

Hypnotized by images of the past: dynamic interpretation and the flawed majoritarianism of statutory law

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**HYPNOTIZED BY IMAGES OF THE PAST:
DYNAMIC INTERPRETATION AND THE FLAWED MAJORITARIANISM OF
STATUTORY LAW**

by Bernard W. Bell

HYPNOTIZED BY IMAGES OF THE PAST:^{*} DYNAMIC INTERPRETATION AND THE FLAWED MAJORITARIANISM OF STATUTORY LAW

by Bernard W. Bell^{}**

Introduction

Between 1975 and 1995 dual challenges to a long-standing consensus regarding statutory interpreting emerged. Under the long-standing orthodoxy, courts functioned as faithful agents of the enacting legislatures — their primary quest was discerning, and then effectuating, legislative intent.¹ One attack on this orthodoxy, made by conservatives and led by Justice Antonin Scalia, argued that the subjective intent of legislators lacked relevance and, indeed, provided an illegitimate basis upon which to interpret statutes.² Rather, they urged, interpretation should focus on the statutory text, the exclusive means for creating rights and obligations, and ignore legislative history. A far different attack, launched by a trio of scholars, questioned the orthodox assumption (which the new textualists shared) that interpreters should focus solely upon enacting legislatures. In slightly varying ways, William N. Eskridge, Jr., Guido Calabresi, and Alexander Alienikoff suggested that interpreters' constructions of statutes must reflect changes in factual circumstances or societal values that occur after the statute's enactment.³ They urged the legal community to recognize that judges should "update" statutes. William Eskridge's "Dynamic

^{*} This phrase is derived from a passage penned by British cultural historian Robert Hewison: "If the only new thing we have to offer is an improved version of the past, then today can only be inferior to yesterday. Hypnotised by images of the past, we risk losing all capacity for creative change." ROBERT HEWISON, *THE HERITAGE INDUSTRY, Introduction* (1987), reprinted in *COLUMBIA WORLD BOOK OF QUOTATIONS* (1996).

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¹ See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 13 (1994); Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L.J. 1, 3, 63-64 (1999); Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 229 (1998).

² See, e.g., Bell, *supra* note 1, at 48-62.

³ ESKRIDGE, *supra* note 1; GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 59-65 (1982); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 20-21 (1988); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

Statutory Interpretation,” which appeared in 1987, stands as a seminal article because of its status as an elemental text of this second challenge to interpretive orthodoxy.

One major criticism frequently leveled against dynamic interpretive approaches (like those of Calabresi, Eskridge, and Alienikoff) focuses on the role such theories force courts to assume. Courts occupy an anomalous place in democratic government. The judiciary can lay claim to little democratic pedigree, yet engages in law-making functions in constitutional, statutory, and common law contexts. When engaging in judicial review, which exists largely to restrain the will of the majority, judges engage in a counter-majoritarian function. Debates regarding the justification for and appropriate scope of such counter-majoritarian judicial review have long dominated scholarly and judicial constitutional law discourse.⁴ Courts face a less dramatic, but still troubling, “non-majoritarian” difficulty when addressing statutory or common law questions.⁵ In such cases, judges rarely intentionally frustrate majoritarian lawmaking (as they do when engaging in judicial review), but, nevertheless, establish legal principles without majoritarian support. Thus critics of dynamic interpretation argue that the assertion of the power to engage in lawmaking independent of a role as the legislature’s honest agent clashes with the courts’ non-majoritarian status.⁶

I will argue that statutory law may also be non- or counter-majoritarian. First, in Part I, I will review the courts’ non-majoritarian features. In Part II, I will explore the non-majoritarian features of statutory law resulting from both: (1) the requirement that legislatures reduce their policies to writing, in the form of generally applicable statutes, and (2) the continued operation of statutes, after the enacting legislature’s departure from office, until advocates of their repeal or

⁴ ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 19-20 (2d ed. 1986); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 4 (1980); see generally Bernard W. Bell, *Byron R. White, Kennedy Justice*, 51 *STAN. L. REV.* 1373, 1381 & n.65 (1999)(collecting sources).

⁵ Bernard W. Bell, *The Wide World of Torts: Reviewing Franklin & Rabin’s Tort Law and Alternatives*, 25 *U. SEATTLE L. REV.* 1, 11-12 (2001).

⁶ E.g., John Copeland Nagle, *Newt Gingrich, Dynamic Statutory Interpreter*, 143 *U. PA. L. REV.* 2209, 2245-49 (1995)(reviewing WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994)); Samuel Estreicher, *Judicial Nullification: Guido Calabresi’s Uncommon Law for a Statutory Age*, 57 *N.Y.U. L. REV.* 1126, 1164-69 (1982); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 22, 28-29 (Amy Gutman ed., 1997).

modification can surmount the formidable obstacles to legislative action. The analysis will thus raise the question of which of several legislatures that exist over time deserves the courts primary allegiance. I will suggest that courts have erred in considering the act of reducing a statute to writing as conferring upon the enacting legislature an entitlement to have its “intent” govern until the statute undergoes revision. In Part III, I will discuss two conventional interpretive techniques, namely favoring the later-in-time statute when resolving statutory conflicts and “extending statutes” by recognizing them as sources of “common law” principles in related contexts. I will highlight each technique’s potential for enabling courts to “update” statutes, at least in some circumstances, without resorting to the more radical approaches advocated by dynamic interpretation’s proponents.

I. Courts As Non-Majoritarian Institutions

Courts are not majoritarian institutions. Appointed judiciaries, like the federal bench and those of many states, are certainly not majoritarian. Indeed, not only are federal judges appointed, rather than elected, the Constitution grants them life tenure and salary protection.

In many states, however, at least some judges undergo some form of electoral judgment.⁷ And increasingly these elections have become vigorous contests focusing on political or ideological issues.⁸ In 1986 Chief Justice Rose Bird and two other members of the California Supreme Court suffered defeat in retention elections because of their rulings in a series of death penalty cases. Ten years later, both Tennessee Supreme Court Justice Penny White and Nebraska Supreme Court Justice David Lanphier lost retention elections. White lost her seat

⁷ 32 THE COUNCIL OF STATE GOVERNMENTS: THE BOOK OF STATES 135-37 (1998)(tbl. 4.4) [hereinafter THE BOOK OF STATES]. Electoral review takes the form of either partisan elections, non-partisan elections, or retention elections. Kurt E. Scheuerman, Comment, *Rethinking Judicial Elections*, 72 OR. L. REV. 459, 459-64 (1993). Partisan elections involve multiple candidates for each judicial seat and identification of each candidate by political party. *Id.* at 460. Non-partisan elections involve multiple candidates for each judicial seat, but no candidate is identified by party. *Id.* at 461. Retention elections are a part of a merit system elections in which judges initially appointed by the governor, must periodically submit themselves to elections in which voters decide whether the judge should continue in office. *Id.* at 463. In such elections, the judge runs unopposed by another candidate. *Id.*

⁸ Edward A. Hartnett, *Why is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 TEX. L. REV. 907, 977 n.372 (1997); B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1431 (2001); Traci V. Reid, *The Politicization of Retention Elections: Lessons From the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68 (1999).

after a campaign centered on crime and the death penalty; the campaign against Lanphier focused upon his rulings regarding legislative term limits and the state's murder statute. The increasingly polemic nature of judicial campaign rhetoric has become quite marked.

Nevertheless, for several reasons, judicial elections generally provide judges with little status as democratic representatives of their "constituents." First, judges enjoy unusually long "terms of office" between elections. The terms of state supreme court justices vary in length from 6 years to 14 years, with judges on the majority of state supreme courts holding office for at least eight years.⁹ Almost invariably legislative terms are shorter — electoral reckoning comes either every two or four years.¹⁰ Second, courts, because of their small size, cannot claim to be as representative as legislative bodies. Small bodies cannot reflect many elements of a diverse citizenry. State courts of last resort vary between five and nine members.¹¹ The upper chambers of state legislatures rarely have fewer than 25 members and often contain more than 50; lower chambers are rarely smaller than 50 and frequently contain 100 or more members.¹² Third, unlike most state legislators, state supreme court justices often run "at large" rather than in "single-member" districts,¹³ which arguably further reduces their representativeness.¹⁴ Fourth, due to the nature of the judicial task, only lawyers, a sizable but nevertheless modest

⁹ THE BOOK OF STATES, *supra* note 7, at 129-30 (tbl. 4.1).

¹⁰ *Id.* at 68 (tbl. 3.3). Legislators in most upper houses have four year terms, while most legislators in lower houses have two year terms.

¹¹ *Id.* at 129 (tbl. 4.1). Even though there are more state court appellate and trial judges on the various courts of a state, they generally sit either alone or in small panels.

¹² *Id.* at 68 (tbl. 3.3).

¹³ *Id.* at 129 (tbl. 4.1).

¹⁴ Chapman v. Meier, 420 U.S. 1, 15-16 (1975); Henry L. Chambers, *Enclave Districting*, 8 WM. & MARY BILL RTS J. 135, 147 n.47 (1999); Edward Still, *Voluntary Constituencies: Modified At-Large Voting as a Remedy for Minority Vote Dilution in Judicial Elections*, 9 YALE L. & POL'Y REV. 354, 363 (1991) ("single member district systems would tie judges to election from small districts composed of many fewer people than would constitute the electorate in an at-large election system").

Granted, at-large elections reduce the representativeness only in the sense that the elected body will less likely to reflect the diversity of the population (particularly geographically-dispersed minority populations). Chapman, 420 U.S. at 16 n.10. The elected body will, instead, likely be more responsive to the dominant group in the electorate. *Id.* at 16 n.10. And indeed, even at-large voting might not diminish the influence of political minorities if coupled with a cumulative voting system. *Id.*; LANI GUINIER, TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 14-16 (1994).

segment of the population, possess the qualifications to hold such offices.¹⁵

Fifth, judicial elections fundamentally differ from other elections, because judges must remain impartial. In judicial elections, candidates cannot make meaningful substantive commitments regarding their exercise of official powers if elected.¹⁶ Thus, the American Bar Association Model Canons provide that candidates for judicial office should make no “pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.”¹⁷ Substantive pledges and campaign promises form a staple of legislative, presidential, and gubernatorial campaigns and sometimes prove integral to an elected leader’s “mandate.”¹⁸ More generally, courts have recognized that “to preserve the dignity of the judiciary,” states may impose upon judicial candidates electioneering restrictions that they cannot impose on candidates for other offices.¹⁹

Not surprisingly, then, political scientists classify judicial elections as low-information contests — the lack of information about judicial candidates, even among those who actually vote in such elections, is endemic.²⁰ Only in rare cases, when issues have particular salience, is

¹⁵ THE BOOK OF STATES, *supra* note 7, at 133 (tbl. 4.3). Indeed, admission to the Bar is an explicit requirement in most states. Though lawyers also tend to predominate in legislatures, lawyers hold a much higher proportion of judicial seats than legislative seats. *See*, George F. Carpinello, *Should Practicing Lawyers Be Legislators?*, 41 HASTINGS L.J. 87, 89 n.9 (1989)(citing a 1986 survey finding that 16% of all state legislators identified their occupation as attorneys).

¹⁶ ABA MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (2000); *see also* *In re Chmura*, 461 Mich. 517, 538, 608 N.W.2d 31, 42 (2000); PHILIP L. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 32 (1980); Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1067-68 (1996).

¹⁷ ABA MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000).

¹⁸ *See generally* HEDRIK SMITH, THE POWER GAME 701, 703, 705 (1998); ELIZABETH DREW, SHOWDOWN: THE STRUGGLE BETWEEN THE GINGRICH CONGRESS AND THE CLINTON WHITE HOUSE 28-34, 93-112 (1996); HAYNES JOHNSON, SLEEPWALKING THROUGH HISTORY: AMERICA IN THE REAGAN YEARS 390 (1991).

¹⁹ *In re Chmura*, 461 Mich. at 534, 608 N.W.2d at 42 (holding that “the state's interest in preserving the integrity of the judiciary supports the imposition of greater restrictions on a candidate's speech during a campaign for judicial office than is permissible in other campaigns”).

²⁰ DAVID W. NEUBAUER, JUDICIAL PROCESS: LAW, COURTS, AND POLITICS IN THE UNITED STATES 144-45 (1991); Dann & Hansen, *supra* note 8, at 1437-38; Marie Hojnacki & Lawrence Baum, *Choosing Judicial Candidates: How Voters Explain Their Decisions*, 75 JUDICATURE 300 (1992); *see* SARA MATHIAS, AMERICAN JUDICATURE SOCIETY, ELECTING JUSTICE: A HANDBOOK OF JUDICIAL ELECTION REFORMS 17 (1990)(providing examples based on surveys of voters who voted in particular judicial elections); *see also* Anthony Champagne & Greg Theilemann, *Awareness of Trial Court Judges*, 74 JUDICATURE 271 (1991).

The problem is even exacerbated in judicial retention elections, in which there is no “live” opponent, and

this lack of information overcome. The defeat of California Supreme Court Justices in 1986 provides a prominent example of such an occurrence. The low level of information typical of most judicial “contests” surely means that judicial elections do little to ensure that successful candidates’ substantive views and judicial philosophy reflect the electorate’s preferences.²¹

Sixth, legislators, and even elected executive branch officials, qualify as representatives because they often maintain continuing relationships with their constituents in ways that judges do not. Citizen lobbying of judges is far more constrained than citizen lobbying of officials in the “political” branches of government.²² Judges decide on records and briefs crafted by lawyers, rather than on arguments outside that closed record;²³ elected legislators and executive branch officials rarely find themselves so limited.

