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The Dumbing Down of Statutory Interpretation

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This Article criticizes a recent movement toward making statutory interpretation simpler and more uniform. The trend is reflected by proposals to adopt codified rules of statutory interpretation, give stare decisis effect to interpretive methodology, use simpler methods of statutory interpretation in lower courts, and implement certain versions of textualism. This Article explains that such proposals are driven by an overarching desire to limit judicial discretion and promote a formal vision of the rule of law; they assume that the traditional hierarchy of legal sources is exclusive, and that statutory interpretation's function is to ascertain the meaning of the law.

This Article challenges each of these goals or assumptions by claiming, first, that instead of seeking to eliminate judicial discretion, the primary goal of statutory interpretation methodology should be to protect the people from the possibility of domination by the state. Second, the resolution of disputes regarding the permissible scope of governmental authority in difficult statutory cases requires the use of practical reasoning, and the quality of statutory law and its democratic legitimacy benefit from a broad range of arguments and diverse judicial perspectives. Third, the traditional hierarchy of legal sources is outdated, and "interpretive methodology" and "agency decision-making" should be viewed as distinct forms of law that merit their own special places in a new legal hierarchy for the regulatory state. Finally, the central function of statutory interpretation by federal courts in the modern regulatory state is to provide individuals and groups with opportunities to contest the validity of particular exercises of governmental authority, rather than to ascertain the meaning of the law in a vacuum. This Article therefore argues that the recent proposals to dumb down statutory interpretation are fundamentally misguided, and it closes by making several related observations about the extent to which interpretive methodology can or should be simple or uniform. In sum, provisional dialogues by and among different centers of power better reflect the nature of law in the modern regulatory state than artificial efforts to achieve simple, predictable, or uniform final answers to our most pressing legal or social problems.

INTRODUCTION

In the early 1980s, a prominent legal scholar observed that "[t]he general contemporary American view of statutory interpretation is that there is not a great deal to say about the subject. As a result, nothing else as important in the law receives so little attention."[1] There has been a dramatic revival of interest

[1] Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 213 (1983), *quoted in* WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION

in the topic since that time,[2] which has focused primarily on how federal courts should interpret statutes in a representative democracy with separated powers.[3] The academic literature and accompanying judicial debates have resulted in the development of dynamic theories of statutory interpretation,[4] the rise (and alleged fall) of the new textualism,[5] the alleged emergence of a new purposivism,[6] and, finally, calls to end the "interpretation wars" that have raged for the past quarter century with the declaration of a "truce."[7] One influential new voice in the field has pointed out that "the kinds of questions" raised by the interpretation wars "are continually debated, but never definitively resolved, in modern Supreme Court statutory interpretation."[8] In her view, "[t]hese debates are no longer useful," and the failure to settle on a consistent and predictable approach to statutory interpretation "wastes court and litigant resources; deprives Congress of an incentive to coordinate its behavior with the Court's interpretive methods; retains rather than eliminates another source of intracourt disagreement; and makes the Court appear result-oriented, because the governing principles change from case to case."[9] The chief problem, from this perspective, is simply that "American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."[10]

A number of scholars have sought to remedy this problem by developing proposals to simplify statutory interpretation and render interpretive methodology more consistent and predictable. Thus, for example, leading scholars have recently advocated the adoption of Federal Rules of Statutory

AND STATUTORY INTERPRETATION 1 (2d ed. 2006).

[2] *See* Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 (1992).

[3] *See* Glen Staszewski, *Introduction to Symposium on Administrative Statutory Interpretation*, 2009 MICH. ST. L. REV. 1.

[4] *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); *see also* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988) (proposing a "nautical," as opposed to an "archaeological" approach to statutory interpretation, which would focus courts on guiding statutes forward instead of uncovering past meaning).

[5] *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006).

[6] *See* John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113.

[7] Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 119 (2009) ("The latest move in the interpretation wars . . . is to declare something of a truce."); *see* Molot, *supra* note 5, at 59-69 (advocating the dawn of a "posttextualist era").

[8] Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1766 (2010).

[9] *Id.* at 1767.

[10] HENRY HART, JR. & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994), *quoted in* ESKRIDGE ET AL., *supra* note 1, at 8.

Interpretation;[11] argued that judicial decisions regarding interpretive methodology should be given stare decisis effect;[12] suggested different (and presumably simplified) approaches to statutory interpretation for lower courts;[13] developed a provocative new theory of "no frills textualism;"[14] published a major new treatise on the proper textualist method of "reading law;"[15] and recognized the virtues of establishing an "interpretive regime" that would allow Congress to draft statutes with greater knowledge of how its work will subsequently be interpreted.[16] The explicit premise of much of this work is that "often it is not as important to choose the best convention as it is to choose one convention, and stick to it."[17] I refer to this trend toward simplification and uniformity as "the dumbing down of statutory interpretation."[18]

[11] *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002); *see also* Gary E. O'Connor, *Restatement (First) of Statutory Interpretation*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 333 (2004) (advocating the creation of a restatement of statutory interpretation based on the ALI model); *but see* Lawrence M. Solan, *Is It Time for a Restatement of Statutory Interpretation?*, 79 BROOK. L. REV. 733 (2014) (expressing skepticism regarding this proposal).

[12] *See* Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863 (2008); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898 (2011); Gluck, *supra* note 8; Jordan Wilder Connors, Note, *Treating Like Subdecisions Alike: The Scope of Stare Decisis as Applied to Judicial Methodology*, 108 COLUM. L. REV. 681 (2008).

[13] *See* Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433 (2012).

[14] William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2044 (2006) (reviewing ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY (2006)) (describing Vermeule's theory of statutory interpretation); *see* VERMEULE, *supra*.

[15] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

[16] *See* William N. Eskridge, Jr. & John Ferejohn, *Politics, Interpretation, and the Rule of Law*, *in* THE RULE OF LAW: NOMOS XXXVI 265, 267-70 (Ian Shapiro ed., 1994); William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law As Equilibrium*, 108 HARV. L. REV. 26 (1994).

[17] Eskridge & Frickey, *supra* note 16, at 67, *quoted in* Foster, *supra* note 12, at 1888; *see* Rosenkranz, *supra* note 11, at 2088 & n.9 (quoting Eskridge and Frickey and claiming that "a central imperative of statutory interpretation" is "a single, predictable, coherent set of rules"); *see also* Gluck, *supra* note 8, at 1848-49 (recognizing that a premise of her work is that "settling on a consistent approach is a worthy goal for statutory interpreters," and claiming that "the benefits of a consistently applied, ex ante-announced interpretive methodology might outweigh the costs of loss of flexibility"); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) ("There are times when even a bad rule is better than no rule at all."); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 140 (2000) ("It is more important that judges select *one* answer and apply it consistently over time than that they select the *right* answer.").

[18] In order to avoid any potential misunderstanding, I want to be entirely clear that I am most certainly not referring to the advocates of these proposals as "dumb." Nor am I

This Article argues that the dumbing down of statutory interpretation is fundamentally misguided, and that the recent calls for simplification and uniformity should be rejected. After describing the foregoing proposals in greater detail,[19] this Article identifies the common goals or assumptions that appear to be driving recent calls for reform.[20] First, the advocates of such proposals are seeking to limit and constrain judicial discretion in the service of widespread visions of legislative supremacy and democratic legitimacy. Second, they are trying to demand greater clarity and predictability in interpretive methodology to promote "the rule of law as a law of rules."[21] Third, the advocates of such reforms generally assume that interpretive methodology is a form of "law," and they rely on the traditional hierarchy of legal sources (namely, the Constitution, statutes, and common law) for the proposition that interpretive methodology must either be constitutional law or common law. Accordingly, they either contend that their proposals are constitutionally mandated[22] or that interpretive methodology is judicially created common law that could be overridden by statute,[23] and should, in any event, be treated as binding precedent or explicitly overruled.[24] Finally, the advocates of such proposals reflexively assume that statutory interpretation's function is to ascertain the meaning of the law. The judiciary necessarily performs this function by selecting and applying available interpretive rules. If courts were to follow (and, better yet, if they were *required to follow*) a consistent and uniform set of interpretive rules, we could simplify the interpretive process, minimize judicial discretion, and improve the clarity and predictability of legal meaning. It is, thus, easy to see why so many scholars and judges would jump on this bandwagon.[25]

accusing them of "dumbing down" the scholarly literature on statutory interpretation. On the contrary, this is some of the most sophisticated, thoughtful, and impressive work in the field, and it has greatly enlivened the discourse on statutory interpretation and generated important new lines of inquiry. My claim is merely that if these proposals were adopted, the intended effect would be to "dumb down" *the practice of statutory interpretation in the courts*. I argue that this would be an unfortunate result for the reasons developed in the Article.

[19] *See infra* Part I.

[20] *See infra* Part II.

[21] *See* Scalia, *supra* note 17.

[22] *See* SCALIA & GARNER, *supra* note 15, at 23-24; *see also* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 8 (2001) (claiming that the American constitutional structure compels central aspects of textualism).

[23] *See* Rosenkranz, *supra* note 11, at 2156 ("[T]he judicial power over this area may, like any other federal common lawmaking power, be trumped by Congress.").

[24] *See generally* Foster, *supra* note 12; Gluck, *supra* note 12.

[25] *Cf.* William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 679 (1999) ("Few would object to the overall goal of making the law more predictable, objective, and so forth.").

This Article aims to dampen this enthusiasm by reevaluating each of the preceding goals or assumptions.[26] First, it claims that instead of seeking to eliminate judicial discretion, the primary goal of statutory interpretation methodology should be to protect the people from the possibility of arbitrary domination by the state.[27] While this vision of statutory interpretation respects the principle of legislative supremacy,[28] it also promotes an understanding of freedom and democracy that is more robust and attainable than the competing views underlying the traditional faithful agent models.[29] Second, this Article recognizes that the advantages of rule-based decision-making should be respected. It claims, however, that the resolution of disputes regarding the permissible scope of governmental authority in difficult statutory cases requires the use of practical reasoning,[30] and that the quality of statutory law and its democratic legitimacy substantially benefit from a broad range of arguments and diverse judicial perspectives.[31] Third, this Article suggests that the traditional hierarchy of legal sources is outdated in the modern regulatory state, and proposes that "interpretive methodology" and "agency decision-making" are distinct forms of law that merit their own special places in the following new legal hierarchy: (1) Constitution, (2) interpretive methodology, (3) statutes, (4) agency action, (5) common law. Moreover, unlike traditional sources of law, which are traditionally viewed as *fixed*, these "new" forms of law are, by definition, *provisional*. From this perspective, Congress cannot dictate binding rules of statutory interpretation to the judiciary, and one court cannot ordinarily dictate the interpretive methodology of its successors. Finally, this Article claims that the central function of statutory interpretation by federal courts in the modern regulatory state is to provide individuals and groups with opportunities to contest the validity of particular exercises of governmental authority.[32] If courts were to follow (or, worse yet, if they were *required to follow*) a consistent and uniform set of interpretive rules, statutory interpretation could no longer perform its central function in the modern

[26] *See infra* Part III.

[27] *See* Glen Staszewski, *Statutory Interpretation As Contestatory Democracy*, 55 WM. & MARY L. REV. 221, 245-49 (2013).

[28] *See id.* at 249, 252-53, 258.

[29] For a political theoretical account of this understanding of freedom and democracy, see PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 177-78 (1997), and Philip Pettit, *Republican Freedom and Contestatory Democratization*, *in* DEMOCRACY'S VALUE 164-83 (Ian Shapiro & Casiano Hacker-Cardón eds., 1999).

[30] *See* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation As Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

[31] *See* Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Interpretation*, 120 YALE L.J. ONLINE 47 (2010), http://www.yalelawjournal.org/forum/the-costs-of-consensus-in-statutory-construction, *archived at* http://perma.cc/89S6-GRY6 ("Dissensus creates a system of open deliberation that has a significant impact on our legal system and creates tangible benefits.").

[32] *See* Staszewski, *supra* note 27.

regulatory state, and the people would be subject to potential domination in ways that would severely undermine democracy.

After setting forth these contrasting views of statutory interpretation, this Article returns to the recent proposals to dumb down statutory interpretation and provides the following observations. First, while Congress is certainly free to provide the federal judiciary with interpretive guidance, the vast majority of codified rules of statutory interpretation cannot bind the courts. Second, while the federal judiciary should treat prior methodological decisions with an appropriate degree of respect, those prior decisions will only provide non-binding, methodological considerations in future cases. Third, the nature of the interpretive arguments that can be presented by parties and relied upon by lower courts should not be artificially restricted. The resource constraints on lower federal courts are likely overstated in this context, and limits on their decision-making competence are better resolved by allowing statutory issues to percolate within the federal judicial system than by attempting to restrict access to relevant and potentially persuasive information. Fourth, textualism's dogmatic focus on ascertaining "what the law as enacted meant"[33] is fundamentally misguided because it eliminates the contestatory dimension of statutory interpretation. This problem is significantly compounded when courts purport to rely on artificial decision-making frameworks[34] or refuse to conduct meaningful review of administrative action.[35] Finally, there is already an "interpretive regime" that provides sufficient guidance to Congress regarding how its work is likely to be interpreted. The contrary position is based on an outdated and deeply erroneous view of the nature of law and the function of statutory interpretation. In sum, provisional dialogues by and among different centers of power better reflect the nature of law in the modern regulatory state than artificial efforts to achieve simple, predictable, and uniform final answers to our most pressing legal or social problems.

I. MANIFESTATIONS OF THE TREND

The trend that is the focus of this Article is reflected by a variety of recent intellectual movements and scholarly proposals. The main unifying principle is a belief that statutory interpretation methodology is currently too complicated, inconsistent, and unpredictable. This is largely the case because the methodology that is used by federal courts to interpret statutes is generally not treated as a traditional form of "law," and judges are therefore permitted to use whatever interpretive methodology they prefer to resolve each particular case.[36] For example, a judge may examine the legislative history of a statute in

[33] *See, e.g.*, Johnson v. Transp. Agency of Santa Clara City, Cal., 480 U.S. 616, 671 (1987) (Scalia, J., dissenting).

[34] *Cf.* Gluck, *supra* note 8, at 1771-1811 (providing examples of states that have adopted "controlling interpretive frameworks").

[35] *See* VERMEULE, *supra* note 14, at 183 (advocating strong deference to agencies).

[36] This description of the current situation and the following example are borrowed from

case *A*, but decline to do so in case *B*. Similarly, a judge could utilize a textualist methodology in case *X*, an intentionalist methodology in case *Y*, and a purposive or dynamic approach in case *Z*. The proposals to dumb down statutory interpretation view this as an unacceptable (indeed, lawless) state of affairs, and they seek to impose simplicity and uniformity on the enterprise. This Part describes the most significant manifestations of the trend, while the following Part explains the ideas and values that are driving it.

A. *Codified Rules of Statutory Interpretation*

The most obvious manifestation of the trend toward simplicity and uniformity in statutory interpretation is Nicholas Rosenkranz's proposal to enact "Federal Rules of Statutory Interpretation."[37] Rosenkranz points out that theories and doctrines of statutory interpretation "have become elaborate and sophisticated," and that "the very richness of this intellectual landscape has resulted in unpredictability and confusion."[38] This is highly problematic, from his perspective, because "[t]he most important features of an interpretive regime are that it be clear, predictable, and internally coherent, and that both promulgator and interpreter of text agree on the regime beforehand."[39] Indeed, Rosenkranz contends that "[i]n most cases, the particular choice of rule will be less important than that some clear rule be chosen."[40] Rosenkranz points out that Congress could, in theory, promulgate a statute that adopts legally binding rules of statutory interpretation.[41] He claims that most of the potential rules would be constitutionally permissible,[42] and that the enactment of such a code would be good public policy.[43] While his discussion of the ideal content of the rules is quite limited, Rosenkranz does recommend the selection of an official dictionary for statutory interpretation, the codification of a slate of preferred canons, and a clear decision (one way or the other) on whether the use of legislative history is permissible.[44] To illustrate the broad range of available

my recent essay on a related topic with Evan Criddle. *See* Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573, 1576 (2014).

[37] *See* Rosenkranz, *supra* note 11.

[38] *Id.* at 2086.

[39] *Id.* at 2157.

[40] *Id.*

[41] *Id.* at 2156. For a non-binding variation on this proposal, see O'Connor, *supra* note 11, at 334 (recommending "that the American Law Institute (ALI) promulgate a 'Restatement of Statutory Interpretation'").

[42] Rosenkranz, *supra* note 11, at 2092-2140.

[43] *Id.* at 2151-53. Rosenkranz recommends adopting the rules through the same process as the Federal Rules of Civil Procedure and Evidence. For a brief description of this procedure, see Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1198-1202 (2012).

[44] Rosenkranz, *supra* note 11, at 2147-51.

options, he also suggests that the rules could require federal courts to interpret statutes in a textualist fashion and eliminate horizontal stare decisis in statutory cases.[45]

The idea of a legislature adopting codified rules of statutory interpretation is not hypothetical. As Rosenkranz points out, all fifty states and the District of Columbia have adopted some version of an interpretative code.[46] Moreover, several foreign nations have adopted interpretive codes.[47] Finally, Congress has enacted the Dictionary Act,[48] which provides presumptive definitions of various terms that are used throughout the United States Code, and the Civil Rights Act of 1991[49] explicitly limits the material that can be used as legislative history in interpreting the statute.[50] Rosenkranz builds on these precedents to advocate the adoption of one coherent and comprehensive set of Federal Rules of Statutory Interpretation.

B. *Methodological Stare Decisis*

Another way to simplify statutory interpretation, and render interpretive methodology more consistent and predictable, would be to persuade the federal judiciary to give stare decisis effect to its methodological decisions.[51] The Supreme Court has repeatedly emphasized in the substantive-law context that "[*s*]*tare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[52] Justice Brandeis famously embraced this policy "because in most matters it is more important that the applicable rule of law be settled

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[45] *Id.* at 2124-26. These suggestions have been adopted pursuant to adjudication by the Michigan Supreme Court. *See* Gluck, *supra* note 8, at 1803-11.

[46] Rosenkranz, *supra* note 11, at 2089-90 & n.10, 2132; *see also* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341 (2010); Alan R. Romero, Note, *Interpretive Directions in Statutes*, 31 HARV. J. LEGIS. 211 (1994).

[47] Rosenkranz, *supra* note 11, at 2089 & n.11 (listing foreign statutory interpretation codes); *see* Acts Interpretation Act 1901 (Cth) ss 15AA & 15AB (Austl.); *see also* D.C. PEARCE & R.S. GEDDES, STATUTORY INTERPRETATION IN AUSTRALIA 24-30, 63 (5th ed. 2001) (discussing codified methodology in Australia); Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479, 525, 534 (2013) (discussing this example).

[48] 1 U.S.C. §§ 1-7 (2000); *see* Rosenkranz, *supra* note 11, at 2110 (implying that while the Dictionary Act is broad in scope, it is still "trivial").

[49] 42 U.S.C. § 1981 (1994).

[50] *Id.* at note ("No statements other than the interpretive memorandum . . . shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying . . . [certain provisions] of this Act . . . ."), *quoted in* Rosenkranz, *supra* note 11, at 2109.

[51] For a detailed discussion and critique of such proposals, see Criddle & Staszewski, *supra* note 36.

[52] Payne v. Tennessee, 501 U.S. 808, 827 (1991).

than that it be settled right."[53] Stare decisis requires the Supreme Court to follow its own precedents in the absence of a "special justification," and it also requires lower courts to adhere strictly to the prior decisions of higher courts.[54] Moreover, the conventional wisdom is that prior interpretations of statutes by federal courts are entitled to "super-strong" stare decisis effect, partly because Congress could amend a statute to override an erroneous or outdated judicial decision.[55] Notwithstanding widespread support for the doctrine of stare decisis on *substantive statutory issues*, however, federal courts generally do not give stare decisis effect to their *methodological decisions* in statutory interpretation cases.[56]

Several scholars have recently recognized that "the doctrine of stare decisis is tailor-made" to provide the consistency and predictability "that are notoriously lacking in statutory interpretation doctrine," and they have argued that federal courts should give stare decisis effect to their decisions regarding interpretive methodology.[57] Thus, Sydney Foster has argued not only that this course of action would provide the same benefits that are provided by the application of stare decisis to substantive decisions, but that giving stare decisis effect to interpretive methodology would serve a valuable coordinating function that is largely unnecessary in the substantive-law context.[58] Accordingly, Foster claims that courts should give even stronger stare decisis effect to interpretive methodology than is provided to substantive decisions.[59] Similarly, Abbe Gluck argues that "settling on a consistent approach is a worthy goal for statutory interpreters."[60] Based on her examination of the experiences of several states,[61] Gluck contends that "judges *can* and *do* bind other judges' methodological choices, in the same way they bind one another

[53] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

[54] Foster, *supra* note 12, at 1864 n.3.

