Fall 2019

Statutory Realism: The Jurisprudential Ambivalence of Interpretive Theory

Abigail R. Moncrieff
Cleveland State University College of Law, a.moncrieff@csuohio.edu

STATUTORY REALISM: THE JURISPRUDENTIAL AMBIVALENCE OF INTERPRETIVE THEORY

Abigail R. Moncrieff[*]

ABSTRACT

In the renaissance of statutory interpretation theory, a division has emerged between "new purposivists," who argue that statutes should be interpreted dynamically, and "new textualists," who argue that statutes should be interpreted according to their ordinary semantic meanings. Both camps, however, rest their theories on jurisprudentially ambivalent commitments. Purposivists are jurisprudential realists when they make arguments about statutory meaning, but they are jurisprudential formalists in their views of the judicial power to engage in dynamic interpretation. Textualists are the inverse; they are formalistic in their understandings of statutory meaning but realistic in their arguments about judicial power. The relative triumph of textualism has therefore been an importantly incomplete triumph of formalism, and it has left judges and scholars alike in a position of jurisprudential incoherence. This article demonstrates the ambivalence of modern interpretive theory and then offers some initial thoughts on the harms of this ambivalence to the rule-of-law values that both sides are trying to advance.

---

* Abigail R. Moncrieff is a Visiting Scholar at the University of Texas at Austin Law School. She thanks the faculties of UT Austin and Harvard Law Schools, especially Einer Elhauge and Adrian Vermeule, for helpful discussions and comments on earlier drafts.

TABLE OF CONTENTS

INTRODUCTION

In the late 1980s, statutory interpretation theory enjoyed a renaissance. A new theory—a reborn textualism—entered the scene to compete with the then-dominant puposivism, and the literature exploded. The public leader of new textualism, the late Justice Antonin Scalia, argued that courts ought to enforce the ordinary semantic meanings of statutory provsions rather than engaging in quixotic searches for legislative intent.[1] Scalia thus presented the first challenge to standard interpretive theory since Karl Llewellyn's evisceration of the

1. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517-18 (1989) [hereinafter Scalia, *Judicial Deference*].

canons of construction in 1949.[2] At around the same time, Guido Calabresis and William Eskridge proposed a new form of purposivism—distinct from the prevailing 1960s Legal Process school[3]—that would allow realatively aggressive judicial updating of statutory operation over time, without legislative amendment.[4] The 1980s thus lanched a new era of statutory interpretation theory: "from the big sleep" of the 1960s and 1970s "to the big heat" of the 1980s and 1990s, as Phillip Frickey called it.[5]

Indeed, Frickey identified the "big heat" more than twenty-five years ago.[6] By now, statutory interpretation theory has gotten so hot that some of its theorists have started leaving the kitchen.[7] Others have started wondering whether there's actually any *there* there,[8] asking whether the epic battle between purposivists and textualists centers on genuine jurisprudential disagreements or whether textualism is merely a clever guise for purposive, value-based judgments.[9]

---

2. *See generally* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950) [herinafter Llewellyn, *Theory of Appellate Decision*].

3. *See generally* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1378 (William N. Eskridge, Jr. & Philip P. Frickey, eds.) (1958)

4. *See* GUDIO CALABRESI, A COMMON LAW FOR THE GE OF STATUTES (1982); *see also* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 21-22 (1988) (arguing in favor of a "nautical" rather than "archaeological" approach to statutory interpretation that would take present circumstances more seriously than enactment-era circumstances in the interpretation of statutory meaning); *see generally* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, U. PA. L. REV. 1479 (1987) [herinafter Eskridge, *Dynamic Statutory Interpretation*].

5. *See* Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 241-44 (1992)

6. *See id.* at 241 n.*.

7. *See generally* Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010). This citation is somewhat tongue-in-cheek, but I have been told by several colleagues that I will be groaned out of the room if I write one more paper on *Chevron* deference, given that the theory seems exhausted. *See also* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298 (2018) ("[T]he Court and many academics have been mired for decades in a by-now boring debate about 'textualism' versus 'purposivism.'").

8. *See* Gary Lawson, *Did Justice Scalia Have a Theory of Interpretation?*, 92 NOTRE DAME L. REV. 2143, 2143 (2017).

9. *See* Richard H. Fallon, Jr., *Three Symmetries between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Roles of Values and Judgment within Both*, 99 CORNELL L. REV. 685, 685 (2014); *see also* John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 75 (2006) (defending textualism's distinctiveness against challenges posed by Larry Alexander & Saikrishna Prakash, *"Is*

Despite the explosion of theoretical writing in statutory interpretation, however, scholars have failed to notice a foundational ambivalence in interpretive theory.[10] Both camps of modern theorists rest their arguments on jurisprudentially contradictory commitments. New textualists and new purposivists alike ground half their theories in jurisprudential realism[11] and half in jurisprudential formalism.[12] When purposivists confront the nature of a statutory instrument, they make realistic arguments.[13] They argue that the true meaning of a statute is its *operational* meaning—its accomplishment of particular real-world ends. When the same purposivists confront the nature of the judicial power to interpret statutes, however, they make formalistic arguments.[14] They claim that the scope of the judicial power is constitutionally defined—either a "cooperative partner" or a "faithful agent" model—and that the judicial role was enshrined as such in Article III at the moment of the constitutional founding. They thus urge a static, non-operational, non-purposive understanding of judicial power even while urging dynamic, operational, and purposive understandings of statutory meaning.

Textualists similarly switch between realism and formalism. When textualists confront the nature of a statutory instrument, they treat the statute formalistically.[15] They argue that a statute is a semantic command from the legislature, which courts and laypeople must obey

---

that English You're Speaking?" Why Intention Free Interpretation Is an Impossibility, 41 SAN DIEGO L. REV. 967, 974–78 (2004), and Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 353 (2005)).

10. One partial exception to this critique of the current literature is Abbe Gluck's recent work, which recognizes the limits of Scalia's formalism. *See* Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177 (2017); Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053 (2016). Gluck's critique of textualism, however, is centered on the distinction between rule-based decision (formalism) and discretionary or case-by-case decision (non-formalism) whereas my argument is centered on the distinction between the enforcement of a textual or semantic meaning (formalism) and the enforcement of an evolutive and operational meaning (realism). Furthermore, Gluck's critique addresses only half of the statutory interpretation divide; hers is a critique of textualism only while I identify jurisprudential ambivalence in both textualism *and* purposivism.

11. For a robust definition of jurisprudential realism, *see infra* Part I.A.

12. For a robust definition of jurisprudential formalism, *see infra* Part I.B.

13. *See infra* Part II.A.1.

14. *See infra* Part II.B.2.

15. *See infra* Part II.C.

regardless of the consequences. But when textualists turn to the judicial power, they make realistic arguments.[16] They claim that the court must limit itself to formalistic interpretation not because the textualist methodology is constitutionally required, but rather because a textualist method will prevent judicial error and promote better legislative processes.[17] Textualists thus urge a dynamic, operational, and purposive understanding of the judicial power—especially relative to the legislative power—even while urging a static, non-operational, non-purposive understanding of statutory meaning.

Perhaps one reason, then, for the growing sense of similarity between textualism and purposivism is that neither camp, as a whole, adopts a jurisprudentially coherent perspective.

This article highlights the jurisprudential ambivalence of several leading statutory interpretation theorists. Rather than surveying the entire literature, the article conducts an in-depth examination and critique of eight leading writers. On the purposivist side, the article demonstrates ambivalent commitments in Professor William Eskridge and Professor Einer Elhauge's writings, and it then contrasts their ambivalences with the pure realism of Judge Richard Posner's theory and the pure formalism of Professor Ronald Dworkin's theory. On the textualist side, the article highlights ambivalence in Justice Antonin Scalia, Judge Frank Easterbrook, and Professor Adrian Vermeule's theories, and it then contrasts their ambivalences with the pure formalism of Professor John Manning's writings.

Before demonstrating the realist and formalist elements of modern theories, however, the article must give precise definitional content to the terms "realism" and "formalism" since I use those terms to signify robust jurisprudential approaches. In modern writing, the terms realism and formalism are often used simplistically to distinguish "political" from "legal" or to distinguish "empirical" from "doctrinal" arguments, but in this article, I mean to use both terms to capture their deeper jurisprudential elements. The first part of this paper therefore carefully outlines both American Legal Realism and jurisprudential formalism. As in the section on modern interpretive theories, however, the article does not attempt a comprehensive literature review or historiography of realism or formalism; instead, the goal is to present the elements of realistic and formalistic jurisprudence that are most relevant and useful to understanding modern statutory interpretation. I therefore give

16. *See infra* Part II.C.
17. *See infra* Part II.C.1.

special attention to the theorists that have made the most significant contributions to the development of the American public law system. On the Realists' side, I focus on Karl Llewellyn, Max Radin, and James Landis; on the formalists' side, I focus on William Blackstone, Christopher Columbus Langdell, and Ronald Dworkin.

After outlining the fundamental features of realism and formalism and then tracing the adoption of both realistic and formalistic elements in modern statutory interpretation theory, the article offers some preliminary thoughts on the harms that might flow from jurisprudential ambivalence, arguing that such ambivalence undermines the very rule-of-law values that interpretive theory is trying to advance.

I. JURISPRUDENCE

"Realism" and "formalism" are both broad terms. As a result, both are susceptible to misunderstanding and manipulation. In fact, in the heyday of American Legal Realism, Karl Llewellyn famously denied that Realism constituted a single school of thought.[18] From the inception of the term, then, "realism" has captured a wide range of jurisprudential perspectives and techniques. "Formalism," for its part, has lived so many lives through the history of American jurisprudence—from William Blackstone's natural law formalism to Christopher Columbus Langdell's common law formalism to Ronald Dworkin's moral formalism to John Manning's public law formalism—that the general term can be hard to pin down. It is therefore important to give a detailed sketch of the jurisprudential ideas that I intend to convey with each term.

A. Realism

Although the 1930s Realist movement might not have constituted a single school of thought, Realist scholars did make distinctive contributions to jurisprudential theory. In my uses of the terms "realist" and "realism," I draw heavily on the terms' historical meanings. It is therefore worth reviewing the American Legal Realists' contributions in some detail. That said, however, I am not a historian, and my selection and characterization of Realist contributions will be largely

18. *See* Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1233–34 (1931) [hereinafter Llewellyn, *Realism About Realism*] ("One thing is clear. There is no school of realists. There is no likelihood that there will be such a school. There is no group with an official or accepted, or even with an emerging creed.").

reconstructive. My goal, in this and future work, is to advance a theory of statutory realism that is relevant for today: for the now-thriving administrative state that was barely nascent when the first Realists wrote. What follows, therefore, is neither a comprehensive survey of Realist writings nor a historiographic account of the selected Realists' contributions. It is instead a reconstructed vision of Realist jurisprudence, crafted to illuminate the role that 1930s Realism plays in statutory interpretation theory today.

The American Legal Realist movement made four broad claims: an epistemic claim about the indeterminacy of law, an empirical claim about the behavior of judges, a normative claim about the legitimacy of law, and an institutional claim about the capacity of courts. The Realists' normative and institutional claims—and the differences between those claims and the formalists' counterparts—will be the most important pieces for understanding the jurisprudential ambivalence of modern statutory interpretation theory, but because the normative and institutional claims flow from the epistemic and empirical claims, it is important to review all four.

The Epistemic Claim. The Realists' epistemic claim was that formal legal sources—including constitutional text, statutory text, rules of statutory construction, and common law precedents—are frequently indeterminate.[19] The Realists argued that, in contested cases, positive legal sources often (or perhaps usually or always) fail to dictate unique outcomes.[20] In many (if not all) cases, then, judges have flexibility to choose among multiple legally permissible and doctrinally defensible

19. *See, e.g.*, JEROME FRANK, LAW AND THE MODERN MIND 1–12 (1930); *see also, e.g.*, KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 22–23 (1960) [hereinafter LLEWELLYN, THE COMMON LAW TRADITION].

20. *See* BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 1, 1 (2010) ("[T]he legal realists discredited legal formalism, demonstrating that the law is filled with gaps and contradictions, that the law is indeterminate, that there are exceptions for almost every legal rule or principle, and that legal principles and precedents can support different results.").

results.[21] No single result is both legally required and epistemically discoverable.[22] As Karl Llewellyn articulated this point:

> The major defect in th[e] system [of precedent-based decision making] is a mistaken idea which many lawyers have about it—to wit, the idea that the cases themselves and in themselves, plus the correct rules on how to handle cases, provide one single correct answer to a disputed issue of law. In fact the available correct answers are two, three, or ten. The question is: *Which* of the available correct answers will the court *select*—and *why*? For since there is always more than one available correct answer, the court always has to select.[23]

Importantly, notwithstanding Llewellyn's assertion in this passage that "there is *always* more than one available correct answer,"[24] most Realists' epistemic claim was cabined to litigation that reached appellate review.[25] Indeed, read carefully, Llewellyn here said that there is "always" more than one answer to "a *disputed* issue of law,"[26] by which he probably meant a question raised in litigated appeals. The Realists did not argue that there was always more than one correct answer to every legal question that arises. Realists acknowledged that legal sources could give determinate answers to many legal questions, but they doubted that such questions would arise in litigation, especially at the appellate levels.[27] After all, litigants have little incentive to pursue their claims if the answers to their legal questions are obvious.

The Empirical Claim. Realism's empirical claim was that judges, confronted with multiple legally permissible results, will choose the result that seems most morally or politically legitimate, given the facts

---

21. This point is the one that H.L.A. Hart, as the foremost critic of Realism, termed "rule skepticism," and it is the Realist contribution that Hart most vehemently rejected. *See* H.L.A. HART, THE CONCEPT OF LAW, 136–41 (3d. ed. 2012). The epistemic claim is also, as we shall see, the Realist contribution that divides Scalia's interpretive theories from Realism despite Scalia's adoption of Realism's institutional claims. *See generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann, ed., 6th ed. 1998) [hereinafter SCALIA, A MATTER OF INTERPRETATION]; *see generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

22. *See* Llewellyn, *Theory of Appellate Decision*, *supra* note 2, at 396.

23. *Id.*

24. *Id.* (emphasis added).

25. *See* FRANK, *supra* note 19, at xxiv (6th prtg. 1949).

26. Llewellyn, *Theory of Appellate Decision*, *supra* note 2, at 396 (emphasis added).

27. *See id.*

of the case.[28] This claim was the core of the Realist movement: the claim that was common to all Realist scholars. As Brian Leiter put it, the "core claim" of Realism was that "in deciding cases, judges respond primarily to the stimulus of the facts of the case, rather than to legal rules and reasons."[29] In Llewellyn's terms, judges make use of "[t]echnical leeways" in the law—they mold the law to fit the case—whenever "the sense of the situation and the case call for [the] use [of such leeways]."[30]

It is this empirical component of Realism that modern scholars sometimes reduce to the (allegedly realist) slogan that "all law is politics," but the Realists' argument was more limited and nuanced than the slogan implies. First, as noted above, Realists cabined their claim to appellate cases.[31] They acknowledged that many legal questions have concrete answers in the law, but they noted that easily-determined questions rarely reach appellate review.[32] It was only appellate judges whom the Realists suspected of using extra-legal notions of justice or morality to decide cases.[33]

Second and more importantly, most Realists—with the notable exception of Jerome Frank[34]—did not primarily argue that courts, in the absence of binding legal rules, decide cases according to the judges' idiosyncratic political preferences.[35] The Realist hypothesis was that cases could be sorted according to "fact situations" or "situation types"—that, within broad doctrinal categories, judges reacted predictably to particular kinds of controversies—and that such fact-based sorting would provide greater predictability and transparency in the law than would the tradition of sorting by broad doctrinal abstractions.[36] Realist authors believed that, while case outcomes were not predictable according to doctrinal category alone, they could be predicted by the commercial norm,

28. Brian Leiter, *American Legal Realism*, *in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY, 50, 52–53 (Martin P. Golding & William A. Edmundson, eds., 2005) [hereinafter Leiter, *American Legal Realism*].

29. *Id.* at 52.

30. Llewellyn, *Theory of Appellate Decision*, *supra* note 2, at 396, 398.

31. *See id.* at 398.

32. *See id.*

33. *See id.* at 397.

34. *See* Leiter, *American Legal Realism*, *supra* note 28, at 52–54; *see also* FRANK, *supra* note 19, at 111.

35. *See* Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 470–71 (1988).

36. *See* Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 ETHICS 278, 281–82 (2001).

trade, industry, or situation type of the case.[37] As Llewellyn described this feature of Realist writing, Realists urged "the worthwhileness of grouping cases and legal situations into narrower categories than has been the practice in the past" because factual situations and commercial types best capture the causal determinants of appellate judicial decision.[38]

That said, however, doctrinal abstractions were not meaningless to the Realists; doctrine provided the language of justification that was required for *defending* particular outcomes, even when the outcomes were chosen for other reasons.[39] Furthermore, Realists hypothesized that the necessity of defending an outcome in doctrinal language would constrain the set of permissible outcomes.[40] The "two, three, or ten"[41] permissible results would be defined by the doctrine even though the judge might base her choice of one result among the "two, or three, or ten" on fact-based norms or values.[42]

The Normative Claim. The Realists' normative claim related to both the meaning and legitimacy of law—and, further (and more radically, at the time), to the *dynamic* legitimacy of law. Unfortunately, Realist writers blended views of law and legitimacy throughout their writings; they never articulated their normative theory with rigor or precision.[43] As a result, the normative dimension of Realism is often undervalued or misunderstood.[44] I reconstruct it here primarily from Llewellyn's survey of Realist writings.[45]

The Realists' claim with respect to meaning was that law is always a means to some social end, never an end in itself.[46] Realists rejected the

---

37. *See id.*

38. Llewellyn, *Realism About Realism*, *supra* note 18, at 1237.

39. *See* Singer, *supra* note 35, at 472.

40. *See id.*

41. Llewellyn, *Theory of Appellate Decision*, *supra* note 2, at 396.

42. *See* Singer, *supra* note 35, at 471–73.

43. *See* Leiter, *American Legal Realism*, *supra* note 28, at 58.

44. *See, e.g.*, *id.* at 58–59 (describing the Realists' normative view of *adjudication* (i.e. how judges ought to write about their decisions) without addressing the Realists' underlying normative view of legal legitimacy).

45. Morton Horwitz and others have been critical of Llewellyn's survey as a historical source, but as noted above, my goal here is not historical but rather reconstructive for modern relevance. Furthermore, as noted below, the normative aspects of Realism are an important common ground between Horwitz's and Leiter's understandings of Realism. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 160–210 (1992).

46. Llewellyn, *Realism About Realism*, *supra* note 18, at 1223 (arguing that Realists "view rules, they view law, as means to ends; as only means to ends; as having meaning

formalistic understanding that laws could be *merely* positive, moral, or theological commands, which could be justified by their pedigree alone. In other words, they denied that law's ultimate goal could ever be the mere expression or codification of a rule. For a Realist, law is not law unless it is attempting to effect some social end. As a result, Realists argued that law's purpose—the social end it is attempting to effect—is inextricable from its meaning.[47] To a Realist, without knowledge of the law's purpose, one cannot know its meaning; laws without purposes are meaningless.[48]

Given that Realists viewed laws exclusively as means to ends, they also (and more controversially) understood laws' legitimacy to depend on their accomplishment of their intended ends.[49] To a Realist, not only the meaning but also the *validity* of a law depends on its real-world consequences.[50] Laws' effects—not their moral or institutional pedigrees or their verbal formulations—constitute the exclusive lodestar for their legitimacy. As a result, Realists stressed not only the descriptive usefulness but also the normative importance of inquiry into laws' consequences. Such inquiry, they argued, was necessary to determine not only what the law is actually doing but also whether the law was doing what it ought to do—and therefore whether the law was what it ought to be.[51] As Llewellyn said, Realists urged "[t]he *temporary* divorce of Is and Ought" so that scholars could assess the law's consequences without "the intrusion of Ought-spectacles *during the investigation of the facts*."[52] But the investigation of facts was necessary, for Realists, in order to decide whether the law is doing what it ought and, if not, how the law ought to be changed.[53]

---

only insofar as they are means to ends"); Llewellyn, *Theory of Appellate Decision*, *supra* note 2, at 396 (arguing that the Realist era was experiencing a return to the "Grand Style" of the early Nineteenth Century, in which "nothing was good 'Principle' which did not look like wisdom-in-result for the welfare of All-of-us"); *id.* at 399 (arguing that in statutory construction as well as common law "the real guide is Sense-for-All-of-Us"); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 ("[L]aws are not abstract propositions. They are expressions of policy arising out of specific situations and addressed to the attainment of particular ends.").

47. *See* Llewellyn, *Theory of Appellate Decision*, *supra* note 2, at 400.

48. *Id.* ("If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense.").

49. *See* Llewellyn, *Realism About Realism*, *supra* note 18, at 1223.

50. *Id.* at 1236.

51. *See id.* at 1236–37.

52. *Id.*

53. *See id.* at 1237.

The third and final element of the Realists' normative claim—and the most radical part of Realist jurisprudence—related to the law's *dynamic* legitimacy. Realists argued that, when law is measured (as it ought to be) by its real-world effects, large swaths of the law are likely to be illegitimate at any given moment in time.[54] Because law moves slowly while postindustrial society evolves quickly, many laws become outdated and thus illegitimate over time. In other words, laws that accomplished desirable real-world effects ten years ago might have harmful real-world effects today, and laws are generally not updated frequently enough to maintain their beneficial real-world consequences. For the Realists, who were focused primarily on the common law system, the payoff of this point was an argument that judges should abandon outdated precedents. As we shall see, however, modern scholars have extended the idea to justify judicial updating of old statutes.[55]

Importantly, the Realists' normative claim is a meeting point between the Llewellyn/Leiter branch[56] and the Hale/Horwitz branch[57] of modern works in Realism.[58] For Leiter and Llewellyn, the primary focus of Realism was the descriptive agenda, which centered on an empirical understanding of adjudication, especially including the causal determinants of judicial decision.[59] But underlying that agenda was a strong normative belief that judges' decisions *should* be evaluated by the ends they accomplish for laymen.[60] It was because legitimacy depends on consequences that Llewellyn was so committed to studying the real-world

54. *See id.* at 1223 (As Llewellyn put it: "[Realist scholars] suspect, with law moving slowly and the life around them moving fast, that some law may have gotten out of joint with life. This is a question in first instance of fact: what does law *do*, to people, or for people? In the second instance, it is a question of ends: what *ought* law to do to people, or for them? But there is no reaching a judgment as to whether any specific part of present law does what it ought, until you can first answer what it is doing now.").

55. *See infra* Part II.B.

56. *See* Leiter, *American Legal Realism*, *supra* note 28, at 65 (critiquing Critical Legal Studies for putting too much emphasis on Hale, whom Leiter views as a minor figure in Realism).

57. *See* Horwitz, *supra* note 45, at xx (critiquing scholars of Realism for over-emphasizing Llewellyn and ignoring Hale, whom Horwitz views as a highly influential figure in the transition from formalistic to realistic thinking about law and legal rules).

58. *See* Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1147 n.31 (1999) (reviewing ANTHONY SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE (1998)) [hereinafter Leiter, *Positivism, Formalism, Realism*] (noting the divergence between Leiter's conception of Realism and the Critical Legal Studies movement's conception of Realism).

59. *See* Leiter, *American Legal Realism*, *supra* note 28, at 57.

60. *See id.*

consequences of judicial opinions, including the situation types that gave rise to particular holdings as well as the effects of those holdings on regulated laymen.[61]

For Horwitz and Hale, the focus of Realism was much more deeply normative. Hale's goal was to undermine the presumption of the common law's neutrality that prevailed in the formalist era. He challenged the distinction between private and public law on the ground that both the common law and the statutory law are creations of the state, either of which might impact laymen's lives in either desirable or undesirable ways.[62] In order to make that claim, Hale needed to adopt the same Realist premise that motivated Llewellyn's work: that law's legitimacy depends on its consequences. It was only through the adoption of an effects-based metric of legitimacy that common law and statutory law could be treated as equals—that the common law's claim to natural superiority could begin to unravel. Indeed, Hale's primary contribution was to shift the criterion of legitimacy from the nature or pedigree of the legal instrument (common law or statute?) to the effects of the legal rule (good or bad for real people?).

Although Hale's work was more obviously normative and critical than Llewellyn's, Hale and Llewellyn shared the foundational and then-revolutionary premise that laws ought to be evaluated according to the ends they accomplish for society—that laws should never be presumed to be ends in themselves.[63] This was the crux of both Llewellyn's and Hale's writing: the normative argument that all laws ought to be evaluated by their effects.[64]

Despite the Realists' focus on effects, however, there is a crucial distinction between Realism's consequential focus and consequentialism's philosophical life. The Realists' normative agenda did not entail any particular political or moral commitments *in the identification of desirable ends*. Realists wanted to measure laws' effects to see whether the law was accomplishing its own stated purposes, not to see whether it was accomplishing "good" according to some higher-law conception of the good. Realism thus splits the difference between positivist and naturalist jurisprudence. The Realists deviated from positivism by arguing that duly enacted laws could become illegitimate—

61. *See id.*

62. *See generally* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

63. *See id.* at 472; Llewellyn, *Realism About Realism*, *supra* note 18, at 1223, 1236.

64. Llewellyn, *Realism About Realism*, *supra* note 18, at 1223, 1236.

and, by implication, non-binding—once they ceased to accomplish their intended ends (and even that laws could be illegitimate upon enactment if enacted for no discernible purpose). Because Realists believed that laws are means to ends, they believed that the current legitimacy of the law is contingent on its operation, not merely on its positive articulation or enforcement. Furthermore, Realist legitimacy, because contingent on consequences, can be tested scientifically, and an external inquiry into law's consequences can therefore determine law's legitimacy. Along these dimensions, then, the Realists were naturalists. Legal legitimacy is not contingent on its source but rather on its nature. But, of course, Realists were not true naturalists. They made an enormous departure from natural law in their refusal to articulate any set theory of legitimate *ends*, other than the accomplishment of society's positive preferences. For a Realist, the desirable ends of the law could not be discovered in any external moral or theological philosophy or through any external scientific inquiry. The law's intended ends needed to be chosen and articulated. In other words, for a Realist, legitimate *ends* must be posited, but legitimate *means* must be discovered.[65]

Of course, most (if not all) Realists were New Deal liberals, but their jurisprudential theory did not depend on their personal preferences for progressive regulatory ends.[66] Realism is thus a consequentialist theory only in its understanding of legal meaning—its assertion that law must always serve some purpose. Realists were not committed to consequentialism in the assessment of the ends themselves.[67] For example, a Realist might be perfectly happy to accept a murder ban that has the posited goal of respecting a nonconsequential imperative against any taking of human life, even if allowing some murders would make society better off on a utilitarian or welfarist analysis. If a Realist's government enacted such a Kantian murder ban, the Realist's assessment of the ban would turn on whether the law, given not only its verbal formulation but also its enforcement mechanisms and real-world effects, actually succeeded at its own goal. If the law's goal is Kantian but its enforcement fails to accomplish the Kantian imperative, then the law is illegitimate not because the Kantian imperative is illegitimately non-

65. *See* Dan Priel & Charles Barzun, *Legal Realism and Natural Law*, *in* LAW IN THEORY AND HISTORY: NEW ESSAYS ON A NEGLECTED DIALOGUE (Maksymilian Del Mar & Michael Lobban, eds., 2016) (noting that Realists accepted a kind of democratic or norms-based form of natural law that allowed the regulated class to choose the goals of their legal rules).

66. *See* Leiter, *American Legal Realism*, *supra* note 28, at 59.

67. *See* Llewellyn, *Realism About Realism*, *supra* note 18, at 1223.

consequentialist but rather because the law fails to achieve its own stated goal.

The Institutional Claim. The Realists' institutional claim was the natural culmination of their epistemic, empirical, and normative claims. When law is assessed *as* policy and measured by its real-world consequences, courts start to look bad at their jobs. Several Realists, although they encouraged judges to base decisions on real-world political and economic consequences, also argued that judges are not well-situated to anticipate or assess those consequences.[68]

Leiter has asserted that "the familiar, contemporary questions about the legitimacy of unelected judges engaging in . . . policy-driven 'legislating from the bench' were not questions that concerned" the Realists.[69] That assertion is true, however, only if one takes a narrow view of contemporary questions. Remember that the Realists measured *all* legal legitimacy by real-world considerations, never by abstract notions of legality or authority.[70] The institutional concerns that Leiter identifies—the democratic pedigree of judges and the legislative quality of judging—are too abstract and conceptual to have concerned the Realists.[71] Leiter is therefore right that Realists never questioned "the legitimacy of unelected judges . . . 'legislating from the bench.'"[72] But that point does not prove that the Realists were unconcerned with the institutional legitimacy of courts. The Realists' institutional question simply had a different and more realistic focus.

For the Realists, the institutional question was whether judicial policymaking would be better or worse for "All-of-us" than policymaking in other forums.[73] In other words, Realists measured the institutional division of labor the same way that they measured a given case's outcome: by its success or failure at capturing real-world social goods for laypeople. To the 1930s Realists, once the legal system acknowledged that adjudication entailed the creation rather than the discovery of law,

---

68. *See* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 881–82 (1930) [hereinafter Radin, *Statutory Interpretation*].

69. Leiter, *American Legal Realism*, *supra* note 28, at 59.

70. See *infra* Part II.C.2 for a fine-tuned distinction between regulatory and institutional issues.

71. Leiter, *American Legal Realism*, *supra* note 28, at 58–59.

72. *Id.* at 59.

73. Llewellyn, *Theory of Appellate Decision*, *supra* note 2, at 396 (arguing that the Realist era was experiencing a return to the "Grand Style" of the early nineteenth century, in which "nothing was good 'Principle' which did not look like wisdom-in-result for the welfare of All-of-us"); *id.* at 399 (arguing that in statutory construction as well as common law "the real guide is Sense-for-All-of-Us").

the question of whether courts should retain regulatory power became whether judges generally do a good job at choosing among legally permissible policies.

The answer the Realists gave was skeptical at best. Realists argued that judges are likely to be systematically error-prone in their decisions when decisional "errors" are measured by consequences rather than by compliance with doctrinal abstractions. Many Realists thus argued that courts lack the capacity to make Realistically legitimate decisions, and they urged a variety of reforms to improve policy outcomes. Some Realists, such as Llewellyn and Radin, advocated court reform as a solution;[74] others, including most prominently James Landis, advocated a largescale transfer of power from courts to the political branches, especially to the New Deal's newly-formed administrative agencies.[75] Here, it is worth considering in some detail and quoting at some length a few of the most relevant Realist writers.

First, consider Llewellyn's explanation of Realists' institutional concerns—and calls for court reform—in his early summary of Realist writings:

> (1) There is fairly general agreement [among Realist scholars] on the importance of personnel, and of court organization, as essential to making laws have meaning.[76] This both as to triers of fact and as to triers of law. *There is some tendency, too, to urge specialization of tribunals.*
>
> (2) There is very general agreement on the need for courts to face squarely the policy questions in their cases, and use the full freedom precedent affords in working toward conclusions that seem indicated. There is fairly general agreement that effects of rules, so far as known, should be taken account of in making or remaking the rules. *There is fairly general agreement that we need improved machinery for making the facts about such*

74. *See* Llewellyn, *Realism About Realism*, *supra* note 18, at 1254; Radin, *Statutory Interpretation supra* note 68, at 882.

75. *See* Louis L. Jaffe, *James Landis and the Administrative Process*, 78 HARV. L. REV. 319, 320 (1964).