Ultimately, we are at best somewhat ambivalent about judicial elections,²⁴ and the legal community worries about the effect of such elections on judicial independence.²⁵ As Justice

where there is often not much of a campaign. William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340, 342 (1987). Non-partisan elections also aggravate the lack of information, because in such elections voters cannot even use party affiliation as a source of information. Lawrence Baum, *Electing Judges*, in LEE EPSTEIN, CONTEMPLATING COURTS 21-22 (1995); Hall & Aspin, *supra* at 342.

²¹ This past term, in *Republican Party of Minnesota v. White*, — U.S. — 122 S. Ct. 2528 (2002), the Court held that Minnesota’s rule prohibiting candidates for judicial office from announcing their views on disputed legal or political issues violated the Free Speech Clause of the First Amendment. Thus, candidates in judicial elections throughout the country will be able to present their views on issues that have or will come before them as judges. Nevertheless it is not clear that electioneering by judicial candidates will assume the same character as electioneering by candidates for legislative and executive branch officers. In any event, elected judges will remain unrepresentative for the other reasons outlined above.

²² Robert W. Bennett, *Should Parents Be Given Extra Votes on Account of Their Children?: Toward a Conversational Understanding of American Democracy*, 94 NW. U. L. REV. 503, 556 (2000).

²³ ROBERT J. MARTINEAU, MODERN APPELLATE PRACTICE: FEDERAL AND STATE CIVIL APPEALS §§ 3.12, 8.1, 8.2 (1983); *see, e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 570 (2001)(declining to address an issue that was not sufficiently briefed and argued before the Court); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664-68 (1994); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-40 (1989)(declining to consider alternative ground for affirmance not raised below and not adequately briefed); *Wisconsin v. Kruzicki*, 209 Wis.2d 112, 134, 561 N.W. 2d 729, 739 (1995).

²⁴ *See* *Chisom v. Roemer*, 501 U.S. 380, 400 (1991); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694 (1995) (“[w]hile democratic values may be advanced by subjecting judges to increased electoral scrutiny, certain constitutionalist values may be compromised at the same time”).

²⁵ *See, e.g.*, Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308 (1997); Mario M. Cuomo, *Some Thoughts on Judicial Independence*, 72 N.Y.U. L. REV. 298 (1997).

Stevens observed for the majority in *Chisom v. Roemer*, there is a “fundamental tension between the ideal character of judicial office and the real world of electoral politics.”²⁶ Thus, the legal community has not celebrated electoral defeats, like those suffered by Chief Justice Rose Bird and two other Associate Justices of the California Supreme Court, as vindications of the electoral system, but instead viewed them with trepidation as threats to judicial independence.²⁷

Professor Eskridge might view the above analysis as beside the point, focusing as it does on a “populist” or “majoritarian” vision of political representation. In “Dynamic Statutory Interpretation” Eskridge advocates a “functional” view of representation that identifies responsiveness to the ongoing needs and problems of the community as the critical element of political representation.²⁸ He observes that courts can and do respond to novel issues and controversies, while legislatures often evade such pressing questions. Under a functional view of representation, then, courts often provide better representation than legislatures typically provide. At the very least, judicial lawmaking actually enhances the democratic legitimacy of government. While responsiveness might qualify as an essential element of political representation, a government official’s responsiveness does not suffice to make that official a “representative.” Thus, unelected officials, or officials who possess the deficient majoritarian credentials of elected judges, do not qualify as “representatives” merely because they respond to the ongoing needs and problems. And judicial lawmaking does not enhance democratic legitimacy merely because in the absence of such judicial action, no law-making would occur.²⁹

Moreover, legislative “unresponsiveness” to community needs and problems stems in part

²⁶ *Chisom*, 501 U.S. at 400.

²⁷ See, e.g., Roger Handberg, *Is Florida’s Present System Still the Best Compromise?: Judicial Accountability and Independence: Balancing Incompatibles?*, 49 U. MIAMI L. REV. 127, 133 (1994); John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348, 355 (1987); see also Reid, *supra* note 8, at 77 (lamenting defeats of Justices White and Lanphier).

²⁸ Eskridge, *supra* note 3, at 1529-33 (citing HANNA PITKIN, *THE CONCEPT OF REPRESENTATION* (1967)). Eskridge appears to abandon explicit reliance on this argument in his later book-length exposition of dynamic interpretation.

²⁹ However, to the extent that statutes govern situations that long-expired legislatures neither envisioned nor intended to address, courts wielding interpretive powers may better reflect current preferences, because at least they have a fuller view of the contours of the problem that concerned the earlier legislature and are more likely to share certain fundamental perspectives with their fellow contemporaries.

from the presumption favoring inaction built into the typical legislative process, as Eskridge himself notes.³⁰ This presumption favoring inaction reflects a longstanding judgment about the relative attractiveness of government action and individual freedom. If that balance has become anachronistic, and we now believe that government must act more decisively, we should reduce the impediments to legislative action, rather than to conceive of judges as majoritarian representatives whose lawmaking supplements the democratic legitimacy of government. At least restructuring the legislative process would qualify as the more democratic approach to addressing the problem of government “unresponsiveness.”

In short, courts are not majoritarian institutions, whether judges are elected or appointed, and thus their rulings do not necessarily reflect majority desires even when they construe statutes or develop the common law. Lack of a majoritarian foundation would seem to confirm the attack on dynamic interpretation as asking non-majoritarian institutions to make policy determinations that they should really leave to majoritarian institutions. But are the products of undoubtedly majoritarian institutions, particularly legislatures, also subject to attack as non-majoritarian?

II. The Non-Majoritarian Nature of Statutory Law

In at least two respects statutes can also be non-majoritarian, and perhaps even counter-majoritarian. In particular, statutes can be non-majoritarian because they must take written form, and because they ordinarily remain in effect indefinitely.

A. The Non-Majoritarian Implications of Written Rules of General Applicability

For rule of law reasons, legislative majorities must reduce their preferences to written text. In particular, written statutes both facilitate the equal treatment of all citizens and enhance fairness by providing citizens fair notice of the law’s requirements.³¹ Unfortunately, language communicates thought imperfectly (even when used most precisely) and almost inevitably statutory text does not precisely reflect the intent of its drafter, particularly because “the drafter” is a collective entity — a legislative body — rather than an individual.

³⁰ *Id.* at 1531. See *infra* text accompanying notes 80-90.

³¹ Bell, *supra* note 1, at 46 (collecting authorities).

Legislatures legislate at a level of generality — a salutary practice as well as a practical imperative. The normative desirability of general statutes follows from the need to facilitate equal treatment and enhance fairness.³² Legislatures cannot directly “adjudicate” individual controversies.³³ Many state constitutions also prohibit special legislation or severely limit the legislature’s power to enact such legislation.³⁴ While Congress can and does enact many “private laws,”³⁵ such enactments merely constitute individual exercises of legislative discretion; they ordinarily do not regulate relationships between private parties and are not used to develop public policy.³⁶ Moreover, as a practical matter, legislatures could not routinely resolve controversies individually by means of the legislative process; they simply lack sufficient time. Thus, legislatures cannot proceed on a case-by-case basis learning as they go. The need to legislate with generality means that legislatures must prescribe resolutions of controversies without seeing the precise contours of those controversies.

Thus, statutory text will often have implications that extend beyond the situations legislators view themselves as resolving. Sometimes, of course, this is intentional. The use of broad language itself suggests that the same principles should apply to situations not explicitly envisioned by the statute’s framers.³⁷ If statutory law reached no further than the precise

³² Even if legislators could employ language with exacting precision, given the attractiveness of rule-like rather than standard-like law, the results mandated by statute would invariably differ from those that would result from legislative consideration of each particular case. Rules inevitably produce some undesirable consequences in individual cases. Bernard W. Bell, *Dead Again: The Nondelegation Doctrine, the Rules/Standards Dilemma, and the Line Item Veto*, 44 VILL. L. REV. 189, 199-205 (1999); Bernard W. Bell, *R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory*, 78 N.C.L. REV. 1253, 1310-13 (2000).

³³ *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 219-224 (1995); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810).

³⁴ 2 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 40.01 (5th ed. rev. 1994) (hereinafter SUTHERLAND STATUTORY CONSTRUCTION); e.g., N.J. CONST. art. IV, §7, cls. 8-9.

³⁵ Joe Moorhead, *Private Bills and Private Laws: A Guide to the Legislative Process*, Vol. 9, No. 3, THE SERIALS LIBRARIAN 115 (1985).

³⁶ Note, *Private Bills in Congress*, 79 HARV. L. REV. 1684, 1684 (1966). Most such laws authorize payments on various monetary claims made against the government or adjust the immigration status of particular individuals. Moorhead, *supra* note 35, at 116-18; *Private Bills in Congress, supra*, at 1684.

³⁷ REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 22, 80 (1975); RONALD DWORKIN, LAW’S EMPIRE 19 (1986); SUTHERLAND STATUTORY CONSTRUCTION, *supra* note 34, at § 49.01.

circumstances enacting legislators contemplated, it would provide a poor tool indeed³⁸ (for reasons that will become apparent shortly).³⁹ An extreme version of statutes intended to apply to unanticipated circumstances are those that use vague terms to delegate law-making authority to courts.⁴⁰

On the other hand, some implications of statutory language for unanticipated circumstances are unintended.⁴¹ Legislatures often have limited ambition and a narrow focus. Enacting majorities often do not intend to resolve (or even provide a framework for resolving) many situations they failed to envision, even if the statutory language they adopted arguably encompassed the un-envisioned situations. In such circumstances, statutory text does not reflect any majoritarian preferences for resolving the new unanticipated circumstances, not even the majoritarian preferences of the enacting legislature. The text's implications surely do not necessarily represent the preferences of the legislature (or the citizenry generally) at the time the issue arises. Applying the statutory text in such circumstances exalts the form of legislation, statutory text, over its substance, namely the majoritarian preferences that produced the statutory

³⁸ Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 253 (1992)(noting that a minimalist refusal to generalize statutory language "is extreme and probably impractical in any complex, modern society").

³⁹ See *infra* text accompanying notes 80-88. Statutes would have little effect because they would require constant revision, and the legislative process' super-majority requirements combined with the limited legislative agenda makes frequent revision difficult.

⁴⁰ The Sherman Act has become the conventional cite for this proposition. *E.g.*, WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS 381-83 (3d ed. 2000); ESKRIDGE, *supra* note 1, at 255-56; RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 289 (1990); Frank Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983). However, judicial lawmaking power under the Sherman Act might reflect creative construction of the statute to avoid the practical difficulties presented by a literal interpretation of the statute rather than the text's "plain meaning" or the enacting legislatures' subjective intent. See, *U.S. v. Trans-Mo. Freight Ass'n*, 166 U.S. 290 (1897)(holding that the Sherman Act barred every contract, combination or conspiracy in restraint of trade, even if permissible at common law, and even if "reasonable"); *Stand. Oil Co. v. U.S.*, 221 U.S. 1, 83, 85-100, 103-06 (1911) (Harlan, J., concurring)(arguing that by permitting "reasonable" contracts in restraint of trade, the Court had engaged in "judicial legislation" and observing that Congress had repeatedly refused to so modify the Sherman Act).

Perhaps better exemplars of statutes intended to confer common law power upon courts are the Uniform Commercial Code unconscionability standard, U.C.C. § 2-302 (1977), and the "fair use" provisions of the Copyright Act of 1976, Copyright Act of 1976, § 107, 17 U.S.C. § 107; see *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 448 n.31 (1984).

⁴¹ One reason for this may be the evolution of the meaning of words over time. See *In re Erickson*, 815 F.2d 1090, 1092-93 (7th Cir. 1987).

text. In effect, a court would rely upon a presumption that the enacting majority intended to resolve certain issues when, in fact, it did not. Enacting legislators' failure to envision all possible applications of statutory text lies at the core of many dynamic interpreters' criticism of static interpretation; it is often central to Eskridge's focus. The problems caused by legislative lack of omniscience may become particularly acute as time passes from the date of the statute's initial enactment, where technological change,⁴² or changes in economic or social organization create circumstances the enacting legislature could not have envisioned.⁴³

Legislative lack of omniscience does not mandate judicial disregard of enacting legislatures, and thus does not preclude a somewhat static approach. Eskridge seems disinclined to conclude that important issues have been left unresolved by statutory law. As noted earlier, he argues that responsiveness to the ongoing needs and problems of the community forms a critical feature of political "representation."⁴⁴ The "responsiveness" imperative in turn demands that statutory law address important questions — if legislatures do not act, then statutes should be updated to address those important questions. Frank Easterbrook provides a useful contrast to Eskridge's approach. In "Statutes' Domains," Easterbrook argues for the importance of recognizing that statutes have limits, *i.e.*, domains, and may simply provide no answer, one way or the other, to many problems, even those closely related to the subject the statute addresses.⁴⁵ Easterbrook grounds his vision in the conventional philosophy of limited government that animates the federal Constitution.

Easterbrook's view, that courts should largely confine statutes to the circumstances enacting legislatures specifically contemplated, renders statutes too anemic. It forces legislatures to focus on a large number of issues, both difficult and easy, momentous and minor, rather than concentrating on a modest number of critical ones. Court can and should avoid burdening

⁴² *Id.* at 1093-94; *see Sony Corp.*, 464 U.S. at 430-32; *Commonwealth v. Richards*, 426 Mass. 689, 690 N.E.2d 419 (1998). A variation on technological change is change in the predominant scientific thought. *See* ESKRIDGE, *supra* note 1, at 53-54 (discussing changing medical consensus regarding classification of homosexuality as a mental disease or defect).

⁴³ *E.g.*, *Nat'l Broiler Mktg Ass'n v. United States.*, 436 U.S. 816 (1978)(interpreting the Capper-Volstead Act in light of changes in the structure of the chicken broiler industry).

⁴⁴ *See supra* note 28 and accompanying text.

