bound only by clearly conveyed legislative intents; the judge faced with an ambiguous statute is free to move beyond, but not against, clear legislative intent by considering current values and consequences; the court may not, however, disobey clear legislative intents even if post-enactment changes in public values have significantly altered the statute's context because legislators do not hold a "meta-intent" that courts conform statutes to current societal needs); Farber, *Legislative Inaction*, *supra* note 2, at 6-7 (nonoriginalist interpretation is necessary when originalism is indeterminate; particularly when a statute is old and broadly worded, indeterminacy may arise from gaps in the record, divergent views of legislators, changes in linguistic usage and cultural context, and the problem of defining original understanding at different levels of generality); Farber & Frickey, *supra* note 2, at 461-65 (practical reasoning suggests that courts should consider consequences if the statute is ambiguous or capable of multiple meanings; drawing with approval on Judge Posner's command theory model); Posner, *Legal Formalism*, *supra* note 2, at 189-91 (under "command theory" of interpretation, unclear statutes are like garbled orders from a company commander to a platoon commander, and the judge must "figur[e] out what outcome will best advance the program or enterprise set on foot by the enactment" even though the legislature's intent cannot be discerned).

168 *See supra* note 167 and accompanying text; Farber & Frickey, *supra* note 2, at 461-65 (practical reasoning suggests that courts should consider consequences); Posner, *Primer*, *supra* note 2, at 449 (pragmatism "reduces questions of meaning to questions of consequences").

169 *See generally* LEGISLATION, *supra* note 48, at 559-61 (discussing how interpretation of jury selection laws that permitted only "electors" or "voters" to serve on juries was

not be recognized as dynamic.[170] "Holistic updating" employs dynamic sources to adapt the entire statutory design to changed circumstances.[171] Holistic updaters include Judge Calabresi, Professors Eskridge and Frickey, and (possibly) Professor Aleinikoff (who may be "creative"). These holistic updaters seek to ensure that law reflects the current political consensus. Unless circumstances have changed, holistic updaters accept that recent statutes probably reflect the current consensus.[172] Holistic updaters use the text and history as a baseline, then consider how current

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affected by the Nineteenth Amendment to the United States Constitution, which authorized women to vote and changed the meaning of "elector" or "voter" to include women).

170 This approach is consistent with the old "plain meaning" rule, under which courts apply the statute's words as written if they have a plain meaning, without considering whether the meaning is consistent with the legislature's intent or purpose. *See supra* notes 112, 143 and accompanying text. *See also* ESKRIDGE, *supra* note 1, at 118-19 (textual approach may be dynamic if textualists apply current meaning); *see also supra* notes 112, 115 (original versus current meaning in textualism).

171 *See generally* Aleinikoff, *supra* note 2 (contrasting dynamic interpretation's "nautical" approach to originalism's and textualism's "archaeological" approach; elaborating on "nautical" metaphor under which legislature sets statute adrift on a course, but courts must adjust the course to unforeseen circumstances); *id.* at 21 (contrasting archeological approach of originalism and textualism in which "the meaning of a statute is set in stone on the date of enactment, and it is the interpreter's task to uncover and reconstruct that original meaning," with dynamism's "nautical" approach in which Congress sets the statute's "initial course" but later factors determine the "current course"); FRANCIS BENNION, STATUTORY INTERPRETATION (1984); CALABRESI, *supra* note 1 (developing theory of common law interpretation to update obsolete statutes); *id.* at 33 (arguing that Supreme Court has used "dynamic, relational intent" to keep statutes up to date and achieve results Congress might not have approved); *id.* at 68-80 (three possibilities to deal with obsolescence: rely on unchecked majoritarian legislature to update laws; return to nineteenth century "golden age" of common law; develop a new legislative / judicial balance to update laws; advocating the last option); Charles P. Curtis, *A Better Theory of Interpretation*, 3 VAND. L. REV. 407 (1950) (nautical metaphor of vessel being launched from old world to new); ESKRIDGE, *supra* note 1 (elaboration of dynamic interpretation theory); *id.* at 50 (labeling his approach "pragmatic dynamism"); *see also* Langevoort, *supra* note 2 (examining courts' role in updating obsolete banking legislation).

172 *See, e.g.*, CALABRESI, *supra* note 1, at 72 ("Obsolescence in legal rules exists when laws do not reflect the views of the current majority on what preferences in treatment are warranted by present conditions. The obvious solution is to make laws respond to the requirements of these majorities."); Eskridge & Frickey, *Equilibrium*, *supra* note 2, at 57-58 ("Especially for recently enacted statutes, . . . the text is usually evidence of current political consensus."); Farber, *Legislative Inaction*, *supra* note 2 (considering implications of current Congress' failure to overturn Supreme Court interpretation of federal statutes); LEGISLATION, *supra* note 48, at 628 ("Most dynamic interpreters believe that statutes do not evolve from their original understandings until circumstances have changed in some material way . . . .").

values and contexts, overriding meta-policies, and the evolution of public values and social or legal circumstances since the enactment of the statute should affect interpretation.[173] For holistic updaters,

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[173] *See, e.g.*, CALABRESI, *supra* note 1; DWORKIN, *supra* note 39, at 313 (The judge should "use much the same techniques of interpretation to read statutes that he used to decide common-law cases. He will treat Congress as an author earlier than himself in the chain of law, though an author with special powers and responsibilities different from his own, and he will see his own role as fundamentally the creative one of a partner continuing to develop, in what he believes is the best way, the statutory scheme Congress began."); Eskridge & Frickey, *Practical Reasoning*, *supra* note 2, at 351-52 (Dynamism interprets a statute by considering the text of the statute along with the goals and expectations of the enacting legislature, in light of current policies and societal values. To a dynamic interpreter, none of the interpretive tools will be viewed in isolation, to the exclusion of others. Rather, each will be considered "in light of the whole enterprise, including the history, purpose, and current values."); *id.* at 354-58 (consider text and history broadly: text as starting point and most authoritative source; begin with specific words, any specialized meanings, grammatical placement, then words in general structure of statute, may look to similar provisions in other statutes; history including original expectations of drafters as seen in legislative history, imaginative reconstruction, actual or attributed purpose); Eskridge & Frickey, *Equilibrium*, *supra* note 2, at 62 ("Statutory text never anticipates all the issues that the statutes will have to address, and over time the unresolved issues will multiply when social circumstances change and the political-legal equilibrium shifts. As statutes evolve, the text loses some of its focal power, and other considerations become increasingly important in statutory interpretation - the purpose of the law, the surrounding legal terrain, and statutory precedents."); GILMORE, *supra* note 23, at 96-97 (suggesting old statutes will die out, middle age is worst, though courts may be able to use inevitable alternative constructions to reach good results); *id.* at 97 ("[I]t is only within the past ten or fifteen years that there have been suggestions in some judicial opinions to the effect that courts, faced with an obsolete statute and a history of legislative inaction, may take matters into their own hands and do whatever justice and good sense may seem to require . . . . [W]e will come to see that the reformulation of an obsolete statutory provision is quite as legitimately within judicial competence as the reformulation of an obsolete common law rule."); Rasmussen, *supra* note 2, at 542-43 (dynamic interpreters approach: (1) begin with text; if plain, it is given presumptive, not conclusive effect; (2) legislative history; specific intent concerning the issue and, where absent, general intent concerning the statute; up to this point dynamism looks like traditional attempt to discern intent; after considering materials contemporaneous with drafting, however, dynamists move to considerations that have no connection to text: (3) relevant social or legal changes since statute was enacted; and (4) current values; the last two are consequentialist); Zeppos, *Candor*, *supra* note 2, at 358 ("Eskridge argues for a similar process of judicial updating of statutes. His approach, however, is more restrained than Calabresi's. Eskridge does not argue for a judicial power to invalidate or ignore statutes. Indeed, he concedes that courts must be guided by originalist sources, such as the text and history of a statute. He argues, however, that in appropriate cases a court should not search for intent of the legislature, but should instead interpret a statute in a way that best meets the needs of present day society."); Popkin, *Collaborative Model*, *supra* note 2 (lawmaking is a collaborative venture in which courts should give primacy to plain meaning, which is determined by reference to the words and their internal and external context (the latter

the legislature sets the general course, but courts necessarily "create" meaning when they apply a statute in particular circumstances. This view, which is shared by holistic and creative dynamists, draws heavily (i) on hermeneutics (the branch of philosophy that explores the nature and processes of interpretation), which teaches that all meaning is contextual, that authors and interpreters each bring to the task their individual experiences and contexts, and that interpretation necessarily involves a dialogue designed to achieve a common ground between the author and reader, and (ii) for some, on parallels to literary theory and literary criticism, including the notion that interpretation is a process of creating rather than uncovering meaning.[174] In determining current mean-

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includes common understanding, and the political values inherent in the statute's purpose and its background considerations), and should ensure that the interpretation fits with earlier and later law and changing circumstances).

[174] *See, e.g.*, Aleinikoff, *supra* note 2, at 57 ("Enactment of a statute represents the beginning of a journey, not the end. The statute 'means' nothing until it takes its place in the legal system, until it begins to interact with judges, lawyers, administrators, and lay people. Each of these interactions changes, or fills out, the meaning of the statute."); Dworkin, *supra* note 2, at 541-43 (interpretation as a "chain-novel" in which each author adds a chapter; analogizing legal interpretation to literary interpretation); DWORKIN, *supra* note 39 (same); LEGISLATION, *supra* note 48, at 607 (for Ronald Dworkin and scholars who draw upon hermeneutics, "Interpretation is an ongoing process of creating new and evolving meaning from text."); ESKRIDGE, *supra* note 1, at 5 ("Modern hermeneutic theories posit that interpretation is neither the reconstruction of an author's intent nor the interpreter's act of social engineering, but rather a process by which the interpreter and the text reach what Hans-George Gadamer terms a 'common understanding.'"); *id.* at 58 ("Philosophical hermeneutics is concerned with the ways in which current readers interpret and understand historical texts. The meaning of the text does not take form until an interpreter understands it, and different interpreters will read the same text differently.") (footnote omitted); William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990); (drawing on hermeneutics to inform statutory interpretation); Eskridge & Frickey, *Practical Reasoning*, *supra* note 2, at 323 ("Interpretation, Gadamer claims, is the search for common ground between interpreter and text."). *See also generally*, Ronald Dworkin, *Comment*, *in* SCALIA, INTERPRETATION, *supra* note 2 (textualism is simply choice of semantic intention over expectation intention; texts have no objective meaning or intention).

On hermeneutics and the intersections between law and literature, *see generally* Clark D. Cunningham, *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561 (1994) (reviewing SOLAN); COSTAS DOUZINAS & RONNIE WARRINGTON (WITH SHAUN MCVEIGH), POSTMODERN JURISPRUDENCE: THE LAW OF TEXT IN THE TEXTS OF LAW (1991) (especially Chapter 2: From the Book to the Text: Hermeneutics, Critique, Deconstruction; and Chapter 8: Law (Un)like Literature: Who is Afraid of Pragmatism?); STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES (1989) [hereinafter FISH, THEORY]; STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES

ing, holistic updaters urge courts to use "practical reasoning" to make adjustments that are necessary to achieve the best results in changed circumstances. These adjustments may be contrary to the legislature's specific purposes or language as long as they serve broader presumed "meta-purposes."[175]

(1980) [hereinafter FISH, TEXT]; HANS-GEORGE GADAMER, TRUTH AND METHOD (2d rev. English ed. 1989); David Couzens Hoy, *Interpreting the Law: Hermeneutical and Post-Structuralist Perspectives*, 58 S. CAL. L. REV. 135 (1985); David Couzens Hoy, *A Critique of the Originalism / Nonoriginalism Distinction*, 15 N. KY. L. REV. 479 (1988); DAVID COUZENS HOY, THE CRITICAL CIRCLE: LITERATURE, HISTORY, AND PHILOSOPHICAL HERMENEUTICS (1978); *Interpretation Symposium*, 58 S. CAL. L. REV. 1 (1985); LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE (Gregory Leyh, ed. 1992); INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER (Sanford Levinson & Steven Mailloux, eds. 1988) (emphasizing interpretation of the United States Constitution, but providing insights transferable to statutory interpretation; also, the essay by Kenneth S. Abraham, "Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair" at 115-129, reprinted from 32 RUTGERS L. REV. 676 (1979), focuses specifically on statutory interpretation); THE POLITICS OF INTERPRETATION (W. J. T. Mitchell, ed. 1983); Gary C. Leeds, *The Latest and Best Word on Legal Hermeneutics: A Review Essay of Interpreting Law and Literature: A Hermeneutic Reader*, 65 NOTRE DAME L. REV. 375 (1990) (book review); Francis J. Mootz, III, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas, and Ricoeur*, 68 B.U. L. REV. 523 (1988); Francis J. Mootz III, *Law and Philosophy, Philosophy and Law*, 26 U. TOLEDO L. REV. 127 (1994); RICHARD E. PALMER, HERMENEUTICS: INTERPRETATION THEORY IN SCHLEIERMACHER, DILTHEY, HEIDEGGER, AND GADAMER (1969); Marc R. Poirier, *On Whose Authority?: Linguists' Claim of Expertise to Interpret Statutes*, 73 WASH. U. L.Q. 1025 (1995); POSNER, *supra* note 25 (especially Chapter 5 "The Interpretation of Statutes and the Constitution"); Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351 (1986); LAWRENCE G. SOLAN, THE LANGUAGE OF JUDGES (1993); Symposium, *Law and Literature*, 60 TEX. L. REV. 373 (1982); Symposium, *1955 Northwestern/Washington University Law & Linguistics Conference*, 73 WASH. U. L.Q. 785 (1995); Robin L. West, *Adjudication is Not Interpretation: Some Reservations About the Law-As-Literature Movement*, 54 TENN. L. REV. 203 (1987); *see also* Paul Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982); Stanley Fish, *Interpretation and the Pluralist Vision*, 60 TEX. L. REV. 495 (1982); Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984); Stanley Fish, *Don't Know Much About the Middle Ages: Posner on Law and Literature*, 97 YALE L.J. 777 (1988) (book review); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985); JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM (1990); DAVID MELLINKOFF, THE LANGUAGE OF THE LAW (1963) (on the history and problems of law's language); *see also generally* JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING (1990).

175 *See supra* note 173 and accompanying text; *see also supra* note 164. Purposivism allows some adaptation of statutes also, but it must always be tied to the legislature's original objectives, even if external post-enactment circumstances may have undermined those objectives. *See* ESKRIDGE, *supra* note 1, at 26 (purposivism "allows a statute to evolve to meet new problems while ensuring legitimacy by tying interpretation to original legislative expectations."); *id.* at 48-49 (in dynamism, statutes may evolve beyond original expectations and, if original assumptions were or become erroneous,

"Creative" dynamists (who include Professor Dworkin, Professor Aleinikoff (possibly, he may be a holistic updater), and certain critical legal scholars and civic republican scholars)[176] view law as a process of public deliberation about political values[177] in which all players must affirmatively and candidly consider consequences.[178] Courts do not merely "apply" legislative policy choices; rather, they necessarily create meaning in a normative, value laden way through statutory interpretation.[179] Some creative dynamists, in-

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against original expectations); *see also* Aleinikoff, *supra* note 2, at 34-35 (legal process allows updating to bring original purpose in harmony with current needs and to harmonize law); CALABRESI, *supra* note 1, at 85-88 (same). Holistic updaters prefer more flexible, pragmatic, eclectic, situation-specific solutions, which recognizes that interpreters are in fact influenced by a variety of factors, over grand theories that attempt to modify or constrain judicial behavior. *See, e.g.*, Eskridge & Frickey, *Practical Reasoning*, *supra* note 2, at 322-23 & n. 3 (practical reasoning "eschews objectivist theories in favor of a mixture of inductive and deductive reasoning (similar to the practice of the common law), seeking contextual justification for the best legal answer among the potential alternatives" and, in hard cases, where evidence of text, history, current needs is inconsistent, urges courts to consider a broad range of historical and current sources and concerns); Farber & Frickey, *supra* note 2; Frickey, *supra* note 2, at 1208 (Practical reasoning is "'a concern for history and context; a desire to avoid abstracting away the human component in judicial decisionmaking; an appreciation of the complexity of life; some faith in dialogue and deliberation; a tolerance of ambiguity, accommodation, and tentativeness, but a skepticism of rigid dichotomies; and an overall humility.' Under this approach, the interpreter consults all potentially relevant sources of statutory meaning. These sources include statutory text, legislative expectations, statutory purposes, evolution of the statute over time, and coherence of the statute with the broader public law."); *see also* Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1341 (1988) (root law in experience, not raw theory); Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1707 (1990) (same).

176 *See infra* notes 177-184.

177 *See, e.g.*, Popkin, *Collaborative Model*, *supra* note 2, at 627 (lawmaking is process "of public deliberation about political values in which courts play an active role."); *see also* RONALD DWORKIN, A MATTER OF PRINCIPLE 70-71 (1985) (judicial review to generate public debate); Farber, *supra* note 175, at 1343 (law as dialogue); Radin, *supra* note 175, at 1725 (same); Smith, *supra* note 2, at 434-35 (noting call for dialogue by pragmatists, radical critics, civic republicans, ethical naturalists, feminists, new and old legal process, and liberal neutrality theorists). *See also supra* note 48.

178 *See generally infra* notes 179-184; Aleinikoff & Shaw, *supra* note 2, at 704 ("consequences ought to carry interpretive weight"): *id.* at 706-12 (consider consequences).

