CONSTITUTIONAL STATUTORY SYNTHESIS

Nickolai G. Levin[*]

* Law Clerk to the Honorable Morris Arnold, United States Court of Appeals for the Eighth Circuit. J.D., Yale University 2002; B.A., Dartmouth College 1999. E-mail: Nickolai.Levin@aya.yale.edu. A previous draft of this Article was awarded the Thomas I. Emerson Prize from the Yale Law School faculty for the best paper or project on a subject related to legislation. The author wishes to thank Bruce Ackerman, Morris Arnold, Diane Browne, Guido Calabresi, Michael Carrier, Charlton Copeland, Brad Daniels, Lane Dilg, William Eskridge, David Fontana, Adam Hickey, Rochelle Kaskowitz, Vasan Kesavan, Emil Kleinhaus, Robert Kry, Ryan Meyers, Michael Yaegar, and Julie Zamacona. All mistakes are my own.

INTRODUCTION

Beware of the "floodgate" conception of statutory evolution—the notion that allowing judges to ameliorate statutory anachronism necessarily opens the interpretive task to an endless stream of political considerations. Under this conception, originalists act as guardians against subjective judicial policymaking and legal unpredictability.[1] And evolutionary theories, while perhaps descriptively accurate,[2] are easy to dismiss as democratically illegitimate.

Perhaps the "floodgate" conception is true in the context of constitutional interpretation, that there is no "viable middle ground between the deadhand problem of originalist constitutional interpretation and the judicial subjectivity problem of nonoriginalist interpretation."[3] But statutory interpretation is different. A statutory middle ground exists because constitutional interpretation *preexists* as a medium for the synchronic, subjective

1. *E.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA 256-59 (1990); 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 9-12 (Amy Gutmann ed., 1997) [hereinafter Scalia, *Essay*].

2. *See, e.g.*, William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1231-46 (2001) (describing the evolutionary path of the Sherman Act, the Civil Rights Acts of 1964, and the Endangered Species Act of 1973).

3. Michael J. Klarman, *Fidelity, Indeterminacy, and the Problem of Constitutional Evil*, 65 FORDHAM L. REV. 1739, 1739 (1997).

dirty work. With every constitutional decision, the status of what is constitutionally protected (and why) changes[4]—perhaps wrongly, perhaps subjectively. But if one presumes the prevailing doctrine to be legitimate,[5] this doctrinal change can serve as a proxy for how society has changed more generally. Fixed and bounded prior to any statutory interpretation, the constitutional doctrine can operate as medium through which *statutes* can be updated in a restrained manner.

This constitutional updating of statutes could be achieved by a process—a theory of statutory evolution—that I call "Constitutional Statutory Synthesis." Similar to the notion of intertemporal synthesis applied by Bruce Ackerman to constitutional interpretation,[6] judges would attempt to preserve both the original meaning of a statute[7] and how constitutional principles have developed since the statute's enactment by incorporating the "gravitational force" of the constitutional change into the statute's interpretation.[8] As such, both aspects of the interpretive process would have a definitive, albeit possibly attenuated, popular pedigree:[9] a primary link to the people through the electoral mandate of the enacting legislature, and a secondary link to the people through the preservation of constitutional principles that garnered past supermajoritarian support.[10] As the constitutional

4. To say that the Constitution is changing does not mean that the Constitution is "living," as I describe *infra* notes 136-43 and accompanying text. *See generally* Morton J. Horwitz, *The Supreme Court, 1992 Term—Foreword: Constitutional Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30 (1992) (exploring the notion of constitutional change thoroughly); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976) (differentiating constitutional interpretive evolution from the idea that new rights can be created through interpretation).

5. *Cf.* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 107-41 (1997) (discussing how constitutional doctrine is a reasonable proxy for current constitutional values in most cases). That doctrine is a reasonable proxy does not mean that courts should necessarily follow the doctrine in *constitutional* interpretation. *See* Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000) (arguing that constitutional interpretation need adhere more to the Constitution itself than past doctrine).

6. *E.g.*, BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 86-99 (1991); Bruce Ackerman, *Constitutional Politics / Constitutional Law*, 99 YALE L.J. 453, 515-45 (1996). Ackerman uses the term "synthesis" to describe the method of considering together the various constitutional additions of the Founding period, Reconstruction, and the New Deal (where informal, doctrinal constitutional change occurred), with increasing relevance on the more current additions. ACKERMAN, *supra*, at 86-162. Richard Fallon has recognized the need for such an intertemporal synthetic approach in terms of interpreting jurisdictional provisions of legislation, Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 983 (1994), but he did not attempt to provide a method.

7. Original meaning could be a combination of text, intent, or purpose. *See* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 401 (1995).

8. *See id.* at 407 (incorporating Dworkin's concept of "gravitational force," RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 111 (1978), into his concept of synthesis).

9. This leaves aside, for the moment, administrative agencies, who are also a critical actor in the process of statutory evolution. They too have a "secondary link to the electorate" through their accountability to the political branches. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 466 (1989).

10. As I explain *infra* notes 115-16 and accompanying text, this view assumes an "authoritarian" version of judicial review to exist whereby constitutional interpretation *always looks backwards* to those constitutional provisions that previously possessed popular support. *See* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1496 (1988) (describing backwards-looking jurisprudence as "*authoritarian* because it regards adjudicative actions as legitimate only insofar as dictated by the prior normative

doctrine changes, so presumably would the application of the statute, subject to the constraint that any application of the statute could not be unfaithful to the original meaning of the statute.[11] As a result, the correct statutory interpretation over time would always depend both on the relevance of interim constitutional change and the specifics of the statutory scheme: The interpretation of a statute thus evolves *only when* relevant constitutional change has transpired *and* it would be practicable to incorporate the change into the statute.

A famous example, Henry Hart and Albert Sacks's Case of the Female Jurors,[12] will help make this theory of constitutional updating clearer. A statute originally enacted in 1868 says: "A person qualified to vote for representatives to the general court shall be liable to serve as a juror."[13] The issue, after passage of the Nineteenth Amendment, was whether women could rightly serve as jurors, as they were now "person[s] qualified to vote." The issue was difficult because the enacting legislature certainly intended to exclude women (as women were not "qualified to vote" in 1868), but the language of the statute was broad enough to comprise women as well.[14] Perhaps the enacting legislature used a general term such as "persons" because it intended to include women automatically if they became qualified to vote; or, it may have used "persons" out of habit, because the use of "person" to mean "man" was commonplace at the time.[15] In light of this interpretive quandary, either allowing or prohibiting women to serve as jurors would be "not unfaithful" to the statute, as the statute's meaning was sufficiently ambiguous so that either option was arguably correct. A synthetic judge would resolve the ambiguity by incorporating the post-enactment constitutional change into the statute's definition of "person" and would allow women to serve as jurors.[16]

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utterance, express or implied, of extra-judicial authority" such as the People). Both Robert Bork and Bruce Ackerman are examples of authoritarian scholars. *Id.* at 1522.

11. As I explain *infra* Subpart I.B.2, unfaithfulness could be determined similarly to how agency interpretations of law are currently evaluated for irrationality under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

12. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1172-85 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958). The example is based on *Commonwealth v. Welosky*, 177 N.E. 656 (Mass. 1931). Hart and Sacks also discuss *People ex. rel. Fyfe v. Barnett*, 150 N.E. 290 (Ill. 1926), and *Commonwealth v. Maxwell*, 114 A. 825 (Pa. 1921).

13. *Wolesky*, 177 N.E. at 658.

14. *Id.* at 659. A textualist might find this case easy; an intentionalist would find it more difficult. In this Article, I do not take a position regarding whether textualism, intetionalism, or any other hermeneutic methodology is the "correct" way to interpret a statute. I assume each judge has his own method. This Article merely concerns how—whatever that method is—the interpretation of statutes should change over time. Because this Article takes no position on the proper hermeneutic methodology, I assume, for the sake of this example, that this case is difficult, even though I recognize that pure textualists might disagree.

15. *See id.* at 660.

16. *Welosky* refused to extend the definition of "person" by implication of the Nineteenth Amendment. The court considered the situation different than previous ones where the right to vote had been extended to members of an existing classification theretofore disqualified, as women were a whole new class. *Id.* at 661. *Barnett* also refused to let women serve as jurors as it claimed that the "words of a statute must be taken in the sense in which they were understood at the time the statute was enacted."

The Female Juror example is highly simplified because it involved formal constitutional change in the form of an amendment and because the application of the constitutional change to the preexisting statute was textually obvious. Constitutional statutory synthesis also applies to certain sufficiently accepted informal constitutional change—where the change is purely doctrinal—such as the New Deal era diminishment of economic substantive due process, the civil rights decisions in the 1960s, and the Rehnquist Court's recent federalism revival. It also applies when the application of the constitutional change is not as immediately apparent as in the Female Juror example.[17]

Synthesis's interpretive legitimacy—in the Female Juror example and more generally—is not oriented in constitutional requirements. There was no contemporary constitutional prohibition of all-male juries.[18] Nor is it because of statutory fidelity—the idea that the statute somehow mandated it—as that is speculative at best.[19] Rather, its legitimacy, as Harry Wellington recognized in his defense of "quasi-constitutional" judicial review, "stems from the nature of [the constitutional principle being incorporated into the statute] and the comparative advantage of courts over legislatures in elucidating principles."[20] Constitutional principles are unlike any other sort of principle or policy consideration because the judiciary has an attenuated link to the people when preserving constitutional principles through their

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Barnett, 150 N.E. at 292. *Maxwell*, conversely, allowed women as jurors, claiming that "[i]t is a rule of statutory construction that legislative enactments in general and comprehensive terms, prospective in operation, apply alike to all persons" within "their general purview and scope." *Maxwell*, 114 A. at 829 (quoting 25 Ruling Case Law 778).

17. Although the Female Juror example included a state statute, this Article only discusses federal statutes. Synthesis could apply to state statutes too; one would also have to consider state constitutional change.

18. *Welosky* considered and quickly dismissed a Fourteenth Amendment challenge to prohibiting women from serving as jurors. *Welosky*, 177 N.E. at 663-64. One might conclude differently if one read the Nineteenth and Fourteenth Amendment in a hybrid fashion as does Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002). Vikram Amar has argued that jury service is a political right and therefore the right for women to serve on juries directly followed from the Nineteenth Amendment. Vikram David Amar, *Jury Service as Political Participation Akin To Voting*, 80 CORNELL L. REV. 203, 241 (1995). *But see id.* at 242 (recognizing that "women's access to juries did not follow the adoption of the Nineteenth Amendment as a matter of course").

19. Lawrence Lessig's work on translation theory makes a strong case that fidelity is enhanced when changes in context, particularly constitutional changes, are factored into figuring out the modern functional equivalent of the original application in the original context. *See* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1182-92 (1993) (explaining the superiority of two-step translation to one-step translation) [hereinafter Lessig, *Translation*]; *see also* Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365 (1997) (describing relevant constraints on translation theory) [hereinafter Lessig, *Constraint*]; Lessig, *supra* note 7 (describing translation and synthesis as modes of fidelity).

20. Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 264 (1973); *see also* Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 32 (1957) (describing how "shrubbery in the constitutional foothills" should enter interpretive considerations). Wellington used this to justify why courts should incorporate constitutional principles if Congress appeared to ignore that principle but the statute could be interpreted as to avoid the constitutional problem. This Article involves a different situation: where the quasi-constitutional consideration arises after the statute's enactment.

past supermajoritarian support. Thus, judicial updating based on constitutional change comports with the classically liberal concept of legitimacy as popular consent. And, the judiciary has a comparative advantage interpreting the Constitution that it does not have in relation to other sorts of considerations.[21] Therefore, allowing *only* constitutional updating of statutes comports with the classical legal process[22] notion of legitimacy as restricting each branch to functions in which it has superior competence. In terms of the Female Juror example specifically, its democratic legitimacy lies in the People enacting the Nineteenth Amendment and the judiciary's comparative advantage in preserving the principles underlying that supermajoritarian enactment.

This Article expounds upon that framework and demonstrates how a synthetic approach could enhance our understanding of several tough statutory cases. Part I develops synthesis theory and methodology. It explains why the Constitution encourages judges to create constitutional statutory coherence—but not necessarily any other sort of statutory coherence, such as political coherence—and describes how to achieve this constitutional coherence with federal statutes interpreted in federal courts.[23] Part II applies synthesis to cases from the areas of antitrust (*Alcoa*[24] and *Sylvania*[25]) and civil rights (*Weber*[26] and *Bob Jones*[27]), using each case instrumentally to elucidate different aspects of how synthesis theory works. Part III extends synthesis theory's application to interpretive methodology itself. Starting from the premise that methodological commitments themselves need to be grounded in the Constitution,[28] it analyzes how a *changing* constitution may alter the legitimacy of constitutionally inspired federalism-related clear-statement rules in cases such as *Gregory*,[29] *Atascadero*,[30] and *BFP*.[31] Part IV compares constitutional statutory synthesis to the evolutionary theories ad-

21. I assume the judiciary's comparative advantage interpreting the Constitution to exist and to be well accepted, but the issue is debatable. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION 18-19 (3d ed. 1999) (listing other possibilities).

22. Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 217 (1983) (depicting "classical" legal process theory as the belief that the judicial power lies in areas of particular institutional competence).

23. State courts could perform constitutional statutory synthesis, too. I do not discuss "synthesis" in state courts here because that broaches issues of parity between state and federal courts in terms of protecting constitutional rights that are beyond the scope of this Article.

24. United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

25. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

26. United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979).

27. Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

28. *E.g.*, Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 839 (1991).

29. Gregory v. Ashcroft, 501 U.S. 452 (1991).

30. Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).

31. BFP v. Resolution Trust Corp., 511 U.S. 531 (1994).

vanced by Alexander Aleinikoff,[32] Guido Calabresi,[33] Ronald Dworkin,[34] William Eskridge,[35] and Cass Sunstein.[36] Part V briefly concludes.

As Part IV explains in particular, several theorists have suggested that judges account for constitutional change as part of statutory interpretation. But previous theorists have included constitutional evolution as one consideration *amongst* many—hence why the term "statutory evolution" currently conjures images of floodgates. As the next Part demonstrates, however, the judiciary's relationship to constitutional change is unique. The appeal of constitutional statutory synthesis is its *restraint.*

I. THEORY

Since Hart and Sacks's project in *The Legal Process* to fit statutes into the current legal system as a whole,[37] both originalist and evolutionary interpretive theories have focused on the need for statutory compatibility with the surrounding body of law. Originalists—whether textualist (looking to the best construction of the statute's words)[38] or intentionalist (focusing on the specific application of the statute contemplated by the enacting legislature)[39]—support such compatibility whenever it enhances "fidelity" (i.e., being a "faithful agent") to the enacting legislature.[40] Justice Scalia, for instance, has discussed how statutory provisions should cohere with both the rest of the statutory scheme and other statutes, "a compatibility which, by a benign fiction, we assume [the enacting] Congress always has in mind."[41] And, Lawrence Lessig's work on translation theory[42]—working primarily in

32. T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988).

33. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

34. RONALD DWORKIN, LAW'S EMPIRE 228-75, 313-54 (1986).

35. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).

36. CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE (1990); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

37. HART & SACKS, *supra* note 12.

38. Noticeable exemplars are Justice Antonin Scalia and Judge Frank Easterbrook. *E.g.*, Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988); Scalia, *Essay*, *supra* note 1. The most sustained recent defense is 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 (1994).

Textualism can be interpreted both as hermeneutic methodology (a directive not to look at legislative history), *see* Scalia, *Essay*, *supra* note 1, at 17, and as a form of dynamic interpretation (ascertaining plain meaning within the "surrounding body of law into which the provision must be integrated"), Green v. Bock Laundry Machine Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring in the judgment).

39. One famous intentionalist approach is imaginative reconstructionism. *E.g.*, Fishgold v. Sullivan Drydock & Repair Corp., 154 F.2d 785, 788-89 (2d Cir. 1946) (Hand, J.) (describing how judges should carry themselves back to when the statute was passed and "reconstruct, as best we may, what was the purpose of Congress when it used the words in which [the sections of the statute] were cast"); *see also* RICHARD A. POSNER, PROBLEMS OF JURISPRUDENCE 270 (1990) ("[J]udges should ask themselves, when the message imparted by a statute is unclear, what the [enacting] legislature would have wanted them to do in such a case of failed communication.").

40. For a description of different sorts of originalist theories, see Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073 (1992).

41. *Green*, 490 U.S. at 528.

42. Lessig's work builds on Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980), and Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpre-*

the constitutional interpretive context[43]—has expanded this "benign fiction" to intertemporal coherence. According to Lessig, a fidelitist would search for the *functional equivalent* of the original meaning in the original context in order to account for changed presuppositions since the statute's enactment[44]—as long as the interpreter retains both "structural humility" and "humility of capacity."[45]

Conversely, evolutionists—usually purposivists of some sort (concentrating on the problem(s) the statute was designed to solve)[46]—consider statutory fidelity to be an elusive siren that often functions more appropriately as a constraint on achieving statutory coherence rather than the goal of interpretation itself.[47] As I see it, their premise is that a range of "not un-

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tivism and Neutral Principles, 96 HARV. L. REV. 781 (1983). Brest was more skeptical of translation than Lessig. On translation-related indeterminacies, see JAMES BOYD WHITE, JUSTICE AS TRANSLATION 257-69 (1990).

43. *But see* Lessig, *Translation*, *supra* note 19, at 1247-50 (discussing the Sherman Act).

44. *Id.* at 1180-92 (calling this two-step fidelity). For criticism, see Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig's Theory of Translation*, 65 FORDHAM L. REV. 1435 (1997). *But cf.* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999) (describing how originalism in constitutional interpretation has changed from original intent to original meaning).

45. Lessig defines structural humility as limiting the scope of translation to presuppositions of a particular kind (political, moral, and so forth). This prevents the translator from improving the material, "carry[ing] the weaknesses of the original text as well as the strengths into its new context." Lessig, *Translation*, *supra* note 19, at 1252-53. Lessig contends that structurally humble judges would not account for political presuppositions. *Id.* at 1254-55.

Lessig defines humility of capacity as limitations on the institution committing the translation (*e.g.*, courts, Congress, agencies) because of weaknesses of institutional capacity. *Id.* at 1252. He claims, for instance, that the Court has not actively policed the limits of interstate commerce, leaving it to Congress, because of inherent institutional limitations on courts performing such a task. *Id.* at 1262.

Despite the humility-related constraints placed on judicial translation, Michael Klarman has attacked Lessig's translation theory (as applied to constitutional interpretation) as indeterminate: "[T]ranslating old concepts into modern contexts inevitably implicates the very sort of unconstrained judicial subjectivity that translation's proponents seek to avoid." Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 395 (1997). This indeterminacy criticism broaches three separate grounds of potential judicial subjectivity. First is determining what presuppositions have changed to deserve translation. *Id.* at 407. Second is the level of generality for which they should be translated. *Id.* at 395. Third is imputation to the original enactors, as the Framers may have "intended that a compensating adjustment be made to reflect the initial accommodation of changed circumstances." *Id.* at 396, 398.

Constitutional statutory synthesis mitigates Klarman's first concern by providing a common set of sources as to ascertain relevant change. *See infra* notes 194-97 and accompanying text. It also avoids his third criticism by avoiding any congressional imputation. It still falls prey, however, to his level-of-generality criticism, *see infra* Subpart I.B.4.b and Part II.

46. The most well-known purposivists are Hart and Sacks. They assume that the legislature is comprised of "reasonable persons pursuing reasonable purposes reasonably," and advise judges to carry out those purposes. HART & SACKS, *supra* note 12, at 1378. They see courts and legislatures as partners carrying out the statutory purpose. As such, purposivism is arguably both originalist (as part of the enacting legislature's considerations) and evolutionary (as it may turn out that the enacting legislature's specific solution is not the best way to solve the problem the statute's framers wanted to solve). I deem purposivism "evolutionist" because it only has independent content when it differs from textual meaning and original legislative intent.

47. This approach accords with what Daniel Farber has called the "weak conception of legislative supremacy," where "a judge may not contravene statutory directives . . . [and] views [legislative] supremacy as a constraint on judicial action, rather than as a complete specification of the judicial role in statutory cases." Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 287 (1989). Farber does not necessarily support this "weak conception of legislative supremacy," as he describes how legislative intent is notoriously "slippery" and that it creates unpredictability concerns.

faithful" interpretations may exist, whereas the choice among them is inevitably subjective.[48] The rationale supporting statutory coherence thus has to be found elsewhere in our constitutional order[49]—and judges' responsibility as legislative agents is limited to being "not unfaithful" to the enacting legislature.

In this light, constitutional statutory synthesis is evolutionist insofar as it adopts a "not unfaithful agent" approach. Part A looks to the Constitution to determine what sort of statutory "coherence" is desirable (in which different types of "coherence" relate to the different types of considerations a judge should include as part of statutory interpretation). Part A contends that *only* coherence to the Constitution itself and other federal statutes is constitutionally encouraged. It sets forth various legal arguments for constitutional statutory coherence even when a statute's constitutionality is not in doubt.[50] Part B describes how to achieve such coherence through synthesis, focusing on how constitutional principles could be affirmatively incorporated into statutory interpretation while remaining "not unfaithful" to original statutory meaning, similar to how administrative agencies interpret statutes under *Chevron*.

A. Constitutional Statutory Coherence

Striking down legislation incompatible with constitutional rights and specific constitutional provisions (what I call "narrow" constitutional statutory coherence) is generally understood to fall under courts' power of judicial review.[51] A more perplexing issue concerns the interpretation of statutes

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See id. at 287-91. Farber claims, however, that "[i]f a judge does have genuine doubts about the legislation's meaning, there can be no question of obedience or disobedience." *Id.* at 291-92. In that light his work is consistent with a "not unfaithful" agent approach because it is those cases that fall in a "not unfaithful" range, *see infra* Figure B, where genuine doubts about statutory meaning exists.

Several scholars are more aptly termed "evolutionist" than Farber. See ESKRIDGE, *supra* note 35, at 239-74 (describing the need for more "horizontal coherence," as opposed to "vertical coherence," than currently exists); DWORKIN, *supra* note 34, at 338 (explaining how the interpreter must construct "justification that fits and flows through [the] statute and is, if possible, consistent with other legislation in force"); and Aleinikoff, *supra* note 32, at 50-58 (discussing the need for "synchronic coherence") for more evolutionist approaches than that of Farber.

48. "Not unfaithful" is my own moniker.

49. *See* Mashaw, *supra* note 28, at 839 ("[O]ne cannot rest with the simple assertion that coherence of the legal order is a good thing. One has to go on to say why coherence is important to a legal order—meaning a constitutional order—like ours.").

50. Ira Lupu has discussed this matter at some length. Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1 (1993). Lupu discusses both situations where statutes are constitutionally questionable and where "statutes are enacted in contexts in which constitutional constraints, though not binding, nevertheless exert normative influence," referring to these as constitutional law orbits. *Id.* at 7-8. He analyzed what it meant when Congress intentionally legislated in areas of constitutional sensitivity, examining the interaction between congressional and constitutional conceptions of those social norms. This Article addresses that comparative dialogic aspect briefly, *see infra* Subpart I.B.4.b, but its primary concern is elsewhere: how to accommodate for post-enactment *changed* constitutional norms and why.

51. For a description of four different types of judicial review, see Guido Calabresi, *The Supreme Court, 1990 Term—Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80 (1991).

that are unambiguously constitutional: Should one affirmatively integrate constitutional principles into statutes wherever practicable according to the statute's terms (what I call "broad" constitutional statutory coherence)? A clear-cut answer does not exist because every answer depends on one's initial premises of democratic legitimacy.

In this Article, I adopt the following two premises that normally support originalist arguments: that legitimacy is linked to popular consent and that each branch of government should restrict its behavior to those functions in which it has superior competence. This Part, assuming these premises, contends that various constitutional provisions work together to establish a tripartite constitutional structure:

> (1) Narrow constitutional statutory coherence is constitutionally *obligated*;
> (2) Broad constitutional statutory coherence and compatibility with other federal statutes are constitutionally *encouraged where practicable*; and
> (3) Other forms of statutory coherence, such as considering likely political consequences to interpretation, are constitutionally *discouraged*, because more competent and electorally accountable actors exist than courts.

To establish this structure, I examine arguments based on courts' power of judicial review, the Constitution as fundamental law, and the Judicial Power. First, however, I explicate the origins of the "popular consent" premise in Lockean liberal political theory[52] and the "superior competence" premise in classical legal process theory and describe their traditional connections to originalist theories.

1. Jurisprudential Premises

a. Lockean Liberal Political Theory: Democratic Legitimacy and Popular Consent

Locke envisions government as a form of social contract in which autonomous individuals overcome collective action problems by "mak[ing] *one* [*b*]*ody* [*p*]*olitick*, [*sic*] wherein the [*m*]*ajority* have a [r]ight to act and

52. The moniker "liberal political theory" encompasses many quite different theories. For instance, D.F.B. Tucker has identified two major groupings: (1) the "Functionalist Liberal Theories," which include the "Utilitarian Functionalism" theory (*e.g.*, John Stuart Mill), the "Indirect Utilitarianism" theory (*e.g.*, Frederick Schauer), and the "Democratic Functionalism" theory (*e.g.*, Alexander Meiklejohn); and (2) the "Deontological Liberal Theories," which include the "Lockean Liberalism" theory (*e.g.*, John Locke) and the "Rawlsian Alternative" theory (*e.g.*, John Rawls and Ronald Dworkin). D.F.B. TUCKER, LAW, LIBERALISM, AND FREE SPEECH 9-42 (1985). These theories are not reducible to any set of characteristics. I focus on Lockean political theory because of its usual connection to originalism and because the notion of legitimacy as popular consent fits with most versions of liberalism. ESKRIDGE, *supra* note 35, at 111.

conclude the rest."[53] Popular consent and accountability thus become the basis for democratic legitimacy.[54] Governmental activity is legitimate only insofar as each branch performs its respective functions that are envisioned by the social contract, as only then is the authority for governmental regulation ultimately traceable to the people.[55]

This contractarian model has continued to form the basis for much liberal and, in particular, originalist thought.[56] Especially to originalists, it usually assumes a formalist dimension in which policymaking authority is vested primarily in the legislature[57] and residually in administrative agencies through their "secondary link to the electorate" by virtue of their accountability to the political branches.[58] According to this contractarian model, the judiciary can displace these branches' political choices only when they conflict with constitutional principles that enjoy attenuated supermajoritarian support.[59]

b. Classical Legal Process Theory: Democratic Legitimacy and Superior Competence

Legal process theories view law as a "purposive activity, a continuous striving to solve the basic problems of social living."[60]

> Certain guiding "principles" have been developed through the legal system, and other "policies" have been adopted to solve specific problems. More fundamental are the "constitutive or procedural understandings or arrangements" by which the substantive arrangements are applied, for process is "at once the source of the substan-

53. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 95 (C.B. Macpherson ed., 1980) (1690).