⁴⁵ Easterbrook, *supra* note 40, at 544.

legislatures in such a way. Though courts should view every statute as having a finite domain, and thus should not expand them to cover circumstances merely because a problem otherwise unresolved by statutory law exists, that domain should encompass the issues the enacting legislature sought to address and materially-similar issues. If an issue before the court raises significant concerns different from those enacting legislatures meant to address, judges should conclude that the statute simply does not address the question and that the legislature must take up the question if statutory law is to resolve the issue.

I have previously presented the “public justification” approach to statutory interpretation, which embodies the interpretive methodology described above.⁴⁶ The public justification approach recognizes legislative history as important independent of legislative intent. Legislative intent provides a problematic foundation on which to ground interpretation. As a practical matter, courts lack the means to discern any such intent (for many reasons that Eskridge enumerates in his book-length explication of his dynamic interpretation theory).⁴⁷ Just as importantly, however, legislative intentions provide a much less legitimate basis for statutory interpretation than the legislature’s public justification of a statute provides.

Rather than viewing legislative history as valuable only as evidence of legislators’ common subjective intent, courts should view legislative history as we generally view promises. A person making a promise creates an obligation for himself, regardless of his intent to keep the promise. Thus, the promise has significance independent of the promiser’s subjective state of mind. There are reasons to accord significance to the legislature’s statements, in the form of legislative history, regardless of the subjective intent of the legislative majority.

The legislature’s explanation of a statute merits recognition as a significant act for two reasons: 1) legislatures have an obligation to justify the statutes they enact, and 2) legislatures should not mislead the public. A legislature’s obligation to explain its actions derives from the respect that government owes its citizens. In democracies, citizens are sovereign. Accordingly legislatures merely act as the citizenry’s agents. Ordinarily, agents owe explanations to the principals from whom they derive their authority. Indeed, principals must have the power to

⁴⁶ Bell, *supra* note 1; *R-E-S-P-E-C-T*, *supra* note 32.

⁴⁷ ESKRIDGE, *supra* note 1, at 16-18; *accord*, Bell, *supra* note 1, at 69-74.

demand explanations of their agents' action in order to maintain control over them. And, in fact, knowledge of legislative rationales critically enhances the citizenry's ability to control its government. Accordingly, legislatures owe the public a justification for actions taken in their name.

A legislature's obligation to explain rests on a second, independent premise — providing explanations to citizens affected by governmental actions accords them the respect due autonomous human beings. Several legal scholars have noted this essential element of respect for individuals.⁴⁸

A second argument for the political significance of institutional explanations of statutes rests upon the premise that government should not mislead the governed, particularly in a democracy. Deception exhibits an even greater disrespect for the status of citizens as sovereigns (and as autonomous beings entitled to respect) than does refusing to supply any explanation at all. Moreover, governmental deception can produce "falsified consent."⁴⁹ Democracy remains legitimate only if citizens participate based on their true preferences, rather than those manufactured by government manipulation of information.⁵⁰

Accordingly, the courts should not condone a legislative practice of acting for one reason while publicly proclaiming another. When private reasons differ from public ones, the public reasons should receive more respect precisely because they are *public*. The act of proclaiming reasons should be considered a public act that has significance beyond its usefulness as evidence of the legislators' secret motivations. If the government offers official justifications that vary from the real reasons for government action, the official statements should be privileged over the actual purposes because of their superior democratic pedigree. Were courts to proceed otherwise, they would condone, and indeed facilitate, such undemocratic legislative deceit.

A legislative duty to explain also finds support in several constitutional principles. The

⁴⁸ Bell, *supra* note 1, at 18-19.

⁴⁹ See MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* 15, 145, 152-57 (1983) (coining the phrase "falsified consent").

⁵⁰ Of course, citizens themselves do not vote on most legislative proposals. However, citizens are expected to influence legislatures between elections by communicating with government officials. Government misrepresentation will frustrate citizens' ability to effectively lobby public officials.

proposition that legislatures must justify their actions follows from the Constitution's recognition of "the People" as sovereign, and the government as merely their agent.⁵¹ Arguably, the Equal Protection Clause requires all government entities to justify the distinctions they make between citizens.⁵² The Due Process Clause, too, may well provide a basis for an explanation requirement, the right to an explanation may qualify as one of the procedural protections implicit in due process. The right to petition government may support such a requirement — citizens may find effective petitioning difficult if they lack the right to demand that legislatures justify the statutes they enact.⁵³

Courts should not enforce a "public justification" obligation by means of judicial review, because of institutional competence considerations.⁵⁴ Rather courts should rely upon such a duty as a background norm when interpreting statutes. Courts sometimes refrain from directly enforcing constitutional principles, in light of institutional competence concerns, but encourage observance of those constitutional principles by their approach to statutory interpretation. For instance, the Court encourages sensitivity to the potential unfairness of retroactive lawmaking by employing certain clear statement rules in interpreting statutes.⁵⁵

A public justification approach relies upon the "underenforced constitutional norm" that legislatures should justify their legislative enactments as a basis for construing statutes.⁵⁶ Under

⁵¹ U. S. CONST. pmbl; U.S. CONST. art. IV, § 4 (requiring Congress to ensure that states maintain a Republican form of government).

⁵² Indeed, some have advocated judicial enforcement of such a principle, arguing that courts should require explicit justification of statutory classifications. SUSAN ROSE-ACKERMAN, *RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE* 44, 51-52 (1992); Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For A Newer Equal Protection*, 86 HARV. L. REV. 1, 21, 33, 47 (1972); see Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 457-59 (1982).

⁵³ The Free Speech Clause also supports a "public justification" requirement. See generally Bell, *supra* note 1, at 14-18.

⁵⁴ First, requiring legislators to proffer reasons for enacting statutes may lead to intrusive judicial review of the quality of those reasons. Second, the judiciary can add little to the political process, which itself encourages legislators to proclaim reasons for enacting statutes.

⁵⁵ See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 285-87 (1994).

⁵⁶ The concept of "underenforced constitutional norms" was popularized by Professor Lawrence Sager. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

a public justification approach, when a legislature votes on a statute, it approves both the statutory text and the institutional justifications presented to the general public (*i.e.*, the public justification). And each legislator has an obligation not only to understand the ordinary meaning of the statutory text, but, in addition, to comprehend the institutional justification for the statute.⁵⁷ The documents comprising the “public justification” may vary depending on the relevant legislature’s customs, but it will ordinarily consist of authoritative statements made by the proponents of legislation and committee reports.⁵⁸ The public justification approach thus seeks the reasonable meaning of words, rather than subjective intentions of those who approved the words. In that sense, it is an “objective” rather than a “subjective” approach. However, the approach expands the text that must be interpreted to include the institutional justifications for statutes as well as their text.

*United States v. University Hospital*⁵⁹ can illustrate the application of such an approach.⁶⁰ *University Hospital* addresses the application of the Rehabilitation Act of 1973⁶¹ to hospitals treating newborns with multiple birth defects. Incorporating language from Title VI of the Civil Rights Act of 1964, which prohibits racial, ethnic, and gender discrimination in government programs, Congress provided, “No otherwise qualified handicapped individual in the United States ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance.”⁶² The United States brought suit under the Act on behalf of an infant suffering from

⁵⁷ An action should qualify as “institutional” only if it satisfies three criteria. First, the action must be made known to all members of the legislature. Second, the action must be subject to reversal by the full membership. Third, members must view the action as authoritative — something other than the expression of an individual or a group. Bell, *supra* note 1, at 84-87.

⁵⁸ Some states may maintain such sparse records that no institutional justification can be identified.

⁵⁹ 729 F.2d 144 (2d Cir. 1984).

⁶⁰ I have previously applied my public justification approach to *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), *Chisom v. Roemer*, 501 U.S. 380 (1991) and *Department of Commerce v. House of Representatives*, 525 U.S. 316 (1999). Bell, *supra* note 1, at 89-94; *R-E-S-P-E-C-T*, *supra* note 32, at 1339-53.

⁶¹ 29 U.S.C. §§ 701-94 (2002).

⁶² 29 U.S.C. §§ 794 (1994).

multiple birth defects, including spina bifida, microcephaly, and hydrocephalus.⁶³ After consulting with physicians, nurses, religious advisors, and other family members, the infant's parents decided not to authorize an operation to correct the spina bifida and hydrocephalus. The parents concluded that the procedure, which might have prolonged the infant's life, would not address her other birth defect and might worsen her condition in other respects.⁶⁴ The Government sought the infant's medical records, acting on the theory that the hospital's failure to operate due to the infant's permanent handicaps constituted discrimination under the Act.⁶⁵ The Second Circuit concluded that the Government's right to the medical records turned on whether refusal to treat a handicapping condition because a patient suffered from other handicaps violated the Act.⁶⁶ The Court concluded that Congress had not contemplated application of the statute to medical decisions regarding terminal newborns suffering multiple birth defects. Moreover, such an application would contravene two important legal principles: that federal officials not involve themselves in medical treatment decisions and that the federal government not preempt state control over family law.⁶⁷

Judge Ralph Winter, in dissent, argued that only “the most compelling reasons” should lead courts to override explicit statutory language based on the absence of supporting legislative history. By transplanting Title VI's anti-discrimination language into section 504, he explained, Congress itself had analogized handicaps with race for all purposes and mandated that “discrimination on the basis of a handicap should be on a statutory par with discrimination based on race.” Given that congressional analogy, the proper resolution of the case was clear. Just as a refusal to perform surgery on a patient because of race is impermissible under Title VI,⁶⁸ a refusal

⁶³ *Univ. Hosp.*, 729 F.2d at 146.

⁶⁴ *Id.*

⁶⁵ *Id.* at 150.

⁶⁶ *Id.* at 149-50.

⁶⁷ *Id.* at 160.

⁶⁸ Judge Winter's argument may be a bit overstated. Surely a physician could recommend different courses of action for African-American and Caucasian patients, if dramatic differences exist in the incidence of a particular disease in the respective populations. For example, surely a doctor having difficulty diagnosing a condition could order a diagnostic test to rule out sickle-cell anemia for an African-American patient when he would not do so for a Caucasian patient.

“to correct a life threatening digestive problem because an infant has Down’s Syndrome” must accordingly constitute a violation of section 504. Characterizing “[t]he logic of the government’s position” as “about as flawless as a legal argument can be,” Judge Winter explained that any doubt about the government’s statutory analysis stemmed from a disagreement with the policy judgment, embodied in the transplanted language of section 504, that handicaps are fully analogous to race. A court, he suggested, was not the proper forum to consider such a challenge.⁶⁹

The public justification approach suggests the majority correctly resolved the case. Nothing in the Rehabilitation Act’s public justification suggests that Congress intended the Act to address parents’ and doctors’ decisions regarding the appropriate medical course to adopt for newborns suffering multiple birth defects.⁷⁰ Such an issue differs sufficiently from the focus of the Act, as evidenced by the statute’s public justification, that the Act should not apply. The inclusion, in the Rehabilitation Act, of a term of art incorporating Title VI law was insufficient to mandate that handicaps were to be analogized to race in all circumstances, whether contemplated by Congress or not. Enacting a statute to wrest from parents and medical authorities difficult decisions about medical treatment for newborns with multiple birth defects must be evidenced by some public justification expressing an intent to adopt such a policy.

The “public justification” approach makes statutes somewhat dynamic, but in a way that honors the legislative majority’s publicly-expressed preferences. Textualist approaches are, in some ways, dynamic as well. Due to post-enactment changes in language use, technology, or social and economic organization, a statute’s text, read literally, may compel results the enacting legislature did not contemplate. However, such dynamism is often random and unintentional. The statutory commands regarding an unanticipated situation may not result from any deliberate decision, but may be the coincidental result of the legislative majorities’ choice of words to express their preferences with regard to a completely different issue. In other words, legislators may have crafted text, particularly appropriate for the circumstances they were attempting to

⁶⁹ *Id.* at 162.

⁷⁰ *See Am. Acad. of Pediatrics v. Heckler*, 561 F. Supp. 395, 401 (D.D.C. 1983); *Univ. Hosp.*, 729 F.2d at 158 (quoting *Am. Acad. of Pediatrics v. Heckler*).

resolve, with no idea of the policies that text would mandate in circumstances they either did not contemplate or could not have envisioned. The public justification approach allows the statute to address new situations and contemplates judges deciding which such novel circumstances the statute addresses on the basis of the issues the legislative majority considered itself to be resolving. At the same time, the public justification approach does not suggest that a statute resolves all issues closely related to it. Deciding which questions the statute “resolves”, *i.e.*, the questions either consciously addressed or materially similar, poses the difficult challenge for a judge who seeks to rely upon a public justification approach. The “public justification” approach nevertheless constitutes an advance over conventional interpretive approaches focused on “legislative intent” — at least a court pursuing a public justification approach must acknowledge that it is defining the scope of the statute, not merely discovering a resolution pre-ordained by the enacting legislature.

Some considerations relevant to a statute’s scope will reflect the enacting legislature’s view of the relationship between issues they resolved and the novel ones that they did not. However, some consideration will reflect judicial perceptions that inevitably stem from more contemporary perspectives. Deciding which issues differ so significantly from those contemplated by the enacting legislature that contemporary legislatures should address them will almost certainly reflect contemporary perspectives, social values, and the current state of technology and social/economic organization.

For example, in *Department of Commerce v. House of Representatives*,⁷¹ the majority concluded that the federal census statute, which mandated adjustment of raw census figures to reflect statistical sampling for all purposes, except for apportionment of the House of Representatives, precluded the use of such adjusted census figures for purposes of apportioning the House. The five-Justice majority held that adjusted figures could not be used for apportionment. Justice O’Connor, writing for the Court, noted the legislative history’s silence on the question. Had legislators meant to allow use of adjusted figures for apportionment, she concluded, they would have made that intent evident in the legislative history.⁷² The dissenters,

⁷¹ 525 U.S. 316 (1999).