179 *See supra* note 174 and accompanying text; *see also* Popkin, *Collaborative Model*, *supra* note 2, at 590 ("[L]aw, not just legislation, is the product of public deliberation, which is an ongoing political process of identifying political values. Legislation is, therefore, tentative and questioning, not willful, and legislative equilibria are unstable, leaving open the possibility of revision. . . . [A] statute is . . . a political event which enters into the law, to be interpreted by the courts. Because law, not just stat-

cluding those who are influenced by civic republicanism[180] or critical legal studies,[181] also suggest that, in performing this creative function, courts have a special responsibility to preserve fundamental rights or protect the interests of persons whose voices are not heard in the "dialogue" of majoritarian political power-balancing that characterizes legislative deliberation.[182] The dynamic court's

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utes, is the product of public deliberation about political values, courts must play a normative role when they interpret and apply the law.").

180 On civic republicanism, *see generally* BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984); Symposium, *The Republic Civic Tradition*, 97 YALE L. J. 1493-1723 (1988); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 157-59 (1990); Sunstein, *supra* note 2, at 451-62 (our basic form of government envisions not a pure democracy but a democratic republic, which assumes that some fundamental rights or norms against which law must be considered and legislation must be structured; law is designed not merely to implement the majority will, but to achieve public good through gathering of information and deliberation); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

181 On critical legal studies, *see generally* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys, ed., rev. ed. 1990); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1983).

On critical race theory, *see generally* CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado, ed. 1995); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberle Crenshaw, Neil Gotanda, Gary Peller, Kendall Thomas, eds. 1995); Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).

On feminist legal theory *see generally*, Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803 (1990) (distinguishing "liberal," "cultural," and "radical" feminism); CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) (cultural feminism); HANKS, HERZ & NEMERSON, *supra* note 140, at 611-645 (distinguishing liberal, cultural and radical feminism); ROSEMARIE TONG, FEMINIST THOUGHT: A COMPREHENSIVE INTRODUCTION (1989).

On the application of feminist and critical theory to statutory interpretation, *see* Symposium, *supra* note 16, at 1755 (opinion of Naomi R. Cahn, cultural feminism); *id.* at 1764 (opinion of John O. Calmore, critical race theory); *id.* at 1785 (opinion of Mary I. Coombs, feminism); *id.* at 1790 (opinion of Dwight L. Greene, critical race theory); *id.* at 1807 (opinion of Laura W. Stein, critical legal theory); *see generally* LEGISLATION, *supra* note 48, at 419-421, 606-13 (critical theory in statutory interpretation); HANKS, HERZ & NEMERSON, *supra* note 140, at 511 (critical legal studies and feminist jurisprudence on the legal response to societal needs).

182 These dynamists are influenced by concerns that legislative processes may exclude minority voices because (i) legislators are chosen by and from power elites, and the laws they enact are likely to reflect the biases of those elites, and (ii) legislators, interested in re-election, are more likely to bow to the pressure of well-organized interest groups who control money and votes, (iii) legislators creating generalized rules simply cannot predict the impact in particular cases. *See generally infra* notes 211-212; *see, e.g.*, Eskridge, *Overriding*, *supra* note 2, at 334-335 (courts should give greater "attention to interests and perspectives that are unrepresented in our pluralist political

value formation role may also be informed by post-modernism, including its suggestion that meaning and rules necessarily are non-neutrally constructed and interpreted from particular perspectives and can be deconstructed and reconstructed from other perspectives to different effects.[183] As a result of these influences, creative dynamists require neither statutory ambiguity nor changed circumstances as prerequisites to courts' responsibility to protect funda-

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system."); ESKRIDGE, *supra* note 1, at 183-192 (civic and feminist republicanism see law and interpretation as a dialogue revealing public values or perspectives of groups otherwise excluded from political processes; policy is formed by deliberation toward common good, not mere deliberation toward majority interest; emphasis is on discovering and hearing competing voices and seeking to accommodate them through understanding); Eskridge & Frickey, *Post-Legal Process*, *supra* note 2, at 717 ("[I]mportance of dialogue or conversation as the means by which innovative judicial lawmaking can be validated in a democratic polity and by which the rule of law can best be defended against charges of unfairness or illegitimacy."); *id.* at 715, 720-22; Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 208 (1984) ("For the Critical scholars, no objectively correct results exist, regardless of whether presented in terms of legal doctrine or policy analysis, and no matter how skilled the advocate or judge. Choosing between values is inescapable."); *id.* at 209 ("In constructing elaborate schemes of legal rights and entitlements which are intended to permit individuals to interact with others without being obliterated by them, mainstream legal theorists simply justify the prevailing conditions of social life and erect formidable barriers to social change."); LEGISLATION, *supra* note 48, at 419-421 (critical scholars claim that the rule of law cannot be neutral, but necessarily involves resolving conflicts among divergent interests with no clear guidelines on how to choose which interest should prevail; deference to legislature is not supportable because the electorate is passive, those who participate are uninformed, and legislators respond disproportionately to monied and well-organized interest groups); *see also* John Rawls, A Theory of Justice 355 (1971) (majority rule is problematic when the burden of injustice falls on permanent minorities).

183 On post-modernism and its effects on interpretation, *see generally* ESKRIDGE, *supra* note 1, at 175, 192-204; Eskridge, *supra* note 174; Peller, *supra* note 174; Peter C. Schanck, *Understanding Postmodern Thought and its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505 (1992); Francis J. Mootz III, *Is the Rule of Law Possible in a Postmodern World?*, 68 WASH. L. REV. 249 (1993); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989); Schacter, *supra* note 2, at 609 ("The 'reconstructionist' view is drawn from principles of civic republicanism and such critical theories as feminism, critical race theory, and strains of postmodernism. This view implores courts to use interpretation as a means of progressive social transformation and pursues a vision of political and cultural equality and inclusion."); *cf. generally*, FISH, TEXT, *supra* note 174 (interpreters are constrained by the conventions of their communities about language, law and meaning); Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989) (questioning critical legal studies' position on radical indeterminacy); Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1 (1986) (criticizing critical legal studies for failing to suggest alternative to biased status quo); *see also supra* note 182.

mental rights and excluded interests. Essentially, creatively dynamic courts attempt to ensure that the public dialogue is complete by actively (and candidly) considering how alternative interpretations would affect the interests of all citizens, including those who may not have had input in the drafting of the statute and who are otherwise chronically marginalized based upon factors such as gender, race, culture, ethnicity, sexual orientation, disability, or social status.[184]

Although dynamic theories vary widely, they each (i) accord courts a policymaking or lawmaking role through statutory inter-

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184 *See generally* Symposium, *supra* note 17 (race and gender); Eskridge, *Overriding*, *supra* note 2, at 411-412 (sexual orientation); LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994) (race).

See also generally Bruce Ackerman, *The Storrs Lectures: Discovering The Constitution*, 93 YALE L.J. 1013 (1984); BICKEL, *supra* note 156; DE TOCQUEVILLE, *supra* note 59, at ch. XV-XVI (power of the majority and tyranny of the majority); *id.* at 264 ("Of all political institutions, the legislature is the one that is most easily swayed by the will of the majority."); *id.* at 269-72 (if majority view is unjust, person who is wronged cannot obtain redress from institutions that reflect the majority view); *id.* at 271 n. 4 (blacks did not exercise their "right" to vote for fear of retribution by the "majority"); Eskridge, *Overriding*, *supra* note 2, at 404-414 (court has a "representation reinforcing" role (citing JOHN HART ELY, DEMOCRACY AND DISTRUST (1980)) to blunt tyranny of majority and provide forum for voices not heard in legislative process); DWORKIN, *supra* note 39; ELY, *supra* note 156 (court has "representation reinforcing" role through judicial review); ESKRIDGE, *supra* note 1, at 156-161 (polity is not majoritarian, electoral and legislative processes do not result in translation of majority choices into law, nor should they necessarily do so; courts can counteract dysfunctions in legislative process); *id.* at 176-183 (natural law theories of statutory interpretation seek to interpret statutes to achieve some higher moral norm which is not necessarily reflected in current majoritarian choices or legislative intents); Eskridge, *Overriding*, *supra* note 2, at 412 (counter-majoritarian court is desirable to further a vision of democracy in which all, not only the majority, may participate); *id.* at 404-414 (court should protect certain fundamental values that are not necessarily protected in the political climate of the legislative process; these may include the rights of persons who belong to minority groups or who suffer negative discrimination based on race or sexual orientation); GUINIER, *supra* note 184; Jonathan A. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986); Rubin, *supra* note 2, at 58-63 (dynamic theories propounded by Eskridge, Sunstein, Calabresi, and Dworkin are consistent with a theory of "comprehensive rationality," under which legislators and judges continually balance a variety of public-regarding and personal-interest motivations); Schacter, *supra* note 2, at 609 ("complementarians" urge courts "not to supersede but to complement popular forces by refining the raw products of pluralist democracy"); Sunstein, *supra* note 2 (James Madison advocated a constitutional democracy which preserved individual rights and balanced majority tyranny against protection of minority as justice; pure majority decisionmaking is not the exclusive justification for democracy); *see also* United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

pretation, (ii) permit courts to use sources extrinsic to and subsequent in time to the enactment of statutes, in at least some circumstances, to guide policy choices, and (iii) expect courts to consider not simply the extent to which their rulings honor legislative mandates (*i.e.*, institutional accountability), but also the consequences of their rulings in individual cases and for the larger society.

Dynamism and Democracy. Two democratic principles drive dynamic interpretation theory. First, dynamists challenge textualism's and originalism's views of what are proper democratic process. Dynamists generally view the courts not as "agents" obligated to implement legislative policy, but rather, as the legislature's constitutionally co-equal partners obligated to pursue democratic goals directly.[185] Some dynamists root this approach in modern political process theories that view law as the product of a complex inter-branch, institutional interaction, rather than of traditional legislative supremacy and judicial deference.[186] This view requires

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185 *See generally, e.g.*, Aleinikoff, *supra* note 2, at 57-58; Aleinikoff & Shaw, *supra* note 2; DWORKIN, *supra* note 39; Eskridge, *Overriding, supra* note 2, at 411-14; Eskridge, *Spinning, supra* note 2, at 321-30 ("relational agents"); *id.* at 330-43 (constitution vests popular sovereignty in three co-equal branches; judges are partners in creating meaning); Eskridge, *Statutory Interpretation, supra* note 2, at 1498-1503; Frickey, *supra* note 1, at 258 ("[T]he Supreme Court should . . . consider itself, under our separation of powers, a partner in the process of getting on with the government of this country."); Gonzalez, *supra* note 2 (historical re-analysis of separation of powers supports role of courts as direct agents of the people and partners of the legislature in preserving democratic values); LEGISLATION, *supra* note 48, at 606-08; Wood, *supra* note 80, at 54-58; Zeppos, *Textualism, supra* note 2, at 1334-42; *see also* ESKRIDGE, *supra* note 1, at 13-14 (approaches that seek to restrain un-elected judges from making law cannot work because they do not reflect what courts or legislatures actually do).

186 *See, e.g.*, Eskridge, *Reneging, supra* note 2; Eskridge & Frickey, *Equilibrium, supra* note 2 ("institutional interaction"); id. at 28-29 (law as "equilibrium," institutions act rationally and strategically with recognition that they are interdependent); Popkin, *Collaborative Model, supra* note 2 (collaborative lawmaking; courts should consider words; internal context; external context, including common understanding, and underlying political values; the statute's fit with earlier and later law; and changing circumstances); Rubin, *supra* note 2 ("comprehensive rationality" defines legislators and judges as lawmakers); *see also supra* note 164 (judicial policymaking); Erwin Chemerinsky, *The Supreme Court, 1988 Term - Forward: The Vanishing Constitution*, 103 HARV. L. REV. 43, 82-83 (1989) (social choice theory reflects that there is no true majoritarian branch; majoritarianism is a continuum and the courts are on it due to appointment, confirmation and the possibility of impeachment); Parent, *supra* note 2, at 101, 139 ("[J]udicial legislation in hard lawsuits, suitably constrained, is morally and politically defensible"; "[I]nterpretive creativity is consistent with democratic ideals because: (1) it is not a form of legislation. . . , and (2) it performs a function no less valuable or

that courts respect their legislative partner's judgments,[187] but it rejects originalism's and textualism's insistence that separation of powers prohibits courts from participating in the lawmaking process.[188]

Second, because dynamism charges courts with a direct responsibility for preserving substantive democratic values, it measures interpretive legitimacy by the "democratic" consequences attained, not solely by the "democratic" processes employed.[189]

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indispensable to ordered society than that performed by the other lawmaking institutions of mature democracies."); *see also generally*, Sunstein, *supra* note 181.

187 *See generally, e.g.*, DWORKIN, *supra* note 39 (each interpreter shows respect for what came before in chain novel model); Eskridge & Frickey, *Equilibrium*, *supra* note 2, at 57 ("So long as statutory text is the primary means by which citizens, agencies, and courts coordinate their understandings about law's equilibrium, text must be the starting point for statutory interpretation."); Posner, *Legal Formalism*, *supra* note 2, at 200 ("The relationship between a military officer and his superiors and their doctrines, preferences, and values is, after all, the very model of obedience and deference."). Courts also recognize that that the legislature may override judicial decisions interpreting statutes. *See generally* Eskridge, *Overriding*, *supra* note 2.

188 *See* Eskridge & Frickey, *Post-Legal Process*, *supra* note 2, at 723 ("What is striking about many new legal process thinkers is not only their substantive commitment to progressive, fair and just law, but also their faith in the judicial process to contribute to such law."); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1016 (1989) (judges are able to foster more rational discussion of public issues because they are independent from politics and interest group pressure); Maltz, *supra* note 154, at 768 ("[M]ore present-minded theorists resort to a variety of rhetorical devices in an attempt to deflect claims that their views are inconsistent with legislative supremacy."); Zeppos, *supra* note 1, at 1120-37 (process-oriented approach of originalism and textualism grounded in adherence to procedures by which "[t]he decision of the judge must trace its pedigree back to the legislature" and in which legitimacy is tied to constraining the judge fail because they do not effectively constrain the judge; courts actually consider pragmatic and present-minded considerations); *see also supra* note 128.

Dynamic scholars also suggest that their approaches will promote candor in judging by bringing into the open considerations that currently affect judicial interpretation but are hidden behind judges' claims that they are simply applying statutes in objective deference to legislative policies. *See, e.g.*, Zeppos, *supra* note 1, at 1082-83; CALABRESI, *supra* note 1, at 180, 190; Eskridge, *Statutory Interpretation*, *supra* note 2, at 1482, 1548; Symposium, *supra* note 16, at 1801-07 (opinion of Jeremy Paul; candor and consequentialism); Sunstein, *supra* note 2, at 462; Posner, *supra* note 1, at 817; *cf.* Zeppos, *Candor*, *supra* note 2 (theories calling for candor raise legitimacy questions; questioning whether candor will achieve its stated goals).

189 *See, e.g.*, Aleinikoff & Shaw, *supra* note 2, at 704 ("[I]dentify some plausible purpose (or purposes) consistent with their reading of the statutory language. We call this constraint 'due process of statutory interpretation.' Second, we believe that an evaluation of consequences ought to carry interpretive weight."); *id.* at 704-05 ("Some connection must be made between the reading given the statutory language and other legal materials - such as statutory structure, the legal landscape - or the real

The attractions of a consequentialist approach are obvious: it emphasizes results (justice) over means (processes), legitimizes means only to the extent that they facilitate the ends of justice, and compels a responsible government to pursue justice rather than abdicate to process. The limitations are just as clear: actively embracing justice as a goal obviates any simple, process-based litmus test for determining law's legitimacy, and opens a Pandora's box of competing visions of justice.[190]

Once consequences are deemed important, interpreters must define good outcomes. From the lens of substantive democracy, the goals that dynamic theorists pursue fall (roughly) into two

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world."); DWORKIN, *supra* note 39, at 313-54 (interpretation should fit society's values and make the statute the best it can be, without violating the constraints of the statute's language); ESKRIDGE, *supra* note 1, at 109 (normative theories measure legitimacy not by formal or procedural criteria alone, but by substance because "the rule of law is neither a law of rules nor a law of procedural integrity but a law of justice or right"); *id.* at 175 ("An insistence that law's legitimacy must rest on substance and not just procedure has inspired various 'normativist' theories of statutory interpretation that are manifestly dynamic."); Eskridge, *supra* note 188, at 1015 ("We are impatient with procedural justifications that mask substantive injustice."); Eskridge & Frickey, *Post-Legal Process*, *supra* note 2, at 717 (new legal process school "self-consciously pursues substantive as well as procedural justice"); Eskridge & Frickey, *Practical Reasoning*, *supra* note 2, at 379 (textualism and originalism cannot achieve their goal of assuring that decisions are based on objective loyalty to democratic values); Gonzalez, *supra* note 2, at 663, 697 (court should choose the most "public-regarding" of plausible statutory meanings); BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER 5-6 (1994) (normativists examine current ethics and morals to determine the statute's meaning by asking "what is good" and "what is justice"); Popkin, *Collaborative Model*, *supra* note 2, at 627 (rejecting framework of law as an expression of governmental will, which leads to debate concerning who legitimately exercises that will; arguing instead that lawmaking is a process of public deliberation about political values, in which courts necessarily play a role); Posner, *Primer*, *supra* note 2, at 449; Sunstein, *supra* note 2 (developing institutional and substantive background norms for interpretation of regulatory agency statutes); Zeppos, *supra* note 1, at 1136-37 (legitimacy is not tied strictly to what method court uses; includes results and is multi-dimensional); *see also* HALL, *supra* note 49, at ch. 16 (historical comparison of process-oriented versus substantive approaches to law); *see generally*, JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (1961) (challenging process-based legitimacy); *supra* note 184 (counter-majoritarian values).