76. *See supra* notes 45–47 and accompanying text. Remember that, for Llewellyn, laws "have meaning" if and only if they accomplish their intended ends. *Id.*

> *effects—or about needs and conditions to be affected by a decision—available to courts.*[77]

In this passage, Llewellyn reemphasized the Realists' normative claim that judges should base their decisions on real-world consequences, but he noted a widespread Realist concern that the judges of the 1920s and 1930s did not have access to the policy facts that are material to consequential decision-making.[78] Llewellyn then identified several possible targets for reform to the judicial system that might remedy systematic judicial ignorance and error: personnel, organization, and machinery.[79] He also included the New Deal era's call for "specialization of tribunals," which the New Deal Congress and President Roosevelt would effectuate, only a few years later, through the creation of administrative agencies.[80]

In an article published the prior year, Max Radin was more explicit than Llewellyn in worrying that judges make mistakes in their assessments of their decisions' consequences, but Radin was vaguer in his call for court reform as a remedy for incompetence.

> The "consequences" [of statutory interpretation decisions] involve prophecy for which the courts are not particularly prepared .... Judges will perhaps have to seek special and expert guidance as to what those consequences will be—especially in those many cases in which a limited and highly specialized group of economic activities is involved.[81]

Here, Radin clearly asserted that judges are not well-suited to the task of consequentialist decision-making. He then offered the same basic solution that Llewellyn described as "improved machinery for making the facts . . . available to courts":[82] for Radin, consultation of experts.[83]

More generally, though, Radin's article expressed a fatalistic attitude toward the problem of limited judicial capacity. Radin believed, like most Realists, that judges base their decisions on consequential

77. Llewellyn, *Realism About Realism*, *supra* note 18, at 1254 (emphasis added).
78. *Id.*
79. *Id.*
80. *See id.*
81. Radin, *Statutory Interpretation*, supra note 68, at 881–82.
82. Llewellyn, *Realism About Realism*, *supra* note 18, at 1254.
83. Radin, *Statutory Interpretation*, *supra* note 68, at 882.

considerations,[84] but he also believed that judges' consequential calculi centered less on material policy facts than on the judges' gut feelings: what he called "*Gefühlsjurisprudenz*" ("emotion-jurisprudence" or "sense-jurisprudence").[85] Radin then wrote:

> The dangers, whatever they are, which are involved in *Gefühlsjurisprudenz* can in no system be completely avoided. . . . Obviously we can not reasonably hope that a unified and clear system of statutory interpretation by means of a competent calculus of probable consequences will be adopted in set terms. The murky terminology and the cardboard structures of technical devices are consecrated, and in all likelihood will need something like a juristic revolution to destroy.[86]

In other words, Radin believed that a first-best adjudicative system would be one in which judges based their decisions on intelligent calculi of real-world consequences, but like most Realists, he doubted that judges were "competent" to engage in the necessary consequential "calculus," particularly given the prevailing legalistic toolbox for statutory reasoning ("[t]he murky terminology and cardboard structures of technical devices").[87] Unlike some other Realists, however, Radin was deeply skeptical that judges' consequential reasoning could be improved through doctrinal reform: through the introduction of "scientific" reasoning into the judiciary.[88] According to Radin, the abandonment of abstract legal reasoning in favor of concrete policy analysis would require a "juristic revolution" that Radin thought implausible.[89]

That said, Radin did offer another—and much more dramatic—version of court reform that he thought could cabin *Gefühlsjurisprudenz*. His solution was not to facilitate or improve policy-based decision-making but rather to require greater judicial respect for clear statutory limits.[90] Here is Radin:

---

84. *See id.* at 882 (calling consequentialist decision-making the "commonest" method of statutory interpretation "in practice, if the least announced").

85. *Id.* at 882–84.

86. *See id.* at 884–85.

87. *Id.*

88. *See id.* at 885.

89. *Id.*

90. *See id.*

> Judges who decide *contra legem* are under our present system impeachable. That method of discipline generally collapses by its own weight. But a disciplinary tribunal which could suspend, reprimand, remove, fine, or sentence to pecuniary reparation, might work, even though the suggestion causes a shudder to common law lawyers.[91]

In this throwaway suggestion, Radin casually addressed one of the biggest stumbling blocks for Realism. Critics of Realism have long worried that the abandonment of legalistic limits—the abandonment of "cardboard structures" and "technical devices"—would turn judicial decisions not just to *Gefühlsjurisprudenz*, but, as James Landis put it, to *Freiegesetzfindung*: "free law finding" or "free lawmaking."[92] Realists' critics, including modern "formalists," have worried that the turn to policy-based decision-making would render positive laws like statutes and precedents entirely meaningless. A norms-shift away from legal formalities in favor of effects-based adjudication, the critics have worried, would leave judges free to choose any result they liked.[93] Radin suggested that this danger could be avoided through the creation of a more fine-tuned disciplinary mechanism for judges who stray too far from positive legal commands.[94] Despite Radin's fatalism, then, he did recognize the need to provide a backstop to judicial policymaking, particularly if courts were to abandon the pretense that the law's "technical devices" constrain their choices.[95] A new "rule of law" mechanism, Radin suggested, might be necessary to prevent judicial *Freiegesetzfindung*.[96] This suggestion is, from a modern perspective, the more radical side of Realistic institutional concern. Radin called for a more refined incentive structure that would allow judges to make policy within legal constraints but would punish judges for straying beyond those constraints.[97]

Another important and influential Realist scholar—James Landis—wrote a reply to Radin's piece in which he suggested an entirely different path for ensuring that legal outcomes accomplish desirable real-world results while respecting legislatively dictated limitations. In *A Note on*

---

91. *Id.* at 884–85.
92. *See id.* at 885; James M. Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 891 (1930) [hereinafter Landis, *"Statutory Interpretation"*].
93. *See generally* SCALIA, A MATTER OF INTERPRETATION, *supra* note 21.
94. *See* Radin, *Statutory Interpretation*, *supra* note 68, at 884–85
95. *Id.*
96. *See id.* at 882–85.
97. *See id.* at 885.

"Statutory Interpretation," Landis asserted that the best way to avoid Radin's fatalistic resort to *Gefühlsjurisprudenz* was to require judges to defer to legislative intentions and purposes.[98] Landis started by noting "the necessity of preferring from the sociological standpoint the *Gefühl* [or 'sense'] of the legislator to the *Gefühl* of the judge."[99] Because of the necessity of that preference, Landis argued that judges should focus their efforts not on calculating probable consequences of their decisions, but rather on discovering and enforcing legislative policy preferences, deferring to Congress's consequential calculi and choices.[100]

Notice here, however, that Landis defended the priority of the legislative *Gefühl* from a "sociological standpoint."[101] Landis did not argue that legislative judgments should trump judicial judgments because of the legislature's democratic credentials, constitutional authority, or conceptual priority.[102] Instead, Landis's point, quoting Dicey, was that while legislative decisions might be imperfect—"reproduc[ing] the public opinion not so much of today as of yesterday"—those decisions would nevertheless be better than "judge-made law," which "occasionally represents the opinion of the day before yesterday."[103] In other words, when legal choices are measured by their consistency with current public opinion, Landis argued, the *Gefühl* of the judge will fare worse than the *Gefühl* of the legislator.[104] And *that* is the reason, for Landis and Dicey, to prefer legislative choices to judicial choices. The Realists prioritized democracy not for its own sake, but for the real-world accomplishment of democracy: a legal system that stays in step with prevailing popular preferences.

In *A Note on "Statutory Interpretation,"* Landis then proceeded to urge deference to legislative intent—or, when specific intent is not discoverable, to legislative purpose—in the construction of statutory terms.[105] Such deference, Landis argued, would require only two changes to then-current practice.[106] First, judges would need to jettison the "barbaric rules of interpretation [that] too often exclude the opportunity

98. *See* Landis, *"Statutory Interpretation," supra* note 92, at 886–88.
99. *Id.* at 888.
100. *See id.* at 891.
101. *Id.* at 888.
102. *See id.* at 888–89.
103. *Id.* at 888 (quoting ALBERT VENN DICEY, LAW AND OPINION IN ENGLAND 369 (2d ed. 1926)).
104. *See id.*
105. *See id.* at 891–92.
106. *Id.* at 890.

to get at legislative meaning in a realistic fashion,"[107] and second, judges would need enough "humility"[108] to stop "overrid[ing] the intent of the legislature in order to make law according to their own views."[109] Landis thus believed that modest reforms to judicial reasoning and to judicial norms could ensure deference to the legislature, and he defended such deference on the ground that policy outcomes, while they would always be *Gefühl*-based rather than legally dictated, should track the preferences of a "sociologically" superior (not legally or constitutionally supreme) institution.[110]

As modern readers likely know, however, James Landis did not limit his institutional reformations to the modest doctrinal reform of deference to the legislature. Landis is most famous for the much more radical institutional reform that he both advocated in scholarship and enacted in government: the transfer of legislative and adjudicative power to administrative agencies.[111] For Landis, the best way to improve the Realistic legitimacy of law was to shift regulatory power away from the slow-moving and generalist institutions of American government (both courts and legislatures) and to give that power to the efficient and expert institutions that were the central innovation of the Realist era: administrative agencies.[112] Agencies, Landis argued, could act with flexibility, initiative, efficiency, and expertise in their areas of specialization and could thus out-perform both courts and legislatures in the Realistic wisdom—and thus jurisprudential legitimacy—of their choices.[113]

I will take the time here to examine Landis's argument in detail. His institutional contributions to Realist jurisprudence were some of the most successful and long-lasting arguments to emerge from the era; they are critical components of Statutory Realism; and they are sometimes omitted from modern histories of American Legal Realism[114] and from modern discussions of "realist" statutory interpretation.[115] But Landis's

107. *Id.*
108. *Id.* at 891.
109. *Id.* at 890.
110. *See id.* at 886–88.
111. *See* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938) [hereinafter LANDIS, THE ADMINISTRATIVE PROCESS].
112. *See id.* at 1–5.
113. *See id.* at 69–70.
114. *See* Leiter, *American Legal Realism*, *supra* note 28; Singer, *supra* note 35.
115. *See, e.g.*, Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003).

exclusion from modern accounts seems an error. Llewellyn's contemporary list of Realist authors includes Landis,[116] and as we shall now see, Landis's critique of courts and his praise of agencies center entirely on Realistic arguments.[117]

In his famous Storrs Lectures on *The Administrative Process*, Landis defended the explosion of the administrative state in emphatically Realistic terms. He started by rejecting the "political conceptualism"[118] of separated powers, arguing that "it is only intelligent realism"[119] to place modern industrial regulation in the hands of a consolidated and efficient regulatory authority—a governmental structure that can run like a business.[120] Here, Landis explicitly tied the growth of the administrative state to the changing reality of regulation in the industrial age: "[T]he administrative process springs from the inadequacy of a simple tripartite form of government to deal with modern problems. It represents a striving to adapt governmental technique, that still divides under three rubrics, to modern needs . . . ."[121] This point is clearly a Realist one: law (including the law of institutions) is legitimate only if it matches and serves the current reality.

Of course, the abandonment of separated powers and the consolidation of regulatory authority within specialized tribunals did not necessitate the growth of "fourth branch"[122] agencies. The New Deal era could have consolidated power within any of the three existing branches of government, and given the common law tradition from which the United States grew, it might have seemed more natural to consolidate

116. Llewellyn, *Realism About Realism*, *supra* note 18, at 1247 n.64.

117. Horwitz does include Landis as a Realist. *See* Horwitz, *supra* note 45; Leiter, *American Legal Realism*, *supra* note 28.

118. LANDIS, THE ADMINISTRATIVE PROCESS, *supra* note 111, at 12.

119. *Id.* at 11. *See also id.* at 10–12 ("[G]overnance as a practical matter implie[s] not merely legislative power or simply executive power, but whatever power might be required to achieve the desired results. . . . If in private life we were to organize a unit for the operation of an industry, it would scarcely follow Montesquieu's lines. . . . [W]hen government concerns itself with the stability of an industry it is only intelligent realism for it to follow the industrial rather than the political analogue. It vests the necessary powers with the administrative authority it creates, not too greatly concerned with the extent to which such action does violence to the traditional tripartite theory of governmental organization. The dominant theme in the administrative structure is thus determined not primarily by political conceptualism but rather by concern for an industry whose economic health has become a responsibility of government.").

120. *Id.* at 11.

121. *Id.* at 1.

122. *See id.* at 47 (quoting the President's Committee on Administrative Management).

power within the judiciary. Indeed, Landis pointed out that the English system had met the need for expertise by creating specialized courts:

> The tendency to encourage specialization in the judicial process is of long standing. Indeed, the courts of King's Bench, Exchequer Chamber, and Common Pleas, originally had this impulse underlying their organization, and for a time developed different doctrinal approaches to the same problems. Later we find admiralty, probate, and divorce intrusted practically to specialized hands.[123]

Landis rejected that approach for the postindustrial United States, however, in a lengthy critique of the judicial process.[124] In so doing, he gave the clearest articulation of the Realists' institutional claim.

First, Landis made the standard Realist point that formal laws not only fail to constrain judges but also fail to accomplish Realistically legitimate results.[125] That is, he noted that legal reasoning, particularly in the hands of generalist judges, is ill-suited to the task of wise policymaking in the industrial age.[126] Here are two of the most relevant passages from Landis, the first specific to statutory interpretation and the second general to judicial decision-making:

> Judicial interpretation of the statutory standards laid down by the Congress plainly gave the judges power to mold the statute to their own conceptions; and that molding had too frequently set at naught the public and political effort which had so hopefully expended itself in the passage of the statute. Judicial interpretation suffered not only from inexpertness but more from the slowness of that process to attune itself to the demands of the day.[127]

> [T]he judicial process suffers from several basic and more or less unchangeable characteristics. . . . A general jurisdiction leaves the resolution of an infinite variety of matters within the hands of courts. In the disposition of these claims judges are uninhibited in their discretion except for legislative rules of guidance or such

123. *Id.* at 32.
124. *See id.* at 30–35.
125. *See id.* at 31.
126. *See id.* at 33–34.
127. *Id.* at 96.

> other rules as they themselves may distill out of that vast reserve of materials that we call the common law. This breadth of jurisdiction and freedom of disposition tends somewhat to make judges jacks-of-all-trades and masters of none. Modern jurisprudence [(i.e., Realism)] with its pragmatic approach is only too conscious of this problem.[128]

In both of these passages, Landis repeats the epistemic claim of Realism: that formal legal sources fail to dictate unique outcomes in contested cases. But, he then builds an institutional element into that claim. He says that the result of legal indeterminacy, combined with general jurisdiction, is a system in which judges can neither build expertise nor respect evolving popular preferences. Judges cannot become experts in the law because the law is not a set, determinate thing to learn; they cannot become experts in policy because the policy issues they confront are too diverse and wide-ranging; and they cannot simply follow the political will because they have too much discretion and temptation to enact their own preferences instead. Judges have neither expertise nor accountability to guide them.

Landis then went even further, arguing that the judicial process is *intrinsically* ill-suited to policymaking, regardless of any court reforms or norms shifts that the Realists could suggest.[129] Indeed, Landis criticized his fellow Realists for suggesting mere doctrinal reform—the mere turn towards scientific, policy-based adjudicative inquiry—as a solution to the problem of ignorant, generalist judges:

> To its solution [Realist jurisprudence] brings little more than a method of analysis, a method that calls upon the other sciences to provide the norms. It thus expands rather than contracts areas of inquiry. . . . But incredible areas of fact may be involved in the disposition of a business problem that calls not only for legal intelligence but also for wisdom in the ways of industrial operation. This difficulty is intrinsic to the judicial process.[130]

Landis thus believed that any judicial regulation, given the structural characteristics of the courts, would fail to produce Realistically legitimate policy.[131] Judges, Landis thought, would never be able to make

128. *Id.* at 30–31.
129. *See id.* at 31.
130. *Id.*
131. *See id.* at 30–31.

wise decisions on questions of modern regulation and "industrial operation" because such decisions are too complex for judges to handle.[132] As Landis argued throughout his lectures, courts are too narrow in their focus (always deciding individual cases, case-by-case), too slow-moving in their responses to prevailing public opinion, and too generalist in their knowledge of political and economic facts to serve as Realistically legitimate policymaking institutions.[133]

Landis's solution, then, was to transfer authority to administrative tribunals—politically responsive experts—that were empowered to make wiser policy for regulated industries and individuals.[134] Notably, because Landis's lectures were published five years after the rise of the New Deal administrative state, the tone of his writing is more like a victory lap than an agenda or proposal.[135] Landis was not imagining and advocating an institutional innovation; he was simply praising the new institutional reality. Throughout the lectures, Landis identified the characteristics of the administrative process that allowed agencies to fare better than either courts or legislatures.[136] Most importantly, he noted that agencies are experts in the industries they regulate,[137] but he also noted that agencies can be much more flexible, proactive, efficient, and responsive than courts.[138] Notice that these assertions are all Realist; they are empirical claims about the agencies' capacities and functions, not conceptual claims about their authority. Landis advocated the shift from judicial to administrative process based wholly on Realistic claims that agencies could outperform courts, at least as long as performance was measured according to Realistic normativity.[139]

In the end, Landis was a Realist through-and-through, and he made a strong case for the irremediable incapacity of courts to make Realistically legitimate decisions. Although Leiter is right that the Realists did not question the democratic legitimacy of judicial policymaking in the conceptualistic terms of today's writers, the Realists nevertheless raised profound questions as to the democratic legitimacy of judicial policymaking. The Realists' critique was simply Realistic rather than conceptual.

---

132. *Id.* at 31.
133. *Id. passim.*
134. *Id.* at 46.
135. *Id. passim.*
136. *Id. passim.*
137. *Id.* at 23–24.
138. *Id. passim.*
139. *See id.* at 46.

B. Formalism

Modern writers use the term "formalism" as an epithet more often than they acknowledge it as a genuine philosophy.[140] In some ways, that simplistic use of the term is understandable given that there has not been a big-F Formalist movement to equal the Realist movement of the 1930s. The term "formalism" therefore lacks the coherence that comes from a sustained philosophical push.[141] Indeed, the closest thing to a genuine Formalist movement in American jurisprudence has been the still-ongoing textualist and originalist movement, which (as I will show) is only partly formalistic, jurisprudentially speaking.[142] Furthermore, while formalistic legal thinking has been a persistent mode of reasoning since Plato and Aristotle, the philosophy has taken many different forms. William Blackstone's natural law formalism, for instance, bears only some resemblance to the common-law formalism of Christopher Columbus Langdell,[143] and Langdellian formalism is quite different from modern public law formalism. The term "formalism" is therefore hard to define with precision and easy to use as a simplistic antonym to the latest jurisprudential fad. Nevertheless, the sheer persistence of formalistic reasoning—as well as the reclaiming of the "formalist" moniker by today's textualists[144]—requires us to take formalism seriously: to treat the term neither as a throw-away epithet for "bad" law[145] nor as a simplistic antonym to realism.

Modern scholars tend to understand formalism primarily as a theory of adjudication: a theory that urges judges to limit themselves to "mechanical," "syllogistic," or "rule-bound" decision-making.[146] That

---

140. *See, e.g.*, SCALIA, A MATTER OF INTERPRETATION, *supra* note 21; Leiter, *Positivism, Formalism, Realism*, *supra* note 58; Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 509–10 (1988).

141. *See* Schauer, *supra* note 140, at 509–10.

142. *See infra* Part II.

143. Indeed, Langdell and his contemporaries rejected natural law formalism. *See* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 28 n.99 (1983).

144. *See* SCALIA, A MATTER OF INTERPRETATION, *supra* note 21, at 25 ("Long live formalism!").

145. *See, e.g.*, Schauer, *supra* note 140, at 509–10 (noting that "formalism" sometimes seems to be the label applied to any law or legal reasoning with which the writer disagrees).

146. *See generally* Leiter, *Positivism, Formalism, Realism*, *supra* note 58, at 1147–48 (mechanical and syllogistic); Richard A. Posner, *Legal Realism, Legal Formalism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1986) [hereinafter Posner, *Legal Realism, Legal Formalism*] (syllogistic); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 603 (1908) (mechanical); Schauer, *supra* note 140 (rule-bound).

understanding, however, accurately describes only Langdellian formalism; it certainly does not capture the natural law or moralistic legal theories of sophisticated formalists like William Blackstone and Ronald Dworkin.[147] Blackstone and Dworkin have both advocated discretionary and dynamic adjudication—rejecting mechanical, syllogistic, and rule-bound decision-making—but they are both recognized as formalists.[148] What, then, is the core characteristic of formalism that can explain both the mechanical formalists and the natural law and moralistic formalists?

To use the same structure laid out above for Realism, the core that is common to all kinds of formalism lies in the normative claim.[149] Formalists consistently organize their theories around a strong normative notion of legal meaning and legitimacy.[150] To understand the central role of formalists' normative claims, it will be useful to trace three of the four components of Realism discussed above—the three that are relevant to formalism, which does not include the empirical claim—but to walk those three claims backward. (While formalism is not a simplistic antonym of realism, the structure of formalistic philosophy is a near-perfect inverse of American Legal Realism.[151]) I will therefore describe the distinctive institutional, normative, and epistemic claims included in the three most significant waves of American formalism: Blackstone's natural law theory,[152] Langdell's common law theory,[153] and Dworkin's moral-philosophic theory.[154] (I will save discussion of modern public law formalists, including John Manning and Justice Antonin Scalia, for Part II of the article.)

The Institutional Claim. In all versions of formalism, legal institutions sit in a hierarchy of authority, and only the institution at the

147. *See* Leiter, *Positivism, Formalism, Realism*, *supra* note 58, at 1146 (discussing how "sophisticated formalist" Dworkin is still in the formalist camp); Schauer, *supra* note 140, at 513 (discussing Blackstone's formalist vision).

148. *See* Leiter, *Positivism, Formalism, Realism*, *supra* note 58, at 1146; Schauer, *supra* note 140, at 513.

149. *See, e.g.*, Schauer, *supra* note 140, at 530–31 (discussing the normative question of formalism).

150. *See id.*

151. *See generally* Leiter, *Positivism, Formalism, Realism*, *supra* note 58.

152. Blackstone was obviously British, not American, but his commentaries on English common law were so significant to the foundation of the American legal system that it seems fair to include his work as a piece of American jurisprudence. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1704–1769).

153. *See generally* Grey, *supra* note 143.

154. *See* Leiter, *Positivism, Formalism, Realism*, *supra* note 58, at 1157–58.

top of the hierarchy holds discretionary authority to make or change the law.[155] Recall the Realists' justifications for urging limits on judicial power. Realists' claims were not premised on an argument about the judiciary's hierarchical power; they were premised on the judicial capacity to mold law to current needs and preferences.[156] While the 1930s Realists urged judicial deference to political branch decisions, they never asserted that the judiciary lacked the legal or constitutional authority to make law.[157] Their arguments were purely consequential rather than conceptual or hierarchical, centering exclusively on the negative effects of judicial errors.[158] By contrast, the most significant formalists in American jurisprudence have all stated their institutional arguments in terms of conceptual legal authority.[159] They have argued that only some lawmaking institutions have the power to make law while other, subordinate institutions are obliged to enforce the dictates of their superiors, without adornment or alteration.[160]

Langdell provides the clearest example of this point. For Langdell, early courts exercised discretion in creating legal rules,[161] and later courts that confronted similar cases were subordinate to their predecessors on the hierarchy of lawmaking authority.[162] All courts were legally bound, under *stare decisis*, to follow the rules that earlier judicial decisions had set. According to Langdell, any decision of a current court

155. *See id.* at 1144, n.18.

156. *See* LANDIS, THE ADMINISTRATIVE PROCESS, *supra* note 111, at 30–35.

157. *See id.*

158. *See id.*

159. *See id.*

160. *See id.*

161. *See* CHRISTOPHER COLUMBUS LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 60–61 (2d. ed. 1880) (arguing that the first courts to confront the applicability of the consideration doctrine to new forms of contracts could have decided the question either way).

162. Grey, *supra* note 143, at 34–35 (noting that the system of Langdellian formalism rested on its accomplishment of "conceptual ordering" with broad principles dictating specific rules of decision); *id.* at 20 (noting that the top-level principles that determined case outcomes were to be discovered in "reported common law decisions"); *id.* at 25–26 (arguing that *stare decisis* saved the legal science from "vicious circularity" by requiring courts to follow precedents even if those precedents seemed to violate the broad legal principles announced in other decisions). It is common to see the simplistic claim in legal scholarship that formalistic theories reject the permissibility of judge-made law. *See, e.g.*, Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought*, 66 CORNELL L. REV. 861 (1980). But for non-naturalists like Langdell and Beale (his contemporary) and for naturalists who reject the authoritativeness of divine law, the law that binds current judges must come from some human source, and for Langdell, the authoritative source of law was, emphatically, judge-made precedent.

that conflicted with the decisions of earlier courts was necessarily invalid.[163] Current courts lacked authority to alter earlier courts' commands.[164] Furthermore, although statutory law was significantly less common in Langdell's time than ours, Langdell also noted that courts could not alter statutory commands.[165] For Langdell, then, common law courts were inferior to legislatures in the interpretation of statutory law, and more importantly to his theory of legal science, they were inferior to their predecessors in the evolution of common law doctrine.[166] Indeed, Langdell's preferred adjudicative mode was "syllogistic" and "mechanical" for precisely this reason; judges were bound to reach results based solely on the legal rules and reasons articulated by earlier judges, in order to maintain current judges' position of subordination to the common law principles set by earlier courts.[167]

Blackstone's hierarchy was more nuanced because he saw the law as divided between two branches: the "natural law" and the "municipal law."[168]

On the natural law side, the hierarchy of legal authority was clear. God held an exclusive power to make divine law, and any human law that was inconsistent with divine law was invalid, irrespective of the human lawmaker's positive authority.[169] As Blackstone put the point:

> This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.[170]

Blackstone, however, also believed that the natural law left large swaths of human behavior unregulated.[171] Within the naturally

163. Grey, *supra* note 143, at 20 ("[T]he better existing case-law confirmed a principle, the more proper it was to disregard as a mistake any single judicial decision inconsistent with the principle.").

164. *See generally id.*

165. LANGDELL, *supra* note 161, at 61.

166. *See id.*

167. *See id.*

168. BLACKSTONE, *supra* note 152, at *41, *45.

169. *Id.* at *41.

170. *Id.*

171. *Id.* at *42.

unregulated terrain, Blackstone argued that human governments could issue discretionary restrictions.[172] As Blackstone said:

> There is, it is true, a great number of indifferent points, in which both the divine law and the natural leave a man at his own liberty; but which are found necessary for the benefit of society to be restrained within certain limits. . . . [W]ith regard to things in themselves indifferent [under the divine and natural law,] . . . [t]hese become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper, for promoting the welfare of the society, and more effectually carrying on the purpose of civil life.[173]

Blackstone thus acknowledged that human institutions could make whatever "municipal laws" they deemed expedient or necessary for social welfare, as long as they confined their discretionary rulemaking to the terrain that God and nature had left unregulated.[174]

Indeed, within the gaps in the natural law, Blackstone appears to have been non-hierarchical among the governmental powers—and thus non-formalistic in his institutional claims. Blackstone argued that anyone with lawmaking power could make whatever laws he or she chose, and he referred to judges and legislators equally as discretionary lawmakers.[175] In fact, Blackstone's chapter on the nature of law gives a proto-Realist understanding of separated powers.[176] He argued, in a move that long anticipated Neil Komesar's comparative institutional competence,[177] that each of the three branches of government brings a distinctive contribution to the lawmaking enterprise.[178] Blackstone then praised the tripartite system of British government for allowing each branch to make its own contributions.[179] In so arguing, Blackstone gave no indication that, in any exercise of lawmaking power, any of the three units of government would owe any particular obeisance to any other.[180]

---

172. *Id.* at *42, *55.
173. *Id.*
174. *Id.*
175. *See id.* at *52.
176. *See id.* at *38–62.
177. *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 3–4 (1994).
178. BLACKSTONE, *supra* note 152, at *51–52.
179. *Id.* at *50–51.
180. *See id.* at *50–52. Blackstone even made the Realist move of separating positive declarations of ends from naturalistic discovery of means: "Democracies are usually the

Indeed, Blackstone somewhat infamously, to modern formalists,[181] argued that judges should pursue broad social purposes and equitable considerations when interpreting statutory language: an argument that rests on a non-hierarchical notion of the relationship between judges and legislatures.[182]

All of that said, Blackstone's non-hierarchical sense of institutions existed only within the terrain that divine and natural law did not touch.[183] All institutions of human government, for Blackstone, were subordinate to God.[184] Blackstone thus adopted the formalistic notion of institutional power by acknowledging one hierarchically primary institution that could issue binding dictates for all of its inferiors.[185]

Dworkin's hierarchy is the most complex, partly because Dworkin is the least formalistic, in the epithetical sense, of the formalists considered here. Dworkin's primary demand of judges (and, indeed, of legislators)[186] is that they preserve the integrity of the legal system as a whole, but he rejected the idea that integrity was best-served by simplistic "fidelity" to posited precedents and other legal commands.[187] The Dworkinian requirement for valid lawmaking, then—Dworkin's ideal method for pursuing the integrity of the legal system—is not robotic obedience of subordinate institutions to one discretionary lawmaker (like subordination to earlier courts for Langdell or subordination to God for Blackstone). For Dworkin, valid lawmaking requires obedience to the cumulative wisdom of all prior lawmakers, which requires discovery and enforcement of the value of political morality that puts the system's accumulated wisdom in its best light.[188] The duty of a Dworkinian lawmaker is to promote the integrity of the legal system by finding and enforcing the moral-philosophical value that best fits and justifies all

---

best calculated to direct the end of a law; aristocracies to invent the means by which that end shall be obtained; and monarchies to carry those means into execution." *Id.* at *50.

181. John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 78–85 (2001). *See* Posner, *Legal Realism, Legal Formalism*, *supra* note 146, at 180–82 for a more in-depth discussion of legal formalism.

182. BLACKSTONE, *supra* note 152, at *61–62.

183. *Id.*

184. *See id.* at *41.

185. *See id.*

186. Dworkin appeared to limit his theory to judges in his earlier work, TAKING RIGHTS SERIOUSLY, but in LAW'S EMPIRE, he extended the obligation of integrity to legislatures. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY viii (1978); *see also* RONALD DWORKIN, LAW'S EMPIRE 176–78 (1986) [hereinafter, DWORKIN, LAW'S EMPIRE].

187. *See* DWORKIN, LAW'S EMPIRE, *supra* note 186, at 400.

188. *See id.* at 400–01.

prior legal decisions.[189] Once a judge accomplishes the Herculean task of discovering the prior law's immanent political morality, that morality becomes the authoritative law to which the judge owes obedience.[190] As Dworkin put it,

> The actual, present law, for Hercules [(Dworkin's ideal judge)] consists in the principles that provide the best justification available for the doctrines and devices of law as a whole. His god is the adjudicative principle of integrity, which commands him to see, so far as possible, the law as a coherent and structured whole.[191]

Dworkin is thus partly Langdellian insofar as he gives a temporal hierarchy to legal decision-making and insofar as he requires current judges to extract binding principles from the cumulative decisions of their predecessors. Dworkin requires later judges to follow the legal pronouncements of earlier judges and legislators.[192] But Dworkin blends into the Langdellian temporal hierarchy a Blackstonian natural law hierarchy of legal materials. He requires judges and legislators to consult not only the prior posited law but also the political morality (a secular natural law concept) that best fits and justifies that posited law. Furthermore, for Dworkin, any posited laws that are moral outliers in the *corpus juris*—any posited laws that are inconsistent with the values of political morality that best fit and justify the entire body of law—are illegitimate.[193] In other words, Dworkin insists that judges are bound to obey, first and foremost, the law's immanent moral values, with the preexisting positive law serving as a constraint on the set of moral values that judges may deem to be legally binding.[194] Dworkin is thus a secular natural law formalist, with a Blackstonian hierarchy of legal materials (placing the moral wisdom of the law over the posited form of the law), but he is also partly a Langdellian formalist, with a temporal hierarchy of legal decisions (requiring judges to discern the morality of the system from its prior decisions rather than from the judges' or the people's current views).