[55] *See* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988).

[56] *See* Foster, *supra* note 12, at 1866, 1872-84; Philip P. Frickey, *Interpretive-Regime Change*, 38 LOY. L.A. L. REV. 1971, 1974-81 (2005); Gluck, *supra* note 8, at 1765; Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 385-86 (2005).

[57] Foster, *supra* note 12, at 1866.

[58] *Id.* at 1886-97.

[59] *Id.* at 1867-69; *see also* Connors, *supra* note 12, at 683 (arguing that "extending stare decisis to statutory interpretation subdecisions might enhance" communication between the judicial and legislative branches).

[60] Gluck, *supra* note 8, at 1848; *see also id.* at 1846-61 (offering a normative defense of consistent approaches to statutory interpretation more generally).

[61] *Id.* at 1771-1811 (providing case studies of several states that have adopted "controlling interpretive frameworks" and that have given their methodological decisions stare decisis effect).

with respect to substantive preferences."[62] Both Foster and Gluck point out that the judiciary gives stare decisis effect to interpretive methodology in various other legal contexts, and they suggest that rules of statutory interpretation should not be treated any differently.[63] Indeed, Gluck claims that interpretive methodology *is* given stare decisis effect when federal courts review the legality of agency decision-making under *Chevron* and its progeny;[64] and there is also precedent for treating interpretive methodology as precedent in other countries.[65] Foster and Gluck therefore advocate the development of a relatively uniform and predictable set of interpretive rules for federal courts,[66] which could be established by giving stare decisis effect to methodological decisions in statutory interpretation.

C. *Lower Standards for Lower Courts*

The advocates of the foregoing proposals appear to expect that they would be creating a uniform and predictable set of interpretive rules that would be binding on all federal courts. The Federal Rules of Statutory Interpretation would therefore presumably apply in the Supreme Court as well as in the lower

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[62] *Id.* at 1823.

[63] *See* Foster, *supra* note 12, at 1900-01 ("[T]he law sometimes does impose constraints on 'how judges think,' directing them on questions of contract interpretation, weighing evidence when making factual determinations, and implementing constitutional provisions."); Gluck, *supra* note 12, at 1968 ("[M]any of these other interpretive regimes—including rules of contract and trust interpretation, choice of law, and even some constitutional law regimes—share key characteristics with the rules of statutory interpretation.").

[64] Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 798-801 (2013). *But cf.* Connor N. Raso & William N. Eskridge, Jr., Chevron *As a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1727 (2010) (examining the Supreme Court's deference doctrine since *Chevron* and finding that "the Justices generally do not give deference-regime precedents anything close to stare decisis effect").

[65] *See, e.g.*, James J. Brudney, *The Story of* Pepper v. Hart*: Examining Legislative History Across the Pond*, *in* STATUTORY INTERPRETATION STORIES 258-94 (William N. Eskridge, Jr. et al. eds., 2011) (describing legislative history's treatment in Britain and making comparisons with the United States).

[66] While Foster would accord "extra-strong" precedential weight to methodological decisions in statutory interpretation, Foster, *supra* note 12, at 1868, Gluck suggests that methodological decisions "might occupy a place on that spectrum of law, perhaps meriting lower precedential weight in order to give judges the ability to evolve interpretive doctrine over time and respond to changes in the legislative process . . . ." Gluck, *supra* note 12, at 1917-18. Gluck has more recently suggested that interpretive doctrine might be "tailored" so that different approaches would apply to different statutes or different areas of law. *See* Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation From the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 797-800 (2014).

federal courts, and the normal rules of horizontal and vertical stare decisis would presumably extend to methodological decisions in statutory interpretation. Aaron Bruhl has recently argued, however, that "[s]tatutory interpretation is a court-specific activity that should differ according to the institutional circumstances of the interpreting court," and "[t]he U.S. Supreme Court is not the model all other courts should emulate."[67]

Bruhl identifies three types of institutional differences among courts that may counsel in favor of distinct interpretive methodologies. First, he suggests that a court's place in the judicial hierarchy could properly influence how it approaches statutory interpretation.[68] For example, some theories and doctrines of statutory interpretation are predicated upon the legislature's ability to amend a statute in response to the judiciary's decision.[69] Yet Bruhl points out that Congress is typically much more likely to learn about a Supreme Court decision on a particular topic than a decision by a federal district court.[70] Accordingly, theories and doctrines that depend upon anticipated legislative responses may be more appropriate for the Supreme Court (and higher state courts[71]) than for lower federal courts.[72] Second, Bruhl points out that "[t]he Supreme Court decides relatively few cases, and each one is the product of massive investment of public and private time and effort,"[73] whereas lower courts "decide many, *many* more cases, and they do so with smaller staffs," weaker or more variable briefing, fewer amicus briefs, and little or no opportunity for collaboration with colleagues.[74] He claims that these resource disparities could properly lead lower courts to use interpretive methodologies that differ in some respects from those of the Supreme Court.[75] Finally, Bruhl argues that differences in judicial selection could potentially justify differences in interpretive methodology.[76] He points out that federal judges receive life

[67] Bruhl, *supra* note 13, at 433.

[68] *Id.* at 458.

[69] *See, e.g.*, Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162 (2002); *see also* Eskridge, *supra* note 55, at 1409 (explaining that federal courts traditionally give especially strong stare decisis effect to interpretive decisions because Congress could amend a statute to overrule an erroneous or problematic decision).

[70] Bruhl, *supra* note 13, at 459.

[71] It is widely recognized that state court judges may have closer ties to the state legislature and other elected officials than most federal judges. *See, e.g.*, ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 299-301 (2009); Bruhl, *supra* note 13, at 462-63.

[72] *See* Bruhl, *supra* note 13, at 459-63.

[73] *Id.* at 470.

[74] *Id.* at 471-72.

[75] *Id.* at 470-86.

[76] *Id.* at 486-94. For a comprehensive treatment of this issue, which focuses primarily on the potential relevance of judicial elections to interpretive methodology, see Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215 (2012).

tenure when they are appointed, whereas state judges are typically elected to fixed terms or required to face voters in a retention election after the term for which they are initially appointed.[77] Moreover, the method for appointing judges within a single judicial system frequently varies in formal or functional ways based on the court's level within the judicial hierarchy. For example, while U.S. Supreme Court Justices are formally appointed pursuant to the same process as federal district court judges, the appointment processes differ in substantial ways as a practical matter.[78] Bruhl's basic thesis is that elected judges, or judges whose selection process involves greater visibility and public scrutiny, should arguably have greater leeway to interpret ambiguous statutes in a manner that involves greater policymaking discretion on behalf of their respective constituencies.[79]

Bruhl's proposal for "heterogeneity" in statutory interpretation differs from the proposals to enact codified rules of statutory interpretation or give stare decisis effect to interpretive methodology because it would likely result in *less simplicity or uniformity*.[80] Nonetheless, his proposal should still be viewed as an important part of the broader trend toward the dumbing down of statutory interpretation because it would effectively result in *lower standards for lower courts*. Indeed, Bruhl explicitly concludes that lower courts should be more deferential to other decision-makers when they interpret statutes, which means that they should "heavily defer to agency interpretations," give substantial weight to the dicta of higher courts, and "hesitate before departing from views embraced by many of their peers at the same level of the judiciary."[81] Moreover, when lower courts are genuinely faced with issues of first impression, Bruhl contends that they should emphasize reasonable interpretations of the enacted text that avoid "generating awkward results," while eschewing ambitious policymaking and being "extremely wary of delving into legislative history."[82] In short, Bruhl contends that lower courts should generally adopt something like the "no frills textualism" discussed in the following section, irrespective of the method of statutory interpretation that would be most appropriate for the U.S. Supreme Court.

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[77] Bruhl, *supra* note 13, at 488-89.

[78] *See id.* at 488.

[79] *See id*. at 491-94; *see also* Bruhl & Leib, *supra* note 76.

[80] *See* Bruhl, *supra* note 13, at 440 (recognizing that if his analysis is correct, "then the vertical aspect of the uniformity program is mistaken" because "[l]ower courts should not be required to follow the same rules as the high court if the aptness of those rules is place-specific"). On the other hand, Bruhl argues that if a uniform interpretive methodology is viewed as essential, higher courts could be expected to follow the interpretive methodology that is appropriate for lower courts, rather than the other way around. *Id.* at 457-58.

[81] *Id.* at 494-95.

[82] *Id.* at 495.

D. *No Frills Textualism*

In one of the most important recent lines of work on statutory interpretation, Adrian Vermeule claims that theoretical disagreements regarding the best interpretive methodology cannot be settled by resort to the Constitution or abstract principles like "legislative supremacy" or "democracy."[83] He also points out that since any ideal theory of statutory interpretation would need to be implemented by real people in actual institutions, the capacities of decision-makers and the systemic effects of their methodologies must be considered in reaching conclusions about how statutes should be interpreted.[84] Vermeule calls for an "institutional turn" in the academic literature, which would necessarily include a prominent empirical dimension devoted to assessing the costs and benefits of particular interpretive techniques.[85] Vermeule contends that the advocates of different foundational theories could reach "incompletely theorized agreements" on how statutes should be interpreted in practice based on the results of an institutional analysis.[86] For example, intentionalists might agree with textualists that courts should not consult legislative history because the costs of this practice exceed the benefits even from an intentionalist perspective.[87]

In conducting his own institutional analysis of how courts should interpret statutes, Vermeule acknowledges that most of the relevant empirical data do not exist and would be difficult to obtain.[88] He therefore draws lessons from a variety of other academic disciplines regarding what decision-makers should do under conditions of uncertainty and bounded rationality.[89] Vermeule argues that the relevant decision-making techniques—which include cost-benefit analysis, the principle of insufficient reason, maximin, satisficing, picking, and fast and frugal heuristics—suggest that "courts' foremost concern should be to minimize their interpretive ambitions, especially by minimizing the costs of judicial decisionmaking and of legal uncertainty."[90] His central point is that the judiciary's use of legislative history and other flexible, dynamic, or policy-oriented methods of statutory interpretation, which potentially consider a broad range of information or evidence, impose certain and substantial costs on the

[83] VERMEULE, *supra* note 14, at 31-33 ("[T]he decisive considerations in choosing methods of constitutional interpretation are necessarily institutional, rather than high-level claims about constitutionalism, democracy, or the nature of law.").

[84] *Id.* at 76-79 (discussing how institutional realities such as human error, limited information, personal views or goals, and costs of decisions should be taken into account when deciding on a proper interpretive theory).

[85] *Id.* at 63-85; *see also* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003); Vermeule, *supra* note 17.

[86] VERMEULE, *supra* note 14, at 82-83.

[87] *See id.* at 82.

[88] *Id.* at 153-54.

[89] *Id.* at 154-56.

[90] *Id.* at 150.

legal system, while providing only speculative benefits in return. Vermeule therefore concludes that those methods of statutory interpretation should not be used for institutional reasons. He calls for "interpretive modesty" from the judiciary, which would push its methodology "toward rules rather than standards, and toward a relatively small, tractable, and cheap set of interpretive tools rather than a relatively large, complex, and expensive set."[91]

In contrast to his skeptical view of the institutional capacity of courts, Vermeule has a great deal of confidence in the ability of administrative agencies to use a wide range of interpretive resources effectively and to determine when it is worthwhile to look beyond the surface meaning of statutory text.[92] He therefore proposes a two-step approach to statutory interpretation by the judiciary. First, he claims that "[w]hen the statutory text directly at hand is clear and specific, judges should stick close to its surface or apparent meaning, eschewing the use of other tools to enrich their sense of meaning, intentions, or purposes."[93] Second, he contends that "[w]hen the statutory text at hand is ambiguous or vague, judges should defer to the interpretations of administrative agencies or executive agents rather than attempting to fill in gaps or ambiguities by reference to other sources."[94] Vermeule also argues that "judges should apply a strong doctrine of statutory precedent, subject, however, to defeasance by later administrative interpretations."[95] Because Vermeule's proposed methodology would preclude courts from considering "legislative history, many of the canons of construction, and holistic textual comparison, which supplements or overrides the provisions at hand by reference to other provisions of the same or other statutes,"[96] as well as other more dynamic or policy-oriented considerations, Bill Eskridge has aptly referred to this approach as "no frills textualism."[97] Vermeule's proposed approach is, of course, also a vivid example of the recent trend toward the dumbing down of statutory interpretation.

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[91] *Id.*

[92] *See id.* at 205-15 (discussing the institutional advantages that agencies have over courts in interpreting ambiguous statutes).

[93] *Id.* at 183.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] Eskridge, *supra* note 14, at 2043. For another critical review of Vermeule's proposed approach, see Jonathan R. Siegel, *Judicial Interpretation in the Cost-Benefit Crucible*, 92 MINN. L. REV. 387 (2007). *See also* Richard A. Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 MICH. L. REV. 952 (2003) (criticizing Sunstein & Vermeule, *supra* note 85).

E. *Reading Law*

Justice Antonin Scalia has been one of the most influential participants in the interpretive wars over the past thirty years.[98] His recent book with Bryan Garner, *Reading Law*, provides a comprehensive statement of his textualist theory and preferred methodology.[99] In particular, after providing an overview of the proposed approach, the treatise articulates and describes fifty-seven "sound principles of interpretation," before "exposing" thirteen "falsehoods" about statutory interpretation. Thus, in an effort to provide "the first modern attempt, certainly in a century, to collect and arrange only the valid canons (perhaps a third of the possible candidates) and to show how and why they apply to proper legal interpretation,"[100] the treatise boils statutory interpretation down to seventy principles or rules that should either be adopted or rejected by the judiciary. This effort to facilitate simplicity and uniformity in statutory interpretation is consistent with Justice Scalia's earlier contention that "[o]ur highest responsibility in the field of statutory construction is to read the laws in a consistent way, giving Congress a sure means by which it may work the people's will."[101]

One could easily question the extent to which Justice Scalia's textualism would, in practice, promote simplicity, uniformity, or consistency in statutory interpretation, given its heavy reliance on complex linguistic, historical, and holistic textual analysis, which may exceed the capacity of most judges.[102] Nonetheless, Judge Easterbrook claims in the book's foreword that the judiciary's rate of agreement in statutory cases would undoubtedly be higher if Justice Scalia's proposed methods were more widely followed, and the book is clearly a self-conscious effort to promote a single, relatively coherent set of interpretive rules for the federal courts.[103] Indeed, the first sentence of the treatise contends that "[o]ur legal system must regain a mooring that it has lost:

[98] *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann et al. eds. 1997); *see also* Frickey, *supra* note 2, at 254-55 (crediting Scalia with helping to revive interest in statutory interpretation).

[99] SCALIA & GARNER, *supra* note 15.

[100] *Id*. at 9 (footnote omitted).

[101] Chisom v. Roemer, 501 U.S. 380, 417 (1991) (Scalia, J., dissenting); *see also* Gluck, *supra* note 8, at 1834 (recognizing that one of the most prominent goals of Justice Scalia's new textualism is to promote "'rule-of-law' norms" and generate "a predictable, formalized approach that can clarify the interpretive process for legislatures, lower courts, and litigants").

[102] *See* VERMEULE, *supra* note 14, at 259 ("Even Antonin Scalia, one of originalism's chief defenders, says that '[p]roperly done, the task requires the consideration of an enormous mass of material' and 'an evaluation of the reliability of the material'; in general originalism is 'a task sometimes better suited to the historian than the lawyer.'" (citation omitted)).

[103] Frank H. Easterbrook, *Foreword* to SCALIA & GARNER, *supra* note 15, at xxiv.

a generally agreed-on approach to the interpretation of legal texts."[104] Given his explicit aspiration to provide such an approach, it seems fair to include Justice Scalia's textualism in general, and *Reading Law* in particular, as part of the broader trend toward the dumbing down of statutory interpretation.

F. *Interpretive Regimes*

The foregoing proposals or methods were all inspired to varying degrees by the insight that statutory interpretation doctrine can provide what John Ferejohn has called an "interpretive regime."[105] According to Bill Eskridge and Phillip Frickey, "[a]n interpretive regime is a system of background norms and conventions against which the Court will read statutes."[106] When such a regime is in place, it "tells lower court judges, agencies, and citizens how strings of words in statutes will be read, what presumptions will be entertained as to [a statute's] scope and meaning, and what auxiliary materials might be consulted to resolve ambiguities."[107] Interpretive regimes facilitate coordination and promote the rule of law by lowering the costs of drafting for Congress and rendering the application of statutes more predictable.[108] When the participants in the legislative process are familiar with the prevailing interpretive regime, they can more easily predict the impact of different statutory language and draft their statutes accordingly.[109] Moreover, "by clarifying the background rules against which Congress is legislating, interpretive regimes aid in effectuating congressional intent."[110] Interpretive regimes are thereby thought to promote the judiciary's ability to serve as a faithful agent of the legislature, which is traditionally viewed as the *sine qua non* of democratic legitimacy in statutory interpretation.[111]

Commentators with very different ideological and methodological orientations have recognized and embraced the value of having an established interpretive regime. Eskridge and Frickey originally touted the idea based on an understanding of statutory interpretation as practical reasoning—which contemplates the consideration of a wide range of evidence in the construction of statutory meaning.[112] Other jurists and scholars have apparently concluded that if some uniformity, clarity, and predictability are beneficial, more of these things must be even better. They have therefore seized on the goal of

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[104] SCALIA & GARNER, *supra* note 15, at xxvii.

[105] Eskridge & Ferejohn, *supra* note 16, at 267; *see also* Eskridge & Frickey, *supra* note 16, at 66 (crediting Ferejohn with the term).

[106] Eskridge & Frickey, *supra* note 16, at 66.

[107] *Id.*

[108] *See id.* at 66-67.

[109] *See id.* at 67.

[110] Foster, *supra* note 12, at 1887 (footnote omitted).

[111] *See infra* Part II.A.

[112] Eskridge & Frickey, *supra* note 16, at 56-57; *see also* Eskridge & Frickey, *supra* note 30.

establishing an interpretive regime to advocate the dumbing down of statutory interpretation.

II. DRIVERS OF THE TREND

Before evaluating this trend, it is worthwhile to unpack its animating assumptions. This Part explains that the proposals and methods described above are uniformly driven by a shared understanding of the need to constrain judicial discretion, the desirability of rule-based decision-making, the exclusivity of traditional sources of legal authority, and statutory interpretation's role in constructing legal meaning. The next Part will question the validity, or at least the primacy, of each of these assumptions.

A. *The Perceived Need to Constrain Judicial Discretion*

The traditional understanding of statutory interpretation is that the judiciary should serve as the faithful agent of the legislature.[113] As "honest agents of the political branches," courts "carry out decisions they do not make."[114] Because statutory interpretation implements previous decisions by an elected legislature and does not involve creative policymaking by courts, the enterprise is consistent with, and indeed, affirmatively facilitates, majoritarian democracy. If Congress disagrees with a judicial decision or wants to change the law for other reasons, it is the legislature's responsibility to amend the statute pursuant to the constitutionally mandated procedures. From this perspective, the democratic pedigree of statutory interpretation is impeccable because elected officials who are politically accountable to voters are making all of the important policy decisions.[115]

The traditional view has been difficult to sustain for a variety of reasons.[116] First, the legal realist movement and contemporary theories of interpretation have highlighted the inherent imprecision of language and the severe limitations on legislative foresight.[117] It is therefore widely accepted that the legislature does not resolve every issue that arises in statutory interpretation and that courts have considerable interpretive leeway. Second, the rise of the

[113] This brief description of the traditional understanding and its shortcomings is drawn from my other recent work on statutory interpretation. *See* Glen Staszewski, *Contestatory Democracy and the Interpretation of Popular Initiatives*, 43 SETON HALL L. REV. 1165, 1169-70 (2013); Staszewski, *supra* note 27, at 231; *see also* Manning, *supra* note 22, at 5 ("[I]f Congress legislates within constitutional boundaries, the federal judge's constitutional duty is to decode and follow its commands . . . ."); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 594-95, 599-603 (1995) (discussing the principle of "legislative supremacy").

[114] Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984).

[115] Staszewski, *supra* note 27, at 231.

[116] *Id.* at 223-24; Staszewski, *supra* note 113, at 1169.