54. *See* Farina, *supra* note 9, at 467 (explaining "the Lockean view" that the exercise of power can be defended only through electoral accountability and describing LOCKE, *supra* note 53, at §§ 134-42); *see also* BORK, *supra* note 1, at 351-55 (implicitly adopting popular consent as the benchmark of legitimacy).

55. LOCKE, *supra* note 53, at § 141 (discussing how the power of the legislature derives from the people by a "positive voluntary [g]rant."); *id.* §§ 96-98 (describing the connection between the consent of the majority and the consent of the whole body politic and why, for practical reasons, the former usually suffices). The Constitution embodies this popular consent notion in many ways, such as the Preamble's famous beginning: "We the People." *E.g.*, Amar, *supra* note 5, at 34.

56. *See* ESKRIDGE, *supra* note 35, at 111; *see also* Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1121 (1998) (explaining how the "fundamental theory of political legitimacy in the United States is contractarian").

57. Locke argues that the legislature's lawmaking power is nondelegable. LOCKE, *supra* note 53, § 141. Thomas Merrill has made a similar argument based on the Constitution's separation of powers and the fact that Article I places "all legislative Powers" in Congress. Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 19, 32-33 (1985).

58. Farina, *supra* note 9, at 466.

59. *See, e.g.*, Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1766 (1997) ("The political theory underlying strict originalism is a form of social contract theory: unelected judges may displace legislative decisions in the name of the Constitution, but *only* because the Constitution is a social contract to which consent was validly given through ratification.").

60. HART & SACKS, *supra* note 12, at 148.

> tive arrangements and the indispensable means of making them work effectively."[61]

It is a political theory, because legitimacy is a procedural, and not a popular, concern: "One may debate the correctness of a legal decision or the degree of popular support for it, but legal process maintains that if a decision is the 'duly arrived at result of a duly established procedure,' that alone lends it legitimacy."[62]

Robert Weisberg has differentiated "classical" legal process theory from "new" legal process theory.[63] Classical legal process theory, drawing on the work of Frankfurter and others, envisions "an organic system composed of the different branches of government, each branch playing its appropriate role."[64] It

> sought to define with fastidious and elegant precision the role of the courts in relation to the roles of the legislature and executive . . . [and] would counsel judges to leave all matters of substantive policy to the other more representative branches, [as] it often took a restrained view of the judicial function.[65]

It tracks formalist conceptions of the separation of powers[66] and what Jane Schacter has called "institutional essentialism."[67] In statutory interpretation, it customarily views judges as legislative *agents*.[68]

New legal process theory, conversely, refers to a process of "interpretation" and "dialog" that focuses on the neutrality of processes and courts' "complementary"[69] role in policing those processes.[70] It views courts as *partners* of the legislature. Its roots are *Carolene Products*'s famous foot-

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61. ESKRIDGE, *supra* note 35, at 142 (quoting HART & SACKS, *supra* note 12, at 3-4 (emphasis omitted)).

62. *Id.* (quoting HART & SACKS, *supra* note 12, at 4 (describing the principle of institutional settlement)).

63. Weisberg, *supra* note 22.

64. *Id.* at 217.

65. *Id.*

66. *Id.* at 232. For an example of a formalist separation of powers conception, see *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

67. Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 598 (1995); *see also* Farina, *supra* note 9, at 466-67 (calling this the "interference with legitimate political control" argument, as each branch performs that for "which it is peculiarly suited").

68. ESKRIDGE, *supra* note 35, at 121 ("For formal (the Constitution) as well as functional (democratic theory) reasons, the legislative supremacy precept demands that subsequent statutory interpretation be linked to what Congress (the surrogate for We the People) consented to when it passed the statute.").

69. *See* Schacter, *supra* note 67, at 626-36 (discussing various legal theories supporting the notion of the Supreme Court and Congress as complementary institutions).

70. *See* Weisberg, *supra* note 22, at 239-49; Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 CAL. L. REV. 919, 919-20 (1989) (reviewing WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (1988)).

note four,[71] as well as Hart and Sacks's famous work. New legal process theories tend to inspire functionalist conceptions of the separation of powers, focusing on overlapping spheres of authority with each branch checking one another.[72]

Classical legal process premises traditionally support originalist, faithful agent theories. That, however, need not be the case. It is well accepted that courts have superior competence interpreting constitutional principles.[73] When a statute violates established constitutional principles, courts are *supposed* to invalidate the statute—to establish narrow constitutional statutory coherence—as a function of courts' role as constitutional agents for "We the People."[74] As I argue in the rest of this Subpart, it also supports broad constitutional statutory coherence—which allows for evolutionary statutory interpretation—as long as the evolved interpretation is "not unfaithful."

Taking these "popular consent" and "superior competence" premises as my basis for democratic legitimacy,[75] I next examine why the Constitution

71. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938); *see* Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 715 (1985) ("The *Carolene* solution is to seize the high ground of democratic theory and establish that the challenged legislation was produced by a profoundly defective process.").

72. *See* Farina, *supra* note 9, at 526 (discussing the relationship between the judiciary as a "counterbalance" and separation of powers concerns).

73. Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2 (1975) ("After a history of far more struggle than is generally remembered, it is now settled that (absent a constitutional amendment) the Court has the last say, and in that sense its constitutional interpretations are both authoritative and final."); *see* Powell v. McCormack, 395 U.S. 486, 549 (1969) (describing the Supreme Court as the "ultimate interpreter of the Constitution"). Monaghan discussed how much of what passed as constitutional interpretation "is best understood as . . . a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions; in short, a constitutional common law subject to amendment, modification, or even reversal by Congress." Monaghan, *supra*, at 2-3. He called this the creation of a "quasi-constitutional" law. *Id.* at 9. He was mainly concerned with Congress's ability to legislate as to set a federal floor of constitutional rights protecting individual liberties. *See id.* at 10-30. I use the term "quasi-constitutional law" differently, referring to how federal policies could be infused with constitutional principles even when their overall constitutionality is not in doubt. *See infra* notes 81-86 and accompanying text (describing my use of the term "quasi-constitutional" law).

74. William Eskridge has also discussed this dual judicial role. "In my view, Article III judges interpreting statutes are both agents carrying out directives laid down by the legislature and partners in the enterprise of law elaboration, for they (like the legislature) are ultimately agents of 'We the People.'" *E.g.*, William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 992 (2001). Eskridge views judges as "partners in the enterprise of law elaboration" because he operates from "new" legal process premises of democratic legitimacy; hence, for him, the fact that judges are agents for "We the People" commits judges to being partners. Since I operate from classical legal process premises, I argue that being agent for "We the People" commits judges to areas of institutional superiority *only* —namely, elaborating and preserving constitutional principles. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution . . . ."); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 23-28 (2d ed. 1986) (depicting the Court's legitimacy as a function of preserving constitutional values; "Not merely respect for the rule of established principles but the creative establishment and renewal of a coherent body of principled rules"); Bruce Ackerman, *Discovering the Constitution*, 93 YALE L.J. 1013, 1051 (1984) ("The *democratic* task of the Supreme Court is to interpret the Constitution of the United States.").

75. Contractarian models of legitimacy tend to support classical legal process premises rather than new legal process premises because the notion of court as legislative partner will cause courts to unmake legislation when defective processes exist. This unmaking of legislation poses contractarian difficulties because it interposes courts between the People and their best policymaking surrogates potentially erro-

establishes three different levels of support (required, encouraged where practicable, and discouraged) for three different types of statutory coherence (narrow constitutional statutory coherence, broad constitutional statutory coherence, and other forms of statutory coherence), starting with arguments based on federal courts' power of judicial review.

2. Narrow Constitutional Statutory Coherence

Narrow constitutional statutory coherence is the byproduct of judicial review, itself the progeny of *Marbury v. Madison*.[76] *Marbury* espoused a formalist conception of the rule of law—which interprets law as a "clear prescription that exists prior to its application and that determines appropriate conduct or legal outcomes"[77]—whereby the legislature makes the law and "it is, emphatically, the province and duty of the judicial department, to say what the law is."[78] According to Chief Justice Marshall, judges, after finding "what the law is," should invalidate legislation inconsistent with the Constitution. This requirement follows from the Constitution's status as fundamental law, the special obligations adhering to a written constitution, and the judiciary's Article III duties to decide cases or controversies consistent with the Constitution's status as fundamental law.[79] That much is old hat, and I do not wish to rehash the arguments about *Marbury*'s legitimacy here. Albeit occasionally contested, it is well established that the Constitution is fundamental law and that judges are obligated to ensure that legislation does not violate recognized constitutional rights or specific constitutional provisions.[80]

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neously based on the judges' values. *See* Harry H. Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486, 500 (1982) (discussing how a theory of political fairness necessarily involves value determinations).

76. 5 U.S. (1 Cranch) 137 (1803).

77. Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 14 (1997). Fallon describes how the term "rule of law" is susceptible of four different conceptions: historicist, formalist, legal process, and substantive. For example, historicist "rule of law" aspires "to respect an ideal of legal legitimacy by associating the law's substantive content with past, publicly accountable acts by decisionmakers who are recognized under historically established norms as possessing legitimate lawmaking power." *Id.* at 11. For examples of historicist originalist scholarship, see RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 1920, at 19-20 (1987); BORK, *supra* note 1, at 318; and Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989) [hereinafter Scalia, *Originalism*].

Formalist conceptions of the rule of law also play a large role in originalist theories. *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LAW AND IN LIFE 167-76 (1991) (describing the relationship between rules and the rule of law); Easterbrook, *supra* note 56, at 1121 (discussing the need for formalism within contractarian models of democratic legitimacy); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) [hereinafter Scalia, *Rule of Law*]. Formalist rule-of-law conceptions underlie Locke's work. *E.g.*, LOCKE, *supra* note 53, § 136 ("The *Legislative . . . is bound to dispense Justice*, and decide the Rights of the Subject *by promulgated standing Laws* . . . [as otherwise men would] be at the same uncertainty[] as it was in the state of Nature.").

78. *Marbury*, 5 U.S. at 177.

79. *Id.* at 177-80. Judicial invalidation of unconstitutional legislation, the modern form of judicial review, corresponds to what Calabresi calls "Type I review." Calabresi, *supra* note 51, at 86-90.

80. *See* Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L.

3. Broad Constitutional Coherence

Broad constitutional statutory coherence involves not only judicial review but also *quasi-constitutional* judicial review. Quasi-constitutional judicial review, as I use the term, refers to the protection of constitutional norms and principles—"shrubbery in the constitutional foothills"[81]—even when the overall constitutionality of the legislation is not in doubt. The Case of the Female Juror is one example involving a state statute, but it arises in relation to federal statutes too. The need for it arises because there are situations in which a specific constitutional provision (e.g., Article I, Section Five of the Fourteenth Amendment) clearly grants Congress the ability to legislate, but the statute still conflicts with other constitutional norms and principles that do not rise to the level of constitutional "rights" as to trump the statute's constitutionality.[82] Or, as is the case with structural constitutional values, they "are either unenforceable by the Court because they involve essentially nonjusticiable political questions or will be underenforced by the Court."[83] The question then becomes not whether constitutional norm *X* (e.g., general substantive due process norms) prevents Congress from enacting legislation *Y* (e.g., the Sherman Act) because constitutional provision *Z* (the Commerce Clause) obviously allows it, but whether *Y* (the Sherman Act) should be interpreted in light of changes in *X* (substantive due process norms), if *Y*'s terms reasonably allow it[84]—or, using *Weber* as an example, whether changed equal protection norms (if present) should affect Title VII's interpretation even though no state action is involved.[85]

REV. 4, 127-68 (2001) (describing how the models of judicial review have evolved over time from "judicial supremacy" to "judicial sovereignty" and critiquing the "judicial sovereignty" approach).

81. Bickel & Wellington, *supra* note 20, at 32.

82. *E.g.*, DWORKIN, *supra* note 8, at xi ("Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do . . . ."). *But see* Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 729 (1998) ("Rights are not general trumps against appeals to the common good or anything else; instead, they are better understood as channeling the kinds of reasons government can invoke when it acts in certain arenas.") (emphasis omitted).

83. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 630 (1992). Eskridge and Frickey assert that the Supreme Court uses clear statement rules as a form of "back door" constitutional lawmaking to protect these unenforceable or underenforced structural values. *Id.* at 597.

84. The *Alcoa* example, *see infra* Part II.A.1, should make this abstract statement more clear. Another example is *United States v. Witkovich*, 353 U.S. 194 (1957). Congress had required aliens against whom deportation orders were outstanding to give under oath information about their "habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper." 8 U.S.C. § 1252 (d) (Supp. IV. 1957). The statute was plainly constitutional given recent Court decisions providing Congress vast powers to regulate aliens. *E.g.*, Jay v. Boyd, 351 U.S. 345 (1956); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953). *Witcovich* held that only information that was relevant to the Government's concern that the alien remain available for deportation could be elicited, as to protect constitutional liberties of aliens. *See* Bickel & Wellington, *supra* note 20, at 32 (praising *Witcovitch* as an example of protecting "shrubbery in the constitutional foothills").

85. The *Weber* example, *see infra* Section II.B.2, should clarify this concern.

It is important, however, to clarify the evolutionary focus of this inquiry insofar as it concerns statutory coherence. Unlike originalist uses of constitutional norms in statutory interpretation, which look to constitutional norms as a form of background material to help elucidate what the statute meant when it was enacted,[86] quasi-constitutional judicial review looks to how constitutional norms have changed since the statute's enactment and incorporates that change into statutory interpretation. In the context of *Weber*, one could implement it by first figuring out Title VII's meaning in 1964 (however one chooses to ascertain original meaning) and then translating that meaning into 1979 given the changes in equal protection norms between 1964 and 1979. Or, as in the Female Juror example, this would incorporate the Nineteenth Amendment change regarding women's voting status into the term "persons," even though the statute originally only meant males.

But the question remains: Why is such translation constitutionally desirable? One argument is that quasi-constitutional judicial review is justified for the same reasons that judicial review itself is justified. That is, one could argue that judges' *obligation* to protect the Constitution applies equally to everything protected thereunder—penumbral values as well as constitutional rights—but the obligation to protect the penumbral values is only triggered when it is practicable within the statute itself. This appears to be the argument made by Bickel and Wellington.[87]

This also appears to be how Young defends the canon of statutory construction to avoid constitutional doubt.[88] The canon to avoid "constitutional doubt" holds that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court's] duty is to adopt the latter."[89] The "classical"[90] version of the avoidance canon, based on Justice Brandeis's concurrence in *Ashwander*,[91] holds that the canon only applies when "a construction of the statute is fairly possible by which the [constitutional] question may be avoided."[92] The "modern" version, as used in

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86. *See* SUNSTEIN, *supra* note 36. Sunstein is not necessarily originalist, but this aspect of his theory is.

87. Bickel & Wellington, *supra* note 20, at 27-28.

> We contend that, by the same token, other values not enshrined in the Constitution but existing in its penumbra and akin to constitutional ones . . . are also entrusted to the guardianship of the Court. They are no doubt somewhat lower on the scale of timeless importance and the Court therefore does not have the power to decree without recourse that they must be vindicated at all costs or even to define their content with finality. But it is for the Court to bring them to the fore so that they may receive their due weight in Congress as they are otherwise most unlikely to do.

Id.

88. Ernest A. Young, *Federal Courts: Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549 (2000). For a description of how synthesis theory differs from the avoidance canon, see *infra* notes 188-90 and accompanying text.

89. Jones v. United States, 526 U.S. 227, 239 (1999) (citation omitted).

90. This terminology is from Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997).

91. Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936).

92. *Ashwander*, 297 U.S. at 348 (Brandeis, J., concurring).

Catholic Bishop,[93] applies the canon as a default rule, whereby the court avoids interpretations that raise serious constitutional questions unless Congress has manifested an affirmative intent to raise those questions.[94] Although the canon has traditionally been defended as a means "to give effect to congressional intention,"[95] Ernest Young defends the avoidance canon on normative grounds, as a form of "'resistance norms:' constitutional norms that may be more or less yielding to governmental action, depending on the circumstances."[96] Young deems courts obligated to enforce these norms equally to other constitutional protections, but in a "soft" capacity, whereby application of the norm must be reconciled with the situation's specifics.[97]

The avoidance canon, however, has its critics, and its criticisms may apply even more strongly to achieving broad constitutional statutory coherence. Judge Henry Friendly has attacked the avoidance canon for creating unnecessary advisory opinions on undecided constitutional questions.[98] Judge Richard Posner has critiqued the canon as creating "judge-made constitutional penumbra[s] that [have] much the same prohibitory effect as the . . . Constitution itself."[99] Frederick Schauer has contested the accuracy of the assumption that the avoidance canon fulfills congressional intent, rejecting the claim that Congress would generally prefer courts to steer clear from constitutionally troublesome interpretations of statutes rather than risk statutory invalidation.[100] And, the Court has often observed that its *duty* to consider constitutionality ends once it determines a statute to be in accordance with the Constitution.[101]

These criticisms were originally levied as reasons not to employ the avoidance canon and, as such, suggest that broad constitutional statutory coherence might also be unwise. One response is that Congress can always override mistaken interpretations. As do Judges Friendly and Posner, I find this response insufficient, as the possibility of future congressional action

93. NLRB v. Catholic Bishop, 440 U.S. 490 (1979).

94. *Catholic Bishop*, 440 U.S. at 507 (1979).

95. *Id.* at 511 (Brennan, J., dissenting); *see also* Almendarez-Torres v. United States, 523 U.S. 224, 238 (describing the canon as a means to implement legislative policy choices). *But see* William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 846-60 (2001) (contesting this account).

96. Young, *supra* note 88, at 1594 (differentiating "resistance norms" from "invalidation norms," whereby "governmental action is perfectly unproblematic even though it pushes right up to the constitutional limit; that limit, however, amounts to an inflexible line beyond which any government action is barred").

97. *Id.* at 1552.

98. Henry Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* BENCHMARKS 196, 211-12 (1967).

99. Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983).

100. Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 74. Others critique that the canon is applied inconsistently. *E.g.*, Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 49-54 (1996). Others discuss how the avoidance canon might impede agency action to adopt a constitutionally threatening application. Kelley, *supra* note 95, at 835.

101. *E.g.*, United States v. Butler, 297 U.S. 1, 63 (1936).

does not justify mistaken interpretations.[102] Nevertheless, I believe these critiques to quasi-constitutional judicial review could be mitigated through appropriate limitations on its usage and justification. One could avoid creating advisory opinions by restricting attempts to achieve broad constitutional coherence to principles *previously* and *sufficiently* recognized in constitutional decisions; one could circumvent Schauer's criticism by not justifying coherence as a matter of original intent;[103] and one could prevent the duty-running-out criticism by justifying constitutional coherence as something constitutionally inspired but not compelled.[104]

There, however, is the rub. The fact that quasi-constitutional judicial review is constitutionally inspired but not compelled reveals that judicial review itself is the wrong place to search for justification. Judicial review entails judicial obligation; quasi-constitutional judicial review entails no such obligation. At best, judicial review and quasi-constitutional judicial review are consistent with one another.

Support of quasi-constitutional judicial review, however, does arise from the essential idea *underlying* judicial review—that the Constitution is fundamental law. To see how, consider *Federalist No. 78*, in which Alexander Hamilton discusses the pragmatic reconciliation of two applicable forms of law:

> This exercise of judicial discretion in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation: *So far as they can by any fair construction be reconciled to each other; reason and law conspire to dictate that this should be done.*[105]

As fundamental law, the Constitution and the statute (ordinary law) can be reconciled to each other as far as can be done by a "fair construction" of the statute. This would treat reconciliation with constitutional principles the same as reconciliation with any other applicable federal statute: something to be accomplished insofar as it is practicable without being unfaithful to the statute. Because the Constitution is a normative text, this "fidelity to

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102. *See* Posner, *supra* note 99, at 816.

103. Schauer's criticism is weakened when constitutional incompatibilities were unforeseen. *See* Lessig, *supra* note 7, at 440 (discussing how a faithful interpreter could more easily adjust a reading to reflect changes in "uncontested" discourses than in "contested" discourses).

104. *Cf.* Monaghan, *supra* note 73, at 9.

105. THE FEDERALIST NO. 78 (Alexander Hamilton) (emphasis added). Another source of inspiration is Alexander Bickel, who argues that "[Judicial review] is not compelled by the language of the Constitution; it is implied from desirable ends that are attributed to the entire scheme." BICKEL, *supra* note 74, at 13, 23-28.

constitutional norms is a good means for achieving long-term public support for just policies."[106]

This argument also has roots in *Rutgers v. Waddington*,[107] a 1784 case where Hamilton served as the attorney. *Rutgers* involved a patriot's property that had been seized by the British when they occupied New York City and that had been handed over to two loyalist merchants. After the war, the owner sued for rent and damages. The merchants' defense was that "military orders" justified the use. The plaintiff negated the defense with a recent New York law disallowing the defense in cases arising out of the occupation. Hamilton, as defense counsel, denounced the New York law as contrary to the law of nations, contending the statute should be construed as to the equity. The court agreed—accepting both Hamilton's argument that the law of nations and the treaty of peace were relevant *and* the plaintiff's view that the positive law adopted by the legislature should be applied—and reconciled the two views, insisting that the defendant was liable for rent but was excused from further liability.[108]

Rutgers is an example of what William Eskridge has recently termed a court's "voidance" powers, whereby a judge voids a certain application of the statute as not to cause a conflict with fundamental law (the law of nations).[109] This view had earlier surfaced, for example, in *Federalist No. 81*, in which Hamilton discussed the desirability of narrowing a statute's application as to avoid a constitutional problem.[110] Hamilton's argument, how-

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106. Christopher L. Eisgruber, *Justice and the Text: Rethinking the Constitutional Relation Between Principle and Prudence*, 43 DUKE L.J. 1, 2 (1993). Eisgruber believes that fidelity to norms helps create just policies because "constitutional norms are a good guide to convictions about justice that the American people hold." *Id.* at 16; *see also* Friendly, *supra* note 98, at 210 (describing how the Constitution "is itself a datum in the interpretation of a statute; 'construction should go in the direction of constitutional policy'").

107. Opinion of the New York Mayor's Court, Aug. 27, 1784, *reprinted in* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 393-419 (Julius Goebel, Jr. ed., 1964).

108. Eskridge, *supra* note 74, at 1026. This interpretation, however, was not treated well in New York. *Rutgers* "was considered by many to be a flagrant violation of the theory of legislative sovereignty and was immediately attacked as a judicial assumption of the power" reserved to the legislature in a republican government. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 459 (1969).

109. Eskridge, *supra* note 74, at 1027 (explaining how this voidance power was exercised repeatedly by 1780 state courts, such as *Commonwealth v. Caton*, 8 Va. (4 Call) 5, 20 (1782)). He also describes how "*Caton* provides the basis for a less expansive reading of *Rutgers*: When a statute's general language runs up against higher law in the circumstances of a case, it is appropriate for judges to avoid the constitutional issue by narrow construction of the statute." Eskridge, *supra*, at 1027.

110. THE FEDERALIST NO. 81 (Alexander Hamilton). In that paper, Hamilton wrote:

> [T]here is not a syllable in the plan, which *directly empowers* the national courts to construe the laws according to the spirit of the constitution . . . . I *admit* however, that the constitution *ought* to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws *ought to give place* to the constitution.

Id. (emphasis added). I interpret the second sentence of the quote as modifying the first, claiming that the Constitution *indirectly* supported such pragmatic reconciliation as a matter of general wisdom—hence, use of the word "admit" and the claim from Federalist No. 78 that the rule of pragmatic reconciliation was a "mere rule of construction, not derived from any positive law, but from the nature and reason of the thing." *Id.*

Eskridge has claimed that this passage represents a response to Brutus's claim that courts would use equitable construction to mold government as they see fit, as Hamilton claimed the judiciary would not

ever, need not be limited to "voidance" situations. In Eskridge's research of statutory interpretation at the Founding, he also described court's "suppletive" powers to *expand* a statute's application *beyond* its words, such as along its purposive dimension.[111] One could extrapolate Hamilton's argument "suppletively" by using the Constitution as a fundamental-law-gap-filler in conjunction with careful restraints to ensure that any suppletive interpretation is fair to the statute itself (such as a "not unfaithfulness" constraint). This suppletive extrapolation comports with Federalist views of statutory interpretation at the Founding, as Eskridge has described how "none of the Federalists . . . denied the desirability of federal judges' expanding statutes, incrementally, to fill in gaps with precepts drawn from 'fundamental law.'"[112]

This pragmatic-reconciliation view raises at least two objections related to Article I's bicameralism and presentment requirements. First, one could claim that *any* statutory reconciliation violated these requirements, because Congress and the President never voted on the "reconciled" statute. Absent unconstitutionality or delegation to consider constitutional principles or other statutes, this objector could claim that the Court is obligated to implement the statute as faithfully as possible to the enacting Congress. This would be a powerful objection if statutory fidelity were determinate, which I do not believe is true. This objection is nevertheless a strong reason to limit statutory reconciliation to situations where the reconciliation is "not unfaithful" to the statute,[113] thus tracking the "classical" version of the avoidance canon.

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enlarge statutes to meet constitutional allowances but only narrow statutes in tension with the Constitution. Eskridge, *supra* note 74, at 1052. This worry about the judiciary enlarging the scope of federal statutes is an important reason to have a "not unfaithful" constraint with real bite.

111. Eskridge, *supra* note 74, at 1003-05 (describing the "suppletive power" as well as its historical roots in Plowden's commentaries and *Heydon's Case*, 76 Eng. Rep. 637 (Ex. 1584)). Eskridge describes how the suppletive power describes the traditional doctrine of "the equity of the statute." Eskridge, *supra* note 74, at 1003-05. As "the equity of the statute," the suppletive power was used in *Heydon's Case* to correct for general mischief in terms of the statute's application. To be clear, I endorse the suppletive power in regards to constitutional concerns only.

John Manning has made a strong case against the "equity of the statute" doctrine and courts' suppletive power, contending that "[r]ead as a whole, Hamilton's remarks cut sharply against the judicial discretion implicit in the "equity of the statute," John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 82 (2001) [hereinafter Manning, *Textualism*], and that "the Founders expressed a marked preference for values such as predictability, transparency, and constraint, rather than the flexibility implicit in a more discretionary approach to statutory interpretation." *Id.* at 58. Manning's objection has great force in relation to the many sorts of considerations that "the equity of the statute" doctrine has traditionally incorporated. But, constitutional norms are different, as Manning recognizes in the context of judicial review. John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1675 (2001) [hereinafter Manning, *Deriving Rules*].