190 *See Infra* notes 191-197; *cf.* Popkin, *Collaborative Model*, *supra* note 2, at 627 ("The court can, of course, be wrong about the values it brings to the decision."); Simon, *supra* note 28, at 1490 (criteria for what is morally good may include welfare or utility; justice or fairness; and ideals or virtues); *id.* at 1533-34 (arguing that moral considerations of justice prevail over utilitarian considerations on racial equality issues in constitutional interpretation).

groups: social justice goals and law and economics goals.[191] In other words, regardless of which dynamic methodology an interpreter employs (originalist, updating, or creative), when the time comes to consider consequences, desirable norms, or current values, some dynamists define "good" in social justice terms, while others define "good" in law and economics terms.[192] Dynamic "social justice" theorists (such as Professors Dworkin, Eskridge, Sunstein and Aleinikoff) measure the value of democracy by its ability to preserve fundamental rights, protect individual rights, promote justice, and produce fair laws.[193] In contrast, dynamic "law-and-ec-

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191 *Cf.* Aleinikoff & Shaw, *supra* note 2, at 703 (in determining statutes' purposes, some focus on whether they are wealth maximizing, others appeal to other purposes); COTTERRELL, *supra* note 22, at 208-09 (law and economics attempts to shape social values by using legal rules to create incentives and disincentives that encourage people to act in ways viewed by society, or by law and economics, as good; it selects efficiency as a good, and aims to create rules that will distribute resources efficiently); *id.* at 210-13 (critical legal studies reflects and shapes social values; it argues that law's constraints fall inequitably on certain groups by law's definitions of what is good; and that good is not neutral, but is defined by power elites in ways that reflect an uneven distribution of power, rights and privileges in society and preserve imbalances through the appearance of neutrality and objectivity); Eskridge & Frickey, *Post-Legal Process*, *supra* note 2, at 725 (three challenges to legal process are law and economics, critical legal studies, and new legal process). *See generally infra* notes 194-198 (law and economics); *supra* note 181 (critical legal studies).

192 The differences between social justice scholars and law and economics scholars parallel the distinctions between political scientists' "best outcome" theories and "popular will" theories of "instrumental" democracy. "Instrumental" theories of democracy focus on democracy's ability to produce good consequences, which are defined in terms of either popular will theories or best outcome theories. In contrast, "internal" theories focus on democracy as a process that fosters equality by giving all citizens equal access and an equal vote. *See generally* JOHN ARTHUR, DEMOCRACY: THEORY AND PRACTICE xii-xiii (1992); *see also* Schacter, *supra* note 2, at 608 (using Arthur's dichotomy to classify originalist interpretation as internal and textual and dynamic approaches as instrumental).

193 This view embraces those "best outcome" theories that view democracy as embodying certain baseline norms of "justice" that restrict individual freedoms and the prerogative of majority choice. *See* ARTHUR, *supra* note 192, at xii-xiii. For these dynamists, democratic values permit or require courts to (i) review statutes for Constitutional errors (*see* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (judicial power to review statutes for constitutional infirmity); DE TOCQUEVILLE, *supra* note 59, at 105 (judicial oath is to the Constitution, not the laws); *id.* at 107 ("[T]he power vested in the American courts of justice of pronouncing a statute to be unconstitutional forms one of the most powerful barriers that have ever been devised against the tyranny of political assemblies.")), (ii) reflect current public values (*supra* notes 163, 173; *see also* ESKRIDGE, *supra* note 1, at 109, 148-51, 175-76, 192-93, 200-204 (critical pragmatism)); and (iii) counter-balance the deficiencies of the majoritarian legislative product (*see supra* notes 180-184 and accompanying text).

onomics" scholars (such as Judge Posner)[194] define desirable results in terms of the costs and benefits of alternate courses of action.[195] Costs and benefits are defined not in terms of preserving the "justice" values treasured by social justice dynamists, but rather in terms of "popular will" ideals (which view government processes as a necessary tool for translating popular choices into law)[196] and

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194 *See supra* note 139 and accompanying text. Judge Posner's evolution from a more archaeological search for actual or hypothetical legislative intent ("imaginative reconstruction") to a more flexible, consequential pragmatism ("sophisticated intentionalism") is noted in Zeppos, *supra* note 1, at 1087 n. 69; ESKRIDGE, *supra* note 1; *see also* Posner, *Legal Formalism*, *supra* note 2; Michael B. Brennan, *Overcoming Law*, 79 MARQ. L. REV. 329, 329 (1995) (book review) (Posner's jurisprudence fuses pragmatism, economics and liberalism).

195 *See* POSNER, *supra* note 166, at 4 (pragmatic approach honors "continuity with the past only so far as such continuity can help us cope with the problems of the present and the future"); *id.* at 12 (criticizing formalism for failing to account for current needs and difficult cases); *id.* at 12-13 (creative role for judiciary); *id.* at 16 (court should consider "the costs to be incurred and the benefits to be reaped from alternative courses of action"); POSNER, *supra* note 139, at 300-01; Richard A. Posner, *What Am I? A Potted Plant?*, THE NEW REPUBLIC Vol. 197, pg. 23, Sept. 28, 1987 [hereinafter Posner, *Potted Plant*] ("Often when deciding difficult questions of private rights courts have to weigh policy considerations. . . . Such questions cannot be answered sensibly without considering the social consequences of alternative answers. . . . When the unforeseen circumstance arises—it might be the advent of the motor vehicle or of electronic surveillance, or a change in attitudes toward religion, race, and sexual propriety—a court asked to apply the rule must decide . . . what the rule should mean in its new setting. That is a creative decision, involving discretion, weighing of consequences, and, in short, a kind of legislative judgment . . . ."); Richard A. Posner, *What has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653 (1990) [hereinafter Posner, *Pragmatism*] (criticizing originalism as formalistic for not considering law's consequences in fact); *see also* Merritt v. Faullener, 697 F.2d 761 (7th Cir. 1983) (Posner, J., dissenting) (favoring rule denying appointed counsel because economic efficiency dictates that a prisoner with a good civil rights case will be able to hire a lawyer on contingency with the lure of 42 U.S.C. §1988 fees).

196 "Popular will" theories view democratic government as the vehicle for reflecting (and creating law that reflects) the will of the governed. *See* ARTHUR, *supra* note 192, at xii. Under these theories, popular choices prevail, unrestricted by any substantive baseline norms. Popular will ideals resonate in law and economics, which generally favors individual free choice, but accepts law as a device for facilitating large group choices that cannot be made efficiently in the marketplace. *See* POSNER, *supra* note 166, at 22-24 (liberal ideal of giving every individual maximum liberty limited only by the liberty of others; that is, the freedom to act as each individual sees to his maximum welfare as long as it does not harm others; open and free markets foster prosperity); *see also* CALABRESI, *supra* note 1, at 91 (fabric of the law is presumed to be a good approximation of the popular will; courts should be permitted to update statutes that would not command majority support today; judicial role under separation of powers includes keeping the legal fabric consistent and up to date; legislative role includes reversing judicial misinterpretation of majoritarian demands and responding to constitutionally valid demands of special groups); *id.* at 96-97 ("the legal fabric,

law-and-economics-influenced "utilitarian" values (such as promoting efficient legal processes, freedom of choice, and maximization of wealth).[197] For example, when a statute is unclear or contains a gap, efficiency demands that the courts assist the legislature by attempting to further the legislative enterprise.[198]

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and the principles that form it, are a good approximation of one aspect of the popular will, of what a majority in some sense desires"); Gonzalez, *supra* note 2; Redish, *Common Law*, *supra* note 2, at 762-64 ("Simply put, a fundamentally democratic society assumes as its normative political premise some notion of self-determination, if only indirectly through a representational structure. To judge the legitimacy of policy decisions by measuring them against a particular substantive value structure runs contrary to the essence of self-determination. The 'freedom' to reach only those substantive decisions which have been determined on some external, objective basis is effectively no freedom at all.") (footnotes omitted); Symposium, *supra* note 16, at 1798-1801 (opinion of Geoffrey C. Miller, employing economic efficiency principles; arguing that it is more efficient for the legislature to create general rules and leave interpretation to the courts; the court fills in meaning by considering the economic impact and cost-benefit analysis to determine the value of conviction and execution in the circumstances). On law and economics, *see generally* MITCHELL PULINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (2d ed. 1989); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1992); RICHARD A. POSNER, THE ECONOMICS OF JUSTICE (2d. ed. 1983).

197 *See* POSNER, *supra* note 133, at 289 (judge "must decide the case, *even though on the basis of considerations that cannot be laid at Congress's door*" including "judicial administrability" or "some broadly based conception of the public interest;" defined in terms of freedom of choice and economic terms); POSNER, *supra* note 166, at 329-84; Posner, *supra* note 1, at 820 (administrability); Posner, *Legal Formalism*, *supra* note 2, at 197-99 (command theory); 201-212 (defining correctly and wrongly decided cases in terms of law and economics values; bad consequences include greater difficulty for Congress in enacting statutes, destroying property rights through inadvertence, and flooding courts with trivial appeals (thereby slowing down and increasing the costs of bankruptcy and distracting the courts from enforcing other legislation); good consequences include promoting economic efficiency in the enforcement of anti-trust law); *id.* at 189-90 (platoon commander model seems designed to foster efficiency); Posner, *Primer*, *supra* note 2, at 449-50 ("The relevant consequences include not only the consequences for the persons or interests affected by the particular provision being 'interpreted,' but also such systemic consequences as what the decision will do to the ability of the legislature to legislate effectively. . . . It will be the rare case where the gains in substantive justice from ignoring or denying the will of the legislature will exceed the loss in impairing interbranch relations and injecting uncertainty into the legislative process. Pragmatic concern with case-specific consequences will therefore be confined largely to those cases where mentalist or purposive interpretation fails."); *see also* Smith, *Pragmatism*, *supra* note 2, at 424-29 (discussing Posner's brand of pragmatism, including use of law and economics framework to solve legal problems).

Judge Posner suggests that these are legitimate "public values" because the community supports them. *See* POSNER, *supra* note 139, at 243, 355-56.

198 *See* POSNER, *supra* note 166, at 16; Posner, *Legal Formalism*, *supra* note 2, at 189-90. The influence of economic theory on Judge Posner's view of legislative processes is also seen in Posner, *Primer*, *supra* note 2, at 434-40 (accepts public choice and social

In summary, although they employ different processes and advocate different values, dynamists emphasize consequences and grant the courts a substantive role in ensuring good results, consistent with the statutory scheme.[199]

D. *Democratic Legitimacy: A Promise Unfulfilled*

Originalism, textualism and dynamism advance strikingly divergent visions of what makes statutory interpretation democratically legitimate.[200] Volumes have been written in a complex debate that seeks to determine which, if any, of these models is "democratic" in theory[201] and in practice.[202] I submit, however, that democratic legitimacy cannot serve as the singular litmus test for determining the validity of competing statutory interpretation theories, for several reasons.[203]

First, an impasse of democratic theory is apparent in seemingly insurmountable philosophical differences concerning whether textual, structural or substantive democratic criteria should be used to measure democratic legitimacy. These disagreements reflect an ongoing debate in constitutional theory concerning whether the Constitution should be read strictly and narrowly according to its terms, contextually and expansively according to its terms, historically according to the founders' original intentions, or flexibly to adjust to changes in society.[204] Even in the un-

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choice theories concerning majority cycling and interest group influence); *id.* at 434-44 (using an economic model, influenced by pragmatism, views voters and legislators as acting to pursue their own goals; acknowledges possibility of altruism, but doubts that it has much force outside of the family); *id.* at 440-41 (courts necessarily play a large role in shaping public policy because the economics of enactment favor generalized laws that must be applied by courts in specific circumstances); *See* Posner, *Potted Plant*, *supra* note 195, at 23 (because of interest group pressure, legislation is not likely to be the product of majority consent).

199 *See supra* notes 164, 168, 173, 184, 195, 197 and accompanying text.

200 *See supra* part II.C. *See also generally* Schacter, *supra* note 2 (suggesting that originalism employs an internal view of democracy which Professor Schacter characterizes as "institutional essentialism" and other theories employ instrumental views of democracy which she characterizes as "preserving," "complementing" and "reconstructing" democracy).

201 *See* sources cited *supra* notes 1-2, 95-197; *infra* notes 204-208.

202 *See infra* notes 209-217.

203 The conclusions in part II.D are more fully developed in Manuscript, *supra* note 98.

204 *See supra* note 102 and accompanying text. Indeed, many of the participants in the statutory interpretation debate are constitutional law scholars. *See also* Schacter,

likely event that constitutional theorists agreed to adopt one of these methods, the impasse of theory would not be broken because each of these components presents still deeper questions. For example, if "textual democracy" is chosen, the question remains whether the bicameralism and presentment requirements of Article I, prohibit judges from looking beyond the text of a statute, or whether they permit judges to consult other sources of legislative meaning.[205] Similarly, if "structural democracy" is chosen, the question remains whether separation of powers implies "legislative supremacy" or whether it, instead, establishes an inter-branch partnership.[206] Finally, if "substantive democracy" is chosen, the question remains whether democracy is designed to achieve social justice objectives, law and economics objectives, or some other objectives.[207] These questions, which implicate far more than the mundane methods of statutory interpretation, have plagued political theorists, legal scholars, and philosophers for generations.[208]

Second, a daunting hurdle confronts efforts to determine whether an interpretive method that seems democratically legitimate in theory will be democratically legitimate in practice. There is no consensus on how legislators, judges, or legislative and judicial processes actually work. In regard to legislative processes, old

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supra note 2, at 663 (acknowledging that the focus on instrumental democratic ideals which she urges will "begin what promises to be a long . . . debate"). In a sense, Professor Schacter's call for interpreters to focus on instrumental democracy to reveal their "true" measures of democratic legitimacy, and this Article's call for interpreters to integrate democratic legitimacy and legal-system values are two sides of a coin. Professor Schacter seeks to develop a "richer, more cogent, and more persuasive link between democratic theory and statutory interpretation" (*id.* at 607), whereas I seek to expand statutory interpretation theory beyond its inevitable link to democratic theory by developing more clearly its crucial links to the broader context of legal-system values.

205 *See* Manuscript, *supra* note 98.

206 *See supra* note 185 and accompanying text. Moreover, the scope of legislative supremacy is contested; some argue for a strong conception in which federal courts may derive federal law only from federal statutes, whereas others argue for a weak conception in which federal courts are bound by federal statutes only when the legislature has spoken clearly. *See* Farber, *Legislative Supremacy*, *supra* note 2; *see also supra* note 154.

207 *See supra* notes 191-197 and accompanying text.

208 *Cf.* Fuller, *Speluncean Explorers*, *supra* note 16, at 645 ("The case was constructed for the sole purpose of bringing into a common focus certain divergent philosophies of law and government. . . . If there is any element of prediction in the case, it does not go beyond a suggestion that the questions involved are among the permanent problems of the human race.").

theories (which originalists embraced) that viewed legislators as public-minded servants diligently, objectively, fairly, and wisely gathering, sifting and balancing all of the varied inputs of a pluralistic society to produce a cohesive body of law designed to foster the public good have lost virtually all respect.[209] In their place, economic theory's view of individuals as "rational self-maximizers,"[210] as applied to legislative processes through public choice and social choice theories, has presented a grim vision of biased interest groups pressing their narrowly-focused concerns on vulnerable individual legislators who react in strategic, self-interested ways to maximize their chances of re-election.[211] The statutes produced by this process do not reflect coherent legislative intents or

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209 *See, e.g.*, Eskridge & Frickey, *Post-Legal Process*, *supra* note 2, at 694, 701-02; Schacter, *supra* note 2, at 603-06; *cf.* HART & SACKS, *supra* note 1, at 1374 (legislators as rational, public-regarding, pluralistic policymakers).

210 *See, e.g.*, POSNER, *supra* note 166, at 16 (people compare and choose among alternatives based on analysis of costs and benefits to maximize their individual wealth or good).

211 *See generally* KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963). Arrow's theorem demonstrates, in essence, that there cannot be one, single, neutral majority choice among alternatives because the choice selected by the same group from the same alternatives will vary depending on the order of selection (majority cycling), strategic voting, and other agenda setting determinations. This leads quite naturally to the recognition that those in control of the agenda can and will manipulate the process to improve the chances of attaining the "majority" vote they desire. The ability to control outcomes coincides, with dire consequences, with public choice or rational choice theory's argument that rational legislators will vote and control agendas in ways designed to avoid risk. They avoid risk by favoring legislation that benefits well organized and funded groups, who will make vocal proponents or opponents of their reelection bid, at the expense of diffuse and less well organized interests that have less impact. *See generally* M. HAYES, LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS (1981). On public choice, social choice and interest group implications for legislative process, *see generally* William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988); Eskridge & Frickey, *Post-Legal Process*, *supra* note 2, at 703; Farber & Frickey, *supra* note 2, at 423; DANIEL A. FARBER & PHILIP P. FRICKEY, PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991); Jack Knight & James Johnson, *Public Choice and the Rule of Law: Rational Choice Theories of Statutory Interpretation*, in NOMOS XXXVI THE RULE OF LAW (Ian Shapiro ed. 1994); Macey, *supra* note 184; Richard A. Posner, *Economics, Politics and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982); POSNER, *supra* note 133, at 288-89; Posner, *supra* note 1, at 702-10; Posner, *Legal Formalism*, *supra* note 2, at 193-95; Symposium, *Public Choice*, 74 VA. L. REV. 167 (1988); JAMES Q. WILSON, POLITICAL ORGANIZATIONS (1973); Zeppos, *Legislative History*, *supra* note 2, at 1304-08 (explaining public choice theory and textualism's embrace of public choice); *id.* at 1322-23 (social choice undermines reliance on text); *see also* HURST, *supra* note 1, at 52 ("Legislatures are pragmatically-minded bodies, their members typically pressed by more business than they have time to handle, buffeted

social policy purposes; they are simply political or strategic deals[212] that frequently are biased in favor of power elites[213] and riddled with confusions arising from hasty committee drafting, the need for compromise, and intentional ambiguity.[214] Although newer

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by competing outside interests, as practicing politicians never far from the thought of reelection and the bearing on reelection of the positions they take.").