⁷² *Id.* at 342-43.

led by Justice Stevens, disputed that assertion, arguing that the potential use of adjusted figures for apportionment became a sensitive political issue only after 1976, when the critical statutory language had last been amended.⁷³ One might argue that the Justices should have resolved the issue by deciding whether sampling for apportionment purposes was so materially different from sampling for other purposes that Congress *should now* have to address the issue directly. Assuming *arguendo* the correctness of the dissent's perception that sampling emerged as a politically-significant issue only after 1976, the Justices would nevertheless have been justified in resolving the interpretive issue based on the current salience of the sampling issue rather than solely on the issue's lack of political salience to members of the 1976 Congress.

B. The Non-Majoritarian Implications of Statutory Longevity

Statutory longevity can also make statutes non-majoritarian. The permanent nature of most statutes in conjunction with both the supermajority requirements for legislative action and the temporal constraints on legislative agendas, creates the probability that statutes will continue to govern long after their supporting majorities disappear. I shall focus, in turn, on statutory permanence, the super-majority requirements typical of American legislative processes, and the time constraints on legislative agendas, and then explore the confluence of those factors.

As Julian N. Eule has observed "law survives the legislator."⁷⁴ Statutes generally remain in effect until modified or repealed.⁷⁵ Some statutes contain sunset provisions that nullify the statute after a set number of years,⁷⁶ however, most do not.

Statutory longevity makes planning easier and law more stable. It reflects a retentionist

⁷³ *Id.* at 360-61.

⁷⁴ Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. BAR FOUND. RES. J. 379, 386.

⁷⁵ 2 SUTHERLAND STATUTORY CONSTRUCTION, *supra* note 34, § 34.01.

⁷⁶ CALABRESI, *supra* note 3, at 59-65. Sunset laws may be ineffectual, POPKIN, *supra* note 40, at 1097, and can have unattractive disadvantages. A sunset provision requires that the statute return to the congressional agenda within the statute's limited life, and requires proponents to repeatedly amass the super-majorities needed for legislative action. It thus deprives proponents of the ability to have the statute continue to operate even after they have lost a majority, but does so only by providing an unfair advantage to opponents, who can regularly secure the statute's repeal by simply assembling a minority sufficient to block the statute's renewal.

bias — embodying a presumption that once-salutary policies remain salutary.⁷⁷ It also means that the public and legislators need not engage in constant extraordinary legislative effort with regard to every statute. Limiting the need for extraordinary legislative effort probably enhances democracy, given that mobilizing the broad general public poses much greater difficulties than mobilizing narrow groups with particularized interests. Public choice theorists suggest that ordinarily narrow interests will prevail over broad diffuse interests. Only in the rare instance when the general public becomes aroused, can it overcome narrow interests.⁷⁸ If a diffuse majority's victory lasts only temporarily, followed by a need to renew the same battle so recently won, law may become less public-regarding.⁷⁹ Statutory longevity also allows the legislature to maintain a manageable agenda essential to meaningful deliberation.

Most federal and state legislative processes require legislative proponents to amass supermajorities. Bare majorities ordinarily cannot enact legislation. Enacting statutes through the legislative process takes more overwhelming support than enacting statutes by means of public plebiscites. On the federal level, several aspects of Article I combine to create a super-majority requirement. Such provisions include the bi-cameralism and presentment requirements, the provisions for staggered Senate terms, and small states' disproportionate representations in the Senate.⁸⁰ Other venerable aspects of federal legislative practice create additional supermajority requirements. For example, the rule permitting filibusters in the Senate essentially requires a bill to have the support (or at least acquiescence) of 60% of Senators before the Senate can vote on it.

⁷⁷ *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 41-42 (1983); see CALABRESI, *supra* note 3, at 102.

⁷⁸ James Q. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357, 370-72 (James Q. Wilson ed., 1980); see generally NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY* 67-75 (setting forth interest group theory and conditions under which concentrated interests may not defeat diffuse interests).

⁷⁹ CALABRESI, *supra* note 3, at 61 & n.8. For example, constant modification of the federal tax code may make the code particularly private-regarding. Congress substantially revised the tax code in 1986 to remove "loopholes" (*i.e.*, special tax exemptions or "tax expenditures") and thereby reduce general tax rates. SMITH, *supra* note 18, at 505-07. Over time, however, increasing numbers of loopholes have begun to sneak back into the tax code (a trend arrested somewhat by fiscal constraints that pit concentrated interests against each other rather than against the general public's interest in lower tax rates, JEFFREY H. BIRNBAUM, *THE LOBBYISTS* 17 (1992)).

⁸⁰ *THE FEDERALIST* NOS. 10, 51 (James Madison) (Clinton Rossitor ed., 1961); John F. Manning, *Textualism and the Equity of the Statute*, 101 *COLUM. L. REV.* 1, 72-78 (2001); accord *In re Sinclair*, 870 F.2d 1340, 1342-44 (7th Cir. 1989) (Easterbrook, J.); Estreicher, *supra* note 6, at 1136-37.

In addition, the fragmented nature of power in both houses of Congress, and in particular the agenda-setting power wielded by committee chairpersons, provides another significant obstacle to legislation, even that supported by a majority of citizens and legislators.⁸¹

Legislatures also operate under time constraints. Legislatures simply lack time to revisit the entire statute book every two years. No body of 100 members, much less one of 435 members, can fully deliberate on many issues in a manner consistent with democratic ideals — in particular the principle that each member has an equal vote. If many issues must be addressed, members specialize.⁸² These specialized subgroups may deliberate, but there will likely be no meaningful deliberation by the body as a whole.⁸³ In the House of Representatives, for example, one or even several members, when acting outside of the areas covered by their committees, can rarely exert significant influence on legislation.⁸⁴ The House and the Senate may take up an issue, but congressional consideration may still not necessarily be majoritarian in the sense of one-person-one-vote.⁸⁵ Only a limited, non-random set of legislators make the policy; the broader bodies essentially consent to those decisions without carefully scrutinizing them.⁸⁶ The trend toward fragmentation and specialization has recently been particularly pronounced in state

⁸¹ See, e.g., ESKRIDGE, *supra* note 1, at 78; CALABRESI, *supra* note 3, at 70; John O. Meginnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 496-99 (1995); McNeollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 720-21 (1992);.

⁸² ALAN ROSENTHAL, GOVERNORS & LEGISLATURES, CONTENDING POWERS 45, 62 (1990) (noting the increasing fragmentation of legislatures into committees in response to increasing legislative workload); Wayne L. Francis & James W. Riddlesperger, *U.S. State Legislative Committees: Structure, Procedural Efficiency, and Party Control*, 7 LEGAL STUD. Q. 454 (1982).

⁸³ Christopher St. John Yates, *A House of Our Own or a House We've Outgrown? An Argument for Increasing the Size of the House of Representatives*, 25 COLUM. J.L. & SOC. PROBS. 157, 183-84 (1992) (describing arguments made in 1921 by members of the House that increasing House membership would reduce representativeness because it would necessitate further limits on floor debate).

⁸⁴ See generally Gerald B.H. Solomon & Donald R. Wolfensberger, *The Decline of Deliberative Democracy in the House and Proposals for Reform*, 31 HARV. J. ON LEGIS. 321 (1994) (lamenting decline of deliberation in House of Representatives). However, deliberation during legislative debate should not be the exclusive standard upon which to judge the level of deliberation. Such deliberation may take place prior to debate.

⁸⁵ The equal voting power of all legislators is essential to democracy. Bell, *supra* note 1, at 50 n.179; Croley, *supra* note 24, at 702.

⁸⁶ See *supra* note 83. See generally ARTHUR MAASS, CONGRESS AND THE COMMON CAUSE 32-44 (1983) (discussing the tension between the need for legislative specialization and the risk that committees will challenge the chamber as a whole for control of legislative business).

legislatures as they shoulder more substantial agendas.⁸⁷ Moreover, in many states these natural time constraints have long been exacerbated by restrictive limits on the length of legislative sessions.⁸⁸

The obstacles legislatures face, such as supermajority requirements and time limitations, are generally considered liberty-enhancing.⁸⁹ The demanding nature of the legislative process specified by Article I has long been considered a particularly important constraint on government power and an essential protection for individual freedom. Similarly, the limits states have imposed upon the length of legislative sessions, and other less-artificial time constraints, constrict the legislative agenda and thus constrain efforts to impose legal obligations upon the citizenry.⁹⁰

However, such constraints may not enhance liberty (and, indeed, may have quite the opposite effect) once a statute becomes law. The same super-majority requirements that made legislative action difficult now work to make any subsequent action to amend the statute more difficult.⁹¹ Efforts to amend statutes that fail because proponents cannot amass supermajorities often seek to loosen restrictions on liberty embodied in extant statutes — thus the need to amass supermajorities may thwart efforts to enhance liberty. For example, supermajority requirements long inhibited the liberalization of restrictions upon contraception⁹² and currently hinder

⁸⁷ ROSENTHAL, *supra* note 82, at 45, 62 (noting the increasing fragmentation of legislatures into committees in response to increasing legislative workload); Alan Rosenthal, *The State of State Legislatures: An Overview*, 11 HOFSTRA L. REV. 1185, 1189-1191 (1983).

⁸⁸ See ROSENTHAL, *supra* note 82, at 44-45; THE BOOK OF STATES, *supra* note 7, at 64-66 (tbl. 3.2); 1 SUTHERLAND STATUTORY CONSTRUCTION, *supra* note 34, § 6.07; Rosenthal, *supra* note 87, at 1188.

⁸⁹ Easterbrook, *supra* note 40, at 549.

⁹⁰ See ROBERT LUCE, LEGISLATIVE ASSEMBLIES: THEIR FRAMEWORK, MAKE-UP, CHARACTER, CHARACTERISTICS, HABITS, AND MANNERS 125-26 (1924); PAUL S. REINSCH, AMERICAN LEGISLATURES AND LEGISLATIVE METHODS 132-33 (1907). Although such restriction of legislative agendas may be counterproductive if they force legislatures to delegate more lawmaking authority to executive branch agencies, which operate free of artificial time constraints and possess a greater capacity to address a large agenda even absent artificial constraints.

⁹¹ Estreicher, *supra* note 6, at 1136-37. Estreicher sees this effect as a normative benefit, asserting “once the law is enacted, it becomes the rightful beneficiary of inertial forces.” He does not justify his assertion. When no statute exists inertia serves to increase liberty. When a statute exists, inertia advantages the statute’s beneficiaries merely because their predecessors in interest prevailed at some earlier time. Thus, surely sunset laws, that limit the period that inertia works in favor of a statute’s beneficiaries, are entirely proper.

⁹² BICKEL, *supra* note 4, at 147, 156 (discussing Connecticut statute forbidding contraception).

modification of the limits on physician-assisted suicide.⁹³ The demanding nature of the legislative process long prevented Congress from modifying the unrealistically stringent, and sometimes counter-productive, limits on the presence of potential carcinogens in foods and food additives.⁹⁴ Not only do obstacles to legislation frustrate efforts to enhance liberty in particular circumstances, but the greater dominance of statutory law means that static interpretation may not even enhance liberty overall. Thus, the situation facing the Founders, when there was little federal law (and an expectation that the federal government's role would remain quite limited),⁹⁵ differs from that we now face in an age of statutes.⁹⁶

Moreover, as Cass R. Sunstein has noted, even the traditional conception of liberty, which undergirds the judgments that supermajority requirements and constricted legislative agendas enhance liberty, is flawed.⁹⁷ Under the conventional view, regulatory regimes limited citizens' freedom of action, and common law contract or property regimes enhanced freedom of action. However, as Sunstein has argued, both regulatory regimes and common law contract and property regimes involve limitation on citizen's actions backed by government sanctions. Regulatory regimes and common law regimes differ only in that the latter involves private power over citizens (sustained by government-enforced common law rights) whereas the former involves public power over citizens. We often forget this critical aspect of an oft-cited passage from *Federalist No. 51*. In that essay, James Madison observes that "[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first

⁹³ *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996), *rev'd*, 521 U.S. 793 (1997)(discussing New York statutes prohibiting aiding commission of suicide).

⁹⁴ The Delaney Clause and analogous provisions, 21 U.S.C. §§ 348, 360b, 376, have been considered unduly restrictive, even by the Food and Drug Administration, the agency that administers it. See *Pub. Citizen v. Young*, 831 F.2d 1108 (D.C. Cir. 1987)(overturning agency reliance on a *de minimis* exception designed to moderate the Delaney Clause's impact); Richard A. Merrill, *FDA's Implementation of the Delaney Clause: Repudiation of Congressional Choice or Reasoned Adaptation to Scientific Progress?*, 5 YALE J. ON REG. 1 (1988)(chronicling the FDA's efforts to moderate the effect of the Delaney Clause).

⁹⁵ Manning, *supra* note 80, at 113-14; Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 389 (1908).

⁹⁶ CALABRESI, *supra* note 3, at 72-80 (discussing the "statutorification" of law and its causes).

⁹⁷ CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 50-51(1993); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 28-38 (1993); *see* SUNSTEIN, *THE PARTIAL CONSTITUTION*, *supra*, at 40-67.

enable the government to control the governed; and in the next place oblige it to control itself.”⁹⁸ Students of American constitutionalism tend to focus on the last clause, the admonition that the government must control itself, ignoring the clause that precedes it, which emphasizes the importance of empowering government to effectively restrain private power. Indeed, one could even suggest that in contemporary society government *inaction* rather than government *action* poses the more pervasive threat to meaningful individual freedom.⁹⁹

Judicial refusal to “update” statutes might limit legislative power nevertheless, because time almost invariably frustrates the enacting legislature’s designs — either loosening legal restrictions by making them work less efficaciously or expanding them beyond their contemplated scope. Appeals to celebrate, and indeed facilitate, such temporal frustration of the enacting legislature’s purpose should be rejected. To the extent that statutes should embody deliberate public policy prescriptions, the random modification of a statute’s prescriptions produced by the ravages of time clash with our conception of government. Statutes that have been rendered less adequate or more expansive with time reflect no rational choice at all. Such statutes do not reflect the deliberate choice of the enacting body, because the legislation no longer operates in the manner it envisaged. Such statutes also do not reflect the will of contemporary legislatures; inaction does not signify legislative approval, but could have any number of meanings fully consistent with the legislature’s unwillingness to endorse the extant statute.¹⁰⁰ The law becomes a haphazard patchwork of an old majority’s statutory policies and random changes brought about by time.¹⁰¹ While such a statute is not unconstitutional *per se*,¹⁰²

⁹⁸ THE FEDERALIST NO. 51, at 322 (James Madison)(Clinton Rossitor ed., 1961).