112. Eskridge, *supra* note 74, at 1057. *But see id.* (describing how "[i]f the ratifying debates are inconclusive as to any matter, it is the suppletive power").

113. Being "not unfaithful" is not the same thing as being equally faithful. Being "not unfaithful" means that the decision falls within a small ε of being a "statutory tie" (*i.e.*, before considering constitutional norms or principles, there can be a slight statutory lean against the "reconciled" interpretation). *See infra* notes 152-56 and accompanying text (explaining this difference more thoroughly). Thus, one can admit there are very few "constitution-free" statutory ties, *see* Schauer, *supra* note 100, at 83, but have more than a trivial amount of situations where a reconciled interpretation would be appropriate.

Alternatively, one might acknowledge the benefits of reconciliation with other federal statutes, as they too satisfy the bicameralism and presentment requirements but deny it as to constitutional principles. The premise of this objection is two-fold: First, pure statutory reconciliation is acceptable, because both statutes were properly enacted and deserve to be implemented fully, so that Congress's objective is to maximize joint implementation of the two statutes; second, application of constitutional principles is countermajoritarian, such that they should not be reconciled with properly enacted statutes. The second premise, however, ignores the past supermajoritarian support that the Constitution itself embodies. Consider Bruce Ackerman's defense of judicial review:

> [W]e must reconsider the leveling opinion that indicts the Supreme Court as a "deviant institution of American democracy," doomed forever to bear the stigma of the "countermajoritarian difficulty." [Consider] the obvious sense in which it is false. When the Court invokes the Constitution, it appeals to legal enactments that were approved by a whole series of majorities—namely the majorities of those representative bodies that proposed and ratified the original Constitution and its subsequent amendments. Rather than a countermajoritarian difficulty, the familiar platitude identifies an intertemporal difficulty.[114]

Ackerman's defense is true *if* one presumes an "authoritarian" version of judicial review (as illustrated below in Figure A).[115] Authoritarian models posit that the principle's existence and authority derives from its past supermajoritarian (or equivalent) popular support and not its normative content.[116] This past supermajoritarian support applies equally whether courts invoke the Constitution to protect a constitutional right or to preserve a constitutional norm or principle. Quasi-constitutional interpretation thus enjoys the same attenuated supermajoritarian support that direct judicial review does. This attenuated supermajoritarian support justifies statutory reconciliation as much as another federal statute's majoritarian support.

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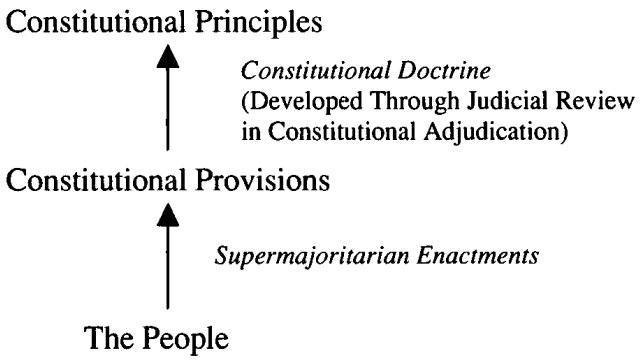
114. Ackerman, *supra* note 74, at 1045-46. This is derived from Hamilton. *See* Eskridge, *supra* note 74, at 1049-50 (explaining Hamilton's belief that "[w]hen the Supreme Court invalidated a statute it was reasserting the power of the people—not of the judges—to control their . . . temporarily misguided agents").

115. For a description of "authoritarian," see *supra* note 10 and accompanying text.

116. Eisgruber, *supra* note 106, at 10.

Figure A—Attenuated Supermajoritarian Popular Support for Constitutional Principles (Presuming an Authoritarian Version of Judicial Review)[117]



Quasi-constitutional judicial review also finds support in scholarship concerning the "judicial Power" under Article III. At the time of the Founding, the dominant view of the "judicial Power" was, as Chief Justice John Marshall put it, that judges should do nothing more than "giv[e] effect to the will of the Legislature."[118] This view, however, was not shared by all. Eighteenth-century commentators, such as William Blackstone reveal a different, broader picture.

> As Blackstone defined it, each exercise of the "judicial power" requires judges "to determine the law" arising upon the facts of the case. "To determine the law" meant not only choosing the appropriate legal principle but also expounding and interpreting it, so that "the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule . . . ."[119]

If there was ambiguity in the law, judges were supposed to turn to "established legal principles" as established in prior precedents.[120]

This resort to established constitutional values as a guide to interpretation became an even more apparent aspect of the "judicial Power" through public law litigation. Owen Fiss[121] and Abram Chayes[122] have described the

117. This diagram ignores the possibility of non-Article V constitutional amendments.

118. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824); *see also* Rogers v. Tennessee, 532 U.S. 451, 472-79 (2001) (Scalia, J., dissenting); John C. Yoo, Note, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 YALE L.J. 1607 (1992).

119. Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *25, and 1 WILLIAM BLACKSTONE, COMMENTARIES *69); *see also* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 1-9 (1992) (noting that eighteenth century jurists viewed the common law as a determinate body of legal doctrine to be discovered, not made). *But see* Lessig, *supra* note 7, at 427-32 (describing how the Legal Realists such as Holmes unraveled the assumption that judges purely discover the law).

120. *Id.*

121. Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L.

rise of structural reform litigation, whereby the rightful place of the courts is "to articulate and elaborate the true meaning of [our public] values"—primarily constitutional values such as equality, liberty, due process, or property.[123] They consider this place to be "rightful," because a judge's independence and his obligation to participate in a dialogue provide courts with institutional superiority regarding the protection of these values.[124] And, as Chayes has described, protecting these values need not end with constitutional decisionmaking: It also applies to the vindication of statutory policy.[125] In this light, the "judicial Power" encourages broad constitutional statutory coherence as a way to implement policy.

4. Other Forms of Statutory Coherence

As John Manning has stated, it is "possib[le] that 'the judicial Power' may authorize judges to promote values that the Constitution does not directly mandate or inspire."[126] William Eskridge's recent work reveals "that the original materials surrounding Article III's judicial power assume an eclectic approach to statutory interpretation, open to understanding the letter of a statute in pursuance of the spirit of the law and in light of fundamental values."[127]

For the sake of argument, I assume Eskridge's work to be accurate: Judges were permitted to consider practical, equitable, political, and technological factors as part of statutory interpretation as of the Founding. As time has progressed, however, these sorts of considerations have become dis-

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REV. 1 (1979).

122. *E.g.*, Abram Chayes, *How Does the Constitution Establish Justice?*, 101 HARV. L. REV. 1026 (1988) [hereinafter Chayes, *How Does*]; Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

123. Fiss, *supra* note 121, at 51. Fiss views "public values" as synonymous to "constitutional values." One need not so equate. Previously-accepted values are a subset of public values.

124. *Id.* at 13.

125. *See* Chayes, *How Does*, *supra* note 122, at 1031-34 (describing courts' broad role in the interpretation of the Sherman Act, antidiscrimination laws, environmental controls, and health and safety legislation). Chayes' claim focuses on how judge-made common law still arises in specific regulatory areas despite *Erie*. Some of his prescriptions are inconsistent with classical legal process premises. *See infra* notes 130-34 and accompanying text. A synthetic judge thus would not necessarily agree with several of his examples of post-*Erie* judicial lawmaking, although the issue is complicated by the fact that it is often arguable whether implicit or explicit congressional authority exists to make federal common law.

126. John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 691 n.26 (1999).

127. Eskridge, *supra* note 74, at 997. Eskridge's work was a response to Manning, *Textualism*, *supra* note 111, at 8, which asserted that "the original understanding of 'the judicial Power' in America is mixed, but ultimately" supports faithful agent theory instead of "equity of the statute." Eskridge agrees that the original understanding was mixed but described how the Marshall Court integrated statutes with the "fundamental principles of the common law, equity and fairness, the law of nations, and the Constitution itself." Eskridge, *supra* note 74, at 997. *But see* Manning, *Deriving Rules*, *supra* note 111, at 1652, 1677-78 (explaining how much of Eskridge's evidence is consistent with faithful agent theory properly understood although admitting that the court's duty as a faithful agent was less strong when statutes were unclear).

couraged, at least pursuant to classical legal process premises of democratic legitimacy as "institutional essentialism."[128]

In 1938, *Erie Railroad v. Tompkins*[129] held that no general federal common law exists as to supply substantive rules of decisions.[130] *Erie* represented the Legal Realist notion that common lawmaking is not a scientific process whereby the law is purely discovered but something that judges made while deciding the answer.[131] This realization had implications for statutory interpretation,[132] namely to discourage judicial lawmaking given the existence of administrative agencies with superior institutional capacities to deal with policy concerns and polycentric disputes:

> A lesson of the New Deal is that agencies are usually better situated to make policy judgments because they have more resources and expertise, are more flexible in responding to changed circumstances with new interpretations, and are better able to deal with the complex balancing involved in solving polycentric problems and to integrate an interpretation into a broader field of policy actions.[133]

Even when agencies failed—perhaps because of agency capture—the next most capable actor was Congress and not the courts.

Political and equitable coherence—at least as part of statutory interpretation—thus became constitutionally discouraged. Whereas judges should

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128. Weisberg, *supra* note 22, at 232 (explaining how "the doctrine of the equity of the statute had been enthusiastically adopted in early America but had later declined under the forces of separation of powers and opposition to Jacksonian majoritarianism").

129. 304 U.S. 64 (1938).

130. *Erie*, 304 U.S. at 78. The predominant view of *Erie* is that courts can create federal common law only where the Constitution or a federal statute explicitly or implicitly so authorizes. Martha A. Field, *The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 887, 927-30 (1986); *cf.* Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984) (contending that the judiciary should consider only those variables that were part of the original legislative deal the judiciary is charged to effectuate); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 792-94 (1989) (arguing first that there can be no such thing as "federal common law," at least as a category of lawmaking distinct from constitutional or statutory "interpretation"; and second that there are few situations where common-law considerations should enter statutory construction as not to "improperly invert[] the hierarchy of policy decisionmaking authority established by our representational democratic structure").

131. *E.g.*, Lessig, *supra* note 7, at 426-32; *see also supra* note 119.

132. *See* Peter Western & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311, 332 (1980). ("The difference between 'common law' and 'statutory interpretation' is a difference in emphasis rather than a difference in kind. The more definite and explicit the prevailing legislative policy, the more likely a court will describe its lawmaking as statutory interpretation; the less precise and less explicit the perceived legislative policy, the more likely a court will speak of common law. The distinction, however, is entirely one of degree.").

133. ESKRIDGE, *supra* note 35, at 170. For a more thorough discussion of judicial deference to agency policy decisions, see, for instance, Colin S. Diver, *Statutory Administration in the Administrative State*, 133 U. PA. L. REV. 549 (1985); Farina, *supra* note 9; Jerry L. Mashaw, *Pro-Delegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985); and Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071 (1990). On how agencies interpret statutes, see Jerry L. Mashaw, *Agency Statutory Interpretation*, *in* ISSUES IN LEGAL SCHOLARSHIP: DYNAMIC STATUTORY INTERPRETATION (2002) [hereinafter Mashaw, *Statutory Interpretation*].

still consider all factors that are explicitly or implicitly delegated to them as part of the statutory scheme, it is not their task, for instance, to consider how the political landscape may have changed since the enactment of the statute. This is the proper domain of administrative agency rulemaking and executive orders, as I explain in more detail in my discussion of *Chevron*, Subpart I.B.2, and my *Weber* example, Subpart II.B.1.[134]

5. Summary: The Three Tiers of Statutory Coherence under the Constitution

The arguments set out above are not conclusive because they relied on "popular consent" and "superior competence" premises of democratic legitimacy—premises with which individuals disagree. Different premises of democratic legitimacy would lead, for instance, to different conceptions of judicial review and ultimately to different judicial roles in statutory interpretation.[135] Taking the two premises to be true, however, the Constitution supports the following structure for statutory coherence:

(1) *Constitutionally required*: narrow constitutional statutory coherence (because of courts' power of judicial review);
(2) *Constitutionally encouraged where practicable*: broad constitutional statutory coherence (because of both the Constitution as fundamental law and "the judicial Power") and compatibility with other federal statutes (for pragmatic reasons);
(3) *Constitutionally discouraged*: Other forms of statutory coherence (because other institutions are more capable and because of the "judicial Power").

B. Constitutional Statutory Synthesis

Broad constitutional statutory coherence involves judicial incorporation of interim constitutional changes into the statutory scheme. It is first useful, however, to clarify how constitutional "change" differs from the notion of a "living" constitution. To say that the constitution changes—as I use the term—means simply that the status of various constitutional rights, norms, and principles are always *in flux*, regardless of whether each new decision

134. As I also describe *infra* Subparts I.B.2 and II.B.1, judges should consider authoritative executive interpretations (such as agency rules) when construing a statute, incorporating them where practicable. This follows from the President's primary link to the electorate *via* his election and agencies' secondary link to the electorate through the President. As I discuss *infra* note 170, however, the practicability range is not necessarily the same as pertains to other federal statutes and broad constitutional coherence.

135. *See* ESKRIDGE, *supra* note 35, at 108 ("Does democratic theory or the rule of law suggest guidelines for reading statutes dynamically? I have no answer, in part because there is no consensus in our polity as to the precise value and implications of democratic theory and the rule of law."). For a breakdown of different theories of statutory interpretation by different legal theories of democracy, see Schacter, *supra* note 67.

further refines the Constitution's organic requirements or finds "modern" constitutional values.[136] (The latter is what a "living" constitution means.)[137] Except for presuming an authoritarian model of judicial review, which cautions against judges finding novel values bereft of past supermajoritarian popular support,[138] this Article does not take a stance on how judges should interpret the Constitution as part of constitutional adjudication.

Constitutional change can be represented by a continuum. On one end is a constitutional amendment. This formally alters the constitutional landscape and perhaps the scope of the rest of the Constitution (as Akhil Amar's work on the Fourteenth Amendment illustrates).[139] On the other end is an everyday constitutional interpretation, which changes the relative strength of competing constitutional principles. As Laurence Tribe states, "constitutional choices will necessarily *alter the scale itself*, for they are themselves decisions about priorities among competing values, and indeed about the very content of those values."[140] For instance, the Court's recent decision in *Boy Scouts of America v. Dale*,[141] which held that the Boy Scouts could prevent an openly gay man from becoming a Scoutmaster because of their First Amendment associational rights, pitted associational norms versus antidiscrimination norms. After *Dale*, the associational norm was stronger than before relative to the antidiscrimination norm. Finally, the middle of the continuum includes a series of decisions furthering one constitutional conception, such as the New Deal's expansion of federal Commerce Clause power and its restriction of economic substantive due process,[142] or the Rehnquist Court's recent federalism revival.[143] The more decisions support

136. *E.g.*, Lessig, *Constraint*, *supra* note 19, at 1366 ("Readings of the Constitution change. This is the brute fact of our constitutional past. The Constitution is read at one time to mean one thing; at another, to mean something quite different. These changes track no change in constitutional text; nor do they follow confessions of earlier mistake.").

137. *See* Ackerman, *supra* note 6, at 526 ("[A]dvocates of the 'living constitution' assert that the Court legitimately supplements backward-looking interpretations with a self-conscious effort to express the moral aspirations of *today's* Americans.").

138. Authoritarian models of judicial review are always backwards-looking to moments of past supermajoritarian support. *See supra* note 10. Bork uses it as a defense of originalism in constitutional interpretation, *see* BORK, *supra* note 1, whereas Ackerman adopts a more evolutive approach to past constitutional moments in that their principles are abstracted over time, *see* ACKERMAN, *supra* note 6.

139. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998).

140. Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 606 (1985).

141. 530 U.S. 640 (2000).

142. *E.g.*, Lessig, *supra* note 7, at 444. Ackerman contends that this New Deal jurisprudential shift represents a "constitutional moment," which enjoyed a supermajoritarian amount of popular support in the 1930s, and carries just as much weight as (or more than) a formal constitutional amendment. *See supra* note 6. For purposes of this Article, I treat the lack of constitutional amendment as dispositive and thus treat the New Deal shift as only partially ensconced relative to an actual amendment. *See* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995) (supporting this view). Even if one accepts the New Deal as a "constitutional moment," one still could advocate a return to Founding values if one thought that the New Deal justices "overinterpreted" what the "moment" meant as compared to what the People actually supported.

143. *E.g.*, Symposium, *The Constitution in Exile*, 51 DUKE L.J. 1 (2001) (discussing the effect of the Rehnquist Court's federalism jurisprudence).

a specific constitutional principle, the more this constitutional change becomes a "de facto" amendment, closer to the formal amendment end of the continuum.

Constitutional statutory synthesis only envisions affirmative incorporation of those constitutional changes "above" a high threshold level on the continuum. Society should consider a subject thoroughly before it finds its way into statutes.[144] There is, of course, a degree of judicial subjectivity in determining what has been sufficiently accepted in constitutional doctrine,[145] but I wish to take it as plausible that virtually everyone will acknowledge some constitutional changes to exist, such as the changed conceptions of interstate commerce after the New Deal.[146] The higher the sufficient constitutional acceptance threshold, the more judicial subjectivity can be mitigated.

This Part develops how one could incorporate constitutional changes into statutory interpretation through synthesis methodology. The first Subpart discusses the principles underlying synthesis as well as how the methodology works at a higher level of abstraction. The second Subpart explains—fictionally assuming that the constitutional doctrine and the relevant statute exist in a vacuum—how the method might specifically work, using agency statutory interpretation under *Chevron* as a guideline. The third Subpart relaxes the vacuum assumption and describes how the presence of new statutes and the amendment of preexisting statutes alters the analysis.

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144. This tracks Justice Scalia's concern that current values should be subject to "long and hard consideration" before becoming constitutionally guaranteed. Scalia, *Originalism*, *supra* note 77, at 862; Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 2261 (2002) (Scalia, J., dissenting) (explaining how "the evolving standards of decency that mark the progress of a maturing society . . . . should be informed by objective factors to the maximum possible extent") (citations omitted). My affirmative incorporation concern is different than Scalia's rights-oriented concern, but both require sufficient societal acceptance.

145. *See infra* Subpart I.B.4.b (discussing judicial subjectivity within synthesis theory).

146. Individuals will debate the scope and desirability of the change, *see supra* note 142, but I estimate that everyone would agree that the doctrine changed significantly. Sufficient constitutional change is not necessarily limited to such big subjects such as commerce, federalism, or civil rights. Another example can be seen within *Stringer v. Block*, 503 U.S. 222 (1992), regarding lower-level Eighth Amendment change. Under *Teague v. Lane*, 489 U.S. 288 (1989), federal courts may not hear habeas petitions asking the Court to recognize "new" rights unless such rights would be retroactively applied in all cases. *Teague* stated that "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301. In *Stringer*, an individual was sentenced to death and part of the instructions to the jury said that an appropriate aggravating factor was whether the crime was "heinous, atrocious, or cruel." Subsequent to the conviction and sentencing, *Maynard v. Cartwright*, 486 U.S. 356 (1988), and *Clemons v. Mississippi*, 494 U.S. 738 (1990), declared such language to be impermissibly vague. The question in *Stringer* was thus whether these cases announced a "new" rule. *Stringer* held no, that although there was "not . . . any single case," a "clear principle emerges" from a "long line of authority," dating back to 1980, invalidating such vague language as inviting arbitrary and capricious application of the death penalty. *Stringer*, 503 U.S. at 232. The principle might have existed prior to Stringer's conviction, but it took *Maynard* and *Clemons* for it to be sufficiently accepted.

1. Synthesis: Principles

Briefly put, constitutional statutory synthesis entails amalgamating post-enactment constitutional change with the applicable statutory provisions within the context of the relevant statutory scheme.[147] In the abstract, one could describe it as a preservationist form of intertemporal and intertextual reconciliation: intertextual insofar as multiple sources of text are relevant—the statute to be interpreted, potentially related statutes, and constitutional doctrine; intertemporal in that each applicable textual utterance occurs at different times; and preservationist because of the backwards-looking focus of the interpretive enterprise, in which the court considers only those principles (constitutional and statutory) and policies (statutory) that are part of past authoritative sources.[148]

Most famously, Bruce Ackerman has employed the notion of multigenerational synthesis as a method of constitutional interpretation. As one example, he described the interpretive task after the Civil War:

> Since the Republicans had repudiated some, but not all, of the Founding generation's Constitution, the Supreme Court could no longer rest content with the Marshallian mission of elaborating the constitutional vision of the Americans who had fought and won the War of Independence. Instead, the Justices were called upon by history to undertake a distinctive task of *multigenerational synthesis.* This not only required them to identify the aspects of the Federalist Constitution that had survived the Republican critique. It also called upon them to synthesize these Federalist fragments into a constitutional order that contained the new constitutional ideals affirmed by the Republicans in the aftermath of the Civil War.[149]

From the recent constitutional enactments, judges had to decide what parts of the original order were consistent with those enactments and what parts had been repudiated. They had to construct a coherent whole.

Constitutional statutory synthesis is similar in that it too involves the creation of a coherent whole from disparate parts, but it differs drastically in that it need not and should not repudiate aspects of the statute. That is, pure constitutional multigenerational synthesis as described by Ackerman focuses on how judges can best be the People's agents.[150] When statutes are

147. Pre-enactment constitutional interpretation may help elucidate original meaning. *E.g.*, Sunstein, *supra* note 36 (describing how background norms affect interpretation).

148. *See* ACKERMAN, *supra* note 6, at 86 (describing multigenerational synthesis as preservationist). There are other sorts of judicial pronouncements, such as extrajudicial speech, *see, e.g.*, Judith Resnik, *Federal Law Can't Help You: The Rehnquist Judiciary, Congress, and Federal Remedial Powers*, (Sept. 10, 2002) (on file with author), and judicial decisions from other countries, *see, e.g.*, David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539 (2001). A synthetic judge, however, would not consider these pronouncements, because they are not authoritative.

149. Ackerman, *supra* note 6, at 516-17.

150. This may entail the judge acting as a partner to the People insofar as it concerns implementation

involved, particularly statutes whose constitutionality is not in doubt, this role of judge as popular agent assumes subservience to the judge's role as legislative agent. Any statutory interpretation unfaithful to the original statute would breach the judiciary's duty as legislative agent and would thus be inappropriate.[151] That, however, raises three questions: First, what does it mean for a statutory interpretation to be unfaithful; second, how does a "not unfaithful agent" approach differ from an originalist, fidelity-based approach; and third, how precisely might this "not unfaithful" approach be implemented through constitutional statutory synthesis?

Unfaithfulness is related to the notion that certainty of statutory meaning is itself a continuum, with an uncontested interpretation in favor of the plaintiff (or 0% in favor of the defendant) at one end and an uncontested interpretation in favor of the defendant at the other (100%). In the middle, there are the ambiguities, with a completely ambiguous statute leaning 50% toward each party. Let ε equal some arbitrarily small number that represents judicial uncertainty in parsing and applying the originalist materials (which consist of some combination of text, legislative intent, and statutory purpose weighted according to the degree the judge finds each attribute relevant)[152] that usually increases as the time since enactment increases (and society changes).[153] Whenever an interpretation of how the statute originally applies in the modern context falls within ε of 50% [50% - ε to 50% + ε] using these originalist materials, the original application of the statute to the problem at hand can be deemed unclear (as in the Female Juror example). Deciding in favor of either party is "not unfaithful." But when the interpretation falls outside of that [50% - ε to 50% + ε] range in favor of one party, it is considered unfaithful to decide in favor of the other. For example, assume $\varepsilon = 5$, and the statute leaned sixty percent in favor of the defendant (Point 1 in Figure B below). To interpret the statute in the plaintiff's favor would be unfaithful. But, if the statute only leaned fifty-four percent in favor of the defendant (Point 2 in Figure B below), finding for the plaintiff might not be faithful, *but it is not unfaithful.*

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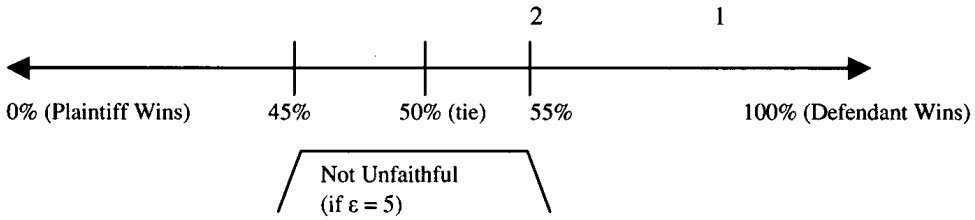
of past mobilizations, but it does not entail making the People's will current.

151. *See* HART & SACKS, *supra* note 12, at 1377-83 (discussing how words and legislative intent, properly analyzed, do limit interpretation); *see also* CALABRESI, *supra* note 33, at 88-89 (adopting the belief that "honest interpretation does not permit all, or even most, out-of-date laws to be brought into line").

152. For one example, see ESKRIDGE, *supra* note 35, at 61-64.

153. Time since enactment is merely a proxy for societal change more generally. As society changes, it becomes more difficult to apply the statute in the modern context. Increased uncertainty accompanies this increased difficulty. As uncertainty increases, so does ε.

Figure B—"Not Unfaithful" Interpretation



Originalist approaches differ in that they focus solely on maximizing fidelity. They direct a judge simply to find where on the continuum the statute lies. If a statute falls at 49%, the judge should decide in favor of the plaintiff; if 51%, the defendant. There is no ε corresponding to judicial uncertainty. A "not unfaithful agent" approach directs the judge to follow the percentages strictly only if the statute falls outside of the [50% - ε to 50% + ε] range. *If* the statute falls inside the range based on a preliminary approximation (or is close), the judge should then consider whether constitutional change exists as to affect interpretation.[154] If relevant change exists, the judge should decide in accordance with the change as long as the synthesized interpretation is "not unfaithful"; if no relevant change exists, the judge should revert to strict percentages.[155] This approach accords with what Daniel Farber has called the "weak conception of legislative supremacy," where "a judge may not contravene statutory directives . . . [and] views [legislative] supremacy as a constraint on judicial action, rather than as a complete specification of the judicial role in statutory cases."[156]

That leads to the third question: What does it mean for a judge "to decide in accordance with the change." The answer lies in the path of evolution. A statute can evolve in five ways:[157]

> (1) Agreed-upon statutory purpose could serve as an engine of evolution. Changes in circumstance may reveal statutory text, intent,

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154. The preliminary approximation is merely a time-saving device in easy cases: a way to save unnecessary analysis by dispensing of cases where interim constitutional change would be irrelevant even if it existed. Of course, the meaning of the text, the legislature's specific intent, and the statute's original purpose(s) will often be debatable. Often, these cases will be close enough to inquire into the presence of relevant constitutional change.