212 *See generally supra* note 211; *see also* Blatt, *supra* note 2, at 837-38 (weaknesses in legislative process; flaws in the assumption that statutes have discernible purposes); Knight & Johnson, *supra* note 211, at 244 ("[P]ublic choice tradition . . . has developed a conception of politics in a democratic society that calls into question many of the bases of the legitimacy of the rule of law. This tradition has been interpreted to argue that statutes, as the product of political competition that aggregates individual preferences into collective outcomes, are incoherent as a statement of the general will of the people in a democratic society.") (footnote omitted); *id.* at 246 (question presented by public choice: "If the conditions have been satisfied for democratic procedures to produce normatively legitimate statutes, then the court's interpretations of those statutes will also be legitimate as long as they relate in the proper way to the actions of elected officials. If the conditions have not been satisfied, then the question becomes one of whether there is something the court can do to enhance the legitimacy of statutes by relating its decision to those actions of legislators most likely to bestow legitimacy."); *id.* at 248 (Public choice suggests that outcomes "will be highly contingent on the particular institutional procedures (e.g., who sets the agenda) under which the decision is made. This contingency leads to the conclusion that political outcomes are the product of strategic manipulation and that democracy is merely a process of political competition. Such a conclusion undermines the claim that the products of the democratic process represent the collective interest and are therefore infused with normative legitimacy."); *cf.* Easterbrook, *Economic System*, *supra* note 2, at 14-15 (treat "rent-seeking" statutes as contracts, deals, or compromises reached among interested parties, rather than as public-regarding policy statements); Macey, *supra* note 184 (courts should interpret statutes "as though" they have public-regarding purposes even if they are truly rent seeking); Farber & Frickey, *supra* note 2, at 424-426 (public choice theory).

213 *See supra* note 181 and accompanying text; *see also* ESKRIDGE, *supra* note 1, at 153 ("Figure 5.1 Group access to Congress to override Supreme Court decisions;" charting groups with greatest and least access in seeking congressional override of statutory decisions); GILMORE, *supra* note 23, at 105 (Suggesting that "ours is a government not of laws but of men and that justice under law is notably unequal."); *cf.* Simon, *supra* note 28, at 1531 (Originalist constitutional interpretation is undermined by fact that it was a "bargain struck by propertied, white males based at least partly on narrow grounds of self-interest or on that group's arguably parochial interpretation of the deep consensus. Given the unfairness of requiring those who bear the legacy of the original disenfranchisement to resort to the amendment process, the rule-of-law virtues that might support an originalist interpretation will very often be outweighed by other goods.").

214 *See generally* GRAY, *supra* note 25, at 173 n.1 (legislative ambiguity may be intentional); Harry W. Jones, *Some Causes of Uncertainty in Statutes*, 36 ABA J. 321 (1950) ("words are imperfect symbols to communicate intent;" "unforeseen situations are inevitable;" "uncertainties may be added" in the political compromise of enactment); Miller, *supra* note 88 (intentional use of ambiguity); POSNER, *supra* note 25, at 227,

theories of institutional interaction, which attribute to legislators both self-interested and public-interested motivations, and pose less fatalistic and less cynical views of the legislative product, are developing,[215] the current state of legislative process theory frustrates efforts to sell interpretive theories that assume any measure of legislative rationality and public-mindedness. Public choice's view of the legislative process has particularly undermined originalists, whose deference to legislative intent or statutory purpose assumes a rational, public-minded legislative process. Textualists respond to public choice by seeking to constrain both legislators and judges. Dynamists respond by granting judges greater flexibility to correct legislative deficiencies.

Similarly, interpretive theories that rely on judges to discern and apply legislative meanings, intents or purposes are frustrated by charges that legislatures can have no single, coherent intent or purpose,[216] and that judges could not neutrally discern those legis-

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251 (delegation of policymaking authority in order to achieve compromise); *id.* at 248 ("To suppose that its every word has significance, that every statute is a seamless whole, misconceives the nature of the legislative process."); Posner, *Legal Formalism*, *supra* note 2 (intentional use of general language to achieve consensus or majority agreement; leaving specifics to courts to hammer out); *Note*, *supra* note 1, at 899 ("Congress' vision is not broad enough to consider all the details of each general policy it enacts, nor can it foresee problems that may evolve so that they fall within the ambit of an older statute. In addition, the limitations of language mean that, even when Congress formulates a specific intent, the words of a statute may not fully capture congressional meaning."); *see also infra* note 247.

215 *See supra* note 186 and accompanying text; *see, e.g.*, Rubin, *supra* note 2, at 4, 55, 58 (developing a theory of "comprehensive rationality," under which legislators "weigh the full range of motivations that we would ordinarily expect them to possess, including ideology, professional standing, and ambition, as well as personal self-interest;" arguing that this model is descriptively and normatively more accurate for legislative behavior than the rational self-interest maximizer assumption of public choice theory; arguing that this model can also explain judicial behavior because "[t]here is no point in telling judges how to interpret a statute, because they will only interpret it in a way that maximizes their job security, income, or power;" and concluding that "both legislators and judges are concerned with striking a balance between their personal views of what is right and the primary constraints on their behavior—the need to be re-elected, in the case of legislators, and the obligation to follow law, in the case of judges"); *see also* Eskridge & Frickey, *Equilibrium*, *supra* note 2 (institutional equilibrium model, in which each branch acts strategically in recognition that their actions may be countered by the other branches, tempers and restrains individual self-interest).

216 *See, e.g.*, Aleinikoff, *supra* note 2, at 41-42 (different levels of generality; always more than one intent or purpose; allows courts to select desired level of generality); *id.* at 24-29 (archaeological models cannot achieve legislative supremacy and judicial restraint at the same time); Blatt, *supra* note 2, at 837-38 (flawed assumption that

statutes have discernible purposes); DICKERSON, *supra* note 29, at 68-79, 89-92; ESKRIDGE, *supra* note 1, at 14, 25-34, 74-80 (actual intent is often undiscoverable; statutes have multiple purposes, at varying levels of generality, and there is no neutral, objective way to choose one purpose; positive political theory demonstrates that statutes are political deals that do not have coherent, public-regarding intents or purposes); Eskridge, *Spinning*, *supra* note 2, at 321, 330-350; Eskridge, *Statutory Interpretation*, *supra* note 2, at 1507; Eskridge & Frickey, *Practical Reasoning*, *supra* note 2, at 326-39 (problems with intent and purpose); Farber, *Legislative Supremacy*, *supra* note 2, at 293-94; Farber, *Legislative Inaction*, *supra* note 2, at 6 ("[D]etermining the original understanding of an old statute may be more difficult because of gaps in the historical record, because of the divergent views of those involved in making the crucial legislative decisions, and because of changes in linguistic usage and cultural contexts. Moreover, . . . the original understanding of a broadly worded statute can be defined at various levels of generality, leading to potentially different results."); Frickey, *supra* note 1, at 250-256 (public choice critiques of originalism and textualism); Frickey, *Faithful* note 130 (considering linguists' and legal scholars' approaches to the question of textual autonomy and interpretive objectivity); GRAY, *supra* note 25, at 170-73 (judge can only reconstruct, not reproduce mechanically, the mind of the legislators; moreover, "the difficulties of so-called interpretation arise when the Legislature has had no meaning at all; when the question which is raised on the statute never occurred to it . . ."); Holmes, *supra note* 34, at 466 ("Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding."); HURST, *supra* note 1, at 34 ("Radin presents two solid objections to the reality of discoverable legislative intention. First, that a statutory text of any substantial generality will normally prove capable of embracing too many and too diverse situations to allow lawmakers to foresee them. Second, that legislators are too numerous and bring too many perceptions and desires to their task to allow them to come to shared choices."); *id.* at 52 ("Legislatures are pragmatically-minded bodies, their members typically pressed by more business than they have time to handle, buffeted by competing outside interests, as practicing politicians never far from the thought of reelection and the bearing on reelection of the positions they take."); Landis, *supra* note 147, at 893; Gerald C. MacCallum, Jr., *Legislative Intent*, 75 YALE L.J. 754 (1966) (difficulties in discerning the intent of an individual legislator, which are further complicated by difficulty of determining the intent of a body of legislators); Radin, *supra* note 51 (legislators can have no common intent); SCALIA, INTERPRETATION, supra note 2, at 32 (problem with search for intent is that there is none); Schacter, *supra* note 2, at 598-603; Schauer, *Formalism*, *supra* note 2, at 532-34 ("[T]he potential tension between the general goal and its concretized instantiation exists at every level. At one level, the tension is between language and purpose; at the next, it is between that purpose and the deep purpose lying behind it; at the next, between the deep purpose and an even deeper purpose; and so on. When we decide that purpose must not be frustrated by its instantiation, we embark upon a potentially infinite regress in which all forms of concretization are defeasible."); Schauer, *Response*, *supra* note 2, at 719; Zeppos, *Candor*, *supra* note 2, at 354; Zeppos, *supra* note 1, at 1087; Note, *supra* note 1, at 899 ("[I]ntent alone cannot yield a coherent model of Supreme Court statutory interpretation. Congress' vision is not broad enough to consider all the details of each general policy it enacts, nor can it foresee problems that may evolve so that they fall within the ambit of an older statute. In addition, the limitations of language mean that, even when Congress formulates a specific intent, the words of a statute may not fully capture congressional meaning."); *cf.* HURST, *supra*

lative intents or statutory purposes in any event because judges are inevitably influenced by their own experiences, biases, and contexts.[217]

These disagreements concerning the theory and practice of interpretation seem to explain competing models' choice of interpretive methods. Textualism is rooted in arguments that only the democratically enacted text is "law," in doubts that statutes have coherent public-regarding intents or purposes, and in concerns that judges who are permitted to look beyond the text will import their personal biases in interpreting statutes. Originalism is based upon arguments that legislative supremacy requires that courts defer to the legislature, and upon confidence that statutes have coherent purposes (or legislators have rational, coherent intents) that the courts can and will neutrally discern and apply. Dynamism's concern for consequences is rooted in the belief that democracy values good results, that courts are co-equal lawmakers, and that interpreters necessarily understand statutory language in light of current contexts and personal experiences. Nevertheless, none of these considerations can fully explain either the motivations that drive the competing interpretive models or the implications for our legal system of choosing among these models.

Our legal system's credibility and its ability to earn citizens' respect and adherence depend upon "legal-system values" that are not expressly reflected in the rhetoric or concerns of democratic

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note 1, at 33 (defending use of "legislative intent" as "so durable a fiction" which "has a use validated by experience").

217 *See supra* note 174 and accompanying text (application of hermeneutics and literary theory to legal interpretation); *see also* Cohen, *supra* note 22, at 845 ("We know, in a general way, that dominant economic forces play a part in judicial decision, that judges usually reflect the attitudes of their own income class on social questions, that their views on law are molded to a certain extent by their past legal experience as counsel for special interests, and that the impact of counsel's skill and eloquence is a cumulative force which slowly hammers the law into forms desired by those who can best afford to hire legal skill and eloquence; but nobody has ever charted, in scientific fashion, the extent of such economic influences."); DWORKIN, *supra* note 39, at 529 ("[O]n many issues the author had no intention either way and that on others his intention cannot be discovered. Some . . . . say that whenever judges pretend they are discovering the intention behind some piece of legislation, this is simply a smoke screen behind which judges impose their own view of what the statute should have been."); Eskridge & Frickey, *Post-Legal Process*, *supra* note 2, at 694-95 & n.12; Zeppos, *Textualism*, *supra* note 2, at 1606 (Critical and progressive scholars' critique of legal process); Zeppos, *Legislative History*, *supra* note 2, at 1323-25 (manipulation of legislative history by courts).

legitimacy. Credibility requires that the law be perceived as being predictable, replicable, fair and just. Theorists cannot assure citizens that the law will meet these objectives merely by demonstrating that the courts use "democratically legitimate" interpretive methods designed to honor legislatures' words or intents, further statute's purposes, or achieve good consequences in individual cases.[218] They must also demonstrate that the law produced by these methods will be horizontally coherent, vertically coherent, socially congruent, and instrumental in fostering a social value formation dialogue.[219] In fact, these legal-system values do quietly pervade the current debate. They remain obscured, however, by the current focus on democratic legitimacy. So long as legal-system values are obscured by a complex debate about democratic legitimacy, theorists cannot assure citizens that interpretation will preserve these crucial values.

In the following section, I argue that legal-system values drive advocates' choice of both the criteria by which they measure democratic legitimacy and the methods by which they interpret statutes. Consequently, it is not possible to understand fully either the motivations underlying the current debate or the implications of selecting among the competing models without comparing interpreters' differing approaches to legal-system values. Although democratic legitimacy is an essential cornerstone of statutory interpretation, no single stone can support the legal system. The time has come to reconstruct the rest of the foundation.

III. Meta-Legitimacy: Integrating Legal System Values in Statutory Interpretation

Part III.A argues that legal-system values influence interpretive theory, that each interpretive model embraces different legal-system values, and that the import of employing conflicting approaches to statutory interpretation becomes clear only by

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218 Ironically, the current debate may undermine confidence in all of the existing models by educating courts and other interpreters to the alleged "democratic" flaws of each model (*e.g.*, originalism places confidence in potentially defective legislative processes; textualism ignores intents, purposes and consequences; dynamism permits judicial "activism" and violates majoritarian legislative supremacy).

219 I am suggesting not that the existing models cannot or do not *achieve* these goals, but rather, that the focus on democratic legitimacy makes it difficult to determine whether and how the competing models might achieve these goals. Indeed, as Part III.A suggests, legal-system values pervade the existing models.

integrating legal-system values and democratic legitimacy. Part III.B considers the relationship among legal-system values, democratic legitimacy and statutory interpretation.

A. *Legal-System Values in Statutory Interpretation Theories*

Competing legal-system values are woven through the arguments that textualists, originalists and dynamists advance in support of their conflicting interpretive models.[220]

1. Textualist Values

Textualists pursue predictability, replicability and systemic consistency as cherished values. Other legal system values (fairness and justice, doctrinal stability, social congruence, social value formation) have little apparent impact on textualism.

Predictability is a prominent theme. For textualists, predictability means that clear rules will pre-determine, *ex ante*, the results in cases covered by a statute,[221] and that citizens will be able to determine statutory rules simply by reading statutes' ordinary language.[222] These notions foster the closely related ideal of repli-

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220 This is not a comprehensive exposition; rather, it identifies legal-system values hidden in the legitimacy rhetoric and encourages further elaboration and debate.

221 *See, e.g.*, SCALIA, INTERPRETATION, supra note 2, at 28-37, 132, 139-40; *see also* Scalia, *supra* note 35, at 1179 ("[An] obvious advantage of establishing as soon as possible a clear, general principle of decision: predictability. Even in simpler times uncertainly has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes. . . . As laws have become more numerous, and as people have become increasingly ready to punish their adversaries in the courts, we can less and less afford protracted uncertainty regarding what the law may mean. Predictability . . . is a needful characteristic of any law worthy of the name.); Easterbrook, *supra* note 2, at 65 (intent obfuscates the law, is less clear than textual meaning); Schauer, *Formalism*, *supra* note 2, at 539 ("One of the things that can be said for rules is the value variously expressed as predictability or certainty . . . . Predictability follows from the decision to treat all instances falling within some accessible category in the same way. It is a function of the way in which rules decide ahead of time how all cases within a class will be determined."); Schauer, *Plain Meaning*, *supra* note 2, at 232 (plain meaning's stabilizing function); GILMORE, *supra* note 23, at 17 (formalism "holds out the promise of stability, certainty, and predictability"); *see also* Johnson v. Transportation Agency, Santa Clara County, 107 S. Ct. 1442, 1473 (1987) (Scalia, J., dissenting) (majority's purposive interpretation demonstrates "the instability and unpredictable expansion which the substitution of judicial improvisation for statutory text has produced").

222 *See supra* note 112 and accompanying text; *see, e.g.*, ESKRIDGE, *supra* note 1, at 34 ("[T]extualism appeals to the rule of law value that citizens ought to be able to read the statute books and know their rights and duties."); Eskridge & Frickey, *Practical*

cability, which directs that like cases be treated alike.[223] Moreover, Justice Scalia argues that, when judges go beyond the text, they are creating retroactive law, which violates the "fairness" component of predictability.[224] Results are considered "fair" if persons affected by the law have the opportunity to know the law's mandates, predict its consequences, and act accordingly. This approach is unconcerned with whether results might be considered substantively "good" (or predictable) as a matter of "natural justice."