⁹⁹ See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 18-24 (1990); Bernard W. Bell, *Filth, Filtering, and the First Amendment*, 53 FED. COMM. L.J. 191, 196 (2001); Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 734-39 (1964). See Albert M. Bendich, *Privacy, Poverty and the Constitution*, 54 CALF. L. REV. 407, 407-09, 414, 440 (1966).

¹⁰⁰ *Cf. Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989)(noting that legislative inaction does not necessarily signify legislative approval of extant judicial construction of statute); *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting)(same); see CALABRESI, *supra* note 3, at 102-03; McNollgast, *supra* note 81, at 735-36.

¹⁰¹ In this respect the statutory law would resemble “checkerboard statutes,” which Dworkin condemns as inconsistent with the need that law have integrity. DWORKIN, *supra* note 37, at 178-84.

Indeed, the courts’ approach to severing valid from constitutionally invalid provisions of a statute may be instructive. When the legislative design is transmogrified by a court’s exercise of judicial review, rather than by the

such a state of affairs offends the general constitutional principle that statutes should embody some conscious, rational choice.¹⁰³ Here, the enacting legislature did not make the choices because they did not anticipate future events. And neither has the subsequent legislature, because of either deadlock or the lack of time to place reconsideration of the statute on its agenda.

Moreover, such an approach would require constant legislative updating. Repeatedly putting the winning coalition to the test, while requiring nothing of the losers, is unwarranted. Public choice theory counsels against frequently putting succeeding majorities to the test, because it takes unusual motivation for diffuse interests to overcome concentrated ones.¹⁰⁴

The non-majoritarian aspect of statutes attributable to statutory longevity is rarely addressed. Advocates of “equitable interpretation” or dynamic interpretation usually base their defense of such approaches on legislatures’ lack of omniscience. Thus, even proponents of “equitable interpretation” consider themselves the legislature’s “faithful agents,” asking themselves how the enacting legislature would have resolved the question were the disputed

passage of time, a court will invalidate the statute if it concludes that Congress would not have enacted the statute as altered. *See, e.g., Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). Such an option is not available with regard to statutes changed by time rather than constitutional adjudication.

¹⁰² See Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 221-22 (1976).

¹⁰³ Bell, *supra* note 1, at 34-37; *Mathews v. DeCastro*, 429 U.S. 181, 185 (1976) (asserting that legislation must be an “exercise of judgment,” not a “display of arbitrary power”).

¹⁰⁴ See note 78-79 *supra*.

Of course, we do not conceive of the permanent nature of constitutional text as a handicap. (Eule suggests that the arguments against entrenchment of statutes apply to constitutions as well, and that, accordingly, the entrenchment of constitutional provisions requires justification. Eule, *supra* note 74, at 388, 388-91.) However, constitutions can be viewed as a part of a pre-commitment strategy, designed as a bulwark against future majorities. See Michael J. Klarman, *What's So Great about Constitutionalism?*, 93 NW. U. L. REV. 145152-55 (1998); Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 123-25 (1993). Thus, constitutions are designed to last even when their specific provisions temporarily lack a majoritarian support, because we distrust majorities’ willingness to adhere to those principles when facing particular crises. Statutes, by contrast, generally do not embody a pre-commitment strategy. One can advance few justifications for allowing a statute enacted by a prior legislature to limit a later legislature’s power to alter it, see *infra* notes 136-40, and, indeed, one might seriously question the constitutionality of legislators’ efforts to bind future legislatures. Such a pre-commitment strategy might be embodied in statutes that require super-majorities in order to change the statute, Rules of the House of Representatives House Rule XXI(5)(c) (requiring three-fifths majority of those voting to pass a tax increase), but the typical statute lacks any such provision.

question put to it.¹⁰⁵ For example, in *Eyston v. Studd*, the Court explained:

In order to form a right judgment when the letter of a statute is restrained and when enlarged by equity, it is a good way, when you peruse a statute, to suppose that the lawmaker is present, and that you have asked him the question you want to know touching the equity, then you must give yourself such an answer as you imagine he would have done, if he had been present.¹⁰⁶

Eskridge, a dynamic interpreter, employs similar “faithful agent” type arguments.¹⁰⁷ But, as the discussion above suggests, one must answer an antecedent question, namely to which of several legislatures that exist over time do the courts owe allegiance. We need not so privilege the act of reducing a statute to writing that we prefer the enacting legislature’s intent to that of the current legislature.¹⁰⁸ The current legislature (and indeed any legislature that post-dates the enacting legislature) surely possesses a superior democratic pedigree because it is closer in time to the decision that must be made. The current legislature surely has a better claim to represent the interests of the current citizenry, the people whose rights and obligations are currently governed by the statute. Even prior legislatures that post-dated the enacting legislature are likely to be more representative of the populace’s current perspectives than the enacting legislature.¹⁰⁹ At

¹⁰⁵ *Burnet v. Guggenheim*, 288 U.S. 280, 285 (1933) (Cardozo, J.); *Friedrich v. City of Chicago*, 888 F.2d 511, 514 (7th Cir. 1989); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983); Learned Hand, *Thomas Walter Swan*, 57 YALE L.J. 167, 171 (1947).

¹⁰⁶ *Eyston v. Studd*, 75 Eng. Rep. 688, 699 (K.B. 1574) (Plowden’s Commentaries).

¹⁰⁷ ESKRIDGE, *supra* note 1, at 117, 126.

¹⁰⁸ Often textualists vociferously argue that the intent of a statute’s drafters should receive no more weight than the intent of legislators who merely voted on the statute. Thus, legislative committees’ understanding of statutory text should receive no more credence than the typical legislator’s likely understanding of that text, *see Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 548 (1989); William Robert Bishin, *The Law Finders: An Essay on Statutory Interpretation*, 38 S. CAL. L. REV. 1, 16 (1965). Similarly, the collective views of members of the Constitutional Convention deserve no more weight than the views of the members of the state ratifying conventions, *see John F. Manning, Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1666 (2001), except to the extent that the Framers’ views are more persuasive and well-reasoned.

Granted, new textualists can distinguish their arguments regarding committee reports and Framers’ intent from my suggestion that an enacting legislature’s views may deserve only limited credence. In the former situation, the drafters’ provisions cannot become law without the others’ concurrence; in the latter case, the drafting legislature’s statute has become law and does not require the actions of later legislatures to make it legally binding (though it does at least require the forbearance of later legislatures to remain effective).

¹⁰⁹ The political views of the populace, like fashions in clothing, may be cyclical. Thus, with respect to some issues, legislatures that existed forty years ago may reflect the current political climate more accurately than a legislature that existed ten years ago. However, such judgments are particularly difficult to make. A conclusive

least, then, the practice of favoring the preferences of the enacting legislature cannot be attributed to a commitment to democracy. Judicial privileging of the enacting legislature's intent must, instead, rest on "rule of law" concerns. One possible "rule of law" justification for privileging an earlier legislature's intent is that the prior legislature cobbled together the coalition needed to enact the statute, while later legislatures did not.

However, a later legislature might have enacted a similar statute with somewhat different intentions had the earlier legislature not acted. Thus, the enacting legislature should not necessarily receive a preference because they, unlike later legislatures, amassed a super-majority coalition to enact a statute. The proponents at the two times may have faced significantly different political circumstances. For the former proponents, the alternative to the statute, if their efforts failed, may have been the absence of any statute addressing their concerns. To the later proponents, the competing alternatives may, instead, be a somewhat acceptable statute or a revised statute incorporating their preferred modest amendments to the extant statute. The reduced significance of failure changes the proponents' ability to mobilize a majority, gives them less reason to revisit the statute, and makes placing the statute on the legislative agenda harder to justify.¹¹⁰

Imagine that a statute is enacted, and then re-enacted ten years later. Assume that the re-enacting legislature left a portion of the statute unchanged. If an interpreter becomes aware of a difference between the enacting legislators' and the re-enacting legislators' understanding of that provision, the interpreter should follow the re-enacting legislature's views, even though that legislature did not draft the language initially.¹¹¹ The re-enacting legislature possesses a superior

presumption that a later legislature has a better democratic pedigree can be defended — the principle that legislatures should always have the power to change the actions of their predecessors, see *infra* notes 136-37, justifies considering that later-in-time legislature to have the superior democratic pedigree.

¹¹⁰ GRANT GILMORE, *THE AGES OF AMERICAN LAW* 95 (1977) (observing that "getting a statute enacted in the first place is much easier than getting the statute revised so that it will make sense in the light of changed conditions"); William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 240 & n. 247 (2000); Eule, *supra* note 74, at 457 n.352.

¹¹¹ Assuming that the disputed provision has not been authoritatively construed in the interim, because if there were such an interim decision, one could argue that re-enactment without change constituted legislative ratification of the intervening judicial decision. *United States v. Bd. of Comm'rs*, 435 U.S. 110, 134 (1978); *Snyder v. Harris*, 394 U.S. 332, 339 (1969); see 2B SUTHERLAND STATUTORY CONSTRUCTION, *supra* note 34, § 49.09.

democratic pedigree because it exists later in time. The enacting legislature's status as the first to reduce the statute to writing should surely be viewed as far less significant (if significant at all), and certainly does not justify favoring the enactors' views over the re-enactors' contrary views.¹¹² Of course, in this hypothetical the later legislature took action, they re-enacted the statute, rather than engaging in no action at all. And my argument preceding the hypothetical focused on honoring the intent of later legislatures who take no action. This difference is not critical, however, because in both circumstances the key text was not altered by the legislature.¹¹³ The hypothetical suggests that one legislature's initial reduction of a statute to writing should not determine which of the various legislatures that existed over time most deserves the contemporary courts' allegiance.

In addition, the initial enactment of a statute may be somewhat idiosyncratic. Once a statute is enacted and becomes established law, support for the statute may grow and fears of the initial opponents may prove illusory. Even if the application of the statute has proved problematic, the basic principles underlying the statute may come to be accepted as conventional, even though considered radical when the statute first passed. Especially in such situations, the views of the initial coalition cobbled together to enact the legislation should not govern over the "intent" of later supportive legislatures that need take no further action. In such circumstances,

¹¹² *Contra* *Pierce v. Underwood*, 487 U.S. 552, 566-67 (1998); *Vt. Agency of Natural Res. v. United States*, 529 U.S. 765, 783 n.12 (2000); *see generally* *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 416 n.19 (1973) (relying upon unattached post-enactment legislative history). In *Pierce v. Underwood*, Justice Scalia, writing for the Court, takes the opposite approach. The statute at issue, the Equal Access to Justice Act, 28 U.S.C. § 2412(d), had been enacted in 1980, and re-enacted in 1985. However, the 1985 Congress had not modified the crucial language when re-enacting the statute. Justice Scalia explained that a 1985 House committee report construing the key provision lacked relevance because the 1985 Congress had not changed the statutory language created in 1980. Accordingly, Scalia concluded, the 1980 Congress' understanding of the crucial term controlled. However, Scalia's rejection of evidence of the "intent" of the 1985 Congress might have resulted from his skepticism toward legislative history in general, and committee reports in particular. *See* Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WISC. L. REV. 205, 217, 221, 229-30. Specifically, Justice Scalia might have doubted that the 1985 committee report reflected the collective intent of the House, the Senate, and the President. If instead, for example, there had been some lexicological development that altered the common understanding of a word used in the statutory text, perhaps Justice Scalia might have concluded that the re-enacting Congress' understanding of the term deserved greater weight than that of the enacting Congress.

¹¹³ Justices Scalia and Stevens have both suggested that legislative re-enactment of text without modification has no more significance than legislative inaction. *Pierce v. Underwood*, 487 U.S. at 567; *United States v. Bd. of Comm'rs*, 435 U.S. at 149 n.12 (Stevens, J., dissenting). Contrary to my argument above, however, in both situations (re-enactment without textual modification and inaction), they disregard the actual or presumed "intent" of the later legislatures that either re-enacted the statute or allowed it to stand.

the later legislators possess a superior democratic pedigree.

Admittedly, if no further legislative action has been taken, an interpreter will encounter difficulty in determining which of several later Congress' "intents", or perhaps more accurately, understandings, to honor. While such a difficulty is indeed troubling, courts should confront this problem rather than continue to honor the intentions of the enacting Congresses despite their poor democratic pedigree.

Two cases that Eskridge himself analyzes, *Smith v. Wade*¹¹⁴ and *United Steelworkers v. Weber*,¹¹⁵ illustrate how this insight might change our perspective.¹¹⁶ *Smith v. Wade* involved the availability of punitive damages against prison officials who had improperly placed plaintiff in a cell with more dangerous inmates (who thereupon assaulted plaintiff). Section 1983 had been enacted in 1871 to confer upon citizens a cause of action against individuals who violated their constitutional rights under color of state law. The Justices engaged in a historical discussion, focused on discerning the Reconstruction Congress's conceptions of common law doctrines. The Justices surmised that legislators would have assumed that courts would apply common law doctrines to questions arising under section 1983. Eskridge concludes, based on his own assessment of late Nineteenth Century common law, that the 1871 Congress would most likely have assumed that courts would preclude recovery of punitive damages. However, Eskridge also concludes that allowing the award of punitive damages fits more coherently with the evolving judicial construction of section 1983. Eskridge resolves this dilemma by arguing that the Court should have interpreted section 1983 consistently with the manner in which the statute has evolved rather than in accordance with the 1871 Congress's "intent."¹¹⁷

Of course, as an alternative response to Eskridge's conundrum, the Court might have decided that the variance of judicial doctrine from the 1871 Congress' intent should be arrested, even if not reversed. In particular, the Court could have committed itself to resolving new questions arising under the statute by seeking to bring the statute more in line with the enacting

¹¹⁴ 461 U.S. 30 (1983).