155. Alternative formulations are possible. My approach mostly tracks a "practical" perspective, "in which changes in society and law drive statutory interpretation in dynamic directions, though the interpreter is constrained by clear texts [and] authoritative legal materials." ESKRIDGE, *supra* note 35, at 69. A true "practical" perspective would also include reliance interests, *id.*, which I do not discuss in this Article.

Even within the practical perspective, one could advocate more textual displacement when statutory text corresponds to "undone" original assumptions. *E.g.*, Farber, *supra* note 47, at 306-17 (discussing, but not necessarily endorsing, such an argument). One could accomplish this in effect by tying the size of ε to the degree of relevant constitutional change.

156. *Id.* at 287. Farber does not endorse this weak conception of legislative supremacy himself, as he considers it "slippery." *See id.* at 288-92. Constraining judicial updating to constitutional concerns should ameliorate most of his anxieties.

157. *See* ESKRIDGE, *supra* note 35, at 52-57, 116-20.

> and purpose at odds with one another. An evolutionary reading would follow the purpose.
>
> (2) Multiple purposes may exist as an original matter. Time may reveal them to be inconsistent. An evolutionary reading may alter the original purposive balance as to strengthen one purpose relative to another. This could entail a mere shift in the original balance, or one purpose completely subsuming the other.
>
> (3) Text changes meaning over time. The plain meaning of the text may be one thing as of the date of enactment but another as of the date of interpretation. An evolutionary reading would follow the evolved plain meaning.
>
> (4) Purposes themselves will change over time. The statute may be designed to solve one problem, but individuals may try to use it to attack a different problem. An evolutionary reading would allow this new application.
>
> (5) Not applying a statute to an originally intended application. The first four options address going *beyond* Congress's expectations. An evolutionary reading could also go *against* Congress's expectations and refuse to apply a statute to a certain situation.

As an initial matter, the fourth type of evolution is generally illegitimate pursuant to a "not unfaithful agent" approach: If a purpose is not part of the original statute, the problem will usually be beyond the statute's domain.[158] That qualification aside, constitutional change could affect any of the paths of evolution.

It should be noted, however, that the constitutional/statutory equilibrium may change over time. This is both because ε increases as time increases (in order to account for augmented uncertainty in determining how originalist materials apply in the modern context) and because counteracting constitutional change could occur. For instance, future Supreme Courts could reverse the Court's recent federalism revival. In this situation, any "synthesized" interpretation that had incorporated changed federalism norms may no longer be valid.

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158. *See generally* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983) (discussing why statutory application should be restricted instead of applying to unanticipated problems). This differs from saying that a statute cannot apply beyond its original intent, as an application of the statute can be within one of its original purposes but beyond its original intent. For a discussion of applying a statute beyond original intent, see ESKRIDGE, *supra* note 35, at 49; and Farber, *supra* note 47, at 282. A more difficult situation arises when the words are broad enough to handle a completely different purpose. This would pit the statute's text against its intent and purpose. Insofar as words are part of the statute, these interpretations would not necessarily be categorically unfaithful. At least, one could not make such a claim without claiming that intent and purpose *are always more important* than text in divining statutory meaning. For an argument that "unless the statute plainly hands courts the power to create and revise a form of common law, the domain of the statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process," see Easterbrook, *supra*, at 544-51.

Figure C—The Four Steps to "Not Unfaithful" Interpretation

(1) Briefly approximate where the statute falls on the continuum based on existing legislative materials (text, intent, purpose(s)).
(2) If it is within the [50% - ε to 50% + ε] range (or close), consider whether relevant constitutional change exists; if not, quit as the case is easy.
(3) If such change exists, synthesize the constitutional change and statutory materials as relevant; if not, revert to strict percentages.
(4) Consider whether the synthesized interpretation is "not unfaithful"; if so, decide in accordance with the change; if not, revert to strict percentages.

2. *Implementation via* Chevron

The question still exists of how, specifically, courts should perform constitutional statutory synthesis. This Subpart assumes that the Constitution and the applicable statute exist in a vacuum, whereby the judge's only interpretive task is to synthesize the relevant constitutional change and the applicable statute. The next Subpart explains how the presence of other statutory enactments may alter the analysis.

When the Constitution and the statute are viewed in a vacuum, *Chevron*[159] nicely conceptualizes the synthetic task. *Chevron* sets forth a two-step test to ascertain when courts should defer to administrative agency interpretations of law:

(1) If "Congress has directly spoken to the precise question at issue . . . [the court] must give effect to the unambiguously expressed intent of Congress. . . ." [Statutory Clarity]
(2) If, rather, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." [160] [Agency Rationality]

Two attributes of this two-step test make it a particularly desirable model for constitutional statutory synthesis. First, agency interpretation is a form of statutory synthesis, reconciling the regulatory statute and presidential policy.[161] Like courts, agencies interpreting statutes also have dual prin-

159. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
160. *Chevron*, 467 U.S. at 842-43 (footnotes omitted). To ascertain statutory clarity, courts use the "traditional tools of statutory construction." INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987).
161. Administrative agencies located within the Executive Branch are subject to executive policy because of the President's ability to hire and fire. *E.g.*, TERRY EASTLAND, ENERGY IN THE EXECUTIVE 277-89 (1992). Independent agencies, while often possessing statutory "for cause" restrictions on re-

cipals: the President and Congress.[162] When forming policy, agencies have to synthesize Executive Orders, such as the mandatory performance of cost-benefit analysis,[163] along with the applicable regulatory statute.[164] In that sense, constitutional statutory synthesis is merely having courts act as the "People's administrative agency"—with both the People and Congress as courts' principals—responsible for incorporating constitutional principles where practicable.

Practicability relates to the second reason *Chevron* could serve as a model for synthesis: Step two of *Chevron* is itself a "not unfaithfulness" determination. Determining whether an agency interpretation is permissible asks not whether the agency's interpretation is best but whether it satisfies some lower bound of permissibility. As long as the interpretation meets this lower bound of statutory fidelity, it is allowed because of deference to the agency.[165] This is the essence of a "not unfaithful" constraint.

There is, however, one main difference between constitutional statutory synthesis and agency interpretation: Courts practicing synthesis have to act as both the People's administrative agency (synthesizing the statute with constitutional principles) and reviewing entity (ascertaining whether such synthesis is unfaithful to the statute) at the same time. Despite the simultaneity in actuality, it is useful to explore each seriatim.

a. Courts as the People's Administrative Agency

A court interpreting an ambiguous statute is similar to an agency implementing an ambiguous statute through rulemaking,[166] especially non-self-executing legislation.[167] Whereas the agency has a factual record to formulate its rules, courts have constitutional doctrine as its "record of prin-

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moval, are also subject to presidential influence in a variety of ways. *See generally* Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273 (1993).

162. Insofar as agencies depend on Congress for their funds, they actually have three principals: the enacting Congress, the current Congress, and the Executive Branch. For ease of exposition, I only speak of agencies synthesizing the statutory language with executive policy, omitting the current Congress from the picture.

163. *E.g.*, Exec. Order No. 12,291, 3 C.F.R. 127 (1981) (President Reagan's Executive Order causing agencies to perform cost-benefit calculus and maximize net social benefits).

164. *E.g.*, Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 551 (1997) (reviewing SCALIA, *supra* note 1) ("[A]gencies are, of course, influenced by shifting political judgments, and their approaches are likely to reflect the President's basic commitments.").

165. *E.g.*, Farina, *supra* note 9, at 502 ("Once ambiguity is discerned, the [*Chevron*] model accepts the existence of a set of 'rational' versions of the statute's 'meaning,' any one of which the court will, at the agency's behest, sustain.").

166. Agencies make rules both formally and informally. Formal rulemaking requires an adjudication-like procedure, such as a hearing. 5 U.S.C. §§ 554, 556 (2000). Informal rulemaking, also known as notice-and-comment rulemaking, does not involve a hearing but still requires the formation and proper evaluation of an adequate factual record. *Id.* § 553. For more on administrative rulemaking, see JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW 439-610 (3d ed. 1992).

167. Non-self-executing laws are "not capable of application as rules of conduct until the agency gives them meaning by adopting binding interpretations." Mashaw, *Statutory Interpretation*, supra note 133, at 8.

ciples" to guide its interpretation. As the agency's factual record provides it with technocratic and political considerations, constitutional doctrine provides courts with sufficiently accepted contemporary principles.

In both situations, if the statute speaks to the "precise issue at hand," no updating should occur, for "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[168] A statutory ambiguity, however, creates a presumption for statutory updating—agencies can update in regards to changed factual circumstances and political considerations,[169] and courts can update in light of changed constitutional principles. The only restriction then is pragmatic, as the particular context must suggest that updating is "a poor reconstruction of congressional desires."[170] Perhaps this will be obvious from the nature of the bill (e.g., appropriations), or perhaps it will be a function of an explicit or implicit legislative directive that updating should not be performed.[171]

To turn to the Female Juror example, the court acting as the People's administrative agency would view the Nineteenth Amendment as sufficiently accepted constitutional change within its "record" (the document and the doctrine). It would incorporate this constitutional change into the statute, because it was not obvious that to include women was a poor reconstruction of legislative desires: Updating the word "persons" is consistent with the canon of statutory construction to apply general terms to all individuals that fall under its purview.[172]

b. Courts as Legislative Agents Reviewing (Their Own) Agency Interpretation

The second step turns to justification. One could attempt to justify this updating presumption in terms of congressional intent. At least in the *Chevron* context, the Court has connected agency deference with real or presumed legislative intent.[173] But that connection seems peculiar and unneces-

168. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) (step one).

169. *E.g.*, Kelley, *supra* note 95, at 869 ("[I]n the absence of clear direction from Congress, the policy choices inherent in determining how statutory regimes will be implemented are quintessentially executive in nature."); *cf.* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 71-72 (1994) ("[A]gencies are both knowledgeable about and responsive to presidential and congressional preferences. Agencies are . . . usually able to anticipate the responses of other national institutions accurately enough to avoid overrides.").

170. *E.g.*, Sunstein, *supra* note 133, at 2091 ("*Chevron* is inapplicable when the particular context suggests that deference would be a poor reconstruction of congressional desires."). "Unfaithfulness" might be defined more leniently when reviewing agency interpretations than in constitutional statutory synthesis, because agencies' comparative technocratic competence in the administrative context may be greater than courts' comparative advantage (over Congress) regarding principles in the synthesis context.

171. A clear statement could, for instance, be an implicit directive not to update a statute.

172. *See supra* note 16 (describing how the *Maxwell* Court applied this canon).

173. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (describing *Chevron* deference as "premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps"); *Chevron*, 467 U.S. at 843-44 (speaking of "express

sary—merely an originalist interpretive reflex that is, at best, a benign fiction.[174] The desirability of "not unfaithful" updating lies not in its fictitious fidelity but in the institutionally responsible creation of a societal benefit that the fiction facilitates. With agencies, the benefit derives from superior technocratic virtue and political sensitivity; with courts, the benefit derives from its superior competence regarding constitutional principles. Deference should be provided to agencies under *Chevron*,[175] and to courts performing constitutional statutory construction, because both forms of updating improve the legal landscape in an institutionally responsible manner.

3. Reenactment and Other Statutes

In *Flood v. Kuhn*,[176] the Court reaffirmed its practice of super-strong statutory stare decisis whereby previous court interpretations are provided a higher level of deference, in part because of the "positive inaction" of Congress.[177] Inaction arguments presuppose that current congressional support exists—thus garnering contemporary popular consent—but not necessarily the enacting legislature's.[178] Although it is arguable that "interpretations by agencies and courts adapting a statute to changed circumstances are presumptively valid so long as they have been brought to Congress's attention and Congress has not changed them,"[179] a formalist perspective of the rule of law, as in *Marbury*, does not support attaching any weight to congressional silence. Formalist rule-of-law virtues depend on the existence of authoritative sources that individuals can look to in order to know what is permitted. Inaction provides no authoritative support.[180] Consequently, constitutional statutory synthesis attributes no significance to congressional inaction regardless of how many rejected proposals exist.

Conversely, congressional action that fulfills the bicameralism and presentment requirements *is* important to synthesis. The traditional reenactment

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delegation").

174. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

> In the vast majority of cases I expect that Congress *neither* (1) intended a single result, *nor* (2) meant to confer discretion upon the agency, but rather (3) didn't think about the matter at all. If I am correct in that, then any rule adopted in this field represents merely a fictional, presumed intent . . . .

Id. at 517. Justice Scalia discussed how this fiction provides "a background rule of law against which Congress can legislate." *Id.*

175. Sunstein, *supra* note 133, at 2090 ("In the absence of a clear resolution, however, a principle of deference might improve the operation of regulatory law and at the same time appropriately distribute authority between courts and agencies.").

176. 407 U.S. 258 (1972).

177. *Flood*, 407 U.S. at 281-83. For more on the subject of super-strong statutory stare decisis, see, for instance, William N. Eskridge, Jr., *The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases*, 88 MICH. L. REV. 2450 (1990).

178. Johnson v. Transp. Agency, 480 U.S. 616, 671 (1987) (Scalia, J., dissenting).

179. ESKRIDGE, *supra* note 35, at 131, 239-74.

180. *See, e.g.*, *Johnson*, 480 U.S. at 672 (Scalia, J., dissenting) (critiquing positive inaction arguments as a "canard," citing difficulties divining congressional intent from Congress's failure to enact legislation).

rule states that "Congress is presumed to be aware of [a prior] interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."[181] Reenactment could occur after any prior interpretation, even a constitutionally synthesized one. Whenever reenactment occurs, a synthetic judge would consider these prior interpretations when analyzing statutory clarity. The prior synthetic interpretation thus becomes legitimate as a matter of congressional intent.

A different situation arises, however, when Congress amends a portion of the statute but not the statutory provision applicable to the case at hand. The issue is whether the amendment should act as a gravitational field, whereby "the principle of it" should be taken as "providing support for judicial correction" of the rest of the statute, or a force-field "marking the outer bounds of inconsistent action."[182] That is, one could argue both that the spirit of the amendment should be incorporated into the interpretation of the applicable provision because Congress usually amends only part of a statute rather than multiple provisions[183]—and the converse—the presence of one amendment indicates a congressional intention not to alter the applicable one—for Congress had the opportunity to amend the applicable statutory provision but did not use it.[184] The specific effect of a statutory amendment on constitutional statutory synthesis depends on the circumstances, particularly whether a practical reason exists to explain why one area was changed and not another (such as being a response to a mistaken judicial interpretation).

The same gravitational-pull/force-field considerations apply to enacting or amending a related statute.[185] The changes to the related statute could serve either as an exemplar of congressional intent or an intentional limit on statutory change.[186] Again, the effect on synthetic analysis depends on the specific context in which the related statute was enacted or the degree to which the related statute has traditionally been read in conjunction with the primary statute (as, for instance, many civil rights statutes and the Civil Rights Act of 1964).

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181. Lorillard v. Pons, 434 U.S. 575, 580 (1978). The premise of the rule is that Congress should make its purpose known upon reenactment if it deviates from past interpretations. HART & SACKS, *supra* note 12, at 1366. This does not mean that the Court always follows the reenactment rule. *See, e.g.*, Girouard v. United States, 328 U.S. 61, 73-76 (1946) (not applying the reenactment rule when Congress has acted "as though" the prior interpretation were not settled law). As synthesis theory attributes no weight to statutory action that does not fulfill the bicameralism and presentment requirements, it ignores this *Girouard* exception.

182. HART & SACKS, *supra* note 12, at 1345.

183. *E.g.*, *id.* at 1358-59 (questioning the extent of a legislative duty to consider every question of public policy and to act one way or another).

184. *E.g.*, BFP v. Resolution Trust Corp., 511 U.S. 531, 550 n.1, 554 n.6 (1994) (Souter, J., dissenting) (discussing this argument). For more on *BFP*, see *infra* Part III.A.

185. I do not have a precise definition for "related." A paradigmatic example would be the Clayton Act and the Sherman Act, two antitrust statutes.

186. Hamilton's pragmatic reconciliation argument in *Federalist No. 78* coheres with both conceptions.

4. Clarifications

The past few Subparts have described synthetic methodology.[187] What remains is to clarify both how it differs from the modern version of the canon to avoid constitutional doubt and why a two-track method to constitutional updating is preferable to abstracting the existing constitutional principles directly within the statute.

a. The Difference from the Modern Avoidance Canon

A synthetic approach with a "not unfaithful" constraint is both broader and narrower than the modern avoidance canon, by which a court construes a statute as not to raise serious constitutional questions unless Congress expressly intended to raise them.[188]

It is broader insofar as synthesis may apply even where no constitutional question exists and the issue is merely one of statutory application. To be more specific, consider the third path of evolution described above: textual evolution. Federalism norms may dictate that a contested term implicates a state regime even though no constitutional question was raised. Such is the situation with *BFP*, discussed below in Part III.C, in which it was uncontested that Congress could establish federal bankruptcy procedures pursuant to the Commerce Clause, but it was debatable whether the term "reasonably" implicated more than complying with state foreclosure procedures.[189] The avoidance canon would not apply. Synthesis would still consider the federalism norms.

It is narrower than the modern avoidance canon because it only construes statutes in accordance with constitutional norms if such an interpretation is "not unfaithful." Constitutional statutory synthesis thus parallels the classical version of the avoidance canon as existed prior to *Catholic Bishop*, which interpreted statutes as to avoid constitutional doubts only if such a construction was practicable by the terms of the statute itself.[190] The fictional imputation of the enacting legislature's intent to avoid the novel constitutional issue is itself to be avoided.

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187. There are many other issues that a more thorough analysis would include, such as: public or private reliance on a court interpretation; and the difference between primary-line legislation (where Congress sets out substantive guidelines) and secondary-line legislation (which is designed to serve as a backstop).

188. *See supra* text accompanying notes 93-94.

189. This desire not to alter the federal-state balance unless Congress has spoken clearly also underlies several criminal law decisions, *e.g.*, United States v. Bass, 404 U.S. 336, 349 (1971), and abstention doctrines, *e.g.*, Younger v. Harris, 401 U.S. 37 (1971). This federal-state balance canon in criminal law often works along with the rule of lenity: Ambiguities in criminal statutes are to be interpreted in favor of the criminal defendant as to avoid a due process and *Ex Post Facto Clause* violation. Thus, even if a statute was reasonable enough to pass constitutional muster under *Bouie v. City of Columbia*, 378 U.S. 347 (1964), it will still be construed narrowly because defendants should not be held accountable for ambiguous violations. *See Bass*, 404 U.S. at 348.

190. *See supra* text accompanying notes 90-92, 113.

b. Two-Track Methodology

Constitutional statutory synthesis requires change to be accepted previously in constitutional doctrine before incorporating that change into statutes—a transitive approach that *presumes* the legitimacy of the constitutional doctrine.[191] It does so for two reasons: first, to limit the range of relevant authoritative sources to aid formalist rule-of-law legitimacy; and second, because the evolution of principles is arguably accomplished better in constitutional interpretation than in statutory interpretation. Source limitation has already been discussed. The superiority of using constitutional interpretation as the primary locus for principled evolution requires more elaboration.

One reason it may be true involves the fact that the Constitution is written at a higher level of generality than are most statutes.[192] This reason, however, does not explain why certain high-generality-level statutes such as the Sherman Act should be treated differently.[193] I find more appealing the notion that there are fewer constraints on principled development in constitutional interpretation than in statutory interpretation. In constitutional interpretation, a judge acts only as the People's agent; in statutory interpretation, a judge must act both as popular agent and as legislative agent, forcing the judge to filter the principle through the enacting legislature's eyes. This is necessary but not as pure and thus suboptimal. Allowing principles to

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191. *See* Lessig, *Translation*, *supra* note 19, at 1217 ("[A transitive approach] assume[es] that every step up to the penultimate was legitimate[] and asks whether the change in the current step is legitimate as well.").

192. *E.g.*, Stanley Ingber, *Judging Without Judgment: Constitutional Irrelevancies and the Demise of Dialogue*, 46 RUTGERS L. REV. 1473, 1477-78 (1994).

193. *But see* Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2547 (1998) ("The greater the level of generality, the more likely the statute will be deemed to be in harmony with the Constitution.").

Three other questionable justifications exist. First, constitutional provisions require supermajoritarian support to be enacted or repealed under Article V. One could claim that this supermajoritarian feature reflects its desired permanence and the need for judges to adapt it to contemporary society. *E.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) (stating that the Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."). For a description of how the Constitution's orientation as higher law is best explained through its supermajoritarian orientation, see John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703 (2002).

Second, there is the Constitution's age. Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 291 (1982) ("Courts have much more leeway in interpreting the Constitution [than legislation], not only because the Constitution is so costly to amend, but also because its antiquity makes it unlikely that the same political forces that procured its enactment are still around to nullify departures from it.").

Third, the content of the Constitution is more principled than that of statutes. In that sense, principled evolution is a more natural part of constitutional interpretation than statutory interpretation. There are both strong and weak forms to this notion. The strong form is that the Constitution itself is a set of abstract moral principles (or points to a set of principles), *e.g.*, Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1253 (1997), while statutes represent policies. A weak form recognizes that statutes contain both principles and policies, HART & SACKS, *supra* note 12, at 141-43, 145-50, but that the average content of the Constitution is more principled than statutes'. *See, e.g.*, RONALD DWORKIN, A MATTER OF PRINCIPLE 22 (1985). I adopt the weak form.

develop in the constitutional arena allows them to develop through fewer filters, such that they can better represent contemporary coherence.

There are, however, four potential weaknesses to a transitive approach to statutory updating. First, judicial subjectivity is not eliminated, as judges still have to ascertain when a constitutional principle has been sufficiently established in the constitutional arena.[194] To choose a well-known example, one could say that *Brown* did not sufficiently establish any "integrative" constitutional principle as of 1954, because the decision rested on multiple foundations, such as the particular importance of integration in education.[195] But, after *Loving v. Virginia*[196] in 1967, the existence of an anti-White Supremacy principle became much clearer.[197] I presume that if one sets the sufficient acceptance threshold as that of *Loving*, judges could agree upon the few situations that qualified.[198]

Second, as in constitutional interpretation, a level-of-generality problem exists.[199] Judges might agree that sufficiently accepted constitutional change existed in constitutional interpretation but disagree as to the contours of its incorporation into statutory interpretation. I discuss this problem specifically in the context of my *Alcoa* and *Sylvania* examples below.[200] A synthetic judge has no *a priori* preference between high-levels and low-levels of generality; the judge would choose the level at which the principle had been abstracted in the constitutional doctrine.[201] Usually, this leads to a lower level of generality, because lower-level constitutional change is more likely to be sufficiently accepted in the doctrine.

A third potential weakness involves the incorporation of "phantom" constitutional norms, as described by Hiroshi Motomura. Motomura surveyed the Court's immigration law jurisprudence, describing how it devel-

194. This is similar to Michael Klarman's critique of translation theory. *See supra* note 45. It is arguably less so here, because the question is not what society has accepted but what the doctrine has accepted. The doctrine is a smaller subset of currently accepted values, as it takes time for current values to be accepted in the constitutional realm. Scalia, *Originalism*, *supra* note 77, at 862; Laurence H. Tribe, *A Constitution We are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 442 (1983).

195. *See generally* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

196. 388 U.S. 1 (1967).

197. *Loving*, 388 U.S. at 11-12 ("The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race.").

198. One could mitigate the subjectivity problem further by setting the sufficient acceptance threshold higher.

199. For a discussion of the level-of-generality problem in constitutional interpretation, see Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

200. *See infra* Part II.A.

201. In Ackerman's model of intergenerational synthesis for constitutional interpretation, the principle applies first to those situations that led to the enactment of the constitutional provisions supporting it. As time goes on, those principles are abstracted as to apply to a broader range of circumstances. *See, e.g.*, ACKERMAN, *supra* note 6, at 86-99. For instance, Ackerman describes how the Fourteenth Amendment was designed originally to apply to blacks only, but, as time passed, it stood for equality more generally. *See id.*

oped under the domination of the plenary power doctrine.[202] He explained how the Court relied on a different set of constitutional norms when directly deciding constitutional issues in immigration cases than when using constitutional norms to inform the interpretation of immigration statutes. "To serve the latter function, many courts have relied on . . . 'phantom constitutional norms,' which are not indigenous to immigration law but come from mainstream public law instead."[203] He found this result problematic because it tended "to undermine the plenary power doctrine through statutory interpretation."[204]

Constitutional statutory synthesis disagrees that these norms are "phantom." The whole point of synthesis is that public law norms *should* affect interpretation even when the public law norms differ from those norms used when addressing constitutionality. For instance, as my *Alcoa* example in Subpart II.A.1 demonstrates, due process norms should affect interpretation of the Sherman Act even though constitutional adjudication usually involves Commerce Clause issues only. Motomura's critique, however, is relevant to the narrower point that a synthesizer needs to consider the entire constitutional structure carefully—both the primary norms involved in constitutional adjudication and secondary norms that apply to statutory interpretation more generally—as to be sure that the secondary norms do not undermine the primary norms. This may not be possible in the immigration context, for, as Motomura explains, the plenary power norms provide Congress with virtually unreviewable power in deciding immigration law policy while the public law norms impede that free reign by providing immigrants with individual, judicially enforceable rights.[205] But outside immigration—in antitrust, for instance—such opposition does not exist, and the two sets of norms can fully coincide.[206]

A fourth potential problem involves entrenching "bad" constitutional decisions. Constitutional statutory synthesis presumes that *all* constitutional doctrine is correct; in terms of statutory incorporation, no one decision is more legitimate than another.[207] This means, for example, that a synthesizer

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202. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990).

203. *Id.*

204. *Id.*

205. *Id.* at 564; *see also id.* (explaining how immigration law represents an "aberrational form of the typical relationship between constitutional and subconstitutional law"). Subconstitutional mainstreaming may affect other areas of congressional plenary power as well, such as federal Indian law. In a series of wonderful articles, Philip Frickey has discussed the problems and challenges that correspond to the "[d]omestication by mainstreaming" of federal Indian Laws. *See* Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 48 (1996); *see also* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1 (1999); Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754 (1997).