[117] *See* Schacter, *supra* note 113, at 599-603.

modern regulatory state has resulted in widespread delegations of broad discretionary authority from the legislature to other institutions and a candid recognition that the resolution of ambiguities in federal regulatory statutes necessarily involves policymaking.[118] Third, recent developments in political science have undermined the optimistic pluralistic conception of the legislative process that underlies the traditional model and called into question voters' capacities to hold elected officials accountable for their policy decisions.[119] While these insights have led some jurists and scholars to reject faithful agent theory in favor of theories of statutory interpretation that envision courts as "cooperative partners" of the legislature,[120] the dominant reaction has been a renewed effort to limit judicial discretion by resorting to formalism and relying more heavily on statutory text.[121]

The latter strategy for promoting legislative supremacy and democratic legitimacy is most clearly illustrated by the preferred approaches of committed textualists, such as Justice Scalia and Professor Vermeule, who "believe that by emphasizing statutory text over statutory purposes, and by excluding legislative history in particular, they can cabin judicial leeway and go a long way toward minimizing judicial flexibility."[122] Jonathan Molot has pointed out, however, that "[i]t is not just self-proclaimed textualists who have moved toward limiting judicial discretion and hewing more closely to statutory text."[123] Rather, mainstream "[j]udges and scholars generally accept that courts should be faithful to legislative instructions and follow laws enacted through bicameralism and presentment, rather than make new laws themselves."[124] Molot contends that the prevailing consensus in statutory interpretation "is to respond to the countermajoritarian difficulty with judicial power by curbing judicial discretion and hewing closely to statutory text."[125]

It is therefore not surprising that, like arguments for textualism, the remaining proposals to dumb down statutory interpretation are also responsive to the perceived problem of judicial discretion. Specifically, if federal courts

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[118] *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

[119] *See* Schacter, *supra* note 113, at 603-06.

[120] *See, e.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 2 (1982) (proposing "granting to courts the authority to determine whether a statute is obsolete"); RONALD DWORKIN, LAW'S EMPIRE 313-14 (1986) (developing an interpretative theory under which "judges should interpret statutes under law as integrity"); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 48-49 (1994) (discussing the dynamic evolution of statutes and the role of agencies and justices in this evolution).

[121] *See, e.g.*, Molot, *supra* note 5, at 30-36; *see also* Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1, 8-12 (2007) (discussing the popularity of textualism among justices and scholars).

[122] Molot, *supra* note 121, at 9 (footnote omitted).

[123] *Id.*

[124] *Id.* at 11-12.

[125] *Id.* at 12.

were to adopt a consistent and predictable interpretive regime, it would be significantly easier for Congress to draft statutes that would accomplish its legal and policy objectives. This would, in turn, limit the policymaking discretion of federal courts in statutory interpretation. Not only would the use of simplified methods of statutory interpretation reduce the policymaking discretion of lower courts, but Professor Bruhl explicitly justifies his proposal on the grounds that lower court judges typically have a less meaningful policymaking mandate than elected judges with statewide constituencies or federal judges who are nominated and confirmed to serve on higher courts.[126] If Congress were to enact Federal Rules of Statutory Interpretation, judicial discretion would be severely constrained, and the federal judiciary would be required to follow Congress's "meta-intent" regarding the proper interpretation of statutes. Federal courts could therefore truly be said to be acting as the faithful agents of Congress during statutory interpretation, even if the text of any particular statute was ambiguous. Finally, if federal courts were to give stare decisis effect to interpretive methodology, they could eventually "fix" the rules and thereby eliminate judicial discretion to revisit the best approach to statutory interpretation on a case-by-case basis in the absence of a special justification.[127] The dumbing down of statutory interpretation should therefore ultimately be understood as part of a broader strategy for justifying judicial power over statutory interpretation in a democracy.

B. *The Perceived Need for Clarity and Predictability*

Besides limiting judicial discretion, the proponents of the foregoing proposals are also trying to demand greater clarity and predictability in interpretive methodology to promote "the rule of law as a law of rules."[128] There is a widely recognized dichotomy between governance by "general rule of law" and "personal discretion to do justice" in each particular case.[129] As explained above, interpretive methodology is currently treated by federal courts as an area in which judges are authorized to exercise "personal discretion to do justice" in each particular case.[130] This is true because federal judges are permitted to decide on a case-by-case basis which interpretive methodology is most appropriate. The reform proposals at issue seek to

[126] Bruhl, *supra* note 13, at 491-94.

[127] *Cf.* Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedent*, 87 VA. L. REV. 1, 8-21 (2001) (discussing the capacity of stare decisis to "fix" the meaning of otherwise ambiguous laws).

[128] *See* Scalia, *supra* note 17.

[129] *Id.* at 1175-76; *see also* Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 956-57 (1995) (discussing the difference between two different forms of legal judgment: the case-by-case model and the general rule model). There is, of course, a closely related debate on the merits of rules versus standards. *See* Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword, The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

[130] *See supra* note 36 and accompanying text.

establish general rules of statutory interpretation and thereby shift interpretive methodology to the opposite side of this dichotomy.

The arguments in favor of the reform proposals largely track the standard arguments that are made by enthusiasts for general rules. One of those arguments is that bright-line rules have the capacity to limit the discretion of the decision-makers who are responsible for implementing the law.[131] The enactment of bright-line rules tends to be a particularly good strategy when lawmakers have different preferences from the officials who will be implementing a mandate or when the legislative process is thought to have superior democratic legitimacy.[132] Of course, this benefit is closely tied to the goal of limiting judicial discretion, which is discussed in the previous section. In addition, the promulgation of general rules substantially limits decision costs because clear rules are significantly cheaper and easier to implement than ex post decisions based on every potentially relevant consideration.[133] The promulgation of bright-line rules also provides advance notice of precisely what the law requires, which is particularly important in a modern regulatory state with widely dispersed authority.[134] Bright-line rules also promote predictability, consistency, and uniformity in the application of law, and thereby facilitate planning.[135]

The promulgation and implementation of general rules is also thought to promote the rule of law in various other ways. For example, a uniform set of clear-cut rules helps to ensure that similarly situated people are treated alike and thereby limits the possibility of arbitrary discrimination by public officials who might otherwise implement the law in a biased or otherwise problematic way.[136] Moreover, rule-based decision-making potentially minimizes shortsightedness and helps give public officials the courage to make difficult or unpopular decisions that will ultimately promote more enduring principles or values.[137] Justice Scalia has argued that adherence to general rules also promotes the rule of law by providing *the appearance of equal treatment* because a rule's authority can often provide a legitimate justification for a decision.[138] General rules are also thought to facilitate collective decision-making in a pluralistic democracy because they can more easily produce incompletely theorized agreements at both the enactment and the

[131] *See* Manning, *supra* note 22, at 70; *see also* FREDERICK SCHAUER, PLAYING BY THE RULES 98-99, 158-62 (1991).

[132] *See e.g.*, Scalia, *supra* note 17, at 1176 ("In a democratic system, of course, the general rule of law has special claim to preference, since it is the normal product of that branch of government most responsive to the people.").

[133] *See* Sunstein, *supra* note 129, at 972-73.

[134] *See* Scalia, *supra* note 17, at 1179.

[135] *See id*.; Sunstein, *supra* note 129, at 976.

[136] *See* Sunstein, *supra* note 129, at 974-75.

[137] *See* Scalia, *supra* note 17, at 1180; Sunstein, *supra* note 129, at 975-76.

[138] Scalia, *supra* note 17, at 1178.

implementation stages.[139] For example, judges might more readily agree on the "plain meaning" of a statutory provision than on whether a particular application furthers the statute's underlying purposes or results in justice or good policy, all things considered.[140] Finally, when general rules are reasonably clear and uniformly applied, it may be easier for the public to hold lawmakers accountable for their policy choices, and it may be correspondingly more difficult for wealthy or politically influential constituents to obtain "special treatment" through the legislative, administrative, or judicial processes.[141]

Given these potential advantages, it is not surprising that "extravagant enthusiasm for rules and an extravagantly rule-bound conception of the rule of law" is "a pervasive social phenomenon,"[142] or that efforts to capitalize on the perceived advantages of general rules would become popular in statutory interpretation.[143] As explained above, the proposals to dumb down statutory interpretation uniformly advocate the creation of a relatively simple or binding set of rules for statutory interpretation, which would allegedly provide greater clarity and predictability in the interpretive enterprise and thereby promote a relatively formal vision of the rule of law.[144]

C. *The Traditional Legal Sources of Interpretive Methodology*

One of the most interesting and important aspects of Abbe Gluck's recent work on statutory interpretation is her observation that the legal status of interpretive methodology remains unresolved.[145] She has focused on this question primarily in the context of the *Erie* problem and other situations in which courts in one jurisdiction must interpret statutes adopted by the legislature of another jurisdiction.[146] In this situation, a court in the forum state

[139] *See* Sunstein, *supra* note 129, at 971-72; *see also* VERMEULE, *supra* note 14, at 85, 116-17 (claiming that institutional considerations can produce incompletely theorized agreements on interpretive methodology by judges and scholars with fundamentally different theoretical commitments).

[140] *See* Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 231.

[141] *Cf.* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2434-37 (2003) (linking the benefits of bright-line rules to the American constitutional structure); Sunstein, *supra* note 129, at 977 (recognizing that the costs of case-by-case decision-making in litigation may systematically favor the well-to-do).

[142] Sunstein, *supra* note 129, at 957.

[143] I have sought to capitalize on the perceived advantages of rulemaking in other contexts. *See* Mulligan & Staszewski, *supra* note 43; Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395 (2003).

[144] *See supra* Part I.

[145] *See* Gluck, *supra* note 8, at 1750; Gluck, *supra* note 12, at 1909-19; *see also* Criddle & Staszewski, *supra* note 36, at 1577 (discussing this aspect of Gluck's work).

[146] *See generally* Gluck, *supra* note 12.

may need to determine whether to follow the same interpretive methodology as the courts in the jurisdiction of the enacting legislature. For example, should federal courts follow the same methodology as state courts when the federal judiciary interprets state statutes? Should state courts follow the same methodology as federal courts when state courts interpret federal statutes? Should Michigan courts follow the same methodology as Wisconsin courts when Michigan courts interpret Wisconsin statutes?

To the extent that relevant jurisdictions do not have uniform or binding rules of statutory interpretation, these questions would seem largely academic. Gluck has pointed out, however, that some states have adopted frameworks for statutory interpretation that are treated as binding within those jurisdictions.[147] Nonetheless, most courts have not provided clear, consistent, or thoughtful answers to the foregoing questions,[148] which would presumably depend at least in part on whether interpretive methodology is properly considered a form of law and, if so, whether it is substantive or procedural.[149] Accordingly, we currently have no clear answers to the fundamental question of the legal status of interpretive methodology.

The important point, for present purposes, is that the proponents of dumbing down statutory interpretation seem to assume that interpretive methodology is a form of "law," and they rely on the traditional hierarchy of legal sources to identify its legal status.[150] The traditional hierarchy of legal sources maintains, in turn, that all law in a constitutional democracy must stem from the Constitution, validly enacted statutes, or the common law (in that order of authority)—and that there is *not* a fourth alternative.[151] Accordingly, the proponents of the proposals at issue either contend that their preferred methodologies are constitutionally mandated[152] or that interpretive

[147] Gluck, *supra* note 8, at 1771-1811.

[148] *See* Gluck, *supra* note 12, at 1903 (reporting that an examination of the relevant case law reveals that "many courts, including the U.S. Supreme Court, are getting the *Erie* question wrong," or that "they are not sufficiently aware that the question exists in the first place"); *id.* at 1924 (finding that "federal courts are wholly inconsistent about whether state or federal methodology applies to state statutes").

[149] *See* 28 U.S.C. § 1652 ("The laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."); Hanna v. Plumer, 380 U.S. 460 (1965) (setting forth an analysis for assessing whether federal courts must follow state law in diversity cases); Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958) (balancing the importance of the usual federal practice against the likelihood of a different result in state court under state procedure).

[150] *See* Criddle & Staszewski, *supra* note 36, at 1578.

[151] Gluck recognizes that, in theory, interpretive methodology could be another form of law, but she declines seriously to pursue this intriguing possibility. Gluck, *supra* note 12, at 1907; *cf. infra* Part III.C (suggesting that interpretive methodology should be understood as a distinct form of law in the modern regulatory state).

[152] John Manning is the leading scholarly proponent of the notion that principles of statutory interpretation can be derived from the structure of the Constitution, and that the

methodology is generally a judicially created form of common law that could be overridden by statute,[153] and should, in any event, be given stare decisis effect like most other legal decisions.[154]

More specifically, Justice Scalia contends that a proper understanding of American constitutional democracy mandates the most fundamental aspects of his proposed methodology for reading law. For example, Scalia relies on the constitutional requirements of bicameralism and presentment, fundamental principles of separated powers, and his theory of democracy to maintain that the proper goal of statutory interpretation is to ascertain the original meaning of the text to an ordinary speaker of English, rather than to ascertain the legislature's intent.[155] The precise sources of authority for his remaining

available structural inferences and historical evidence counsel against "the equity of the statute" and "the absurdity doctrine" and in favor of textualism. *See* Manning, *supra* note 22; Manning, *supra* note 141; *see also* John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685 (1999); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997). *But see* VERMEULE, *supra* note 14, at 29-33 (criticizing Manning's view). While Scalia's approach differs in some respects, he seems to share Manning's basic view of the possibility of deriving concrete principles of statutory interpretation from a proper understanding of the Constitution. *See infra* notes 155-157 and accompanying text; John F. Manning, *Justice Scalia and the Legislative Process*, 62 N.Y.U. ANN. SURV. AM. L. 33 (2006) (taking stock of Justice Scalia's approach).

[153] *See* Rosenkranz, *supra* note 11, at 2140 ("To the extent that the judicial power includes power to develop interpretive rules, that power is a federal common lawmaking power, which a contrary statute may trump."); *see also* Scott, *supra* note 46, at 344 ("Because the canons are nothing more than common law, legislative enactments that repudiate or support canons should not only be included in any conversation about the canons, but also considered important and controlling.").

[154] *See* Foster, *supra* note 12, at 1868-69 (claiming that "statutory interpretation doctrines can be classified according to whether they are derived from a statute, the common law, or the Constitution" and arguing that the Court should give doctrines of statutory interpretation stronger stare decisis effect than the substantive decisions emanating from each of the respective legal sources); Gluck, *supra* note 8, at 1846-62 (claiming that "the ability of the state courts . . . to articulate a single methodological approach" and thereby treat interpretive methodology as "law" naturally raises "the question of why statutory interpretation methodology should be treated differently" and providing a normative argument in favor of "methodological consensus"); Gluck, *supra* note 12, at 1907, 1912-17 (arguing that "as a matter of both doctrine and theory, there are compelling reasons to reconceptualize federal statutory interpretation methodology as law" and drawing an analogy to "federal common law"); Gluck, *supra* note 64, at 757 (exploring the possibility that interpretive methodology is a form of judge-made common law).

[155] *See, e.g.*, SCALIA & GARNER, *supra* note 15, at 82 ("Originalism is the *only* approach to text that is compatible with democracy." (emphasis added)); *id.* at 233 (arguing that the attribution of "fair meaning" to "public texts" is an "unremovable duty of the courts"); *id.* at 345 ("The very nature of the constitution requires the judges to follow the letter of the law.") (quoting Montesquieu, *The Spirit of Laws* (pt. 1) 75 (Thomas Nugent trans., 1949)); *id.* at 397-98 (claiming that "[t]he traditional view is that an enacted text is itself the law" and "that 'it demeans the constitutionally prescribed method of legislating to suppose that its

principles of statutory interpretation are less clear and more varied, but he relies quite heavily on both "logic" and "tradition" to flesh out the proper methods for reading law in a constitutional democracy.[156] Some of his subsidiary principles might be considered common law rules of statutory interpretation that could be modified over time by federal courts or Congress, but Justice Scalia contends that a serious effort by Congress to codify binding rules of statutory interpretation would raise significant constitutional difficulties based on the separation of powers.[157] He therefore seems to suggest that while federal judges could potentially tinker with his proposed methodology at the margins, a proper understanding of the fundamental principles of our constitutional democracy mandates the central principles of textualism.

Professor Vermeule shares Justice Scalia's preference for a version of textualism, but he strongly disagrees with the position that any particular interpretive methodology can be derived from the U.S. Constitution or abstract principles like democracy or separation of powers.[158] In this regard, Vermeule argues that "[t]he Constitution cannot plausibly be read to say a great deal about the contested issues of statutory interpretation[,]" and that "what it does say is often so minimal and so abstract as to leave open all the contested questions of interpretive choice."[159] He therefore concludes that "[t]he best reading of the Constitution is that interpretive formalism and interpretive antiformalism are *constitutionally optional* for judges."[160] As a result, Vermeule argues that the resolution of disputed questions about how to interpret statutes will necessarily "require empirical and institutional analysis in addition to first-best theorizing from constitutional premises,"[161] and he suggests that the federal judiciary's answers to these questions should be understood as a form of common law that could vary over time based on the available information.[162]

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elaborate apparatus for deliberation on, amending, and approving a text is just a way to create some *evidence* about the law, while the *real* source of legal rules is the mental processes of legislators'" (emphasis added) (quoting *In re* Sinclair, 870 F.2d 1340, 1344 (7th Cir. 1989) (Easterbrook, J.))).

[156] *See, e.g.*, *id.* at 233 ("Logical reasoning is the duty of courts, and not even the legislature can exclude it."); *id.* at 369 ("From the beginnings of the republic, American law followed what is known as the 'no-recourse doctrine'—that in the interpretation of a text, no recourse may be had to legislative history.").

[157] *Id*. at 43-44, 243-46.

[158] VERMEULE, *supra* note 14, at 29-34, 75-76.

[159] *Id.* at 31.

[160] *Id.* at 33 (emphasis added).

[161] *Id.*

[162] Vermeule acknowledges that his proposed methodology for statutory interpretation is provisional and that his conclusions might change in response to better information about the institutional variables. *Id*. at 289-90. He also suggests that the prevailing approaches to statutory interpretation have changed over time based on shifts in behavior by the relevant

Professor Rosenkranz gives more credence to the idea that the validity of specific interpretive doctrines could be influenced in a meaningful way by the Constitution, and he develops an elaborate framework for assessing the constitutional status of a wide range of interpretive techniques.[163] He nonetheless concludes that the vast majority of interpretive principles are judicially created common law that could permissibly be displaced by a duly enacted statute.[164] Similarly, while Professor Bruhl agrees that the interpretive techniques used by federal courts must be constitutionally permissible and that some interpretive choices may be required or prohibited by the Constitution, he concludes that "the types of interpretive choices" that he addresses "are essentially matters of common law in the sense that they could be changed by either courts or legislatures."[165] Foster and Gluck seem to take essentially the same position, and they proceed to maintain that if interpretive methodology is, at bottom, a set of judicially created common law rules, interpretive methodology should be given stare decisis effect, just like most other judicial decisions.[166] Indeed, Foster argues that interpretive methodology should be given even stronger stare decisis effect than comparable substantive decisions based on the overarching need for a clear and predictable interpretive regime in this area.[167] By treating most aspects of interpretive methodology as judicially created common law, these scholars make the establishment of a simplified or uniform set of interpretive rules possible, even if the Constitution does not mandate any particular interpretive methodology.

D. *Interpretation As Constructed Meaning*

The final assumption driving the proposals is a common belief that statutory interpretation's function is to ascertain the meaning of the law. This trend in the literature leaves room for disagreement about precisely *how* this should be done, but these jurists and scholars seem to agree that when a federal court has finished interpreting a federal statute, the end result is "to say what the law is."[168] Interpretive methodology is essentially understood as *the process by which courts attribute meaning to the law*. The dumbing down of statutory interpretation is based on the notion that if courts adopted a simple, consistent, and uniform interpretive methodology, they could facilitate clarity and predictability in legal meaning, and thereby limit judicial discretion and promote the rule of law.

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legal actors. Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149 (2001).

[163] Rosenkranz, *supra* note 11, at 2092-2140.

[164] *Id.* at 2140.

[165] Bruhl, *supra* note 13, at 445 n.23.

[166] *See supra* note 154 and accompanying text.

[167] Foster, *supra* note 12, at 1884-97.

[168] *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

Most accounts of statutory interpretation divide the task of ascertaining the meaning of the law into two components or stages, which correspond roughly to the framework for reviewing the legality of interpretive decisions by administrative agencies under *Chevron*. The first stage examines whether the statute has a clear meaning with respect to the precise question at issue,[169] and nearly everyone agrees that federal courts are typically obligated to give effect to the unambiguous meaning of the statutes enacted by Congress.[170] Different interpretive methodologies differ, however, with respect to how they go about assessing whether a statute's meaning *is* unambiguous and in their degree of willingness to recognize or acknowledge statutory ambiguity. Federal courts therefore disagree about precisely how they should implement the first step of the *Chevron* inquiry.[171] In any event, nearly everyone agrees that at some point the meaning of the law on a particular question is best described as ambiguous, and courts therefore need to select and apply interpretive rules or methods to resolve the ambiguity and fix the content of the law.[172] Although *Chevron* recognizes that agencies can lawfully adopt a range of "reasonable" interpretations of ambiguous statutory provisions over time, the judiciary has traditionally given ambiguous federal statutes a single fixed meaning,[173] and this is generally still the case outside of *Chevron*'s limited domain.[174] The key point is that the function of statutory interpretation is widely viewed as

[169] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc. 467 U.S. 837, 842 (1984).