Textualists also seek to foster predictability through legal coherence, which they define horizontally. To achieve coherence in the law, legal rules will be read, as far as possible, to be consistent with other legal rules.[225] Although Justice Scalia argues, through a "benign fiction," that Congress intends new laws to be interpreted compatibly with existing laws, he acknowledges that Congress, in fact, (somewhat contrary to his "fiction") enacts laws that are "episodic and oblivious of adjacent laws."[226] Only through "legitimate interpretive techniques" can judges "make sense out of the whole."[227] The techniques that textualists view as legitimate focus narrowly on rules and language, rather than on policy or principle. In other words, textualism seeks to ensure that words mean the same things in related statutes, rather than to preserve policy coherency across related statutes.[228] By reading related statutes "as if"

Reasoning, *supra* note 2, at 340 (same); Scalia, *supra* note 35, at 1179; *Bock Laundry*, 490 U.S. at 507 (Scalia, J., concurring); *see also supra* notes 34-36 and accompanying text (predictability).

223 *See* Scalia, *supra* note 35, at 1178-79 (common law's narrow, incremental, discretion-conferring approach dis-serves the ideals of equal treatment, *i.e.*, replicability, and predictability, by failing to establish generalized rules). *See also supra* note 38 (replicability).

224 *See, e.g.*, SCALIA, INTERPRETATION, *supra* note 2, at 10-11; *see also supra* notes 54-56 and accompanying text (predictability in a "fairness" sense and a "justice" sense).

225 *See* SCALIA, INTERPRETATION, supra note 2, at 16-17; Scalia, *Speech*, *supra* note 2, at 11-15; *Bock Laundry*, 490 U.S. at 528 (Scalia, J., concurring) (meaning "most compatible with the surrounding body of law into which the provision must be integrated - a compatibility which, by a benign fiction, we assume Congress always has in mind").

226 *Cf.* SCALIA, INTERPRETATION, *supra* note 2, at 143-44; *with id.* at 16-17, 129-30; *Bock Laundry*, 490 U.S. at 507.

227 *See* SCALIA, INTERPRETATION, *supra* note 2, at 144.

228 *See, e.g.*, Scalia, *Speech*, *supra* note 2, at 11-14; West Virginia University Hospitals v. Casey, 499 U.S. 83 (1991) (Scalia, J.) (comparing language of civil rights statute to language of non-civil rights statutes); *cf. id.* (Stevens, J. dissenting) (emphasizing purpose and history of civil rights statute); Pierce v. Underwood, 487 U.S. 552 (1988) (Scalia, J.) (considering use of the word "substantial" in other statutes); ESKRIDGE, *supra* note 1, at 226-27 ("Scalia admits 'coherence' arguments, that is, arguments that

their words had the same meanings, textualists create a coherence of meaning that the legislature may not have designed. This allows courts to apply related statutes consistently and allows persons affected by statutes to determine how related statutes will be reconciled.

Vertical coherence (or doctrinal stability), which requires that statutes be read and applied in ways that are consistent with their prior history and prior interpretation, plays little role in textualist interpretation.[229] Indeed, Justice Scalia has argued that originalism's search for historic intent or purpose actually undermines predictability because it abdicates the judge's duty to "rationalize" the law (by "making those adjustments that coexisting texts require in order that the corpus juris as a whole makes sense") and "leaves inconsistency and contradiction in the law."[230] This view enhances Justice Scalia's drive for horizontal coherence. For example, two statutes that historically have addressed unrelated issues (such as bankruptcy and taxation) may in fact clash when applied to a situa-

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an ambiguous term is rendered clear if one possible definition is more coherent with the surrounding legal terrain than other possible definitions. But, unlike defenders of legislative history, Scalia admits only arguments based on textual coherence (this meaning is consistent with other parts of the statute or other terms in similar statutes), and not those based on historical coherence (this meaning is consistent with the historical expectations of the authors of the statute.)"); Eskridge, *Textualism, supra* note 2, at 655 (same); *id.* at 678 (Justice Scalia's theory emphasizes horizontal coherence, in which interpretation of the statute is coherent with present legal sources, including the current statutory text, the whole statute, analogous statutes, and interpretive canons); Zeppos, *Textualism, supra* note 2, at 1621 ("[T]extualism also presumes legislative rationality and strives for overall coherence in the law by borrowing from other provisions of the United States Code."); *id.* at 1623 ("Justice Scalia searches not for policy coherence but simply a coherence of meaning."); *See also* Aleinikoff & Shaw, *supra* note 2, at 697 (vertical and horizontal critique of textualism).

229 *See, e.g.*, Scalia, *Speech, supra* note 2, at 9-10 ("Rather, it is a process of rationalizing the law - making those adjustments that coexisting texts require in order that the corpus juris as a whole make sense. The extensive use of legislative history scraps this venerable and important process, and leaves inconsistency and contradiction in the law, so long as some player in the legislative process has expressed that result."); *cf.* ESKRIDGE, *supra* note 1, at 271 (Scalia will consider vertical coherency for those few statutes he finds to be open-textured such as the Sherman Act); Eskridge, *Textualism, supra* note 2, at 681-83 (Scalia might use legislative history in limited circumstances, such as when a statute is ambiguous or absurd on its face).

230 *See* Scalia, *Speech, supra* note 2, at 8-11, 17. *See also* West Virginia University Hospitals v. Casey, 499 U.S. 83 (1991) (Scalia, J.) (comparing language of civil rights statute to language of non-civil rights statutes); *cf. id.* (Stevens, J. dissenting) (emphasizing purpose and history of civil rights statute).

tion that implicates both statutes. A textualist can obviate these inconsistencies and create coherence by interpreting the statutes "as if" terms used in both statutes meant the same thing, even though those terms may mean different things to tax attorneys and bankruptcy attorneys. The problem with this approach, of course, is that it may lead to results that could not have been predicted by persons who relied on historic understandings and interpretations of either statute.

Textualists seem equally unconcerned with ensuring that the law reflects or embodies social values or choices (social congruence). Textualists accept that the legislature fails to preserve public values (because statutes are the product of interest-group-influenced, self-interested voting, log-rolling and agenda setting),[231] yet they prohibit the courts from considering or preserving public values. Indeed, Justice Scalia recognizes that statutes "have broader social purposes" that go beyond their texts, and that "new times require new laws."[232] He argues, nevertheless, that "judges have no authority to pursue those broader purposes or write those new laws."[233] If judges cannot consider social policy, and the legislature does not, then who does? Textualism seems to embody a disturbing vision of politics in which social values are absent from law. Certainly, it could be argued that textualists preserve whatever public values reside in constitutional mandates by striking down unconstitutional statutes. Nevertheless, democracy presumes that law will reflect citizens' current democratic choices, values, needs or interests. The laws that are designed to respond to societal needs must not violate the constitution; however, they certainly may and do spread across a broad latitude within the threshold of constitutionality. It is unclear how textualist interpretation can preserve social congruence if legislators *do* not consider social values and judges *can* not.[234]

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231 *See supra* note 131 and accompanying text.

232 *See* SCALIA, INTERPRETATION, *supra* note 2, at 23.

233 *See id.*

234 Professor Frickey has suggested that textualism's interpretive "canons" may mediate "predictability and certainty" by promoting "justice." Frickey, *supra* note 130, at 1091. The canons that Justice Scalia accepts, however, appear to be designed solely to further the predictability enterprise. Justice Scalia accepts the following canons: *expressio unius est exclusio alterius* (the inclusion of one class is an implicit exclusion of the other), *noscitur a sociis* ("'it is known by its companions'"), *ejusdem generis* (of the same sort), and "'a statute cannot go beyond its text.'" SCALIA, INTERPRETATION, *supra* note

The legal-system values that textualists embrace explain the methodology that textualists employ. Textualists contend that, to ensure predictability, replicability and horizontal coherence, the rule of law must be a "law of rules," not a law of policies, principles or values.[235] Clear and predictable rules are so critical to textualism's vision of legal-system values that "There are times when even a bad rule is better than no rule at all."[236] The rigidity of specific rules fosters certainty, whereas the flexibility of general policies fosters uncertainty. To achieve rule-based certainty, textualists adopt a text-based, ordinary-language methodology, and spurn consideration of any sources or objectives that might introduce the uncertainty that they view as being inherent in interpretive discretion.[237]

2, at 25-26. *See also supra* note 119. Each of these is designed to reveal the meaning of a word or phrase. He rejects other canons that would permit purpose to trump text (*id.* at 26-27), and he expresses serious reservations about, if not outright rejection of, "presumptions" that are designed to ensure a minimal level of "justice" in interpreting statutes, such as the "rule" suggesting that ambiguities in treaties and statutes dealing with Native American rights are to be construed in favor of Native Americans, the "rule" that statutes in derogation of the common law are to be narrowly construed, the "rule" that remedial statutes are to be liberally construed to achieve their "purposes," and the "rule" requiring a "clear statement" to eliminate state sovereign immunity (*id.* at 27-28). Justice Scalia rejects these other canons and presumptions because he believes that they permit too great a possibility for uncertainty. *Id.* at 28. He would, somewhat grudgingly it seems, accept the "rule of lenity" in construing criminal laws, but only, he emphasizes, because it "is almost as old as the common law itself, so I suppose that it is validated by sheer antiquity." *Id.* at 29. Its very antiquity, it seems, suggests that its application is predictable.

235 *See supra* note 221 and accompanying text; *see generally* SCALIA, INTERPRETATION, *supra* note 2, at 25 ("The rule of law is *about* form.") (emphasis in original); Scalia, *Speech*, *supra* note 2; Scalia, *supra* note 35; *see also* Zeppos, *Textualism*, *supra* note 2, at 1623-33 (discussing Justice Scalia's separation of law, that is "rules," from policy).

236 *See* Scalia, *supra* note 35, at 1179; *see also supra* note 221; Burnet v. Coronado Oil and Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J.) ("[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right."); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 64 (1994) ("'Getting things right' may be a principal goal of law without its being a principal or even a particularly important goal of legal interpretation.").

237 *See generally* SCALIA, INTERPRETATION, *supra* note 2 (advocating a "reasonable" textual construction of statutes and the Constitution; spurning reference to legislative intent or legislative history in interpreting statutes); *id.* at 132 (textualism is less susceptible of manipulation than intentionalism); *id.* at 28 (presumptions decrease predictability); *id.* at 29-37 (legislative history undermines predictability); Scalia, *supra* note 35, at 1184 (the formulation of general rules is facilitated by textualism in statutory interpretation and originalism in constitutional interpretation); *id.* at 1178-79 (common law's narrow, incremental, discretion-conferring approach disserves the ideals of equal treatment and predictability by failing to establish generalized rules);

Legal-system values also seem to drive textualist's choice of "textual democracy" as the criteria by which to measure democratic legitimacy. I submit that Justice Scalia chooses textual democracy not because it holds some inherent claim to legitimacy, nor because it is mandated by Constitutional theory, but rather because he pragmatically believes that it is the most effective way to ensure predictability and coherency in the law (and in Constitutional interpretation). This is clear is Justice Scalia's contention that a flexible interpretation of the Constitution as a "living" document is fraught with uncertainty arising from the virtual impossibility of defining universally acceptable guiding principles for Constitutional evolution.[238] Similarly, both "substantive" and "structural" measures of democratic legitimacy introduce a level of uncertainty that is unacceptable to textualism. "Substantive" democracy (which dynamic interpreters embrace) requires the interpreter to determine whether the interpretive methods employed actually achieve "good" results (such as social justice, reflection of the popular will, or efficient legal processes). Divergent views concerning what results are desirable, and concerning what methods best achieve

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id. at 1179-80 (general rules better constrain judges, while also providing them with the shield of a "rule" to stand behind in making unpopular decisions); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (originalist constitutional interpretation better constrains judges from imposing their personal values on the constitution); *see also* Eskridge, *Overriding*, *supra* note 2, at 373 ("Applying the apparent meaning of the text furthers important rule of law values, such as predictability, certainty, and objectivity."); Popkin, *"Internal" Critique*, *supra* note 2, at 1164 ("Justice Scalia favors a text- and rule-based approach to statutory interpretation because it restrains judicial lawmaking. He favors such restraint because it serves two rule of law values. First, he argues that judicial lawmaking undermines justice because it increases the likelihood of unequal treatment and retroactive law. Second, judicial lawmaking violates separation of powers values because the democratically elected legislature is the preferred source of law."); Zeppos, *Textualism*, *supra* note 2, at 1631 (Justice Scalia does not use textualism in constitutional analysis); *id.* at 1633 (suggesting that Justice Scalia's differing approaches to statutory and constitutional interpretation reflect different ways of constraining judges); id. at 1634 ("Much of [Justice Scalia's] jurisprudence now seems built on the supposed separation of law and policy and the need to have bright-line rules to allow for predictability and restraint in judging."); *cf.* EISENBERG, *supra* note 29, at 147-49 ("text-based" theories view "law as the body of doctrinal propositions that have been promulgated in past texts by officials of the relevant jurisdiction (together, perhaps, with doctrines that can be developed from such propositions by internal operations, like logical deduction)" which have legal force because they have been officially adopted without regard to substantive justification); Zeppos, *Legislative History*, *supra* note 2, at 1349 & n. 252 ("overlap" between textualism and formalism).

238 *See* SCALIA, INTERPRETATION, *supra* note 2, at 44-47.

those results, undermine textualism's cherished certainty. Similarly, a structural approach to democracy introduces uncertainty. The goal of structural democracy is to ensure that governmental institutions act within their respective realms of competence and authority. By stating this as a goal, structural democracy introduces uncertainty by permitting interpreters to identify conflicting visions of legislatures' and courts' respective competence and authority (*e.g.*, courts as agents of the legislature without the competence to weigh and balance social values, versus courts as independent agents of the people, with the competence and authority to preserve social values, particularly if the legislature has failed to do so). Textual democracy cordons off all of these inquiries by focusing interpreters exclusively on the meaning of a statute's text, regardless of whether the statute achieves social justice, popular will or any desirable objectives, and regardless of whether the legislature created the statute by weighing and balancing competing social interests and values, or by manipulating agendas and voting to serve the self-interests of a majority of legislators.

Viewing interpretive theory from a legal-system values framework brings into sharp relief textualism's criticism of other interpretative models. On its face, textualism rejects dynamism and originalism as democratically illegitimate because the latter theories do not confine interpretation to the democratically enacted text of the law.[239] From a more fundamental legal-system values perspective, however, textualists would argue that non-textual interpretive methods defeat law's rule-based predictability, replicability and horizontal coherence. Thus, textualism castigates dynamism for obviating the certainty of legal rules through judicial fiat by permitting courts to consider nebulous, changeable contexts and public values.[240] Similarly, textualism charges originalism with undermining certainty by permitting judges to mask personal preferences in a seemingly neutral search for legislative intent or statutory purpose, and with destroying horizontal coherence by reading each statute historically.[241]

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239 *See supra* notes 123-131 and accompanying text.

240 *See* SCALIA, INTERPRETATION, *supra* note 2, at 16-18, 21-23.

241 *See supra* note 235 and accompanying text; SCALIA, INTERPRETATION, supra note 2, at 1-23; Schauer, *Plain Meaning*, *supra* note 2, at 232 ("[F]or the Court to lessen its reliance on plain meaning would serve only to substitute for the community's contingent normative choices the equally contingent and equally normative choices of indi-

Several "legal-system values" critiques could be leveled at textualism. First, in emphasizing predictability and horizontal coherence, textualists seem to spurn other legal-system values, such as vertical coherence,[242] social congruence,[243] justice in individual cases, and use of the law to formulate social values.[244] Justice, tex-

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vidual interpreters. The reliance on plain meaning . . . substitutes a second-best coordinating solution for a theoretically optimizing but likely self-defeating search for first-best solutions by multiple decisionmakers with different goals and different perspectives.").

242 *See supra* notes 39-40, 228-229 and accompanying text.

243 *See supra* notes 231-233 and accompanying text. Textualism's apparent acceptance of public choice theory makes it unlikely that textualists expect the legislature to translate community needs and values into law through a public-minded, unbiased process.

Textualists might, however, argue that their approach serves some "economic" public values. *See, e.g.*, Rasmussen, *supra* note 2; Schauer, *Plain Meaning*, *supra* note 2, at 232, 253 (plain meaning serves stabilizing and coordinating functions; saves time and allows a judge to reach decision or a multi-judge court to come to consensus, particularly on issues of less substantive interest); Schauer, *Response*, *supra* note 2 (clarifying, defending and elaborating on this view); *but cf.* Farber & Frickey, *supra* note 2, at 458-61 (practical social costs of textualism include increasing costs of drafting legislation, increased need for corrective legislation and associated transaction costs, cost of detailed unambiguous legislation, increased cost of interpretation because easy answers that legislative history might provide are not available, decreased efficiency in implementing legislative intent); Zeppos, *Legislative History*, *supra* note 2, at 1360-61.