---

189. *Id.*
190. *Id.* at 400.
191. *Id.*
192. *See id.* at 401–03.
193. *See id.* at 405–06.
194. *See id.* at 404–07.

Despite their differences, the three most significant versions of American formalism have all included strong notions of institutional hierarchy and constraint. In all three, today's courts are bound to follow some other speaker's dictates. For Langdell, they are required to follow earlier courts' commands;[195] for Blackstone, they are required to follow God's commands;[196] and for Dworkin, they are required to follow the moral value that best integrates all earlier speakers' legal commands and thus gives integrity to the legal system as a whole.[197]

The Normative Claim. The formalists' normative claims—as to legal meaning, legal legitimacy, and dynamic legitimacy—follow necessarily from their hierarchical sense of institutional obligation. To summarize first, with further elaboration below, the formalists' normative claims are as follows. For legal meaning, the claim is relatively simple: The institution that sits at the top of the lawmaking hierarchy has the exclusive authority to establish legal meaning, and the law thus means whatever the hierarchically primary institution says it means.[198] For legitimacy, the formalists' claim is purely source-based. The first test for a legal command's validity is whether it issued from the hierarchically primary institution. If it did, then the command is valid by virtue of its pedigree, regardless of its substance. If it did not (if it issued from a lower-ranking institution), the pronouncement is valid if consistent and invalid if inconsistent with the pronouncements of any higher-ranking institutions. For dynamic legitimacy, the formalists once again offer an account that centers on pedigree. They argue that only the institution at the top of the hierarchy—the one with discretionary lawmaking power—can change the meaning or operation of the law. Because formalists believe that meaning is dictated, established, and changeable only by a single institution, most formalists (with the important exception of Dworkin) treat legal meaning as a semantic fact, which is discernible from the face of the primary institution's most recent legal pronouncements.

As we consider these normative elements for each of the three formalists, recall that, for the Realists, both legal meaning and legal legitimacy can change without any positive governmental action, simply

195. Grey, *supra* note 143, at 24–27.

196. BLACKSTONE, *supra* note 152, at 41–42.

197. DWORKIN, LAW'S EMPIRE, *supra* note 186, at 176–78.

198. *See* BLACKSTONE, *supra* note 152, at 45–46; DWORKIN, LAW'S EMPIRE, *supra* note 186, at 400–01;1 LANGDELL, *supra* note 161, at 61.

due to changes in the real-world context and circumstance of a law.[199] If life and society change in a way that frustrates an existing law's purposes or that otherwise undermines the existing law's means-ends fit, then the existing law becomes Realistically invalid.[200] To regain Realistic legitimacy, the law's operation (and, thus, its semantic meaning) must change to accommodate social evolutions.[201] Indeed, some modern realists[202] argue that courts can and should overrule statutes that become, as Llewellyn put it, "out of joint with life."[203] Realists thus believe in a bottom-up evolution of legal meaning, which requires governmental institutions to respond to grassroots changes. Formalists argue the inverse. They insist that the only way for legal meaning or operation to change is through top-down amendment by the one governmental institution that is authorized to make law.[204] In other words, in formalistic jurisprudence, legal meaning does not evolve or change unless and until the institution with discretionary lawmaking power countermands the existing law. Furthermore, in formalistic jurisprudence, such change is usually designed to be slow and difficult for the hierarchically primary institution to accomplish.[205]

Now consider each of these normative elements for our three American formalists. For Blackstone, God establishes legal meaning through his revelations of divine will to mankind.[206] Man then enshrines God's law in the Holy Scriptures, and those documents become a static

199. *See* discussion *supra* Section II.A.

200. *See* Llewellyn, *Realism About Realism*, *supra* note 18, at 1223 ("[Rules and laws are] means to ends . . . only means to ends . . . [and] hav[e] meaning only insofar as they are means to ends.").

201. *See id.* at 1236.

202. This view appears most forcefully and frankly in Guido Calabresi's book, CALABRESI, *supra* note 4, but Eskridge holds a softer version of the same view, Eskridge, *supra* note 4.

203. Llewellyn, *Realism About Realism*, *supra* note 18, at 1223.

204. Eskridge, *Dynamic Statutory Interpretation*, *supra* note 4, at 1498–99.

205. There is a common misconception that, in formalistic legal theory, the law is eternally static. *See, e.g.*, Summers, *supra* note 162, at 867 n.4 (claiming that, for formalists, "law is like a static and closed logical system"). In all three of the major formalistic theories considered here, however, the theorists discussed mechanisms for change in the law, or at least in the law's real-world functioning. For none of those theorists was the law set in stone for all perpetuity, and for Dworkin in particular (as we shall shortly see), changes in law were frankly acknowledged to be new law rather than new discoveries of existing law. *See infra* note 239.

206. BLACKSTONE, *supra* note 152, at *42.

source of semantic legal meaning.[207] For a Blackstonian, then, the meaning of the divine law depends exclusively on God's discretionary determination of what the law is; the men who receive and convey God's commands are required to articulate them consistently with God's intended meaning. Contrary to the Realists' sense that purposeless laws are nullities, Blackstone implied that laws could have meaning even if they served no discernible purpose: that God *could* issue arbitrary commands and that, if he did, they would be binding laws.[208] But Blackstone believed in God's beneficence and therefore believed that divine laws would tend to promote human happiness.[209] As Blackstone put it, he doubted that any divine laws would seem, to human eyes, to be mere "abstracted rules and precepts, referring merely to the fitness or unfitness of things."[210] Blackstone's point, however, was predictive, not normative. He believed that God is unlikely to issue purposeless commands,[211] but he did not argue, as Llewellyn did, that purposeless commands would be invalid and meaningless simply by virtue of being purposeless.[212] Blackstone's test for legitimacy, then, was the source of the legal command—whether it came from God or not—rather than the content or consequence of the law.[213] Furthermore, as noted in the discussion of formalism's institutional claim, Blackstone clearly argued that human laws must be consistent with the divine law in order to be legitimate and binding.[214]

---

207. *Id.* at *41–42 ("[D]ivine providence . . . hath been pleased, at sundry times and in divers manners, to discover and enforce it's [sic] laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures.").

208. *Id.* at *42.

209. *Id.* at *40–41.

210. *See id.* at *40–41 (The greater context of Blackstone's point is as follows: "As therefore the creator is a being, not only of infinite *power* and *wisdom*, but also of infinite *goodness*, he has been pleased to contrive the constitution and frame of humanity, that we should want no other prompter to enquire after and pursue the rule of right, but only our own self-love, that universal prompter of action. For he has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter. In consequence of which mutual connexion of justice and human felicity, he has not perplexed the law of nature with a multitude of abstracted rules and precepts, referring merely to the fitness or unfitness of things, as some have vainly surmised; but has graciously reduced the rule of obedience to this one paternal precept, 'that man should pursue his own happiness.'").

211. *See id.*

212. *See* Llewellyn, *Theory of Appellate Decision*, *supra* note 2, at 400.

213. *See* BLACKSTONE, *supra* note 152, at *40–41.

214. *See id.* at *41.

As for changes to legal meaning, Blackstone referenced only one mechanism for progress in or amendment to the divine law: divine revelation.[215] According to Blackstone, God had "at sundry times and in divers manners" issued an "immediate and direct revelation" of the law.[216] That said, Blackstone did not believe that new revelations changed the natural law; rather, God's "precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity."[217] Blackstone's insistence here that changes in law are actually discoveries of preexisting law (a claim that Langdell later repeated in different form)[218] is the aspect of pre-industrial formalism that seems to have been most thoroughly debunked during the reform age.[219] Indeed, as early as 1914, Max Weber, the German sociologist of law and legal systems, refused to treat divine revelation as mere discovery of preexisting law.[220] Weber acknowledged that divine revelation is a mechanism for changing (rather than clarifying) the law in divine legal systems: "[T]he regulations enjoined by the religion are regarded . . . as eternally valid—susceptible of interpretation, but not of alteration, *unless the god himself reveals a new commandment.*"[221] That said, irrespective of whether new revelations are understood as clarifying or altering the existing law, Blackstone clearly argued that only God holds power to change the law's valid *operation* and *implementation*.[222] New revelations, even for a Blackstonian, were the only mechanism for legitimately changing the *de facto* meaning of the law, regardless of whether such revelations changed the law's metaphysical or *de jure* meaning.[223] Furthermore, Blackstone noted that God can accomplish such change only through the issuance of new revelations, presumably through new prophets or a new messiah.[224] Otherwise, the existing revelations and scriptures retain their position at the top of the legal-institutional hierarchy, as the controlling law that

215. *Id.* at *42.
216. *Id.*
217. *Id.*
218. *See* Grey, *supra* note 143, at 26–27.
219. *See, e.g.*, Thomas S. Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201, 206 (1965) (referring to the view that legal change is mere discovery as "a bit willful to the modern mind").
220. *See* MAX WEBER, ECONOMY AND SOCIETY 577 (Guenter Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., 1963).
221. *Id.* (emphasis added).
222. *See* BLACKSTONE, *supra* note 152, at *41.
223. *See id.* at *41–42.
224. *See id.*

binds all human institutions.[225] Change, thus, must occur only through formal action from the top of the hierarchy.

For Langdell, the original source of legal meaning is human, not divine: The meaning of law is determined by the first court to consider a new legal question.[226] Judges who encounter a question of first impression declare an answer, and in reasoning their way to the answer they choose, the judges articulate the broad legal principles that guide them.[227] Lower or later courts are then required to follow whatever legal principles the first judges followed.[228] The meanings of binding legal principles, then, are established in the case law; the case of first impression becomes the authoritative source of meaning to which all later courts are bound.

Once a principle has been declared, there are only two ways for a Langdellian judge to change the meaning or operation of an established legal principle. The first and crasser method is the widespread and systematic violation of existing law.[229] As Thomas Grey explained in his exposition of Langdellian orthodoxy: "In law, unlike science, error, if persisted in, at some point became truth . . . ."[230] In Langdellian formalism, an individual case that failed to follow established principles could be dismissed as error, but widespread and systematic failure to follow an established principle, in favor of a new one, would cause the law to change.[231]

The second and more ideal method of change, for Langdellian formalists, is the same as Dworkin's method of progress (as we shall shortly see): New judges can discover, articulate, and follow a legal principle that was immanent, but not articulated, in the prior cases, as long as the new principle fits and justifies prior cases and current social needs better than previously-articulated principles.[232] Here, again, is Grey:

---

225. For a more realistic (but therefore less jurisprudentially formalistic) description of change in divine legal systems, see generally Silvio Ferrari, *Adapting Divine Law to Change: The Experience of the Roman Catholic Church (With Some Reference to Jewish and Islamic Law)*, 28 CARDOZO L. REV. 53 (2006) (demonstrating that divine legal systems often update divine laws to changing social circumstances through human interpretation and creative enforcement mechanisms).

226. *See* Grey, *supra* note 143, at 11–12.

227. *Id.* at 25–27.

228. *See id.*

229. *See id.* at 25–26.

230. *Id.* at 26.

231. *See id.* at 25–26.

232. *See id.* at 31.

> Progress occurred [in Langdellian orthodoxy] when the scholar (or the great judge or lawyer)[233] discovered a previously unrecognized principle, one that provided a simple and satisfying explanation for existing decisions, and at the same time reflected the slowly changing needs and conditions of society. Such a principle, because immanent in decided cases, was already the law, so that its articulation was an act of discovery, not one of illegitimate legislation. On the other hand, once discovered, it would produce different, better decisions than had the older, less scientific formulation of doctrine and hence would contribute to the progress of the law.[234]

Although Langdell's crasser method of change acknowledged that widespread violations of principle would cause changes to the law, his more idealistic notion of legal progress, like Blackstone's, characterized new articulations of legal principle as discoveries of existing law rather than creations of new law (a significant difference from Dworkin despite the other similarities in their notions of progress).[235] There is a sense, then, in which both Blackstone and Langdell believed that law is static and immutable; both theorists argued that new articulations of law were mere clarifications of the existing law.[236] Nevertheless, for both Blackstone and Langdell, the *perceived* meaning and the real-world operation of the law could change over time.[237] For present purposes, the important point is not whether such changes are changes to "The Law" or not; the important point is that the only legitimate mechanism for any change in law's *operation*, for both Blackstone and Langdell, is positive action of the hierarchically primary institution.[238] For Blackstone, only God could legitimately change legal operation, and for Langdell, only judicial clarification of existing precedent could legitimately change legal operation.[239] The difference between these formalists and the Realists, then, is that the formalists required legal progress to be accomplished

---

233. Notice the similarity of this idea to Dworkin's ideal judge, Hercules. *See supra* text accompanying note 187.

234. Grey, *supra* note 143, at 31.

235. *See* Grey, *supra* note 143, at 25–26; BLACKSTONE, *supra* note 152, at *40–42; Leiter, *Positivism, Formalism, Realism*, *supra* note 58, at 1157 (describing Dworkin as "positivism's arch-opponent").

236. *See* BLACKSTONE, *supra* note 152, at *40–42; Grey, *supra* note 143, at 25–27.

237. *See* BLACKSTONE, *supra* note 152, at *40–42; Grey, *supra* note 143, at 26–27.

238. *See* BLACKSTONE, *supra* note 152, at *40–42; Grey, *supra* note 143, at 25–27.

239. *See* BLACKSTONE, *supra* note 152, at *40–42; Grey, *supra* note 143, at 25–27.

top-down from the hierarchically primary lawmaking institution, and they believed that such change should require hard work: a divine revelation for Blackstone and a scholarly (or Herculean)[240] discovery of immanent principles for Langdell.[241]

Unlike his formalist predecessors, Dworkin denied that law's meaning was a matter of mere semantic or historical fact,[242] and he frankly acknowledged that changes in law's meaning or operation were changes in the true meaning of "The Law."[243] Like Blackstone and Langdell, however, Dworkin insisted that the meaning of law is a matter of top-down declaration, and he believed that changes in meaning should issue, slowly and laboriously, from the top of the institutional hierarchy.[244]

Recall that the top of Dworkin's hierarchy consists of all past political and legal decisions, from which current interpreters must extract not only semantic legal rules but also broad principles of political morality that can determine outcomes in hard cases.[245] The determinants of legal meaning and legitimacy in Dworkin's empire, then, are twofold; the semantic forms of past political decisions provide a constraint on the valid content of the law, but those pronouncements' true meaning goes beyond their semantic forms. The most legitimate legal meaning is that which best aligns the entire system with the value of political morality that puts the law in its best possible light. Judges, legislators, and political philosophers alike must therefore contribute to the discovery of legal meaning through the identification of principles that best legitimize the legal system's past and present coercive operation.

For Dworkin, both of these determinants of legal meaning and legitimacy are matters of top-down declaration.[246] The first—the semantic content of past declarations—is easy to understand as a hierarchical and static declaration. The law's semantic content is determined and dictated by past speakers and cannot be changed once

240. DWORKIN, LAW'S EMPIRE, *supra* note 186, at 400–01; DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 186, at 113–15.

241. *See* BLACKSTONE, *supra* note 152, at *40–42; Grey, *supra* note 143, at 25–27.

242. DWORKIN, LAW'S EMPIRE, *supra* note 186, at chs. 1–2 (especially pages 45–46 describing the "semantic sting argument").

243. DWORKIN, LAW'S EMPIRE, *supra* note 186, at 400. According to Dworkin, the idea that a new, purer articulation of law was "the actual, present law" before Hercules's discovery of it is "too crude." *Id.*

244. *See id.* at 400–01.

245. *Id.* at 401–03.

246. *Id.* at 400–01.

recorded.[247] The second determinant of meaning is much more nuanced—and might seem Realistic at first blush—but actually has the same top-down character as other formalistic theories of meaning. In describing the "interpretive attitude" that explains disagreements over legal meaning, Dworkin argued that the "strict rules" of the legal system "must be understood or applied or extended or modified or qualified or limited by [the] point [of the legal system as a whole]."[248] This argument sounds similar to the Realist idea that laws must have purpose in order to retain meaning and validity—and that laws should be interpreted dynamically to remain consistent with their purposes. But the purposes that matter to Dworkin are not the regulatory ends of individual legal rules; Dworkin did not insist that every individual rule put forth by the American legal system have a concrete and discoverable purpose in order for each rule to have legitimate meaning and binding force.[249] Nor did he argue that laws should be interpreted dynamically to maintain their operational meaning. Instead, the purposes that matter to Dworkin are the overarching (one might say "brooding" and "omnipresent")[250] purposes of The Law as a coercive institution. The values of political morality that guide legal meaning for Dworkin are not grassroots values; they are not values that laypeople can determine for themselves and articulate, from the bottom up, in order to change legal meaning, operation, or legitimacy. Dworkinian legal principles are the values of political morality that Herculean judges and political philosophers extract from the entire legal system, which includes, but is not limited to, grassroots community values. To be legitimate, however, such purposes must be defensible as worthy justifications for the legal system's past, present, and future operation; they cannot be posited by laypeople because they require a kind of philosophical and moral validity that only a Herculean thinker can discern. Despite his purposive attitude, then, Dworkin is formalistic in two senses. First, the values-based elements of legal meaning and validity are immanent in legal institutions' past pronouncements, not primarily in current laypeople's preferences and values. Second, those values must be extracted by legal or philosophical actors through expert interpretation and imposed on laypeople through positive governmental

247. *See id.*

248. *Id.* at 47 (talking about courtesy in an obvious metaphor for law).

249. *See id.* at 47–48.

250. *See* S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky.").

action. As Dworkin said, "The courts are the capitals of law's empire, and judges are its princes, but [philosophers are] its seers and prophets."[251]

In that description of Dworkinian legal meaning and legitimacy, we see a glimmer of Dworkin's theory for change and progress in the law. For Dworkin, the philosophers—the "seers and prophets" of the law—are the ones charged with driving the law in the direction of its "dreams": in the direction of its best self.[252] Dworkin thus charged an intellectual aristocracy with the law's advancement, as did Blackstone and Langdell. For Blackstone, only prophets could change the law's operational meaning; for Langdell, only judges sitting in common law courts could do so; and for Dworkin, only great legal philosophers (whether they be academics, judges, or legislators) could do so.[253] That said, however, Dworkin did not ignore grassroots, Realistic evolutions in law's legitimacy in the same way that Blackstone and Langdell perhaps did. Dworkin argued that political philosophers and Herculean judges would and should engage in a fresh project of interpreting and justifying the legal system whenever underlying community values shifted in a way that undermined the system's existing justification.[254] When such shifts occur, philosophers and judges must find new values of political morality that can improve the legal system's current operation while simultaneously fitting and justifying the system's preexisting law. For Dworkin, that is, emergent or shifting values can become a binding part of the law—can become legal norms—if (but only if) expert interpreters can make the new values fit and justify the preexisting system *in addition* to improving the system for the future. Like Blackstone and Langdell, then, Dworkin perceived change as a top-down enterprise. Although Dworkin wanted the legal system to change in response to grassroots evolutions in political values, he required such change to occur only through expert and official action that could update the legal system while simultaneously preserving the character of the preexisting system.

The Epistemic Claim. The formalists' epistemic claim is that the existing law often (or perhaps always) contains determinate, right answers to most (or perhaps all) of the legal questions that might arise.[255]

---

251. DWORKIN, LAW'S EMPIRE, *supra* note 186, at 407.

252. *Id.* at 400–10.

253. *See id.* at 407–10; BLACKSTONE, *supra* note 152, at *40–42; Grey, *supra* note 143, at 25–27.

254. *See id.* at 67–73.

255. Schauer, *supra* note 140, at 510; Grey, *supra* note 143, at 9; David Lyons, *Legal Formalism and Instrumentalism—a Pathological Study*, 66 CORNELL L. REV. 949, 950 (1981).

This epistemic claim is the one for which formalists seem to be most reviled in modern writing—because the Realists largely won their claim that the positive law is indeterminate—but modern criticism of formalism's epistemic claim seems somewhat misguided.[256] The formalists' sense that legal determinacy is epistemically possible is perfectly consistent with—and perhaps even required by—their strong institutional and normative claims.

Remember that, for formalists, (1) law is valid only if it was enacted by an institution with lawmaking power, where lawmaking power is assigned hierarchically and where one discretionary lawmaker sits at the top of the hierarchy; (2) the meaning of an enacted law depends exclusively on the meaning attributed to that law by the institution at the top of the hierarchy; and (3) the meaning or operation of such law can change only through a countermanding action of the hierarchically primary institution.[257] If those institutional and normative claims are right, then *subordinate* institutions on the hierarchy should, of course, be bound to follow the commands of their superiors.[258] Furthermore, any subordinate institution's investigation into the meaning of a legal command should, of course, be limited to an investigation of the superior institution's intended or articulated meaning. If the enactment and elaboration of law is a hierarchical enterprise in which only one institution has lawmaking power, then inferior institutions should engage in no independent-minded or discretionary determination of the existing law's meaning or operation. According to formalism's institutional and normative claims, any discretionary legal pronouncements from inferior institutions are invalid if inconsistent with their superiors' commands.[259] Formalists thus insist that the role of inferior institutions is merely to follow their superiors' rules—an insistence that seems logically required from formalism's hierarchical understanding of legal meaning and validity.

Modern scholars sometimes treat the formalists' epistemic claim as an assertion of the law's "completeness."[260] That is, modern scholars sometimes understand formalism as depending on the notion that every single possible case has a unique "right answer" in the existing law, such

256. *See* TAMANAHA, *supra* note 20.
257. *See supra* Part I.B.
258. *See generally supra* Part I.B.
259. *See supra* Part I.B.
260. *See* Grey, *supra* note 143, at 6–7; Lyons, *supra* note 255, at 965–67.

that governmental institutions never need to "make" new law.[261] Indeed, completeness was a central aspiration of Langdell's and a central assertion of Dworkin's. Langdell hoped that legal scientists, with enough systematic effort (as in the later Restatement projects he inspired),[262] could discover and organize binding legal principles that would decide all cases, and Dworkin believed that judges' decisions in hard cases were discoveries of binding legal principles, not discretionary decisions.[263] Importantly, however, Blackstone did not believe that the body of hierarchically primary legal commands was complete, and the modern public law formalists, especially including Justice Antonin Scalia, have followed Blackstone rather than Langdell and Dworkin in this regard. Both Blackstone and Scalia happily acknowledged that there might be "gaps" in the body of hierarchically primary legal commands, leaving inferior institutions with some discretion to make legal choices within the gaps.[264] For Blackstone, as noted above, the divine and natural law left gaps that allowed human institutions to make "municipal law," and Blackstone seemed to view the municipal law somewhat realistically: as a non-hierarchical and discretionary project of multiple governing institutions.[265] For Scalia, as we shall see below, statutes sometimes (though rarely) leave gaps that allow agencies or courts to make discretionary regulatory choices in the resolution of statutory cases.[266] Completeness is thus not a characteristic of *all* formalistic legal theory.

In general, then, we cannot say that all formalists claimed that the law provides determinate answers to all legal questions. Formalism's universal epistemic claim is only this more-limited two-part claim: First, courts—and other institutions that must answer to superiors on the lawmaking hierarchy—ought to follow their superiors' commands whenever such commands exist. Second, *mere* obedience to existing commands (whenever there is an existent command rather than a gap) is epistemically possible, without any overlay of discretionary interpretation or choice. Importantly, formalists do not claim that hierarchically inferior institutions empirically *do* discover and obey their

261. *See* Grey, *supra* note 143, at 7.

262. *Id.* at 42–43.

263. *See* Ronald Dworkin, *Judicial Discretion*, 60 J. PHIL. 624, 624–25 (1963); DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 186, at 81; Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1060 (1975).

264. *See supra* Part 1.B; Scalia, *Judicial Deference*, *supra* note 1; *see also infra* Part II.C.1.

265. *See supra* Part 1.B.

266. *See* Scalia, *Judicial Deference*, *supra* note 1; *see also infra* Part II.C.1.

superiors' commands; many modern formalists regularly complain that they do not.[267] Rather, the claim is that inferior decision-makers *could* and legally *should* follow their superiors' commands and should do so without exercising any independent discretion as to what the commands ought to have been or ought now to be.

II. JURISPRUDENTIAL AMBIVALENCE

A. Definitional Preliminaries

The two major camps of statutory interpretation theory—textualism and purposivism—are both led by scholars whose writings exhibit jurisprudential ambivalence. Among the leading scholars, each camp borrows half of its theory from realism and half from formalism. To see the jurisprudential ambivalence at work, however, we must first define the camps, giving precise contours to "purposivism" and "textualism." Furthermore, we must also disentangle two layers of statutory interpretation theory that are only sometimes considered separately in modern writing: the regulatory and structural layers.

1. Purposivism and Textualism

The purposivist approach to statutory interpretation, in its simplest form, asks judges to consider the general policy aim underlying a statute and to enforce the statute to accomplish that aim, even if doing so seemingly stretches or violates the statutory text. The letter of the law ought to yield to the spirit of the law whenever the two conflict. This idea is often attributed to the Legal Process scholars, Henry Hart and Albert Sacks, who famously urged judges to interpret statutes consistently with the legislature's purposes, based on a background presumption that legislators are "reasonable persons pursuing reasonable purposes reasonably."[268] Hart and Sacks, however, urged courts to consider only the historical purposes of the enacting legislators.[269] The modern strain of purposivism goes well beyond that "originalist" understanding of purpose.[270]

---

267. *See* Lyons, *supra* note 255, at 950–52.
268. HART & SACKS, *supra* note 3, at 1378.
269. *Id.*
270. *See* Eskridge, *Dynamic Statutory Interpretation*, *supra* note 4, at 1480 (criticizing Hart and Sacks on this ground).

Today's scholarly purposivists, including some judicial interlocutors like retired Judge Richard Posner and active Judge Guido Calabresi, have argued that statutes ought to be interpreted to effect desirable ends in the real world, whether or not the legislature had those ends in mind at the time of the statute's enactment.[271] Modern purposivism thus ranges beyond the enacting legislature's policy mood, the mischief the legislature intended to correct, or even the broader policy context against which the legislature acted. In its most ambitious form, purposivism today does not limit itself to such originalist, historicist, or intentionalist investigation, urging judges to use their interpretive authority to accomplish good real-world results on an ongoing basis.[272] The strand of purposivism that I consider here is thus a theory of interpretive dynamism, not merely a theory of purpose-centered interpretation.

Textualism, in its old and simple form, was a mechanical and robotic methodology that asked judges to follow the plain meaning of the statutory text, relatively insensitively to context or consequence. In the old textualist school, judges assumed that they could usually discover and enforce an objectively correct, literal meaning of a statutory command, and they believed that they should limit themselves to such literalistic enforcement whenever possible.[273]

The so-called "new textualism," however, is much more nuanced.[274] New textualism requires judges to limit their inquiry to the semantic content of the statute, but that inquiry should include, for a modern textualist, the statute's broader "semantic context."[275] Modern textualists still believe that when the statutory text offers a clear outcome, judges should choose that outcome regardless of any seeming disparity between the outcome and the statute's overall purpose or the enacting legislature's intent.[276] But textualists today admit that

---

271. *See generally* Posner, *Legal Realism, Legal Formalism*, *supra* note 146.

272. Among judges, this version of purposivism is less popular than the Legal Process version; Justice Stephen Breyer and former Justice John Paul Stevens have written primarily from the perspective of Legal Process purposivism, and the newer members of the Supreme Court seem to be following a more textually constrained approach. *See* John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113 (2012).

273. *See* Manning, *What Divides Textualists and Purposivists?*, *supra* note 9, at 79 & n.28.

274. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 621 (1990) [hereinafter Eskridge, *The New Textualism*].

275. *See* Manning, *What Divides Textualists and Purposivists?*, *supra* note 9, at 76 (arguing that textualists consider only the "semantic context" of the statute while purposivists consider the "policy context").

276. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003).

statutory text is sometimes indeterminate and also that interpreters play a role in imputing meaning to the text.[277] In cases in which the statutory text is unclear, textualists believe that judges should consider semantic clues in the full statute, in other statutes, and from the linguistic conventions of the legislature in its time.[278] If all of those clues fail to provide an answer (which modern textualists believe they rarely will), judges should defer to an executive agency's interpretation[279] or perhaps even declare the statute inapplicable.[280] What judges should *not* do, according to today's textualists, is choose the outcome that produces the best results, whether the "best" results are measured against legislative intent or purpose or against broader policy preferences of the judge, the political branches, or the polity.[281]

My targets here are interpretive dynamism, which I will often refer to as "purposivism" despite its differences from the Legal Process variety of purposivism, and semantic rather than literalistic textualism, which for simplicity I will refer to as "textualism" without distinguishing between old and "new" textualism.

2. Regulatory and Structural Arguments

In all theories of statutory interpretation—textualist and purposivist alike—there are two layers of argument that are conceptually distinct but rarely considered separately, and it is between these two layers that many modern theorists shift their jurisprudential approaches. The first layer comprises what I call "regulatory" arguments, and the second comprises what I call "structural" arguments. These two layers are separable elements of modern public law theory, but theorists today rarely distinguish between them with rigor or clarity. It is therefore necessary to provide a basic definitional distinction between the two layers before we can turn to a deeper investigation of the layers' jurisprudential characteristics.

In one sense, the distinction is simple: "Regulatory" arguments are about laws that govern private entities (or laypeople) while "structural" arguments are about laws that govern public institutions (or governments). This distinction is similar but not identical to Hart's

277. *See* Manning, *What Divides Textualists and Purposivists?*, *supra* note 9, at 75.
278. *See id.* at 76, 81.
279. *See* Scalia, *Judicial Deference*, *supra* note 1, at 515.
280. *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 534 (1983).
281. *See* Manning, *What Divides Textualists and Purposivists?*, *supra* note 9, at 92–95.

distinction between "primary" and "secondary" rules: rules which impose obligations (primary) and rules which empower someone to create primary rules (secondary).[282] In statutory interpretation theory, the central question is often a regulatory (or primary) one: What does a particular statutory term mean? How does it or should it apply to the people it regulates? But statutory interpretation necessarily involves, at least implicitly but often explicitly, a host of attendant structural (or secondary) questions: Does Congress have the power to enact the statutory provision at issue, and does the extent of Congress's power depend on the meaning of the relevant provision? If an agency was involved in a provision's initial interpretation and implementation, does the agency have the power to interpret and implement the statute as it did? Does the court have the authority to override a congressional or administrative opinion on the proper meaning of the relevant statutory provision?

The distinction between regulatory and structural questions, then, is the distinction between the meaning of the law (regulatory) and the power or capacity of a particular institution to enforce a particular meaning of the law (structural).

Although this article focuses exclusively on statutory interpretation, it is worth noting that the division between regulatory and structural questions—or between meaning and power—is equally as important for administrative and judicial enactments as it is for legislative enactments. The meaning of an administrative regulation is obviously a regulatory question, but in answering that question, one must often make structural arguments or assumptions, such as whether the agency had authority to implement the relevant regulation and whether the agency followed required procedures in the choice and implementation of the relevant regulation.[283] Likewise, debates over the best outcome for a common law case center on regulatory questions, but they often depend on or invoke structural questions regarding the court's jurisdiction to resolve a common law case as well as the procedures required for the court's resolution.