[170] *See id.* at 842-43 (setting forth the Court's recognition of this principle). Most judges and scholars would recognize exceptions to this rule when a statute contains a scrivener's error or when its plain meaning would lead to absurd results. *See, e.g.*, Cass R. Sunstein, *Avoiding Absurdity? A New Canon in Regulatory Law*, 32 ENVTL. L. REP. 11126 (2002). These exceptions are controversial within textualist theory. *See* Manning, *supra* note 141; John C. Nagle, *Textualism's Exceptions*, 2 ISSUES IN LEGAL SCHOLARSHIP, no. 2, 2002, at 1, *available at* http://www.bepress.com/ils/iss3/art15 (describing the exceptions, but ultimately concluding that they are infrequently used and of marginal benefit). Some courts and commentators maintain, however, that scrivener's errors and unintended absurdities can be understood to *create ambiguity*, and that such exceptions are therefore fully compatible with a norm that requires the judiciary to follow the unambiguous meaning of statutory mandates. *See, e.g.*, Am. Water Works Ass'n v. EPA, 40 F.3d 1266, 1271 (D.C. Cir. 1994) ("Indeed, where a literal reading of a statutory term would lead to absurd results, the term simply 'has no plain meaning . . . and is the proper subject of construction by the . . . courts.'" (internal citation omitted)); Sunstein, *supra*, at 11126 (arguing that agencies should be permitted to interpret statutes to avoid absurd results even when courts should not).

[171] *See* Elizabeth Garrett, *Step One of* Chevron v. Natural Resources Defense Council, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 55, 55-84 (John F. Duffy & Michael Herz eds., 2005) (describing the different approaches).

[172] *See, e.g.*, Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989) (emphasizing the need to invoke background principles or norms to resolve difficult statutory cases).

[173] *See* Nelson, *supra* note 127, at 14-15 (discussing the historical trend).

[174] *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 239 (2001) (Scalia, J., dissenting); Skidmore v. Swift & Co., 323 U.S. 134 (1944).

ascertaining the meaning of the law, and "interpretive methodology" determines how this is done, both in terms of identifying and enforcing unambiguous statutory mandates and in choosing and applying the principles or rules for resolving statutory ambiguity. Some methodological approaches undoubtedly place greater importance on the distinction between clarity and ambiguity than others,[175] but even the most pragmatic theories of statutory interpretation tend to assume that the basic function of the enterprise is to ascertain the meaning of the law in a particular case.[176]

The foregoing understanding of the function of statutory interpretation and the role of interpretive methodology is central to each of the proposals to dumb down statutory interpretation. The common strategy is to provide simple, clear, and consistent rules for identifying and enforcing unambiguous statutory mandates, as well as simple, clear, and consistent rules for resolving statutory ambiguity. The proposals also seem to anticipate the creation or adoption of a simple, clear, and consistent hierarchical or tiered framework for proceeding through the various stages of the analysis in statutory cases.[177] Indeed, the overarching goal is to provide a relatively simple formula for ascertaining the meaning of the law in any particular case.[178] In sum, if federal courts would just agree to adopt one or more of the foregoing proposals, they could dramatically simplify the interpretive process, minimize judicial discretion, and potentially improve the clarity and predictability of legal meaning. The interpretive wars would, for all intents and purposes, finally be over, and we could all move on to more useful and productive things.

III. REEVALUATING THE ASSUMPTIONS

If only things were so simple. It is true, of course, that each of the foregoing assumptions is both widely held and deeply rooted in contemporary public law theory, and that helps to explain the popularity of the trend toward dumbing down statutory interpretation among a truly brilliant and otherwise ideologically diverse group of scholars and judges. The animating goal of this Article, however, is to challenge these prevailing assumptions and to articulate

[175] *See* Molot, *supra* note 5, at 45-48 (criticizing strict textualists for aggressively seeking to eliminate ambiguity from statutory interpretation and claiming that this tactic magnifies the differences between textualism and purposivism).

[176] *See, e.g.*, Eskridge & Frickey, *supra* note 30, at 345-62 (identifying and describing the philosophies of meaning that underlie their approach); *id.* at 347 (describing "the creation of statutory meaning" that occurs when courts interpret statutes).

[177] *See infra* notes 217-19 and accompanying text.

[178] Thus, for example, Scalia maintains (incredibly, in my view) that application of his fifty-seven correct principles of statutory interpretation will lead to a single correct answer in most cases. *See* SCALIA & GARNER, *supra* note 15, at 6 ("As we hope to demonstrate, most interpretive questions have a right answer."); *id.* at 232 (suggesting that ambiguities can always be resolved by "the normal tools of interpretation"); *id.* at 401 ("In most cases—and especially the most controversial ones—the originalist answer is entirely clear.").

a fundamentally different way of thinking about these matters. This Part claims that rather than seeking to eliminate judicial discretion, the goal of statutory interpretation methodology should be to protect the people from the possibility of arbitrary domination by the state. It proceeds to argue that the best way to achieve this goal is for courts to engage in practical reasoning when they interpret statutes and for public officials with diverse perspectives to give reasoned explanations for their decisions. This Part also contends that the traditional hierarchy of law is outdated and that interpretive methodology and agency action should be recognized as distinct forms of law in a new legal hierarchy for the regulatory state. Finally, this Part claims that the function of statutory interpretation is to provide the people with opportunities to contest the validity of governmental action, rather than to ascertain the meaning of the law in a vacuum. The final Part of the Article concludes that the dumbing down of statutory interpretation is fundamentally misguided, and it sets forth some principled limitations on the extent to which interpretive methodology can or should be simple or uniform.

A. *The Importance of Avoiding Domination*

The proponents of the proposals at issue exhibit the classic liberal anxiety that is engendered by judicial discretion in a democracy, and they seek to limit judicial policymaking as much as possible.[179] Eliminating judicial discretion from statutory interpretation is impossible, however, and there are good reasons to question whether the proposals at issue would necessarily constrain judges in difficult cases where the text is ambiguous or where the clear text would lead to absurd results or unreasonable consequences.[180] Moreover, to the extent that the proposals would establish artificial decision-making frameworks that would resolve statutory disputes without regard to their policy consequences or Congress's apparent goals, the result would be *affirmatively undemocratic*.[181]

Justice Scalia has argued that "[o]riginalism is the *only* approach to text that is compatible with democracy,"[182] and he has boasted that "[i]t takes a theory to beat a theory and, after a decade of trying, the opponents of originalism have never converged on an appealing and practical alternative."[183] This section

[179] *See supra* Part II.A.

[180] *See* William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531 (2013) (reviewing SCALIA & GARNER, *supra* note 15) (claiming that Scalia's approach would not eliminate unpredictability or judicial policymaking from statutory interpretation).

[181] *See id.* at 567-75 (explaining that a "canons-based textualism" poses a problem for democracy that "is especially acute when judges apply canons of construction that they have created and ignore legislative history that Congress has created").

[182] SCALIA & GARNER, *supra* note 15, at 82.

[183] *Id.* at 92 (quoting RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 92 (2004)).

provides a brief overview of a theory of republican democracy that easily beats liberal theory as a foundation for thinking about the role of courts, and it compels the conclusion that instead of seeking to eliminate judicial discretion, the primary goal of statutory interpretation methodology should be *to protect the people from the possibility of arbitrary domination by the state*.

Before describing the relevant aspects of this theory, it may be useful to flesh out the liberal anxiety with judicial discretion that pervades American public law. As Bill Eskridge has explained, "[l]iberalism posits a society of autonomous individuals whose interests are incommensurable. These autonomous individuals form a social contract to achieve collective goals unattainable through private action."[184] Those individuals like to preserve their autonomy, however, and they generally prefer to protect the private sphere from interference by the state.[185] The agreed-upon mechanism for making collective decisions on behalf of society is the legislature, which is accountable to the people through regular elections.[186] Because federal judges are not politically accountable, their exercise of policymaking discretion is in severe tension with liberal democratic theory.[187] Accordingly, liberal democratic theory seeks to limit the policymaking discretion of judges by requiring them to justify legal decisions as the product of the policy choices of elected officials.[188]

Liberal theory typically equates freedom with *non-interference*, and posits that government may only legitimately interfere with the freedom of citizens through the authoritative decisions of elected representatives. Judicial discretion therefore raises the classic problem of "the countermajoritarian difficulty" in judicial review and its functional equivalent in statutory interpretation.[189] Professor Eskridge has persuasively concluded that "it is doubtful that any theory will successfully allay liberalism's anxiety about permitting unelected judges to make policy choices that invade private interests."[190]

The best strategy for justifying, and indeed genuinely appreciating, the inevitable role of judicial discretion in statutory interpretation is therefore to move away from the tenets of liberal theory, and to consider principles of republican democracy.[191] Philip Pettit has recently set forth a theory of

[184] William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 344 (1989); *see also* Staszewski, *supra* note 27, at 238-39 (relying on Eskridge's work to explain this view).

[185] *See* Eskridge, *supra* note 184, at 344.

[186] *See id.* at 344-45.

[187] *See id.* at 345.

[188] *See id.*

[189] *See* Molot, *supra* note 121, at 6-7.

[190] Eskridge, *supra* note 184, at 345.

[191] The following description of Pettit's theory and its implications for statutory interpretation incorporate text from my related work in this area. *See* Staszewski, *supra* note

democracy that rejects the liberal conception of *freedom as non-interference* in favor of the republican conception of *freedom as non-domination*.[192] From this perspective, the primary role of government is to protect freedom, which consists of the absence of the possibility of domination by other agents. Contrary to the tenets of liberal theory—where regulatory intervention necessarily invades liberty—government can promote freedom under this view by protecting citizens from the possibility of domination by private parties. The problem, of course, is that government can also be a source of domination. It is therefore essential for a republican democracy to provide safeguards to limit the possibility of domination by the state.

Pettit explains that limiting the possibility of domination by the state requires mechanisms to prevent public officials from ignoring the interests and perspectives of ordinary people, and that this argues in favor of *the electoral dimension of democracy*.[193] Periodic elections bring government under the control of the people in the sense that voters are empowered to select candidates for office based on their likelihood of promoting the collective interests of the people.[194] The republican argument for elections is simply that they provide a sensible way to force government to advance the common, perceived interests of citizens, and thereby provide a check against potential domination by the state.[195]

Pettit recognizes, however, that elections can only provide limited protection against the possibility of domination because electoral democracy is not necessarily responsive to the interests and perspectives of minorities.[196] Indeed, "it is quite consistent with electoral democracy that government should only track the perceived interests of a majority, absolute or relative, on any issue and that it [will] have a dominating aspect from the point of view of others."[197] For this reason, republican theorists have always been concerned about providing structural safeguards to prevent the tyranny of the majority.[198] "The

27, at 225-29, 240-45, 253-54; Staszewski, *supra* note 113, at 1171-72.

[192] PETTIT, *supra* note 29, at 51; Pettit, *supra* note 29, at 163.

[193] Pettit, *supra* note 29, at 173.

[194] *See id.*

[195] *See id.*; *cf.* Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 535 (1998) (claiming that political representation was designed as a means of allowing the American people to protect themselves from abuses of power by government).

[196] Pettit, *supra* note 29, at 173-78.

[197] *Id.* at 174.

[198] *See, e.g.*, Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, *in* HOW DEMOCRATIC IS THE CONSTITUTION? 102, 104 (Robert A. Goldwin & William A. Schambra eds., 1980) ("There can be no dispute that the framers desired to place certain kinds of restraints on certain kinds of popular majorities."); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 44 (1985) ("The system of checks and balances within the federal structure was intended to operate as a check against self-interested representation and factional tyranny . . . .").

elimination of domination would require, not just that the people considered collectively cannot be ignored by government, but also that people considered severally or distributively cannot be ignored either."[199]

Pettit therefore considers "whether there is any way of subjecting government to a mode of distributive or minority control in order to balance the electorally established mode of collective or majority control."[200] The most obvious solution is a procedure that would enable minorities to question public decisions on the basis of their perceived interests, and to trigger a review in an impartial forum where all "relevant interests are taken equally into account and only impartially supported decisions are upheld."[201] *The contestatory dimension of democracy* provides citizens with the power to challenge public decisions on the grounds that their interests and perspectives were not adequately taken into account during the decision-making process, and that the resulting decision was therefore arbitrary.[202] The underlying assumption is that the final decision would have been different if such interests were given equal consideration.[203] Pettit claims that the electoral dimension of democracy promotes legitimacy by ensuring that governmental decisions originate, "however indirectly, in the collective will of the people."[204] Significantly, however, the contestatory dimension of democracy further improves the legitimacy of those decisions to the extent that they can withstand challenges brought by individuals "in forums and under procedures that are acceptable to all concerned."[205] Whereas the electoral mode of democracy "gives the collective people an indirect power of *authorship* over the laws," the contestatory mode of democracy "would give the people, considered individually, a limited and, of course, indirect power of *editorship* over those laws."[206]

I have recently argued that Pettit's theory of republican democracy, and the related insights of deliberative democratic theory, have a remarkable ability to explain the democratic legitimacy of the judiciary's role in statutory interpretation in the modern regulatory state.[207] In a nutshell, Congress is authorized by the Constitution to play the primary authorial role in the lawmaking process,[208] and this is entirely legitimate because of the electoral

[199] Pettit, *supra* note 29, at 178.

[200] *Id.*

[201] *Id.* at 179.

[202] *See id.* at 180.

[203] *Id.*

[204] *Id.*

[205] *Id.*

[206] *Id.* (emphasis added).

[207] Staszewski, *supra* note 27, at 240; Staszewski, *supra* note 113, at 465-76 (applying this theory to the interpretation of successful ballot measures).

[208] *See* U.S. CONST. art. I, § 1.

dimension of democracy.[209] It follows that when Congress has explicitly resolved a legal or policy question in a reasoned fashion, administrative agencies and courts are obligated to respect the legislature's decision.

The corollary of this view of legislative supremacy, however, is that when Congress *has not* explicitly resolved a particular legal or policy question in a reasoned fashion during the lawmaking process, the best way to avoid the potential for arbitrary domination is for the public officials who implement the law to engage in reasoned deliberation regarding the best course of action on the merits under the circumstances.[210] In the modern regulatory state, responsibility for resolving these statutory ambiguities will ordinarily fall, as an initial matter, on an administrative agency with delegated authority to carry out the purposes of the federal programs established by Congress.[211] When an agency's interpretation of a statute is subsequently challenged in courts, the judiciary plays an "editorial role" and examines whether the agency has made a reasoned decision.[212] If so, the agency's decision should be upheld; if not, it should be vacated and remanded for further consideration (and potential revision). When there is no agency responsible for implementing a statute (or the responsible agency has not taken a reasoned position on the matter), and Congress has not explicitly resolved the question, the judiciary will necessarily play a more robust editorial role when the proper understanding of a statute is contested. The people are thereby provided with a variety of different forums for potentially contesting legal or policy issues, and individuals cannot be adversely affected by governmental action unless a reasoned decision that considered their interests and perspectives was provided at some point in the legal process.

For present purposes, the central point is that the public officials who implement the law will necessarily have substantial policymaking discretion when Congress has not explicitly resolved an issue during the legislative process.[213] This is highly problematic under the traditional, liberal theory of democratic legitimacy in statutory interpretation, which maintains that unelected administrators and judges should serve as the legislature's faithful agents and "carry out decisions they do not make."[214] The exercise of policymaking discretion is significantly less troubling, however, if the purpose of democracy is to promote freedom as non-domination, and there are structural safeguards in place to prevent the possibility of domination by the state. From this perspective, courts affirmatively promote republican

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[209] Staszewski, *supra* note 27, at 249.

[210] *Id.* at 253.

[211] *Id.*; *see also* Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 502-03 (2005).

[212] Staszewski, *supra* note 27, at 229.

[213] *Id.* at 253-54.

[214] *See supra* note 114 and accompanying text.

democracy when they engage in hard-look judicial review of agency action or otherwise provide individuals or groups with a meaningful opportunity to contest a statute's application to their conduct.

B. *The Value of Practical Reasoning and Diversity*

The proposals for dumbing down statutory interpretation seek to promote greater clarity and predictability in the interpretive enterprise, and thereby to promote the rule of law as a law of rules.[215] No one doubts that agencies and courts are obligated to respect Congress's policy choices when it has explicitly resolved the precise question at issue in a reasoned fashion during the legislative process. Nonetheless, scholars and judges tend to have different conceptions of statutory ambiguity and different approaches for assessing whether it exists,[216] and they often part ways on the best course of action when a statute is deemed ambiguous or unanticipated problems arise.

The trend is for commentators to advocate relatively simple and uniform formulas for ascertaining the meaning of the law in any particular case, which typically include some combination of (1) simple, clear, and consistent rules for identifying and enforcing unambiguous statutory mandates; (2) simple, clear, and consistent rules for resolving statutory ambiguity; and (3) simple, clear, and consistent hierarchical frameworks for proceeding through the various stages of the analysis in statutory cases.[217] Thus, for example, Professors Bruhl and Vermeule essentially propose (1) following the surface meaning of clear textual provisions, or (2) deferring to administrative interpretations of ambiguous statutory mandates.[218] Similarly, Gluck admires the binding three-step framework that was adopted by the Oregon Supreme Court as a matter of stare decisis, which (1) seeks to ascertain the plain meaning of the statutory text in its semantic context; (2) examines the legislative history of the statute if the intent of the legislature remains unclear; and (3) resolves any remaining ambiguities by resorting to "general maxims of statutory construction."[219] Justice Scalia's proposed methodology for reading law provides a set of allegedly valid rules that is designed to ascertain the "plain meaning" of the text and thereby limit the scope of statutory ambiguity,[220] which he would resolve, when necessary, by following prior

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[215] *See supra* Part II.B.

[216] *See, e.g.*, Ward Farnsworth et al., *Ambiguity About Ambiguity: An Empirical Inquiry Into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257, 258-59 (2010) ("This ambiguity about ambiguity is latent; courts generally talk about whether a statute is ambiguous without making clear whether they are making internal or external judgments."); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006).

[217] *See supra* Part I.

[218] *See supra* Parts I.C-I.D.

[219] Gluck, *supra* note 8, at 1777 (quoting Portland Gen. Elec. Co. v. Bureau of Labor and Indus., 859 P.2d 1143, 1146 (Or. 1993)).

[220] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989

judicial precedent, seeking to carry out the statutory purpose, or by deferring to an authoritative interpretation by an administrative agency.[221]

Perhaps most important for present purposes, all of these approaches would effectively compel courts to "eschew[] the use of other tools to enrich their sense of meaning, intentions, or purposes,"[222] and they would generally forbid judges from considering the policy implications of their decisions or how things have changed since a statute was enacted. While regulatory agencies could presumably take these policy-oriented considerations into account in reaching their decisions on the best way to implement a statute, the advocates of some of these proposals maintain that the judiciary should not second-guess those decisions based on the superior political accountability and expertise of administrators.[223] Hence, they seemingly reject the use of hard-look judicial review to evaluate the validity of an agency's resolution of statutory ambiguity. In short, these proposals essentially boil down to (1) finding the answer that was put into the statute by Congress, largely through the use of textual analysis, and (2) resolving any latent ambiguity by deferring to the policy choices of agencies. The proposals, by design, leave virtually no independent policymaking or checking function (or, in other words, no *editorial role*) for the federal judiciary. As a result, they effectively strip statutory interpretation of its capacity to serve as a mechanism of contestatory democracy, except when agencies unambiguously exceed the scope of their statutory authority.

My proposed vision of statutory interpretation recognizes that the advantages of rule-based decision-making should be respected when Congress *has* explicitly resolved an issue in a reasoned fashion during the lawmaking process.[224] My claim, however, is that the resolution of disputes regarding the permissible scope of governmental authority in difficult statutory cases requires the use of practical reasoning, and that the quality of statutory law and its democratic legitimacy benefit from an ongoing, multi-institutional, systemic dialogue on those questions. Moreover, if statutory interpretation is to provide individuals and groups with opportunities to challenge the validity of governmental authority, and thereby avoid the possibility of domination by the state, interpretive litigation should be an information-rich environment that is open to a wide range of competing arguments and a variety of potential justifications for judicial decisions.