244 *See, e.g.*, HART, *supra* note 38, at 129-30 ("The vice known to legal theory as formalism or conceptualism consists in an attitude to verbally formulated rules which both seeks to disguise and to minimize the need for such choice, once the general rule has been laid down. One way of doing this is to freeze the meaning of the rule so that its general terms must have the same meaning in every case where its application is in question. . . . To do this is to secure a measure of certainty or predictability at the cost of blindly prejudging what is to be done in a range of future cases, about whose composition we are ignorant."); Schauer, *Plain Meaning*, *supra* note 2, at 251-52 ("Nor . . . do I claim that plain meaning is an infallible reflector of the intentions of the user of the language, or a universally reliable guide to the background purposes of a statute written in language, or a particularly adaptable vehicle for keeping up with various social or political changes, or a particularly sensitive tool for applying the necessarily general notion of meaning to the necessarily particular components of individual cases."); *id.* at 252 ("The comparative crudeness of plain meaning explains why interpreting a statute according to its plain meaning will at times generate an absurd result, or at least a result at odds with the best direct application of the purposes underlying that statute, or at odds with best current policy in light of changed circumstances, or at odds with what the drafters would have desired were they faced with the current situation in light of current circumstances."); *id.* at 253 (favors plain meaning despite its flaws based upon Justices' lack of interest and expertise in the substantive areas and time that would be required to reach a consensus in the absence of plain meaning; this is plain meaning's coordinating function); Schauer, *Formalism*, *supra* note 2, at 539-40 ("Little about decision constrained by the rigidity of rules seems intrinsically valuable. Once we understand that rules get in the way, that they

tualists might respond, comes with the "fairness" inherent in predictable rules.[245] Yet, by failing to explain how these other legal-system values might be preserved, textualism suggests that they simply are irrelevant to the legal system.

Second, although textualism promises greater predictability and coherence in judicial decisions, it may be unrealistic to believe that every word or phrase has a solitary "ordinary" meaning.[246]

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gain their ruleness by cutting off access to factors that might lead to the best resolution in a particular case, we see that rules function as impediments to optimally sensitive decisionmaking. Rules doom decisionmaking to mediocrity by mandating the inaccessibility of excellence. Nor is there anything essentially just about a system of rules. . . . Insofar as factors screened from consideration by a rule might in a particular case turn out to be those necessary to reach a just result, rules stand in the way of justice . . . . [But] [o]ne of the things that can be said for rules is the value variously expressed as predictability or certainty. . . . Predictability follows from the decision to treat all instances falling within some accessible category in the same way. . . . This predictability comes only at a price."); *id.* at 542 ("[R]ule-bound decisionmaking is inherently stabilizing, . . . [but] make[s] it more difficult to adapt to a changing future. . . . Yet this conservatism, suboptimization, and inflexibility in the face of a changing future need not be universally condemned. . . . We achieve stability, valuable in its place, by relinquishing some part of our ability to improve on yesterday. . . . To stabilize, to operate in an inherently conservative mode, is to give up some of the possibility of improvement in exchange for guarding against some of the possibility of disaster."); Zeppos, *Textualism*, *supra* note 2, at 1623 ("The rationality sought by textualism has nothing to do with substantive justice.").

245 *See supra* notes 54-56 and accompanying text (distinguishing fairness and justice); *supra* otes 221-228 (textualism and predictability); *but cf.* Zeppos, *Legislative History*, *supra* note 2, at 1361 (textualism cannot lead to predictable results unless all judges accept textualism).

246 *See supra* notes 214-217 and accompanying text. *See also* Eskridge & Frickey, *Practical Reasoning*, *supra* note 2, at 340-45 (problems with textualism; text may be capable of different interpretations, language may not be plain, context influences meaning, interpreters' own context of current values and experience influences interpretation); Farber & Frickey, *supra* note 2, at 457-58 ("[O]ne fundamental flaw in the Scalia-Easterbrook conception is its assumption that statutes have a legal meaning that exists before the process of statutory interpretation. . . . An ambiguous statute, however, lacks any clear pre-existing meaning.""); Frankfurter, *supra* note 15, at 528-29 (problems of construction arise from inherent ambiguity of words and composition, intentional ambiguity, and unanticipated situations); Jones, *supra* note 214; Miller, *supra* note 88 (ambiguity should be construed as a purposive design by legislature to defer to judiciary); *id.* at 34 ("Since words do not have a single meaning, but vary in accordance with the context in which they are used, there must be someone designated to make authoritative statements as to their meaning when specific problems arise. The 'someone' is of course the judge, and his function in so doing is of course that of making, not finding law."); Schauer, *Plain Meaning*, *supra* note 2, at 242-45 (even where justices agree to seek plain meaning, they may disagree on what meaning is plain); Schauer, *Formalism*, *supra* note 2, at 539-40 (predictability of rules requires first, an ability to determine that an item falls in the category covered by the rule;

Third, similarly, contested meanings may allow textualists to mask value choices in facially neutral determinations of "ordinary" meaning.[247] These two concerns suggest that textualism's quest for text-based certainty may be illusory.

Fourth, textualism's failure to consider the vertical coherence of statutory history and prior precedents may actually undermine predictability (by ignoring expectations that statutes will be applied consistently with prior interpretations) if interpreters have come to rely upon historical interpretations.[248] Justice Scalia tempers this concern slightly by acknowledging that the need for stability requires him to accept *stare decisis*, although he accepts the doctrine reluctantly as an exception to his textualist focus.[249] Curiously, textualism's grudging deference to precedent and apparent (although not consistently employed) insistence that courts apply a

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second, the people and the decisionmakers see the item as falling in the category and the people know the decisionmakers see the item as falling in the category; third, the category is noncontroversial and determinable; fourth, the rule treats all members of the category alike); *id.* at 540-41 ("[T]he key to understanding the relationship of ruleness to predictability is the idea of decisional jurisdiction. The issue is . . . . whether giving some decisionmaker jurisdiction to determine what the rule's purpose is (as well as jurisdiction to determine whether some item fits that purpose) injects a possibility of variance substantially greater that that involved in giving a decisionmaker jurisdiction solely to determine whether some particular is or is not a vehicle. . . . Grants of decisional jurisdiction not only increase permissible variance and the possibility of 'computational' error, they also involve decisionmakers in determinations that a system may prefer to have made by someone else."); Sunstein, *supra* note 2, at 416-17; Zeppos, *Legislative History*, *supra* note 2, at 1323 (judges may manipulate text; "Statutory language has no single or objective meaning.").

247 *See supra* note 121 and accompanying text; *see also* Schauer, *Formalism*, *supra* note 2 (formalism has been criticized for denying the reality that interpreters are in fact making choices within norms or among competing norms, and for limiting decisionmakers to the literal language of the rule rather than permitting the judge to rely on the purpose of the rule or an exception to the rule to achieve a more just result; arguing that language can and, at least sometimes, does constrain decisionmakers); Wood, *supra* note 80, at 63 (textualism allows as much arbitrary judicial discretion as other methods). Zeppos, *Textualism*, *supra* note 2, at 1623-29 (expressing doubt that textualism necessarily leads to determinate results that are not manipulable by interpreters); *cf.* SCALIA, INTERPRETATION, *supra* note 2, at 132 ("[T]extualism is no ironclad protection against the judge who wishes to impose his will, but it is *some* protection") (emphasis in original). This is particularly evident in the suspicion that textualist judges, most of whom are politically conservative, may be using textualist interpretation to avoid following precedents that they view as being too politically liberal.

248 *See supra* notes 39-40 and accompanying text.

249 *See* SCALIA, INTERPRETATION, *supra* note 2, at 139-40.

statute's *original* meaning (which would serve vertical coherence) may be inconsistent with its quest for horizontal coherence.

Finally, it may be incredible to suggest that statutory gaps and ambiguities should be filled without reference to purposes, consequences, or practical considerations that may in fact have occupied center stage in the political and popular debate surrounding the enactment of a statute.[250]

In sum, a clear "legal-system values" justification, narrowly rooted in the certainty and systemic consistency that arises from a formalistic, text-based interpretation, drives textualist interpretation. The legal-system values dilemmas for textualism are that its methodology may fail to preserve other values such as justice, social congruence, social value formation and the doctrinal stability associated with vertical coherence, its emphasis on horizontal and textual coherence may actually undermine its quest for predictability by ignoring reliance interests, and its confidence that legal texts have singular, inherent, neutrally discernible meanings may be erroneous.

2. Originalist Values

Most originalist theories are based upon assumptions that, at least in theory, would appear to preserve doctrinal stability, systemic consistency, and social congruence, and to generate law that is predictable, replicable, fair and just. The legal-system values dilemma for originalism lies in challenges to its assumptions, and consequential doubts that originalist methodologies can actually achieve their presumed goals.

Originalism's process-oriented approach to law necessarily rests in a relatively high degree of confidence that legislative and judicial processes are "democratic." Most importantly, originalists' faith in legislative rationality led to assumptions that the legislature would preserve social congruence and respond to social needs

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250 *See, e.g.*, Aleinikoff & Shaw, *supra* note 2, at 703-04 ("[W]e are deeply troubled by a defense of a theory [textualism] that pays so little attention to the way in which statutes function, and ought to function, in our legal system. . . . Certainly the Congress that drafted the statute was intensely concerned about such issues. Why should those who actually bring the statute to bear on society not be similarly concerned.?"); *id.* at 712-13 (suggesting that Justice Scalia may employ textualist formalism to mask his own policy preferences, such as a desire to make civil rights litigation difficult for plaintiffs).

through a fair, open and representative process of gathering, sifting, and balancing competing interests and needs in a grand, pluralistic tradition.[251] Thus, although both textualism and originalism constrain courts, textualism does so without regard to whether the legislative product is socially congruent, whereas originalism does so in order to preserve the social congruence that is presumed to inhere in the legislative product. If the initial legislative product is socially congruent, then the courts can and should maintain that congruence by hewing closely to the original legislative intent or statutory purpose.

Against this backdrop, in which social congruence through the legislative process is assumed, originalists sought also to ensure that the law would be predictable. Disagreements concerning the nature of the judicial process led to divergent methods of achieving predictability. Early intentionalists sought predictability through vertical coherence. That is, by reconciling each new judicial decision to original legislative intents as interpreted historically in prior precedents, intentionalism sought to ensure that the results in particular cases would be predictable and that the growth and development of legal doctrine would be stable.[252] Intentionalism's confidence in this scheme was shaken by the legal realists, who argued that historic sources were too easily manipulated, protested that legislative bodies could have no coherent subjective intent, doubted that judges could or did objectively discern and

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251 *See* EISENBERG, *supra* note 29, at 9-10 (legislature is representative, highly diverse in training and experience, responsive and accountable to society, provides legitimacy even when rules depart from existing standards); Eskridge & Frickey, *Post-Legal Process*, *supra* note 2, at 695; Frickey, *supra* note 1, at 249 ("[A]ll law is supposed to be rational and be premised on intelligible purposes."); Zeppos, *Textualism*, *supra* note 2, at 1601 ("For Hart and Sacks law was an evolutionary and purposive process providing reasonable solutions to societal needs."); *id.* at 1623 ("Hart and Sacks . . . indulged in the assumption that the legislature pursued rational policy goals in response to societal demands. Thus, Hart and Sacks presumed a kind of coherence in policymaking.").

252 *See generally* ESKRIDGE, *supra* note 1, at 239 ("Liberal theory . . . valorizes vertical coherence in order to ensure predictability and stability in the law."); POSNER, *supra* note 25, at 242-45, 242 ("Another reason for wanting to tether the legal . . . interpreter to the author's intentions is the importance of minimizing inconsistent interpretations in law. Law presupposes a degree of uniformity . . . . [I]f every lawyer and judge felt free to imprint his own personal reading on any statute, chaos would threaten."); *id.* at 243 ("The problem of legitimacy . . . is central to law and government."); *id.* at 244 ("The legitimacy of a legal interpretation . . . requires a linkage of some sort with the plans and purposes of the framers of the statutory or constitutional provision being interpreted.").

apply legislative mandates, and feared that deference to outdated statutes would hamper law's ability to respond to social needs and would undermine horizontal coherence if old laws were interpreted without reference to subsequent changes in related laws. To remedy these concerns and enhance laws' predictability, legal realists emphasized horizontal coherence. They urged the courts to ensure that each new decision was carefully crafted to fit into the entire surrounding body of law.[253] Legal process scholars and some legal realists attempted to integrate horizontal and vertical coherence. They preserved vertical coherence by applying statutes in light of underlying purposes and policies, and preserved horizontal coherence by identifying (or presuming) consistent policies in related statutes and by reconciling each new decision with existing law.[254] This "policy coherence" provided organizing principles around which predictable, consistent interpretation could be

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253 *See* FRIEDMAN, *supra* note 22, at 687-89 (legal realists focus on utility and consequences of legal rules); LLEWELLYN, *supra* note 34, at 42 (Grand Style requires that courts "face up to their job of integrating the particular statute into the doctrinal whole" and recognize and apply a "broad statutory policy in an apt area even though that area is not embraced by the literal language"); *id.* at 36-38, 40 (criticizing formalistic techniques); *id.* at 121-57, 245, 260-64, 268-87, 426-429 (coherency through "situation sense"); *id.* at 199, 222-23, 373 (integrate statute into whole of doctrine); *see also* ESKRIDGE, *supra* note 1, at 239 (realists favor horizontal over vertical coherence in order to ensure that law meets social needs); Eskridge & Frickey, *Post-Legal Process*, *supra* note 2, at 694-95 & n.12; Eskridge & Frickey, *Equilibrium*, *supra* note 2, at 34 (realists concerned with substantive policy, legal process with institutional competence, formalists with rule-of-law); LEGISLATION, *supra* note 48, at 423 (realists concerned more with horizontal coherency than vertical because of indeterminacy of past and manipulability of sources; *citing* Charles Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407, 423 (1950)).

254 *See* Frankfurter, *supra* note 15; HART & SACKS, *supra* note 1, at 167 (ambiguity should be resolved by interpreting statute "so as to harmonize with more general principles and policies"); *id.* at 166-67, 386-426, 565-89 (harmonizing law); LLEWELLYN, *supra* note 34, at 41 (continuity of legal doctrine; fit with current doctrine); *see also* ESKRIDGE, *supra* note 1, at 239-40 (legal process sought to reconcile vertical and horizontal coherence by balancing reliance interests against pull for change); *id.* at 143 (Hart & Sacks' Legal Process contains a "coherency theory, according to which statutes should be interpreted consistently with the surrounding legal terrain or legal principles."); Eskridge & Frickey, *Post-Legal Process*, *supra* note 2, at 695 (Hart & Sacks balanced the rules versus policies dilemma through purposivism; by assuming that statutes were enacted by reasonable persons who are pursuing reasonable purposes, purposivism balanced the realists' policy-oriented skepticism of formalism against the need for clear and objective rules in a "brilliant hybrid of deductive, formalist rules and inductive, anti-formalist policy"); LEGISLATION, *supra* note 48, at 424 (same); *See also* Hubbard v. United States, 115 S. Ct. 1764 (1995) (Stevens, J.) (stare decisis serves stability and predictability); *cf.* The Boys Markets, Inc. v. Retail Clerks Union, 398 U.S.

centered. Once an interpreter (or interpretive community) identified the policies and principles that applied to a particular field of law (for example, overarching principles that drive consumer bankruptcy law include a "fresh start" for an honest debtor, and "equitable distribution" to similarly situated creditors), the interpreter could then achieve predictable, coherent interpretation by preserving those policies when interpreting the same statute over time and in changed circumstances, and when interpreting new and related statutes.[255] By focusing on policy coherence, purposivists find predictable and replicable law not in immutable rules (as do textualists), but in a system that generates public-regarding statutes which have coherent purposes that courts apply consistently over time (to preserve doctrinal stability) and consistently across related statutes (to ensure systemic consistency).

In sum, originalism seems designed to pursue predictability, replicability, justice and fairness by assuming that legislative processes preserve social congruence and by attempting to devise and refine judicial processes that will preserve vertical and horizontal coherence. The principal controversy in originalism has been how best to achieve these objectives, not whether these objectives are valid. Intentionalists argued that courts should (and could) honor subjective legislative intents. Legal process purposivists argued that courts could not honor subjective intents, but could and should honor objective statutory purposes. From a democratic legitimacy perspective, originalism criticizes textualism and dynamism for failing to honor the democratic touchstone of legislative supremacy.[256] From a legal-system values perspective, however, originalism may be more troubled by the threat to predictability, vertical coherence, and horizontal coherence that arises from textualism's refusal to consider policy coherence, and from dynamism's insistence on importing public values that have not been tested in the political forum, may not be reflected in prior precedents, and may not be discernible to the reader of a statute.

The legal-system values critique of originalism lies in the apparent failure of its fundamental assumptions that the legislature is made up of reasonable people pursuing reasonable purposes, and

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235, 240-241 (1970) (Brennan, J.) (reconsideration does not undermine predictability where prior decision departed from established policy).

255 *See supra* note 254 and accompanying text.

256 *See supra* notes 134, 152-159 and accompanying text.

that the courts can and do neutrally discern and reconcile legislative intents or statutory policies to create a coherent whole.[257] Without these assumptions, there is little basis for arguing that deference to the legislature will preserve legal-system values. Social congruence cannot be assured by deference to a body that pursues its members' interests rather than its constituents' will. Predictability cannot be attained if words have no objective, neutrally discernible meaning or if courts defer to legislative intents and statutory purposes that are incoherent and malleable. If legislative and judicial processes do not achieve the desired results, then originalism's process-oriented approach to preserving legal-system values will fail.

3. Dynamic Values

Broad consequentialist notions of justice, fairness, and public values drive dynamism.[258] Dynamism clearly embraces the legal-system values of social congruence, justice in individual cases, and the use of law as a vehicle for social value formation.[259] From a

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257 *See supra* notes 216-217 and accompanying text.

258 *See supra* notes 162-164, 176-184; *infra* notes 259-260 and accompanying text.