---

282. HART, *supra* note 21, at 81–99. I use the "regulatory" and "structural" terms partly because the overlap with Hart is imperfect and partly because the terms "regulatory" and "structural" have stronger substantive connotations—and are thus easier to remember—than the terms "primary" and "secondary."

283. *See, e.g.*, City of Arlington v. FCC, 569 U.S. 290, 297 (2013) (noting that questions of an agency's jurisdiction are often inextricable from questions of a statutory term's meaning).

Notice that, when the "regulatory" layer centers on a statute, the "structural" questions are constitutional, but when the "regulatory" layer centers on an administrative regulation or a common law case, the "structural" questions are often statutory. The primary source of an agency's substantive powers and procedural obligations is its organic statute or the Administrative Procedure Act, and the source of a court's substantive powers and procedural obligations is often a jurisdictional statute or a body of procedural regulations, like the Federal Rules of Civil Procedure. The distinction between "regulatory" and "structural" arguments, then, is not quite as simple as a distinction between statutory and constitutional arguments—although there is considerable overlap in the realm of statutory interpretation.

In statutory interpretation theory, the distinction between regulatory and structural arguments becomes slightly more nuanced because statutory interpretation involves all three branches of government. The structural layer thus necessarily raises questions of *relative* rather than *absolute* power to make and interpret law. No one doubts, for instance, that courts have the constitutional authority to establish precedents—to make common law—but theorists hotly contest the extent of judicial power *relative* to legislative power in the interpretation of statutes.[284] For example, if we assume that flexible, dynamic, or purposive interpretation of statutory text constitutes, in some sense, the "creation" of statutory law (an assumption that begs the regulatory question), then we must confront the question of whether courts have the power to transform the civil law into something different than what Congress wrote.

As we shall see, many modern theorists follow different jurisprudential assumptions in their regulatory arguments than in their structural arguments. Purposivists generally make realistic arguments about statutory meaning (regulatory realism) but formalistic arguments about judicial power (structural formalism) while textualists generally make formalistic arguments about statutory meaning (regulatory formalism) but realistic arguments about judicial power (structural realism).

One way of understanding the jurisprudential ambivalence is to say that, in general, purposivists consider the structural layer to center on a question of judicial *authority* while textualists think it centers on a question of judicial *capacity*.[285] But purposivists think of statutes in

284. *See* HART, *supra* note 21, at 50–78.
285. *See* Fallon, *supra* note 9, at 704–25.

terms of their *capacity* to accomplish particular regulatory ends while textualists think of them in terms of their *authority* over judges and laypeople.[286] Among the most prominent modern writers, only Dworkin and Manning are purely formalistic, and only Posner is purely realistic.[287] In the remainder of this section, I review a small but prominent subset of the vast theoretical literature in statutory interpretation, demonstrating the jurisprudential ambivalence of five of the most influential theorists in the modern wave of statutory interpretation theory (Eskridge, Elhauge, Scalia, Easterbrook, and Vermeule) as well as the jurisprudential purity of three others (Dworkin, Manning, and Posner).

B. Purposivists: Eskridge, Posner, Elhauge, and Dworkin

With the one exception of Dworkin, most modern purposivists are regulatory realists. They view statutes as means to ends: instruments for accomplishing particular consequences for regulated laypeople.[288] They also argue that the meaning of a statutory provision ought to change in the bottom-up fashion that the American Legal Realists advocated.[289] That is, purposivists generally argue that, when underlying real-world conditions change in ways that render a statutory provision textually outdated, the courts ought to interpret the text flexibly enough to preserve the statute's *operational* meaning (its desirable real-world consequences) even if that approach sacrifices or ignores the semantic meaning of the statutory text.[290] That view rests on a realistic belief that the true meaning of the statute is found exclusively in the ends it accomplishes. It is this realistic notion that leads purposivists to argue that a statute's operation must change over time to keep pace with evolving real-world conditions, lest the statute lose its true meaning and validity.[291]

But, with the one exception of Posner, most purposivists are structural formalists. When asked why courts should be allowed to alter

286. *See* Manning, *supra* note 9, at 70.

287. *See* RICHARD A. POSNER, HOW JUDGES THINK (2d ed. 2010). Posner, however, refuses to defend his realism in theoretical or jurisprudential terms. *See* Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998) [hereinafter Posner, *Against Constitutional Theory*].

288. *See, e.g.*, Eskridge, *Dynamic Statutory Interpretation*, *supra* note 4, at 1479–80.

289. *See id.* at 1480.

290. *See, e.g.*, *id.*

291. *See id.* at 1498, 1502, 1538.

the meaning of a statute, purposivists respond with one of two arguments about the judicial power. First, some argue that the Constitution vests the judiciary with a common law or equitable authority to interpret dynamically.[292] Second, some argue that the judiciary, as Congress's "faithful agent" in the constitutional structure, must be allowed the flexibility to enforce Congress's purposes because a smart and faithful agent does not obey its principal's orders in a robotic, purposeless way.[293] Both of these arguments rest on a formalistic, "right answer" notion of judicial authority, focusing on the courts' *power* rather than their *capacity*. The arguments rest on an assumption that the judicial power either legally contains or legally does not contain a power of purposivist interpretation. These purposivists do not make a Realistic attempt to show that judicial updating of statutory provisions will be empirically or consequentially superior to textualist interpretations, nor do they typically admit a possibility that textualist methods might sometimes be empirically or consequentially superior to dynamic updating.

Although there are many purposivist authors writing today,[294] I center my discussion here on a deep investigation of four influential theorists whose work seems most representative of the general approach. I thus examine the works of William Eskridge (who started the modern purposivist wave and whose influence on other purposivist writers cannot be denied), Richard Posner (whose theory of pragmatic interpretation has been extremely provocative), Einer Elhauge (whose recent work on statutory default rules offers an importantly different justification for dynamic interpretation), and Ronald Dworkin (whose work is both extraordinarily influential and importantly formalistic, providing a counter-example to the predominantly Realist attitude of purposivist theory).

1. Regulatory Arguments

Although different purposivists take different approaches in defending regulatory updating, three of the four purposivists considered

292. *See, e.g.*, Eskridge, *Dynamic Statutory Interpretation*, *supra* note 4, at 1499–1500.

293. Manning, *Textualism and the Equity of the Statute*, *supra* note 181, at 10–15.

294. Perhaps the most important purposivists excluded from my consideration here are the ones that have most actively engaged in dynamic interpretation on the Supreme Court: Justice Stephen Breyer and former Justice John Paul Stevens. As noted above, both Breyer and Stephens have been more inclined to follow Legal Process purposivism, which lacks the Realistic foundation of modern dynamic purposivism. *See* Manning, *The New Purposivism*, *supra* note 272, at 154.

here (excluding Dworkin) share the Realists' view that the meaning of a statute depends on its consequences, including not only the statute's intended consequences at the time of its enactment but also its ongoing empirical consequences.[295] Indeed, the primary difference between purposivists and intentionalists is the purposivists' insistence that statutory meaning ought to incorporate and react to evolving real-world conditions.

William Eskridge. In the modern wave of statutory interpretation theory, the first author to advocate dynamism was William Eskridge, in *Dynamic Statutory Interpretation.*[296] Eskridge's goal was to present and defend a model of statutory interpretation that permitted consideration of evolving real-world conditions and thus permitted judicial updating of a statute's meaning and operation over time.[297] As he put it, Eskridge's purposivism would allow a judge to consider not only text and historical context but also "the subsequent evolution of the statute and its present

295. *See* Eskridge, *Dynamic Statutory Interpretation*, *supra* note 4, at 1480; Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 5 (1996) [hereinafter Posner, *Pragmatic Adjudication*]; EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 8–9 (2008); *cf.* DWORKIN, LAW'S EMPIRE, *supra* note 186, at 338.

296. *See generally* Eskridge, *Dynamic Statutory Interpretation*, *supra* note 4. A few years before Eskridge published his article, Guido Calabresi published a book that advanced a similar but far more ambitious thesis on the judicial power to interpret statutes dynamically. *See generally*, CALABRESI, *supra* note 4. Calabresi's work, which advocated not only judicial updating but also judicial *repeal* of outdated statutes, was far more radical and thus much less influential than Eskridge's more measured theory. *Id.* at 105. I therefore do not include Calabresi's work as one of the core purposivist theories of modern statutory interpretation scholarship, but it is worth noting that Calabresi's work did seem to inform some of Eskridge's thinking. *See* Eskridge, *Dynamic Statutory Interpretation*, *supra* note 4, at 1481 n.7 (noting that Eskridge's "approach is related to, but stops far short of, the proposal in" Calabresi's book). Also barely predating Eskridge's paper was Dworkin's book, LAW'S EMPIRE, in which he advocated dynamic interpretation, but as noted above and as discussed further below, Dworkin's theory of regulatory meaning is formalistic despite his advocacy of interpretive dynamism. DWORKIN, LAW'S EMPIRE, *supra* note 186, at 338. The other influential theorists of purposivism who predated Eskridge—and who are perhaps surprisingly not included here—are Hart and Sacks. *See* HART & SACKS, *supra* note 3. In their extremely influential THE LEGAL PROCESS, Henry Hart and Albert Sacks advocated a modified intentionalism that incorporated broader notions of purpose and process than the statutory intentionalists who came before them. *Id.* at 1374–80. Nevertheless, Hart and Sacks did not advocate the Realists' dynamic approach to statutory meaning; they focused exclusively on the purposes and consequences that existed at the time of the statute's enactment. *Id.* Hart and Sacks were therefore static rather than dynamic purposivists, and I treat them here as intentionalists despite their inclusion of broad purpose as a measure of intent.

297. *See* Eskridge, *Dynamic Statutory Interpretation*, *supra* note 4, at 1481–82.

context, especially the ways in which the societal and legal environment of the statute has materially changed over time. . . ."[298] In introducing this basic notion of dynamic interpretation, Eskridge quoted Llewellyn. When real-world circumstances change a statute's operation, Eskridge argued, "it seems sensible that 'the quest is not properly for the sense originally intended by the statute [or] for the sense sought originally to put into it, but rather for the sense which can be quarried out of it in light of the new situation.'"[299]

As Eskridge fleshed out the claim that statutory meaning includes an "evolutive component," he delved explicitly and deeply into Realist jurisprudence, using Radin's writing to undermine the legitimacy—and even the possibility—of limiting a statute's meaning to its original intent.[300]

Eskridge then drew on "[m]odern humanistic scholarship" to offer an updated version of the Realists' epistemic and empirical claims. According to Eskridge, there was a "growing academic consensus that different interpreters over time are likely to interpret the same text differently."[301] The consensus theory of "contextualist interpretation," Eskridge argued, "denies the possibility of consistent and objective interpretations of the same statute by different judges—or even by the same judges under different circumstances."[302] Eskridge thus argued that statutes are unlikely to bind judges to single outcomes (the epistemic claim) and that, in "hard cases" with multiple legally permissible outcomes, "interpretation will inevitably be affected by the current context of the judicial interpreter" (the empirical claim).[303]

Later in his defense of interpretive dynamism, Eskridge strongly echoed the Realists' normative claims as well—though he did so in updated academic language and without incorporating the Realists' institutional concerns.[304] Eskridge argued that the Constitution commits its institutions to the pursuit of "the common good" (not mere legislative bargains),[305] and he argued that pursuit of the common good requires statutes to "grow and develop in response to novel fact situations and

298. *Id.* at 1483.
299. *Id.* at 1480 (quoting Llewellyn, *Theory of Appellate Decision*, *supra* note 2, at 400).
300. *See id.* at 1506–09 (arguing that Realistic attacks on "mechanical jurisprudence" had undermined intentionalist approaches to statutory meaning).
301. *Id.* at 1510.
302. *Id.*
303. *Id.* at 1508.
304. *Id.* at 1509.
305. *Id.* at 1513.

significant changes in the legal terrain."[306] This argument rests on the same notion of legal legitimacy that the Realists articulated fifty years before: that statutes in the American constitutional order gain and retain their legitimacy from their beneficial real-world consequences—their ability to enhance the common good.[307] Indeed, Eskridge makes his vision of dynamic legitimacy explicit: "The legitimacy of government is ultimately based upon the continued responsiveness of the whole government to the objective needs of the evolving society."[308]

Eskridge thus incorporated all the core components of Realism into his theory of regulatory legitimacy, except the institutional claim.[309] His justification for dynamic statutory interpretation centered on the notion that a statute's meaning does and should depend on its real-world consequences and that a statute's ongoing legitimacy thus depends on the willingness of interpreters to update the statute's operation in light of changing real-world circumstances.[310] In his regulatory arguments—in his arguments about statutory meaning—Eskridge is a realist.

Richard Posner. Richard Posner's theory of interpretation—and especially its relationship to Realism—has evolved quite a bit over time, but in his most recent writings, Posner's interpretive theory is fully Realist. That said, in his earliest works, Posner argued that jurisprudential distinctions between realism and formalism "have no application to statutory or constitutional law" because "interpretation [of a written text] is neither logical deduction [(i.e., formalism)] nor policy analysis [(i.e., realism)]."[311] In the same work, Posner took a largely formalistic position. He acknowledged only a limited role for realistic interpretation: the role of gap-filling when hierarchically primary orders are absent or unclear.[312] His early view thus closely followed the tradition of Blackstone and also anticipated Scalia. Here is early Posner:

> In our system of government, the framers of statutes and constitutions are the superiors of the judges. The framers communicate orders to the judges through legislative texts (including, of course, the Constitution). If the orders are clear, the

306. *Id.* at 1520.
307. *See supra* Part I.A.
308. Eskridge, *Dynamic Statutory Interpretation*, *supra* note 4, at 1523–24.
309. *See supra* Part I.A.
310. *See generally* Eskridge, *Dynamic Statutory Interpretation*, *supra* note 4, at 1523–24.
311. Posner, *Legal Realism, Legal Formalism*, *supra* note 146, at 187.
312. *See id.* at 189–90.

> judges must obey them. Often, however, because of passage of time and change of circumstance the orders are unclear . . . . [The judges] are part of an organization, an enterprise—the enterprise of governing the United States—and when the orders of their superiors are unclear, this does not absolve them from responsibility for helping to make the enterprise succeed. . . . Judges should ask themselves . . . when the "orders" they receive from the framers of statutes and constitutions are unclear: what would the framers have wanted us to do in this case of failed communication?[313]

Here, Posner treats statutes as the commands of a superior on the institutional hierarchy, which is a formalist's notion of statutory meaning, and he permits consequentialist interpretation only when the superior's orders are unclear. In this passage, however, there is also an important hint that realism would eventually overtake Posner's theory. The cause of statutory ambiguity that he imagines is not textual or semantic ambiguity; it is "passage of time and change of circumstance."[314] Posner thus hinted here that statutory meaning depends, not only originally but also dynamically, on the statute's real-world effects; otherwise, time and circumstance could not render a statute unclear.

A mere ten years later, Posner was singing a very different—and now robustly Realist[315]—tune about statutory meaning. In his theory of "pragmatic adjudication," Posner rejected the idea that statutes are

---

313. *Id.* at 189.

314. *Id.*

315. In his mid-career writing, Posner denied that his legal pragmatism was merely a "warmed-over legal realism or critical legal studies." RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 84 (2003). His reason, however, was that he saw both Realism and CLS as politically contingent (and exclusively liberal-progressive) movements. *Id.* Posner claims that pragmatism, unlike realism, "relies on advances in economics, game theory, political science, and other social-scientific disciplines, rather than on unexamined political preferences and aversions, to take the place of legal formalism." *Id.* Perhaps Posner, here, was focused on the more fringe elements of Realism, like Jerome Frank, or modern caricatures of Realists that reduce Realist jurisprudence to the not-actually-Realist slogan of "all law is politics." In truth, the Realists offered the exact same faith in social scientific inquiry as a replacement for formalism that Posner offers, as Posner seemed to accept in his more recent writings. *See* RICHARD A. POSNER, REFLECTIONS ON JUDGING 105–30 (2013) (embracing "realism" as a label for his approach) [hereinafter POSNER, REFLECTIONS ON JUDGING]; Richard A. Posner, *Michael C. Dorf's "Review" of Richard A. Posner, Divergent Paths: The Academy and the Judiciary: A Response by the Book's Author*, 66 J. LEGAL EDUC. 203, 205 (2016) ("Dorf discusses legal realism at length in his 'review,' describing me as a legal realist—a label I'm happy to wear . . . .").

"authorities" and instead argued that they are mere "signposts," which can provide information to judges in their pursuit of optimal real-world outcomes.[316] Here is mid-career Posner:

> [The pragmatist] judge wants to come up with the best decision having in mind present and future needs, and so does not regard the maintenance of consistency with past decisions as an end in itself but only as a means for bringing about the best results in the present case. . . .
>
> The pragmatist judge thus regards precedent, statutes, and constitutions both as sources of potentially valuable information about the likely best result in the present case and as signposts that must not be obliterated or obscured gratuitously, because people may be relying upon them. But because the pragmatist judge sees these "authorities" merely as sources of information and as limited constraints on his freedom of decision, he does not depend upon them to supply the rule of decision for the truly novel case. For that he looks also or instead to sources that bear directly on the wisdom of the rule that he is being asked to adopt or modify.[317]

What a change! In ten years, Posner evolved from treating statutes as commands to treating statutes as mere evidence of desirable policy, even using scare-quotes to indicate that statutes have no actual authority—but only purported "authority"—over judges.[318] This passage entirely rejects the formalistic—and fully embraces the realistic—notion of legal meaning. For 1996 Posner, statutes (as part of a set of "past" legal decisions) are nothing more than "means for bringing about the best results in the present case."[319] They are means to ends. The semantic content of the statute, according to Posner, is meaningful only insofar as it might be a useful indication of the best way to satisfy "present and future needs."[320] Of course, Posner did (as he must and as 1930s Realists did) admit that judges might often do best by adhering to statutory text, but the legal nature of a statutory text, for Posner as for the Realists, is

316. Posner, *Pragmatic Adjudication*, *supra* note 295, at 5.
317. *Id.*
318. *Id.*
319. *Id.*
320. *Id.*

emphatically non-binding.[321] According to Posner, only the consequences of statutory enforcement (or non-enforcement) ought to matter to the pragmatic jurist.[322]

Unfortunately, at the same time that Posner started embracing a fully realistic jurisprudence, he also started eschewing any "effort to develop a generally accepted theory to guide [] interpretation . . . ."[323] In Posner's most recent works, he has focused primarily on court reforms that might help judges to become better realists—that might help judges to optimize the immediate, evolving, and systemic consequences of their opinions.[324] He has not given a robust jurisprudential defense of his interpretive approach.[325] Nevertheless, Posner's recent works make it clear that he continues to embrace a realistic notion of statutory meaning.[326] He now understands statutes as flexible and dynamic means to ends, rather than understanding them (as he once did) as semantic and authoritative commands from the legislature.

Einer Elhauge. The latest entrant in the interpretive dynamists' camp is Einer Elhauge,[327] who has argued that judges should resolve

---

321. *Id.*; Llewellyn, *Theory of Appellate Decision*, *supra* note 2, at 396.

322. *See* Posner, *Pragmatic Adjudication*, *supra* note 295, at 7–8.

323. Posner, *Against Constitutional Theory*, *supra* note 287, at 1–2. This article was specific to theories of constitutional interpretation, but elsewhere in his writing, Judge Posner refers to the Constitution as a piece of legislation, essentially equivalent to a statute. *Id.* Furthermore, Posner wrote a few pieces on statutory interpretation theory in the 1980s but none thereafter. *See, e.g.*, Posner, *Legal Realism, Legal Formalism*, *supra* note 146, at 182–90. He seems to have eschewed all such interpretive "theorizing" by the late 1990s. Posner, *Against Constitutional Theory*, *supra* note 287, at 1–2.

324. *See* POSNER, REFLECTIONS ON JUDGING, *supra* note 315, at 126–30; RICHARD A. POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY 76–92 (2016).

325. In REFLECTIONS ON JUDGING, for instance, Posner includes a full chapter on interpretation, but he spends the chapter criticizing others' interpretive theories rather than explicating his own. *See* POSNER, REFLECTIONS ON JUDGING, *supra* note 315, at 178–235. Posner's description of his own interpretive approach is reserved for a few sentences at the very end of the chapter:

> The realist judge's approach is that if the statute is clear, fine; if it's not clear, let's try to figure out what the legislature's general aim or thinking was and interpret the statute to advance that aim. And there may be clues in the legislative history. If we can't figure out what the aim is, we'll have no alternative but to assume the role of pro tem legislators and impose some reasonable meaning on the statute . . . . [R]ealistic interpretation insists on consideration of context in the full factual sense in a wide spectrum of cases. *Id.* at 234–35.

326. *See id.*

327. Elhauge's work makes strong claims to descriptive accuracy in addition to claiming normative attractiveness. I will focus exclusively on the normative dimension of his work here. *See generally* ELHAUGE, *supra* note 295.

statutory ambiguities to satisfy "current enactable preferences."[328] Elhauge's theory tracks—but does not explicitly adopt—the Realists' notion of dynamic legitimacy. The argument is that judges ought to interpret all ambiguous statutory terms, whether the statutes be young or old, to reflect political preferences that could be enacted into law at the moment of the statute's interpretation.[329] Ambiguities ought not to be resolved, Elhauge insists, to comply with the enacting legislature's original or reconstructed intentions or the judge's own current preferences.[330] The lodestar should be the preferences of the legislative and executive branches that are in power at the moment of interpretation.

To defend this approach, Elhauge argues that a legislature would rather influence the meanings of all statutes that come before the courts during the two years of its tenure than influence the meanings of the legislature's own statutory enactments for all time.[331] In other words, a rational legislature would rather impact the entire *corpus juris* for a short time than impact its own enactments for all time.

Although Elhauge, unlike Eskridge and Posner, did not explicitly invoke the Realists' theories of statutory meaning,[332] Elhauge's theory is deeply inconsistent with the formalistic notion of a statute as a static command from its author, and his argument assumes the realistic notion of a statute as a means to some real-world end. Elhauge overtly argues that statutory enforcement ought to satisfy political preferences, and his insistence on examining current rather than original preferences is a realistic move, resonating with the Realists' notion of dynamic legitimacy and conflicting with the formalists' insistence that only the hierarchically primary institution can legitimately update a law's meaning or operation.[333]

328. *Id. passim*.

329. Like most modern theorists, Elhauge adopts the Realists' idea that statutory text is often ambiguous to the point of indeterminacy: the Realists' epistemic claim. *Id.*

330. *Id.* at 23–38, 316.

331. *Id.* at 10 ("[T]he enacting legislative polity would prefer *present* influence (while it exists) over *all* the statutes being interpreted, rather than *future* influence (when it no longer exists) over the *subset* of statutes it enacted.").

332. Elhauge cites Radin for the notions that legislative intent is impossible to ascertain and that legislative history is unreliable. *See id.* at 119, 123. Elhauge cites Llewellyn for the notion that the canons of statutory construction are indeterminate. *See id.* at 188–203. He does not discuss Realism qua Realism nor does he discuss Radin's or Llewellyn's deeper theories of statutory meaning. *Id.*

333. *Id.* at 115–33.

The realism of Elhauge's approach is perhaps most apparent in this brief concession in the introductory chapter of his book:

> This is not to deny that courts should consider other possible traditional judicial goals like advancing statutory coherence, stability, or certainty. But the proper basis for such consideration is not that these goals are ends in themselves, but rather that advancing them generally increases political satisfaction. Interpretations thus should not further those goals when other evidence indicates that doing so would deviate from enactable preferences.[334]

Here, Elhauge lays bare the consequentialism of his jurisprudential approach. Preference-satisfaction is the purpose of law, and all traditional legal considerations in statutory interpretation should be understood merely as costs and benefits—deviations from preferences or satisfactions of preferences—that might alter the net consequences of a judge's choice.[335] This approach to statutory meaning and operation is fundamentally realistic.

Ronald Dworkin. Although Ronald Dworkin was one of the first theorists to advocate dynamic statutory interpretation, his justification for that approach is jurisprudentially distinct from that of his fellow purposivists. His is formalistic. Remember that, for Dworkin, there is a hierarchically primary legal authority, but the hierarchy is not topped by a governing institution.[336] Instead, the top of the hierarchy is the principle of political morality that puts the entire legal system in its best possible light.[337] The obligation of all lawmakers, whether they be adjudicators or legislators, is to ensure the integrity of the legal system as a whole.[338]

In Dworkin's formalism, then, statutes cannot be authoritative commands because they do not, in themselves, qualify as political-moral values that can give integrity to the entire legal system.[339] As Dworkin put it, "A community of principle does not see legislation the way a rulebook community does, as negotiated compromises that carry no more or deeper meaning than the text of the statute declares; it treats

334. *Id.* at 8–9.
335. *Id.* at 23.
336. *See supra* Part I.B.
337. *See supra* Part I.B.
338. *See supra* Part I.B.
339. *See* DWORKIN, LAW'S EMPIRE, *supra* note 186, at 313–54.

legislation as flowing from the community's present commitment to a background scheme of political morality."[340] For Dworkin, then, a statute is merely one part of the overall legal system that needs to be integrated into the "background scheme."[341] It is a piece of the puzzle that Judge Hercules must consider in his quest for the moral principle that binds him,[342] and the best interpretation of a statute is the one "that makes the story of government the best it can be,"[343] measured not only in terms of the government's wisdom and justice in concrete cases but also in terms of the governmental scheme's overall coherence, integrity, and fairness.[344]

Dworkin thus advocated a kind of purposivism, but it is not the consequential purposivism of his fellows. Dworkin's theory is not—or at least is not *only*—that statutes are means to ends, which must have good real-world results in order to be legally legitimate. Instead, his theory is that statutes must play a morally valid and principled role in the legal system as a whole, or else they are legally invalid for their non-compliance with the value of political morality that sits atop the legal hierarchy. Here is Dworkin, imagining his Judge Hercules trying to decide a statutory case:

> Hercules is not trying to reach what he believes is the best substantive result, but to find the best justification he can of a past legislative event. He tries to show a piece of social history—the story of a democratically elected legislature enacting a particular text in particular circumstances—in the best light overall, and this means his account must justify the story as a whole, not just its ending. . . .
>
> Integrity requires him to construct, for each statute he is asked to enforce, some justification that fits and flows through that statute and is, if possible, consistent with other legislation in force.[345]

340. *Id.* at 345–46.
341. *Id.* at 346.
342. This approach to statutory interpretation is usually called "coherence" in the literature because it seeks to make all statutes morally coherent with all other positive legal commands in the system.
343. DWORKIN, LAW'S EMPIRE, *supra* note 186, at 340.
344. *Id.* at 337–43.
345. *Id.* at 338.

In addition to arguing for inquiry beyond the statutory text, Dworkin aligned with other modern purposivists in arguing for dynamic, evolving interpretation of statutory meaning. Again, however, his justification was formalistic, not realistic, because it was premised on the need to maintain integrity and coherence in the overarching legal order.[346] Here, again, is Dworkin:

> Hercules' method . . . rejects the assumption of a canonical moment at which a statute is born and has all and only the meaning it will ever have. Hercules interprets not just the statute's text but its life, the process that begins before it becomes law and extends far beyond that moment. He aims to make the best he can of this continuing story, and his interpretation therefore changes as the story develops.[347]

Dworkin's method (which he calls Hercules' method) is not based on a Realist notion that evolving real-world conditions might render a statute legally invalid by altering its on-the-ground consequences.[348] His justification for altering statutory meaning over time is that the statute's "life"—the legal acts that an interpreting judge must integrate, cohere, and justify—cannot be limited to the initial enactment.[349] Instead, the judge must make the best he can out of the statute's entire "political history," which for Dworkin "includes not only the act but the failure to repeal or amend it later," "public opinion . . . now," and "other decisions that Congress and the courts have made in the meantime."[350]

"Hercules interprets history in motion," Dworkin said, "because the story he must make as good as it can be is the whole story through his decision and beyond. He does not amend out-of-date statutes to suit new times . . . . He recognizes what the old statutes have since become."[351] This is a formalistic take on dynamic interpretation. Dworkin's theory is out-of-step with the textualists because it does not treat statutory text as a formal law to which judges owe their obedience, but his theory is also out-of-step with other purposivists because it depends on a formal and binding law to govern judicial decision. Dworkin's law—law as

346. *Id.* at 348–50.
347. *Id.*
348. *See id.*
349. *See id.* at 338.
350. *Id.* at 349.
351. *Id.* at 350.

integrity—does not merely permit but rather *commands* dynamic and purposive statutory construction.[352]

2. Structural Arguments

Despite giving jurisprudentially realistic understandings of statutory meaning, Eskridge and Elhauge both adopt formalistic understandings of the judicial power. Eskridge appeals to the old English doctrine of the "equity of the statute" to justify dynamic interpretation,[353] and Elhauge adopts from his predecessors and interlocutors the "faithful agent" model of judicial power, which he argues requires interpretive dynamism.[354] Both the "equity of the statute" and the "faithful agent" model are formalistic doctrines; both attempt to define, once and for all, a constitutionally mandated role for the judiciary in the interpretation and implementation of statutes, and both center on a question of judicial *authority* while ignoring issues of judicial *capacity*. Although Eskridge's theory of common law power does not place the judiciary in a hierarchically inferior position relative to the legislature (as does the model that Elhauge engages), both models nevertheless attempt to discover a conceptual answer to the judiciary's power and to derive that answer from a hierarchically primary body of law: the Constitution.[355]

Dworkin, too, takes a formalistic approach to the structural layer of interpretive theory, matching his formalistic approach to questions of meaning; he insists that the judicial power must include a power of interpretive dynamism because only such a reading of the American Constitution fits and justifies historical practices. Only Posner offers a realistic analysis of structural issues that places questions of judicial capacity at the center of the analysis, but Posner's work largely shrugs off questions of justification when addressing the judicial power, focusing instead on structural reforms that might aid judicial implementation of statutory pragmatism. As a result, none of the leading modern purposivists gives a robust realistic defense of judicial authority to engage in interpretive dynamism.[356]

352. *Id.* at 338–40.

353. Eskridge, *Dynamic Statutory Interpretation*, *supra* note 4, at 1502.

354. ELHAUGE, *supra* note 295.

355. Eskridge, *Dynamic Statutory Interpretation*, *supra* note 4, at 1497.

356. Indeed, I have been unable to find a Realistic answer to the structural questions inherent in interpretive dynamism from any modern purposivist other than Posner and Justice Stephen Breyer. I exclude Breyer from my deep analysis in the text only because he has been a less active scholarly writer than Judge Posner, but his early academic writing

Eskridge. William Eskridge is the most extreme perpetrator of jurisprudential ambivalence in the theoretical literature. As noted, Eskridge was an early adopter of Realism in his theory of statutory meaning, but his understanding of the judicial power has been solidly formalistic.[357] In a long debate with John Manning, Eskridge has attempted to demonstrate that the Constitution authorizes dynamic interpretation.[358] Throughout the debate, Eskridge engaged Manning on Manning's own formalistic terms, with both writers attempting to discover one single, authoritative answer to the scope of the judicial power and with both writers mining the history of founding-era practices

---

evinces a realistic approach to structural questions, including a confrontation of limited judicial competence. *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1991) (arguing from a self-consciously pragmatic standpoint that judges ought to continue consulting legislative history); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 394–95 (1986) (arguing from a perspective of comparative institutional competence that courts are ill-equipped to second-guess agency policy determinations). For examples of structural formalism from other purposivist writers, *see, e.g.*, Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 1004 (1978) ("[T]he law is largely a set of external standards that guide the judge, and it is doubtful if his role is ever to give sway to subconscious feelings he is incapable of articulating."); Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 811 (2013) (applying the lens of formal judicial lawmaking powers to the question of whether courts have authority to create an actual law of interpretive methodology); Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637, 2638–40 (2003) (explaining that *Marbury* and *Chevron* indicate that Congress has the power in the first instance to define whether courts or agencies should be the primary interpreters of statutes); Aharon Barak, *On Society, Law, and Judging*, 47 TULSA L. REV. 297, 299–302 (2011) (asserting that the interpretive role of the judiciary is an essential component of the separation of powers necessary for a functioning democracy); Peter L. Strauss, *The Courts and Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 265 (1998) (arguing that courts might be constitutionally *required* to consult legislative history); Aleinikoff, *supra* note **Error! Bookmark not defined.** at 59–62 (grounding his argument for dynamic interpretation in Dworkinian-like notions of morality and coherence); Jane Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593 (1995) (defending various interpretive practices according to a theory that they promote a more ideal form of democracy than the simple principle-agent notion of legislative supremacy). Daniel Farber gives an answer of which the Realists would have approved by deeming dynamic interpretation "inevitable," but he does not contend with the error costs that the American Legal Realists foresaw. *See* Daniel A. Farber, *The Inevitability of Practical Reason*, 45 VAND. L. REV. 533, 551 (1992).