206. Incorporating public law norms at a lower level of generality will help mitigate the prospect of opposition between the two sets of norms.

207. One may presume that the doctrine is legitimate but admit that certain cases might be wrongly decided. The presumption is only based on the belief that it is likely to be more right than wrong.

should incorporate the Rehnquist Court's recent federalism jurisprudence into statutes even if one disagrees with them as a constitutional matter. Insofar as judges may disagree as a constitutional matter but incorporate principles statutorily because of the presumption of legitimacy, synthesis will entrench "bad" decisions unless Congress overrules the interpretation.

Potential entrenchment is not necessarily detrimental. In fact, it respects the judiciary's role in statutory interpretation and helps achieve principled purity. As Ackerman has described, a judge's duty in normal politics is to preserve the results of a previously mobilized People regardless of potential incongruity with current values because this is necessary to mobilize the People to act themselves.[208] This coincides with the notion of a judge as a law-finder and not a law-maker; and it ultimately coheres with the contractarian notion that legitimacy derives from popular consent because it strengthens the charge to the People to act themselves.

There is another benefit—a dialogic benefit[209]—relating to a potential congressional override of a mistaken synthesized statutory interpretation. In response to a synthesized interpretation where the statute's constitutionality was never in doubt, a legislature desiring to override the interpretation can do so on the basis that it: (1) agrees with the validity of the constitutional principle but disagrees with its incorporation into the statutory scheme, (2) disagrees with the constitutional principle itself, or (3) believes a mistaken principle has been mistakenly incorporated.[210] Because of the lack of constitutional doubt, legislative supremacy has to be respected. Synthesis thus provides a mechanism through which the Court and Congress can dialogue about the existence and relative strength of constitutional principles.

This would effectively sidestep the result in *Boerne*,[211] at least at the level of constitutional norms. *Boerne* involved the constitutionality of the Religious Freedom Restoration Act of 1993 (RFRA), a statute adopted pursuant to Congress's Fourteenth Amendment enforcement powers that was designed to override the Court's previous opinion in *Smith* (a First Amendment decision).[212] *Boerne* held RFRA to be unconstitutional because "Congress' power under section 5, however, extends only to 'enforc(ing)' the provisions of the Fourteenth Amendment . . . [and] not the power to determine what constitutes a constitutional violation."[213] *Boerne* thus holds that

208. ACKERMAN, *supra* note 6, at 231-65; *id.* at 265 ("[T]he Supreme Court is hardly a conservative friend of the status quo, but an ongoing representative of a mobilized People during the lengthy periods of apathy, ignorance, and selfishness that mark the collective life of the private citizenry of a liberal republic."). Derrick Bell also proposes this sort of strategy as part of his "Celestial Curia" narrative. Derrick Bell, *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 17-21 (1985).

209. Dialogic benefits are normally associated with new legal process theory.

210. For an empirical description of congressional override behavior, see William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).

211. City of Boerne v. Flores, 521 U.S. 507 (1997).

212. Emp. Div. of Human Res. of Or. v. Smith, 494 U.S. 872 (1990). *Smith* upheld a state law of general applicability criminalizing peyote use against a First Amendment free exercise challenge.

213. *City of Boerne*, 521 U.S. at 519 (citation omitted).

once the Court determined the substantive contours of a constitutional right, Congress would have to abide by it.

Constitutional statutory synthesis mitigates this constitutional-dialogue-killing aspect of *Boerne* by extending the Court-Congress dialogue about norms and principles (simply not rights) into an area of legislative supremacy. As long as the statute is constitutional, Congress can enact whatever statute it wants, including one that disagrees with the Court's statement of constitutional principles. Under *Boerne*, courts will not be bound by Congress's subsequent statement of constitutional principles in subsequent constitutional adjudications.[214] Nevertheless, courts would likely heed the congressional disagreement. Minimally, judges could refrain from incorporating these principles into other statutes; maximally, they could construe the congressional override broadly and incorporate its spirit into other statutory interpretations.

II. APPLICATION TO SUBSTANTIVE LAW

Usually, constitutional statutory synthesis will be unnecessary because the application of the statute will be clear. In "hard" cases, however—those within the [50% − ε to 50% + ε] range—considering constitutional change might obviate the need to make that final "hard" determination based on originalist materials alone. This Part analyzes four potentially "hard" cases—two antitrust cases (*Alcoa* and *Sylvania*) and two civil rights cases (*Bob Jones* and *Weber*)—as to explore different attributes of synthesis theory. *Alcoa* is the paradigmatic example of how it applies, *Sylvania* demonstrates the path-dependence of statutory evolution under synthesis theory and examines level-of-generality concerns, *Weber* illustrates the difference between political and principled evolution, and *Bob Jones* helps elucidate the bite of the "not unfaithful" constraint.

A. The Sherman Act

Perhaps because of the Sherman Act's general language,[215] which might serve as an implicit delegation to update its meaning,[216] many evolutionary

214. Michael McConnell has skillfully described why *Boerne* is not constitutionally necessary. Instead, one could adopt an "interpretive" understanding of congressional authority to enact legislation pursuant to its Fourteenth Amendment enforcement powers, whereby Congress would have some authority to determine for itself what the provisions of the Fourteenth Amendment mean. Michael W. McConnell, *The Supreme Court, 1996 Term—Comment: Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 171 (1997). McConnell explains both "[a] modest understanding of congressional interpretive authority" in which "the Court is not obligated to adopt, or even to defer to, Congress's interpretation . . . [only] undertake a reexamination of the issue with a fresh eye, without the constraints of stare decisis," *Id.* at 172; and a "stronger version of congressional interpretive authority" whereby congressional interpretations are entitled to a substantial degree of deference. *Id.* The dialogic approach described in the text embodies McConnell's "modest" understanding—at least at the level of constitutional norms and principles—and can be adopted even with *Boerne* as valid law.

215. The Sherman Act provides:

theorists have begun their analysis of "changed circumstances" with new Sherman Act interpretations after the New Deal. Hart and Sacks described *United States v. South-Eastern Underwriters Ass'n*,[217] where the Court held that the Sherman Act applied to the insurance business. There, the majority agreed that prior to the Sherman Act's enactment, "a series of Supreme Court decisions [held] that insurance was not commerce" and that "Congressmen in 1890 could not have contemplated that the Sherman Act could apply to insurance;" but the majority also believed that the recently expanded definition of interstate commerce now included insurance, thus allowing Sherman Act coverage.[218] And, William Eskridge used the 1877-1938 labor injunction decisions to demonstrate how Sherman Act jurisprudence (and that of other statutes) shifted from common-law baselines in the late 1800s and early 1900s to more labor-friendly constructions after the New Deal.[219]

In the spirit of Hart, Sacks, and Eskridge, I too begin with the Sherman Act and the New Deal. Judge Learned Hand's classic opinion in *Alcoa* is an excellent example of synthetic application, demonstrating how changed conceptions of substantive due process—specifically, challenged beliefs about the neutrality of common-law baselines—could affect statutory interpretation. To be clear, *Alcoa* surely was *not* a conscious application of constitutional statutory synthesis, as Judge Hand justified the decision on the basis of original intent. But, as the following discussion attempts to demonstrate, that imputation of original intent is the weakest part of the decision. Constitutional statutory synthesis would have provided a much stronger foundation for the outcome.

1. Alcoa: *The Paradigm Example*

Alcoa[220] (short for "Aluminum Company of America") is famous for several reasons: procedural oddities (the Second Circuit heard the case instead of the Supreme Court because of Court conflicts of interest), its method of ascertaining the market share of Alcoa, its change in section 2 requirements to make out a successful monopolization charge, and its justification for this change being, in part, the Sherman Act's "social purposes"

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§ 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . is . . . illegal.

§ 2: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States [is illegal].

15 U.S.C. §§ 1-2 (1890).

216. Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 731-32 (1988) ("The Sherman Act adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.").

217. 322 U.S. 533 (1944).

218. HART & SACKS, *supra* note 12, at 1185-86.

219. ESKRIDGE, *supra* note 35, at 81-107.

220. United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

to protect small producers. This Subpart focuses on the latter two aspects. It starts with the case itself and the predominant critiques of the decision's inconsistency and inaccuracy. It then explains how constitutional statutory synthesis alleviates the confusion.

a. The Decision

Decided in 1945, *Alcoa* involved Alcoa's alleged monopolization of the virgin ingot aluminum market. Prior to *Alcoa*, monopolization under section 2 required one firm to possess a sufficiently high market share[221] (called monopoly in the concrete) and to exercise monopoly power, which "require[d] overt acts"[222] that demonstrated an intent and "purpose of excluding others from the trade."[223] The *Alcoa* Court held that Alcoa had a ninety percent market share, which sufficed to qualify as a monopoly in the concrete. The remaining question, however, was whether Alcoa exercised monopoly power, given that at the time of the 1940s suit, Alcoa was earning a "not extortionate" ten percent profit.[224]

In the first of two famous paragraphs, the *Alcoa* Court explained that "[i]t does not follow because 'Alcoa' had such a monopoly, that it 'monopolized' the ingot market: it may not have achieved monopoly; monopoly may have been thrust upon it."[225] The Court explained how control of ninety percent of the market might be permissible under the Sherman Act, because "[a] single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. . . . The successful competitor, having been urged to compete, must not be turned upon when he wins."[226] This was in line with previous section 2 doctrine—primarily *Standard Oil*, *United States Steel*,[227] and *International Harvester*[228]—which focused on the presence of an "act of aggression," such as predatory price cutting, before concluding that a firm exercised monopoly power.[229]

In the next paragraph, however, Judge Hand reversed course, describing how Alcoa was not merely a successful competitor as was United States Steel.

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221. *Alcoa*, 148 F.2d at 424 ("That percentage [ninety] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not.").

222. United States v. United States Steel Corp., 251 U.S. 417, 451 (1920) ("[T]he law does not make mere size an offence [*sic*] or the existence of unexerted power an offence [*sic*]. It, we repeat, requires overt acts.").

223. United States v. Standard Oil, 221 U.S. 1, 75 (1911).

224. *Alcoa*, 148 F.2d at 426.

225. *Id.* at 429.

226. *Id.* at 430.

227. United States v. United States Steel Corp., 251 U.S. 417 (1920).

228. United States v. Int'l Harvester Corp., 274 U.S. 693 (1927).

229. *United States Steel*, 251 U.S. at 451; *see Int'l Harvester*, 274 U.S. at 708 (focusing on how the firm had priced below cost to "driv[e] out its competitors" and "dominate[]" the industry).

> *It would completely misconstrue 'Alcoa's' position in 1940 to hold that it was the passive beneficiary of a monopoly*, following upon an involuntary elimination of competitors by automatically operative economic forces. . . . This increase and this continued and undisturbed control did not fall undesigned into 'Alcoa's' lap; obviously it could not have done so. It could only have resulted, as it did result, from *a persistent determination to maintain the control*, with which it found itself vested in 1912. There were at least one or two abortive attempts to enter the industry, but 'Alcoa' effectively anticipated and forestalled all competition, and succeeded in holding the field alone. True, it stimulated demand and opened new uses for the metal, but not without making sure that it could supply what it had evoked. There is no dispute as to this; 'Alcoa' avows it as evidence of the skill, energy and initiative with which it has always conducted its business; as a reason why, having won its way by fair means, it should be commended, and not dismembered. *We need charge it with no moral derelictions after 1912*; we may assume that all it claims for itself is true. *The only question is whether it falls within the exception established in favor of those who do not seek, but cannot avoid, the control of a market.* It seems to us that that question scarcely survives its statement. It was not inevitable that it should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. *Only in case we interpret 'exclusion' as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not 'exclusionary.'*[230]

Judge Hand justified this change in course through reference primarily to the Sherman Act's original non-economic purposes.[231] To list three of his quotes:

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230. *Alcoa*, 148 F.2d at 430-31 (emphasis added).

231. *Id.* at 427-29. More economic explanations exist than stated by Judge Hand. Eleanor Fox and Lawrence Sullivan have pointed out that *Alcoa* marks the beginning of the "structural consensus" approach to monopolization. ELEANOR FOX & LAWRENCE SULLIVAN, CASES AND MATERIALS ON ANTITRUST 128 (1989). By 1959, industrial organization scholars had developed the structure-conduct-performance model of analysis: Concentrated market structure leads to anticompetitive conduct and bad performance. *See generally* J. BAIN, INDUSTRIAL ORGANIZATION (1959); E. MASON, ECONOMIC CONCENTRATION AND THE MONOPOLY PROBLEM (1959).

> [1] It is possible, because of [the Act's] indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. These considerations [we think are the purposes of the Act].
> [2] We have been speaking only of the economic reasons which forbid monopoly; but . . . there are others, based upon the belief that great industrial consolidations are inherently undesirable, *regardless of their economic results*. In the debates in Congress Senator Sherman himself . . . showed that among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital *because of the helplessness of the individual before them.*
> [3] Throughout the history of [the antitrust laws], it has been constantly assumed that one of their purposes was to perpetuate . . . for its own sake and *in spite of possible cost*, an organization of industry in small units which can effectively compete with each other.[232]

Finding Alcoa's behavior inconsistent with these original purposes, the *Alcoa* Court held that Alcoa violated section 2.[233]

b. The Doctrinal Differences

Alcoa altered the section 2 requirements in two interrelated ways.[234] First, it eradicated the specific intent requirement. Prior to *Alcoa*, the Court had looked for "manoeuvres [*sic*] not honestly industrial."[235] The *Alcoa* Court "disregard[ed] any question of 'intent'"[236] because "no monopolist monopolizes unconscious of what he is doing."[237] It sufficed that Alcoa sought to keep "complete and exclusive hold upon the . . . market with which it started," no matter how "innocently it otherwise proceeded."[238] Thus, although *Alcoa*'s first paragraph recognized that monopoly may have been "thrust upon [Alcoa]" and that the successful competitor "must not be turned upon when he wins"—preserving the passive beneficiary exception to monopoly power—its second paragraph severely diminished the scope of this exception by expanding what constituted intent to monopolize.[239] Some have construed these passages to mean that any company with monopoly

232. *Alcoa*, 148 F.2d at 427-29 (emphasis added).

233. *Id.* at 432.

234. *Alcoa*'s changes to the section 2 requirements were soon adopted by the Supreme Court in *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

235. *Alcoa*, 148 F.2d at 431.

236. *Id.* This was despite the fact that "[b]y far the greatest part of the . . . record . . . was concerned with proving such an intent." *Id.* at 432; *see* Wilson D. Miscamble, *Thurman Arnold Goes to Washington: A Look at Antitrust Policy in the Later New Deal*, *in* 7 BUSINESS & GOVERNMENT IN AMERICA SINCE 1870: THE NEW DEAL AND CORPORATE POWER, at 239 (Robert F. Himmelberg ed., 1994).

237. *Alcoa*, 148 F.2d at 432.

238. *Id.*

239. *Id.* at 429-30.

power would be susceptible to a monopolization claim unless it had a specific intent to de-monopolize the market.[240]

Consequently, *Alcoa* significantly enhanced the bifurcation between permissible pre- and post-monopoly conduct. Alcoa had not changed how it operated since its incipiency. But once performed by a company with monopoly power, actions such as doubling and redoubling capacity *became* prohibited under *Alcoa*. Monopolists in the concrete thus only had a limited subset of permissible actions available to them.[241]

c. The Common Debate

Juxtaposing these two doctrinal differences against *Alcoa*'s first paragraph, which alleged doctrinal adherence, has led commentators such as Robert Bork to lambaste *Alcoa* for its internal inconsistencies. As Bork explains, Judge Hand appears to support the "successful competitor," but "[i]f we return to Hand's remarks about lawful monopolies, we will see that he takes back what he seemed to say about the lawfulness of gaining a monopoly through 'superior skill, foresight and industry.'"[242] In "Hand's reasoning, the exercise of superior skill, foresight, and industry is itself an abuse."[243] (Hereinafter, I refer to this as "*Alcoa*'s apparent contradiction.") Because of this apparent contradiction, Bork concludes that the "*Alcoa* opinion . . . [is] a thoroughly perverse judicial tour de force, contrary to the legislative intent of the Sherman Act, the great 1911 cases . . . and the entire spirit of antitrust."[244]

The debate thus usually turns to one of fidelity,[245] looking to whether the Sherman Act's legislative history does or does not support Judge Hand's

240. *See, e.g.*, ROBERT BORK, THE ANTITRUST PARADOX 166-69 (1993) (describing the pretextual nature to Judge Hand's distinction between unlawful achievement and lawful passivity and how it really only permits "utter passivity and lucky accident"); *cf.* Stanley Robinson, *Antitrust Developments: 1979*, *in* ANTITRUST IN TRANSITION 417, 418 (Milton Handler ed., 1990) ("[A] literal reading of the opinion left a monopolist only one defense to a charge of monopolization: a showing that he enjoyed his preeminent market position by circumstances beyond his control.").

241. *But see* STEPHEN ROSS, PRINCIPLES OF ANTITRUST LAW 26-27 (1993) (describing three "conflicting definitions of monopolization" within *Alcoa*: "(1) deliberately conducting business as a monopolist, (2) a defendant that had a monopoly 'thrust upon it' would not be a monopolist (e.g., if changes in taste drive out all but one firm), and (3) a defendant would not be a monopolist if it acquired monopoly power because of 'superior skill, foresight, and industry'"). Ross believes the second reading is most plausible. *Id.* at 27.

242. BORK, *supra* note 240, at 168.

243. *Id.* at 169. Bork deemed Hand's support for the successful competitor "illusory." *Id.* at 52.

244. *Id.* at 170. Philip Areeda and Herbert Hovenkamp concur in the critique of inconsistency, 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW § 611d (2d ed. 2001), and claim that the stated examples of exclusionary conduct, such as expanding capacity to meet anticipated demand are "absurd," *id.* § 611e.

245. *But see* ROSS, *supra* note 241, at 31 (justifying the opinion in Jeffersonian terms, as "simple expansion" is different from creating a "new" product, as "[i]t can be more readily assumed that an increase in demand will induce someone other than the monopolist to enter the market to fill the demand; thus, society can reap the economic benefits of increased capacity as well as the social benefits of diffused economic power").

"social" reading.[246] And it ends as a draw (at least within the [50% - ε to 50% + ε] range): The legislative history is inconclusive as to any purpose[247]—with arguments from consumer welfare to wealth transfers to protection of small businesses[248]—and the New Deal made ascertaining the "functional equivalent" of the original application more difficult.

Constitutional statutory synthesis, however, provides an explanation for *Alcoa*'s apparent contradiction, as it turns out that *Alcoa* is contradictory *in the same way that substantive due process doctrine is contradictory* after the New Deal. That is, *Alcoa* repudiates the same ideas in monopolization doctrine that cases such as *West Coast Hotel*[249] and *Carolene Products*[250] repudiated in substantive due process doctrine—namely, the neutrality of common-law baselines. Judge Hand's renewed focus on the Sherman Act's "social purposes" is justifiable as the second form of statutory evolution: where multiple purposes originally exist but time leads judges to alter the original purposive balance.[251]

d. Constitutional Change from Lochner *to* Carolene Products

During the *Lochner*[252] era, approximately 1905-1936, the Supreme Court was skeptical of a great deal of public interest legislation, invalidating statutes on substantive due process grounds when the underlying problem was not a common-law wrong.[253] Through time, the Court realized that common-law baselines were not neutral, because the status quo contained its own inequalities that a theory of laissez-faire capitalism perpetuated. The Court consequently permitted increased congressional regulation, recogniz-

246. *Compare* Louis Kaplow, *Antitrust, Law and Economics and the Courts*, *in* THE POLITICAL ECONOMY OF THE SHERMAN ACT 250 (E. Thomas Sullivan ed., 1991) (yes), *with* BORK, *supra* note 240, at 53 (no).

247. *Cf., e.g.*, 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman) ("This bill . . . only [seeks] to prevent and control combinations made . . . to increase the profits of the producer at the cost of the consumer. . . . If their business is lawful they can combine in any way and enjoy the advantage of their united skill and capital, provided they do not combine to prevent competition . . . ."), 21 CONG. REC. 2460 (1890) (statement of Sen. Sherman) ("The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital . . . ."), 21 CONG. REC. 3146 (1890) (statement of Sen. Hoar) (claiming that "[w]e have affirmed the old doctrine of the common law").

248. *Compare* BORK, *supra* note 240, at 51 (discussing the consumer welfare approach to antitrust), *and* Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696 (1986) (protecting consumers), *with* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982), *and* Louis B. Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076 (1979) (commenting on the non-economic goals discussed in Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979)).

249. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

250. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

251. For different types of statutory evolution, see *supra* text accompanying note 157.

252. Lochner v. New York, 198 U.S. 45 (1905).

253. *Lochner* invalidated legislation regulating bakers' maximum hours. *Lochner*, 198 U.S. at 58.

ing that the government bore equal responsibility for allowing these inequalities to persist as for creating new ones.

Lochner viewed government regulation as activist, interfering with "the freedom of master and employee to contract with each other in relation to their employment,"[254] and common-law baselines as neutral (being prepolitical).[255] As Cass Sunstein states:

> For the *Lochner* Court, neutrality, understood in a particular way, was a constitutional requirement. The key concepts here are threefold: government inaction, the existing distribution of wealth and entitlements, and the baseline set by the common law. Governmental intervention was constitutionally troublesome, whereas inaction was not; and both neutrality and inaction were defined as respect for the behavior of private actors pursuant to the common law, in light of the existing distribution of wealth and entitlements.[256]

Lochner did not completely deny states the power to legislate, but it restricted the states' legislative power to those categories traditionally assumed to be in its police power.[257] Legislation that went beyond "common law wrong[s]"[258] created a constitutional wrong as well. Even if inaction perpetuated existing differences, *Lochner* deemed it better to uphold each individual's bargaining prerogative than to rectify extant inequalities.[259]

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254. *Id.* at 64.

255. *E.g.*, BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 365 (1998) ("Within this *Lochnerian* vision, the market operated as a prepolitical baseline establishing basic entitlements. It was *only* the state that could provide unconstitutional 'subsidies' when it enacted 'class legislation' that picked the pockets of one group merely to enhance the welfare of another."). Other scholars have described *Lochner* as supporting an absolute right to property. BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 30-31, 83 (1980). And, others have described *Lochner* as simply skeptical with legislative motive, *e.g.*, Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 765 (1997), as well as the means/ends connection between the legislation and its purpose, *e.g.*, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 825 (3d ed. 1996). *Lochner* may have involved a rent-seeking statute that was the result of special interest groups. *Id.* at 827.

256. Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987). In *Lochner*, the preservation of existing wealth and entitlements arises only implicitly. *See Lochner*, 198 U.S. at 57 (discussing how bakers can protect themselves without State interference).

257. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1697, 1718 (1984). ("In the *Lochner* era, the Court attempted to create a separate category of impermissible ends, using the libertarian framework of the common law as a theoretical basis. Under that framework, the government's police power was sharply limited, and modern social legislation . . . appeared not as an effort to promote a public value, but instead as a raw exercise of political power by the beneficiaries of the legislation."). This, for instance, was how *Lochner* described *Holden v. Hardy*, 169 U.S. 366 (1898), as based on the particular "kind of employment, mining . . . and the character of the employés [*sic*] in such kinds of labor." *Lochner*, 198 U.S. at 54. *Holden* is particularly noteworthy in its focus on mineworkers regulation at the common law and when the Constitution was enacted. *See Holden*, 169 U.S. at 387, 394-96 (citing state cases).

258. *See* Sunstein, *supra* note 256, at 877 (explaining how paternalistic, redistributive measures were not a "common law wrong").

259. As Lawrence Tribe explains:

> As a corollary [to *Lochner*'s logic], it followed that any statute which was [designed] to redistribute resources and thus benefit some persons at the expense of others . . . would extend beyond the implicit boundaries of legislative authority.

Through 1936, the Court continued to invalidate legislation on substantive due process grounds in *Adair v. United States*,[260] *Coppage v. Kansas*,[261] *Adkins v. Children's Hospital*,[262] and *Morehead v. New York ex. rel. Tipaldo*,[263] focusing on the sanctity of liberty of contract. These decisions were intermixed with other cases that sustained public interest legislation, such as *Muller v. Oregon*,[264] *Bunting v. Oregon*,[265] *Home Building & Loan Ass'n v. Blaisdell*,[266] and *Nebbia v. New York*.[267] Together, these cases set forth a "liberty of contract"/public-interest dyad that occupied the *Lochner* era, albeit in shifting emphasis over time. As the Court claimed in *Muller*:

> [1] It is undoubtedly true, as more than once declared by this court, that the general right to contract in relation to one's business is part of the liberty of the individual, protected by the Fourteenth Amendment to the Federal Constitution; [2] yet it is equally well settled that this liberty is not absolute and extending to all contracts,

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. . . .

. . . But equalization or redistribution of economic or social power, which 'takes property from *A*. and gives it to *B*.,' was an impermissible end of legislation.

LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 439 (1978).

260. 208 U.S. 161 (1908). *Adair* held that a federal law prohibiting employers from discharging an employee because of labor union membership violated the employer's liberty of contract.

261. 236 U.S. 1 (1915). *Coppage* declared a state statute prohibiting the use of "yellow-dog" contracts unconstitutional, consciously preserving the existing distribution of wealth and entitlements. *Coppage*, 236 U.S. at 17-18 ("[It is] impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights."). The "public good" did not require "removal of those inequalities." *Id.* at 17-18.

262. 261 U.S. 525 (1923). *Adkins* struck down minimum wage legislation for women and children, focusing on how there was "no difference" between "selling labor" and "selling goods." *Adkins*, 262 U.S. at 554, 558. This equation of labor and goods allowed the *Adkins* Court to paint the statute of violating the principle of neutrality by taking property from employer *A* and giving it to employee *B*. *Id.* at 557-58 (describing the surplus wage as a "compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole").

263. 298 U.S. 587 (1936). *Morehead* struck down a New York Statute prescribing minimum wages for women, invoking the authority of *Adkins*. *Morehead*, 298 U.S. at 604.

264. 208 U.S. 412 (1908). *Muller* upheld maximum hour legislation for women based on the physical differences between the sexes. *Muller*, 208 U.S. at 419.

265. 243 U.S. 426 (1917). *Bunting* permitted maximum hour legislation for mill workers to protect their safety. *Bunting*, 243 U.S. at 435-38 (accepting that the legislation's purpose was to protect the physical well-being of mill workers even though the legislation was "not as complete as it might be").