259 *See* CALABRESI, *supra* note 1 (concern that outdated statutes do not reflect current social desires, needs and preferences); *id.* at 72 ("Obsolescence in legal rules exists when laws do not reflect the views of the current majority on what preferences in treatment are warranted by present conditions. The obvious solution is to make laws respond to the requirements of these majorities."); *id.* at 124-41 (comparing retentionist bias (which applies originalist interpretation) and revisionist bias (which applies current social consensus); courts should consider asymmetries in inertia, changes in legal topography, landscape of enactment, Constitutional infirmities, and how the rule fits in to the field of law); Dworkin, *supra note* 1, at 543-44 ("Law is a political enterprise, whose general point, if it has one, lies in coordinating social and individual effort, or resolving social and individual disputes, or securing justice between citizens and between them and their government, or some combination of these . . . . [A]n interpretation . . . must show the value of that body of law in political terms by demonstrating the best principle or policy it can be taken to serve."); Eskridge, *Spinning, supra* note 2, at 332 (legislative supremacy "rests upon unproven assumptions that (1) specific legislative intent governs over general or meta-intent, (2) legislative expectations over time do not matter, and (3) legislative supremacy trumps all other values, such as protecting constitutional rights, reaching just results in individual cases, and providing policy coherency across apparently conflicting statutes."); Eskridge & Frickey, *Equilibrium, supra* note 2, at 35 ("[L]aw as institutional equilibrium . . . renders law more adaptable over time because groups objecting to outdated legal rules have multiple fora in which to press their petitions for change."); *id.* at 56 ("The Supreme Court performs three systemic roles in statutory interpretation: it implements statutory agreements, reshapes those deals to adapt to changed circumstances, and announces the ground rules for predicting the effect of contem-

legal-system values perspective, dynamism's focus on ensuring that the law reflects and fosters the development of social values suggests that legal theory has come full circle and returned to the cherished common law notion that law is deeply rooted in and inseparable from community needs and values.[260]

The legal-system values dilemma for dynamism is that consequentialism could abrogate predictability, replicability, doctrinal stability (vertical coherence), and systemic consistency (horizontal coherence).[261]

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plated statutes."); *id.* at 94 & n. 307 (court's role in enhancing political discourse; "[A] Court deferring to an unstable consensus will have missed an opportunity to facilitate an extremely useful dialogue within our pluralism. A critical role, perhaps ultimately *the* critical role, for the Court in a pluralistic society is to facilitate the integration of new groups and interests into the existing system.") (emphasis in original); Eskridge & Frickey, *Practical Reasoning*, *supra* note 2, at 359 (current values include fairness in individual cases); Eskridge & Frickey, *Post-Legal Process*, *supra* note 2, at 717 ("[L]awmaking is a process of value creation that should be informed by theories of justice and fairness. . . . [L]egislation too often fails to achieve this aspiration, and, thus, creative lawmaking by courts and agencies is needed to ensure rationality and justice in law."); Melnick, *supra* note 1, at 98 ("[D]ynamic statutory interpretation means that judges must openly rewrite statutes to bring them in line with contemporary problems, knowledge, values, and expectations."); Simon, *supra* note 28, at 1533 (substantive approach to values preferable to procedural approach). *See generally Symposium*, *supra* note 16.

260 *Cf.* Blatt, *supra* note 2, at 835 ("[T]he post-Realist approach . . . is on the wane, and that the Blackstonian, preclassical, and classical patterns are reemerging in its stead."); COTTERRELL, *supra* note 22, at 182-83 ("In one sense the wheel turns full circle because the virtues of classical common law thought - its insistence on the inseparability of law from an idea of community or communal values of some kind, its concern with underlying principle as much as with technical rule, its image of law as continuously and steadily developing - are now apparently what [Dworkin, Pound and Fuller] . . . are especially concerned to recapture. . . . At the same time, what might be called neo-classical common law thought, of which Dworkin's legal philosophy is the best example, ... seems forced to give up any prospect of a science of law - in the sense of a search for something more systematic and objective than the participant perspective of a practical legal interpreter. Yet it was precisely that search for systematic theoretical explanation of the nature of law [which led to positivism]."). *See also* CALABRESI, *supra* note 1, (calling for a common law approach to overturn obsolete statutes); Hutchinson & Morgan, *supra* note 2, at 1761-62 (charging that Calabresi's approach is "democratically illegitimate" and may thwart reliance expectations).

261 *See* DICKERSON, *supra* note 29, at 126 ("To read statutes against current, rather than original, usage and environment would subject statutory meanings to uncontrolled and often capricious circumstance."); Farber, *Legislative Inaction*, *supra* note 2, at 16 ("Attempts by judges to rely on public values raise some obvious and troubling questions. The ability of judges to identify enduring values may well be questioned. Moreover, the results in many cases may be tightly constrained in ways that make reference to broader social values problematic."); Martin H. Redish & Theodore T. Chung, *Democratic Theory and Legislative Process: Mourning the Death of Originalism in*

Dynamists do not abandon the need for predictability in law; however, they do not fully explain how dynamic interpretation achieves predictable law. The fear is that dynamic interpreters' unconstrained pursuit of their own individual values will undermine predictability.[262] Dynamists respond that the law will be more predictable if judges openly pronounce the values on which they are relying, rather than mask them beneath facially objective rules of construction.[263] Moreover, originalist dynamists and updating dynamists seem to root predictability at least partially in the use of originalist sources. Originalist dynamists only consider dynamic sources if the text and history are indeterminate, and updating dynamists usually require changed circumstances before they depart from original meanings.[264] These dynamic interpreters are constrained by clear texts, authoritative legal materials, reliance interests, cultural or ideological consensus, background norms, and political pressure in terms of how an issue is framed.[265] Similarly,

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Statutory Interpretation, 68 TUL. L. REV. 803, 841 ("Dynamic scholars have raised the stakes of the debate over statutory interpretation; what had been primarily a dispute over interpretive methodology has become, with the introduction of dynamic theories, a struggle between differing conceptions of our political order. In short, dynamic statutory interpretation has replaced the democratic commitment to self-determination with a system of government that vests ultimate policymaking authority in an unelected and unaccountable elite, the 'guardians' of the common good. And this 'common good' is apparently to be determined wholly apart from the preferences of the members of society. Properly understood, then, dynamic interpretation strikes at the very core of American political theory.").

262 *See supra* note 261 and accompanying text; *cf.* Eskridge, *Spinning*, *supra* note 2, at 345-51 (indeterminacy allows for bias under any method); ESKRIDGE, *supra* note 1, at 107 (The fact that a court using dynamic interpretation may make a bad policy choice raises a procedural question of "democratic values: Shouldn't elected legislators, rather than nonelected judges and bureaucrats, be making these important and politically controversial decisions? The other concern arises from the rule of law: If a statute means something different today from when it was enacted, is there not a risk that people will lose confidence in the predictability, reliability and objectivity of the law?"); COTTERRELL, *supra* note 22, at 182-215 (discussing varieties of skepticism about normative analysis of law).

263 *See supra* notes 188, 262 and accompanying text; *see also* Eskridge & Frickey, *Practical Reasoning*, *supra* note 2, at 362-78; Zeppos, *Candor*, *supra* note 2.

264 *See* Eskridge & Frickey, *Practical Reasoning*, *supra* note 2, at 356; Farber, *Legislative Supremacy*, *supra* note 2, at 292.

265 *See* Aleinikoff, *supra* note 2, at 60 (text constrains judge); *id.* at 61 ("[N]autical models are not likely to create great instability and unpredictability in the law. To be sure, nonoriginalism produces doctrinal change, but both the common law and constitutional law seem to achieve a reasonable degree of certainty and an ability to respond to new social conditions. It is not obvious why statutory law could not do the same."); Dworkin, *supra* note 1, at 544-45 (interpretation constrained by concept of

some dynamists note that courts' regard for institutional inter-dependence (including the potential for legislative reversal) restrains their ability to pursue their own agendas.[266]

From a broader perspective, however, dynamism seems to be concerned that society will rebel against bad results even if those results are "predictable."[267] Citizens do not expect results that seem unjust or outdated. Predictability, then, may be more closely associated with understanding social norms and determining what society will view as a good result, than with executing legislative policies that may not be known to citizens or applying words that may not be read by citizens.[268] In other words, dynamism views

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"integrity and coherence of law as an institution."); ESKRIDGE, *supra* note 1, at 148, 201 (shared background norms: "Linguistic, syntactic, and other conventions are background understandings that are widely shared and that generate predictability in our legal culture."); *see also* Frickey, *supra* note 130, at 1090-91 (established practices may promote predictability mediated by justice; difficulty is determining what is an established practice).

266 *See, e.g.*, ESKRIDGE, *supra* note 1, at 66, 69 (statutory interpretation as sequential game in which each player, including lower courts, Congress, president, and the Court act based upon expectations of how others will react, particularly when the others have power to overrule through amendment, veto, and judicial review); Eskridge, *Reneging*, *supra* note 2; Eskridge, *Overriding*, *supra* note 2; Eskridge & Frickey, *Equilibrium*, *supra* note 2 at 77-87; *id.* at 77 ("There is a potential tension between democratic values and rule-of-law values in our system. The former promote responsiveness to changing political preferences, while the latter promote stability or predictability of rights and obligations. Our approach has the normative advantage of reconciling democratic values with the rule of law. . . . [T]he back-and-forth process of anticipated responses, signaling, and implicit bargains is a way by which democratically elected decisionmakers internalize values of predictability and stability and rule-of-law decisionmakers internalize values of popular accountability."); *id.* (Textualism "exacerbates the tension between democracy and the rule of law" because it is "insensitive to the expectations of elected representatives" and it "sacrifices the security and predictability associated with the rule of law.").

267 That is, predictability in a fairness or notice sense. *See supra* notes 50-52 and accompanying text.

268 *Cf.* EISENBERG, *supra* note 29, at 157-58 (common law necessarily is uncertain, nevertheless, "[M]any people plan on the basis of law implicitly rather than explicitly, because they do not know the law. For these people, planning on the basis of law consists of acting on the implicit belief that if a person conducts himself in a way that society regards as proper, he will be deemed to have acted lawfully, and if a person is injured by conduct that society regards as wrongful, he will have the law's protection. . . . Legal rules that are not certain are consistent with reliable planning, because with few exceptions reliable planning does not depend on certainty, but on a reasonable degree of likelihood and the capacity to estimate probability."); *see also* Eskridge & Frickey, *Equilibrium*, *supra* note 2, at 79 ("[C]onsiderations of stare decisis are strongest when the questionable precedent is one that is consistent with current legal and social values; conversely, stare decisis will not save a precedent that is clearly out-

predictability as embracing an expectation of "justice," measured by good results, whereas textualism views predictability as embracing an expectation of "fairness," measured by definite, knowable rules.[269]

Finally, to foster predictability, most dynamic interpreters embrace vertical coherence (creative dynamists less, perhaps, than others). They emphasize that statutes must be understood in light of their history, the legal and societal contexts and backdrops against which they were enacted, and the ways in which those contexts may have changed since enactment.[270]

Dynamists also embrace horizontal coherence, which they view from a broad, policy-oriented perspective. For dynamists, horizontal coherence requires that courts fit their interpretations into surrounding background norms, which they define variously to include concepts such as equality, right and wrong, entitlement, responsibility, duty, the legal landscape, and societal values.[271] As

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of-sync with current political winds."); *id.* at 81 ("When the Supreme Court disrupts . . . a stable practice, . . . it is not only unsettling a specific legal regime, but is also raising the possibility of general insecurity, in which neither private parties nor Congress can rely on settled law. This weakens the Court's stabilizing role in statutory interpretation, and undermines both democratic values and rule-of-law values.").

269 *See supra* notes 54-57 and accompanying text (fairness and justice).

270 *See supra* notes 167-173 and accompanying text.

271 *See, e.g.*, Aleinikoff, *supra* note 2, at 58 ("There is another dimension implicit in a nautical approach beyond simply understanding law as an enterprise that exists in the present. It is the project described by Hart and Sacks of fitting the statute into the current legal system a whole - what I have called above synchronic coherence. The case for coherence is based, in part, on traditional legal values of fairness and equality (treating like cases alike) and - perhaps surprisingly - notice (that is, lay persons consulting the statute may be more likely to read it in light of current understandings than by searching out the legislative history and the state of the law at the time of enactment.) Most significantly, consistency in the present is important because we recognize that fundamental understandings, such as right and wrong, entitlement, responsibility, fairness, and duty, lie behind every aspect of our legal system. . . . To fit statutes into the overall fabric of the law is to make them reflect, to make them responsive to, these evolving background norms."); *id.* at 59 ("The nautical approach suggests a process of interpretation that uses familiar tools of statutory construction - the language, structure, and purpose of a statute, related statutory provisions, and prevailing common law and constitutional norms. What the nautical approach demands is that the process of interpretation be carried out in a present-minded fashion, as if the statute had been recently enacted."); CALABRESI, *supra* note 1, at 113 ("The first task of courts in all instances remains to look to the landscape, to legal principles. If the statute can be said to fit, that settles the issue. If it does not, the guess, increasingly made at common law, as to majoritarian wishes will inevitably be made."); Dworkin, *supra* note 1, at 540-46 (analogizing legal interpretation in "hard cases" to the writing of a chain-novel, in which each author draws upon what comes

these norms evolve and change, so must interpretation.[272] Coherence arises from recognizing these norms and fitting each interpretation into the existing legal landscape.

Dynamic interpreters attempt to blend vertical and horizontal in order to achieve a policy coherence that harmonizes the past and the present. They do this by beginning in the past, understanding the social contexts of enactment, then pulling interpretation forward into the present by considering how those contexts have changed.[273] This is similar to, but more expansive than, the approach taken by legal process originalists. Legal process scholars identify the statute's original purposes, then pull interpretation forward into the present by applying those purposes to new circumstances. Dynamists identify the broad social contexts and backdrops against which a statute was enacted, then pull interpretation forward into the present by considering how those social contexts have changed. For example, suppose that the purpose of the "no dogs" statute could be stated, as two levels of generality, as prohibiting dogs or promoting a clean and safe park. A purposive interpreter might interpret the statute to prohibit pet wolves (clean and safe park) and guide dogs (prohibit dogs, clean and safe park). A dynamic interpreter would, however, consider the social context of the statute. Perhaps when the statute was enacted persons with disabilities rarely used guide dogs. That context has changed. Persons with impaired sight now often travel independently with guide dogs. In light of that changed context, guide dogs might be excluded from the statutes' prohibition. Yet, creative dynamists and some updating dynamists also argue that the law should challenge the existing consensus in order to push society forward toward

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before, but understands it and adds to it from her own experience and perspective with a goal of creating a unified whole); DWORKIN, *supra* note 39, at 176-84, 190-92, 217, 225 (under "law as integrity" the best interpretation in hard cases is that which makes the statute the most consistent with underlying values of society, within the limits imposed by the statutory language); *id.* at 228-75, 348 (chain novel analogy) DWORKIN, *supra* note 177; DWORKIN, *supra* note 45; Eskridge, *Spinning*, *supra* note 2, at 344 ("[T]here are certain meta-principles that underlie legislative activity. True deference to legislative supremacy will strive to effectuate these underlying principles. One such principle is that statutes are part of a coherent body of public law that should be implemented in a reasonable manner. Our nation's public laws are an ongoing enterprise, and courts applying those laws should try to assist in making that enterprise work.").

272 *See supra* note 271 and accompanying text.

273 *See id.*

greater justice and to protect those who are not well represented in the political process.[274] This reflects the classic tension between the law's role as a mirror of social values and as a magnet that forms social values.[275] As a result of this tension, dynamism has been criticized for failing to explain clearly when the court should abandon social consensus in favor of emerging views of justice.[276] It has also been criticized for putting too much faith in courts to identify social values and preserve horizontal coherence.[277]

In summary, for dynamists, the legal-system values of predictability, replicability, vertical coherence and horizontal coherence are all rooted in and inseparable from social values.[278] From a "democratic" perspective, dynamism charges that textualism and originalism are not democratically legitimate because they mis-state the proper legislative / judicial relationship. From a legal-system values perspective, however, dynamism seems to be more concerned that textualism obviates predictability by ignoring long-standing practice and citizens' expectations in favor of often contestable "ordinary" meanings,[279] and textualism and originalism undermine coherence and social congruence by placing too great an emphasis on legislative mandates, which may have little or no

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274 *See supra* notes 173-184 and accompanying text.

275 *See supra* text preceding note 49.

276 *See* Melnick, *supra* note 1, at 111-15; *id.* at 112 ("[S]hould . . . statutory interpretation reflect or challenge the current political consensus? Eskridge wants to have it both ways.").

277 *See id.* at 117; *see also supra* notes 261-262.

278 *Cf.* EISENBERG, *supra* note 29, at 151-154 (text-based proposition that some results are clearly ordained is false because it assumes rules govern without consideration of social propositions and justifiability; but justifiability is central to all common law rules); *id.* at 154-61; *id* at 154 (Under a "generative" theory, the common law "consists of the rules that would be generated at the present moment by application of the institutional principles of adjudication.").