357. *See generally* Eskridge, *Dynamic Statutory Interpretation*, *supra* note 4.

358. *See generally* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001) [hereinafter Eskridge, *All About Words*]; William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509 (1998) [hereinafter Eskridge, *Unknown Ideal*].

in pursuit of that answer.[359] Eskridge thus assumed, together with Manning, that the Constitution would provide a law of judicial power and that, once discovered, the Constitution's answer would bind judges, either by authorizing or by forbidding dynamic interpretation.[360]

These are formalistic assumptions. Eskridge's arguments rest on a hierarchical notion of law and legal institutions, with the Constitution and its drafters sitting at the top of the legal hierarchy. They rest on a static notion of legitimacy, with the scope of the judicial power set at the moment of the Constitution's adoption and presumably subject to amendment only through the Article V process. And, perhaps most importantly (because most in tension with his regulatory arguments), Eskridge's structural arguments rest on formalistic notions of meaning and epistemic possibility. Eskridge's arguments assume that the Constitution means what the document means, insensitively to the purposes or consequences of its interpretation for today's judges and for the subjects of today's judicial opinions, and they assume that, with enough mining of the history, one can discover and obey the Constitution's command.

It might be tempting to imagine that Eskridge's formalistic approach was purely reactive to Manning's formalistic attack. But Eskridge made several structural arguments in *Dynamic Statutory Interpretation* as well (an article that predated Manning's work by almost ten years),[361] and most of Eskridge's earliest arguments were jurisprudentially formalistic as well.[362] For instance, in *Dynamic Statutory Interpretation*, Eskridge appealed to constitutional history,[363] the equity of the statute doctrine,[364] and conceptual rules of contract interpretation (together with a conceptual distinction between contracts and consent decrees).[365] Most

359. *See generally*, Eskridge, *All About Words*, *supra* note 358; Eskridge, *Unknown Ideal*, *supra* note 358.

360. *See* Eskridge, *All About Words*, *supra* note 358, at 991–94.

361. When *Dynamic Statutory Interpretation* was published, Manning was fresh out of law school and working in the Department of Justice's Office of Legal Counsel; Manning's first published piece appeared nearly ten years later. *See* John F. Manning, *Faculty Profiles*, HARVARD LAW SCHOOL, http://hls.harvard.edu/faculty/directory/10552/Manning (last visited Jan. 20, 2020).

362. *See generally* Eskridge, *Dynamic Statutory Interpretation*, *supra* note 4.

363. *See* Eskridge, *Dynamic Statutory Interpretation*, *supra* note 4, at 1503 (citing William Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 802–05 (1985)); Eskridge, *Dynamic Statutory Interpretation*, *supra* note 4, at 1513.

364. *See* Eskridge, *Dynamic Statutory Interpretation*, *supra* note 4, at 1503.

365. *See id.* at 1520–23.

persistently, he rested his view on "our polity's constitutional commitment to the common good . . . ."[366] All of these arguments appeal to "higher law" notions of judicial power to justify interpretive dynamism.

Even in Eskridge's consideration of judicial competence—the core concern of the American Legal Realists—Eskridge gave formalistic answers. He summarized his first two responses as follows: "[I]f we allow lawmaking by agencies in statutory matters and by courts in nonstatutory matters, we should allow lawmaking by courts in statutory matters."[367] This argument bears a striking resemblance to formalistic syllogisms,[368] and even beyond that resemblance, it rests on a simple legalistic analogy that begs the core realistic questions of whether *any* of those lawmaking powers (those of agencies or courts in statutory matters or those of courts in nonstatutory matters) accomplishes good results for regulated laypeople.[369] Eskridge's third answer to the competence concern was that "the adjudicative process will minimize the imposition of values idiosyncratic to individual jurists, because it is incremental and conventional."[370] This answer is somewhat more realistic. The American Legal Realists did note that doctrinal languages of justification would limit judicial discretion, and the Realists would have been interested in an analysis that centered on the functional characteristics of the judiciary. But Eskridge's argument nevertheless falls far short of addressing the Realists' core concern about the effects of judicial interpretation. Merely cabining judicial discretion would not satisfy a good Realist; Realists should need reassurance that judicial decisions, whether discretionary or not, would bring about good results.

Despite Eskridge's pioneering work as a regulatory realist, his justifications for allowing judges to implement regulatory realism are all formalistic. It's a bizarre jurisprudential twist for a theorist who understands at least some other constitutional provisions in realistic terms.[371]

Elhauge. Einer Elhauge may be more a victim than a perpetrator of jurisprudential ambivalence; his book's structural arguments are primarily responsive—or perhaps merely conciliatory—to other theorists' perspectives. Nevertheless, Elhauge devoted more effort in his book to

366. *Id.* at 1518.
367. *Id.* at 1536.
368. *See generally* Posner, *Legal Realism, Legal Formalism*, *supra* note 146.
369. *See* Eskridge, *Dynamic Statutory Interpretation*, *supra* note 4, at 1535.
370. *Id.* at 1536.
371. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME SEX-MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 123–52 (1996).

addressing his interlocutors' faithful agent model than he did to pondering the judiciary's capacity to make good policy decisions.[372] More fundamentally, Elhauge's normative justification for "current preferences default rules" rests on one core formalistic claim: that the proper goal of statutory interpretation should be the maximization of *legislative* (rather than popular or judicial) preferences because the judiciary is the legislature's agent.[373]

Elhauge started from the view, held by a majority of current scholars, that courts ought to serve as "faithful agents" of the legislature.[374] He then asked what the legislature, as the courts' principal, would want judges to do with unclear statutory texts.[375] He then argued, in his core normative claim, that legislator-principals would want an interpretive approach that maximized current political satisfaction.[376] Elhauge did not, however, give a realistic or consequential defense of the faithful agent model itself.[377] Indeed, Elhauge explicitly set aside any questions related to the validity of faithful agency, including any questions related to the validity of the legislative process or of legislative supremacy more generally.[378] Here is Elhauge:

> When statutes are clear, no one doubts that judges must follow that clear meaning, which by definition reflects an enactable preference. . . . No doubt, in each society there are grounds to critique the process by which enactments are made. But each society must have accepted some set of reasons to justify compelled obedience to the enactable preferences that are reflected in clear statutes. . . .

372. *See generally* ELHAUGE, *supra* note 295, at 4–5.

373. *Id.* at 41–42.

374. John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 694 (1999) (noting a "widely shared premise that judges must act as 'faithful agents' of the legislature"); *see also* Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 65 STAN. L. REV. 901, 913 (2013) (noting the arguments that textualists and purposivists alike make in name of the "faithful-agent model" of statutory interpretation and judicial power); *cf.* Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 290 (1990) (arguing that the faithful agent model is unhelpful in actually resolving interpretive disputes that center on ambiguous statutory terms).

375. ELHAUGE, *supra* note 295, at 41.

376. *Id.*

377. *See id.* at 29–31.

378. *Id.*

. . . .

> In short, the question here is . . . not whether to commit statutory enactments to the political process, nor how best to structure that process. However debatable our choices about the latter issues might be, once they have been resolved to make that commitment and structure a particular process, they do not offer viable grounds for deviating from the preferences that are enactable, given the particular process that has been chosen. Those are the preferences we have decided should determine the choice of enacted statutory language. Those preferences thus should determine interpretations of any unclear language produced by that process, given the underlying choice to advance those preferences.[379]

In this central passage, Elhauge explicitly assumed that legislative preferences, as long as they have been enacted into statutory text or *could be* enacted into statutory text, should bind judicial decision (an assumption that he says "no one doubts" but that, as we have seen, both Dworkin and Posner rejected).[380] Elhauge thus adopted the formalistic assumption that courts are constitutionally inferior to legislatures on the lawmaking hierarchy: that courts must do their best to follow legislative dictates rather than either following their own preferences or doing their best to effect good outcomes. He thereby necessarily adopted the formalistic view that a higher law—the enactable preferences of the political branches—could determine the legally proper scope of judicial power. These assumptions rest on a "right answer" view of the judicial power rather than resting on questions of judicial capacity and consequence. For Elhauge, "our choices" of a "particular [legislative] process" for statute-making, embodied in the constitutional structure, have become the law that delimits the scope of judicial authority.[381]

All of that said, the last two chapters of Elhauge's book confronted Realistic concerns about the consequences of a current-preferences default rule. Elhauge addressed concerns about frustration of reliance interests among the polity, the appropriateness of judicial estimation of legislative preferences, judicial administrability of preference-satisfying and preference-eliciting rules, and the competence of courts to measure

379. *Id.*
380. *See id.* at 29; *see* DWORKIN, LAW'S EMPIRE, *supra* note 186, at 338, 349.
381. ELHAUGE, *supra* note 295, at 31.

and predict legislative preferences.[382] The last two chapters thus addressed some structural considerations through a Realistic lens. But the question that Elhauge asked in those chapters was whether courts could, realistically, play the "faithful agent" role that he had assigned to them.[383] He did not ask—and, in fact, explicitly denied asking—whether the faithful agent role itself would be better or worse than its plausible alternatives (such as the Posnerian approach).[384]

For example, throughout the chapter considering whether a current preferences default rule would disrupt reliance interests, Elhauge seemed to be toying with the question of whether the faithful agent model, as he described it, would harm the regulated polity by disrupting reliance on statutory commands or prior judicial interpretations.[385] But he explicitly denied that "reliance and stability [could] offer independent normative grounds for deviating from the default rules that best maximize political satisfaction."[386] Instead, he justified the incorporation of reliance as a value by arguing that "the legislative polity itself would want some degree of stability and reliance . . . ."[387] Even in the midst of a Realistic discussion, then, Elhauge retreated back to the formalistic view that legislative preferences are the hierarchically primary source of structural law and that judges' obligation is to maximize the satisfaction of those preferences.

Later in the same chapter, Elhauge made his core reliance on the formalistic view even clearer, saying, "Absent some constitutional argument . . . judges have no justification for imposing policy views that contradict political preferences."[388] But Elhauge made that assertion without justifying the judges' obligation to follow political preferences—or at least without providing any justification beyond his assertion early in the book that "we have decided" (presumably constitutionally) that legislatures' preferences (rather than judges' preferences) "should determine the choice of enacted statutory language."[389] Maybe judges have no justification for imposing policy views that contradict political preferences, but what justification, beyond a formalistic assertion of constitutional choice and faithful agency, do judges have for enforcing

382. *Id.* at 302–34.
383. *See id.*
384. *See id.* at 305–06.
385. *See id.* at 302–13.
386. *Id.* at 308.
387. *Id.*
388. *Id.* at 316.
389. *Id.* at 31.

only political preferences? Perhaps because of his admitted empirical uncertainty on Realistic questions of optimality,[390] Elhauge ended up hanging his hat on the formalistic assertion that judges are bound by a constitutional division of labor to enforce current legislative preferences.[391]

Elhauge considers himself to be a Realist,[392] and there is no doubt that he offered some Realistic analysis in his book, particularly in rebutting Vermeule's and Easterbrook's objections to dynamic interpretation.[393] The book's central thesis, however, rests on a claim that the proper goal of statutory interpretation is the satisfaction of Congress's preferences, and Elhauge justified that goal formalistically (by reference to constitutional structure) rather than realistically (by reference to real-world consequences).[394] His fundamental justification for using congressional—rather than popular or judicial preferences or some other measure of optimality—is not a Realistic claim that legislative preference satisfaction is the best possible rule for the constitutional system as a whole or for the regulated polity that statutory decisions most directly affect.[395] Rather, his justification is that courts are obligated, under a constitutionally-dictated faithful agent model, to defer to legislative preferences.[396]

Dworkin. In Ronald Dworkin's primary discussion of statutory interpretation, he ignored questions of judicial power, and his only nod to concerns of judicial capacity was his use of the name "Hercules" to describe his ideal judge—an implicit acknowledgement that his ideal might be unattainable by any but the strongest of mortals.[397] In a later work on constitutional interpretation, however, Dworkin's introduction confronted the counter-majoritarian difficulty[398] that attends judicial

390. *See id.* at 302 ("In short, these alternative default rules depend on an empirical premise that is quite uncertain.").

391. *See id.* at 323.

392. Conversation between Elhauge and author.

393. *See* ELHAUGE, *supra* note 295, at 313–34. Chapter 17 includes a lengthy engagement with Easterbrook, and chapter 18 includes a lengthy engagement with Vermeule.

394. *See id.* at 23–24.

395. *See id.* at 24.

396. *See id.* at 323–24.

397. *See* DWORKIN, LAW'S EMPIRE, *supra* note 186, at 313–54 ("Statutes").

398. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1986). Dworkin does not cite Bickel in his introduction, but he is clearly confronting the alleged inconsistency between judicial review and majoritarian democracy. *See* DWORKIN, LAW'S EMPIRE, *supra* note 186, at 313–54 ("Statutes").

review.[399] After arguing that the moral values of American democracy do not demand majoritarianism, Dworkin applied his usual formalistic approach—searching for the moral value that best fits and justifies historical practices—to understand the judiciary's interpretive power:

> [W]hen we are interpreting an established constitutional practice, . . . [t]hen authority is already distributed by history, and details of institutional responsibility are matters of interpretation, not of invention from nothing. In these circumstances, rejecting the majoritarian premise means that we may look for the best interpretation with a more open mind: we have no reason of principle to try to force our practices into some majoritarian mold. If the most straightforward interpretation of American constitutional practice shows that our judges have final interpretive authority . . . we have no reason to resist that reading . . . .[400]

Dworkin's approach looks for a "best" interpretation of the judicial power, but his notion of what's "best" depends on his moral interpretation of constitutional practice and law.[401] Entirely missing from this passage is any consideration of the on-the-ground consequences of judicial interpretations, whether of constitutional or statutory texts, given the particular characteristics and capacities of courts and judges.

But we need not rely on silence to conclude that Dworkin set aside consequential considerations here. In the paragraph immediately preceding the passage quoted above, Dworkin imagines the considerations that would be relevant if he were choosing an institutional division of labor in the first instance, at the time of a government's initial formation.[402] In that case, Dworkin said, he would "see no alternative but to use a result-driven . . . standard . . . ."[403] He went on in a strikingly realistic fashion:

> The best institutional structure is the one best calculated to produce the best answers to the essentially moral question of what the democratic conditions actually are, and to secure stable

399. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 1–38 (1996).
400. *Id.* at 34–35.
401. *See id.*
402. *Id.* at 34.
403. *Id.*

> compliance with those conditions. A host of practical considerations are relevant .... People can be expected to disagree about which structure is overall best, and so in certain circumstances they need a decision procedure for deciding that question .... That is why the initial making of a political constitution is such a mysterious matter, and why it seems natural to insist on supermajorities or even near unanimity then, not out of any conception of procedural fairness, but rather out of a sense that stability cannot otherwise be had.[404]

There are only two anti-realistic elements of that passage: the use of morality as a lodestar for "best answers," which might assume a single right answer, and the implicit understanding that the process would lead to a static "institutional structure."[405] Otherwise, the passage adopts a largely realistic understanding—results-oriented, practical, and contestable—of the institutional division of labor. But, "[t]he situation is different," Dworkin told us, "when we are interpreting an established constitutional practice, not starting a new one."[406] Once a set of legal decisions has been made, according to Dworkin, the proper scope of judicial authority is no longer the one that is "best calculated to produce the best answers" for the current reality.[407] At that point, Dworkin's law of integrity insists that the proper scope of judicial authority is the one that best fits and justifies the prevailing practice, regardless of retail consequences.[408]

Posner. Unlike his purposivist fellows, Richard Posner has squarely confronted the problems of limited judicial capacity to assess the real-world outcomes of their decisions, and Posner has given realistic answers,[409] including a frank acknowledgement that a judge attempting to find the best real-world result "may fall on his face."[410] Furthermore, like one branch of American Legal Realists, Posner has advocated court

404. *Id.*
405. *See id.*
406. *Id.*
407. *Id.*
408. *See id.* at 34–35.
409. Posner has also argued that judicial pragmatism can be reconciled with a pragmatic theory of democracy. *See generally* POSNER, LAW, PRAGMATISM, AND DEMOCRACY, *supra* note 315. His primary structural defense of pragmatic adjudication in his most recent works, however, is not grounded in formal democratic theory.
410. Posner, *Pragmatic Adjudication*, *supra* note 295, at 7.

reform—instead of deference to the political branches—to protect against judicial error.[411] Put most succinctly, here is Posner's view:

> There are two principle concerns about realism in judging. The first is that judges may be mistaken about the "real world," especially if asked to consider scientific, statistical, or otherwise technical data; they may be bamboozled. That is a real danger, but one they can be armed against by proper training in the management of technical issues, which is different from having technical expertise . . . . The second concern is that the law will be less predictable if it is at the whim of changing understandings of the real world. This concern is groundless. . . . Law must change as technology changes.[412]

This passage reflects an entirely realistic theory of the judicial role—a theory that centers entirely on capacity rather than authority and that imposes no formalistic restriction on the considerations that might guide interpretive decisions. Throughout his writings, Posner has argued for a number of reforms to the education and practices of appellate judges that, he has argued, would improve judges' capacities to consider the real-world consequences of their decisions.[413]

Posner's answer to the problem of limited judicial capacity, then, is not the formalistic assertion that judges hold a constitutional authority to interpret dynamically, which they are entitled to exercise despite any concerns about their abilities. Instead, his answer is a sincere effort at systemically enhancing the capacity of judges, together with a prototypically realistic shrug: "[I]t is not completely insane to entrust [judges] with responsibility for deciding cases in a way that will produce the best results in the circumstances . . . ."[414]

What's notably missing from Posner's writing, however, is an attempt to reconcile his notion of the judicial role with the constitutional structure as a whole. The Realists, especially Landis, sought to optimize governance throughout the tripartite constitutional structure, not just within the judiciary, and they paid close attention to the interactions among judges, legislatures, and agencies.[415] The rise of the

411. POSNER, REFLECTIONS ON JUDGING, *supra* note 315, at 126.
412. *Id.*
413. *See, e.g.*, POSNER, HOW JUDGES THINK, *supra* note 287; POSNER, REFLECTIONS ON JUDGING, *supra* note 315; POSNER, DIVERGENT PATHS, *supra* note 324, at 76–92.
414. Posner, *Pragmatic Adjudication*, *supra* note 295, at 12.
415. *See generally* Leiter, *American Legal Realism*, *supra* note 28.

administrative state was an attempt to improve the Realism of all regulation, not just judicial decision.[416] Posner gives only two short nods to this realistic concern. First, he argues that agencies generally make unwise decisions that are unworthy of judicial deference[417]—and here it seems odd (and unrealistic) that he leaves the point there rather than urging possibly beneficial reforms to administrative decision-making to parallel the reforms he urges to judicial decision-making. Second, Posner repeatedly encourages judges to consider the "systemic costs" of their decisions.[418] For Posner, that point seems mostly to be about costs associated with unpredictability and instability that might emerge from "ad hoc" decision-making,[419] but the allusion to systemic costs *could* also include inter-institutional costs such as the costs to Congress of passing legislative overrides when judges make mistakes in their assessments of consequences.[420]

Another piece of structural realism that Posner has, so far, confronted only positively, not normatively, is the incentive structure that judges face when deciding between textualist and purposivist interpretations of particular statutory provisions.[421] In a recent book coauthored with Lee Epstein and William Landes, Posner treated judges as members of a standard labor market who face only weak external incentives to shape their decisions to particular values or methodologies.[422] As the authors acknowledge, though, the book offers "strictly a positive analysis" of both incentives and decisions.[423] Posner's structural Realism has not (yet) offered any normative assessments of the incentive structure's optimality for giving rise to realistically desirable decisions.

---

416. *Id.*

417. POSNER, REFLECTIONS ON JUDGING, *supra* note 315, at 123.

418. *Id.* at 122.

419. *See, e.g.*, POSNER, LAW, PRAGMATISM, AND DEMOCRACY, *supra* note 315, at 61 (arguing that consequentially-minded interpretation must give "due regard (not exclusive, not precluding tradeoffs) for the political and social value of continuity, coherence, generality, impartiality, and predictability in the definition and administration of legal rights and duties").

420. *See infra* Part II.

421. *See, e.g.*, Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993).

422. *See* LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 5 (2013).

423. *Id.*

C. *Textualists: Scalia, Easterbrook, Vermeule, and Manning*

Modern textualists are regulatory formalists.[424] They view statutes as pure commands, which require laypeople and judges alike to follow statutory rules regardless of their consequences.[425] For a textualist, even a statute that will have bad effects for laypeople ought to be enforced as drafted because the text is the only thing duly enacted by the hierarchically primary lawmaker: Congress.[426] Textualists thus argue that only Congress may change statutory meaning or operation to accommodate changes in real-world conditions.[427] In other words, change must occur formally, from the top down, not dynamically, from the bottom up.

But many modern textualists (with the exception of John Manning) arrive at their regulatory formalism through structural realism.[428] They want statutes to be binding commands that limit judicial choices primarily because they worry that judicial lawmaking will have bad real-world consequences.[429] Of the textualist authors considered here, only Manning argues that judges are constitutionally forbidden to engage in dynamic interpretation.[430] The others freely admit that the Constitution imposes no such constraint. Most textualists, thus, are structural realists.

As with the investigation of purposivism above, I limit my treatment here to a small subset of textualist authors in order to provide deep analysis of the leading theorists' writings. I examine Antonin Scalia and Frank Easterbrook (who are largely responsible for starting the formalist movement in public law but whose approaches to structural questions diverge in important ways), Adrian Vermeule (whose work presents the most adamantly realistic structural defense of regulatory formalism), and John Manning (who has been the most prolific academic defender of textualism and whose structural formalism provides an important counter-example to textualism's realistic tendencies).

Because textualists typically start their arguments from structural premises that lead to regulatory formalism, I examine the textualists' arguments in the opposite order from the purposivists'.

---

424. POSNER, REFLECTIONS ON JUDGING, *supra* note 315, at 110.
425. *Id.*
426. *Id.* at 110–12.
427. *Id.*
428. *Cf.* Manning, *Textualism and the Equity of the Statute*, *supra* note 181.
429. *See generally id.*
430. *Id.*

1. Structural Arguments

Most textualists freely admit that the Constitution does not forbid judges from interpreting statutes dynamically. Indeed, Adrian Vermeule has gone out of his way to emphasize that the Constitution imposes no such constraint and, indeed, that the Constitution provides no answer as to the scope of the judiciary's interpretive authority.[431] Furthermore, most textualists fail to identify any *other* positive law that denies judges the authority to engage in dynamic interpretation. Rather than arguing that judges are legally forbidden to interpret dynamically, then, textualists have typically argued that judges will produce a better overall system if they limit their role to the obedient enforcement of statutory texts.[432] That argument is fundamentally realistic.

Antonin Scalia. The originator and leader of the modern textualist movement was Professor, then Judge, then Justice Antonin Scalia. Much of Scalia's theory—and much of his impact—arose from his judicial opinions, but for the sake of brevity and manageability, I focus here on his scholarly statements of textualism, especially his 1997 book, *A Matter of Interpretation*,[433] and his more recent book, coauthored with Bryan Garner, *Reading Law*.[434] The heart of Scalia's structural argument was not that judges are required, as a matter of law, to enforce statutory texts regardless of their consequences. Instead, Scalia's primary concerns with modern purposivism (which he called "consequentialism") were the following: (1) that it would destabilize the law by creating too much unpredictability, (2) that it would bypass the system's best process for aggregating the polity's preferences, and (3) that it would make legislating more difficult for Congress by undermining legislators' uses of words.[435]

In the lecture that forms the basis for *A Matter of Interpretation*, Scalia started with an examination of the common law, embracing the Realist insight that common-law judges make law rather than finding

431. Sunstein & Vermeule, *supra* note 115, at 908.

432. *Id.* at 889.

433. SCALIA, A MATTER OF INTERPRETATION, *supra* note 21. Scalia's approach, especially to structural issues, did evolve over time; he became more open to structural formalism later in his career. His book, though, can be fairly credited with solidifying the academic acceptability of textualism and is therefore worth examining in depth.

434. SCALIA & GARNER, READING LAW, *supra* note 21.

435. *See id.* at 22–23, 426.

it.[436] He then said, "All of this would be an unqualified good, were it not for a trend in government that has developed in recent centuries, called democracy."[437] As an opener, that line might imply that democratic theory forbids judicial lawmaking, but Scalia then clarified that his objection was not based on formal limits, whether theoretical, political, or legal:

> I do not suggest that Madison [in *The Federalist* No. 47] was saying that common-law lawmaking violated the separation of powers. . . . I do suggest, however, that once we have taken [the] realistic view of what common-law courts do, the uncomfortable relationship of common-law lawmaking to democracy (if not to the technical doctrine of the separation of powers) becomes apparent.[438]

Scalia thus started his defense of textualism with an open-ended concern about—not a formal objection to—judicial lawmaking in a democratic system. He admitted that judicial lawmaking might be "a desirable limitation upon popular democracy,"[439] but he questioned "whether the *attitude* of the common-law judge . . . is appropriate"[440] for statutory cases. In his framing of the problem, then, Scalia's structural arguments were not assertions of formal limits on judicial power. They were concerns about the anti-democratic consequences of lawmaking by unelected judges.

Of course, the concern that judicial lawmaking is "anti-democratic" might be formalistic in the Dworkinian sense. Perhaps Scalia thought that principles of democratic theory ought to constrain judges as a kind of higher-order law, despite the absence of constraint from "the technical doctrine of the separation of powers."[441] But in the next subsection of his printed lecture, Scalia made clear that he was searching for "the *best* rules . . . of statutory interpretation,"[442] not the rules that were legally required by dictates of democratic theory or constitutional power. Scalia

436. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* TANNER LECTURES ON HUMAN VALUES 79–80, 87–93 (1995).

437. SCALIA, A MATTER OF INTERPRETATION, *supra* note 21, at 9.

438. *Id.* at 10.

439. *Id.* at 12.

440. *Id.* at 13.

441. *Id.* at 10.

442. *Id.* at 14.

complained that "legal scholarship has been at pains to rationalize the common law" but "has been seemingly agnostic as to whether there is even such thing as good or bad rules of statutory interpretation."[443] Scalia's quest, then, was not for the legally required approach to statutory interpretation but, rather, for the *best* approach among available—and legally permissible—alternatives.[444] This quest is entirely realistic.

In his attacks on legislative history, Scalia levied an even more clearly realistic critique of judicial capacity.[445] Scalia included one formalistic argument—that Article I of the Constitution prohibits judicial reliance on legislative history[446]—but the "most exasperating [thing] about the use of legislative history,"[447] for Scalia, was not its unconstitutionality. It was that legislative history "is much more likely to produce a false or contrived legislative intent than a genuine one."[448] Furthermore, he said, "the more courts have relied on legislative history, the less worthy of reliance it has become."[449] These arguments are empirical, and they are quintessentially realistic. Scalia argued that reliance on legislative history would cause judges to err in their assessments of good statutory results.[450] For Scalia, then, exclusive devotion to the statutory text was desirable not because of limits on the judicial or legislative power but because of limits on judicial capacity to understand and interpret sources beyond the text.[451] Scalia capped his critique of legislative history with this profoundly realistic claim: "The most immediate and tangible change the abandonment of legislative

443. *Id.*

444. In his early work on *Chevron* deference, Scalia made it quite clear that he did not consider judicial consideration of policy consequences to be forbidden under the constitutional separation of powers. *See* Scalia, *Judicial Deference*, *supra* note 1, at 514–15 (denying that the separation of powers requires agencies rather than courts to consider policy consequences of statutory interpretation on the ground that "[p]olicy evaluation is . . . part of the traditional judicial tool-kit . . . ").

445. *See* Eskridge, *Unknown Ideal*, *supra* note 358, at 1541. Notably, in Eskridge's review of Scalia's book, Eskridge laid out the "cost-benefit calculus for Scalia's rule excluding legislative history." *Id.* Eskridge thus recognized the stark realism of Scalia's argument, and in a rare moment of structural realism for Eskridge, he rebutted Scalia's cost-benefit calculus in its own terms. *See id.*

446. *See* SCALIA, A MATTER OF INTERPRETATION, *supra* note 21, at 35.

447. *Id.* at 31.

448. *Id.* at 32.

449. *Id.* at 34.

450. *See* Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 436, at 104.

451. *See id.* at 98–99.

history would effect is this: Judges, lawyers, and clients will be saved an enormous amount of time and expense."[452]

In his more recent work, Scalia (together with Garner) continued to present a primarily realistic justification for limiting judicial discretion. In *Reading Law*, Scalia and Garner defended "[t]he [n]eed for a [s]ound [a]pproach"[453] to statutory interpretation, presenting their work—like Scalia's earlier lectures—as a quest for the good, not as an enforcement of the required.[454] They then argued that "the notion that judges may (even should) improvise on constitutional and statutory text enfeebles the democratic polity,"[455] quoting Justice Harlan to argue that "an invitation to judicial lawmaking results inevitably in 'a lessening, on the one hand, of judicial independence and, on the other, of legislative responsibility, thus polluting the bloodstream of our system of government.'"[456] Here again, then, Scalia and Garner opened with a realistic account of the problem: that judicial lawmaking undermines the democratic system in a consequential, results-oriented sense, not in a conceptual, legal sense. The problem is not that our democratic Constitution formally limits the judiciary's interpretive role; the problem is that interpretive flexibility and dynamism give rise to anti-democratic consequences, such as enfeeblement of the polity, politicization of the judiciary, and lessening of legislative responsibility.

As Scalia and Garner turned their attention to critiques of purposivism and consequentialism, they reiterated both of Scalia's realistic defenses of textualism: that purposivism lessens predictability and stability in the law and that it circumvents the best process for producing desirable policy.[457] First, they argued: "The most destructive (and most alluring) feature of purposivism is its manipulability. . . . The unpredictability of purposivism is inevitable."[458] Here is the concern for "rule of law" and for a "government of laws, [] not of men" that pervades Scalia's writing.[459] But, again, the concern is not that judicial lawmaking formally violates the separation of powers—although Scalia was fond of

452. SCALIA, A MATTER OF INTERPRETATION, *supra* note 21, at 36.
453. *See* SCALIA & GARNER, READING LAW, *supra* note 21, at 3.
454. *See id.* at xxviii.
455. *Id.* at 4.
456. *Id.* (quoting JOHN M. HARLAN, THE EVOLUTION OF A JUDICIAL PHILOSOPHY: SELECTED OPINIONS AND PAPERS OF JUSTICE JOHN M. HARLAN 291 (David L. Shapiro, ed., 1969)).
457. *See id.* at 18–19.
458. *Id.*
459. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 697–98 (1988) (Scalia, J., dissenting).

pointing out that the "government of laws" quotation came from the Massachusetts Charter's provision requiring separated powers.[460] Instead, their concern was that judicial lawmaking causes too much instability and unpredictability in the law.[461] Stability is better achieved when judges rely on "the slow progress of the machinery of democratic government"[462] to effect desirable changes.