266. 290 U.S. 398 (1934). *Blaisdell* approved state legislation that temporarily extended the period of relief for mortgagors, holding that the Contract Clause had a state police power exception. *Blaisdell*, 290 U.S. at 439. *Blaisdell* explained that emergencies did not create the power for the state to legislate but merely furnished the occasion to exercise state police power already enjoyed. *Id.* at 426. Notably, it extended the definition of emergency from physical causes to economic conditions such as the Great Depression. *Id.* at 439-40.

In 1935, the Court unanimously struck down the Frazier-Lemke Act of 1934 in which Congress gave mortgage debtors five years of undisturbed possession if they paid their creditors a "reasonable rental" and allowed debtors to discharge their debt by paying the assessed value of their property. Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 593, 601-02 (1935). *Radford* distinguished *Blaisdell* on the ground that *Blaisdell* involved only thirty days relief, whereas the 1934 Act infringed property rights more substantially. *Radford*, 295 U.S. at 581.

267. 291 U.S. 502 (1934) (allowing legislation setting minimum and maximum prices for milk).

> and that a State may, without conflicting with the provisions of the Fourteenth Amendment, restrict in many respects the individual's power of contract.[268]

In the earlier period of *Lochner* and *Coppage*, the balance was almost completely toward the first prong of the dyad, allowing regulation only of common-law wrongs. Even by 1923, the balance was still predominantly in favor of "liberty of contract." As *Adkins* stated, freedom of contract "is subject to a great variety of restraints. *But freedom of contract is, nevertheless, the general rule and restraint the exception*; and the exercise of legislative authority to abridge it can be justified only by the existence of *exceptional circumstances*."[269] In the 1930s, the balance shifted toward the second prong, leading *Nebbia* to claim: "*Equally* fundamental with the private right [of contract] is that of the public to regulate it in the common interest."[270] In 1937, *West Coast Hotel* solidified (and furthered) this transition by reversing *Adkins* and allowing wage regulation.[271]

West Coast Hotel introduced an "additional and compelling consideration which recent economic experience has brought into a strong light" that would guide post-New Deal due process adjudication:

> *The exploitation of a class of workers who are in an unequal position with respect to bargaining power* and are thus relatively defenceless [*sic*] against the denial of a living wage is not only detrimental to their health and well being but *casts a direct burden for their support upon the community*. . . . The bare cost of living must be met. . . . *The community is not bound to provide what is in effect*

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268. 208 U.S. at 421 (citing *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), *Holden*, and *Lochner*).

269. Adkins v. Children's Hosp., 261 U.S. 525, 546 (1923) (emphasis added).

270. *Nebbia*, 291 U.S. at 523 (emphasis added). *Nebbia* expanded the application of the public interest prong to any industry that, for adequate reason, was subject to control for the public good—equating it with the state police power (which had been expanded in *Blaisdell*). *Id.* at 533-37; *see id.* at 537 ("So far as . . . due process is concerned . . . a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation."); *id.* at 530 ("[T]he normal law of supply and demand was insufficient to correct maladjustments detrimental to the community."). For a description of *Nebbia* as "[t]he decision in which . . . abandonment transpired" from *Lochner*, see BARRY CUSHMAN, RETHINKING THE NEW DEAL 7, 92 (1998).

271. West Coast Hotel v. Parrish, 300 U.S. 379 (1937). *Cf.* CUSHMAN, *supra* note 270, at 105 (describing *West Coast Hotel* as "the final phase of a long and unevenly staged judicial withdrawal" from substantive due process). In 1937, the Court also retreated from *Coppage* by upholding Wagner Act provisions that prohibited discharges for union membership and the use of "yellow-dog" contracts. *E.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

For a description of how *West Coast Hotel* resulted from Justice Roberts's switch in time between *Morehead* and *West Coast Hotel*, see the sources cited in CUSHMAN, *supra* note 270, at 243 n.1. Cushman challenges this story. Justice Roberts explained that he had joined the *Morehead* opinion on the narrow ground that the statute was not similar to the one struck down in *Adkins* and that the state had not requested that *Adkins* be overruled. *Id.* at 45. Cushman states the real reason was a lapse of communication between Justice Roberts and Chief Justice Hughes and that Hughes did not indicate by *Morehead* that he was ready to overrule *Adkins*. *Id.* at 101. *But see* Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165, 2174 n.62 (1999) (describing Justice Roberts's memorandum as unconvincing).

> *a subsidy for unconscionable employers*. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest.[272]

As Cass Sunstein explicates, the "subsidy" derived from the common-law system itself, as "the failure to impose a minimum wage is not nonintervention at all but simply another form of action—a decision to rely on traditional market mechanisms, within the common-law framework, as the basis for regulation."[273] The Court realized that both intervening and not intervening involved "making a choice."[274] On this view, "*West Coast Hotel* suggests that governmental 'inaction' is itself a constitutionally significant *decision*."[275]

The retreat from *Lochner*'s substantive due process regime continued in *Carolene Products*'s famous footnote four:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth . . . .
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be re-

272. *West Coast Hotel*, 300 U.S. at 399-400 (emphasis added); *see also* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 862 (1992) ("The facts upon which [*Adkins*] had premised a constitutional resolution of social controversy had proven to be untrue, and history's demonstration of their untruth not only justified but required the new choice of constitutional principle that *West Coast Hotel* announced.").

273. Sunstein, *supra* note 256, at 880-81; CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 54-59 (1993) (explaining how after *West Coast Hotel* the status quo was hardly considered neutral as the existing distribution could hardly be considered prepolitical). *But see* CUSHMAN, *supra* note 270, at 88-89 (explaining how the baseline was shifted three years earlier in *Nebbia*).

274. Sunstein, *supra* note 256, at 881.

275. STONE ET AL., *supra* note 255, at 834 (emphasis added); *see* Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1350 (2002) (describing the change as a broadening of the constitutional transaction frame, from "framing particular instances of wealth redistribution as constitutionally cognizable transactions" to "implicitly aggregating and offsetting many instances of wealth redistribution over time into a holistic system of pluralist politics").

> lied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[276]

Bruce Ackerman's explanation of this footnote sheds light on its relevance. Building on Ely's representation-reinforcement interpretation of the last two paragraphs, in which courts scrutinize legislation more carefully when "discrete and insular minorities" lacked equal access to the political process,[277] Ackerman explains the three paragraphs as a form of inter-generational synthesis. In addition to the latter two paragraphs' focus on the equality of the political process, Ackerman attaches additional significance to the first paragraph's description of the Bill of Rights as a list of specific prohibitions.[278] According to Ackerman, *Carolene Products*'s "use of the rhetoric of specificity" allows it "to integrate the Founding's affirmation of constitutional liberty . . . with the New Deal's affirmation of activist national government" in a manner that facilitates the last two paragraphs' return to the "Reconstruction's egalitarian affirmations" as applied to the new "centerpiece" of egalitarian concern: the structure of politics.[279]

Under this view, *Carolene Products* recognized that judges should generally avoid politics but that occasions will arise when extant inequalities loom so large as to require remediation in order to restore the political marketplace's democratic functionality. After *Carolene Products*, the new baseline of constitutional legitimacy was one of "undominated equality,"[280] a combination of constitutional freedom and equality.

e. Mapping the Path of Change Back onto the Sherman Act

As James May, a prominent historiographer of the Sherman Act's early application has noted: "Once in America there was a powerful, widely shared vision of a natural, rights-based political and economic order that simultaneously tended to ensure opportunity, efficiency, prosperity, justice, harmony, and freedom; and laissez-faire constitutionalism and antitrust law were deemed to be crucial, complementary vehicles for its realization."[281] As he demonstrates, judges from 1880-1918 "repeatedly reaffirmed the basic, traditional rights of labor, property, and exchange, and the fundamental, related principles of competition and 'nondiscretionary' adjudication, in

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276. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

277. JOHN HART ELY, DEMOCRACY AND DISTRUST 77, 87 (1980).

278. ACKERMAN, *supra* note 6, at 121-30. *But see* Louis Lusky, *Footnote Redux: A* Carolene Products *Reminiscence*, 82 COLUM. L. REV. 1093, 1098-1100 (1982) (discussing how the first paragraph was simply added to satisfy Chief Justice Hughes and did not represent Stone's vision).

279. ACKERMAN, *supra* note 6, at 126, 128-29.

280. BRUCE ACKERMAN, RECONSTRUCTING AMERICAN LAW 100 (1984). This may entail social equality too. *See, e.g.*, J. M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2313 (1997) ("Democratic ideals seem to require a further commitment to democratic forms of social structure and social organization, a commitment to social as well as political equality.").

281. James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257, 391 (1989).

both constitutional and antitrust analysis."[282] Just as the *Lochner* era embodied a dyad, so did early section 2 Sherman Act jurisprudence, protecting (1) individual liberty of contract but (2) allowing the government to regulate in the public welfare. And, just as the balance shifted through time in constitutional law, so did it too in section 2.

At first,[283] in cases such as *Northern Securities*, [284] the balance between the two prongs was unclear because the Court seemingly justified extensive regulation—prohibiting "every restraint of trade"—in "liberty of contract" terms.[285] Nevertheless, in *Standard Oil*[286] and *American Tobacco*,[287] two

282. *Id.* at 392 (citations omitted). Chief Justice Hughes, for instance, viewed the Sherman Act as a "charter of freedom" possessing the "generality and adaptability comparable to that found to be desirable in constitutional provisions." Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933).

283. The earliest Supreme Court section 2 monopolization case was *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), which held that the Sherman Act did not apply to the Sugar Trust, as manufacture preceded commerce. *E.C. Knight*, 156 U.S. at 11-12. Soon thereafter, the Court avoided this manufacture-commerce restriction by finding additional interstate incidents in a flow of commerce.

284. N. Sec. Co. v. United States, 193 U.S. 197, 328 (1904) (condemning a holding company in which two competing railroads had combined to dominate the railroad industry). Railroad companies were the subject of several early section 1 cases, such as *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), in which the Court forbade a price-fixing agreement among the railroads, as "commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the *small dealers and worthy men* whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings." *Trans-Missouri Freight*, 166 U.S. at 323 (emphasis added). Although it recognized that "[t]hese are misfortunes which seem to be the necessary accompaniment of all great industrial changes," it claimed it was "wholly different, however, when such changes are effected by combinations of capital, whose . . . control dictate the price at which the article shall be sold." *Id.* Justice White dissented, claiming this reading would frustrate the "plain intention of the law": "to protect the liberty of contract and the freedom of trade." *Id.* at 355 (White, J., dissenting).

James May has described how Justice Peckham, Justice White, and future-Chief Justice Taft espoused a "laissez-faire constitutionalism" attitude toward antitrust, in which they "conceded the importance of both state power and private right and sought to clarify the legitimate, constitutional scope of both state authority and private freedom." May, *supra* note 281, at 263. To May, "laissez-faire constitutionalism" embodied a dyad whereas "[o]n the one hand, [jurists] upheld considerable regulatory authority," but "[o]n the other hand, [these judges] increasingly stressed the unconstitutionality of arbitrary government deprivation and redistribution of private property." *Id.* Although Justice White adopted a more flexible and permissive approach to antitrust than the other two, "all three jurists still sought to distinguish harmful from beneficial activity within a largely traditionalist frame of reference *centrally concerned* with individual rights and the proper 'nondiscretionary' delineation of state and federal power." *See id.* at 301, 304-05 (emphasis added). For more on Chief Justice Taft's early views (and the importance of liberty of contract therein), see WILLIAM TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT 37 (1914).

These concerns are worthy to note especially considering Eskridge's evidence on the early labor injunction cases about how the Sherman Act was used against workers. *See* ESKRIDGE, *supra* note 35, at 81-105; *see also* WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 117-61 (1965). Other evidence of the dyad's balance in terms of private freedom can be found in federal courts' treatment of patent holders. Courts often dismissed antitrust challenges against patent holders, contending that patents were a form of private property. *See* Michael A. Carrier, *Unraveling the Patent-Antitrust Paradox*, 150 U. PA. L. REV. 761, 775 n.35 (2002) (listing cases).

285. *Northern Securities*, 193 U.S. at 351 ("Liberty of contract does not imply liberty in a corporation or individuals to defy the national will, when legally expressed. . . . [The right to acquire and hold property] must be exercised in subordination to the law."). There is evidence, however, that Justice Harlan was only concerned with the large trusts. *See id.* at 339 ("Congress, when enacting that statute, shared the general apprehension that a few powerful corporations or combinations sought to obtain . . . such absolute control of the entire trade and commerce of the country as would be detrimental to the general welfare."). It is perhaps possible to justify regulation in freedom of contract terms whenever any large concentration of power is concerned. *See* ESKRIDGE, *supra* note 35, at 81-105 (discussing antitrust

1911 "early landmark" decisions, the balance shifted decidedly toward the first prong and permissiveness of larger corporations through the establishment of the "specific intent" requirement to prove a section 2 violation.[288] Although both cases involved section 2 violations, they established that section 2's requirements apply only to companies *actively interfering* with smaller companies' ability to compete.

In *Standard Oil*, the federal government brought suit under section 1 and section 2 against John Rockefeller's Standard Oil Trust, for having "obtained a complete mastery over the oil industry," controlling ninety percent of the business and allowing it to fix prices.[289] The Court, in an opinion by Chief Justice White, affirmed the lower court ruling that the Trust had violated the Sherman Act, focusing less on the Trust's ninety percent control and more on how the government had established the Trust's prima facie intent to exclude others from the petroleum trade.[290]

The decision is most famous for its adoption of the "rule of reason" test in section 1 cases,[291] which provided judges with discretion to allow "reasonable" restraints (which were allowed at the common law).[292] But, it is more relevant here that *Standard Oil* defined monopoly according to the common-law definition, focusing on their prohibition because of interference with "individual freedom of contract."[293] In particular, it distinguished how at the common law "monopoly in the concrete" was not prohibited, because a "wrongful purpose" was also required to monopolize:[294]

> And it is worthy of observation, as we have previously remarked concerning the common law, that . . . [the Sherman Act omits] *any direct prohibition against monopoly in the concrete*[, as] it indicates a consciousness that *the freedom of the individual right to contract when not unduly or improperly exercised was the most efficient means for the prevention of monopoly, since the operation of the*

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laws' application against labor unions).

286. Standard Oil Co. v. United States, 221 U.S. 1, 33 (1911).

287. United States v. American Tobacco Co., 221 U.S. 106, 182 (1911).

288. *See* PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS 470-76 (4th ed. 1988) (describing the "early landmark" section 2 decisions). Scholars debate how much *Standard Oil* changed antitrust policy from earlier cases. *Compare, e.g.*, RUDOLPH PERITZ, COMPETITION POLICY IN AMERICA, 1888-1992, at 56-58 (1996) (arguing that *Standard Oil* reversed the course set in the formative era), *with* Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. REV. 1, 12 (1999) (claiming that the "*Standard Oil* decision was no outlier").

289. Standard Oil Co. v. United States, 221 U.S. 1, 33 (1911).

290. *Standard Oil*, 221 U.S. at 76.

291. *Id.* at 62.

292. *See* May, *supra* note 281, at 306-07.

293. *Standard Oil*, 221 U.S. at 54, 61-62 ("1. That by the common law monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public. 2. That . . . the freedom of the individual to deal was restricted where the nature . . . of the dealing was such as to engender the presumption of intent to bring about at least one of the injuries which it was deemed would result from monopoly . . . .").

294. *Id.* at 55, 56; *see also id.* at 52 (attributing this view to Hawkins); LETWIN, *supra* note 284, at 144-52 (discussing how lower federal courts had adopted the common law definition of monopoly in section 2 analysis).

> *centrifugal . . . forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented* if no . . . right to make unlawful contracts having a monopolistic tendency were permitted. *In other words that freedom to contract was the essence of freedom from undue restraint on the right to contract.*[295]

Standard Oil fit this definition of monopoly because it possessed a wrongful purpose.[296]

Standard Oil parallels *Lochner* both in its numerous references to the freedom to contract, as well as its adoption of a definition of neutrality—and hence permissibility—set relative to common-law baselines.[297] The same focus on wrongdoing occurred in *American Tobacco* involving the Tobacco Trust, announced two weeks later. As Chief Justice White explained, the Trust also violated section 2, as its "wrongful purpose" was "overwhelmingly established" by "the ever-present manifestation" of "a conscious wrongdoing . . . to restrain others."[298]

Just as the constitutional law balance weighed in favor of the "liberty of contract" prong through *Adkins* in 1923, so did the antitrust balance through the 1920s monopoly cases. The Court's permissiveness toward large corporations became especially evident in its 1920 *United States Steel* decision in which the Court found no violation.[299] United States Steel was organized in 1901 as the vehicle by which 180 independent firms were brought under unified control with the express hope of attaining monopoly power. Immediately after its formation, it controlled eighty to ninety-five percent of domestic production of some steel lines, but its overall share of iron and steel products had declined to some forty percent by the time of suit.[300] The government sued, arguing that this combination was formed for the purpose of restricting competition. The government alleged that the formation was illegal, because United States Steel's centralized control over several elements of production gave it a dominant position and thus suppressed competition. The government urged the Court to adopt a necessary effects test, alleging that the size and centralized ownership of the company necessarily threatens the normal operation of the law of competition.[301]

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295. *Standard Oil*, 221 U.S. at 62 (emphases added).

296. *Id.* at 76 (focusing on Standard Oil's "intent to drive others from the field and to exclude them from their right to trade and thus accomplish the[ir] mastery"); *see* BORK, *supra* note 240, at 37 ("The *Standard Oil* decision turned upon defendants' bad intent.").

297. 3 AREEDA & HOVENKAMP, *supra* note 244, § 606c (describing this as one of *Standard Oil*'s concerns); *see* PERITZ, *supra* note 288, at 56-58 ("[*Standard Oil*] can be understood as closing *Lochner*'s circle of individual liberty, its vision of a private sphere defined in opposition to a public, majoritarian domain.").

298. United States v. American Tobacco Co., 221 U.S. 106, 182 (1911); *see also* BORK, *supra* note 240, at 41 (analogizing White's discussion of vertical integration to the concept of barriers to entry).

299. United States v. United States Steel Corp., 251 U.S. 417 (1920).

300. 3 AREEDA & HOVENKAMP, *supra* note 244, § 609.

301. *United States Steel*, 251 U.S. at 419-21.

The Court held that no violation of section 2 existed even if the eighty to ninety-five percent market share figure were accurate. The four-Justice majority refused to condemn the company's formation despite the absence of an offsetting virtue.[302] All the Justices agreed that mere monopoly in the concrete was not unlawful and refused to adopt a necessary effects test.[303] The majority refused to endorse the Government's "paternalism," acknowledging that "[c]ompetition consists of business activities and ability—they make its life; but there may be fatalities in it."[304] It concluded that "the law does not make mere size an offence, or the existence of unexerted power an offence. It . . . requires overt acts."[305] That United States Steel was a "continually operating force" was not enough.[306]

In 1927, the Court affirmed this proposition that "mere size is not an offense" in *International Harvester*.[307] There, it focused on how the International Harvester Company lacked an "attempt[] to dominate" and how there "existed, a free, untrammeled, keen and effective competition in harvesting machinery that was in no wise restrained or suppressed by the International Company."[308] The Court held that a sixty-four percent market share was acceptable, especially given its decline from seventy-seven percent in recent years.[309]

The origins of change began in the 1932 *Swift* opinion in which Justice Cardozo stated:

> Mere size, according to the holding of this court, is not an offense against the Sherman Act unless magnified to the point at which it amounts to a monopoly, but size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past.[310]

This was significant because *Swift* involved a consent decree entered because of monopolization charges in 1920. The *Swift* Court focused on how the company was still equally able to "starve out weaker rivals."[311]

Thus, after *Swift*, the Court still adopted the *United States Steel* framework, focusing on overt acts and past specific intent.[312] But just as *Nebbia*

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302. AREEDA & HOVENKAMP, *supra* note 244, § 609.

303. *United States Steel*, 251 U.S. at 451; *id.* at 460 (Day, J., dissenting).

304. *Id.* at 450.

305. *Id.* at 451. The Court differentiated *Standard Oil* and *American Tobacco* from *United States Steel* by emphasizing the intensity of the intimidation present in both of the 1911 cases. *Id.* at 456.

306. *United States Steel*, 251 U.S. at 452. *United States Steel* drew a difference between monopoly in the concrete and a monopoly at law, as was the case at common law. It considered there to be only two options: *either* a company achieved its dominance through superior efficiency *or* it achieved its dominance through a wrongful purpose to exclude others. United States Steel did not have a wrongful purpose and thus was legitimate.

307. United States v. Int'l Harvester Co., 274 U.S. 693 (1927).

308. *Int'l Harvester*, 274 U.S. at 693, 708-10.

309. *Id.* at 709.

310. United States v. Swift & Co., 286 U.S. 106, 116 (1932) (citations omitted).

311. *Swift*, 286 U.S. at 116.

set the groundwork for *West Coast Hotel* and *Carolene Products* to repudiate elements of *Lochner* and *Adkins*, *Swift* set the groundwork for *Alcoa* to repudiate elements of *Standard Oil* and *United States Steel*.

f. Alcoa *Revisited*

Subpart II.A.1.a described *Alcoa*'s apparent contradiction within its two famous paragraphs (as well as the eradication of specific intent afterward). The first paragraph contained *United States Steel*'s proposition that "mere size" is not an offense and an ode to how the "successful competitor" should not be turned upon when he wins. The second paragraph—and statements about how "no monopolist monopolizes unconscious of what he is doing"[313]—then repudiated most of that notion, essentially gutting the passive beneficiary exception by prohibiting many normal methods of competition when performed by a monopolist. Intertemporal synthesis, more than inconsistency, better explains the logic of this two paragraph sequence: The first paragraph attempts to preserve specific elements of the Sherman Act's common law laissez-faire past (thus serving the same function as the first paragraph in *Carolene Products* that reduced the Bill of Rights to a list of specific prohibitions), and the second paragraph involves a newly-focused concern to remedy monopolist market structures (reflecting the *West Coast Hotel* recognition that nonintervention in the free market subsidized those with preexisting power).

The basic structure of *Alcoa*'s strategy is as follows:

> (1) Equate the past (*United States Steel*) with the passive beneficiary exception to monopoly;
> (2) Describe how new understandings indicate that even preservation of existing power by legitimate means cannot be seen as passive (as evidenced in the New Deal due process constitutional decisions);
> (3) Preserve the passive beneficiary exception by limiting its application to cases such as *United States Steel* where smaller producers are able to compete effectively with larger corporations (as possibly evidenced through the large corporation's market share).

In this light, *Alcoa*'s first paragraph cites *United States Steel* in order to preserve some of the past—the passive beneficiary exception—but does so in a manner that clears the way for the next paragraph's pronouncements on how actively maintaining monopoly power cannot be seen as passive. *Alcoa* cites *United States Steel* because United States Steel was already in the

312. *Cf. id.* at 119 ("[T]he defendants had abused their powers so grossly . . . [that t]here was the fear that . . . they would still be . . . able to crush their feebler rivals . . . by forms of competition too ruthless and oppressive to be accepted as fair and just.").

313. United States v. Aluminum Co. of Am., 148 F.2d 416, 432 (2d Cir. 1945).

process of losing market share of various iron and steel lines. Smaller producers were able to compete with it. The same could not be said for Alcoa, which remained dominant.[314] The first paragraph's "mere size is not an offence" quote should be taken quite literally, as size would not be an offense if it was not exerted in a fashion harmful to smaller producers. As in footnote four of *Carolene Products*, the paragraph seeks to preserve as much of the past doctrinal framework as lets the Court remedy its augmented concerns with the abuses of size.[315]

Alcoa's second paragraph—and its disregard of specific intent—contains the new concern that preserving existing imbalances is equivalent to creating them. As in *West Coast Hotel*, *Alcoa* realized that that the preservation of the "free" market had its own winners and losers, specifically that competitors would still be effectively excluded from the marketplace by even more benign (potentially pro-competitive) monopolist behavior such as anticipating future demand. *Alcoa* recognized that to require specific intent would leave many competitors powerless in light of the larger monopolist who would be able to use its existing advantages to perpetuate its dominance in the marketplace—and that the monopolist knew it. As such, the *Alcoa* Court "need charge it with no moral derelictions after 1912," as both "good" monopolists (those using legitimate pre-monopoly conduct to preserve its monopoly) and "bad" ones (those having a wrongful purpose) perpetuate the existing inequality and social evils that come from a monopolized market structure.[316]

Together, these paragraphs set forth a baseline of "undominated equality" similar to *Carolene Products* that is capable of being expressed in two different ways. First, interpreting the New Deal constitutional change at a lower level of generality, one could view the first and second paragraphs as *equal* and deem *Alcoa* simply more watchful for practices that interfere with smaller companies' freedom. This watchfulness would include some actions that were permissible when the monopolist was smaller. Under this expression, *Alcoa* would commit future courts to scrutinizing monopolistic practices thoroughly, but the burden of persuasion would remain with the plaintiff to prove that such monopolistic abuse occurred.

Second, interpreting the New Deal change at a higher level of generality, one could view *Alcoa*'s second paragraph as playing a larger role than the first. This second reading would interpret *Alcoa*'s concern with dismantling minority impediments to equality—such as a monopoly market structure—as effectively shifting the burden of persuasion to the monopolist. It would presumptively diminish the subset of "pre-monopoly" legitimate actions that a monopolist can perform, unless the monopolist could show

314. This persistent dominance could of course be the result of superior ability.

315. In both *Carolene Products* and *Alcoa*, commentators have critiqued these first paragraphs as inconsonant with what came afterward. *Compare* ELY, *supra* note 277, at 77 (*Carolene Products*), with BORK, *supra* note 240, at 166 (*Alcoa*).

316. *Alcoa*, 148 F.2d at 431.

that these actions did *not* enhance or maintain the size of its monopoly. Under this reading, the difference between *United States Steel* and *Alcoa* was not the underlying firm behavior but rather the fact that competition had already started to erode United State Steel's market share by the time of suit but not Alcoa's, which meant that Alcoa's competitors were helpless while United States Steel's were not.[317] As the *Alcoa* Court recognized, there would not have been a section 2 problem if Alcoa had less market share.[318]

Both readings are consistent with intertemporal synthesis, as the new realizations determine what parts of the past should remain. That is, perhaps some elements of the past *do* contradict the new understandings—and in that sense citation to the past doctrine is overbroad—but that does not necessarily mean that the attempted juxtaposition of past and present is erroneous. The Warren Court, armed with a new body of structure-conduct-performance industrial organization scholarship,[319] apparently adopted the second reading. In retrospect, viewing *Alcoa* through the Warren Court, that might appear to be the only reading of *Alcoa*. There is evidence, however, that Judge Hand would have adopted the first.

g. Judge Hand

In 1912, Learned Hand worked with Herbert Croly, author of *The Promise of American Life*,[320] and George Rublee on the antitrust plank of Theodore Roosevelt's campaign, in which they supported letting business grow in size while remaining subject to extensive federal regulation. All three shared the belief stated previously by Croly that the "trusts and monopolies were distinctive features of the economic development of the age . . . . [They] were not the reprehensible creatures of evil men nor the unnatural offspring of evil laws like the tariff. They were simply the predictable outgrowth of the American way of doing business."[321]

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317. *Id.* at 424, 428.