DUKE L.J. 511, 521.

[221] *See* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON STATUTORY INTERPRETATION 230 (2012) ("For Justice Scalia himself, the answer is to follow and reason from Supreme Court precedent construing open-textured laws like the Sherman Act *or* defer to reasonable agency interpretations of statutes *or* attribute a purpose to the statute and construe it according to such purpose.").

[222] VERMEULE, *supra* note 14, at 183.

[223] *See, e.g.*, Scalia, *supra* note 220, at 515; *supra* Parts I.C-I.D.

[224] Staszewski, *supra* note 27, at 252-53.

The animating idea is that avoiding the possibility of domination by the state requires public officials to consider and respond in a reasoned fashion to the interests and perspectives of everyone who will be significantly affected by coercive exercises of governmental authority. When the legislature explicitly resolves an issue in a reasoned fashion during the lawmaking process, we ordinarily assume that Congress satisfies this requirement because of the structural safeguards that the Constitution provides to facilitate reasoned deliberation.[225] For this reason, agencies and courts *are* generally obligated to follow the legislature's decisions, and the primary mechanisms for contesting existing law are for critics of the status quo to seek a statutory amendment or persuade the judiciary to declare a statute unconstitutional.

When Congress fails to anticipate or resolve an issue during the legislative process, it routinely delegates the relevant policymaking authority to an administrative agency.[226] Agencies are, in turn, relatively well-positioned to determine whether Congress *has* explicitly resolved an issue in a reasoned fashion during the legislative process, and, if not, which courses of action would be most appropriate under the circumstances.[227] Agencies, of course, tend to have a great deal of prior experience and substantive expertise in their regulatory areas. They are also subject to the ongoing influence of elected officials through the powers of appointment and removal, the budget process, and various means of congressional and executive oversight. Significantly, administrators are frequently required to follow procedures that obligate them to consider and respond to the interests and perspectives of the regulated entities and regulatory beneficiaries that are most likely to be affected by their decisions, as well as the views of attentive, ordinary citizens.[228] Thus, for example, the Administrative Procedure Act requires agencies to provide meaningful opportunities for public notice and comment when they promulgate

[225] *See, e.g.*, Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Public Sphere*, 34 WILLAMETTE L. REV. 421, 444 (1998) ("We presume that the legislature will not only meet but will engage and deliberate with and about the relevant strangers in the public sphere and that the strangers, although remaining strangers and never becoming friends, will be treated with concern and respect."); Staszewski, *supra* note 27, at 251-53 ("[T]he structural safeguards that are provided by the Constitution to facilitate reasoned deliberation and prevent faction help to explain the strong presumption of constitutionality that the judiciary routinely ascribes to legislation."). While this assumption may not be true in many cases, it is widely believed that judicial enforcement of robust principles of "due process of lawmaking" would be unworkable. *See, e.g.*, Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707 (2002) (lamenting the Court's exceedingly rigorous intrusion into congressional processes). Accordingly, the judiciary will typically enforce the legislature's policy decisions in the absence of a substantive constitutional violation.

[226] *See* Staszewski, *supra* note 27, at 254.

[227] *See id.* at 258-61.

[228] *See id.* at 261.

legislative rules,[229] and agency interpretations of statutes are not entitled to as much judicial deference if they decline to provide such procedures.[230] While there is little empirical research that rigorously examines how agencies interpret their enabling acts,[231] it seems likely that they would typically engage in a process of practical reasoning, which considers a variety of relevant factors to make what they regard as the best decision under the circumstances in each particular situation.[232]

Most scholars seem to agree that agencies are likely to be better statutory interpreters than courts for the foregoing reasons.[233] Nonetheless, the availability of meaningful judicial review of agency decision-making is vital from the perspective of republican democracy for a couple of reasons. First, judicial review can help to ensure that agencies respect the explicit policy choices of the enacting Congress, and thereby honor the principle of legislative supremacy when a statute is subsequently implemented.[234] Second, judicial review can help to ensure that agencies engage in reasoned decision-making, and that they give adequate consideration to all of the interests and perspectives that are expressed during the administrative process.[235] Judicial review can therefore prevent agencies from giving short shrift to legal considerations, while simultaneously discouraging agencies from giving excessive weight to political considerations that are unrelated to the merits of implementing their delegated statutory authority. Agencies have plenty of incentives to reach decisions that comport with the preferences of powerful or

[229] *See* 5 U.S.C. § 553 (2012).

[230] *See* United States v. Mead Corp., 533 U.S. 218 (2001).

[231] For a recent study that addresses some aspects of this topic, see Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703 (2014) (exploring empirically how the Court's deference doctrine may affect statutory interpretation by agencies).

[232] *See* CHRISTOPHER F. EDLEY JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 72-95 (1990) (claiming that all agency decisions have political, scientific, and legal dimensions that are difficult or impossible to disentangle); Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014) (providing case studies of the pragmatic manner in which agencies tend to apply old statutes to unanticipated new problems).

[233] *See* Staszewski, *supra* note 27, at 258-61 (providing sources); s*ee also* William N. Eskridge, Jr., *Expanding* Chevron*'s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411 (arguing in favor of according agencies primacy over courts in statutory interpretation).

[234] *See, e.g.*, William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975); Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1279-80 (2002).

[235] *See* Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 885-93 (2012) (explaining that hard-look judicial review promotes principles of deliberative democracy).

influential political actors, and their decision-making therefore naturally accords with the electoral dimension of democracy.[236] The regulatory state also needs to provide mechanisms of contestatory democracy that protect political minorities from the possibility of domination by the state. Procedural safeguards, such as notice-and-comment rulemaking, are an important part of the solution, but there is also a need for judicial review of agency action under the Administrative Procedure Act.[237]

The fact that judicial review of agency action provides a mechanism of contestatory democracy, which promotes legislative supremacy and improves the democratic legitimacy of agency lawmaking, does not mean that courts should not give deference to the reasonable policy choices of administrators. Rather, I have previously argued that in assessing whether Congress has explicitly resolved the precise question at issue during the legislative process, courts should give an appropriate degree of respect to an agency's assessment of the unambiguous meaning of a statute.[238] When a court determines that Congress has not considered or resolved the precise question at issue, it should uphold the agency's policy decision if the agency has adequately considered and responded to the information and views expressed in the administrative record, and thereby engaged in reasoned deliberation. This form of judicial review, which is relatively pragmatic and deferential in nature, differs substantially from the "rubber-stamp" that Vermeule and Scalia would seemingly extend to agency action. It also responds to the fundamental concern that "if federal courts decline to provide meaningful judicial review of the resolution of statutory ambiguities by regulatory agencies, the executive branch would acquire too much unrestrained lawmaking power, and agencies could therefore arbitrarily dominate the people."[239]

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[236] *See id.* at 853.

[237] *See* Staszewski, *supra* note 27, at 261-68.

[238] *Id.* at 264, 267; *see also* Michael Herz, *Judicial Review of Statutory Issues Outside of the* Chevron *Doctrine*, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 125, 142-43 (John F. Duffy & Michael Herz eds., 2005) ("*Skidmore* deference comes into play in two separate settings, not always carefully distinguished. First, outside *Chevron*'s domain, *Skidmore* holds sway. Second, even within *Chevron*'s domain, *Skidmore* deference should apply within step one."); Eskridge, *supra* note 233, at 448-50 (claiming that federal courts should give *Skidmore* deference to an agency's resolution of questions of law under the first step of *Chevron*).

[239] Staszewski, *supra* note 27, at 267-68; *see also* Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 121 (2011) ("Congress may enact legislation entrusting lawmaking authority to administrative agencies as long as it constrains administrative decisionmaking substantively, procedurally, and structurally in such a way that delegation does not engender domination by manifestly increasing the government's capacity for arbitrariness."); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989) (emphasizing the role of the judiciary as a check on the executive power of agencies); Jonathan T. Molot, *The Judicial Perspective in the Administrative State:*

The foregoing analysis suggests that most policy decisions in the regulatory state should ultimately be the products of reasoned decisions by Congress or an administrative agency. Sometimes, however, federal courts will be called upon to interpret statutes when neither Congress nor an administrative agency has engaged in reasoned deliberation on the question. This could be the case because Congress failed to foresee an issue or was unwilling or unable definitively to resolve the matter, and because Congress either did not delegate formal lawmaking authority to an administrative agency or an agency with such authority did not use the requisite lawmaking procedures. In such cases, federal courts will necessarily be performing a lawmaking or policymaking function, and they should do so by engaging in reasoned deliberation on the best course of action under the circumstances.

This is another major way in which my proposed understanding of the judiciary's role in statutory interpretation differs most sharply from the proposals for simplification and uniformity. Rather than adopting a single set of rules that would artificially minimize statutory ambiguity, "eschew the use of tools that could enrich the judiciary's sense of Congress's meaning, intentions, or purposes,"[240] or forbid courts from openly considering the policy implications of their decisions or how things have changed since a statute was enacted, we should encourage courts to consider all of the information that could be relevant to making the best possible decision in each case. Perhaps most important, we should also expect courts to be responsive to the arguments presented by the parties and to give reasoned explanations for their decisions. The whole point of statutory interpretation from this perspective is to give individuals or groups an opportunity to challenge public decisions in an impartial forum on the grounds that their interests or perspectives were not taken into account during the decision-making process, and the consideration of those views allegedly warrants a decision in their favor. The imposition of legal restrictions on the information or arguments that could be presented by the parties or relied upon by the courts would therefore defeat the purpose of the enterprise and deprive judicial lawmaking or policymaking of its democratic legitimacy in this context.

Professors Eskridge and Frickey have provided the classic model of practical reasoning in statutory interpretation,[241] and I have previously explained how a deliberative and pragmatic approach should inform the judiciary's editorial role from the perspective of statutory interpretation as

Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role, 53 STAN. L. REV. 1, 68 (2000) ("[S]o long as judges retain authority to interpret law—whether that law be in the form of congressional statutes or administrative regulations—the judiciary would continue to play its original role of inducing lawmakers to anticipate judicial reaction, to internalize judicial values, and to engage in careful deliberation and drafting.").

[240] *See supra* note 222 and accompanying text.

[241] Eskridge & Frickey, *supra* note 30, at 365.

contestatory democracy.[242] Federal courts will undoubtedly disagree about how statutes should be interpreted in some hard cases under this approach, because judges will have different perspectives about the best course of action on the merits under the circumstances. The judicial discretion that is inherent in this approach should be understood, however, as a feature rather than a bug of the interpretive enterprise.[243]

If there were only one way of interpreting statutes, dictated either by the Constitution or a binding set of codified rules, courts would have much less leeway to decide which sources of interpretive guidance should receive the greatest weight in any particular case. Since each of the leading foundational theories emphasizes information that is valuable for different reasons, none of those approaches will be appropriate in every situation. For example, textualism does not provide a single correct answer when the statutory text is ambiguous or when the plain meaning of a statute would lead to highly problematic results that were not anticipated by the legislature. Similarly, intentionalism cannot resolve a case when the lawmakers did not anticipate or resolve the problem that arises during adjudication. Meanwhile, purposivism is not especially helpful when a statute promotes competing purposes or when a court must decide how far Congress went in achieving a statute's underlying goals and the statute does not provide ascertainable limiting principles. Moreover, many cases present conflicts among the different considerations emphasized by the competing foundational theories, or between the results that would ordinarily be dictated by the straightforward use of those methods and other widely accepted values. Finally, there are some hard cases where none of the foundational theories provides a clear answer to the interpretive problem and other public values must dictate the result. The choice of interpretive methodology in hard cases necessarily goes hand-in-hand with the judiciary's assessment of the best decision under the circumstances. Any ex ante effort to specify a single interpretive methodology would, if consistently followed, (1) force the judiciary to disregard relevant interests or perspectives and reach what it perceives as *the wrong decision* in some hard cases; (2) leave courts without the tools necessary to reach *any* sensible decision in certain cases; or (3) preclude courts from being candid about the true rationales for some of their decisions. This effort would therefore facilitate the possibility of arbitrary domination by the state.

The fact that different judges may disagree and reach inconsistent outcomes in some hard cases is not a significant problem for several related reasons. First, most hard cases do not have a single correct answer, and it does not

[242] Staszewski, *supra* note 27, at 262-78.

[243] *See* Leib & Serota, *supra* note 31; *see also* Solan, *supra* note 11, at 747 (claiming that "it will never be possible to come up with a hierarchy that will rank all of the [legitimate] considerations in such a way as to have the ranking apply across a broad range of cases . . . because various factors can be stronger or weaker from case to case and judges require enough flexibility to take this into account").

promote democracy to pretend otherwise or to adopt a mechanical formula for resolving statutory disputes that precludes consideration of potentially persuasive information. Second, the traditional principles of statutory interpretation that courts use when they engage in practical reasoning provide meaningful constraints that limit the scope of judicial discretion and cabin the range of plausible outcomes.[244] The judiciary plays an editorial role in statutory interpretation; it is not the primary lawmaker from this perspective. Third, judicial decisions under this approach should be relatively minimalistic, incremental, dynamic, and provisional[245]—which means that they could potentially be distinguished in subsequent cases based on new information, reconsidered based on new information or arguments from a regulatory agency that subsequently engaged in reasoned deliberation on the matter,[246] or overruled by Congress pursuant to a statutory amendment if there was sufficient consensus in favor of a different course of action. Finally, diverse judicial perspectives and interpretive methodologies promote a dialogue within the federal judicial system on the best way of handling difficult statutory questions both in particular cases and as a more general matter. This diversity also helps to facilitate a broader, multi-institutional, systemic dialogue about the best resolution of contested policy issues, thereby improving the modern regulatory state's democratic legitimacy. Both aspects of this dialogue would be severely hampered by the dumbing down of statutory interpretation, because there would be much less forthright or reflective discussion of the merits of various policy alternatives.

C. *The Modern Legal Hierarchy in the Regulatory State*

The proponents of the proposals at issue adhere to the traditional hierarchy of legal sources, and they seem to assume that these sources of law are exclusive.[247] Accordingly, they either contend that their preferred interpretive methodology is constitutionally mandated, or that interpretive principles are judicially created common law, which should be treated as precedential unless overridden by Congress.[248] My claim is that the traditional hierarchy of legal sources is outdated in the modern regulatory state, and that "interpretive methodology" and "agency decision-making" should be recognized as distinct forms of law in the following new legal hierarchy: (1) Constitution, (2) interpretive methodology, (3) statutes, (4) agency action,[249] and (5) common

[244] *See* Eskridge & Frickey, *supra* note 30, at 380-83.

[245] *See* Staszewski, *supra* note 27, at 273.

[246] *See* Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1276 (2002).

[247] *See supra* Part II.C.

[248] *See supra* notes 22-24 and accompanying text.

[249] This discussion focuses primarily on the place of interpretive methodology in a new legal hierarchy for the regulatory state. I plan to address the legal status of various types of agency action and develop this proposed legal hierarchy more fully in a subsequent project.

law. Moreover, unlike traditional sources of law, which are generally viewed as *fixed*,[250] these "new" forms of law are, by definition, *provisional*. Accordingly, Congress cannot dictate binding rules of statutory interpretation to the judiciary, and one court cannot ordinarily dictate the interpretive methodology of its successors.

While a full reconsideration of the nature and sources of "law" is a much larger project than I can accomplish here, I wish to offer a descriptive hypothesis and a normative thesis. The descriptive hypothesis is that interpretive methodology is influenced by the Constitution and the meta-intent of Congress, but it generally cannot be controlled by those sources. Moreover, courts generally believe that they *are bound* by constitutional limits on their interpretive discretion, and that *Congress cannot dictate* how the judiciary interprets statutes. Accordingly, interpretive methodology falls in between the Constitution and statutes as a source of law in the modern regulatory state. The normative thesis is that viewing interpretive methodology as a provisional source of law, which is influenced from the top by the Constitution and from the bottom by Congress's meta-intent, is an attractive way of thinking about the interpretive enterprise and the broader nature of law. This is partly the case because the current treatment of interpretive methodology helps to facilitate the ongoing, systemic dialogue about the best ways of solving difficult social problems that is discussed above, and it is therefore an important part of what keeps the law purposive, dynamic, and equitable. This understanding of interpretive methodology helps to avoid some of the shortcomings of an unduly strict attachment to "legalism,"[251] and it suggests that our *legal ethos* includes commitments to reasoned deliberation, contestatory democracy, and freedom from the possibility of domination.[252] This section concludes by drawing upon the work of legendary law and society scholars Philippe Nonet and Philip Selznick to distinguish my proposed view of law from the apparent vision of the advocates of dumbing down statutory interpretation.[253] In short, they want to transform interpretive methodology into a more primitive form of "autonomous law," whereas my approach values the interpretive process's capacity to make the law more *responsive*.

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[250] Common law precedent can, of course, be distinguished or overruled, but courts are obligated by stare decisis to follow binding precedent that is on point, unless previous decisions are overruled. Similarly, constitutions and statutes can be amended, but doing so is often quite difficult as a practical matter. Accordingly, the traditional sources of law are fixed in the sense that they do not ordinarily change from case to case.

[251] *See* JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS (2d ed. 1986).

[252] *Cf.* Robin West, *Reconsidering Legalism*, 88 MINN. L. REV. 119 (2003) (claiming that the prevailing legal ethos also includes a fundamental commitment to preserving peace and providing security).

[253] PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW (1978).

1. The Descriptive Hypothesis

My descriptive hypothesis is relatively simple, and it is amply supported by the existing literature on statutory interpretation. The first part of the claim is that statutory interpretation is influenced by the Constitution.[254] This is illustrated most clearly by substantive canons of statutory interpretation, which are typically designed to promote constitutional norms that are not fully enforced for institutional reasons when federal courts engage directly in judicial review.[255] Scholars have recognized that numerous substantive canons perform this function, including the rule of lenity,[256] the avoidance canon,[257] various federalism canons,[258] non-delegation canons,[259] and the absurdity doctrine.[260] These canons are also understood to facilitate reasoned deliberation by elected officials on sensitive issues when legislation might otherwise be interpreted to push the constitutional envelope in ways that Congress may not have carefully considered.[261] The Constitution's influence on statutory interpretation is also illustrated by the heated debate over the appropriate use of legislative history. Leading textualists, such as Justice Scalia, have argued that the use of legislative history to ascertain Congress's intent conflicts with the Constitution,[262] while other commentators have suggested that ignoring legislative history would be in tension with a constitutional structure that is self-consciously designed to facilitate reasoned deliberation by lawmakers.[263] Most broadly, the Constitution's influence on statutory interpretation is illustrated by the fact that the leading foundational

[254] *See, e.g.*, Glen Staszewski, *Constitutional Dialogue in a Republic of Statutes*, 2010 MICH. ST. L. REV. 837, 862-65 (describing various ways in which statutory interpretation is influenced by the Constitution).

[255] *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992); *see also* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

[256] *See* Eskridge & Frickey, *supra* note 255, at 600-01.

[257] *See* Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. 397 (2005).

[258] *See* Eskridge & Frickey, *supra* note 255, at 619-30.

[259] *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

[260] *See* Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1028-46 (2009).

[261] *See* Criddle & Staszewski, *supra* note 36, at 1587-88.

[262] *See supra* notes 155157 and accompanying text.

[263] *See, e.g.*, Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L.J. 1 (1999) (arguing that courts should use legislative history in order to encourage the legislature to fulfill its obligation to publicly justify its statutes); Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242 (1998).

theories—which include textualism, intentionalism, and purposivism—can all be understood to promote different constitutional values in different ways.[264]

At the same time, the constitutional norms that are promoted by statutory interpretation are generally pitched at too high of a level of abstraction to mandate the use of any particular interpretive methods. Professors Bruhl and Vermeule have therefore persuasively argued that, except for some restraints on potentially egregious judicial behavior at the margins, the Constitution simply does not resolve the major disagreements that exist regarding how statutes should be interpreted.[265] Accordingly, it seems fair to say that interpretive methodology is *influenced by* the Constitution, but that it cannot be *controlled by* the Constitution as a general matter.

The second part of my descriptive hypothesis is that interpretive methodology is influenced by the meta-intent of Congress. Thus, courts frequently claim that their chosen methods of statutory interpretation are consistent with Congress's intent regarding how federal statutes should be interpreted.[266] Because courts have historically had very little information about Congress's interpretive preferences,[267] it is widely recognized that most of these claims are best understood as legal fictions. Nonetheless, there is apparently widespread consensus that Congress's views on statutory interpretation matter, even if those views are generally difficult to ascertain with reliability or precision. At the same time, however, when legislatures *have* adopted codified rules of statutory interpretation, and thereby affirmatively expressed their meta-intentions on interpretive methodology, the judiciary has generally ignored or declined to follow those instructions.[268] This could be the case, in part, because one legislature's meta-intent regarding interpretive

[264] *See* Leib & Serota, *supra* note 31, at 52.