Turning to the form of purposivism that Scalia called "consequentialism," Scalia and Garner argued that "it is precisely because people differ over what is sensible and what is desirable that we elect those who will write our laws—and expect courts to observe what has been written."[463] Here, Scalia and Garner again avoided any claim that legislative lawmaking is the only democratically—and thus the only constitutionally—acceptable form of lawmaking. Instead, they argued that legislative lawmaking is the consequentially best form of lawmaking because it allows the polity to aggregate—and to find compromises among—its many disparate notions of "the good, the true, and the beautiful."[464] Judicial lawmaking, by contrast, slips too easily into a "hegemony"[465] of the judges' policy preferences. Textualism, for Scalia and Garner, is not constitutionally mandated; it is merely *desirable* because it provides "an objective test" for legal meaning that is better at promoting democratic policy outcomes than "tests that invite judges to say that the law is what they think it ought to be."[466]

Another important—and importantly realistic—feature of Scalia's structural perspective was the idea that textualism best facilitates Congress's legislative projects.[467] This feature of Scalia's theory did not appear forcefully in his books, but it did appear in a short dialogue between Scalia and John Manning that was published the same year as *Reading Law*.[468] In that dialogue, Manning asked Scalia why interpreters "owe fidelity to the text"—a phrasing that loads the dice in favor of a formalistic answer by reference to duty ("owe") and obedience

460. *See id.* at 697.
461. SCALIA & GARNER, READING LAW, *supra* note 21, at 18–19.
462. *Id.* at 20.
463. *Id.* at 22.
464. SCALIA, A MATTER OF INTERPRETATION, *supra* note 21, at 45.
465. SCALIA & GARNER, READING LAW, *supra* note 21, at 6.
466. *Id.* at 22.
467. *See* Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1610 (2012) [hereinafter Scalia & Manning, *Dialogue*].
468. *Id.*

("fidelity").[469] But Scalia gave a primarily realistic response.[470] First, he argued that "there is no way to tell what [the legislators] intended *except* the text,"[471] repeating his assertion that legislative history and other extrinsic sources of legislative intent will, empirically, lead judges astray.[472] Second and more interestingly, he said this:

> That also answers your question—do you think legislators really are so meticulous in their use of language? They had better be because they are enacting laws for all of us. If you reject the assumption of meticulousness, what is Congress supposed to do when it wants a certain precise result? There's no way legislators can meticulously bring about that result because judges are not paying attention anymore. Whether or not Congress is always meticulous, if we don't *assume* that Congress picks its words with care, then Congress won't be able to rely on words to specify what policies it wishes to adopt or, as important, to specify just how far it wishes to take those policies.[473]

This passage is an idea that appears frequently in Scalia's judicial opinions: that judges ought to provide a stable set of interpretive rules so that Congress's words will function predictably—and in a way that effects the legislators' policy choices.[474] Notably, though, the argument is *not* that judges must obey Congress's words because Congress is hierarchically superior to the judiciary; it is instead a consequential and realistic version of that idea, which rests on the effects of judges' interpretive choices. Scalia's claim was not that judges *must* obey Congress's linguistic choices but rather that they *should*—because the failure to do so makes Congress's policymaking job harder.[475]

At this point, I must note that Scalia did make several references to judicial "authority" and sometimes "usurpation," implying a more formalistic notion that judges lack legal power to interpret dynamically or purposively.[476] But Scalia did not give much legal or constitutional

469. *Id.* at 1611.
470. *See id.* at 1612.
471. *Id.* (emphasis added).
472. *Id.*
473. *Id.* at 1613 (emphasis added).
474. *See id.*
475. *See id.*
476. SCALIA, A MATTER OF INTERPRETATION, *supra* note 21, at 20 ("Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former."); *id.* at 21 ("There are more sophisticated routes to judicial

meat to those arguments; he simply made passing references to the idea of limited judicial authority without elaborating the limits' formal legal bases.[477] The heart of Scalia's attack, then, seems to have been his desire to find "good rules of statutory interpretation" that would best facilitate democratic governance through the legislature. And his reason for prioritizing legislative policymaking was not that he viewed Congress as the legally or hierarchically primary institution—not that he prioritized "legislative supremacy" as a constitutional value—but rather that he viewed Congress as a consequentially *better* policymaking institution than the courts given Congress's superior capacity to aggregate the polity's preferences and to strike compromises among conflicting preferences.[478]

Frank Easterbrook. Justice Scalia's close intellectual ally, Judge Frank Easterbrook, has made an even more robustly realistic case for structural limits on judicial power. Like Scalia, much of Easterbrook's theory can be found in his judicial opinions, but as I did for Scalia, I limit my investigation of Easterbrook's theory to his academic writings, again for purposes of brevity and manageability.

In his academic work, Easterbrook levied and elaborated many of the same challenges that Scalia levied: (1) the need for predictability and stability in the law,[479] (2) Congress's need for consistent interpretive

---

lawmaking than reliance upon unexpressed legislative intent, but they will not often be found in judicial opinions because they are too obvious a usurpation."); *id.* at 22 ("It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is."); *id.* at 23 ("[J]udges have no authority to pursue [ ] broader purposes or write [ ] new laws."); *id.* at 28–29 ("[W]hether these dice-loading rules [i.e., substantive canons of construction] are bad or good, there is also the question of where the courts get the authority to impose them.").

477. SCALIA & GARNER, READING LAW, *supra* note 21, at 353. Indeed, the one limit on judicial authority that Scalia clearly identified in his scholarly writing was the judicial oath of office, which (he and Garner argued) prohibits judges from considering consequences for the parties before the court. *Id.*

478. *See* Scalia & Manning, *Dialogue*, *supra* note 467, at 1614–17.

479. *See* Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 7 (2004) [hereinafter Easterbrook, *Judicial Discretion*] (emphasizing the uniformity benefits of administrative decision compared to judicial decision given that "there are thirteen courts of appeals and about seven hundred odd district judges, some of them very odd indeed"); *id.* at 15 ("[I]n writing what the judges believe is a better law to achieve Congress' ends, the court . . . would . . . deprive the addressees of the law of fair warning."); Easterbrook, *Statutes' Domains*, *supra* note 280, at 533 n.2 ("Arguments such as Calabresi's [argument for interpretive dynamism] err in supposing . . . that the application of the common law method can yield principled (which is to say consistent) rules. . . . [T]he belief that courts can establish a principled jurisprudence is simply fallacious."); Frank H. Easterbrook, *Text, History, and Structure in Statutory*

rules to enable it to legislate clearly,[480] and (3) the harm that interpretive dynamism could do to the Article I process for aggregating—and for finding compromises among—disparate political priorities.[481] To that list, however, Easterbrook added three important critiques of interpretive dynamism, one of which we already encountered from Easterbrook's former colleague on the Seventh Circuit, Judge Posner. First, Easterbrook argued (as did Posner) that judges will often err in their exercises of interpretive discretion.[482] As noted in the discussion of

---

Interpretation, 17 HARV. J.L. & PUB. POL'Y 61, 63 (1994) [hereinafter Easterbrook, *Statutory Interpretation*] ("One thing we wish the legal system to do is to give understandable commands, consistently interpreted. . . . [L]iberat[ing] judges . . . is objectionable on grounds of democratic theory as well as on grounds of predictability.").

480. *See* Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87, 99 (1984) [hereinafter Easterbrook, *Legal Interpretation*] ("[O]ur objective must be to establish a consistent and principled set of rules for legal interpretation, so that drafters have a set of norms to use in communicating."); Easterbrook, *Statutes' Domains*, *supra* note 280, at 536 (arguing that judicial rules of interpretation are necessary "unless the community of readers is to engage in ceaseless (and thus pointless) babble"); *id.* at 552 ("The rule [of deeming statutes inapplicable when they neither clearly apply to the facts before the court nor clearly delegate common-law lawmaking power to the judiciary] would enhance the power of the legislature by specifying a vocabulary for conveying its decisions to its judicial agents."); Easterbrook, *Statutory Interpretation*, *supra* note 479, at 62 ("A method that sees legislative history as a friend rather than as merely inevitable leads to a jurisprudence in which statutory words become devalued."); *id.* at 63 ("A method of construction concentrating on values and imputed intent denies to the drafters the ability to choose rules, with their gains, their pains, and their limited scope."); *id.* ("A third thing we wish to do is to empower Congress. Let it make rules."); *id.* at 64 (arguing that judges can protect against congressional evasion of constitutional procedures "by insisting that words in laws be taken seriously").

481. Frank H. Easterbrook, *Judges as Honest Agents*, 33 HARV. J.L. & PUB. POL'Y 915, 918 (2010) [hereinafter Easterbrook, *Honest Agents*] ("[L]imiting interpretation to the work of the enacting Congress honors the reality that laws are enacted as packages."); *id.* at 922 (arguing that principal-agent analogies are unhelpful in statutory interpretation because they misunderstand the aggregative and compromise-centered nature of legislating, which prevents legislation from issuing single-minded commands for agents to follow); Easterbrook, *Judicial Discretion*, *supra* note 479, at 12 ("Both legislation and regulation depend on logrolling. Litigation breaks bulk, and this implies a big difference in appropriate interpretive strategy. All in all, for judges compelled to consider issues in isolation, there just isn't anything *there* except for the text.") (emphasis added); *id.* at 13 ("Compromises lack purposes. And *that* has powerful effects on interpretation.") (emphasis added); *id.* at 15 ("To honor the legislative choice, the Court must enforce the device that was chosen."); Easterbrook, *Statutes' Domains*, *supra* note 280, at 540 ("Almost all statutes are compromises, and the cornerstone of many a compromise is the decision, usually unexpressed, to leave certain issues unresolved."); *id.* at 546 ("[J]udicial pursuit of the 'values' or aims of legislation is a sure way of defeating the original legislative plan.").

482. Easterbrook, *Honest Agents*, *supra* note 481, at 918 ("[J]udicial attempts to predict what Congress will do come croppers more often than not."); Easterbrook, *Judicial*

Posner's structural arguments, concerns about judicial error are fundamentally realistic concerns.

Second, Easterbrook turned his attention to the life tenure of Article III judges.[483] Here, Easterbrook could have argued that life tenure is a formal, textual, constitutional rule that liberates judicial decision-making, but he did not. Instead, he argued that the purpose—and the best possible consequence—of judicial tenure is to insulate litigants from politically-motivated decision-making, empowering judges to remain faithful to enacted laws even when the application of such laws might protect politically disfavored individuals or interests.[484] Here is Easterbrook:

> Tenure was created largely to protect individual litigants from political influence. . . . No one who operates an abortion clinic wants to face a judiciary whose election coffers are filled by the hard work of anti-abortion activists. The most practical way to ensure dispassionate *application* of law to fact is a judiciary with very long tenure.
>
> In other words, judges have tenure to make it easier (because less costly) for them to be faithful to decisions taken in the past. . . . Although judges are more apt to be dispassionate than are political officials, their dispassion need not lead them to be more faithful to either old decisions or the median view of today's legal

---

Discretion, *supra* note 479, at 7–8 ("Often the adjustment [required to update a statutory scheme pursuant to a delegation of interpretive power] is technical, however, and specialists are apt to make technical changes better than generalist judges who spend too much of their time handling cocaine cases."); *id.* at 18 (emphasizing the importance of "the relative costs of error from expansive versus beady-eyed readings"); Easterbrook, *Legal Interpretation*, *supra* note 480, at 92 ("Even the most humble judge will fail if given a charge to recreate in his own mind the 535 minds that contemplated yesterday's problems and to continue legislating on their platforms."); Easterbrook, *Statutes' Domains*, *supra* note 280, at 551 ("Few of the best-intentioned, most humble, and most restrained among us have the skills necessary to learn the temper of times before our births, to assume the identity of people we have never met, and to know how 535 disparate characters from regions of great political and economic diversity would have answered questions that never occurred to them."); Easterbrook, *Statutory Interpretation*, *supra* note 479, at 61 ("A Sherlock Holmes could work through the clues [of statutory meaning found in legislative history], and those most reliable, and draw unerring inferences. Alas, none of us is a worthy successor to Holmes, even the Oliver Wendell variety. At our best, we err. And we are almost never at our best."); *id.* at 69 ("Judges are overburdened generalists, not philosophers or social scientists.").

483. Easterbrook, *Judicial Discretion*, *supra* note 479, at 9.

484. *Id.*

> culture; it may lead them to be more faithful to their *own* views. This is the dark side of tenure. . . . Judges can't be . . . sacked. And that is why people with tenure should not be exercising discretion in interpretation.[485]

Easterbrook's treatment of Article III's tenure provision was not merely purposivist in the simple sense that it looked to the enactor's motivations; it was much more deeply realistic. Easterbrook argued that the tenure provision should be interpreted and applied in the way that effects the best consequences for today's universe of judicial decisions and behaviors, even providing a modern example (abortion clinics) to justify his understanding of the provision's best application.[486] The argument is thus a purely realistic take on structural constitutional limits.

The third argument that Easterbrook added to the canon of structural realism was the problem of agency slack between Congress and the judiciary, which arises, Easterbrook argued, from the extraordinary expense of enacting legislative overrides.[487] Remember that Posner tended to refer generally to "systemic costs" of interpretive choices, without identifying many concrete examples. Easterbrook emphasized one form of such costs: the expense to Congress of enacting overrides.[488] Here is Easterbrook:

> [I]f a judge strays [from politically desirable decisions], the only remedy is more legislation—which in political terms is *much* more costly [than firing a bureaucrat].
>
> . . . [I]t is therefore predictable that, in a country where legislation is difficult, judges will claim more political leeway than in a country where legislation is easy. . . . [T]he agency slack in the United States seems to me a cost rather than a benefit because it greatly complicates the legislative task when the legislature wants to adopt stable and mechanical rules.[489]

This point, too, is quintessentially realistic. Indeed, Easterbrook explicitly cast the argument in terms of cost-benefit analysis, implying

485. *Id.* at 9–10 (emphasis added).
486. *Id.* at 9.
487. *Id.*
488. *Id.* at 8–9.
489. *Id.* (emphasis added).

that consequential optimality ought to be the lodestar in defining the judicial role.[490]

All told, Easterbrook's structural arguments are, like Scalia's and Posner's, jurisprudentially realistic rather than formalistic. He has never attempted a robust argument that judges are constitutionally or otherwise formally prohibited from interpreting statutes dynamically.[491]

Adrian Vermeule. The most recent perpetrator of jurisprudential ambivalence in the textualist camp has been Adrian Vermeule. Vermeule's work offers a robustly realistic theory of the structural issues in statutory interpretation, arguing that comparative institutional competence counsels empirically and consequentially against dynamic interpretation in the judiciary (while permitting such interpretation by administrative agencies).[492]

Vermeule started his work with a wide-ranging critique of prior theorists, accusing everyone from Bentham to Manning of ignoring "institutional" considerations in their interpretive theories.[493] What Vermeule seems to have meant by that, though, was not that the prior theorists ignored institutional power or authority altogether but rather that they hung their hats (wrongly and fruitlessly, according to Vermeule) on formalistic notions of judicial power that short-change the realistic limits of judicial capacity, including the potentially harmful

---

490. *See id.*

491. Like Scalia, Easterbrook has made passing references to constitutional limitations and to other notions of judicial "power" or "authority." *See* Easterbrook, *Legal Interpretation*, *supra* note 480, at 91, 94. Most recently, he made a simple assertion "that faithful application of statutes is part of our heritage from the United Kingdom, and thus what the phrase 'the judicial Power' in Article III means." Easterbrook, *Honest Agents*, *supra* note 481, at 915. He made that assertion without argument or even citation, however, and the bulk of his analysis in that paper and throughout his writings has focused on realistic arguments of judicial capacity and systemic effects. *See id.* at 915–18.

492. *See* Sunstein & Vermeule, *supra* note 115, at 888–90. This is essentially the same argument that Easterbrook made in *Honest Agents*. Easterbrook, *Honest Agents*, *supra* note 481, at 915–18.

493. *See* Sunstein & Vermeule, *supra* note 115, at 886. This paper was later incorporated as the first chapter of Vermeule's solo-authored book. *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006) [hereinafter VERMEULE, JUDGING UNDER UNCERTAINTY]. Curiously, Vermeule canvassed a large swath of historical theorists, from Blackstone and Bentham through Manning and Posner, but he excluded Scalia and Easterbrook, both of whom, as we have now seen, had offered precisely the kind of institutional realism that Vermeule claimed was missing from the other theorists' work. *See id.* at 18–24, 29–33, 52–59. Indeed, Vermeule's book does not even mention Frank Easterbrook's name. *See id.* at 326 (index page at which Easterbrook's name would appear if included).

systemic effects of courts' creative interpretations.[494] Here is Vermeule's introduction to his overall project:

> My target [for critique] here is *first-best conceptualism*: the attempt to deduce operating-level rules of interpretation directly from high-level conceptual commitments—for example, commitments to democracy, or the rule of law, or constitutionalism, or an account of law's authority or of the nature of legal language. All such deductions fail, because intermediate premises about the capacities and interaction of legal institutions are necessary to translate principles into operational conclusions. An inescapable problem for first-best conceptualism is the possibility of *second-best effects*. Interpreters situated in particular institutions make mistakes when implementing any first-best account, and the rate of mistakes will vary with changes in the decision-procedures the interpreters use, as will the cost of reaching decisions.[495]

In framing the project, then, Vermeule criticized all formalistic approaches to structural questions, whether grounded in legal, political, or constitutional theory,[496] and he did so on the fundamentally realistic basis that fealty to a "brooding omnipresence" might have harmful real-world effects. Vermeule thus argued that theorists ought to shift their focus to realistic questions about—and empirical evaluations of—the on-the-ground decision and error costs of judicial choices, including systemic costs and benefits of interpretation. The entire motivation for Vermeule's project, then, was his frustration with the formalism—the unempirical

494. *See* Richard A. Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 MICH. L. REV. 952, 953 (2003). Posner wrote a reply to Sunstein and Vermeule's article, in which he scathingly criticized the authors for overclaiming the extent of prior theorists' blindness to institutional concerns. *See generally id.* But the structural arguments that Posner highlighted in the other theorists' works were all formalistic arguments that would not have satisfied the cost-benefit considerations Vermeule wanted to highlight. *See generally id.* Posner, thus, seems to have missed the point in some sense, perhaps because Sunstein and Vermeule were insufficiently clear about the scope and nature of their objections.

495. VERMEULE, JUDGING UNDER UNCERTAINTY, *supra* note 493, at 2.

496. *See also id.* at 42 (summarizing the argument from chapter one as having demonstrated that "the text, structure, and history of the Constitution simply contain no real instructions about interpretive method" such that "[f]ormalism cannot be justified on formalist grounds").

and unrealistic quality—of prior theorists' structural arguments. His own work in response is structurally realistic through and through.

Vermeule's attack on the use of legislative history provides a useful example of the realistic considerations he emphasized. In that attack, he avoided any reference to Article I problems with legislative history: either the idea that legislative history does not go through bicameralism and presentment or the idea that references to legislative history as authoritative sources of meaning would create a non-delegation problem. Instead, Vermeule focused on an empirical assertion that judges make frequent mistakes in their considerations of legislative history, highlighting the infamous *Holy Trinity* case as his example of legislative history leading judges astray.[497] He then pointed out the simple truth that legislative history imposes high decision costs given its volume and complexity, and he argued that those decisions costs are almost certainly not worth bearing given their speculative (if not non-existent) accuracy benefits.[498] This approach is entirely realistic, eschewing any assertions of formal limits on judicial power and focusing entirely on empirical questions of judicial capacity. The central focus of Vermeule's analysis is the consequential value—the real-world effects—of various interpretive methodologies.

Vermeule's theory of statutory interpretation, then, presumed a realistic notion of structural constitutional law. He started from the epistemic claim that the Constitution provides no definitive answer to the question of judicial power and then turned to the Realists' preferred normative approach: examining the real-world consequences of competing interpretive methodologies (all of which he presumed to be constitutionally permissible). In short, Vermeule's cost-benefit analysis is exactly the kind of empirical analysis to which the American Legal Realists aspired—and which the Realists almost certainly would have done themselves if cost-benefit analysis had been in vogue in their time.[499]

John Manning. Among the four textualists considered here, John Manning is the only one with a jurisprudentially consistent theory. Manning offers a purely formalistic defense of textualism, arguing at the structural level that "the judicial power" of Article III constitutionally

497. *Id.* at 86–117.

498. *Id.* at 192–95.

499. *See id.* at 186 (describing the "cost-benefit terms" of his methodological approach to statutory interpretation).

requires judges to obey legislative commands.[500] According to Manning, judges lack the constitutional authority—not because of their limited capacity but because of the nature of their constitutional role—to interpret statutes dynamically.[501]

Manning made this argument most forcefully in his rebuttal of Eskridge's claim that the "equity of the statute" doctrine constitutionally authorizes interpretive dynamism.[502] In his article on the equity of the statute, Manning mined the founding-era history to find the one true scope of judges' interpretive discretion.[503] His entire approach, thus, was formalistic, not only in the sense that he sought a formal legal limit on the judicial power but also in the sense that he sought a command from the hierarchically primary policymaking body: the constitutional framers.

The structural formalism of Manning's approach is not limited, however, to his confrontation of Esrkidge's formalistic work. Manning's structural formalism is apparent throughout his writing. For instance, Manning has argued that the non-delegation doctrine forbids judicial reliance on legislative history,[504] that the constitutional structure generally forbids judges from bending statutory text in order to avoid absurd policy results,[505] and that "the constitutional ideal of legislative supremacy" requires judges to adopt interpretive rules that will best facilitate legislative bargaining.[506] Indeed, he has said that the legislative supremacy requirement is so strict and precise that it requires judges to consider only the semantic context, not the policy context, of statutory enactments.[507] All of these arguments rest on appeals to a constitutional "right answer"—and a near-complete answer to all interpretive puzzles—derived from the historical and current constitutional relationship between the courts and Congress.

---

500. *See generally* Manning, *Textualism and the Equity of the Statute*, *supra* note 181, at 56–70 (discussing the differences between the legislative and judicial branches of American government, and the reasoning for their separation).

501. *See id.* at 57 (stating that the U.S. Constitution "sought to differentiate sharply the functions performed by these two distinct branches").

502. *See id.* at 56–70 (arguing that the constitutional framers envisioned a judiciary that would serve as Congress's "faithful agent," not one that would serve as Congress's partner in the elaboration of statutory law).

503. *See id.* at 22–56.

504. *See generally* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 673 (1997).

505. *See* Manning, *The Absurdity Doctrine*, *supra* note 276, at 2431–54.

506. *See* Manning, *What Divides Textualists From Purposivists?*, *supra* note 9, at 91.

507. *See id.* at 91–110.

Manning is indeed so insistent on structural formalism that he has written two commentaries specifically addressing the need for structural constitutional analysis of statutory interpretation theory, which he argues is essential to flush out the one right answer to the scope of judicial power.[508] One of Manning's commentaries was a response to Cass Sunstein's call for empirical evaluation of interpretive formalism, in which Manning argued that constitutional concepts cannot be cast aside in favor of empirical evaluation (an argument that, at minimum, assumes there are formalistic constraints on the relevance of empiricism).[509] The other commentary was an evaluation of the structural constitutional claims in Posner's pragmatic theory of adjudication.[510] In that piece, Manning praised Posner's turn from the pretense of "imaginative reconstruction" of legislative intent to the more transparent assertion of a broad lawmaking power in the federal judiciary, arguing that the evolution in Posner's justifications laid bare the structural constitutional questions inherent in interpretive theory.[511]

In short, Manning has devoted much of his career to the quest for a formal limit on the interpretive practices of the federal judiciary, arguing persistently that one must consult the Constitution, and especially the constitutional history, to discover the true scope of judicial power. Even when Manning has addressed the same questions that his fellow textualists have answered realistically—such as the problems with legislative history and the superiority of the legislative process at aggregating disparate policy preferences—Manning has engaged in formalistic analyses, grounding his answers in constitutional theory and history rather than in realistic costs and benefits.

2. Regulatory Arguments

All textualists—even those that start with realistic arguments about the judicial role—make formalistic arguments about statutory meaning. Indeed, modern textualism could be summarized as the following set of

508. *See* Manning, *Constitutional Structure and Statutory Formalism*, *supra* note 374, at 685–97; John F. Manning, *Statutory Pragmatism and Constitutional Structure*, 120 HARV. L. REV. 1161 (2007) [hereinafter Manning, *Statutory Pragmatism and Constitutional Structure*].

509. *See* Manning, *Constitutional Structure and Statutory Formalism*, *supra* note 374, at 685 n.1, 694 (commenting on Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636 (1999)).

510. *See* Manning, *Statutory Pragmatism and Constitutional Structure*, *supra* note 508, at 1161–62.

511. *See id.* at 1161–63.

formalistic beliefs about meaning: (1) that a statute is a command from the legislature, the meaning and legitimacy of which (2) are discernible from the legislative enactment itself and (3) are alterable only by legislative amendment.[512] For all modern textualists, the *operational* meaning of a statute is indistinguishable from its semantic meaning; the real-world consequences of a statute are the sole responsibility of the legislature; and neither the statute's meaning nor its operation can change or evolve in any way other than by top-down revision.[513] The bottom-up evolution of meaning that the Realists envisioned is, for the textualists, simply not law.[514]

Scalia, Easterbrook, and Manning have made all of these points explicitly. Vermeule, whose theory is methodological rather than jurisprudential, repeatedly claimed that a formalistic methodology would be superior at discovering statutory meaning under any jurisprudential theory, but as we shall see, that assertion is true only if one assumes that statutes bear static and semantic rather than dynamic and operational meanings.[515] Even when Vermeule turns his attention squarely to Eskridge's and Posner's interpretive theories, he misses the point that meaning itself might be contingent on a statute's evolving real-world consequences. Despite his robust structural realism, Vermeule's methodological theory assumes the posture of regulatory formalism, ignoring the possibility of realistic dynamism in a statute's meaning and legitimacy.

Scalia. Scalia's regulatory formalism was the simplest and most conclusory of the four theorists considered here. (For all his brilliance, Scalia's pithiness often elided the complexity of his assertions.) Indeed, the most (in)famous line from *A Matter of Interpretation*, when considered in its context, demonstrates Scalia's commitment to the first element of regulatory formalism: that statutes are commands from the legislature, which must be duly enacted in order to take force. Scalia wrote, "Of all the criticisms leveled against textualism, the most mindless is that it is 'formalistic.' The answer to that is, *of course it's formalistic*! The rule of law is *about* form."[516] Importantly, though, that

512. *See* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 67, 71 (1988); Farber, *Statutory Interpretation and Legislative Supremacy*, *supra* note 374, at 284.

513. *See supra* part I.B.

514. *See supra* part I.B.

515. VERMEULE, JUDGING UNDER UNCERTAINTY, *supra* note 493.

516. SCALIA, A MATTER OF INTERPRETATION, *supra* note 21, at 25.

line was only about regulatory, not structural, formalism. Here is the passage that immediately followed in Scalia's writing:

> If, for example, a citizen performs an act—let us say the sale of certain technology to a foreign country—which is prohibited by a widely publicized bill proposed by the administration and passed by both houses of Congress, *but not yet signed by the President*, that sale is lawful. It is of no consequence that everyone knows both houses of Congress and the President wish to prevent that sale. . . . Is that not formalism?[517]

The answer, of course, is that it *is* formalism—but also highly contestable, as judges (including Justice Scalia) know from their considerations of "post-enactment legislative history" in the interpretation of enacted statutes. Thanks to judges' use of post-enactment history, unenacted bills are often of *some* legal consequence.[518] But Scalia's argument importantly assumes that all rules to govern laypeople must be found in formal enactments and only in formal enactments, which is the very heart of regulatory formalism.[519] Scalia's simple point—that lawmakers' unenacted purposes and intentions are not laws in and of themselves[520]—is obviously correct, but it ignores the realistic possibility that legislators' articulated views ought to inform the meaning or legitimacy of *other* laws, including judges' (and laypeople's) interpretive decisions.

The second element of regulatory formalism is the idea that legal meaning is discernible from the face of a formal enactment. Unlike Langdell and some other jurisprudential formalists, Scalia did not believe that statutes provided "complete" meanings; he believed that statutory texts might leave some questions unanswered, giving rise to gaps or ambiguities.[521] Nevertheless, Scalia said that he believed "*more* often" than many judges that "the meaning of a statute is apparent from

---

517. *Id.*

518. The bill in Scalia's example would be a species of "post-enactment legislative history," for example, in a case surrounding any similar prohibition that had been previously enacted, such as a ban on supporting certain foreign governments or a ban on unlicensed trade in certain kinds of goods or what-have-you. Post-enactment history is an interpretive clue that judges reference in statutory interpretation cases with some regularity (including some that Justice Scalia has joined). *See, e.g.*, Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

519. *See* SCALIA, A MATTER OF INTERPRETATION, *supra* note 21, at 25.