318. *Id.* at 424 ("That percentage [ninety] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not."). I conflate here two aspects of the monopolization inquiry: (1) the determination of monopoly power and (2) if so, the determination whether the firm behaved illegally. I do so mainly because *Alcoa* itself was the first decision to separate these two aspects of analysis, and I do not believe that both determinations are entirely unrelated. *See, e.g.*, FOX & SULLIVAN, *supra* note 231, at 122 (discussing how market definition is an "analytical artifact[]").

319. For examples of this scholarship, see the sources cited *supra* note 231.

320. HERBERT CROLY, THE PROMISE OF AMERICAN LIFE (1909). The book powerfully criticizes the laissez-faire approach of the day and set forth a profound vision of Hamiltonian nationalism, constructive individualism, and industrial democracy. For more on Croly, see EDWARD A. STETTNER, SHAPING MODERN LIBERALISM: HERBERT CROLY AND PROGRESSIVE THOUGHT (1993); DAVID W. LEVY, HERBERT CROLY OF *THE NEW REPUBLIC* (1985); and CHARLES FORCEY, THE CROSSROADS OF LIBERALISM (1961).

321. LEVY, *supra* note 320, at 73. In general, Croly believed that large companies were desirable, representing efficiency advantages. The explosion of economic enterprise called for "business specialists," and Croly lauded large corporations and their efficiency-related advantages. *Id.* at 107. He believed, however, that the trusts needed to be regulated, because the accumulation of wealth in a few men led to what he called "chaotic individualism." *Id.* at 23. The precise balance was an empirical matter, as Croly believed it was not yet settled whether large scale or small scale production was better. *E.g.*, Letter

Judge Hand, a progressive, thus differed from Louis Brandeis (who believed in the "curse of bigness"[322] and that "good" trusts did not exist[323]).[324] Hand believed that governmental agencies such as the FTC were better than extensive price regulation such as the Sherman Act.[325] In general, Hand believed "the less regulation, the better."[326]

Corn Products,[327] one of Judge Hand's section 2 cases as a district judge (decided while the Court was awaiting argument in *United States Steel*[328]) provides particular insight into his analytical approach toward the Sherman Act. Judge Hand suggested there are two broad categories or theories for proving unlawful monopolization: a structural approach—where "it is the mere possession of an economic power . . . capable, by its own variation in production, of changing and controlling price, that is illegal"—and a conduct approach—which emphasizes the exercise of a power to fix prices or exclude competitors by unfair or abusive practices.[329] Judge Hand eventually followed the *conduct* approach, discussing the importance of finding a monopolistic intent to exclude competitors.[330] He clarified that section 2 was not concerned with inefficient small competitors, as "[t]he national will has not declared against elimination of competitors when they fail from their inherent industrial weakness."[331]

This decision is remarkable in comparison to *Alcoa*'s eradication of the specific intent requirement and focus on smaller competitors' helplessness,[332] especially when one considers that the only major interim section 2 decision was *United States Steel*, which condoned large corporations. Arguably, Judge Hand's interpretation of section 2 changed because of his

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from Herbert Croly to Learned Hand (Dec. 20, 1911) (on file with Harvard Law School Library). As of 1909, Croly believed that the Sherman Act should have been repealed, because its social purposes propped up inefficient small businesses. CROLY, *supra* note 320, at 359. But, he later supported *Standard Oil* and *American Tobacco*, for although those decisions came down against monopolists with improper intent, they did not outlaw monopolies per se. Douglas Walter Jaenicke, *Herbert Croly, Progressive Ideology, and the FTC Act*, *in* 2 BUSINESS & GOVERNMENT IN AMERICA SINCE 1870, *supra* note 236, at 68 n.26.

322. *E.g.*, LOUIS D. BRANDEIS, THE CURSE OF BIGNESS (Osmond K. Fraenkel ed., 1934).

323. *Id.* at 115 ("Clearly misleading is the phrase, 'Natural monopoly should not be interfered with.' There are no natural monopolies in the industrial world."). Brandeis attacked the Steel Trust, as it gained control "not through the greater efficiency, but by buying up existing plants . . .and by controlling strategic transportation systems." *Id.*

324. GERALD GUNTHER, LEARNED HAND 193 (1994) (stating Hand believed "[b]igness often meant efficiency").

325. *An Unseen Reversal*, NEW REPUBLIC, Jan. 9, 1915, at 7-8.

326. Letter from Learned Hand to Herbert Croly (Dec. 15, 1911) (on file with Harvard Law School Library); *see also* Letter from Learned Hand to Felix Frankfurter (Sept. 12, 1912) (on file with Harvard Law School Library) (criticizing "Brandeis's effort to throw us into the camp of the monopolists.").

327. United States v. Corn Prods. Refining Co., 234 F. 964 (S.D.N.Y. 1916).

328. In private correspondences, Hand had expressed his confusion with antitrust jurisprudence. Letter from Learned Hand to George Rublee (June 9, 1914) (on file with Harvard Law School Library); Letter from Learned Hand to Felix Frankfurter (Apr. 4, 1926) (on file with Harvard Law School Library) (calling antitrust the "most discreditable line of decisions . . . that [the Supreme Court has] ever given.").

329. *Corn Prods.*, 234 F. at 1012.

330. *Id.* at 1014.

331. *Id.* at 1015.

332. *See supra* notes 232, 236-41 and accompanying text.

imaginative reconstruction approach to statutory construction and his augmented insight into the free market's deficiencies. But that does not mean that his original anti-Brandeis orientation was completely lost. Hand *still* believed in the efficiencies of large corporations, hence his "ode to the successful competitor." The "ode" was not, as Bork claimed, illusory or a pretext for Hand's real thoughts only to emerge in the second paragraph.[333] *What had changed was the background assumptions of market functionality that had given effect to Hand's purposive-based analysis.*[334] The New Deal had seriously undermined confidence in the self-corrective attributes of the free market to protect less powerful entities—as recognized in *West Coast Hotel* and *Carolene Products*—and in the belief that large size represented actual efficiencies.[335] With his new understandings, Judge Hand diminished, but did not eliminate, the passive beneficiary exception of *United States Steel* as to augment scrutiny of the harms that arise through large companies' operation (bridging the difference between the conduct approach and structural approach from *Corn Products*) This led to greater protection of smaller producers, thus concurrently enhancing "social" purposes as well.

h. Summary of Alcoa *as Constitutional Statutory Synthesis*

As an original matter, *Alcoa* is a "hard" case. The weakest part of Judge Hand's opinion is its intimation that it is what the Sherman Act's enactors would have wanted. The statute itself is barren of clues. The legislative history (if one were to look at it) is not much better.[336] Forcing an originalist to decide the proper resolution based on that indeterminacy alone is unnecessary and undesirable. The constitutional change between 1890 and 1945 (or even 1920 and 1945) was relatively clear. By 1945, the *Lochner* era was gone. Incorporating that change into the Sherman Act provides a much more objective basis for reorienting section 2 jurisprudence in light of augmented skepticism of larger companies than any originalist inquiry. And, it provides a reason that the Sherman Act's "social purposes"—even if originally secondary to consumer welfare—now gained significance in section 2 application.[337]

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333. *See supra* note 243 and accompanying text.

334. In Lessig's terms, this would be a change from an "uncontested discourse" (*i.e.*, a background understanding originally taken for granted by most of the community) to a contested discourse, whereby the Court had "retreat[ed] from judgments that it unself-consciously had made before." Lessig, *supra* note 7, at 452. Synthesis occurred instead of repudiation, as "one set of ideas did not triumph over another." *Id.*

335. *See id.* at 461 (describing how the view before *West Coast Hotel* "depended upon a credible claim that these economic institutions were actually independent. The Depression made it plausible that aspects of the economy previously thought independent were actually dependent. . . . [I]t became plausible to believe a *newly recognized fact* of an increasingly interdependent economic system.").

336. *See supra* note 247.

337. *But see* Carrier, *supra* note 284, at 763 n.2 (questioning the simultaneous pursuit of economic and non-economic goals).

This brought section 2 doctrine more in line with section 1 doctrine. Prior to *Alcoa*, the Supreme Court had already interpreted section 1 in an intrusive manner—consistent with the New Deal change—in *Socony*.[338] *Socony* held that "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is" automatically illegal once identified.[339] Its "famous footnote 59"[340] illuminated that it was irrelevant under section 1 whether the conspirators actually had the power to fix prices, as "[t]he existence or exertion of power to accomplish the desired objective becomes important only in [section 2 cases]."[341] Although the footnote recognized that "two sections overlap in the sense that a monopoly under § 2 is a species of restraint of trade under § 1," it claimed that section 2 was a less restrictive subset of antitrust law, as the companies' effectiveness in accomplishing their objectives only mattered in section 2 cases.[342] *Alcoa* had bridged the gap between section 1 and section 2 by reorienting the "effectiveness" inquiry.

This, however, draws into question the legitimacy of modern antitrust jurisprudence as a system of economics-driven rules in which social purposes are virtually ignored.[343] The next Subpart analyzes this issue in more detail.

2. Sylvania: *The Post-Synthesis Path of Evolution*

Antitrust's shift towards a system of economic rules began in the 1977 *Sylvania* opinion.[344] *Sylvania* is most famous for reversing *Schwinn*[345] and applying the "Rule of Reason"[346] to vertical[347] nonprice restraints[348] (replacing the old rule of *per se* illegality[349]). This change allowed vertical non-

338. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). *Socony* was not necessarily a novel section 1 interpretation, as it has pre-New Deal roots in *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

339. *Socony-Vacuum*, 310 U.S. at 223.

340. AREEDA & KAPLOW, *supra* note 288, at 221.

341. *Socony-Vacuum*, 310 U.S. at 226 n.59 (citations omitted).

342. *Id.*

343. *See* Marina Lao, *Tortious Interference and the Federal Antitrust Law of Vertical Restraints*, 83 IOWA L. REV. 35, 39 (1997).

344. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); *see* Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI. L. REV. 1, 2 (1977) ("[*Sylvania*] places unusual emphasis on the role of economics in deciding antitrust cases . . . which is hostile to many of the traditional rules of antitrust liability.").

345. United States v. Arnold, Schwinn & Co., 388 U. S. 365 (1967).

346. The "rule of reason" means that the behavior is illegal only if it is unreasonable given the circumstances. *See* Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

347. A horizontal restraint is "an agreement between competitors at the same level of the market structure," whereas a vertical restraint involves "combinations of persons at different levels of the market structure." United States v. Topco Assoc. Inc., 405 U.S. 596, 608 (1972).

348. A nonprice restraint is an agreement that does not involve fixing prices, such as territorial restrictions.

349. Per se illegality means that restraints "are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry." N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

price restraints to persist if reasonable,[350] allowing firms to pursue vertical efficiencies that would enable growth in size.[351]

This was a vast change from the "business egalitarianism that [was] so prominent in the jurisprudence of preceding Courts."[352] In 1972, the Supreme Court had claimed:

> [T]he Sherman Act [particularly is] the Magna Carta of free enterprise. [It is] as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.[353]

Sylvania deviated from this focus by claiming that *inter*brand competition—and not *intra*brand competition—was "the primary concern of antitrust law."[354] (Adopting the Rule of Reason for vertical nonprice restraints was essential to this transition, because vertical nonprice restraints had the "potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition."[355]) Instead, *Sylvania* focused on maximizing resource allocation and total societal welfare.

The issue as concerns this Article is not whether this shift away from "business egalitarianism" is substantively desirable as a matter of policy, but whether *Sylvania* was a democratically legitimate evolutionary opinion. A simple answer is yes, the Sherman Act's vague language implicitly dele-

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350. *See, e.g.*, Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 10 (1984) ("We cannot condemn so quickly anymore. What we do not condemn, we must study. The approved method of study is the Rule of Reason."). As a practical matter, the shift to Rule of Reason analysis aided corporate defendants tremendously, because many complaints are now dismissed because plaintiffs have difficulty proving market power. *See, e.g.*, Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 B.Y.U. L. REV. 1265, 1268 (1999) (finding that courts have disposed of eighty-four percent of Rule of Reason cases in the modern era on the grounds that the plaintiff could not demonstrate an anticompetitive effect).

351. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 55 (1977) (listing efficiencies as: "[inducing] competent and aggressive retailers to make the kind of investment of capital and labor that is often required . . . to induce retailers to engage in promotional activities or to provide service and repair facilities," and to control the "'free rider' effect").

352. BORK, *supra* note 240, at 419; *see also* E. Thomas Sullivan, *The Economic Jurisprudence of the Burger Court's Antitrust Policy: The First Thirteen Years*, 58 NOTRE DAME L. REV. 1, 1 (1982) ("In place of the 'competition equality' populism of earlier periods, the Burger Court has embraced a neoclassical 'competition efficiency' paradigm.").

353. United States v. Topco Assoc., 405 U.S. 596, 610 (1972); *cf.* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 371 (1963) (similarly focusing on the protection of small businessmen).

354. *Sylvania*, 433 U.S. at 52 n.19, 54 (stating interbrand competition would check intrabrand competition).

355. *Id.* at 51-52.

gated the power to courts to change antitrust law as they see fit.[356] This argument is apparently made by both Calabresi[357] and Eskridge.[358] It accords courts the same degree of leniency in enacting policy that is normally provided to administrative agencies.[359]

Synthesis, conversely, is more restrained. It would allow courts to act as agencies in terms of devising policies, but its policy options would have to be fully consistent with the previously synthesized interpretation. As *Alcoa* legitimately altered the purposive balance of the Sherman Act because of the New Deal constitutional change, post-*Alcoa* antitrust policies would have to reflect this post-synthesis balance.[360] Assuming *arguendo* that *Sylvania* was a break from past doctrine given its overrule of *Schwinn*,[361] a synthetic judge would ascertain its legitimacy by asking whether: (1) there was relevant constitutional change in the interim between 1945 and 1977, (2) other antitrust statutes were amended or enacted as to have a "gravitational force" on the Sherman Act's proper interpretation, or (3) *Sylvania* represents an "alternative means to a common end" as *Alcoa* (in Lessig's terms, "two-step" fidelity).[362] If one of the first two options were true, *Sylvania* would be legitimate because of some sort of extra-statutory support. If the third option were true, *Sylvania* would be legitimate as an extension of the constitutional change originally supporting *Alcoa*. I examine each possibility in turn.

First, it is unlikely that any relevant constitutional change was sufficiently accepted by 1977.[363] One could argue that constitutional change in

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356. *See* Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 731-32 (1988) (Scalia, J.).

357. This is the general import of Calabresi's argument that judges should have the common-law power to update statutes when implicit delegation exists. *See* CALABRESI, *supra* note 33.

358. *See* ESKRIDGE, *supra* note 35, at 255 (explicating—and apparently supporting—Justice Stevens's belief that courts are implicitly left with the responsibility for filling in the details of common-law statutes).

359. If true, this might raise nondelegation problems considering the Sherman Act's vagueness.

360. Of course, if there had been constitutional change since *Alcoa*, antitrust policies would have to reflect the balance as of that change.

361. One could argue that *Schwinn* itself was the deviant doctrinal decision. *E.g.*, Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 47 (1977) ("Schwinn itself was an abrupt and largely unexplained departure from *White Motor Co. v. United States*, 372 U.S. 253 (1963), where only four years earlier the Court had refused to endorse a per se rule for vertical restrictions."). This argument, however, is implausible given the rest of Warren Court antitrust doctrine. *White Motor* refused to hold vertical price restraints per se illegal, because it was the Court's very "first case involving a territorial restriction in a *vertical* arrangement," and it knew too little to reach a conclusion. *White Motor*, 372 U.S. at 261. In *United States v. Topco Assoc.*, 405 U.S. 596 (1972), which included territorial restriction arrangements similar to that involved in *Sylvania*, the Court classified the restraints as horizontal and deemed them *per se* illegal. *Topco*, 405 U.S. at 608.

362. Lessig, *Translation*, *supra* note 19, at 1249. Lessig writes:

> According to [the two-step conception], then, one could well understand the history of antitrust law as the selection of alternative means to a common end, where the means chosen depend upon the context of choice, and the context of choice includes both the values Congress selected (protecting consumers) and the facts of the world (conceptions of economics).

Id.

363. The baseline for change is not necessarily the New Deal. *See infra* notes 445-51 and accompanying text (describing the possibility that an anti-White Supremacy principle became sufficiently accepted in constitutional law after *Loving*). If so, 1967 to 1997 would be the relevant time period.

favor of efficiency existed,[364] relying on: *Mathews v. Eldridge*'s three-part balancing test to determine what process is due as a form of procedural efficiency;[365] *San Antonio Independent School District v. Rodgriguez*'s conclusion that wealth is not a suspect class, allowing states to finance primary and secondary school education in the most economically-efficient (cheapest) manner possible;[366] and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*'s removal of the "commercial speech" exception to First Amendment protection as partly to protect "the proper allocation of resources in a free enterprise system."[367] But a synthetic judge would not deem this change sufficiently accepted *by 1977*[368] considering

364. William Eskridge and Philip Frickey describe the Burger Court's recognition of resource scarcity in its public-law opinions. William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to the Legal Process*, at cxxi-cxxiii, in HART & SACKS, *supra* note 12.

365. 424 U.S. 319, 335 (1976). *Mathews* described the three parts as:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.

This was a stark change from *Goldberg v. Kelly*, 397 U.S. 254 (1970), and *Boddie v. Connecticut*, 401 U.S. 371 (1971). *Goldberg* held that welfare "benefits are a matter of statutory entitlement" for qualified persons and that a pre-termination hearing was necessary. *Goldberg*, 397 U.S. at 261-63. *Boddie* rejected the cost arguments of the state, *Boddie*, 401 U.S. at 382, and the idea that the procedures need only be adequate to the general class of affected individuals. *Id.* at 379-80; *cf.* Paul W. Kahn, *The Court, the Community, and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 19 (1987) (describing how *Eldridge* embodies efficiency-based analysis).

366. *Rodgriguez*, 411 U.S. 1 (1973); *see id.* at 42 n.85 (refusing to "weigh the arguments for and against 'district power equalizing'"); *id.* at 43 (questioning the correlation between cost and quality). In so concluding, the Court acknowledged the "significance of education" but refused to let this fact affect equal protection analysis. *Id.* at 30. The Court explicitly eschewed becoming a "super-legislature" in terms of directing policies based on the fact that some activities were more fundamental than others. *See id.* at 31. "As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation." *Rodgriguez*, 411 U.S. at 35.

367. 425 U.S. 748, 762, 765 (1976). For another possible source of constitutional change in favor of efficiency, see *Milliken v. Bradley*, 418 U.S. 717 (1974), which held that a court's remedy for de jure segregation must be narrowly tailored as to fit the constitutional violation. Also, one could look at the Court's treatment of implied causes of action. *Compare* J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (implying causes of action liberally to fulfill statutory purpose), *with* Cort v. Ash, 422 U.S. 66 (1975) (implying causes of action only when consistent with congressional intent). Or, one could look at the Court's restriction of state court prisoner's ability to raise claims on habeas corpus. *Compare* Fay v. Noia, 372 U.S. 391 (1963) (holding that claims not raised in state courts may be raised on habeas corpus unless the petitioner deliberately bypassed state procedures), *with* Wainwright v. Sykes, 433 U.S. 72 (1977) (holding that claims not presented in state court may be raised on habeas corpus only if there is cause and prejudice). *See, e.g.*, CHEMERINSKY, *supra* note 21, at 883 (tying this change to efficiency).

368. An efficiency principle might *currently* exist, although its limits are not very clear. *See generally* Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651 (2001) (contending that the administrative state now embodies certain cost-benefit default principles built into statutory construction). Perhaps it gained sufficient acceptance in the Reagan era. In dormant Commerce Clause cases, the Court started using a flexible balancing approach in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). In the late 1970s and early 1980s, the Court started employing this test to strike down state legislation designed to protect businesses of that state in *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978), *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), and *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662 (1981). These cases often discussed the federal interest in efficiency. *E.g.*, *Kassel*, 450 U.S. at 671.

It is possible, however, to interpret these cases as supporting economic freedom instead of effi-

that other cases such as *National League of Cities v. Usery*[369] still adopted an inflexible position toward regulation (prohibiting Commerce Clause legislation from applying against the states "in areas of traditional governmental function").[370] Thus, changed constitutional norms do not justify *Sylvania*.

Second, there is no statutory change that can be said to have a gravitational force on the Sherman Act. "In 1975, Congress repealed the authority for states to enact the so-called 'fair trade' laws which permitted sellers to engage in [state-sanctioned] resale price maintenance."[371] In 1976, Congress passed the Hart-Scott-Rodino Antitrust Improvements Act,[372] which requires that parties to a merger between sufficiently large firms[373] file "Pre-Merger Notification" forms with the government.[374] Like the repeal of the fair trade laws, this Act works against *Sylvania*, as it was part of the Carter Administration's efforts to decelerate large mergers.[375]

Third, as an alternative means to *Alcoa*'s end, *Sylvania* is on its strongest—but still insufficient—grounds. *Schwinn* had previously drawn a distinction based on sale versus nonsale (consignment) transactions, holding restrictions on the former subject to *per se* liability and restrictions on the latter subject to the "rule of reason." One of *Sylvania*'s justifications for overruling *Schwinn* was that allowing manufacturers to achieve the efficient distribution of their product helped small businessmen.[376] Although recognizing that "the view that the manufacturer's interest necessarily corresponds with that of the public *is not universally shared*," *Sylvania* noted that "to the extent that the form of the transaction is related to interbrand benefits, the [*Schwinn*] Court's distinction is inconsistent with its articulated concern for the ability of smaller firms to compete effectively with larger ones."[377] In a footnote, the Court explained how *per se* rules

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ciency. *See* Exxon Corp. v. Maryland, 437 U.S. 117, 125, 126 n.16 (1978) (protecting the free flow of goods and services between states); Louis Henkin, *Economic Rights Under the United States Constitution*, 32 COLUM. J. TRANSNAT'L L. 97, 122 (1994) (claiming that dormant Commerce Clause doctrine serves as a source of economic freedom).

369. 426 U.S. 833 (1976).

370. *National League of Cities*, 426 U.S. at 852.

371. William L. Reynolds & Spencer Webber Waller, *Legal Process and the Past of Antitrust*, 48 SMU L. REV. 1811, 1822-23 (1995). In 1976, "the House Commerce Committee approved a bill . . . which provides that trademark licensing agreements limiting the geographical territory in which a franchise holder can [operate] . . . shall not be deemed per se violations of the antitrust laws." Petition for a Writ of Certiorari at 15 n.2, Continental T.V., Inc. v. GTE Sylvania Corp., 537 F.2d 980 (9th Cir. 1976) (No. 76-15). But, this did not become law and thus has no legal force.

372. 15 U.S.C. § 18a (2000).

373. The Act applies if a party with annual net sales or total assets of at least $100 million is acquiring a party with annual net sales or total assets of at least $10 million. *Id.* § 18a (a)(B)(ii)(II).

374. Before the 1970s, one also could look at the Celler-Kefauver Act of 1950, 64 Stat. 1125 (1950), which strengthened the Clayton Act's antimerger provisions. *See generally* William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1125-26 (1989).

375. *See id.* at 1126-27.

376. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 56 (1977).

377. *Sylvania*, 433 U.S. at 56.

> may work to the ultimate detriment of the small businessmen who operate as franchisees, [because t]o the extent that a *per se* rule prevents a firm from using the franchise system to achieve efficiencies that it perceives as important to its successful operation, the rule creates an incentive for vertical integration into the distribution system, thereby eliminating to that extent the role of independent businessmen.[378]

Justice White's concurrence criticized this analysis, contending that "concern for the freedom of the businessman to dispose of his own goods as he sees fit" was the most probable explanation for the Court's precedents—not economic efficiency.[379] Absent "contrary congressional action," Justice White would not have overruled *Schwinn*:

> After summarily rejecting this concern, reflected in our interpretations of the Sherman Act, for "the autonomy of independent businessmen," the majority not surprisingly finds "no justification" for *Schwinn*'s distinction between sale and nonsale transactions because the distinction is "essentially unrelated to any relevant economic impact." But while according some weight to the businessman's interest in controlling the terms on which he trades in his own goods may be anathema to those who view the Sherman Act as directed solely to economic efficiency, this principle is without question more deeply embedded in our cases than the notions of "free rider" effects and distributional efficiencies borrowed by the majority from the "new economics of vertical relationships."[380]

Whether or not one agrees with Justice White's criticism depends on the level of generality at which one originally interpreted the New Deal change in *Alcoa*. Justice White's concern for the "autonomy of independent businessmen"—read "small" businessmen—reflects the Warren Court's higher-level-of-generality interpretation of *Alcoa* (and *Socony*). In this light, *Sylvania*'s focus on economic efficiency is illegitimate because it elevates the importance of large corporation autonomy over small businessman autonomy[381]—a preference that *Alcoa*, if its second paragraph is dominant, repu-

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378. *Id.* at 57 n.26.

379. *Id.* at 67 (White, J., concurring in the judgment) (citing several prior decisions).

380. *Id.* at 68-69 (internal citations omitted) (citing Bork's work). The Ninth Circuit had taken this position in its lower court opinion. GTE Sylvania Corp. v. Contintental T.V., Inc., 537 F.2d 980, 988 (9th Cir. 1976) (en banc) (describing the "major purpose of the Sherman Act" as "to insure the 'unrestrained interaction of competitive forces' that 'will yield the best allocation of our economic resources . . . while at the same time providing an environment conducive to the preservation of our democratic political and social institutions'") (quoting *N. Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958)). The Ninth Circuit majority differentiated *Sylvania* from *Schwinn* on the fact that, unlike *Schwinn*, "each Sylvania dealer was *free to sell to any buyer he chose*." *See Sylvania*, 537 F.2d at 990 (emphasis in original).