279 *See, e.g., supra* note 278; Eskridge & Frickey, *Equilibrium, supra* note 2, at 77 ("Maintaining that clear statutory texts can trump long-standing practice and taking a dogmatic and often bizarre view of what is clear, the new textualism sacrifices the security and predictability associated with the rule of law."); Sunstein, *supra* note 2, at 425 ("Structural approaches . . . . depend on an assumption that statutes are in fact internally consistent and coherent - an assumption that recent theories of legislation have questioned in light of the influence of interest groups, compromise, and irrationality."); *id.* at 441 ("The problems with textualism and with the agency view lead some to conclude that statutory interpretation produces unpredictability and indeterminacy in most or all cases."); Zeppos, *Legislative History, supra* note 2 at 1361 ("[T]extualism's claim of predictable results under a preexisting set of principles is also doubtful.").

policy coherence and which may not reflect community expectations.[280] Moreover, because they decline to consider consequences, originalists and textualists cannot ensure just results in individual cases. The legal-system values dilemma for dynamism is that rooting law's legitimacy in public values or fundamental values may unrealistically assume that one, unified and discoverable set of community values exists. Also, by allowing judges to import policies and values that cannot be discerned from the statute, dynamism may undermine the type of rule-based predictability textualists favor and may permit judges to pursue their own policy preferences and biases.

4. Summary

Legal-system values clearly undergird interpretive theory and are fundamental to law's legitimacy. Textualists' complaints that originalism and dynamism undermine law's certainty and predictability by granting excessive interpretive discretion to the courts are rooted in legal-system values. Dynamists' arguments that textualism undermines doctrinal stability by ignoring prior history and established precedent, that originalism and textualism are too static to permit the law to respond to changing social values, and that textualism (and, perhaps, originalism) ignores justice in individual cases are rooted in legal-system values. Indeed, the clash between competing legal-system values probably is more significant in the modern debate between textualism and dynamism than it was in the mid-century clash between intentionalism and purposivism. Both of the latter "originalist" models appear to have embraced similar legal-system values, although they disagreed on how to achieve them. In stark contrast, textualism and dynamism clearly embrace conflicting legal-system values. Textualists emphasize the virtue of "order," attained through predictable, systemically consistent rules.[281] Dynamists emphasize the virtue of "justice," attained through an articulated regard for current social values.[282] With the failure of originalism's optimistic attempt to balance order and justice, the development of these starkly conflicting approaches is not merely understandable, it is virtually in-

280 *See supra* notes 209-215 and accompanying text.
281 *See supra* notes 221-237, 245, 269 and accompanying text.
282 *See supra* notes 258-270 and accompanying text (fairness and justice).

evitable. If legal-system values cannot be assured indirectly through neutral processes, interpreters can be expected to develop methods that permit courts to pursue these values directly. Textualism places greatest value in rule-based order, predictability and coherence, and pursues these virtues through an interpretive method that focuses almost exclusively on the rule of the text. Dynamism places greatest value in justice, social congruence and social value formation, and pursues these virtues through an interpretive method that grants courts sufficient flexibility to achieve justice even as circumstances change.

Viewing interpretive theory from a democratic legitimacy perspective, the differences between textualism and dynamism rest in the complexities of theorists' competing visions of democratic theory and practice. Viewing interpretive theory from a legal-system values perspective, however, the differences between textualism and dynamism clearly rest in articulated choices among competing legal-system values. Moreover, a legal-system values perspective reveals weaknesses that are less apparent when these competing models are examined only to determine which is the most democratically legitimate. It reveals, for example, that the most serious problem with pure textualism is not simply that it employs a frequently criticized, formalistic approach to democratic theory and constitutional interpretation, nor that it refuses to permit courts to consider consequences, social congruence, or individual justice when interpreting statutes. Rather, the problem is that, in their fervor to preserve the formalist values of rule-based predictability and coherence, textualists fail to explain how the legal-system values of social congruence, social value formation and substantive justice are preserved in the legal system. Textualism might be more compelling if it accepted and demonstrated that these values were preserved in the legislative process. (Indeed, one could argue that, if certain statutes are the product of an optimum deliberative process, then textualism would be the proper interpretive methodology for those statutes.) Indeed, by assuming that legislative processes fail to respond to social needs and concerns, and by prohibiting courts from considering these values, textualism appears to erase these values from the legal system.

Counter-complaints could, of course be leveled at dynamism. From the perspective of democratic theory, a co-equal partnership between the courts and the legislature is compelling. From a legal-

system values perspective, however, opponents doubts that dynamic interpretation can lead to predictable results and fear that dynamic judges will simply import their own personal preferences into their decisions. Although justice is a desirable consequence, the difference between a democracy and other systems that strive to achieve justice is that, in a democracy, socially desirable ends are to be identified by the people or their representatives, rather than a benevolent dictator. The question for dynamists is whether judges have the competence and imprimatur to determine the public good.

Legal-system values are fundamental to interpretive theory and practice. If these legal-system values are hidden beneath a complex debate about democratic legitimacy, rather than treated as a focus of discussion, however, theorists cannot assure citizens that interpretation will preserve these crucial values and interpreters will not fully appreciate the implications of choosing among the competing interpretive models.

B. *Legal-System Values, Democratic Legitimacy and Statutory Interpretation*

The current approach to statutory interpretation theory undermines the integrity of the legal system by fracturing legal theory into a curious dichotomy in which the common law is measured by legal-system values but statutes are measured by democratic theory. The law must form one coherent system, not two.[283] That system, as a whole, must preserve legal-system values without regard to whether a particular case is governed by statutory, constitutional, or common law (or some combination). It cannot do so unless the impact of legal-system values on statutory interpretation is clearly understood. As discussed in the previous section, a legal-system val-

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283 By asking the narrower question "what are the goals of statutory interpretation" rather than the broader question "what are the goals of the legal system," legal theory risks undermining the integrity of the legal system by identifying separate goals for common law and statutory law. This Article argues that interpretive theory should first identify overarching goals for the legal system, then apply these meta-goals in determining what interpretive methods will foster these goals in a legal system in which common law and statutes must work together. *Cf.* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 110 (1991) ("A more accurate measure of the desirability of any legal process... is whether the mix of results it produces is better than the mix of results we would get with alternative processes or laws.").

ues analysis can foster a more sophisticated understanding of the implication of employing different interpretive methods. An emphasis on legal-system values will also, however, raise a number of complex questions concerning the relationship between legal-system values and democratic legitimacy in statutory interpretation. The following discussion identifies the parameters of the effort to understand this relationship and to re-integrate legal-system values, democratic legitimacy and statutory interpretation.

The first question concerns the relationship between democratic legitimacy and legal-system values. Are legal-system values and democratic legitimacy two, equally important pillars supporting statutory law? Is one pillar more important than the other? Perhaps democratic legitimacy is the foundation of all law, and legal-system values are simply a series of components of what makes law democratically legitimate. Conversely, perhaps democratic legitimacy is subsumed in legal-system values. I submit that both are essential. Every statute must be enacted and interpreted in ways that are both democratically legitimate and designed to preserve legal-system values. Democratic legitimacy and legal-system values are inextricably inter-twined. First, both interpreters' choice of criteria by which to measure democratic legitimacy, and their choice of interpretive methodology, seem to be driven not merely by theoretic understandings of the best "true" conception of what democratic theory requires. Rather, they are driven inexorably by the legal-system values that competing theorists embrace.[284] Second, components of democratic theory coincide with various legal-system values. Most significantly, ensuring that law reflects social choices or values is fundamental to democratic government. This "democratic" value mirrors that "legal-system" value of social congruence and, perhaps, of social value formation. The difference between democracy and other systems that cherish the legal-system value of social congruence is that, in a democracy, social values are discerned from citizen's choices, whereas in a monarchy, for example, a benevolent king might determine what values are congruent with social good. In other words, democracy is one way of ensuring that the law is socially congruent *i.e.*, that it reflects social values and choices, responds to social needs, grows with social change, and perhaps, forms social values and ensures that the law protects

284 *See supra* notes 281-282 and accompanying text.

minority interests and fundamental values against majority preferences. Although social congruence may be attained by varied methods, only democratic methods of attaining social congruence are acceptable in a democracy. Moreover, social congruence is not the only component of democratic legitimacy. Democracy also requires that law and legal interpretation will be consistent with the Constitution, and that legal institutions will act within their respective spheres of authority and competence. Thus, it is not satisfactory to claim that an interpretive method (such as creative dynamism) is democratically legitimate merely by demonstrating that it achieves results that are consistent with society's values. Conversely, it is difficult to determine how an interpretive method (such as strict textualism) that refuses to consider whether statutes reflect social values could meet the social congruence requirement inherent in both legal-system values and democratic legitimacy. In summary, an interpretive method might preserve legal-system values without being democratically legitimate; but an interpretive method that seems to be democratically legitimate may fail miserably to preserve legal-system values. Both aspects of interpretive legitimacy must be considered.

The second, related, problem is determining which institution(s) are responsible for preserving legal-system values. Should the courts undertake this responsibility when applying all types of law (common, statutory and constitutional)? Or must courts applying statutory law "presume" that the legislature has preserved legal-system values, such that the court's role is simply to follow the legislative mandate without considering whether a statute or its application violates some legal-system value? If the latter, is that "presumption" rebuttable? For example, what role should courts play if it is clear that an old statute conflicts with related current laws and is unlikely to be repealed or amended? Should courts assume that the legislature expects judges to harmonize the law by rewriting the old law? I submit that all institutions must work together to achieve and preserve legal-system values. If the empirical evidence of political process theory reveals that the legislative process has not preserved these values, then the legal community must demand reform of the legislature (to, for example, permit easier repeal of out-dated laws) or must ensure that these values are protected by other institutions.

The third problem is determining at what point legal-system

values should be incorporated into statutory interpretation. Should legal-system values operate at the level of theory, practice, or both? That is, at the level of theory, should legal-system values be employed to determine which of the competing methods of statutory interpretation is the most legitimate? At the level of practice, is it within courts' traditional and democratically legitimate "judicial power" to consider these values each time they apply a statute? Or, should legal-system values be considered both in the preliminary task of choosing or developing an interpretive model and in the practical task of applying a statute? I submit that it is inevitable that certain values be addressed at each stage of interpretation. First, an interpretive theory must be designed to preserve all of the legal-system values. A theory that clearly cannot preserve these values is of little use unless it is accompanied by sound arguments explaining why certain of these values are not relevant to the legal system. Second, some legal-system values necessarily are in the domain of the courts. For example, both textualists and dynamists (as well as originalists) agree that the courts should seek to attain horizontal coherence and predictability in law, although they define these concepts somewhat differently.[285] Courts also, traditionally, have been charged with preserving doctrinal stability.[286] The question, and real focus of dispute, is whether values such as social congruence and social value formation are in the courts' domain. For textualists and originalists, the power and duty to preserve these values clearly rests exclusively in the elected and politically accountable branches of government. For dynamists, the pull of justice grants courts an independent responsibility to consider whether legislation (especially old legislation) conforms to social values.

These first three groups of questions apply particularly to the relationship between democratic legitimacy and legal-system values in statutory interpretation. They are, therefore, essential to understanding the competing interpretive models. The next three groups of issues are relevant to the role of legal-system values in

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285 *See supra* notes 225-227, 271-273 and accompanying text; *see also* Wood, *supra* note 80, at 59, 61 (English judges have responsibility to fit decisions into the existing law); SCALIA, INTERPRETATION, *supra* note 2, at 16-17, 129-30 (agrees that English and American judges have the power to interpret statutes in a way that fits them into the entire legal system).

286 *See supra* notes 39-40, 53, 252-254 and accompanying text.

any form of law. These questions have plagued legal scholars for generations, and cannot be resolved here.

Fourth, are predictability, replicability, vertical coherence, horizontal coherence, social congruence, responsivity to changes in society and in social values, formation of social values, and fairness and justice in individual cases, all legitimate legal system values? If so, are these the only functional values that underlie our legal system? Are there objective criteria for determining what is a legitimate legal-system value? For example, are "tradition," use in common law systems, and use over time and across systems, sufficient tests? Is rejection by moderns enough to exclude a traditional value, or is use by moderns enough to include one, contrary to tradition? These questions are important to the interpretive debate for two reasons. First, it is not clear that textualism accepts values other than predictability, replicability, and horizontal coherence. Second, it is not clear whether the social value formation ideal, which some dynamists embrace, is generally accepted.

Fifth, how are these values defined and attained? How can one determine whether a particular interpretive method, a particular interpretation, or a particular legal rule fosters doctrinal stability, systemic consistency, social congruence, or social value formation? Can insights be gleaned from criticisms or accolades voiced in law journals, judicial opinions, or the arguments of litigants?[287]

Sixth, what is the proper weight and balance among these legal system values? Are some more important than others? Is it possible that some values are more important for certain types of law, whereas other values are more important for other types of law? For example, is "justice" less relevant than "predictability" and "certainty" in commercial law?[288] Is "predictability" subordinate to "justice" in civil rights law? These, of course, are the foundational

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287 *See* EISENBERG, *supra* note 29, at 64-65 (if a rule lacks social congruence or systemic consistency, that fact is likely to have been brought out in criticisms in law reviews, treatises, other cases, and statutes that modify rule); *id.* at 64-76 (developing rules to determine whether and how to apply common law precedents based upon their social congruence, systemic consistency). On high-profile issues, the popular press may weigh in as well.

288 *See e.g.*, Dewsnup v. Timm, 502 U.S. 410, 435 (1992) (Scalia, J., dissenting) (The majority opinion is "as the Court irrelevantly observes, probably fairer from the standpoint of natural justice. (I say irrelevantly because a bankruptcy law has little to do with natural justice.")).

questions. The interpretive debate reflects a clear preference by textualists for the values associated with order, and a clear preference by dynamists for the values associated with justice. It likely is impossible to preserve "order," absolutely, without sacrificing some measure of "justice," or to preserve "justice," absolutely, without sacrificing some measure of "order." Originalism sought to achieve a workable balance between order and justice.[289] With originalism's demise, it is inevitable that interpreters will continue the struggle to determine how these competing values can be reconciled and maintained.

Finally, the six questions raised above implicate a broader question: can the incorporation of legal-system values into the debate break the current democratic legitimacy impasse, or will it simply add a further layer of complexity to an already difficult debate? I submit that legal-system values can facilitate a deeper understanding of, first, the motivations underlying the current interpretive models and, second, the implications of employing these competing models. It is unclear, however, whether legal-system values will reveal an unassailable choice among competing interpretive models. Textualism's failure to address several important justice-oriented values is troubling, and may suggest that it is not a legitimate interpretive model, notwithstanding its claim of a democratic pedigree. The question remains whether one of the varied forms of dynamism, which at least addresses each of the identified legal-system values, or some alternate model, might achieve an acceptable balance among these values. Nevertheless, dynamism cannot claim to preserve the type of rule-based order and predictability promised by textualism. The very nature of the tensions among legal-system values frustrates efforts to choose order-oriented values to the exclusion of justice-oriented values or vice versa.

One conclusion is clear. Although each of the current models lays an arguably credible claim to democratic legitimacy, efforts to determine which is the most democratically legitimate have failed. The focus should now turn to determining how democratic legitimacy values interact with legal-system values, and to creating an

289 *Cf.* Frickey, *supra* note 130, at 1086 (every traditional interpretive model seeks to achieve some measure of predictability through objective limits such as text, intent, and canons, and some measure of justice through normative limits).

interpretive model that preserves the values that undergird our legal system. If an interpretive model fails to preserve legitimate legal-system values, its claim to a democratic pedigree is of little value.[290]

IV. Conclusions and Next Questions

For decades, democratic legitimacy has served as the principal touchstone of statutory interpretation theory. During the past fifteen years, however, courts and commentators have been locked in a seemingly irreconcilable debate over what makes interpretation democratically legitimate. The debate is mired in the complex interrelationships among democratic theory, political process theory, critical legal theory, economic theory, linguistic theory, and the philosophy of interpretation.[291] If consensus is to develop in this environment, its roots must lie not in a simple fine-tuning of earlier theories, but rather in a fundamental re-examination of the nature of our legal system and the role that statutes play in it. That re-examination must begin by re-integrating legal-system values and democratic legitimacy.

If we emphasize democratic legitimacy as the sole test of interpretive legitimacy, we risk losing sight of important values by which we measured the legitimacy of the legal "system" under the common law and by which we also should measure the current legal "system" predominated by statutes. A (perhaps the only) way to resolve the current impasse is to re-examine each model in light of the values that underlie our legal system, including predictability, replicability, doctrinal stability, systemic consistency, social congru-

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290 A deeper understanding of the relationship between statutory interpretation, democratic legitimacy and legal-system values could foster a dialogue toward consensus around a model that draws strength from the existing competing models. Also, by considering legal-system values, it may be possible to refine the current models by determining whether certain legal-system values are more important than others for various types of statutes, and whether certain interpretive methods are more appropriate than others for various types of statutes.

291 *See, e.g.*, Eskridge & Frickey, *Post-Legal Process*, *supra* note 2, at 693 ("Today, alternative philosophies of law—including the law and economics movement, critical studies, and the 'new' legal process—challenge the legal process consensus. This challenge has particularly important ramifications in the field of legislation."); Zeppos, *Statutory Interpretation*, *supra* note 1, at 1077 ("Scholars and judges have brought to bear a variety of disciplines - for example, economics, positive political theory, philosophy, psychology, literature, and history - to critique the Court's existing practice and to justify alternate approaches.").

ence, formation of social values, and fairness and justice in individual cases. These meta-principles undergird the current debate, but are obscured by the rhetoric of democratic legitimacy. If dialogue is to be furthered, interpreters should determine which legal-system values they view as legitimate, and which they reject (and why), and should affirmatively select among competing models based not solely upon democratic theory, but based upon the ways in which competing interpretive models foster these values.

Although democratic legitimacy is essential to interpretive theory, an interpretive model that claims a democratic pedigree but fails to preserve legal-system values cannot be legitimate.