520. *See id.*

521. *See generally* Scalia, *Judicial Deference*, *supra* note 1.

its text and from its relationship with other laws."[522] For Scalia, he proclaimed, it would be "relatively rare" that he would find more than one interpretation of a statutory provision to be "reasonable."[523] Later in his career, Scalia became even more insistent that statutory meaning could be discerned without consideration of policy consequences. Indeed, he and Garner penned over 400 pages in their attempt to rebut the Realists' argument that statutory text is often indeterminate.[524] According to Scalia and Garner, "good judges . . . do not 'give new content' to the statute, but merely apply the content that has been there all along, awaiting application to myriad factual scenarios."[525] Their view, then, was that the entire meaning of a statute is contained within the formal enactment, not to be supplemented or altered by reference to underlying real-world conditions or consequences.[526]

With respect to the final point of regulatory formalism—the idea that only Congress can change a statute's meaning—Scalia was clearer in his judicial opinions than in his academic writings. To provide just one clear example from a recent battle royale between textualism and purposivism, Scalia roundly criticized Chief Justice Roberts for enforcing the plan rather than the text of the Affordable Care Act in *King v. Burwell*, and he did so in part on the ground that Congress, rather than the court, is "responsible for both making laws and mending them."[527] Judges, Scalia argued, "lack the prerogative to repair laws that do not work out in practice"[528] because that prerogative belongs exclusively to Congress.[529]

Scalia thus unapologetically embraced regulatory formalism. Put most simply, Scalia's view was that "[t]he text is the law, and it is the text that must be observed."[530] Despite his realistic approach in urging limits on the judiciary's power, Scalia denied the relevance of the same kinds of consequential and systemic considerations in his notions of statutory meaning.[531] Although relevant to his understanding of the judicial power, Scalia deemed consequential considerations

522. *Id.* at 521.
523. *Id.*
524. *See generally* SCALIA & GARNER, READING LAW, *supra* note 21.
525. *Id.* at 5.
526. *See id.* at 5–7.
527. King v. Burwell, 135 S. Ct. 2480, 2505 (2015) (Scalia, J., dissenting).
528. *Id.*
529. *Id.* at 2506.
530. SCALIA, A MATTER OF INTERPRETATION, *supra* note 21, at 22.
531. *See id.* at 22–23.

impermissible—not just dangerous or undesirable, but formally *impermissible*—in judges' determinations of statutory meaning.[532]

Easterbrook. In his academic writing, Easterbrook has focused most of his attention on structural rather than regulatory questions, but he has nevertheless addressed all three of the formalistic claims noted above. First, in his critique of intentionalism, Easterbrook has said that "[n]o matter how well we can know the wishes and desires of legislat*ors*, the only way the legislat*ure* issues binding commands is to embed them in a law."[533] This critique openly assumes not only that statutes are, in fact, "binding commands" but also that the meanings of the commands are "embed[ed]" in the laws themselves.[534] For Easterbrook, there is no additional meaning or information to be derived from the ends the legislators "wished" or "desired" to accomplish.[535]

On the second element of regulatory formalism—the idea that meaning is contained entirely in the legal enactment—Easterbrook has taken a unique jurisprudential stance. Like Scalia, Easterbrook has embraced the idea that statutes contain gaps, and he has therefore, like Scalia, eschewed the formalists' fantasy of legal completeness.[536] Easterbrook's solution to that problem, however, has been to argue that statutes are simply inapplicable to any issue that Congress neither addressed itself nor explicitly authorized a court or agency to address.[537] If a prosecutor or private litigant tries to stretch statutory text in bringing a case, Easterbrook has argued, the court should simply dismiss the case.[538] As Easterbrook put it, "My suggestion is that unless the statute plainly hands courts the power to create and revise a form of common law, the domain of the statute should be restricted to cases

---

532. *See id.*

533. Easterbrook, *Statutory Interpretation*, *supra* note 479, at 68–69 (emphasis added).

534. *See id.*

535. *Id.*

536. *See, e.g.*, Easterbrook, *Statutes' Domains*, *supra* note 280; *see also* Easterbrook, *Legal Interpretation*, *supra* note 480, at 93 ("The usual assumption of parties and judges in litigation is that Congress . . . [has] solved, or authorized judges to solve, all questions that arise later on. Surely this is nothing but a conceit."). Easterbrook has also, more so than Scalia, embraced the American Legal Realists' notion of linguistic indeterminacy. *See* Easterbrook, *Statutory Interpretation*, *supra* note 479, at 67 ("In interesting cases, meaning is not 'plain'; it must be imputed; and the choice among meanings must have a footing more solid tha[n] a dictionary—which is a museum of words, an historical catalog rather than a means to decode the work of legislatures.").

537. Easterbrook, *Statutes' Domains*, *supra* note 280, at 543.

538. *Id.* at 533.

anticipated by its framers and expressly resolved in the legislative process."[539] That suggestion is aggressively formalistic along the second dimension of regulatory formalism; it argues that the statute has literally no evolving, consequential, or implicit meaning—that all of the statute's meaning must be included within the four corners of the statutory text at the moment of its enactment or legislative amendment. It also assumes that federal courts, at least, can offer no legitimate legal answer to a litigant's question from any source other than a statutory text (or, presumably, a state's common law).

On the third element of regulatory formalism—the claim that only legislative amendment can change the meaning of a statute—Easterbrook wrote relatively little. He did, however, consider the role that post-enactment legislative history might play in statutory interpretation, and there he argued that judges ought to treat "subsequent [legislative] events as ineffective to alter the meaning of a statute" unless those subsequent legislative actions can "be transmuted into an enrolled bill . . . ."[540] Easterbrook thus seemingly believed, along with the other textualist authors, that only a legislative amendment could change a statute's meaning.

Vermeule. Unlike Scalia and Easterbrook, Vermeule has not explicitly embraced regulatory formalism in the jurisprudential sense because, as noted, Vermeule's theory is self-consciously methodological rather than jurisprudential. Throughout his account, therefore, Vermeule attempted to show that formalistic methodology is optimal for "all standard value theories"[541] of statutory interpretation, by which he seemed to mean that formalism would be best from any jurisprudential perspective. In other words, Vermeule urged that simple textual interpretation is the optimal methodology for any judge, whether the judge ultimately believes that statutes should be interpreted according to their "meaning, intentions, or purposes."[542] To this end, Vermeule claimed that "a variety of interpretive approaches . . . have converged on the view that clear statutory text is the single best indicator of statutory meaning and of legislative intentions or purposes,"[543] and he therefore argued that "to depart from the baseline of clear and specific text is to

539. *Id.* at 544.
540. *Id.* at 539.
541. VERMEULE, JUDGING UNDER UNCERTAINTY, *supra* note 493, at 197.
542. *Id.* at 186.
543. *Id.* at 195.

incur certain loss for speculative benefit."[544] Indeed, Vermeule argued that "the baseline level of information" contained in a statutory text "is said to be quite high by all standard value theories"[545] of statutory meaning.

But these characterizations are true *only* of those value theories that treat statutes as static commands.[546] Vermeule's arguments made no room for the modern purposivist view, laid out in depth above, that a statute's true meaning is its operational rather than its semantic meaning, such that all statutes should be semantically adjusted and calibrated to maintain their desirable real-world consequences. Under the view of regulatory realism, the statutory text is obviously an inadequate repository of information because statutory text typically says very little about the wide-ranging and constantly evolving consequences of its enforcement.

Despite his attempts to evade jurisprudential tangles, then, Vermeule silently assumed a stance of regulatory formalism. His analysis makes sense only if one views statutes as static commands from

544. *Id.* at 187.

545. *Id.* at 197.

546. Vermeule's claims that his theory would satisfy purposivism as well as intentionalism and textualism likely assumed the Legal Process variety of purposivism, which seeks to interpret statutes consistently with their original, enacted purposes. Vermeule's understanding does not capture the dynamic purposivism of the modern scholars considered here. Indeed, Vermeule's misunderstanding of interpretive dynamism is apparent in his direct treatment of Eskridge's work. According to Vermeule, "Eskridge emphasizes that the legal system is under constant pressure to adjust old statutes to new circumstances, but it does not follow that *judges* must do any adjusting." *Id.* at 43. This view of Eskridge's claim, though, seems to misunderstand the nature of Eskridge's theory in *Dynamic Statutory Interpretation*. Eskridge was not arguing that judges should update statutes because statutory updating is a valuable function of a government generally; he was arguing that judges should interpret dynamically because a statute's true meaning is its operational rather than its semantic meaning. In order for a statute's operational meaning to remain constant across a sea of evolving real-world circumstances, Eskridge argued, the statute's semantic meaning must change. *See generally* Eskridge, *Dynamic Statutory Interpretation*, *supra* note 4. Eskridge was thus offering a "value theory" of statutory meaning that is entirely at odds with Vermeule's assertion that the plain text of the statute always provides a "high baseline level of information" about statutory meaning. (Vermeule came closer to what I view as the right understanding of Eskridge later, when talking about agencies' power of common-law interpretation: "The great strength of Eskridge's dynamism is the descriptive premise that the import of both statutes and judicial precedent changes over time with changes in ordinary usage of language, changing technology and policy questions, and new contexts of application." VERMEULE, JUDGING UNDER UNCERTAINTY, *supra* note 493, at 225. By that point in the book and theory, though, Vermeule had already assumed a stance of regulatory formalism in his assertions that text provides the best evidence of meaning.).

the legislature, the meanings and legitimacy of which are discernible from the statutory enactments themselves.

As for the third element of regulatory formalism—the idea that statutory meaning can change only by legislative amendment—Vermeule was more explicit, and he offered a different theory than the standard regulatory formalist's insistence on a top-down congressional action.[547] In the end, though, Vermeule's theory for statutory change is still jurisprudentially formalistic. Vermeule argued for a strong doctrine of deference to administrative agencies—a strong and rule-based version of *Chevron* deference—on the ground "that agencies might be best situated to function as statutory updaters on dynamic premises."[548] Here, Vermeule clearly rejected the standard regulatory formalist's position that Congress—and only Congress—must be responsible for updating statutory meaning, but his replacement theory was not the Realists' bottom-up notion of operational meaning. Instead, Vermeule simply interposed agencies between Congress and courts in the formal institutional hierarchy, arguing that judges ought to adopt administrative amendments as formal changes just as they would, for any regulatory formalist, ordinarily adopt congressional amendments.[549]

All told, then, Vermeule's theory assumed the posture of regulatory formalism despite all his efforts to avoid conceptual and jurisprudential entanglements.[550] His arguments are inconsistent with the realistic notion of statutory meaning as operational meaning, which can evolve without a formal textual amendment.

Manning. Like Easterbrook, Manning has focused the majority of his writing on structural issues, but he has developed a refined version of regulatory formalism in a few of his pieces. On the first point of regulatory formalism, Manning's view is the standard one: that statutes

547. Vermeule did argue that Congress might under-supervise the consequences of its enactments "partly because the correctivist stance of American courts ensures that underspecified or ill-considered legislation will in effect be supplemented or amended by judicial decisions." VERMEULE, JUDGING UNDER UNCERTAINTY, *supra* note 493, at 55. This point, which arose in Vermeule's critique of Posner's regulatory realism, contains a weak assumption that legislative amendment might be a better mechanism than judicial interpretation for statutory updating. Ultimately, though, Vermeule clearly rejected the standard formalistic view that *only* congressional amendment could change statutory meaning.

548. *Id.* at 226.

549. *Id.* at 206, 214–15 (discussing judicial deference to administrative interpretations and decisions).

550. *See generally id.* at 153–82 (discussing the current issues of judicial interpretation and goals of avoiding those issues under his theory of judicial interpretation).

are binding commands from the legislature.[551] Throughout his work, Manning has adopted the "faithful agent" model of "legislative supremacy," and he has made clear that he understands the formalistic notion of statutes-as-commands to be a necessary component of constitutional structure.[552] In his critique of the absurdity doctrine—which counsels judges to avoid interpretations that would produce absurd results—Manning embraced an extreme view of this position, arguing that judges ought to act on *any* commands the legislature issues regardless of whether they can make any policy sense of those commands at all.[553]

On the second piece of regulatory formalism—the idea that meaning and legitimacy are discernible from the face of the enactment—Manning has taken a more nuanced view. According to Manning, "modern textualists do not believe that it is possible to infer meaning from 'within the four corners' of the statute."[554] Nevertheless, Manning's textualism does "contend that the effective communication of legislative commands is in fact possible because one can attribute to legislators the minimum intention" to use language in a contextually ordinary and appropriate way.[555] Manning has thus argued that, although "textualists necessarily *impute* meaning to a statute,"[556] they base their imputation on "a suitably objective inference of purpose,"[557] which they derive from the "enacted text in context."[558] But, Manning clarified, "[w]hen contextual evidence of semantic usage points decisively in one direction, that evidence takes priority over contextual evidence that relates to questions of policy."[559] According to Manning, then, the context that matters is neither the policy context surrounding the statute's enactment nor the present context surrounding the statute's enforcement; it is the statute's "semantic context" relative to the entire *corpus juris*.[560] This view does not assume

551. Manning, *What Divides Textualists From Purposivists?*, *supra* note 9, *passim* (referring to statutes throughout the piece as either "legislative instructions" or "legislative commands" and asserting that both Legal Process purposivists and modern textualists consider statutes to be commands that bind the courts).

552. *See, e.g.*, *id.* at 71–72.

553. *See* Manning, *The Absurdity Doctrine*, *supra* note 276, at 2443–44.

554. Manning, What Divides *Textualists From Purposivists?*, *supra* note 9, at 79 (quoting White v. United States, 191 U.S. 545, 551 (1903)).

555. *Id.*

556. *Id.* at 83.

557. *Id.* at 85.

558. *Id.* at 92.

559. *Id.* at 92–93.

560. *See id.* at 92–96.

that meaning is discernible from the face of the enactment in a simplistic sense, but it does assume that the semantic meaning of the statute must be the exclusive determinant of its operation. Manning's vision of meaning, thus, has been a formalistic one despite his embrace of some realistic skepticism about the determinism of statutory language.

Of the four textualists considered here, Manning has said the least about the role of legislative amendment in textualist theory. Nevertheless, Manning's entire justification for textualism rests on the idea that the constitutionally dictated legislative process, especially including the various "veto-gates" that occur through bicameralism and presentment, is the only valid method for issuing statutory commands.[561] That theory necessarily implies that statutory updating, as well as initial statutory enactment, must occur through the same formal process.

III. AMBIVALENCE AND THE RULE OF LAW

So far, I have shown that several important interpretive theorists make jurisprudentially ambivalent arguments. Eskridge and Elhauge are regulatory realists but structural formalists, and Scalia, Easterbrook, and Vermeule are regulatory formalists but structural realists. At this point, one might naturally wonder whether and, if so, why this ambivalence matters. Is it not perfectly coherent to say that judicial power ought to be calibrated to its consequences while statutory meaning ought not to be? Or, on the other side, why *not* argue that the judicial power is absolute and static while statutory meaning ought to evolve over time? After all, one might reasonably argue that the judicial power derives from a different source of law than does statutory meaning; perhaps the judicial power is part of the "higher law" of the Constitution[562] while statutes are merely positive legal commands. Furthermore, as one reviewer of this article noted, "the American legal tradition rests on both consequence-based realist arguments and principle-based formalist arguments," such that the blending of these approaches into a single theory or judicial holding "might just be a

561. *See* John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1314 (2010); Manning, *The Absurdity Doctrine*, *supra* note 276, at 2390.

562. *See generally* Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 365 (1929).

function of anticipating and responding to potential counterarguments."[563]

My concern with these ways of thinking is that ambivalence—whatever the reason for it may be—undermines the very rule-of-law values that interpretive theory is trying to promote. I will sketch this concern roughly here, reserving a fuller discussion for future work. Even a rough sketch of the argument requires some explication of the "rule of law" concept in its various and contested forms, including a demonstration of the rule-of-law motivations of interpretive theory. After providing a rough conceptual map, I will then sketch three problems for rule-of-law principles that arise from interpretive theory's jurisprudential ambivalence.

A. The Rule of Law

Interpretive theory is centrally concerned with the rule of law. Indeed, when Scalia helped launch the renaissance of statutory interpretation scholarship in the 1980s, one of his most influential arguments was that textualism promotes the rule of law better than either purposivism or intentionalism.[564] In *The Rule of Law as a Law of Rules*, Scalia argued that judges should set forth general rules as often as possible in order to enhance the predictability of law and to reduce the discretion of judges.[565] Textualism, he claimed, facilitates this desirable rulemaking.[566] The year before Scalia published his article, however, Alexander Aleinikoff had made the opposite argument: that dynamic purposivism is the better approach for promoting rule-of-law values.[567] Aleinikoff argued that dynamism does a better job than either textualism or intentionalism of maintaining "the moral force necessary to legitimate current positive law."[568] The renaissance of interpretive theory has thus, from the very start, centered around a contest over the rule of law.[569]

---

563. E-mail from Hannah Begley, Senior Articles Ed., STANFORD L. REV., to author (Feb 26, 2019, 11:32 AM CST) (on file with author).

564. *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) [hereinafter Scalia, *Rule of Law as a Law of Rules*].

565. *Id.* at 1184–85.

566. *Id.*

567. Aleinikoff, *supra* note **Error! Bookmark not defined.**, at 56–60 (rebutting the argument that statutory updating by judges would "undermine the rule of law").

568. *Id.* at 59.

569. In general, debates over the rule of law often center on the separation of powers, and debates over separation of powers often center on the rule of law. Indeed, one of Scalia's favorite things to point out is that the two concepts are intertwined in the constitution for

The contest, however, is often fought on entirely different battlefields, without either side realizing that it is not really aiming at the other. The problem is that textualists and purposivists—just as they disagree on the fundamental nature of a statutory text—also disagree on the fundamental nature of the rule of law. Indeed, despite its having been a central ideal of civil society from Aristotle[570] to the present, the rule of law is not a well-defined concept in general. Jeremy Waldron has argued that the concept is an "essentially contested" one, which may forever evade definition due to widespread disagreement over its core aspirations.[571]

Fortunately, my goal here is not to demonstrate that either the textualists or the purposivists have the better claim to promoting the one-and-only, true Rule of Law. Instead, my goal is to show that jurisprudential ambivalence necessarily undermines *any* attempt to advance the rule of law, according to any plausible understanding of what the rule of law entails. I will therefore give only a rough sketch of the competing understandings of the rule of law, with apologies for barely skimming the surface of the vast and wonderful literature on the concept. I start by identifying the core idea, including a famous list of practical values that is common to competing theories. I then sketch the diverging paths that textualists and purposivists have taken from that core idea, to demonstrate the rule-of-law motivations of interpretive theory. Because the rule-of-law concept is so intertwined with the interpretive debate, I will not attempt to isolate the textualists' or the purposivists' rule-of-law concept from their interpretive and structural arguments.

1. The Core Concept

Among the competing theories of the rule of law, the least common denominator is the desire to prevent arbitrary and self-interested governance, in favor of reasoned and public-regarding governance. As Waldron put it, "the lead idea of the Rule of Law is that somehow respect

---

the Commonwealth of Massachusetts, which John Adams drafted. *See* Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). There is also a collection of leading essays on the rule of law that was published under the title *The Rule of Law and the Separation of Powers*. The two concepts are fundamentally linked. *See* THE RULE OF LAW AND THE SEPARATION OF POWERS (Richard Bellamy ed., 2005).

570. *See generally* ARISTOTLE, THE POLITICS, AND THE CONSTITUTION OF ATHENS (Stephen Everson ed., 1996).

571. Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (In Florida)?*, 21 L. & PHIL. 137, 153–59 (2002).

for law can take the edge off human political power,"[572] and as Margaret Radin put it, the central ideal is that "our law itself will rule (govern) us, not the wishes of powerful individuals."[573] In a recent reformulation of his leading work on the rule-of-law concept, Joseph Raz articulated the common core similarly, arguing that "at least one, commonly agreed, aim of the rule of law is to avoid arbitrary government . . . [i.e.,] the use of power that is indifferent to the proper reasons for which power should be used."[574]

This core ideal goes hand-in-hand with the cliché that no one may be "above the law." In order to prevent self-interested governance, the system must prevent the supremacy of human over legal institutions, and for that supremacy to hold, those who govern must also be governed by the laws they create. The law itself, rather than any individual or group in a position of power, must be supreme.[575]

Together with this central ideal, theorists generally agree on a bundle of practical characteristics that the laws must reflect in order to claim compliance with the rule of law: clarity, stability, publicity, predictability, generality, uniformity, non-retroactivity, and equality.[576] With the exception of equality, which is a more recent addition to the rule-of-law concept, this oft-repeated list can be traced to Lon Fuller's influential natural law treatise, *The Morality of Law*.[577] I shall therefore refer to the list as the Fuller characteristics.

Curiously, the relationship of the Fuller characteristics to the core ideal of non-arbitrariness and public-regardingness—and of the law's supremacy over human power—is often left unspecified.[578] Nor is it

572. *Id.* at 159.

573. Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 781 (1989).

574. Joseph Raz, *The Law's Own Virtue* 1–5 (Oxford Legal Stud. Research Paper No. 10/2019, 2018) (emphasis omitted).

575. *See generally* Jeremy Waldron, *Rule* by *Law: A Much Maligned Preposition* (Pub. L. and Legal Theory Research Paper Series, Working Paper No. 19–19, 2019) (discussing the importance of rule by law).

576. LON FULLER, THE MORALITY OF LAW: REVISED EDITION (1969). The only characteristic I list here that does not find a comfortable home on Fuller's original list is equality, but several later theorists have insisted that equal treatment under the law is necessary to the rule of law.

577. *Id.*; *see, e.g.*, Scalia, *Judicial Deference*, *supra* note **Error! Bookmark not defined.**; Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 316 (1985); Lord Bingham, *The Rule of Law*, 66 CAMBRIDGE L.J. 67, 73 (2007); JOHN RAWLS, A THEORY OF JUSTICE 237–38 (1971).

578. Most often, Fuller's characteristics are thought necessary to the *efficacy* of law. *See* Radin, *Reconsidering the Rule of Law*, *supra* note 573, at 786 n.17. Law will not work

entirely intuitive. It is, of course, *theoretically* possible to have an opaque, dynamic, secretive, unpredictable, particularistic, retroactive, and unequal system that is nevertheless well-reasoned and public-regarding rather than arbitrary and self-serving. Indeed, just as personalized medicine and medical privacy have become gold standards for medical innovation, we might imagine that a perfectly personalized and sensitively dynamic justice system, with thick privacy protections for accused wrongdoers, would be a better system than a generalized, public, one-size-fits-all legal world—or, at least, it could be better *if* personalized justice could be implemented in a way that truly worked for the welfare of the citizenry rather than becoming a self-serving or oppressive instrument of the powerful.

The trouble is that, in a secretive system, observers would be unable to distinguish reasoned and public-regarding from arbitrary and self-serving governmental decisions. If law were shrouded in mystery or constantly changing or excessively individuated, we would not be able to tell whether our governors were behaving consistently or inconsistently with the core virtue of law's rule: reasoned public-regardingness. The only people who would witness the decision-making of the powerful would be those against whom (or for whom) the powerful acted, and those individuals would not be credible whistle-blowers. An accused wrongdoer would have an obvious incentive to mischaracterize the charge against her as arbitrary or unreasoned.

The rule of law thus contains an important but often unstated requirement that appears to be common to all theories: empowerment of

---

to organize political life—to influence human behavior—if the polity does not know what the law requires. *See id.* at 786, 786 n.17 (noting the instrumentalist understanding of Fuller's list and also noting that Fuller himself thought his list more deeply normative than the instrumental reading implied). This understanding of Fuller, however, bears no relationship whatsoever to the agreed-upon core of the rule-of-law concept, namely the prevention of arbitrary and self-serving governance. As Radin noted, Fuller's revised edition of *The Morality of Law* included a response to the instrumentalist reading of his work, in which he argued that he was actually attempting to put forward "an interactional theory of law," which would put, at the very center of the "Rule of Law," the requirement of "a cooperative effort—an effective and responsible interaction—between lawgiver and subject." *Id.*; FULLER, *supra* note 576, at 219. Only a morally sound interactional relationship—a "joint normative enterprise of lawmakers and law-followers," as Radin put it, would properly incentivize a rulemaker to "pay any attention to his own enactments" while simultaneously incentivizing his subjects to "abide his rules." Radin, *Reconsidering the Rule of Law*, *supra* note 573, at 786 n.17; FULLER, *supra* note 576, at 219. Fuller's clarification of his list brings the Fuller characteristics much closer to the monitoring and enforcing role that I assign it here; the clarification insists that law-followers must be "in on the game," so to speak.

the polity to monitor the powerful. If those in power are to be bound by the law—if, in Thomas Paine's famous formulation, the law is to be king[579] or, in Ronald Dworkin's famous formulation, we are to live in law's empire[580]—then we must know what the law is: what it authorizes and what it prohibits. The polity must be "in on the game," so to speak. Otherwise, citizens will be incapable of perceiving the problem and complaining about it when those in power violate the law—when the powerful set themselves above and claim supremacy over the law.[581] In other words, one way that the rule of law ensures the supremacy of law over lawmakers is by enlisting law-followers as law-enforcers, not through the distribution of coercive power but through the distribution of information and awareness. As Radin put it, the rule of law insists that governance be a "joint normative enterprise of lawmakers and law-followers."[582]

That said, a polity that is empowered to monitor the governors, although plausibly necessary to the rule of law, is surely not sufficient. There must also be multiple entities with positive legal power to enforce the law against each other. If there were only one, unitary governor, she could violate the law openly and notoriously without consequence, usurping the law's supremacy. The polity's only recourse would be a coup, which is too costly a remedy to function with regularity. To prevent usurpation, then, there must be multiple, separate governors with law-enforcement power—and without incentives to collude—that can check each other's excesses and violations. This necessity explains the close association between the rule of law and the separation of powers.[583]

Both the requirement of public monitoring and the requirement of mutual enforcement depend, for their success, on law's accessibility and

---

579. THOMAS PAINE, COMMON SENSE (1776).

580. DWORKIN, LAW'S EMPIRE, *supra* note 186, at vii.

581. Justice Scalia came close to identifying this connection between the core rule-of-law concept and the Fuller characteristics. He argued that "one effective check upon arbitrary judges is criticism by the bar and the academy" but that this check fails when decision rules are excessively opaque or particularistic. Scalia, *Rule of Law as a Law of Rules*, *supra* note 564, at 1180.

582. Radin, *supra* note 573, at 786 n.17 (citing L. FULLER, THE MORALITY OF LAW 237 (rev. ed. 1969).

583. John Adams drew that connection explicitly in drafting the Constitution for the Commonwealth of Massachusetts. *See* MASS. CONST. art. XXX ("In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.").

transparency—on law's compliance with the Fuller characteristics. Neither the polity nor the separate governors can perform their monitoring or enforcement roles if governmental decisions are kept secret. The common core, then, of the rule of law ideal is an enforceable supremacy of reasoned and public-regarding law over all humans.

2. The Textualist Take

The textualist understanding of the rule of law is a fairly straightforward combination of Fuller's list with the jurisprudentially formalistic[584] normative claim that laws are commands from hierarchically primary lawmakers.[585] Scalia and Manning have been the most explicit thinkers about the rule-of-law motivations of textualism, so I will focus on their work here. According to both Scalia and Manning, the rule of law depends on the articulation of general and determinate rules rather than particularistic or flexible standards, and those rules must be articulated, as much as possible, by the legislature rather than the judiciary.[586]

Scalia has made the strong claim that general rules are the only things that deserve to be called "law"—that particularistic decision-making under a discretion-conferring standard is more properly considered factfinding than law-determining.[587] He then grounded that

584. The term "formalistic" has a different meaning in the rule-of-law literature than in the pure jurisprudential literature discussed above. In the rule-of-law literature, "formalistic" theories are distinguished from "instrumental" and "substantive" theories. Lyons, *supra* note 255, at 949. In that categorization, substantive theories (most closely associated with Rawls and Bingham) include a moral component, requiring a legal system to respect human rights or liberty in order to qualify as a system with the rule of law; instrumental theories center around the features of a legal system that are required to inspire obedience in the polity without permitting arbitrary governance; and formalistic theories center more exclusively on the structures of government that are required for a system to have "rule-of-law" characteristics, without including the moral or instrumental components. RAWLS, *supra* note 577; Bingham, *supra* note 577, at 72.

585. *See supra* Part I.B.

586. *See generally* Scalia, *Rule of Law as a Law of Rules*, *supra* note 564, at 1176–87; Manning, *Textualism and the Equity of the Statute*, *supra* note 181, at 58, 66–70.

587. *See* Scalia, *Rule of Law as a Law of Rules*, *supra* note 564, at 1182 ("My point here . . . [is] simply that we should recognize that, at the point where an appellate judge says that the remaining issue must be decided on the basis of the totality of the circumstances, or by a balancing of all the factors involved, he begins to resemble a finder of fact more than a determiner of law."); *id.* at 1187 ("All I urge is that . . . the *Rule* of Law, the law of *rules*, be extended as far as the nature of the question allows; and that, to foster a correct attitude toward the matter, we appellate judges bear in mind that when we have finally reached the point where we can do no more than consult the totality of the circumstances, we are acting

view in the argument that general rules better comply with rule-of-law values, arguing that only general rules—not flexible standards—can facilitate equality,[588] uniformity,[589] predictability,[590] judicial restraint (or non-arbitrariness),[591] and the supremacy of law over majoritarian power.[592]

Importantly, Scalia acknowledged that general rules cannot provide determinate answers to all problems that might arise; he thus eschewed the Langdellian or Dworkinian fantasy of completeness, admitting that judges must exercise some discretion.[593] But he argued that judicial discretion is an unavoidable chink in the rule-of-law's armor. It is a failure of, not a part of, the rule of law.[594] The moment that judges begin to exercise discretion, Scalia argued, is the moment that "the Rule of Law leave[s] off" and judges become factfinders rather than law-enforcers.[595]

Scalia also argued that the rule of law requires legislatures rather than judges or agencies to declare the law, as much as possible, because the legislature is "most responsive to the people."[596] Scalia thus seemingly equated reasoned public-regardingness with electoral responsiveness, assuming that the legislature, because of its electoral incentive, is more likely than the judiciary to choose non-arbitrary, public-regarding rules. Scalia also tied responsiveness to transparency (the core concern of the Fuller characteristics), arguing that "rules of inadequate clarity or precision" are unacceptable under the American rule of law "because they leave too much to be decided by persons other than the people's representatives."[597] Scalia thus recognized the connection among transparency, non-arbitrariness, and monitoring, and

---

more as fact-finders than as expositors of the law."). *See also* Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645, 651–57 (1991) (critiquing Scalia's view that "decisionmaking according to entrenched rule is one of the factors necessary for a decisionmaking environment to count as law . . . ."). For a useful counter-argument from equally dedicated textualist and originalist thinkers, see Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483, 483 (2014).

588. Scalia, *Rule of Law as a Law of Rules*, *supra* note 564, at 1178.

589. *Id.* at 1178–79.

590. *Id.* at 1179.

591. *Id.* at 1179–80.

592. *Id.* at 1180 (hypothesizing that judges will be more "courageous" in their duty of standing up to the "popular will" if they can "stand behind the solid shield of a firm, clear principle enunciated in [an] earlier case[].").

593. *Id.* at 1186–87.

594. *Id.* at 1182.

595. *Id.* at 1187.

596. *Id.* at 1176.

597. *Id.*

he argued that the best way to ensure government by transparent, reasoned rules—and by an entity that the polity would be empowered to monitor—was to leave the rulemaking task to the legislature.

For Scalia, then, the ideal that the legal system be "a joint normative enterprise of lawmakers and law-followers"[598] depends on the assignment of lawmaking power to the legislature alone. Only the legislature, with its electoral incentive to represent the popular will, is constituted to function as the kind of joint enterprise that the rule of law demands.[599] In a rule-of-law system, Scalia asserted, "judges cannot create [rules] out of whole cloth, but must find some basis for them in the text that Congress or the Constitution has provided."[600]

Manning was somewhat gentler, much more straightforward, and, of course, more jurisprudentially formalistic in his claims, but the thrust of his argument was the same. For Manning, discretionary judicial decisions may be "law," but they are inconsistent with the *rule* of law because they undermine "predictability, transparency, and constraint . . . ."[601] The fundamental requirement of the rule of law, Manning argued, is that governance be conducted "according to known and established laws, rather than the exercise of official discretion."[602] Manning thus set up judicial discretion as an antagonist of the Fuller characteristics, implying that predictability and transparency cannot be achieved by the creation of flexible standards that allow for discretionary decisions in concrete cases.[603]

Furthermore, quoting Locke, Manning argued that the power of interpretive flexibility—which he equated with the collapsing of judicial and legislative powers—would tempt judges to "exempt themselves from obedience to the laws they make."[604] Manning thus adopted the core rule-of-law value of law's supremacy over lawmakers, tying that value directly to the prohibition of judicial discretion: the prohibition of "ad hoc alterations of the law . . . ."[605] In Manning's view, a judge who has the power to alter statutory law on a case-by-case basis is not subservient to the law; she is the master of the law.

---

598. Radin, *Reconsidering the Rules of Law*, supra note 573, at 786 n.17.
599. *See* Scalia, *Rule of Law as Law of Rules*, *supra* note 564, at 1183.
600. *Id.*
601. Manning, *Textualism and the Equity of the Statute*, *supra* note 181, at 58.
602. *Id.* at 66.
603. *Id.* at 70.
604. *Id.* at 68 (quoting JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 143, at 76 (C.B. Macpherson ed., Hackett Pub. Co. 1980) (1690)).
605. *Id.*

Ultimately, Manning argued that the practical aspiration of the rule of law is the reduction of "law to determinate statutory commands" in order to create "legal determinacy and the limitation of official discretion."[606] The Framers sought to achieve this elusive goal, Manning argued, through the strict separation of the legislative and judicial functions, requiring the legislature to make the law and the judiciary faithfully to interpret it.[607] Manning's rule of law thus requires compliance with the Fuller characteristics *through* a strict separation of legislative and judicial functions, which prohibits judges from engaging in flexible, purposive, or dynamic interpretation of statutory text.