¹¹⁵ 443 U.S. 193 (1979).

¹¹⁶ Eskridge, *supra* note 3, at 1484-94.

¹¹⁷ *Id.* at 1485-86.

legislature's original intent. Yet a third alternative may exist, at least theoretically. If a court could confidently surmise how a later Congress that might have enacted section 1983 (had it needed to), would have addressed the situation, arguably the court should interpret the statute with reference to that intent. Drawing such an inference about a later legislature's "intent" may be an impossible task, because the central question is a counter-factual regarding an abstract concept (*i.e.*, legislative intent). However, this theoretical, but impractical, third alternative does provide a justification for invoking majoritarianism to conclude that adherence to the intent of enacting lawmakers, whose terms of office ended more than 100 years before the controversy arose, is unwarranted. Thus, the Reconstruction Congress's preferences with regard to section 1983 should not necessarily govern, because a less anachronistic Congress, say one that existed during the Lyndon B. Johnson presidency or the New Deal, might well have enacted the same statute with a more contemporary perspective.

The same argument might potentially be advanced with regard to *Weber*. *Weber* involved the question of whether Title VII of the Civil Rights Act of 1964, which prohibits racial, ethnic, and gender discrimination in employment, permits voluntary "affirmative action" programs. Title VII was initially enacted amid extraordinary controversy. From his immersion in that history, Eskridge concludes that "center of gravity" of proponents suggests that collectively they would not have permitted affirmative action.¹¹⁸ The congressional debates "reveal[] hostility to quotas generally" and suggests that "the purpose most broadly accepted in Congress was that of creating a color-blind society."¹¹⁹ Eskridge notes in particular the central role Senator Dirksen and about a dozen conservative Republican senators played in defeating the Southern Democratic filibuster. Even if Eskridge's assessment is wrong, surely in 1964 some of the crucial proponents could not have acknowledged *publicly* that they favored affirmative action.¹²⁰ However, perhaps viewing the intent of a later Congress, one that might have enacted the same statutory text had the 1964 Congress not relieved it of the necessity to do so, might lead a court to uphold

¹¹⁸ *Id.* at 1491.

¹¹⁹ *Id.*

¹²⁰ Under a public justification approach, the question of publicly-acknowledged intent is more important than an unstated or privately-stated "intent" that legislators are unwilling to acknowledge publicly.

affirmative action as consistent with Title VII. In 1964, proponents were forced to rely upon the votes of conservative Republicans to break a filibuster led by the Senate's Southern Democrats, who at the time enjoyed enhanced powers by virtue of both their seniority and dominance of the committee system.¹²¹ If Title VII had not passed when it did, but later, during the latter years of the Johnson presidency, or during the Nixon, Ford, or Carter presidencies, perhaps the enacting Congress would have been much more favorably inclined toward the concept of affirmative action than the 1964 Congress.¹²²

Eskridge does not really address the flawed majoritarian quality of statutes in the path-breaking article that serves as the focus of this symposium. He addresses it directly only briefly in his book-length argument for dynamic interpretation.¹²³ Eskridge's dynamic interpretation approach encompasses interpreting statutes in light of changes in majoritarian preferences, but is broader, generally advocating judicial construction with reference to contemporary circumstances. And indeed, Eskridge sometimes argues for dynamic interpretation to more fully effectuate the enacting legislature's intent.¹²⁴

Guido Calabresi more directly targets the non-majoritarian effect of statutory permanence in *A Common Law for the Age of Statutes*. He argues that courts should simply consider statutes no longer binding upon them after a limited period of time. The courts could, after that time, overrule or modify statutes to reflect the "legal topography," and thus invite legislative reconsideration of the statute. In deciding whether to "overrule" or modify a statute, courts should take into account asymmetries in the affected interests' abilities to secure legislative action. In particular, the court should rule against the interest that can most easily secure

¹²¹ Indeed, the undemocratic manner in which many Senators (and other elected officials) were chosen, namely in elections from which African-American voters were largely barred, may have contributed to civil rights proponents' need to compromise with those more equivocal on the issue. Thus, with regard to the Civil Rights Act of 1964, there is yet an additional reason to accord only modest weight to the views of swing voters necessary to break Southern senators' filibuster.

¹²² ESKRIDGE, *supra* note 1, at 77, 79.

Such an approach does not mean that the interpretation of Title VII should reflect the retrenchment of the 1980's and 1990's. Legislation to establish the principle of "color-blindness" and to preclude voluntary affirmative action programs was not frustrated because proponents believed that statutory law already embodied such precepts. Rather, such efforts failed because the absence of super-majorities needed to mandate such a retrenchment.

¹²³ See ESKRIDGE, *supra* note 1, at 134-40.

¹²⁴ See *id.* at 117, 125-26.

legislative reconsideration.¹²⁵

Calabresi's diagnosis of the non-majoritarian quality of statutory permanence is sound, but his remedy problematic. The requirement that judges "overrule" or modify statutes with reference to the "legal topology" almost certainly does not adequately restrain non-majoritarian judges from "updating" statutes based on their ideological predispositions rather than neutral, generally-accepted non-ideological principles.¹²⁶ Moreover, Calabresi's argument that courts should interpret statutes to encourage legislative reconsideration, while attractive, ultimately subverts the prime judicial role — resolving individual disputes. Calabresi's approach in effect urges judges to use their role as arbiter of individual disputes strategically, not to render justice in the individual case but to maximize the likelihood that democratic institutions will revisit the statute. Individual litigants, who need the courts to define their rights, become mere pawns in a judicial effort to initiate or maintain a dialogue with the legislature.¹²⁷

Calabresi's argument is problematic for yet another reason. Calabresi establishes that a longstanding statute may reflect only a defunct majority's policy judgments. However, his analysis does not suggest that a contemporary legislature would adopt any particular policy at all with regard to a particular issue confronting a court. Thus, Calabresi's argument really suggests that a court should essentially decide that no law governs a controversy covered by a statute that has, the court suspects, lost majority support. This suggests that the judiciary should preclude disputants from invoking its processes, one way or the other, to resolve their legal dispute. Legislatures can avoid resolving disputes by simply failing to act. Courts do not have the same

¹²⁵ CALABRESI, *supra* note 3, at 124-29. Interestingly, Eskridge has studied various groups' effectiveness in securing legislation in response to unfavorable statutory rulings. ESKRIDGE, *supra* note 1, at 152-53; William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988).

¹²⁶ Calabresi does address this point, and asserts that general legal principles will constrain judicial decision-making with regard to nullifying or modifying statutes, much as they constrain judges in the development of common law doctrines. Nevertheless, scholars particularly criticize dynamic theories, like Calabresi's, on this point. Nagle, *supra* note 6, at 2245-49; Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 852 (1994); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 19, 32-33 (1985). Of course a similar debate has played out over the last forty years with respect to constitutional adjudication. See ELY, *supra* note 4, at 44-48. See *supra* note 4.

¹²⁷ Bernard W. Bell, *Metademocratic Interpretation and Separation of Powers*, 2 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 7-18 (1998-99). If employed without great caution, the approach can also impose an undue burden on the legislature. See *id.* at 18-20.

luxury, they ordinarily must rule on cases brought before them (even if only to confirm, by dismissing a claim for failure to state a recognized cause of action, that a private party may act free of legal constraint).¹²⁸

Calabresi's interpretive methodology is most acceptable when a court merely concludes that an extant statute no longer applies. Such applications of a Calabresi-esque methodology are exemplified by Judge Calabresi's own approach to New York's assisted suicide laws, and Professor Alexander Bickel's and Judge Jon O. Newman's approaches to Connecticut's contraceptive and abortion laws, respectively.¹²⁹ Justifying Calabresi's methodology becomes more difficult when, instead of invalidating the statute, a court "updates" the statute by modifying or expanding its terms. Such a court is no longer merely declaring that the legislative act that created the statute has no further effect (*i.e.*, that the policy preferences of former legislators simply cannot govern for so long a time after they have left office). Instead, the court is itself using the statute to effectuate policies that the judges themselves believe appropriate. Admittedly, such judicial lawmaking poses less of a difficulty for state courts, which possess recognized common-law powers.¹³⁰ But it certainly poses a difficulty for federal courts, which generally lack such powers.¹³¹ Judicial lawmaking may even present a problem for state courts in contexts where their common law powers are severely limited — for example where the legislature has acted comprehensively so as to occupy the field or where an entire field is a creature of statutory law. The fields of criminal law and worker's compensation provide two examples of such areas.

Julian Eule suggests another approach. The legislature can resolve the problem of the non-majority status of statutes that have remained after their supporting majority has disappeared

¹²⁸ Of course, most jurisdictions' highest courts may, like legislatures, refuse to resolve certain issues because they enjoy discretionary jurisdiction.

¹²⁹ *Quill*, 80 F.3d 731-43 (Calabresi, J. concurring); *Abele v. Markle*, 342 F. Supp. 800, 810-11 & n.18 (D. Conn. 1972)(Newman, J., concurring); BICKEL, *supra* note 4, at 155-56.

¹³⁰ Bernard W. Bell, *In Defense of Retroactive Laws*, 78 TEX. L. REV. 235, 262 n.162 (1999).

¹³¹ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *accord Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972).

by making amendatory legislation retroactive.¹³² The Judiciary would then review the legislature's assessment of the timing of the old legislative majority's disappearance, by deciding the appropriateness of the legislatively-specified time period of retroactive application. This approach maintains the traditional conception of legislatures' and courts' respective roles. Legislatures act first in assessing whether the old law should be rendered nugatory during some period prior to its actual repeal; the Judiciary then reviews the reasonableness of the legislature's determination. However, legislatures will not likely seek to ascertain the date of the enacting majority's disappearance, nor will they likely make amending legislation retroactive for considerable periods of time.¹³³ Moreover, retroactivity raises other concerns that will surely preclude courts from upholding retroactive statutes simply because a legislature credibly concludes that an old statute had lost majority support long before its repeal or revision. In particular, courts will surely have concerns about ensuring citizens fair notice of their rights and obligations, and retroactive statutory revisions cannot provide such advance notice.¹³⁴ Indeed, for that reason, even in areas in which courts can freely apply legal rules retroactively, as when they revise or abrogate common law or constitutional doctrines, courts sometimes exhibit a reluctance to apply significant changes in judicial doctrine to conduct that predates decisions announcing the particular doctrinal shift.¹³⁵

In short, statutory longevity, supermajority requirements, and lack of time combine to create circumstances in which statutes may not reflect the will of current majorities, but instead will continue to embody decisions of legislators who have long since left office and have little democratic authority to continue exercising legislative power over citizens. Thus, while courts may be non-majoritarian, the products of the political branches of government may also become

¹³² Eule, *supra* note 74, at 458-59. See generally Bell, *supra* note 130, at 251-54. Such an argument is much more credible when the government has never adopted a policy with regard to a particular issue than when a new majority seeks to overturn a prior governmental policy.

¹³³ And judges will not likely be adept at assessing any such legislative judgments. Indeed, support for an old policy may not have gradually declined, but may have waxed and waned over the course of many years.

¹³⁴ *Landgraf*, 511 U.S. at 265; DANIEL E. TROY, *RETROACTIVE LEGISLATION* 18-19 (1998).

¹³⁵ *Chevron Oil Co. v. Huson*, 404 U.S. 97, 107-08 (1971)(setting forth three-factor test for deciding when to use prospective overruling); *Kelly v. Gwinnell*, 96 N.J. 538, 544, 476 A.2d 1219, 1222 (1984); MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 127-32 (1988)(discussing prospective overruling, but arguing that it should be employed only on a limited basis).

non-majoritarian.

III. Weak Dynamic Statutory Interpretation

More conventional interpretive doctrines than those presented by Eskridge and Calabresi can make law somewhat dynamic and at the same time keep faith with the “faithful agent” theory of statutory interpretation. In particular, while Congress may leave a particular statute or particular provision unchanged for long periods of time, it nevertheless enacts or modifies other statutes. Giving weight to these changes in interpreting old statutes is consistent with the faithful agent theory, at least in a loose sense. This sort of “updating,” which might be termed “weak dynamism,” may occur in two ways: (1) resolving statutory conflicts, and (2) viewing statutes as creating common law principles that may be used in construing other statutes.

A. Resolving Statutory Conflicts

Resolving conflicts between statutes may result in some older statutes evolving. Judges typically seek to harmonize conflicting statutes. But when statutes are irreconcilable, courts prefer either the more specific statute or the statute enacted later in time. Court will first favor the more specific of two conflicting statutes. If neither statute is more specific than the other, the court when then favor the statute enacted later. The later in time presumption may be justified by the proposition that the preferences of later legislatures should supersede those of earlier legislatures.¹³⁶ Citizens lack the ability to govern themselves if their elective representatives cannot modify the policies established by earlier legislators. As one observer has explained: “Each election furnishes the electorate with an opportunity to provide new direction for its representatives[:]; [t]his process would be reduced to an exercise in futility were the newly elected representatives bound by the policy choice of a prior generation of voters.”¹³⁷

¹³⁶ WILLIAM D. POPKIN, STATUTES IN COURT 242, 244 (1999). 1A SUTHERLAND STATUTORY CONSTRUCTION, *supra* note 34, at § 23.03. In at least one circumstance in which it is impossible to accord such primacy, the Constitution requires concurrence by a super-majority before the document creating legal obligations can go into effect. Eule, *supra* note 74, at 425. In particular, treaties must be ratified by two-thirds of the Senate. U.S. CONST. art. I, § 2.