[265] VERMEULE, *supra* note 14, at 29-34, 75-76; Bruhl, *supra* note 13, at 444-47 & n.23; *supra* notes 83, 158-60, 165 and accompanying text.

[266] *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 912-16 (2013).

[267] For recent empirical studies of this issue, see *id.*; Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002).

[268] *See* Gluck, *supra* note 8, at 1786 ("The state cases indicate that courts will find ways around legislated methodological rules they do not like, and that judges may be unwilling to relinquish authority over interpretive methodology."); Romero, *supra* note 46, at 241-43 (recognizing the tendency of courts to "ignore" interpretive instructions from the legislature); *see also* Amy Widman, Interpretive Independence: The Irrelevance of Selection and Retention Methods to State Statutory Interpretation (unpublished manuscript) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2464302) (July 9, 2014) (providing empirical support for the proposition that state courts do not consistently follow codified rules of statutory interpretation, and finding that this conclusion holds true regardless of the subject matter of the cases, the contents of the interpretive code, or how the judges were appointed).

methodology could conflict with another legislature's substantive intent regarding the application of a particular statute, and it is almost universally accepted that the specific trumps the general in the case of two conflicting statutory mandates.[269] This could also be the case because most codified rules of statutory interpretation are too general to have much practical impact.[270] This is also likely to be the case, however, because many judges do not believe that the legislature can legitimately tell them how to interpret statutes, especially when an interpretive code would force them to reach results that they view as erroneous or in conflict with other public values.[271] Thus, it also seems fair to say that interpretive methodology is *influenced by* Congress's meta-intent regarding statutory interpretation, but it cannot be *controlled by* Congress's meta-intent as a general matter. Moreover, since courts generally appear to believe that they are bound by constitutional limits on their interpretive discretion *and* that Congress cannot dictate how they interpret statutes, interpretive methodology falls in between the Constitution and statutes as a source of law in the modern regulatory state. Finally, it bears reiterating that because federal courts do not give stare decisis effect to the interpretive methodology that was used to decide prior cases, interpretive methodology is distinct from the common law and other traditional legal sources insofar as "the law" changes from case-to-case and is therefore relatively provisional.

2. *The Normative Thesis*

My normative thesis is that viewing interpretive methodology as a provisional source of law that is influenced from the top by the Constitution and from the bottom by Congress's meta-intent, but that is not tightly controlled by either of those sources, is an attractive way of thinking about the interpretive enterprise and the broader nature of law. The previous section explained that if there was only one way of interpreting statutes, which was

[269] *See* Andrew Tutt, Comment, *Interpretation Step Zero: A Limit on Methodology as "Law*,*"* 122 YALE L.J. 2055, 2059-61 (2013).

[270] *See id.* at 2055; Romero, *supra* note 46, at 217.

[271] *See, e.g.*, Boykin v. State, 818 S.W.2d 782, 786 n.4 (Tex. Crim. App. 1991) ("[I]nterpretation statutes that 'seek[] to control the attitude or the subjective thoughts of the judiciary' violate the separation of powers doctrine." (quoting James C. Thomas, *Statutory Construction When Legislation is Viewed as a Legal Institution*, 3 HARV. J. LEGIS. 191, 211 n.85 (1966))); SCALIA & GARNER, *supra* note 15, at 243-46 (discussing the "interesting question" of "how far a legislature can go in prescribing how the courts interpret," claiming that the question "is for the most part academic," but suggesting that "[a]n interpretive command applicable to *all* statutes" is potentially problematic because it may be "an intrusion upon the courts' function of interpreting the laws, rather than an exercise of the legislature's power to clarify the meaning of its product"); *see also* Linda D. Jellum, *"Which is to be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837 (2009); Jennifer M. Bandy, Note, *Interpretive Freedom: A Necessary Component of Article III Judging*, 61 DUKE L.J. 651 (2011).

either dictated by the Constitution or by a binding set of codified rules, courts would have much less leeway to decide which sources of interpretive guidance should receive the greatest weight in any particular case. This would interfere with their ability to reach what they regard as the best decision in each case and would likely inhibit judicial candor.

In contrast, an approach that allows the judiciary to engage in practical reasoning about the best course of action on the merits under the circumstances facilitates reasoned decision-making by the state. As explained above, courts are obligated to respect Congress's policy decisions when the legislature has explicitly resolved the precise question at issue during the lawmaking process. Moreover, courts should defer to an agency's resolution of statutory ambiguity if the agency has engaged in reasoned decision-making on the matter. If neither Congress nor an agency has explicitly resolved the precise question at issue in a reasoned fashion, however, this task necessarily falls to the judiciary.[272] Federal courts should, in turn, be free to make what they regard as the best decisions on the merits under the circumstances, and they should be expected to justify their decisions with reasons that correspond with the accompanying interpretive methodology. Congress can, of course, overturn a judicial decision by a statutory amendment, and agencies may engage in further deliberation on the matter, which could subsequently persuade the judiciary to change its position. Because interpretive methodology goes hand-in-hand with the judiciary's explanation for its decision in hard cases, the flexibility that is provided by existing law helps the judiciary reach sound decisions in particular cases and facilitates an ongoing, multi-institutional dialogue about the best ways of solving our most difficult collective problems. Interpretive methodology is therefore an important part of what keeps the law purposive, dynamic, and equitable. At the same time, however, constitutional principles and Congress's likely meta-intent influence statutory interpretation, and those considerations therefore combine with legal culture to provide meaningful constraints on the judiciary's discretion in statutory interpretation, even if they cannot control the precise methodology that is used or the result that is reached by courts in hard cases.

From a broader jurisprudential perspective, this understanding of interpretive methodology helps to alleviate some of the shortcomings of an unduly strict attachment to "legalism," and it suggests that our "legal ethos" also includes commitments to reasoned deliberation, contestatory democracy, and freedom from the possibility of domination. Judith Shklar argued that an ideological commitment to "legalism" is what unites the legal profession, and she defined legalism as "the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules."[273] Accordingly, "being a lawyer means that one is

[272] *See supra* notes 208-212 and accompanying text; *see also* Staszewski, *supra* note 27, at 269, 297.

[273] SHKLAR, *supra* note 251, at 1.

committed to the ideological proposition that moral conduct is a matter of following rules."[274] In other words, "legalism" is a commitment to following rules for the sake of following rules. Shklar argued that legalism is common to both natural law theories of jurisprudence *and* legal positivism, and that it commits lawyers to the formalist position that all questions posed by conflicting rights and duties are fully determined by existing law.[275] "Law, then, in the empire of legalism, has a static, given, autonomous, seamless, and complete nature, not only for formalists, who hold this thesis quite explicitly, but in some fashion, for virtually all lawyers."[276] Because the rules that determine existing legal rights and duties were, by definition, established in the past, "legalism, and hence the profession that defines itself by reference to it, has a distinctively and unmistakably conservative hue."[277]

While Professor Shklar was profoundly critical of legalism and the ideology that it represents, the important point for present purposes is that the proposals to dumb down statutory interpretation exemplify this legalistic attitude. This is illustrated by the fact that the advocates of some of the proposals are clearly more concerned with establishing binding rules of statutory interpretation than they are with the content of those rules. Moreover, all of the proposals are designed to make statutory interpretation more rule-oriented and to limit or preclude the exercise of judicial discretion or policymaking judgment. The proponents of the proposals suggest that the absence of binding rules makes statutory interpretation "lawless," and they aim to rectify this situation by telling federal courts precisely how to interpret statutes in every subsequent case. Federal courts would thereby become duty-bound to follow a consistent and predictable interpretive methodology, and moral quandaries would no longer arise in statutory interpretation. Instead, the rules of statutory interpretation would have "a static, given, autonomous, seamless, and complete nature," and the questions posed by conflicting rights and duties in difficult statutory cases could be fully determined by established law.[278]

Robin West has persuasively argued that legalism accurately captures a defining element of American legal culture, but that our legal ethos also includes other important values, such as a commitment to preserving peace and promoting personal security to avoid the situation that would obtain in a state of nature.[279] She points out that the goal of law is "not only to encourage or force rule-compliant behavior," but also "to create the conditions for a higher quality of life than could be had in the absence of law," and that law is therefore necessary to prevent "the exploitation of vulnerability and the abuse

[274] West, *supra* note 252, at 119; *see also id.* at 119-25 (summarizing Shklar's arguments).

[275] *See id.* at 120.

[276] *Id.*

[277] *Id.*

[278] *Id.*

[279] *See id.* at 149-52.

of private power as an impediment to the enjoyment of social and civilized life."[280]

While West was writing from the perspective of liberal political theory, there is no mistaking the similarity between her vision of law and Pettit's theory of republican democracy, which focuses on the need to protect citizens from the possibility of domination by private actors or the state.[281] The central insight that can be derived from their work is that law and democracy both exist to protect the freedom of individuals or groups from the possibility of arbitrary exercises of power by private citizens or public officials. My claim is that the federal judiciary's current treatment of interpretive methodology serves precisely this goal by providing meaningful opportunities for contestatory democracy, and that the use of practical reasoning to resolve interpretive disputes also promotes the intimately related value of reasoned deliberation. This suggests that non-domination, contestatory democracy, and reasoned deliberation are all important aspects of our legal ethos. It also suggests that the current practice of resolving interpretive disputes through the use of practical reasoning is entirely consistent with widely held and normatively attractive visions of the rule of law.

3. *Autonomous Versus Responsive Law*

The "legalism" that is implicitly promoted by the reform proposals at issue, and my proposed understanding of interpretive methodology—which embraces additional values and commitments—are plainly based on very different conceptions of the rule of law. Philippe Nonet and Philip Selznick have identified three paradigmatic stages of the rule of law, which they viewed in evolutionary terms.[282] The first stage is *repressive law*, whereby the state seeks to establish order and consolidate its authority over society.[283] "In this model law is the command of a sovereign who possesses, in principle, unlimited discretion; law and the state are inseparable."[284] Nonet and Selznick claim that the use of public authority "is repressive when it gives short shrift to the interests of the governed, that is, when it is disposed to disregard those interests or deny their legitimacy."[285] When governing power is used in this fashion, "the position of the subject is precarious and vulnerable."[286] A

[280] *Id*. at 149-50.

[281] *See supra* notes 192-206 and accompanying text.

[282] NONET & SELZNICK, *supra* note 253, at 18. They emphasize, however, that the later stages of law are not necessarily better than prior stages, and that a normative evaluation of a legal system would depend on the social context. *Id.* at 25-27.

[283] *Id.* at 29-52.

[284] *Id*. at 17.

[285] *Id*. at 29.

[286] *Id.*

repressive regime is therefore "one that puts all interests in jeopardy, and especially those not protected by an existing system of privilege and power."[287] Nonetheless, repression need not be all-encompassing or the result of a malevolent intent. Rather, it also occurs "where power is benign but takes little note of, and is not effectively restrained by, affected interests."[288] A repressive system of law tends to be manifested by "a *close integration of law and politics*, in the form of a direct subordination of legal institutions to public and private governing elites: law is a pliable tool, readily available to consolidate power, husband authority, secure privilege, and win conformity."[289] Moreover, repressive law tends to be characterized by "*rampant official discretion*, which is at once an outcome and a chief guarantee of the law's pliability."[290] In other words, repressive law forces citizens to follow the dictates of the state, and the state has no obligation to consider the interests or perspectives of ordinary citizens or to follow consistent rules.

In ordinary circumstances, repressive law does not have many fans, since it does not comport with widespread conceptions of either law or democracy. The second stage of the rule of law identified by Nonet and Selznick aims to remedy the "legal" deficiencies of repressive law, and ultimately matches up rather closely with Shklar's conception of "legalism" and most traditional theories of the rule of law. This view, which Nonet and Selznick characterize as *autonomous law*, is a potential mechanism "for *taming* repression" and establishing "a government of laws and not of men."[291] The rule of law is established under this model "when legal institutions acquire enough *independent* authority to impose standards of restraint on the exercise of governmental power."[292] An autonomous legal system is characterized by "the formation of specialized, relatively autonomous legal institutions that claim a qualified supremacy within defined spheres of competence."[293] Nonet and Selznick describe the chief attributes of autonomous law as follows:

> Law is separated from politics. Characteristically, the system proclaims the independence of the judiciary and draws a sharp line between legislative and judicial functions.
>
> The legal order espouses the "model of rules." A focus on rules helps enforce a measure of official accountability; at the same time, it limits both the creativity of legal institutions and the risk of their intrusion into the political domain.

[287] *Id.* at 30.

[288] *Id.* at 31.

[289] *Id.* at 51.

[290] *Id.*

[291] *Id.* at 53 (employing the language of MASS. CONST. art. XXX).

[292] *Id.*

[293] *Id.*

> "Procedure is the heart of law." Regularity and fairness, not substantive justice, are the first ends and the main competence of the legal order.
>
> "Fidelity to law" is understood as strict obedience to the rules of positive law. Criticism of existing laws must be channeled through the political process.[294]

Nonet and Selznick recognize that a "close accountability to rules" is the chief advantage of autonomous law, and that "legalism is its affliction."[295] They explain that a narrow focus on rules tends to limit "the range of legally relevant facts, thereby detaching legal thought from social reality."[296] Legalism privileges legal authority "to the detriment of practical problem solving," as "[t]he application of rules ceases to be informed by a regard for purposes, needs, and consequences."[297] This is costly "because of the rigidities" that are imposed by legalism, "but also because rules construed *in abstracto* are too easily satisfied by a formal observance that conceals substantive evasions of public policy."[298] Nonet and Selznick recognize that the shortcomings of legalism provide structural incentives for citizens to criticize the operation of autonomous law, and that this creates an environment that is conducive to challenges to governmental authority, which in turn provokes calls for the recognition of legal rights and increased flexibility or equity in interpretive litigation.[299] "The long-term effect is to build into the legal order a dynamic of change, and to generate expectations that law respond flexibly to new problems and demands."[300] Nonet and Selznick claim that from this development, "[a] vision emerges, and the possibility is sensed, of a responsive legal order, more open to social influence and more effective in dealing with social problems."[301]

The third stage of the rule of law is therefore *responsive law*,[302] which essentially seeks to remedy the *democratic* shortcomings of an unduly strict attachment to legalism. Nonet and Selznick point out that "[t]he quest for responsive law has been a continuing preoccupation of modern legal theory,"[303] beginning with legal realism and the advocates of sociological jurisprudence, and extending to traditional legal process theory as well as its more recent incarnations. The primary goal of such theories is "to make law more responsive to social needs," which generally requires "a broadening of

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[294] *Id*. at 54.

[295] *Id.* at 64.

[296] *Id.*

[297] *Id.*

[298] *Id.*

[299] *See id*. at 71-72.

[300] *Id.* at 72.

[301] *Id.*

[302] *See id.* at 73-113.

[303] *Id.* at 73.

the field of the legally relevant, so that legal reasoning [can] embrace knowledge of the social contexts and effects of official action."[304] Responsive theories of law tend to be receptive to increased opportunities for participation in the legal process and to relatively expansive notions of the role of law. Such theories maintain that the rule of law should extend beyond procedural justice, and that it should be designed to help identify the public interest, promote institutional competence, and achieve substantive justice. In this higher stage of legal development, legal institutions can be expected "to give up the insular safety of autonomous law and become more dynamic instruments of social ordering and social change."[305]

Nonet and Selznick provide a detailed analysis of the defining attributes and potential dangers of responsive law, which is organized around four main points. The first point is that responsive law is highly purposive and dynamic in nature and that those qualities are natural outgrowths or responses to the legalism of autonomous law.[306] Because bright-line rules are inherently static and imprecise, the legal process becomes receptive to arguments for updating and fine-tuning those rules to better accord with their underlying purposes, other widely-accepted principles or values, and contemporary circumstances. While "[a]utonomous law recoils from the unsettling effect of purposive thinking," this feature of responsive law "counteracts the tendency of officials to retreat behind rules and evade responsibility" for their decisions.[307] The second point is that responsive law's reliance on evolving purposes and principles provides a powerful basis for criticizing the legal status quo, and thereby has a tendency to undermine the received authority of rules and provide incentives for the use of relatively flexible or equitable approaches to interpretation.[308] The third point is that the "openness" of responsive law provides increased opportunities for participation in the lawmaking process by a wider range of individuals and groups, and that it changes the nature of legal participation and results in "a wider sharing of legal authority."[309] In a responsive system of law, "legal action comes to serve as a vehicle by which groups and organizations may participate in the determination of public policy."[310] While responsive law rejects a sharp separation of law and politics, it also recognizes that the legal process is governed and constrained *by legal authority*, and that law and politics are therefore distinct. The fourth point is that the legal pluralism that responsive law facilitates has "both the virtues and the vices of openness," and that legal institutions therefore "need effective

[304] *Id.* (internal quotation marks and citations omitted).

[305] *Id.* at 74.

[306] *See id.* at 78-86.

[307] *Id.* at 82-83.

[308] *See id.* at 87-94.

[309] *Id.* at 95; *see also id.* at 95-103.

[310] *Id.* at 96.

tutelage in the accommodation of pressure."[311] In other words, responsive law needs competent institutions that are capable of withstanding the characteristic dangers of pressure politics. Nonet and Selznick therefore emphasize the importance of institutional design, and they express great hope for the potentially productive role that could be played by administrative law and the modern regulatory state in helping to achieve a more responsive legal system.

In my view, Nonet and Selznick's work strongly suggests that interpretive methodology is properly considered *a form of law*. The real question is whether our legal system's current approach to interpretive methodology should be retrograded to fit within the paradigm of autonomous law, or whether it should be allowed to continue to operate in a relatively *responsive* fashion. The proposals to dumb down statutory interpretation are literally reactionary because they are seeking to transform interpretive methodology into a less advanced form of autonomous law. In contrast, the federal judiciary's current approach and my proposed understanding are better characterized as instantiations of responsive law because they seek to counteract the shortcomings of an excessive attachment to rules and promote a more effective and responsive legal system. The proponents of the reform proposals at issue are evidently concerned that the exercise of judicial discretion in statutory interpretation could lead to "repressive law" or tyranny. While Nonet and Selznick recognized that responsive law is relatively "risky," and that it would not necessarily be advisable in societies with weak legal cultures or public institutions, it is vital to understand that there is a world of difference between the official use of discretion to maintain the state's authority and the official use of discretion to prevent the arbitrary domination of its people. The latter, by definition, promotes freedom and democracy, whereas the former does not.

* * *

From a broader perspective, it bears noting that the American legal system contains both autonomous and responsive features. When lawmakers have explicitly resolved the precise question that has arisen in adjudication, the traditional sources of substantive law (i.e., the Constitution, statutes, and the common law) are thought to establish authoritative rules that provide fixed answers. The role of the judiciary is to implement those rules and thereby to respect the autonomy of the law. Nonetheless, when lawmakers have not explicitly resolved the precise question at issue or circumstances have materially changed, and the applicable law is therefore ambiguous, agencies and courts can and should implement or interpret the law in a responsive fashion. Agency action and interpretive methodology are therefore *distinct forms of law* in the modern regulatory state, and they should be recognized in the following new legal hierarchy: (1) Constitution, (2) interpretive methodology, (3) statutes, (4) agency action, and (5) common law.

[311] *Id.* at 104; *see also id.* at 104-13 (explaining responsive law's advantages and limitations).

D. *Interpretation As Contestatory Democracy*

Faithful agent theories of statutory interpretation cannot eliminate judicial discretion in hard cases. Instead of viewing this as a problem for democracy, we should recognize that the point of this form of government is to prevent the possibility of domination, and that statutory interpretation can affirmatively promote democracy when an issue has not been resolved in a reasoned fashion by Congress or an agency. In order to perform this function, statutory interpretation must take place in an information-rich environment in which decision-makers consider a wide range of interests and perspectives. Courts should be encouraged to engage in practical reasoning and expected to have differences of opinion. Although interpretive methodology is influenced by the Constitution and Congress's intent regarding interpretive practices, it is not tightly controlled by those sources, and the methodology that is used by one court is not binding on other courts in subsequent cases. Interpretive methodology should be understood as a distinct form of law, which falls in between the Constitution and statutes in a new legal hierarchy for the regulatory state. This pragmatic approach to interpretive methodology helps to make our entire legal system more responsive.