3. The Purposivist Take

Realists are generally less concerned with the rule of law than are their formalistic counterparts. The rule of law is, after all, a conceptual—and thus primarily formalistic—ideal. A violation of the rule of law *concept* ought not to matter to a dedicated realist unless it causes concrete negative consequences for the polity. Perhaps for that reason, Dworkin is the only purposivist on my list who has written his own theory of the rule of law;[608] Eskridge's most significant confrontation with the concept and its relationship to dynamic interpretation was in his (formalistic) conversation with Manning;[609] and Posner has treated the Fuller characteristics as mere costs and benefits that judges should incorporate into the holistic cost-benefit analysis that guides each retail decision.[610]

That said, a number of realistically inclined authors, including Radin and Aleinikoff, have made some interesting arguments about the rule of law. Their ideas resonate, perhaps surprisingly, with a recent argument by one of the leading positivist philosophers on the rule of law, Joseph Raz.[611] Upon Raz's foundation, a dynamic purposivist could claim strong

606. *Id.* at 69–70.

607. *Id.* at 66.

608. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 9–32 (1985).

609. *See generally* Eskridge, *All About Words*, *supra* note 358.

610. *See, e.g.*, POSNER, LAW, PRAGMATISM, AND DEMOCRACY, *supra* note 315, at 63–64 ("A good pragmatic judge will try to weigh the good consequences of steady adherence to the rule-of-law virtues, which tug in favor of standing pat, against the bad consequences of failing to innovate when faced with disputes that the canonical texts and precedents are not well adapted to resolve.").

611. *See* Raz, *The Law's Own Virtue*, *supra* note 574. The surprise rests in the fact that Raz is a positivist who would generally reject the Realist jurisprudence underlying the defense of dynamic purposivism. But Raz's recent update to his work on the rule of law

compliance with a rule-of-law norm. The purposivist perspective is complex and deserves its own consideration in future work, but I will sketch it roughly here.

The argument starts with the Realists' epistemic claim that it is impossible to create a completely determinate system of laws.[612] Remember that, for Manning, the rule of law's aspiration is the reduction of all law to "determinate statutory commands."[613] But thinkers as early as Aristotle[614] and as formalistic as Scalia[615] and Dworkin[616] have acknowledged the impossibility of achieving that ideal.[617] The beginning question for the purposivist, then, is whether the existence of textually undetermined cases is an unavoidable failure of the rule of law—as Scalia would have it—or whether, instead, there is some other notion of "law" that a decision-maker can obey when deciding textually undetermined cases. Might a judge be interpreting and applying some law *other than* positive textual commands when filling statutory gaps?

Of course, the possibility of a gap-filling law does not necessarily imply a text-trumping law. Even if there is some law that might bind judges when they fill statutory gaps, that law might not justify a form of dynamic purposivism that ignores or updates outdated textual commands. So the obvious next question for the purposivists' rule of law is this: If there *is* a notion of law that can guide judicial discretion in filling statutory gaps, should that notion of law trump statutory text when the two conflict? Which "law" is to be supreme in the rule of "law": positive textual commands or the law that sometimes supplements—and might at other times contradict—those commands?

The answer to these questions, for the purposivist, starts from the Realists' normative claim: that law's legitimacy depends on whether or

---

incorporates some of the Realists' normative ideas of law's legitimacy and thus provides some important support for dynamic interpretation's consistency with the rule of law.

612. *See supra* Part II.A.

613. Manning, *Textualism and the Equity of the Statute*, *supra* note 181, at 69.

614. *See* ARISTOTLE, *supra* note 570, at 78 (noting the "difficulty of any general principle embracing all particulars"); ARISTOTLE, NICHOMACHEAN ETHICS 98 (Roger Crisp ed., 2014) ("[A]ll law is universal, and there are some things about which one cannot speak correctly in universal terms.").

615. Scalia, *Rule of Law as a Law of Rules*, *supra* note 564, at 1186–87 (acknowledging that case-by-case decision-making cannot be "entirely avoided").

616. DWORKIN, A MATTER OF PRINCIPLE, *supra* note 608, at 18–23.

617. For a useful realist exposition of the problem, see Farber, *The Inevitability of Practical Reason*, *supra* note 356, at 543–47.

not it serves the interests of the governed.[618] Recall Llewellyn's insistence that law is not valid unless it reflects "wisdom-in-result for the welfare of All-of-us."[619] On this basis, the Realists argued that when a judge lacks a determinate statutory answer (as she often will, the Realists claimed), she should choose the outcome that produces the best consequences—the outcome that best serves the interests of the governed.[620] Remember, too, that the Realists believed that consequence-based interpretation—cases organized by "situation type"—would reveal predictable patterns.[621] The Realists believed that they could enhance the common law's compliance with the Fuller characteristics by ignoring doctrinal categories in favor of fact-based and consequentialist considerations.[622]

Realists, however, did not argue that consequentialist calculi constituted a "higher law" or a "fundamental law" that could constrain judicial discretion or trump statutory text. Nor did they claim that obedience to the "welfare of All-of-us" is a requirement for the rule of law. Those kinds of claims are far too conceptualistic and formal to have interested the 1930s Realists. But later writers have made precisely these arguments.

Let's start with Raz, whose perspective is perhaps the most surprising given that he is a dedicated positivist.[623] In a recent update to his earlier work on the rule of law,[624] Raz concluded that "conformity to the rule of law is acting with manifest intention to serve the interests of the governed, as expressed by the [positive] law and its morally proper interpretation and implementation."[625] Recalling the core ideal of the rule of law—reasoned public-regardingness—Raz argued that "indifference to reason, arbitrary use of power, is only one way in which one can offend against the rule of law. Another is acting for a purpose

618. *See* Llewellyn, *Theory of Appellate Decision*, *supra* note 2, at 399 (arguing that in statutory construction as well as common law "the real guide is Sense-for-All-of-Us.").

619. *Id.* at 396.

620. *See id.* at 399.

621. *See id.* at 397–98 (listing generalizations fairly made when courts are influenced by a "sense of the situation") (emphasis omitted).

622. *See id.* at 398–99 (discussing how courts may find leeway by narrowing or expanding prior doctrine and practice).

623. Compare Raz's perspective here, for example, to Kramer's and Marmor's understandings of the rule of law, which are much more strictly positivist. *See generally* Matthew H. Kramer, *On the Moral Status of the Rule of Law*, 63 CAMBRIDGE L.J. 65 (2004); Andrei Marmor, *The Rule of Law and Its Limits*, 23 L. & PHIL. 1 (2004).

624. Joseph Raz, *The Rule of Law and Its Virtue*, 93 L.Q. REV. 195 (1977).

625. Raz, *The Law's Own Virtue*, *supra* note 574, at 7–8.

which is clearly not one that governments are entitled to pursue."[626] He then argued that the only legitimate purpose of government is "to promote . . . the interests of the governed . . . includ[ing] their moral interests . . . ."[627] Raz, thus, elevated the interests of the governed over the positive law, arguing that promotion of the public interest—not mere adherence to public rules—is the "core" of the rule of law.[628] The positive law, on this account, is an "expression" of the interests of the governed, but it requires "morally proper interpretation and implementation" in order to serve the higher rule-of-law value of promoting the public interest.[629]

Of course, this perspective does not answer Scalia and Manning's core argument. Their primary claim is that law will be most public-interested—*and* most compliant with the Fuller characteristics—when the lawmaking function is assigned exclusively to the most public-regarding governmental institution: the legislature.[630]

But Eskridge and Aleinikoff have provided compelling answers to that textualist claim.

Eskridge's answer is twofold. First, in his original article on dynamic interpretation, Eskridge argued that legislating is a "poorly functioning" process that frequently fails to advance "our polity's constitutional commitment to the common good . . . ."[631] Drawing on the public choice literature, Eskridge argued that legislative decision-making is more likely to serve moneyed interests than public interests, thereby failing the rule of law's core aspiration of public-regardingness.[632] Furthermore, Eskridge argued that majoritarian institutions will inevitably violate the Fuller characteristics.[633] In a piece with John Ferejohn, Eskridge argued that all "minimally democratic institutions will produce incoherent, unstable, and morally arbitrary sets of commands."[634] A majoritarian lawmaking power that can pass and amend statutes at will is extremely

626. *Id.* at 7 (footnote omitted).

627. *Id.*

628. *Id.* at 7–8.

629. *Id.* at 8.

630. *See* Manning, *What Divides Textualists From Purposivists?*, *supra* note 9, at 111; Scalia, *The Rule of Law as a Law of Rules*, *supra* note 563, at 1176.

631. Eskridge, *Dynamic Statutory Interpretation*, *supra* note 4, at 1518.

632. *See id.* at 1511–12.

633. *Cf. id.* at 1498 (stating that "the polity created by the Constitution requires a government that . . . promotes the common good," and not "one of rigid separation of powers or pure majoritarianism.").

634. William N. Eskridge, Jr., & John Ferejohn, *Politics, Interpretation, and the Rule of Law*, *in* THE RULE OF LAW: NOMOS XXXVI 266, 266 (Ian Shapiro ed., 1994).

unlikely to produce a stable and coherent body of law that promotes the common good. Eskridge thus argued that legislative enactments will fail to produce a *corpus juris* that *either* satisfies the Fuller characteristics of stability and coherence *or* satisfies the Razian requirement of manifestly intending to promote the common good.

The second piece of Eskridge's argument is the claim that judicial flexibility in the interpretation of statutory commands can bring the whole system closer to the rule of law—that judges can hew coherent and public-regarding law out of the raw material of statutory text.[635] Eskridge argued that the role of the judge is not merely to interpret and enforce whatever the legislature passes, but rather to "integrat[e] statutes into fundamental law"[636] and "to confine broad statutory language by reference to the larger tapestry of law . . . ."[637] For Eskridge, then, "the rule of law is not just a law of rules, but a law of ongoing practice,"[638] which requires judges to shape statutory texts into the evolving nomos—the entire normative legal world in which we operate.[639]

Furthermore, Eskridge and Ferejohn argued that this form of dynamic interpretation—with coherence and the common good as its lodestars—is not ad hoc or lawless in the ways that Scalia and Manning imply.[640] Instead, dynamic interpretation is guided by "systems of norms or conventions that regulate the interpretation of legal materials, including statutes."[641] These complex normative systems, which Eskridge and Ferejohn termed "interpretive regimes,"[642] can themselves qualify as law that governs judicial decision, even though they are not positively enacted textual commands from the legislature.

Eskridge's view of the rule of law, then, is that the openness and transparency of law—the Fuller characteristics themselves—require the positive law to cohere with the society's fundamental commitments and practices, including the overarching commitment to the common good. The law as a whole cannot claim to be clear, stable, and predictable if there is conflict between the statutory law and the common law, or between the statutory law and the constitutional law, or even between

635. *See* Eskridge, *All About Words*, *supra* note 358, at 1086.
636. *Id.*
637. *Id.* at 1039.
638. *Id.* at 1104.
639. *See* Robert M. Cover, *Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983) (discussing how the law fits into our normative universe).
640. *See* Eskridge & Ferejohn, *supra* note 634, at 394.
641. *Id.*
642. *Id.* at 268.

the statutory law and the unwritten but deeply felt norms of the polity. On this understanding, judges must have the power to shape legislative enactments, through the law of interpretive regimes, so that those legislative enactments fit into the broader (if not "higher") legal system, including the polity's ongoing normative practices.

This notion resonates with the pragmatic reinterpretation of the rule of law that Margaret Radin began to sketch at around the same time Eskridge started writing on dynamic interpretation.[643] In Radin's pragmatic understanding of the rule of law, "judges are an interpretive community" (not a group of "functionaries" charged with applying textual commands) who must "act as independent moral choosers for the good of a society, in light of what that society is and can become."[644] On this view, "the law in the statute books is not the real law"; the real law is the broader, continuously-evolving tapestry of a society's "normative practice."[645]

Eskridge and Radin thus give an emphatic "yes" to the question of whether some other law exists that can trump statutory text when the two conflict. That law is the polity's broader normative enterprise of moral and social regulation. Because the legislature does not always comply with the rule of law's aspiration of coherence or its commitment to the common good, judges enhance the rule of law when they mold statutes to fit the broader *nomos*.

Aleinikoff's argument overlaps significantly with Eskridge's in the second claim, but his starting point is slightly different. Rather than arguing that the legislature suffers from public choice failures, Aleinikoff made the simpler point that textualist interpretation—or any "archaeological" interpretive method that looks to the statute's drafting era for its meaning—will promote the interests of a past, rather than a present, polity.[646] Although Aleinikoff did not appeal directly to the public interest or the common good, he argued that law generally is "a tool for arranging today's social relations and expressing today's social values":[647] a view that presumes a purposive, public-spirited role for the law.[648] He thus saw law—like Eskridge and Radin did—as an ongoing "enterprise that exists in the present,"[649] not as a set of "once-shouted

643. Radin, *Reconsidering the Rules of Law*, *supra* note 573, at 810–17.
644. *Id.* at 817.
645. *Id.* at 819.
646. Aleinikoff, *supra* note 4, at 66.
647. *Id.* at 58.
648. *See id.*
649. *Id.*

commands that continue simply to echo through time."[650] Textualist interpretation undermines that present enterprise—undermines today's rule of law—by "stripping [statutory text] of its connections to the legal enterprise of which it is [now] a part."[651] Aleinikoff thus argued that textualist interpretation undermines the coherence, stability, and predictability of today's legal system by injecting outdated, historical visions of law and society into the current enterprise. "[W]e fully expect our laws, no matter when enacted, to speak to us today,"[652] Aleinikoff wrote, and those expectations are foiled when judges enforce historical rather than operational meanings of statutory provisions.[653]

The second part of Aleinikoff's argument is essentially identical to Eskridge's: that judges best respect the rule of law when they work to "fit statutes into the overall fabric of the law . . . ."[654] Aleinikoff argued that positive laws should be "as consistent as possible with other laws and with underlying legal and moral principles."[655] Judges serve a useful role in creating—and in maintaining over time—that big-picture coherence. Furthermore, Aleinikoff shared Eskridge's view that dynamic interpretation "is not unconstrained judicial activity" that amounts to "policymaking [by] unelected judges"; it is, instead, "a demand that the interpretive process be present-minded."[656]

For dynamic purposivists, then, the rule of law does not require a law of rules. The unwritten law of the polity's interests and normative commitments—its needs and preferences—is also a law that can rule. And that law should serve as a constraint not only on judicial decisions but also on legislative enactments. When legislative text contradicts the current needs and preferences of the polity, then, judges respect the rule of law best by enforcing the present's *nomos* over the past's text.

---

650. *Id.* at 57.

651. *Id.* at 56.

652. *Id.* at 58.

653. It is worth here noting the resonance between Aleinikoff's argument and Elhauge's core view that judges should center the interpretive enterprise around the advancement of "current enactable preferences," not the enacting legislature's preferences. *See supra* text accompanying notes 320–28. Elhauge did not discuss the rule of law in his book, but his argument shares common ground with Aleinikoff's here.

654. Aleinikoff, *supra* note 4, at 58.

655. *Id.* at 60.

656. *Id.* at 59–60.

B. *Jurisprudential Ambivalence and the Rule of Law*

Jurisprudential ambivalence—in and of itself—undermines the rule of law. According to any plausible understanding of what the rule of law requires, ambivalence surrounding the criteria of law's legitimacy necessarily frustrates the rule of law's aspirations. The core problem is that an ambivalent theory rests on contradictory concepts of what the law is. This core problem then has practical consequences for the rule-of-law values of non-arbitrariness and transparency. An ambivalent theory thus necessarily fails at its own goal of promoting the rule of law, such that jurisprudential ambivalence ought to be disqualifying for any theory of statutory interpretation.[657]

1. The Concept of Law

The core problem with jurisprudential ambivalence is that it sows confusion around the very concept of law. Formalism and realism rest on different understandings of legal legitimacy; in Hart's terms, they rest on different (and mutually incompatible) rules of recognition.[658] Formalism insists that law is not valid unless it issues from a hierarchically primary lawmaker[659] while realism insists that law is not valid unless it advances the well-being of the polity.[660] These two criteria cannot coexist within a single theory; although the legislature will undoubtedly attempt to promote the well-being of the polity most of the time, it is inconceivable that any designated lawmaker (other than a beneficent, omniscient, and omnipotent god) will *always* and *only* issue pronouncements that advance the common good. No single lawmaker can keep law perpetually aligned with the evolving needs and preferences of the polity. It is therefore impossible to view legitimacy as depending on both formalistic and realistic understandings; under the realistic view, some pronouncements of the primary lawmaker will sometimes be invalid, and under the formalistic view, some of the polity's normative views will be

657. It is worth noting that I share many positivists' view that the rule of law is only one of many possible virtues of a legal system. *See, e.g.*, Raz, *supra* note 574. My argument here is not that a threat to the rule of law is always a tremendous sin that should disqualify any legal argument. The reason that a violation of the rule of law is disqualifying for interpretive theory in particular is that the stated goal of most such theory is to promote the rule of law. Any interpretive theory that harms the rule of law thus not only fails to achieve its own goal but actually damages the very value it is trying to promote.

658. *See generally* HART, *supra* note 21.

659. *See supra* Part I.B.

660. *See supra* Part I.A.

unenacted and thus non-legal. In an ambivalent theory, then, the structural and regulatory layers rest on irreconcilable notions of law and legitimacy. This problem is fatal to the rule of law, which depends, at minimum, on a coherent conception of what law is. Otherwise, law-followers have no hope of understanding which legal pronouncements must be followed. As Hart put it, legal systems depend on the "ultimacy" of a rule of recognition.[661]

To make this problem more concrete, let's return to Eskridge and Scalia. (In this discussion, I assume that Eskridge, if he had to pick, would want to be purely realistic while Scalia, if forced to pick, would have wanted to be purely formalistic.)

Recall that Eskridge defended statutory dynamism by arguing that all law, including statutory text, must continually promote the common good in order to claim continuing validity.[662] As Eskridge put it, "The legitimacy of government is ultimately based on the continued responsiveness of the whole government to the objective needs of the evolving society."[663] In his regulatory arguments, Eskridge thus assumed the realist's conception of law—the view that "wisdom in result for the welfare of All-of-us" is the ultimate rule of recognition in the American system.

But if that is true, then the legitimacy of the Article III power of interpretive dynamism cannot depend much (if at all) on the founding era's notions of common law powers and the equity of the statute.[664] The legitimacy—even the bare legality—of a judicial practice of interpretive dynamism ought to depend, according to Eskridge's own notion of legal legitimacy, on whether that practice satisfies or harms "the objective needs of the evolving society."[665] Eskridge ought not to be able to evaluate the legality of interpretive dynamism without evaluating the evolving real-world consequences of its practice.[666] And, of course, a judicial power

661. HART, *supra* note 21, at 107–10.

662. Eskridge, *Dynamic Statutory Interpretation*, *supra* note 4, at 1523–24.

663. *Id.*

664. *Cf.* Eskridge, *All About Words*, *supra* note 358.

665. *See* Eskridge, *Dynamic Statutory Interpretation*, *supra* note 4, at 1524.

666. Elhauge's theory confronts much the same problem; his test for regulatory legitimacy is an interpretation's consistency with current enactable preferences, but he does not apply that metric of legitimacy to his structural arguments. *See* ELHAUGE, *supra* note 295 *passim*. He merely assumes a faithful agent role for the judiciary without asking whether the current legislature actually wants courts to serve that role. It is at least possible that the political branches would want courts to have more or less independence than the role of faithful agent implies. Why not interpret the judicial power itself according to current preferences?

to enforce "the equity" rather than merely the text of a statute has dramatically different real-world consequences today than it did in the founding era. After all, there were far fewer statutes at the founding; there were virtually no administrative agencies;[667] and today's politics of federal judicial appointments would be unrecognizable to Alexander Hamilton. Eskridge thus made an argument about the Article III power that is simply not a valid legal argument according to his own theory of legitimacy.

Scalia did likewise. Remember that, for Scalia, law must be written down and enacted by a hierarchically primary lawmaker in order to claim legitimacy and enforceability.[668] As a result, according to Scalia, the texts of the Constitution and the statutes contain the entirety of the binding law in the American system.[669] As he put it, "judges cannot create [rules] out of whole cloth, but must find some basis for them in the text that Congress or the Constitution has provided."[670] In his regulatory arguments, Scalia thus assumed the formalist's conception of law—the view that final promulgation by a designated lawmaker is the ultimate rule of recognition in the American system.

But if that is true, then the limit on judges' interpretive power—the rule that judges must engage only in textual interpretation—cannot be grounded in the ill effects of interpretive dynamism. By Scalia's own jurisprudential terms, dynamic interpretation cannot be unlawful—or even illegitimate—based on its facilitation of judicial discretion or its incentive effects for legislators, or even its consequences for rule-of-law values like the Fuller characteristics. If interpretive dynamism is illegitimate at all under a formalistic theory, it must be illegitimate only because it violates some textually promulgated restriction on judicial practice. According to Scalia's own rule of recognition, the illegality of interpretive dynamism must depend on some formally articulated rule—from some source other than the judiciary itself—that limits the judicial power. Scalia, however, explicitly denied that interpretive dynamism violates "the technical doctrine of separation of powers."[671] Scalia thus made an argument about the Article III power that is simply not a valid legal argument according to his own theory of legitimacy.

---

667. Vermeule criticizes Eskridge for ignoring the role of administrative agencies. *See* VERMEULE, JUDGING UNDER UNCERTAINTY, *supra* note 493, at 40–52.

668. *See* Scalia, *Rule of Law as a Law of Rules*, *supra* note 564, at 1183.

669. *See id.*

670. *Id.*

671. SCALIA, A MATTER OF INTERPRETATION, *supra* note 21, at 10; *see also* Scalia, *Judicial Deference*, *supra* note **Error! Bookmark not defined.**.

Let's now return to the core of the rule-of-law concept. According to all theories, the rule of law requires a reasoned, public-regarding system of laws that the polity can understand, with multiple law-enforcers empowered to hold each other accountable to the law's supremacy.[672] Confusion surrounding the system's core concept of law—confusion about the law's rule of recognition—is necessarily fatal to this aspiration, for two reasons: It makes the law arbitrary, and it makes the law opaque.

2. Arbitrariness

First and most importantly, a system cannot claim to be "reasoned" if the criteria of legitimacy sometimes shift without justification or even explanation. It might be possible, as I hypothesized in the introduction to this Part, to argue that the judicial power derives from a different source of law than does statutory meaning—and that we should assess legitimacy differently for different sources. One might argue, à la Blackstone, that the judicial power is part of the "higher law" of the Constitution (akin to Blackstone's divine law) while statutory text is merely an instrumental gap-filler in the American fundamental law (akin to Blackstone's municipal law).[673] Perhaps interpretation of the fundamental law should be more static and formal because higher law values need to be more stable than does statutory law (to rehabilitate Eskridge's view), or perhaps interpretation of the fundamental law should be more flexible and dynamic because the fundamental law is much harder formally to amend than is the statutory law (to rehabilitate Scalia's view).

But this kind of argument, to be consistent with the rule of law's demand for reason-giving, requires careful thought and articulation of a kind that no interpretive theorist has offered. Indeed, Scalia generally claimed to be a constitutional originalist (i.e. formalist)—albeit a "faint-hearted" one[674]—while Eskridge has generally subscribed to living constitutionalism (i.e. realism). Why, then, did both men switch perspectives when arguing about the Article III power of statutory interpretation? Neither author gave a reason.[675]

---

672. *See supra* Parts II.A, II.B.

673. *See generally* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND.

674. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) ("I hasten to confess that in a crunch I may prove a faint-hearted originalist.").

675. I am picking on Scalia and Eskridge here only for brevity's sake. There are many ambivalent writers, and I have not found a single thoughtful justification for the ambivalence.

Furthermore, there are many plausible objections to the argument that the criteria of legitimacy should be different for constitutional and statutory texts. Most importantly, statutes gain their power from Article I of the Constitution, which not only vests the legislative power in the Congress[676] but also outlines the bicameralism and presentment requirements for the creation of statutory law.[677] Statutes and courts are thus *both* constitutional creatures. The American system is quite unlike Blackstone's natural law system, in which the municipal law was something wholly separate from God's divine law.[678]

Reconsider Scalia's perspective with this simple point in mind. In essence, Scalia's argument was that Article I formally forbids the amendment of statutory meaning through any process other than bicameralism and presentment and that this formal constitutional rule is the only relevant criterion for assessing the permissibility of judicially-enacted statutory amendment.[679] But when Scalia turned his attention to Article III, he argued that although the Constitution formally empowers the judiciary to make law and although such empowerment was acceptable in the pre-New Deal common law world, the empowerment of judicial lawmaking has become invalid with the rise of the modern public law state.[680] His switch in jurisprudential perspective, then, is not between statute and Constitution; it is between two constitutional provisions: Article I and Article III. And Eskridge's switch is merely the inverse. His argument, fundamentally, is that Article III formally empowers judicial lawmaking—which is sufficient to justify dynamism—but that Article I's formal insistence on bicameralism and presentment is not sufficient to forbid judicial amendment to statutory meaning.[681] Eskridge's switch is thus similarly a switch between two constitutional provisions.

Blackstone's differing criteria for different bodies of law might be defensible under the rule-of-law concept, but a switch in the criteria of legitimacy *within the Constitution* seems virtually impossible to

676. *See* U.S. CONST. art. I, § 1.
677. *See* U.S. CONST. art. I, § 7.
678. 1 WILLIAM BLACKSTONE, *supra* note 152, at *41.
679. John F. Manning, *Justice Scalia and the Legislative Process*, N.Y.U. ANN. SURV. AM. L. 33, 36 (2006).
680. *See* Scalia & Manning, *Dialogue*, *supra* note 467, at 1615–18.
681. *See* Eskridge, *Dynamic Statutory Interpretation*, *supra* note 4 *passim*.

defend.[682] Even if the ambivalent theorists had tried to justify the switch, the case would have been extremely difficult to make. Ambivalence appears wholly arbitrary.

Jurisprudential ambivalence in interpretive theory thus violates the core rule-of-law requirement of reason-giving. The aspiration of non-arbitrariness is an aspiration of dispassionate consistency. In Aristotle's famous formulation, "The law is reason unaffected by desire."[683] When ambivalent theorists alternate between jurisprudential perspectives, they appear to do so—without reason—in order to justify their desired results. Eskridge, as a scholar rather than a governor, might be excused for violating the rule of law, but his theory should be disqualified from governance. Scalia, as a governor, had no excuse.

3. Transparency

The second practical problem of interpretive theory's incoherent notions of law—its ambivalence on the rule of recognition—is that it frustrates the aspiration of transparency. The rule of recognition is, as the name implies, the connection between the polity and the law.[684] It is the standard by which the polity recognizes and assesses laws' validity. In order for the polity to be "in on the game" of social governance—in order for the legal system to be an interactional enterprise of lawmakers and law-followers, in which law-followers can hold lawmakers accountable to the laws they make—the polity needs to know how to tell the difference between valid and invalid laws.[685]

Of course, it might be impossible for a large and diverse population to agree on a single rule of recognition. As I noted in the introduction to this Part, there is a plausible argument, raised by one reviewer of this Article, that the American polity was built on multiple legal traditions with conflicting notions of legitimacy. But we need to distinguish between two kinds of conflict, one of which threatens the rule of law more than the other: disagreement *among* blocs and disagreement *within* blocs.

On one hand, disagreement about the rule of recognition *among* blocs of thinkers and voters can lead to productive and interesting debate,

682. Manning has made some valiant attempts at demonstrating that Article III does not empower interpretive dynamism; I am not here disputing Manning's take. I am critiquing only Scalia's ambivalence.

683. ARISTOTLE, *supra* note 570, at 88.

684. *See* HART, *supra* note 21, at 136–41.

685. *Id.*

without necessarily threatening the rule of law.[686] The system could satisfy the Fuller characteristics through "incompletely theorized agreements" among voters who do not share first principles of legitimacy.[687] As long as competing approaches sometimes converge and cause minimal disruption when they diverge, the Fuller characteristics can survive such disagreement.[688] Furthermore, if the disagreement occurs along predictable and well-reasoned lines, then the system's pluralistic notions of law need not frustrate the rule of law's non-arbitrariness or participatory requirements.[689] Ordinary voters can probably understand, for example, that conservatives tend to appeal to formal textual enactment as the criterion of legitimacy while progressives tend to appeal to real-world consequences. In such a system, voters could hold conservative governors accountable for violating text while holding progressive governors accountable for causing bad consequences.

On the other hand, disagreement or ambivalence that occurs *both* among *and* within blocs of thinkers seems more dangerous to the Fuller characteristics and to the polity's participatory capacity. It is hard to make heads or tails of a system that uses different criteria of legitimacy for different provisions of a single legal instrument, without a solid intellectual foundation for the ambivalence. Remember that the Fuller characteristics demand clarity, stability, publicity, predictability, generality, and uniformity.[690] Unreasoned jurisprudential ambivalence, within a single school of thought, violates all of those requirements. It makes the criteria of legitimacy unclear, unstable, opaque, unpredictable, specific, and non-uniform.

Now add to this problem the possibility that the switch between jurisprudential perspectives would go in different directions for different voters: that conservatives would be formalistic about Congress but realistic about the judiciary while progressives would be the opposite. Now the system has four different standards for evaluating the Constitution, and the standards' application depends on both the provision at issue and the thinker's political preferences. Although it

686. *See* Stephen V. Carey, Comment, *What Is the Rule of Recognition in the United States?*, 157 U. PA. L. REV. 1161, 1167–68 (2009).

687. *See* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 *passim* (1995). *See generally* FULLER, *supra* note 576.

688. Sunstein, *supra* note 687, at 1735 n.8.

689. *See* Henry S. Richardson, *Specifying Norms as a Way to Resolve Concrete Ethical Problems*, 19 PHIL. & PUB. AFF. 279, 305–06 (1990).

690. FULLER, *supra* note 576.

might be possible for legal academics to wrap their minds around this matrix, ordinary voters would have a much harder time. And the rule of law in a democratic system requires that ordinary voters—not only Herculean judges and philosophers—be capable of assessing the law's validity.

CONCLUSION

The problem with the American jurisprudence of statutory interpretation is that we are trying to derive rules for a civil law system from a document that was drafted for a common law world. A broad judicial power, entrusted to an independent judiciary, was a sensible system for a people who believed that Law was a "brooding omnipresence,"[691] discoverable and enforceable by the "nine lawyers on the Supreme Court."[692] But for a people who now believe that law is a human (and often rather crass) means of effecting desirable social ends—and who believe that the ends of the law must be agreed upon and articulated rather than discovered in the sky—the legitimacy of a powerful and independent judiciary is much more dubious. The leading scholars of statutory interpretation have somehow managed to embrace only one or the other half of this modern tension. Only a few have adapted their jurisprudence coherently to the problems of a common law system in a civil law world. As a result, interpretive theory is currently failing at its own goal. Jurisprudential ambivalence undermines any hope that interpretive theory can enhance the rule of law.

691. So. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).
692. Obergefell v. Hodges,135 S. Ct. 2584, 2627 (2015) (Scalia, J., dissenting).