¹³⁷ Eule, *supra* note 74, at 404-05; *accord* U.S. Trust Co. v. New Jersey, 431 U.S. 1, 45 (1977) (Brennan, J., dissenting)(“One of the fundamental premises of our popular democracy is that each generation of representatives can and will remain responsive to the need and desires of those they represent”).

Statutes may limit future legislation in circumstances where they do not impose burdensome requirements upon future legislators. Examples of such statutes include those that require express reference to the statute itself if a later legislature intends to make the statute inapplicable in certain contexts,¹³⁸ and those specifying that no future statute may operate retroactively unless the legislature explicitly makes it retroactive.¹³⁹ In both instances, the statutes impose a negligible burden on later legislatures, essentially requiring that the statutory text of future statutes reflect a conscious and open decision to contravene the policy set forth in the earlier statute.¹⁴⁰

A recent Supreme Court case of some renown, *FTC v. Brown & Williamson*,¹⁴¹ illustrates the evolutionary potential of the effort to harmonize statutes. Indeed, Justice O'Connor observes in her opinion for the Court that reconciliation of statutes enacted at various times has long been a prime judicial function.¹⁴² *FTC v. Brown & Williamson* involved the Federal Food, Drug, and Cosmetics Act ("the FDCA").¹⁴³ Tobacco companies challenged the Food and Drug Administration's ("FDA") regulation of tobacco products, arguing that the FDCA did not confer upon the agency jurisdiction over tobacco products. The critical statutory language, which had been enacted in 1938, appeared to authorize FDA regulation of tobacco products. In particular,

¹³⁸ E.g., Administrative Procedure Act, ch. 324, 60 Stat. 237 § 12, 5 U.S.C. § 559 ("subsequent statute may not be held to supersede or modify" several sections of the APA "except to the extent that it does so expressly"); Religious Freedom Restoration Act of 1993 ("RFRA"), Pub. L. No. 103-141, § 6(b), 107 Stat. 1488, 1489 (1993) ("Federal statutory law adopted after the date of the enactment of this Act is subject to the Act unless such law explicitly excludes such application by reference to this Act").

¹³⁹ E.g., TEX GOV'T CODE ANN. § 311.022 (West 1998). See Bell, *supra* note 127, at 30 n.120.

¹⁴⁰ Courts impose similar burdens by creating "clear statement" rules. See Bernard W. Bell, *Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done In the Post-Chevron Era?*, 13 J.L. & POL. 105, 149-50 (1997). Judges should view a prior legislatures' efforts to protect certain important policies by establishing interpretive presumptions no less favorably than judicial efforts to protect important policies by adopting interpretive presumptions. See generally Bell, *supra* note 127, at 29-33.

¹⁴¹ 529 U.S. 120 (2000); see generally Buzbee, *supra* note 110, at 194-200 (analyzing the decision); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 S. CT. REV. 223 (same).

¹⁴² *FDA v. Brown & Williamson*, 529 U.S. at 143. O'Connor, quoting *U.S. v. Fausto*, 484 U.S. 439, 453 (1988), observes: the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute."

¹⁴³ 52 Stat. 1040, codified as amended at 21 U.S.C. §§ 301 et seq. (2002).

21 U.S.C. § 321 broadly permitted regulation of any substance or any “device” “intended to effect the structure or any function of the body.” After a massive administrative proceeding, the FDA had made precisely such findings about cigarettes — concluding that tobacco products have pharmacological effects, and that the tobacco companies intended cigarettes to produce such pharmacological effects.¹⁴⁴

Justice O’Connor devoted some attention to the intent of the 1938 Congress, as the Court’s conventional “faithful agent” interpretive methodology demands. However, she could not muster a particularly strong argument, due to the paucity of probative evidence and the composition of her five-Justice majority (which precluded drawing inferences from legislative silence).¹⁴⁵ In a critical paragraph, Justice O’Connor begins to make a classic argument based on congressional silence, noting the tobacco industry’s significance and Congress’s failure to discuss the FDCA’s applicability to tobacco. However she abruptly abandons her “silence” analysis and puzzlingly asserts that legislative intent lacks significance, a peculiarly Scalia-esque argument. She does not, however, couple that observation with a typical textualist analysis of the critical statutory language’s common meaning, an analysis which, the dissent cogently argued, supported the FDA’s assertion of jurisdiction. Rather, O’Connor finds the 1938 congressional silence noteworthy because that silence was “relevant” to the basis for the FDA’s later representations to Congress that it lacked authority to regulate tobacco, and those representations in turn formed “the background against which Congress enacted subsequent tobacco-specific statutes.”¹⁴⁶ To put it charitably, O’Connor’s argument was strained and quite unconventional.

Justice O’Connor devoted most of her opinion to discussing statutes and legislative efforts that occurred long after Congress’ initial adoption of the statutory provision at issue. She concluded from the course of legislative activity since the early 1960’s that Congress had

¹⁴⁴ 61 Fed. Reg. 44619 (1996).

¹⁴⁵ Justices Scalia and Thomas, critical members of the majority, reject the use of legislative history in general, see Tiefer, *supra* note 112, at 217, 221, 229-30; Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 363 (1994), and react with particular scorn to inferences drawn from legislative silence, see, e.g., *Dept. of Commerce v. United States House of Representatives*, 525 U.S. 316, 344 (1999)(Scalia, J., concurring); *Chisom v. Roemer*, 501 U.S. 380, 406 (1991)(Scalia, J. dissenting); see generally Bell, *supra* note 1, at 90-91.

¹⁴⁶ *Brown & Williamson*, 529 U.S. at 147.

intended to reserve for itself the authority to regulate tobacco.¹⁴⁷ She explained: “Congress has persistently acted to preclude a meaningful role for any administrative agency in making policy on the subject of tobacco and health.” She thus, in effect, narrowed the text of the statute, enacted by a Congress presumably unaware of the public health hazards associated with smoking, based largely on later Congresses’ preferences. While the 1938 Congress probably did not believe it was conferring upon the FDA the ability to ban tobacco in the near future, as Justice O’Connor surmised,¹⁴⁸ one can merely speculate about the reactions of New Deal legislators to the prospect of the FDA’s assertion of jurisdiction to regulate tobacco almost sixty years in the future, if they had been informed about the severe pharmacological effects of tobacco and the substantially greater contemporary public distaste for tobacco.¹⁴⁹ Most likely, I suspect, they would not have wanted to decide the issue for us.

In short, on occasion the necessity to reconcile earlier statutes with later ones sometimes compels courts to “update” statutes.¹⁵⁰

B. Statutes as Common Law Principles — Extending Statutes

Recent statutes may serve to “update” older statutes if courts apply a second, more controversial technique — that of “extending statutes.” This technique involves viewing statutes as not only resolving matters within their scope, but more generally (separately or in combination) establishing broader common-law principles for courts to use in developing common law or construing other statutes, particularly long-standing ones.¹⁵¹ In the context in

¹⁴⁷ *Id.* at 156; *see generally, id.* at 143-56. This conclusion held enhanced attractiveness because of the normative constitutional appeal of encouraging Congress to make significant decisions rather than delegating their resolution to administrative agencies., as Justice Breyer alleged in his dissent. *Id.* at 189-192.

¹⁴⁸ *Id.* at 147. I agree with Justice O’Connor’s supposition about the enacting legislators’ expectations, but am not sure it is much more than a supposition.

¹⁴⁹ Indeed, Breyer makes an argument that this is precisely the type of statute that gives broad law-making power to an agency, and that if the agency concluded that tobacco had the health effects of more conventional drugs, the FDA would have the power to regulate them. *Id.* at 164-67. He provides a much more nuanced historical view than does Justice O’Connor.

¹⁵⁰ See ESKRIDGE, *supra* note 1, at 126.

¹⁵¹ *See generally*, 2B SUTHERLAND STATUTORY CONSTRUCTION, *supra* note 34, at § 55.01 (discussing application of statutory principles in common-law fashion to analogous situations not covered by the statute).

which it is most often employed, revising judge-created common law doctrines, reliance on the “extending statutes” technique can be defended rather easily. In altering common law doctrines, the court uses the imperfectly-majoritarian “extending statutes” technique to modify doctrines produced by its own prior non-majoritarian lawmaking.¹⁵² Luminaries like Dean Roscoe Pound, Professor James M. Landis, and Justice Harlan F. Stone, among others, have advocated such a practice in that context.¹⁵³ The United States Supreme Court has used the “extending statutes” technique in the common law context, most prominently in *Moragne v. States Marine Lines, Inc.*¹⁵⁴

The extending statutes technique is somewhat more difficult to reconcile with democratic theory when used to alter the conventional meaning of longstanding statutory text. In such circumstances a court uses an imperfectly majoritarian technique to alter the product of majoritarian political processes. Nevertheless, the Supreme Court used the “extending statutes” approach to justify an evolutionary approach to statutory interpretation in *Kiefer v. Kiefer v. Reconstruction Finance Corp.*,¹⁵⁵ and the New York Court of Appeals relied upon a similar technique in *In re Jacob*.¹⁵⁶ In this context, the “extending statutes” approach can be justified given the previously-described flawed majoritarian quality of long-standing statutes.¹⁵⁷

¹⁵² Pound, *supra* note 95, at 389.] However, even in that context, judges must be alert to the potential that the legislature’s limit on the statutory scope may reflect more than a focus on a particular problem and may indeed represent an affirmative judgment that the principle embodied in the statute should not apply more generally.

¹⁵³ James M. Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213, 219-22, 229-30 (1934); Pound, *supra* note 95, at 385-86, 388; *see also* Harlan Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 12-15 (1936); *see generally* JAMES WILLARD HURST, DEALING WITH STATUTES 44-45 (1982).

¹⁵⁴ 398 U.S. 375 (1970).

¹⁵⁵ 306 U.S. 381 (1939).

¹⁵⁶ 86 N.Y.2d 651, 636 N.Y.S.2d 716, 660 N.E.2d 397 (1995). The doctrine of desuetude has also been used to challenge the application of old laws that have been undermined by later enactments. *See supra* note 129; *see generally*, 2 SUTHERLAND STATUTORY CONSTRUCTION, *supra* note 34, at § 34.06.

¹⁵⁷ Courts might also rely upon developments in constitutional doctrine to “update” statutes. Evolving constitutional doctrine, while not necessarily majoritarian, may nevertheless be less anachronistic than some statutes. A majority of the Court recently, in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), adopted a quite dynamic interpretation of the Federal Arbitration Act (“the FAA”), based on changes in Commerce Clause jurisprudence. (Ironically, the five Justice majority included Justices who have been quite scornful of dynamic interpretation, in particular Justices Scalia and Thomas.) The Court said that in interpreting the FAA it would not focus upon Congress’ conception of its Commerce Clause powers when it enacted the FAA in 1925. *Id.* at 116-18. Rather, the scope of commercial activity that came within the Clause would expand and contract depending on the

The weak dynamism of the “extending statutes” technique forms a part of the interpretive approach of many scholars and jurists, even those generally on opposite sides of the statutory interpretation wars. An element of weak dynamism is inherent in both Eskridge’s and Calabresi’s theories, though they also recommend more assertive statutory updating as well. Both suggest that the emergence of policies in later statutes enacted by the legislature qualifies as a changed circumstance justifying dynamic interpretation.¹⁵⁸ Thus, for Calabresi, later statutes, particularly a group of later statutes all embodying the same policy, form an important part of the “legal topography” to which courts must refer when updating statutes.¹⁵⁹ However, for Calabresi “legal topography” consists of more than merely later-enacted statutes — it also includes developments in constitutional law doctrines, common law doctrines, and indeed even trends in scholarly thought.¹⁶⁰ Calabresi may overestimate the constraint that “legal topography” will place on lawmaking judges (as I have suggested earlier), and his “legal topography” may include non-majoritarian features, but the weak dynamism of extending statutes is nevertheless one element of his methodology.¹⁶¹

On the other end of the spectrum, Justice Scalia’s approach incorporates weak dynamism. In particular, he asserts that a court, when construing ambiguous statutory text, should consider the corpus of the law and try to harmonize the statute with that legal corpus.¹⁶² He does not seek to ameliorate the problematic nature of statutory permanence. He either does not conceptualize

current judicial definition of the Commerce power’s scope. The Court thus interpreted the Act to reach the limits of the Commerce Clause power at the time of judicial decision rather than the limits of the Commerce Clause power as the enacting Congress conceived them to be. Indeed, this approach to interpreting the term “transaction involving commerce” contrasted with the court’s much more textual reading of the proviso exempting labor contracts from the FAA — it read the language to exempt only interstate transportation workers, rather than all workers within the reach of the Commerce Clause as currently conceptualized. *Id.* at 114-15, 119-21. However, the evolutionary potential inherent in interpreting statutes in light of doctrinal developments in constitutional law lies beyond the scope of this paper.

¹⁵⁸ See ESKRIDGE, *supra* note 1, at 126-27.

¹⁵⁹ CALABRESI, *supra* note 3, at 129-35.

¹⁶⁰ *Id.* at 129, 131.

¹⁶¹ *Id.* at 129.

¹⁶² *Green*, 490 U.S. at 528 (“The meaning of terms on the statute books ought to be determined . . . on the basis of which meaning is . . . most compatible with the surrounding body of law into which the provision must be integrated — a compatibility which, by a benign fiction, we assume Congress has in mind.”)

statutory permanence as non-majoritarian or does not believe the courts should address the problem.¹⁶³ Rather, he seems to strive for statutory harmony as a normative ideal. Nevertheless, Justice Scalia's technique of considering the legal corpus can lead courts to update statutes by interpreting them with reference to later statutes that embody different, more contemporary legislative policies.