This theory would not make much sense, however, if the function of statutory interpretation were merely to ascertain *the meaning of the law*. That idea, while admittedly conventional, is based on precisely the sort of legalism that my vision of statutory interpretation rejects, because it falsely assumes that law has "a static, given, autonomous, seamless, and complete nature."[312] This traditional view should be discarded, and we should recognize that the central function of statutory interpretation by federal courts in the modern regulatory state is to provide individuals and groups with opportunities to contest the validity of particular exercises of governmental authority.[313]

I have recently explained in other work that most issues of statutory interpretation in federal court arise in the context of challenges to the validity of agency action.[314] One party is claiming that the government has exceeded the scope of its lawful authority, while the government is contending that the manner in which it has chosen to implement a statute is both legally

[312] West, *supra* note 252, at 120.

[313] *Cf.* Solan, *supra* note 11, at 748 ("It is not unusual to speak of a statute's meaning, but determining meaning is not really the task at hand in statutory interpretation. What judges do in deciding statutory cases is to make a judgment about whether a law applies to the facts of a case and, if so, how it applies."). For other recent discussions of the distinction between linguistic meaning and legal content, and the highly complex and normatively controversial relationship between them, see Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217 (Andrei A. Marmor & Scott Soames eds., 2011), and Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479 (2013).

[314] Staszewski, *supra* note 27, at 227-28, 246-47.

permissible and reasonable as a policy matter. When a court decides such a case or controversy, it is resolving a "contest" over the permissible scope of governmental authority. Statutory interpretation in federal court is therefore typically a species of judicial review of agency action—and a prototypical example of a mechanism of contestatory democracy. Moreover, this conception of statutory interpretation also holds in most cases where an administrative agency is not involved, including litigation challenging the government's understanding of criminal statutes.

My prior work provides a detailed discussion of the respective roles of Congress, agencies, and courts in making and implementing law from this perspective,[315] and I will not repeat that analysis here. Instead, I will simply provide a watchword for each of the respective institutions: in sum, Congress should be deliberative; agencies should be dynamic; and courts should be practical if we want to avoid arbitrary domination by the state. While the meaning of a statute is important and should generally be followed, a host of other factors will ordinarily be relevant when agencies and judges make their interpretive decisions, including the legislative history of the statute, its underlying purposes, applicable legal precedent, canons of construction, constitutional norms, related statutory provisions and common law principles, a potentially broad range of policy considerations, and how things have changed since a statute was enacted.[316] From this perspective, neither agencies nor courts are "ascertaining the meaning of the law" when they interpret statutes in the modern regulatory state. Rather, agencies are carrying out their delegated authority to implement statutory programs, while courts are generally reviewing the legality of an agency's decisions.[317] Agencies are making policy decisions within the constraints provided by Congress, and the judiciary is providing the people with opportunities to contest the validity of those exercises of governmental authority.[318] Requiring federal courts to follow a consistent and uniform set of interpretive rules, which would necessarily foreclose access to potentially relevant information or views, would undermine statutory interpretation's central function in the modern regulatory state, and subject litigants to the possibility of domination in ways that would severely undermine democracy.

IV. REJECTING THE TREND

The previous Part provides a competing vision of statutory interpretation and the rule of law, which explains why the recent proposals to dumb down

[315] *See id.* at 249-78.

[316] *Id.* at 298.

[317] *See* Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, 2009 MICH. ST. L. REV. 89, 119 (explaining that "[n]either [the court nor the agency] is trying to figure out what the statute means" because "[t]he agency is making policy, [and] the court is ensuring that the agency has not abused its discretion in doing so").

[318] Staszewski, *supra* note 27, at 298.

statutory interpretation are fundamentally misguided and should be rejected. Rather than trying to eliminate judicial discretion by adopting a simple and uniform approach to statutory interpretation that would be legally binding and external to a judge's sense of the best way to resolve a case, I have suggested that courts should resolve hard cases through the use of practical reasoning. This pragmatic approach provides litigants with meaningful opportunities to contest the validity of governmental authority, and thereby allows courts to avoid the possibility of arbitrary domination by the state, while respecting the competing interests and perspectives of different litigants and judges. This approach improves the responsiveness of law and promotes fundamental principles of republican democracy.

This Part briefly returns to each of the proposals at issue to make some related observations about the extent to which interpretive methodology can or should be simple or uniform. It closes by suggesting that provisional dialogues by and among different centers of power better reflect the nature of law in the modern regulatory state than artificial efforts to achieve simple, predictable, and uniform final answers to our most pressing legal or social problems. Unlike recent proposals to dumb down statutory interpretation, the existing interpretive regime correctly reflects this insight.

A. *Interpretive Guidance*

While some scholars have suggested that "the interpretation wars" could be ended by Congress's enactment of federal rules of statutory interpretation, it is more likely that codified rules of statutory interpretation are "advisory" by their very nature. Most of the codified interpretive rules that have been adopted by American states or foreign countries explicitly state that this is the case.[319] Moreover, most interpretive codes are too general, prosaic, or eclectic to exert significant influence over how the judiciary decides particular statutory cases.[320] Finally, as explained more fully below, courts generally do not, frequently cannot, and probably will not consistently follow codified interpretive rules with which they disagree.

First, as a descriptive matter, courts do not consistently follow codified interpretive rules with which they disagree.[321] Professor Gluck has provided detailed case studies of recent events in Texas and Connecticut that vividly illustrate this phenomenon.[322] The state legislature in Texas has adopted codified interpretive rules that explicitly endorse an eclectic approach to statutory interpretation and that authorize the state judiciary to consider, among other things, the legislative history and purpose of a statute, even when the text

[319] *See* Romero, *supra* note 46, at 217 & nn.27-28 (citing examples).

[320] *See id.* (providing examples of states that have merely codified common law canons of interpretation).

[321] *See generally* Widman, *supra* note 268.

[322] Gluck, *supra* note 8, at 1785-97.

is unambiguous.[323] Nonetheless, the Court of Criminal Appeals, which is the highest court in Texas for criminal matters, has explicitly refused to consider extrinsic sources of statutory interpretation in the absence of textual ambiguity, and has chosen instead to follow a modified textualist methodology.[324] The Court of Criminal Appeals has justified its departure from the state interpretive code by claiming that legislative efforts "'to control the attitude or the subjective thoughts of the judiciary' violate the separation of powers doctrine."[325] Gluck reports that the Texas Supreme Court, which is the state's highest court for civil matters, "is inconsistent" in its willingness to follow the state interpretive code, but that it "often reaches the same result [as the Court of Criminal Appeals], albeit more diplomatically."[326] Gluck provides other examples of both high courts deviating from the state interpretative code and examines the Fifth Circuit's approach to diversity cases involving the interpretation of Texas statutes. She amusingly reports that the codified rule authorizing consideration of extratextual evidence in the absence of ambiguity "has resulted in at least three different judicial approaches: the criminal court (and the Fifth Circuit, generally) ignores it, the Texas Supreme Court evades it, and the lower state courts forthrightly find statutes ambiguous in order to accommodate both the rule and the highest courts' objection to it."[327]

The situation in Connecticut involved the opposite ideological configuration, but nonetheless resulted in a similar judicial refusal to follow the rules of statutory interpretation that were codified by the legislature. This power struggle was initiated when the Connecticut Supreme Court announced in 2003 that it would no longer follow a plain meaning rule that precluded the consideration of extrinsic evidence of statutory meaning in the absence of textual ambiguity.[328] In response to this decision, the state legislature promptly enacted a statute, which prohibits consideration of "extratextual evidence" of statutory meaning if the "text is plain and unambiguous and does not yield absurd or unworkable results."[329] Despite the state legislature's rejection of the Connecticut Supreme Court's eclectic approach, Professor Gluck reports that "the Connecticut Supreme Court has been very reluctant to apply the overruling statute."[330] After examining all of the relevant cases, Gluck found that "as long as the parties are arguing over statutory meaning, as litigating

[323] TEX. GOV'T CODE ANN. § 311.023 (West 2013) ("In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the: (1) object sought to be attained . . . (3) legislative history . . . .").

[324] *See* Boykin v. State, 818 S.W.2d 782, 785-86 (Tex. Crim. App. 1991).

[325] *Id.* at 786 n.4 (quoting James C. Thomas, *Statutory Construction when Legislation is Viewed as a Legal Institution*, 3 HARV. J. LEGIS. 191, 211 n.85 (1966)).

[326] *See* Gluck, *supra* note 8, at 1789.

[327] *Id.* at 1790-91.

[328] *See* State v. Courchesne, 816 A.2d 562, 578 (Conn. 2003).

[329] CONN. GEN. STAT. § 1-2z (2003).

[330] Gluck, *supra* note 8, at 1794.

parties are likely to do, the Connecticut Supreme Court finds the text ambiguous and holds [the state interpretive code] inapplicable."[331] Moreover, she points out that because the court rarely finds the statute applicable, it has been able to avoid deciding "whether the statute unconstitutionally infringes on judicial authority, despite various hints in dicta that it might."[332] Gluck therefore correctly concludes that "Connecticut's example underscores that resistance to legislated rules is not a textualist-only phenomenon," and that the state judiciary's approach "has meant that the legislated rule has had almost no practical effect."[333] While Texas and Connecticut may provide especially stark examples, Gluck and other scholars have found that state courts, as well as courts in other countries, frequently ignore codified rules of statutory interpretation, and the conventional wisdom is therefore that "courts will find ways around legislated methodological rules they do not like, and that judges may be unwilling to relinquish authority over interpretive methodology."[334]

Even if courts sincerely wanted to follow codified rules of statutory interpretation, they would have significant difficulty in doing so. Commentators have pointed out that *the interpretive code must itself be interpreted*, and codified rules of statutory interpretation will frequently be ambiguous about whether they apply to a particular case at hand.[335] This "step zero" inquiry will necessarily turn on subsidiary questions that cannot be answered solely by reference to the interpretive code,[336] such as (1) whether the interpretive code should be applied retroactively; (2) whether the interpretive code is intended to displace other widely accepted norms of statutory interpretation, especially when those norms are constitutionally motivated; (3) how courts should prioritize codified rules of statutory interpretation and other widely accepted interpretive principles; (4) what should be done if there are internal conflicts within an interpretive code; and (5) what should be done if there are conflicts between the results that would be generated by applying the interpretive code and the ascertainable intent of the legislature in a particular case. These kinds of questions necessarily recreate

[331] *Id.* at 1794-96.

[332] *Id.* at 1797.

[333] *Id.*

[334] *Id.* at 1786; *see also id.* at 1824-29 (describing this broader trend); Tutt, *supra* note 269, at 2056-57 (recognizing that "often, these legislated interpretive rules fail," and reporting that this is widely believed to be a result of judicial "reluctance, resistance, and evasion" (internal quotations and citations omitted)); Widman, *supra* note 268, at 29 ("Regardless of claim type, judge selection, or even the substance of the code construction acts, the courts did not consistently follow these legislative directives as 'law,' which makes sense institutionally.").

[335] *See* Tutt, *supra* note 269, at 2059; Romero, *supra* note 46, at 228-47 (discussing "practical limitations on the impact of interpretive directions").

[336] *See* Tutt, *supra* note 269, at 2057-58 (discussing "the impossibility of infinite regress" in this context).

judicial discretion, and they have a tendency to counsel in favor of the narrow application of codified rules of statutory interpretation.

Andrew Tutt has therefore recently argued that "[t]his step zero problem ultimately means that binding interpretive methodologies are almost sure to unravel unless there is methodological consensus among past and future legislatures."[337] He illustrates this proposition by pointing out that courts could legitimately rely on the canon that the specific trumps the general to decline to apply interpretive codes when doing so would undermine the intent of the legislature that enacted the particular statute at issue.[338] He also points out that courts routinely decline to apply interpretive code provisions that appear to abrogate the rule of lenity by "imputing to the legislature that enacted the lenity-repealing statute an intent to comply with the settled rule-of-law norms that animate the rule of lenity itself"—and concluding "that the legislature that repealed the rule of lenity could not have intended the repeal to apply to the facts of this *particular* case."[339] Because cases of this nature appear to thrust judges into an irreconcilable clash between the competing desires of two different legislatures, Tutt claims that criticizing courts for willfully disregarding codified rules of statutory interpretation is often unwarranted, and that "[j]udges who fail to heed interpretive rules are often among the legislature's most faithful agents."[340] He therefore persuasively concludes that courts "may fail to implement binding methodological frameworks not because they won't, but because they can't."[341]

Finally, even if federal judges *could* consistently implement codified rules of statutory interpretation, I suspect that they probably *wouldn't*. Because interpretive methodology is necessarily connected to judicial reasoning and the resolution of particular cases, courts are likely to disregard, ignore, or avoid provisions of interpretive codes that would otherwise compel them to reach decisions with which they strongly disagree, especially when courts believe that their preferred interpretations promote constitutional principles or other widely accepted public norms. For reasons explained above, courts can frequently justify such decisions by relying on the intent of the legislature that enacted the interpretive code (e.g., the code was not intended to apply to this case), or by relying on the intent of the legislature that enacted the statute at issue (e.g., applying the code to this case would undermine the intent of the legislature that enacted this statute, and the specific trumps the general), as well as by giving greater weight to judicially created norms (e.g., applying the

[337] *Id.* at 2057.

[338] *See id.* at 2059-61.

[339] *Id.* at 2064; *see also* Romero, *supra* note 46, at 230-31 (describing how some courts "will consider the rule of lenity and similar interpretive principles to take precedence over any legislative interpretive direction").

[340] Tutt, *supra* note 269, at 2057.

[341] *Id.*

code to this case would raise serious constitutional difficulties that should be avoided).

Moreover, unlike constitutional authority, most federal judges probably believe that the mandatory enforcement of codified rules of statutory interpretation would conflict with "the judicial power,"[342] and, if push came to shove, they would probably hold many binding interpretive rules unconstitutional. This is unlikely to happen, however, because courts can typically avoid serious constitutional difficulties by ignoring, disregarding, or working around codified interpretive rules by using techniques like those described above. Indeed, they could explicitly invoke the avoidance canon to narrowly construe codified rules of statutory interpretation to avoid these more general constitutional concerns. The legal status of codified interpretive rules is therefore likely to remain ambiguous as a practical matter. In any event, the legislature cannot *force* the judiciary to follow codified rules of statutory interpretation, and in the absence of an established norm that such rules are legally binding, courts are likely to continue to disregard codified interpretive rules that would lead them to reach what they view as improper results.

This does not mean that codified interpretive rules cannot play a worthwhile function. They do, after all, express the enacting legislature's meta-intent, and the judiciary will often follow them when they do not conflict with a court's assessment of the best resolution of a particular case. More important, by providing courts with meaningful guidance regarding the legislature's interpretive preferences, codified rules of statutory interpretation provide relevant information that the judiciary should consider, even if the court ultimately declines to follow those directives in a particular case.[343] Accordingly, codified rules of statutory interpretation may provide a useful contribution to the ongoing, multi-institutional dialogue regarding how statutes should be interpreted in the modern regulatory state.

B. *Methodological Considerations*

For similar reasons, federal courts should treat prior methodological decisions with an appropriate degree of respect, but those decisions should only provide non-binding guidance for future cases. In a recent empirical study of the Supreme Court's review of legal challenges to administrative agency interpretations of statutes, Bill Eskridge and Connor Raso have distinguished "precedent," which provides formally binding rules that are applied predictably and systematically, from "canons," which are applied episodically and reflect policies rather than precise legal rules.[344] While most scholars believe that the Court's deference doctrine functions as *precedent*, Eskridge and Raso demonstrate that the Court treats the principles underlying its prior deference

[342] *See* U.S. CONST. art. III, §1.

[343] *See* Romero, *supra* note 46, at 243-47 (endorsing such a conception of codified interpretive directions).

[344] *See* Raso & Eskridge, *supra* note 64, at 1734-35, 1765-66.

decisions more like *canons*, because "deference regimes operate mostly as presumptions or balancing factors evaluated by the Justices in combination with a variety of considerations."[345] Eskridge and Raso find that while "members of the Court sometimes seem to treat deference regimes (especially *Chevron*) as matters of stare decisis, the data establish that neither the Court nor any one of its Justices actually does so in the general run of cases."[346] In other words, none of the Justices follow the Court's deference doctrine in a consistent and predictable way. Eskridge and Raso also claim that the *canonical treatment* of deference doctrine will almost certainly extend to other aspects of interpretive methodology because "statutory interpretation methodology does not seem susceptible to the rule-like approach of stare decisis"—it is fundamentally "a web of considerations with different and varying weights rather than a set of hierarchical rules."[347] Eskridge and Raso support this conclusion by pointing out that even the venerable "plain meaning rule" can be trumped by other considerations in sufficiently compelling circumstances,[348] and by arguing that the application of stare decisis will not "stick" on issues of interpretive methodology, partly because reliance interests are weaker in this context and partly because courts will not let "form" dictate "substance."[349] Federal courts simply will not let methodological constraints lead them into making unreasonable legal or policy decisions, and this creates a need for continuing flexibility in deciding how to decide statutory cases.

Similarly, Evan Criddle and I have recently argued that interpretive methodology is significantly different from substantive rules of law in several fundamental ways, and that it would be highly problematic for federal courts to attempt to freeze interpretive rules into place by applying stare decisis to prior methodological decisions.[350] In this regard, substantive rules of law typically involve first-order rules of conduct (such as "no dogs allowed"), whereas interpretive methodology is composed primarily of second-order "rules about rules" (such as "interpret the statute by following the plain meaning of its text"), or even third-order "rules about rules about rules" (such as "defer to an agency's reasonable interpretation of an ambiguous statutory mandate").[351] This severely complicates the prospect of giving stare decisis effect to interpretive methodology for several reasons. First, interpretive methodology involves higher stakes than substantive rules of law because interpretive rules are used to resolve disputes about the permissible scope of countless statutes in

[345] *Id.* at 1734-35.

[346] *Id.* at 1751.

[347] *Id.* at 1811.

[348] *See id.* at 1807 (discussing *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009), which invoked the avoidance canon to reach a result that was unsupported by the statutory text).

[349] *See id.* at 1808-11, 1815-17.

[350] Criddle & Staszewski, *supra* note 36, at 1591-95.

[351] *Id.* at 1591.

every policy area.[352] Second, interpretive methodology has a significant influence on judicial reasoning and the decisions that are reached *in cases of first impression*.[353] Any attempt to dictate a binding interpretive methodology could lead judges to reach outcomes with which they strongly disagree, and many judges will naturally and legitimately resist being forced into this type of "error." Third, interpretive methodology is "frequently intertwined with a judge's most fundamental beliefs about the rule of law and democracy," and judges may understandably resist being forced to decide cases of first impression in a manner that conflicts with their understanding of the proper role of federal courts in a constitutional democracy.[354] Fourth, the reliance interests that are served by the doctrine of stare decisis are typically weaker in the context of interpretive methodology than in the context of substantive law.[355] Finally, "the flexibility that is provided by the current approach to statutory interpretation [in federal courts], and the broad range of arguments that are available to litigants and judges, provide affirmative benefits that improve the resolution of particular cases and make our legal system more responsive."[356]

While I also agree with the bulk of Eskridge and Raso's analysis and conclusions, they seem to suggest that interpretive methodology cannot be given stare decisis effect because interpretive methodology resists such treatment, and their argument is therefore arguably circular.[357] Indeed, Professor Gluck purports to have disproved this "impossibility thesis" by providing examples of state courts that have given interpretive regimes stare

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[352] *Id.* at 1592.

[353] *Id.* at 1592-93.

[354] *Id.* at 1593. In an interesting twist on the debate over the value of proposals for methodological consensus, Maggie Lemos argues that interpretive methodology does not ordinarily dictate the outcomes in particular cases, but it does provide a seemingly neutral legal justification for more fundamental political views on the desirability of broader legal change. *See* Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849 (2013) (reviewing SCALIA & GARNER, *supra* note 15). While Lemos claims that "the political nature of methodological debates highlights the importance of consensus," she is skeptical of the likelihood "that methodological consensus will ever emerge organically from the federal courts." *Id.* at 904. She also suggests that efforts to treat methodology "as ordinary law" may be misguided because of the perceived stakes of the interpretive wars for the few judges who are committed to a particular methodology. *See id.* at 905-06. She concludes that by raising "the temperature on methodological debates that are already overheated," proposals for methodological stare decisis "may do more harm than good to the rule-of-law values of notice and predictability that the doctrine of stare decisis is designed to promote." *Id.* at 906.

[355] Criddle & Staszewski, *supra* note 36, at 1593-94.

[356] *Id.* at 1594-95; *see also* Leib & Serota, *supra* note 31, at 49, 53-58, 61-62.