One objection to the "extending statutes" approach may rest on the conception of statutes as compromises. The broad principles underlying a statute, and perhaps explicitly stated in its preamble or "public justification," do not fully reflect legislative preferences. Rather, the limits on the application of the underlying principle hold as much significance as that underlying principle itself.¹⁶⁴ Thus, courts should apply the principles underlying a statute only in the precise ways that the enacting legislatures mandated, so as to honor the compromises that the statute embodies. Such an argument is strongest when advanced in the context of roughly contemporaneous interpretation. Legislators will likely have contemporary circumstances in mind when crafting a legislative compromise, and their right to exercise power is at its height. The argument loses force as the statute ages and becomes an accepted part of the law for two reasons. First, the compromise made as a part of the statute's enactment may well not have been addressed to a future state of affairs, like the one facing the court considering extending the statute, but rather to the precise circumstances extant at the time of the statute's enactment.¹⁶⁵ Second, if the contemporary polity accepts the underlying statutory rationale as a broader

¹⁶³ *K Mart Corp v. Cartier Inc.* 486 U.S. 281, 325 (1988)(Scalia, J., dissenting); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 897 (1983). Thus, in *K-Mart*, Scalia argued that the majority's decision to update the statute was wrong, asserting that it was a legislative prerogative to, by its own inaction, allow temporal distortion of existing statutes. Indeed, in his Suffolk Law School speech, he suggested that the Executive Branch, rather than the Judiciary, can serve as the institution that limits the permanence of policies embodied in statutes. In this, he is undoubtedly correct. *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). However, agency updating itself may be problematic. See CALABRESI, *supra* note 3, at 44-58; DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993). Assessment of the agency role in updating is beyond the scope of this paper.

¹⁶⁴ Easterbook, *supra* note 40, at 540-43; see Manning, *supra* note 80, at 18 n.72; McNollgast, *supra* note 81, at 711-12, 734-35.

¹⁶⁵ See POPKIN, *supra* note 136, at 230. Indeed, Popkin suggests that courts are uniquely qualified to fit statutes into their historical context. *Id.* at 246. Certainly the enacting legislature could not have done so, having been unable to predict the future, and the contemporary legislature, unlike the court, can avoid addressing the issue.

principle applicable more widely than to the circumstances of the statute (and the legislature's embodiment of the principle in other statutes might suggest precisely such acceptance), we should not necessarily care that a legislative minority or a segment of the legislative majority forced proponents to enter into an expedient compromise limiting the scope of that principle. The legislators who advocated limited application of the principles, and those who acquiesced, no longer are entitled to exercise legislative authority for the contemporary citizenry.

However, judges should constrain their use of the "extending statutes" technique to update statutes. A court should not update every anachronistic statutory provision, because judicial updating discourages legislative action, particularly legislative efforts to advance a similar policy.¹⁶⁶ Such judicial restraint is particularly warranted when the anachronistic statute addresses an issue subject to ongoing debate. In such circumstances, a court should ordinarily eschew dynamic interpretation, even weak dynamic interpretation, and adhere more closely to a static approach. Such an approach encourages legislative resolution of the issue once the legislature can overcome the debilitating political impasse precluding immediate action.

The application of child welfare laws to pregnant women whose conduct endangers their fetuses provides a setting in which an "extending statutes" argument might initially seem attractive.¹⁶⁷ However, the countervailing precept favoring legislative resolution of controversial issues counsels forswearing reliance on the "extending statutes" technique. Several states have sought to invoke child welfare and child endangerment laws against expectant mothers, to protect

¹⁶⁶ BICKEL, *supra* note 4, at 156; Estreicher, *supra* note 6, at 1165-67; see also POPKIN, *supra* note 136, at 235.

¹⁶⁷ John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 441 (1983)("[t]he cases imposing liability for prenatal injury establish the prenatal duties to the fetus only of persons other than its mother; but the rationale of these cases extends to the mother's negligent conduct as well"). Both pro-life and pro-choice forces appreciate the power of the principle that recognizes the fetus as a person — pro-life advocates press the analogy, *see, e.g.*, William E. Buelow III, Comment, *To Be or Not to Be: Inconsistencies in the Law Regarding the Legal Status of the Unborn Fetus*, 71 TEMP. L. REV. 963, 994 (1998); Murphy S. Klasing, *The Death of an Unborn Child: Jurisprudential Inconsistencies in Wrongful Death, Criminal Homicide, and Abortion Cases*, 22 PEPP. L. REV. 933, 977-79 (1995), pro-choice advocates challenge at every turn the concept that a fetus is a person, because of the consequences acceptance of that view may have for the continued existence of a woman's constitutional right to terminate her pregnancy, Nat'l Abortion & Reprod. Rights Action League, *Bush Administration Proposal to Make "Unborn Children" Eligible for CHIP is Part of Stealth Campaign to Undermine Abortion Rights*, available at http://www.naral.org/mediaresources/fact/chip_points.html(Feb. 2002).

the fetus or to prosecute the mother.¹⁶⁸ *Wisconsin v. Kruzicki*¹⁶⁹ provides a rather dramatic example of such litigation.

In *Wisconsin v. Kruzicki*, the Wisconsin Supreme Court faced a case in which an appellate court had held that the state could take an expectant mother and her fetus into custody pursuant to the state child welfare laws.¹⁷⁰ The Wisconsin child welfare law was initially enacted in 1919, and most recently revised in relevant part in 1977. It authorized state authorities to take a “child” into custody pursuant to a judicial order upon an adequate showing that the child’s welfare demands the child’s immediate removal from his or her present custodian.¹⁷¹ The statute defined child as “a person who is less than 18 years of age.”¹⁷² The appellate court had held that a fetus qualified as a “person” under 18, and thus the state could take into protective custody the endangered fetus, and, therefore, its mother.¹⁷³

Society’s perception of fetuses and their entitlement to legal protection has evolved since 1955, and indeed even since 1977. The law has evolved toward recognizing criminal and tort

¹⁶⁸ *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997)(criminal prosecution of mother for child abuse and endangerment based on her cocaine use during pregnancy); *State v. Gray*, 62 Ohio St. 3d 514, 584 N.E.2d 710 (1992)(attempted criminal prosecution of a woman for drug abuse while pregnant under a child endangerment statute); *Johnson v. Florida*, 602 So.2d 1288 (Fla. 1992)(attempted criminal prosecution of pregnant drug-abuser for delivery of a controlled substance to another in violation of the narcotics laws). See generally DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 159-64 (1997).

¹⁶⁹ 209 Wis. 2d 112, 561 N.W.2d 729 (1997).

¹⁷⁰ *Wisconsin v. Kruzicki*, 197 Wis. 2d 532, 547-60, 541 N.W.2d 482, 487-93 (Ct. App. 1995).

¹⁷¹ *Wisconsin v. Kruzicki*, 209 Wis.2d at 123-24; 561 N.W.2d at 734-35. The Court explained that the Wisconsin legislature had originally enacted Chapter 48, consolidating and revising statutes dealing with neglected, dependent, and delinquent children (and providing that children in danger could be taken into protective custody), in 1919. Chapter 48 had defined a neglected child as “any child under the age of sixteen” who met certain criteria. The age limit was raised to eighteen in 1939. In 1955, the legislature moved the definition of child to a separate definitions section, defining “child” as “a person under 18 years of age.” In 1977, the legislature changed the definition of child to mean “a person who is less than eighteen years of age.” In 1995, the legislature made substantial changes in Chapter 48, but left the definition of “child” unchanged. Thus, it appeared that the last substantive change in the definition of the term child had been made in 1955 at the latest (and arguably in 1939, when the age limit was increased to eighteen). None of the statutory changes since 1919 appear particularly relevant to the question of whether a fetus can be considered a “child” for purposes of the statute.

¹⁷² Wis. Stat. § 48.02(2) (2001).

¹⁷³ *Kruzicki*, 197 Wis. 2d at 538-39, 541 N.W.2d at 484.

liabilities for harming fetuses, particularly viable ones.¹⁷⁴ While much of this movement has involved judicial modification of common law doctrines,¹⁷⁵ in some states it has involved statutory revisions.¹⁷⁶ While there has been a continued recognition of women's rights to terminate their pregnancies (primarily by judicial rulings on federal constitutional challenges),¹⁷⁷ in some states even laws regulating abortion have moved toward recognizing fetal interests to the maximum degree consistent with federal and state constitutional limitations (and beyond).¹⁷⁸ Nevertheless, the relationship between mother and child involves interests that fundamentally differ from those involved in most of the areas where states have increasingly accorded fetuses recognition as "persons" — protecting the fetus may involve significant infringements on the freedom of the women who carry them. Use of child endangerment laws in that context could authorize limitation of not only otherwise illegal activity (*e.g.*, the illegal use of narcotics), which states have heretofore targeted, but also of entirely legal activity, such as smoking, consuming alcohol, failure to maintain proper standards of nutrition, and failure to secure adequate pre-natal care.¹⁷⁹

Not surprisingly, the Wisconsin Supreme Court found little indication of an intent to

¹⁷⁴ See Robertson, *supra* note 167, at 439-41; accord RICHARD C. TURKINGTON & ANITA L. ALLEN, PRIVACY LAW 661-64 (1999).

¹⁷⁵ See *Summerfield v. Super. Ct.*, 144 Ariz. 467, 475-77, 698 P.2d 712, 721 (1985); Buelow, *supra* note 167, at 979-84; Klasing, *supra* note 167, at 934-51.

¹⁷⁶ The criminal prohibitions on killing fetuses are largely a product of statutory law. Alison Tsao, Note, *Fetal Homicide Laws: Shields Against Domestic Violence or Sword to Pierce Abortion?*, 25 HASTINGS CONST. L.Q. 457, 461, 468-69 (1998); Buelow, *supra* note 167, at 976-78.

¹⁷⁷ See generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.29, at 809-23 (5th ed. 1995).

¹⁷⁸ *E.g.*, Neb. Rev. Stat. § 28-328(1) (2001) (partial birth abortion ban invalidated in *Stenberg v. Carhart*, 530 U.S. 914 (2000)); Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989 18 Pa. Cons. Stat. §§ 3203-3220 (1990) (addressed in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)); see generally NAT'L ABORTION AND REPROD. RIGHTS ACTION LEAGUE FOUND., WHO DECIDES?: A STATE-BY-STATE REVIEW OF ABORTION AND REPRODUCTIVE RIGHTS 1-14 (11th ed. 2002), available at <http://www.naral.org/mediaresources/publications.html>.

¹⁷⁹ See Robertson, *supra* note 167, at 442-50; Tsao, *supra* note 176, at 478. States seem to have chosen a different approach with respect to pregnant women's consumption of alcohol, which can lead to fetal alcohol syndrome. Some states have chosen to mandate warnings (either at the point of purchase or at the time of issuance of marriage licenses), rather than invoking child welfare laws to place pregnant drinkers in custody or initiating criminal prosecution for child endangerment.

resolve these issues at any of the points that the Wisconsin legislature had revised the definition of “child” for purposes of the state’s child welfare statutes.¹⁸⁰ Thus, addressing such situations was surely not a part of the public justification of the statute at any point. In addition, the issue of limiting pregnant women’s freedom of action, particularly freedom of action to engage in otherwise legal activities, raises issues that differ significantly from those raised by the third-party activities that harm fetuses.¹⁸¹ The freedom of those third parties is not limited in the same way. Moreover, they may have no relationship to the fetus and, indeed, act in opposition to those who do (namely the parents). Because state legislatures should confront these issues directly (if pregnant women’s conduct is to be restrained), the Wisconsin Supreme Court ruled correctly in refusing to extend the “laws” recognizing fetal interests, and acted properly in refusing to recognize fetuses as children for purposes of Wisconsin’s child endangerment statutes.¹⁸²

¹⁸⁰ *Kruzicki*, 209 Wis. 2d at 124, 137, 561 N.W.2d at 735, 740.

¹⁸¹ *See, e.g., Kruzicki*, 209 Wis. 2d at 130-31, 561 N.W.2d at 737-38; *Summerfield*, 144 Ariz. at 478, 698 P.2d at 723. Indeed, the quintessentially pro-life Missouri statute which explicitly includes *in utero* human offspring within the definition of “person” for purposes of all state statutes, Mo. Rev. Stat. § 1.205 (2001), also explicitly provides that nothing therein “shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.” Mo. Rev. Stat. §1.205(4).

¹⁸² *See Kruzicki*, 209 Wis. 2d at 134-38, 561 N.W.2d at 739-40.

Conclusion

In a time when law, public restrictions upon private conduct, is so central, the inadequacies of the institutions that create “law” pose a dilemma. Legislators cannot resolve policy issues at the speed required by modern life, given the central position that law has assumed in our society. By necessity, in many instances deadlocked legislatures simply refuse to act. Courts lack the legitimacy to make controversial policy judgments openly because of non-majoritarian institutions’ anomalous position in a democratic polity. Yet they must rule on controversies brought before them.

As I have suggested above, though judicial statutory “updating” may be non-majoritarian, continuing to apply the prescriptions of legislators whose right to make such decisions has long ended and who have not even seen the contours of the issue faced by those in the present is surely not consistent with our conception of majoritarianism either. Thus, courts must make judgments when circumstances unanticipated by the enacting legislature arise. I have suggested that later statutory law provides a majoritarian basis for updating old statutes. The usefulness of this approach is no doubt limited, and surely theories like those advocated by Eskridge and Calabresi provide guidance in a much wider range of cases. However, they do so at a cost of becoming unmoored from majoritarianism.

Ultimately, Eskridge and other members of the dynamic interpretation school have advanced the understanding of statutory interpretation greatly, by suggesting that we stop allowing ourselves to be hypnotized by “images of the past” in the form of departed legislators’ preferences.

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