[357] *See* Raso & Eskridge, *supra* note 64, at 1811 (claiming that "statutory interpretation methodology does not seem susceptible to the rule-like approach of stare decisis").

decisis effect.[358] Although those interpretive regimes have not been in place for long, and it is not clear that they will "stick" when the ideological composition of those courts changes,[359] the disparity in treatment raises interesting questions about the institutional and cultural differences between state and federal courts. In any event, it seems clear that federal courts currently refuse to give stare decisis effect to interpretive methodology, and that whether they should continue to do so is largely a normative question. Eskridge and Raso acknowledge that "norms matter" in thinking about the legal status of interpretive methodology,[360] and I would contend that federal courts should continue to treat interpretive methodology in a canonical fashion because doing so promotes all of the norms articulated in the previous Part of this Article. In particular, the current treatment of interpretive methodology recognizes the importance of avoiding the possibility of arbitrary domination, facilitates practical reasoning and the respectful treatment of diverse perspectives in interpretive litigation, allows statutory interpretation to be influenced by a wide range of public values without being unduly constrained by fixed legal norms, and allows statutory interpretation to function as a mechanism of contestatory democracy. In short, the current treatment of interpretive methodology creates a more responsive system of law, and thereby promotes freedom and democracy.

C. *Percolation in the Lower Courts*

So, federal courts are not required to follow codified rules of statutory interpretation, and interpretive methodology should not be given stare decisis effect, but shouldn't we at least encourage lower courts to follow a simpler approach to statutory interpretation than the U.S. Supreme Court? The normative perspective developed in Part III suggests not. Professor Bruhl builds his case for "hierarchical heterogeneity" in statutory interpretation on the hierarchical nature of the judicial process, the disparities in technical capacity and resources among different levels of courts, and differences in methods of judicial selection.[361] None of these differences justify restrictions

[358] Gluck, *supra* note 8, at 1772.

[359] Indeed, the Oregon Supreme Court has recently modified its interpretive framework, *see* State v. Gaine, 206 P.3d 1042, 1050 (Or. 2009) ("[W]e no longer will require an ambiguity in the text of a statute as a necessary predicate to the second step—consideration of pertinent legislative history that a party may proffer."), and the Michigan Supreme Court has reversed its position on the absurdity doctrine, *see* Cameron v. Auto Club Ins. Ass'n, 718 N.W.2d 784, 790-91 (Mich. 2006) (claiming that the absurdity doctrine was not implicated because there were numerous explanations for "why the Legislature could have intended the result the plain language of the statute requires"); Gluck, *supra* note 8, at 1807 (pointing to the four-justice majority who thought the rule against absurdities should be reinstated and who "argue[d] for the overruling of a precedent, not merely a change in nonbinding judicial philosophy").

[360] *See* Raso & Eskridge, *supra* note 64, at 1816-17.

[361] *See supra* notes 67-82 and accompanying text.

on the judiciary's authority to consider information that is relevant to the best resolution of any particular case. On the contrary, the adoption of lower standards for lower courts would inhibit the capacity of statutory interpretation to function as a mechanism of contestatory democracy, and would therefore undermine the central point of the enterprise.

As Bruhl points out, there is little doubt that lower court decisions are generally less visible than decisions of the Supreme Court, and that relevant information about the best resolution of a case is sometimes generated as a case moves up the appellate ladder.[362] Moreover, lower court decisions can certainly have an impact on the workload of higher courts, particularly when lower courts invalidate the work of legislatures or agencies or render decisions that create circuit splits.[363] While one reaction to these institutional realities would be to encourage lower courts to tread lightly and to try to avoid reaching decisions that rock the boat, the better view from my perspective is to recognize that lower courts are part of a broader legal process that is designed to facilitate reasoned deliberation about legal and policy issues by many actors in a variety of institutional contexts.[364] Thus, if lower courts invalidate statutes on constitutional grounds, deviate from a straightforward reading of statutory text to avoid constitutional doubts or absurd results, or invalidate agency action as arbitrary and capricious or contrary to law, those decisions should ordinarily be reviewed by a higher court. The institutional advantages of higher courts simply mean that they are well-situated to provide a second opinion and perform this reviewing function. Even if those decisions are not appealed, perhaps because the federal government wants to avoid creating adverse precedent, such decisions will typically generate further deliberation and activity within the executive branch and potentially within the legislature. While lower court decisions are less likely to capture the attention of Congress than higher court decisions, lower court decisions of the foregoing nature are specifically designed to promote constitutional norms and other public values. Those lower court decisions thereby protect individuals or groups from the possibility of arbitrary domination by the state, unless or until public officials with greater authority over the matter engage in focused deliberation on the precise questions at issue.

This type of focused dialogue is most likely to occur when a court reaches a decision that differs from the stable equilibrium established by legislatures, agencies, and other courts, and while lower courts should not be provocative without good reason, they should not hesitate to disagree with other public officials or create circuit splits on issues that generate reasonable differences of

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[362] Bruhl, *supra* note 13, at 459-65.

[363] *See id.* at 465-69.

[364] *See* Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 487-88 (2012) (explaining that percolation promotes deliberation between and among governmental institutions and thereby promotes core democratic values).

opinion. This is precisely how important legal and policy issues "percolate" within the federal judicial system,[365] and why the Supreme Court can ultimately resolve hard cases in a reasoned fashion with the benefit of the broad range of views and perspectives that were expressed or developed while the issue was working its way up the judicial ladder.[366] Of course, if lower courts agree with the government's position, the opportunity for contestatory democracy still improves the democratic legitimacy of the state's exercise of authority,[367] and the losing party remains free to seek appellate review of that decision. There is, however, no reason to artificially restrict the nature of the interpretive arguments that can be presented by the parties, or relied upon by the courts, during the early stages of the legal process.

Higher courts may sometimes have resource advantages that allow them to give more careful consideration to a wider range of relevant information, but that does not mean that lower courts should be precluded from considering relevant information when it is available to them. Moreover, the resource limitations of lower courts are certainly not a valid reason for precluding *the parties* from presenting relevant information or arguments about the best resolution of a case *in their briefs*. Professors Bruhl and Vermeule both seem to overstate the difficulties faced by courts that are willing to consider eclectic sources of information and engage in practical reasoning, because they virtually ignore the role that the parties play in litigation. Lower courts, in particular, do not interpret statutes on a "blank slate," by conducting independent research from scratch on every potentially relevant line of inquiry. Rather, they rely primarily on the briefs and arguments of the parties to reach a decision about the best resolution of the case, and they write an opinion based largely on that information. While courts almost certainly conduct independent research to verify or supplement the information that is provided by the parties, they are also expected to be responsive to the arguments of the parties under traditional theories of adjudication.[368] The traditional role of a judge in adjudication is entirely compatible with an understanding of statutory

[365] *See* Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 699 & n.68 (1984).

[366] From this perspective, higher courts should generally treat the decisions of lower courts with respect, and higher courts should feel free to rely on those decisions when they are persuasive. *Cf.* Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851 (2014) (examining the role of lower court precedent in the Supreme Court's decision-making).

[367] *See* Ronald J. Krotoszynski, Jr., *The Unitary Executive and the Plural Judiciary: On the Potential Virtues of Decentralized Judicial Power*, 89 NOTRE DAME L. REV. 1021, 1053 (2014) ("The system places a premium on disparate decision-makers all reaching the same conclusion—when this occurs, the decision enjoys both great formal scope of application and legitimacy.").

[368] *See* Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 137-60 (2005) (discussing the expected role of courts under traditional models of adjudication).

interpretation as contestatory democracy—where the function of interpretive litigation is to give individuals or groups an opportunity to challenge the validity of governmental authority. It would therefore be fundamentally illegitimate for courts systematically to disregard or ignore the views or perspectives of the parties in reaching their decisions.

The disconnect between these proposals to dumb down statutory interpretation and the actual nature of interpretive litigation is magnified in the modern regulatory state, where agencies are frequently parties, and the federal government is typically represented by the Department of Justice. The Justice Department is a repeat player in interpretive litigation involving major regulatory statutes, and it does not need to reinvent the wheel or conduct research from scratch in most of its cases. Rather, it can compile the complete legislative and regulatory histories of those statutes, along with any other information that would generally be relevant in interpretive litigation. I know from personal experience that lawyers representing the federal government in interpretive litigation in federal district court can walk over to "main Justice" to read the collected legislative history of major regulatory statutes before writing their briefs on many interpretive issues. Of course, regulatory agencies also have the resources and incentives to compile similar information on all of the major statutes they implement. The point is that economies of scale encourage the federal government to compile the type of information that is needed to interpret regulatory statutes in a pragmatic fashion. As a result, Justice Department briefs routinely provide the court with a detailed "statutory background" and "regulatory background" before addressing the precise questions at issue in the case. The court will therefore frequently have this information (as well as the relevant citations) as a matter of course in cases that require the interpretation of regulatory statutes, without exerting any time or effort beyond reading the briefs.[369]

[369] My personal experience and intuition regarding the relative ease with which the federal government can brief the legislative history of a statute is strongly supported by Nicholas Parrillo's recent study of the rise of legislative history in federal courts. Parrillo finds that the use of legislative history almost suddenly became routine around 1940 as a result of the work of the newly expanded New Deal regulatory state, which "was the first institution in American history capable of systematically researching and briefing legislative discourse and rendering it tractable and legible to judges on a wholesale basis." Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. 266, 266 (2013); *see also* Eskridge, *supra* note 233, at 425 ("I have read all the briefs filed by the Solicitor General supporting an agency interpretation in hundreds of Supreme Court cases between 1984 and 2006. Upon reading these cases, my judgment is that the agency briefs were, virtually without exception, most useful discussions of legislative history, and that executive department lawyers were skilled and relatively scrupulous in discovering and analyzing legislative history."). In any event, my primary point is that one cannot properly assess the costs associated with competing methods of statutory interpretation without considering the role of the parties.

This insight suggests that we should worry less about the resource disparities between different levels of federal courts and more about the resource disparities that often exist *between the parties*. When one party has better access to information than her opponent, and the party with greater resources has potential incentives to present selective information to the court, there is a danger that the court could be swayed to reach a decision that differs from the choice that would be made with full information. Moreover, this problem is less likely to occur at higher levels of the federal judiciary because cases that are pursued on appeal tend to have more resources devoted to them.[370] While resource disparities pose serious problems for many aspects of litigation,[371] the ubiquity of the problem does not mean that we should not be concerned about its potentially negative impact on statutory interpretation. There are a couple of reasons to believe, however, that the problem may be less significant in this context than in many others. First, the Justice Department has an ethical duty of candor, and while the government usually has no obligation to help the opposing party put its best foot forward, it cannot affirmatively mislead the court either.[372] Second, the parties who challenge the government's understanding of regulatory statutes by seeking judicial review of administrative action are frequently well-financed regulated entities.[373] The opposing party therefore frequently has more resources at its disposal than the lawyers who are representing the federal government. Indeed, the propensity of regulated entities to seek judicial review of agency action is widely believed to have contributed to the ossification of informal rulemaking by administrative agencies, in a closely related context.[374]

Resource disparities between parties also pose a significantly less daunting problem if we return to thinking about statutory interpretation as contestatory democracy from a systemic perspective. Contestatory democracy is largely about providing individuals or groups with meaningful opportunities to be heard. We should therefore not preclude those individuals or groups from providing the information and arguments they find most persuasive. They should also be able to devote whatever resources they can to put their best feet forward. If resource constraints limit the quality of their briefing, that is unfortunate, but it does not change the fact that they have had an opportunity to

[370] *See* Bruhl, *supra* note 13, at 470-73.

[371] *See, e.g.*, Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

[372] *See, e.g.*, United States v. Shaffer Equip. Co., 11 F.3d 450, 457 (4th Cir. 1993) (finding that government lawyers owed the court a general duty of candor).

[373] *See* Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1314-18 (1998) (describing "structural biases" of litigation and claiming that challenges to regulation "are overwhelmingly" brought by regulated entities).

[374] *See, e.g.*, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995).

challenge the legality of public authority. Moreover, they can pursue an appeal if they have the will and the way, and the case may come out differently in another judicial forum. The creation of a split within the lower courts would, in turn, likely facilitate the type of dialogue described above, and potentially result in an eventual Supreme Court decision on the issue. If that were to occur, the full range of interests and perspectives would likely be presented to the Court by the parties and a host of amici, who would all have had the opportunity to learn from the deliberations that already occurred in the lower courts.[375]

In any event, Professors Bruhl and Vermeule both recommend resolving ambiguities in the surface meaning of statutory text by *deferring to the views of administrative agencies*, and Bruhl claims that lower courts should be even more deferential than higher courts.[376] This recommendation is unlikely to alleviate the resource disparities that sometimes exist between the Justice Department and its adversaries in litigation. Moreover, if lower federal courts declined to provide meaningful review of the quality of an agency's reasoning, they would also be depriving the people who are challenging the exercise of public authority of an opportunity for contestatory democracy, and they would thereby be undermining the central function of statutory interpretation in the modern regulatory state, *especially* if such decisions are not appealed. The proposals to dumb down statutory interpretation are so heavily focused on finding the cheapest and easiest way to ascertain the meaning of the law, that they forget that the underlying lawsuits are typically brought *to challenge the validity of agency action*.

Should a judge's method of selection influence her interpretive methodology? This is an interesting and complicated question, but for present purposes a simple "probably not" should suffice. This answer is partly a function of my sense that the political accountability of elected judges is generally weak and potentially problematic, and that courts can be held *deliberatively* accountable by giving reasons for their decisions.[377] This answer is also partly a function of my view that courts should engage in practical reasoning when they interpret statutes, and that they should therefore make decisions that reflect their understanding of the best answer on the merits under the circumstances. My sense is that although federal judges with life tenure may be better situated to achieve this ideal based on their relative insulation

[375] *See* Krotoszynski, *supra* note 367, at 1082-83 (recognizing that the structure of the federal judicial system "greatly enhances process values and diffuses judicial power in a way that advances deliberation, reason-giving, and consistency among and between courts," and claiming that "before we embrace efforts to promote higher levels of uniformity, to be achieved more quickly and more reliably, we should not fail to appreciate some of the deliberative benefits of the current system").

[376] Bruhl, *supra* note 13, at 494-95; *see also* Aaron-Andrew P. Bruhl, *Hierarchically Variable Deference to Agency Interpretations*, 89 NOTRE DAME L. REV. 727 (2013).

[377] Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253 (2009).

from political pressure, it is an ideal to which all judges should aspire, regardless of their method of appointment or removal.

D. *The Fatal Flaws of the New Textualisms*

My proposed vision of statutory interpretation as a mechanism of contestatory democracy helps to illuminate the most fundamental problems with textualism.[378] Simply put, the function of statutory interpretation in the modern regulatory state is not simply to ascertain the meaning of the law, but rather to provide the people with opportunities to contest the validity of governmental action. While the semantic meaning of the statutory text is always important, and perhaps frequently dispositive, courts should also consider a variety of other information before making a final decision in most statutory cases. By considering the interests and perspectives of individuals or groups who stand to be adversely affected by the application of governmental authority, and by assessing and responding to their arguments in a reasoned fashion, the judiciary can limit the potential for arbitrary domination by the state and thereby promote democracy.

In contrast, textualism's dogmatic focus on ascertaining "what the law as enacted meant" is fundamentally misguided because it eliminates the contestatory dimension of statutory interpretation. This is a product of textualism's proclaimed effort to preclude courts from openly considering the policy consequences of their decisions, and it is operationalized by insisting that statutory meaning is fixed when the law is enacted and related efforts to limit the scope of statutory ambiguity. Textualism further erodes the contestatory dimension of statutory interpretation by privileging historical linguistic analysis and a statute's semantic context over the enacting legislature's policy goals and other contemporary public norms when attributing meaning to a statute. This problem is significantly compounded, moreover, when courts purport to rely on artificial decision-making frameworks to ascertain the meaning of the law or refuse to conduct meaningful review of administrative action.

If the function of statutory interpretation is to provide the people with opportunities to challenge the validity of governmental authority, it would be particularly problematic for courts to defer to any "permissible" resolution of a statutory ambiguity by an administrative agency, irrespective of whether the agency engaged in reasoned decision-making under the circumstances. Rather, courts should sustain challenges to the validity of agency action unless Congress explicitly resolved the precise question at issue in accordance with the agency's decision, or the agency adequately considered the competing interests and perspectives and reached a reasoned decision on how to implement an ambiguous statute in light of the available information. Otherwise, the people could be harmed by the state as a result of semantics or

[378] *See* Staszewski, *supra* note 27, at 295-99.

interest group politics, without any governmental institution making a reasoned determination that such treatment would advance the public interest.

Courts that follow a strict textualist methodology will therefore be prone to making democratically illegitimate decisions. This is hardly surprising, however, since new texualist theorists have an impoverished view of the requirements of democratic legitimacy, and tend to disregard the potential role of courts in improving democracy. The vision of statutory interpretation as contestatory democracy charges courts with the obligation to listen to the interests and perspectives of individuals and groups whose voices were not heard in the legislative or administrative processes, and to reach decisions that are responsive to their legitimate concerns. The federal judiciary can therefore protect the people from the possibility of arbitrary domination by the state. Professor Vermeule would apparently discount these potential benefits as speculative, and focus instead on limiting the costs of statutory interpretation and minimizing the possibility of judicial mistakes.[379] Meanwhile, Justice Scalia contends that "'one of the chief functions of our courts is to act as an animated and authoritative dictionary.'"[380] While buying and using a dictionary may be cheaper and easier than protecting the people from the possibility of arbitrary domination by the state, this approach does nothing to promote freedom in our society, and it therefore misses the entire point of statutory interpretation in a republican democracy.

E. *Institutional Dialogues*

This Part has provided reasons to doubt that statutory interpretation can or should be made substantially simpler or more predictable. If this thesis is correct, the prospects for establishing an interpretive regime that would allow Congress to better predict how its statutes will be implemented in hard cases are not very good. This is not a problem from the standpoint of contestatory democracy. Contrary to the view of the advocates of dumbing down statutory interpretation, there is already an interpretive regime that provides sufficient guidance to Congress regarding how its work is likely to be interpreted. Most important, Congress knows that when it has explicitly resolved a specific policy issue in a reasoned fashion during the lawmaking process, agencies and courts are obligated to respect that decision based on the principle of legislative supremacy. When a statute is ambiguous regarding the precise question at issue, however, Congress knows that agencies will typically implement their own views of the best course of action on the merits under the circumstances, and that courts will review those decisions for a reasoned explanation. Because different courts may have different views of the validity of agency action, and because Congress could amend a statute definitively to resolve the matter (or administrative agencies could change their minds), the

[379] *See supra* Part I.D.

[380] SCALIA & GARNER, *supra* note 15, at 415 (quoting LORD MACMILLAN, LAW AND OTHER THINGS 163 (1938)).

entire process is best understood as an ongoing, multi-dimensional institutional dialogue.[381] Provisional dialogues by and among different centers of power better reflect the nature of law in the modern regulatory state than artificial efforts to achieve simple, predictable, and uniform final answers to our most pressing legal or social problems.

CONCLUSION

This Article has aimed to dampen the recent enthusiasm for making statutory interpretation simpler and more uniform. After describing several prominent theories or proposals that exemplify this trend, the Article explained that they are essentially driven by a perceived need to constrain judicial discretion, a desire to make interpretive methodology more rule-oriented, a belief that the traditional hierarchy of legal sources is exclusive, and an assumption that statutory interpretation's function is to ascertain the meaning of the law. Because these beliefs and assumptions are not unusual, the proposals to dumb down statutory interpretation could very easily continue to gain adherents. Yet, many knowledgeable commentators and judges may be uncomfortable with the idea of adopting a uniform and binding set of relatively mechanical rules of statutory interpretation, even if it is difficult to pinpoint the precise reasons for this discomfort.

This Article has attempted to explain this discomfort by challenging each of the foregoing assumptions. In particular, it has emphasized the importance of avoiding the possibility of arbitrary domination by the state and a belief in the value of practical reasoning and diverse perspectives within the interpretive enterprise. It has also proposed a new hierarchy of law for the modern regulatory state, and argued that the function of statutory interpretation in our contemporary system of governance is to provide citizens with opportunities to challenge the validity of governmental action. From this perspective, the proposals to dumb down statutory interpretation are fundamentally misguided, and there are serious limitations on the extent to which statutory interpretation methodology can or should be simple or uniform. Finally, the Article has sought to show that a relatively ambitious judicial role in statutory interpretation promotes a normatively attractive view of democracy and the rule of law, and that it is ultimately the more traditional faithful agent theories, and particularly the new textualism, that suffers from a democratic deficit.

[381] *Cf.* Eskridge & Frickey, *supra* note 16 (proposing a theory of law as the equilibrium that results from a balance among competing forces and institutions).