381. *Cf.* Earl E. Pollock, *The Schwinn Per Se Rule: The Case for Reconsideration*, 44 ANTITRUST L.J. 557, 570-71 (1975) (discussing how allowing vertical nonprice restraints does not alter total autonomy but shifts the focus from the dealer's economic freedom to the manufacturer's).

diated. (Outside of *Alcoa*, this reading may be correct if sufficiently accepted constitutional change in favor of equality occurred since *Alcoa* in cases such as *Brown* and *Loving*.)[382]

The *Sylvania* Court's interpretation is consistent with a lower-level-of-generality interpretation of *Alcoa*. There is a mix of efficiency and small businessman concerns, as vertical nonprice restraints are one way that small businessmen can become more efficient to compete with larger companies. Nothing about this position inherently repudiates the Court's high degree of watchfulness for large corporation anticompetitive abuse, as Judge Hand was concerned with presuming efficiencies because of size—not behavior that led to actual efficiencies.

This latter interpretation, however, is peculiar given what *Sylvania* has come to represent in later cases. Consider the 1984 case of *Monsanto*,[383] involving the proper standard to defeat a defendant's motion for judgment notwithstanding the verdict. At issue in *Monsanto* was whether a jury could reasonably infer a vertical price-fixing conspiracy from the sole fact that a manufacturer had terminated a distributor after other distributors had complained about price-cutting. The question was difficult because, under *Colgate*,[384] a manufacturer could legally set retail prices in advance and terminate noncompliant distributors, but under *Dr. Miles*,[385] it was illegal for a manufacturer and distributor to set prices together in advance. Thus, evidence of dealer termination was circumstantial evidence of an advance price-fixing agreement, but it also was consistent with *Colgate*-permitted conduct: vertical nonprice restraints that were permitted under the reasonableness standard of *Sylvania*.[386]

The *Monsanto* Court, concerned that the possible imposition of treble damages from an unfavorable jury verdict would deter manufacturers from initially partaking in this *Colgate*- (and *Sylvania*-) permitted conduct—thus preventing efficiency-enhancing measures from ever being adopted[387]—held that to defeat a defendant's motion for j.n.o.v.:

> There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. . . . [T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufac-

382. A synthetic judge chooses the level of generality supported in constitutional doctrine. *See supra* note 201 and accompanying text. For ease of exposition, I do not discuss the possibility of changed constitutional conceptions of equality here, but in the context of *Bob Jones*, *infra* Subpart II.B.2.

383. Monsanto v. Spray-Rite Service Corp., 465 U.S. 752 (1984).

384. United States v. Colgate & Co., 250 U.S. 300, 306-07 (1919).

385. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 404-09 (1911).

386. *Monsanto*, 465 U.S. at 762-63 (stating how complaints about price-cutters are "natural" and "unavoidable" reactions by distributors to the activities of their rivals).

387. *Id.* at 763 (describing the possible deterrence of efficiency-enhancing measures by the possible application of a per se standard and imposition of treble damages).

> turer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective."[388]

Two years later in *Matsushita*,[389] the Court extended this "tends to exclude" requirement to summary judgment more generally.[390]

The holdings of *Monsanto* and *Matsushita* are remarkable in relation to *Alcoa* because they signify a complete departure from even the lower-level-of-generality interpretation of *Alcoa*. By *Monsanto*, the Court had become much more concerned with the *ex ante* effects of its decisions on societal welfare,[391] leading it to place stringent requirements on antitrust plaintiffs bringing suit. (Possibly, by the mid 1980s, constitutional change in favor of efficiency existed as to support this relaxed scrutiny of large corporations.)[392] This is the opposite of *Alcoa*'s high degree of watchfulness for anticompetitive abuses and a far cry from *Alcoa*'s economic-social purposive balance.

In this light, *Sylvania* itself may be legitimate as an extrapolation of *Alcoa*'s focus, but its progeny might not be.[393] The issue then becomes whether the post-*Sylvania* progression was reasonably foreseeable; and, if so, whether that reasonably foreseeable progression was precisely why *Sylvania* came out as it did. In hindsight, as well as the late 1970s, it is easy to speculate that it was.[394]

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388. *Id.* at 764 (citation omitted).

389. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

390. *Matsushita*, 475 U.S. at 588 ("Thus, in [*Monsanto*], we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently."). The Court tempered (clarified) *Matsushita*'s reach in *Eastman Kodak Co. v. Image Tech. Serv., Inc*, 504 U.S. 451 (1992), by explaining that *Matsushita* only limited unreasonable inferences.

391. *See generally* Easterbrook, *supra* note 130.

392. Note that *Monsanto* was after the dormant Commerce Clause shift described *supra* note 368. There are, of course, many other factors which might describe the shift in antitrust law, such as Chicago School antitrust scholarship, a Reagan-Bush appointed judiciary that was more receptive to an economics-oriented approach, as well as a Justice Department that chose not to bring many cases. These factors, probably more so than possible constitutional change, describe *why* antitrust law shifted as it did; they do not, however, augment the interpretive legitimacy of the change—at least according to "popular consent" and "superior competence" premises of democratic legitimacy.

393. Lessig has described how the Sherman Act's evolution through the Reagan Era could be seen as an "alternative means to a common end," *if one assumed that* framers adopted a consumer welfare approach or "that the framers intended to delegate to the courts the power to choose the policy values that the statute would advance." Lessig, *Translation*, *supra* note 19, at 1249-50. Synthesis rejects the delegation option as too unrestrained. And, it rejects the consumer welfare focus as historically inaccurate. Lessig recognizes the same. *Id.* (describing how, historically, "the Chicago School stands on weak ground").

394. *See, e.g.*, Tyler A. Baker, *Interconnected Problems of Doctrine and Economics in the Section One Labyrinth: Is* Sylvania *A Way Out?*, 67 VA. L. REV. 1457, 1460 n.12 (1981) (explaining that "[a]lthough the commentary ranges from the euphoric to the splenetic, [all authors] agree that the decision has important implications far beyond its specific holding"). *But see* Posner, *supra* note 344, at 7 (explaining how the Supreme Court "may not have been fully aware of the potential reach of the free-rider concept"). *Sylvania*'s effects also pervaded section 2 analysis in the circuit courts. *E.g.*, California Computer Products, Inc. v. IBM Corp., 613 F.2d 727 (9th Cir. 1979); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979). *Berkey* condemned only those practices whose effectiveness

B. Civil Rights

Synthesis can also help update civil rights statutes through incorporation of changed constitutional conceptions of equality. This Part explores two controversial cases: *Weber*[395] (dealing with the permissibility of voluntary affirmative action under Title VII) and *Bob Jones*[396] (concerning whether private schools who racially discriminate because of religious reasons should receive tax-exempt status).

1. Weber*: Policy Versus Principle*

Weber concerned whether Title VII of the Civil Rights Act of 1964[397] forbids private employers[398] from voluntarily adopting affirmative action plans. The majority, in an opinion by Justice Brennan, held that voluntary affirmative action was permitted under Title VII, relying on the Act's alleged purpose as well as the language and legislative history of section 703(j), which stated only that nothing contained in Title VII would *require* preferential treatment.[399] The majority believed it significant that 703(j) did not say "require or *permit*" racially preferential integration efforts.[400] In dissent, Justice Rehnquist chastised the majority for ignoring the plain meaning of section 703(a)[401] and section 703(d),[402] as well as what he al-

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depends on monopoly power. *See generally* Case Comment, *Antitrust Scrutiny of Monopolists' Innovations:* Berkey Photo, Inc. v. Eastman Kodak Co., 93 HARV. L. REV. 408, 413-14 (1979) ("*Berkey* abandoned the 'cryptic' suggestion of . . . (*Alcoa*) that all monopolies are illegal except those 'thrust upon' a 'passive beneficiary.' The *Berkey* test permits a monopolist actively to seek the benefits of integration . . . .") (citations omitted).

395. United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979).

396. Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

397. 42 U.S.C. § 2000e (2000).

398. No Fourteenth Amendment claim existed because only private employers were involved. *E.g.*, The Civil Rights Cases, 109 U.S. 3 (1883) (holding that the Fourteenth Amendment only applies to state action).

399. *Weber*, 443 U.S. at 205-08 (describing the statutory purpose as to "'open employment opportunities for Negroes in occupations which have been traditionally closed to them.'") (quoting 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey)). Section 703(j) provides: "Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance which may exist [in] the available work force in any community." 78 Stat. 257, 42 U.S.C. § 2000e-2(j).

400. *Weber*, 443 U.S. at 205.

401. Section 703(a)(2) makes it unlawful for an employer to "classify his employees 'in any way which would . . . tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race.'" 78 Stat. 255, 42 U.S.C. § 2000e-2(a)(2).

402. Section 703(d) provides that: "It shall be an unlawful employment practice for any employer . . . to discriminate against any individual because of his race . . . in admission to, or employment in, any program established to provide apprenticeship or other training." 78 Stat. 256, 42 U.S.C. § 2000e-2(d). For Rehnquist's criticism, see *Weber*, 443 U.S. at 227 (Rehnquist, J., dissenting). For more on how *Weber* ignores the plain meaning of section 703, see Farber, *supra* note 47, at 305, which describes how "[i]t is difficult to escape the conclusion that the Court went 'not merely *beyond*, but directly *against* [T]itle VII's language."

leged to be the Act's sole purpose to eliminate "'*all* racial discrimination in employment, without exception for any group of particular employees.'"[403]

Justice Blackmun concurred in the majority's opinion, stating that he shared "some of the misgivings expressed in [Rehnquist's] dissent, concerning the extent to which the legislative history of Title VII clearly supports the result the Court reaches today," but he believed that "additional considerations, practical and equitable, only partially perceived, if perceived at all, by the 88th Congress, support the conclusion reached by the Court."[404] In particular, he described how after *Griggs*[405] employers were liable under Title VII for employment practices with a disparate impact as to prevent the effects of segregation from being "lock[ed] in."[406] To Justice Blackmun, disparate impact liability had policy ramifications, because this

> broad prohibition against discrimination places the employer and the union on . . . a 'high tightrope without a net beneath them.' If Title VII is read literally, on the one hand they face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks.[407]

Consequently, Justice Blackmun proposed an "arguable violation" theory, whereby voluntary affirmative action was allowed whenever an arguable disparate effect of the employer's past practices remained. In sum, this shifted the interpretation of Title VII away from the "bargain struck in 1964 with the passage of Title VII [that] guaranteed equal opportunity for white and black alike" toward a more remedial purpose.[408]

A synthesizer would approach *Weber* with a two-tier, five-variant framework; the viability of voluntary affirmative action under Title VII could be:

(1) Outside the "not unfaithfulness" range as an originalist matter;
  (a) Prohibiting voluntary affirmative action [0% to 50% - ε] (Justice Rehnquist's dissent); or

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403. *Weber*, 443 U.S. at 220 (Rehnquist, J., dissenting) (quoting *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 (1976), which held that Title VII prohibits racial discrimination against whites as well as blacks). In particular, Justice Rehnquist looked to the memorandum by Senators Clark and Case, which stated that employers "would not be obliged—or indeed permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights." *Id.* at 240 (emphasis omitted). Justice Rehnquist also denied that voluntary affirmative action plans were compelled by Executive Order 11,246, because the Order would violate the clear language of section 703(d) if that were true. *Id.* at 225 n.6.

404. *Id.* at 209 (Blackmun, J., concurring).

405. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

406. *Weber*, 443 U.S. at 215 (Blackmun, J., concurring).

407. *Id.* at 209-10 (citation omitted).

408. *Id.* at 210-12, 214, 215 (describing this theory as a response to practical problems "not anticipated by Congress").

(b) Allowing voluntary affirmative action [50% + ε to 100%] (Justice Brennan's majority opinion); or

(2) Inside the "not unfaithfulness" range as an originalist matter;

(a) Prohibiting voluntary affirmative action [50% - ε to 50%] (Justice Blackmun's concurrence); or

(b) A tie [50% exactly]; or

(c) Allowing voluntary affirmative action [50% to 50% + ε].

If he believed the answer was 1(a) or 1(b) based on his preliminary approximation, a synthetic judge would prohibit or allow voluntary affirmative action accordingly regardless of whether any constitutional change existed. If he believed it to be 2(a), 2(b), or 2(c), a synthetic judge would decide in the direction of relevant constitutional change if it existed in the interim; if not, the judge would revert to his initial predispositions.

Justice Blackmun's opinion appears to fit in the 2(a) category. While he shared the dissent's misgivings concerning the extent to which the legislative history supported voluntary affirmative action, he believed that the Court in *Griggs* had "refused to give controlling weight to the memorandum of Senators Clark and Case which the dissent now finds so persuasive."[409] This led him to believe that the case probably did lean toward the dissent as an initial matter, but that voluntary affirmative action should be allowed because of practical and equitable considerations created by *Griggs*.[410]

Here, I wish to analyze the validity of Justice Blackmun's choice to let Title VII's interpretation evolve based on post-enactment practical and equitable considerations. As a premise to my analysis, I assume, as Justice Blackmun does, that *Weber* is a hard case because of Title VII's multiple purposes to aid black integration and to eliminate *all* racial discrimination in society.[411] *Griggs* had interpreted Title VII to allow "disparate impact" suits—an interpretation arguably quite inconsistent with Title VII's original interpretation.[412] In *Weber*, at least to Justice Blackmun, this posed the question of how to implement a past authoritative interpretation arguably inconsistent with original meaning.

In this situation, a synthetic judge would choose the narrowest method of implementation possible. If conceivably possible to implement *Griggs* without generally endorsing voluntary affirmative action—regardless of whether it is overwhelmingly less practical—a synthetic judge would choose the less practical, but more faithful to the statute, option. This was the path of the lower court opinion in *Weber*. The Fifth Circuit majority

409. *Id.* at 215.

410. *See id.*

411. For discussion of *Weber* as a hard case, see, for instance, ESKRIDGE, *supra* note 35, at 9-47; and DENNIS PATTERSON, LAW AND TRUTH 65-67 (1996).

412. *See, e.g.*, Earl Maltz, *The Legacy of* Griggs v. Duke Power Co.*: A Case Study in the Impact of a Modernist Statutory Precedent*, 1994 UTAH. L. REV. 1353, 1357.

described how it was possible to allow affirmative action plans in a "restorative" sense as to "make whole" identifiable victims of past discrimination, without allowing voluntary affirmative action in cases such as *Weber* where the parties admitted that no prior discrimination had existed.[413] *Griggs* poses no impediment to that policy because *Griggs* had a "business necessity" defense that allowed employment practices that caused a disparate impact as long as they were justified by business necessity.[414] This would allow *Griggs* to reach instances of hidden discrimination—where the companies' proffered justification for the business practice was pretextual—and permit companies to ameliorate the effects of this past discrimination without generally allowing race-conscious measures.[415] Given this narrower, albeit potentially suboptimal, policy option, a synthetic judge would not join Justice Blackmun's concurrence based on *Griggs* alone.[416]

The synthetic judge's task, however, is not complete. The judge would next examine whether any relevant constitutional change existed in the interim as to read the term "discrimination" with some evolving constitutional norm of equality. There was not. In *Washington v. Davis*[417] and *Arlington Heights*,[418] the Court rebuffed efforts to define disparate impact as discrimination under the Equal Protection Clause of the Fourteenth Amendment.[419] *Bakke* allowed public affirmative action, but the Court's fractured opinion does not provide anywhere near the sufficiently accepted constitutional support necessary to support statutory evolution.[420] The same is true with the "deregulation" constitutional change described in the *Sylvania* example—it provides some support of relevant constitutional change but not enough to support statutory evolution in 1979.[421]

Nevertheless, a synthetic judge ultimately would allow voluntary affirmative action in *Weber*, but only because of deference to the Equal Employment Opportunity Commission's (EEOC) interpretations of Title VII and because of compliance with Executive Order No. 11,246. The EEOC had adopted an effect-based approach to serve Title VII's remedial purpose

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413. *See* Weber v. Kaiser Alum. & Chem. Corp., 563 F.2d 216, 219-26 (5th Cir. 1977) (stating how Title VII requires affirmative relief to correct for continuing inequalities created by past discriminatory employment practices but not to correct for past societal discrimination).

414. *Griggs*, 401 U.S. at 431; *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (developing this "business necessity" defense).

415. *See* George Rutherglen & Daniel R. Ortiz, *Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 UCLA L. REV. 467, 508-09 (1988).

416. The potential suboptimality of this policy option is made evident by Justice Blackmun's concurrence as well as Judge Wisdom's dissent in the lower court. *Weber*, 563 F.2d at 230 (Wisdom, J., dissenting) ("Divining the result a court would reach in [future Title VII] litigation is no small problem.").

417. 426 U.S. 229 (1976).

418. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

419. *Arlington Heights*, 429 U.S. at 264-68; *Washington*, 426 U.S. at 242.

420. *See, e.g.*, DWORKIN, *supra* note 193, at 330 ("[*Weber*] was, in fact, the same issue that the Court faced in *Bakke*, but did not, as a Court, answer.").

421. *See supra* notes 365-69 and accompanying text (describing constitutional cases supporting deregulation of the market place). One would also have to consider the 1978 dormant Commerce Clause cases.

better.[422] One could see why deference is appropriate through a hypothetical case challenging the EEOC's interpretation. Step one under *Chevron* would look to statutory clarity using traditional tools of statutory construction. As described above, category 2(a) presumes Title VII is not sufficiently clear. This would lead to agency deference as long as the EEOC's interpretation was rational (i.e., "not unfaithful"). Here, because voluntary affirmative action is the most practical way to implement *Griggs*, *Chevron* step two would be met. Voluntary affirmative action would be allowed because of agencies' superior technocratic virtue—thus conferring a societal benefit without damaging the statutory scheme.

This permission of voluntary affirmative action because of agency deference, however, comes with an important limitation: Voluntary affirmative action would only be allowed as long as the agency supported it. If, for instance, the Reagan EEOC had desired to reverse policies, voluntary affirmative action would no longer be permitted for the same reason of agency deference. Consequently, it would not lead to the permanent sort of support that affirmative action proponents' desire.

The same is true in terms of complying with Executive Order No. 11,246. Because compliance with the Order is not unfaithful to Title VII, voluntary affirmative action should be allowed because of the President's popular mandate supporting his choice of policies. But again, this rationale supports voluntary affirmative action only as long as the President does.

More permanent support comes in the Civil Rights Act of 1991.[423] Congress passed the 1991 Act to override the Court's interpretation of Title VII in *Wards Cove*[424] (among other decisions), which had defined plaintiff's burden of proof and the defendant's defenses in ways that made Title VII disparate impact cases much harder to win.[425] The 1991 Act restored the pre-*Wards Cove* burdens and defenses. Section 116 states that "[n]othing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law."[426] This is significant in terms of the relationship between Title VII and voluntary affirmative action, because those pre-*Wards Cove* decisions had developed in the context in which voluntary affirmative action served as a defense to disparate impact suits. In this light, the 1991 Act signifies congressional acceptance of voluntary affirmative action as a policy to avoid disparate impact liability under Title VII, similar to how post-synthesis statutory reenactment ensconces existing judicial interpreta-

422. *See* ESKRIDGE, *supra* note 35, at 73; *see also* Daniel A. Farber & Philip P. Frickey, *Is* Carolene Products *Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 686, 711-13 (1991) (discussing the political development of affirmative action).

423. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

424. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

425. *Wards Cove*, 490 U.S. at 656-61 (1989).

426. 105 Stat. at 1079.

tions as an intended element of the statutory scheme.[427] Hence, after 1991, it would be unfaithful to read voluntary affirmative action out of Title VII.[428]

2. Bob Jones*: The Bite of the "Not Unfaithful" Constraint*

Bob Jones[429] involved the question whether schools that racially discriminate on the basis of religious doctrine qualified as tax-exempt under section 501(c)(3) of the Internal Revenue Code of 1954. Section 501(c)(3) stated that organizations would be tax-exempt if "*organized and operated exclusively for religious, charitable,* scientific, testing for public safety, literary, *or educational purposes.*"[430] Until 1970, the IRS granted tax-exempt status to private schools, without regard to their racial admissions policies, under 501(c)(3), and granted charitable deductions for contributions to such schools under section 170 of the Code.[431] In 1971, the IRS introduced Revenue Ruling 71-447, which stated that both the courts and the IRS have long recognized that

> the statutory requirement of being "organized and operated exclusively for the religious, charitable . . . or educational purposes" was intended to express the basic common law concept [of "charity"]. . .
> .
> . . . .
> All charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy.[432]

"Based on the 'national policy to discourage racial discrimination in education,' the IRS ruled that 'a [private] school not having a racially nondiscriminatory policy as to students is not 'charitable' within the common law concepts reflected in sections 170 and 501(c)(3) of the Code.'"[433] The IRS's interpretation of the Code disqualified Bob Jones University from tax-exempt status because of the university's discriminatory policies, particularly its disciplinary rule prohibiting interracial dating and marriage.[434]

Bob Jones approved the Ruling as a valid interpretation of 501(c)(3), despite 501(c)(3)'s plain meaning and original intent (its predecessors were enacted in 1894 when segregation was required by law) by looking to the

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427. *See supra* Subpart I.B.3.

428. *See* Nelson Lund, *The Law of Affirmative Action in and after the Civil Rights Act of 1991: Congress Invites Judicial Reform*, 6 GEO. MASON L. REV. 87, 88-89 nn.7-8 (1997) (listing sources).

429. Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

430. *Bob Jones*, 461 U.S. at 578 n.1 (quoting 26 U.S.C. § 501(c)(3)) (emphasis in original).

431. *Id.* at 577-78 & n.2. Section 170 (a) allows deductions for certain "charitable contributions." Section 170 (c) defines charitable contribution as a gift "to or for the use of" an organization "operated exclusively for religious, charitable, . . . or educational purposes," effectively tracking section 501 (c)(3).

432. Rev. Rul. 71-447, 1971-2 C.B. 230.

433. *Bob Jones*, 461 U.S. at 579 (quoting Rev. Rul. 71-447, 1971-2 C.B. 231).

434. *Id.* at 580.

statute's overall purpose—holding that its framers generally intended that tax-exempt entities meet "certain common-law standards of charity—namely, that [a tax exempt] institution . . . must . . . not be contrary to established public policy."[435] It contended that racial discrimination in education violated "established public policy," citing *Brown*, civil rights statutes such as the Civil Rights Act of 1964, and Executive Orders.[436] The Court thought it particularly relevant that Congress had acquiesced to the 1970 Ruling, citing thirteen failed bills to overturn the Ruling as well as Congress's recent amendment of section 501(i) to deny tax-exempt status to *social clubs* that provided for racial or religious discrimination.[437]

Justice Rehnquist dissented, contending that "[w]ith undeniable clarity, Congress has explicitly defined the requirements for § 501(c)(3) status. An entity must be . . . organized for *one* of the eight enumerated purposes . . . . Nowhere is there to be found some additional, undefined public policy requirement."[438] He analyzed back to 1894 and 501(c)(3)'s predecessor, maintaining that tax-exempt status requires the organization to provide a public benefit but that *any* of the eight enumerated uses (e.g., religious, charitable, *or* educational) qualified. The acquiescence argument, he argued, was not only inappropriate but also inaccurate: Until 1970, the IRS had continuously interpreted section 501(c)(3) to allow tax-exempt status for schools like Bob Jones, and in 1976, Congress *did* specifically amend section 501(c)(3) to add "to foster national or international amateur sports competition" to the enumerated purposes.[439]

The majority's opinion in *Bob Jones* is problematic, especially its attribution of the common-law charitable purpose to the 1954 Congress. "The Court's evidence for this purpose was thin, and surely the Court did not mean to turn the exemption into a referendum on the goodness of an organization's purpose."[440] The acquiescence argument too was troublesome considering "Congress' similar acquiescence in exactly the opposite interpretation before 1970. . . . Why should Congress' silence after 1970 count so much, while its silence before 1970 counts not at all?"[441] Rather, justification for *Bob Jones* must lie outside the realm of actual congressional purpose—both in its general, "not contrary to established public policy" formulation and as specifically applied to Bob Jones's prohibition on interracial dating.

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435. *Id.* at 586. To support this statement, the Court looked to nineteenth century cases involving the charitable law of trusts, such as *Perin v. Carey*, 24 How. 465, 501 (1861), which stated that a public charitable use must be "consistent with local laws and public policy."

436. *Bob Jones*, 461 U.S. at 593-96 (citing Titles IV and VI of the Civil Rights Act of 1964, the Voting Rights Act of 1965, Title VIII of the Civil Rights Act of 1968, and the Emergency School Aid Act of 1972).

437. *Id.* at 599-602 (citing Act of Oct. 20, 1976, Pub. L. No. 94-568, 90 Stat. 2697 (1976)).

438. *Id.* at 613 (Rehnquist, J., dissenting) (emphasis added).

439. *Id.* at 612, 615-19 (citing the Tax Reform Act of 1976, Pub. L. No. 94-455, § 1313(a), 90 Stat. 1730 (1976)).

440. ESKRIDGE, *supra* note 35, at 146.

441. William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 90 (1988).

The majority tried to do this, citing *Brown* and civil rights statutes as "outside" materials to demonstrate how public policy had fundamentally changed. Its argument however is still incomplete. If the answer is *Brown*, why did it take until 1970 for the interpretation of 501(c)(3) to change? A response might be the "gravitational force" of the other statutes, such as the Civil Rights Act of 1964, was specifically directed at eliminating organizations' racial discrimination.[442] But that ignores the possibility that perhaps tax exemption was supposed to remain outside the antidiscrimination movement as a way to promote religious freedom.[443]

To a synthesizer, the combination of *Brown* and the Civil Rights Act of 1964 provides significant support for the majority's opinion, but the picture is not yet complete. At the very least, a synthesizer would also consider pre-*Brown* change from the New Deal, as well as the critically important post-*Brown* antidiscrimination decisions such as *Loving*. The New Deal Court (in decisions such as *West Coast Hotel*) realized that governmental inaction that perpetuated existing practice was itself a form of governmental action for which the government bore moral responsibility,[444] suggesting governmental responsibility for subsidizing discrimination through tax exemption. *Loving*, decided in 1967, enunciated the principle that measures designed to maintain white supremacy are unconstitutional, holding that a Virginia statute banning interracial marriages violated the Fourteenth Amendment Equal Protection and Due Process Clauses,[445] finally illuminating the principled basis underlying *Brown* and other Warren Court antidiscrimination cases.[446] More significant as to *Bob Jones*, the Court enunciated the principle that measures designed to maintain white supremacy are unconstitutional.[447] Together, the New Deal, *Brown*, the Civil Rights Act of 1964, and *Loving* connote that by 1967—and especially 1983 (the year of *Bob Jones*)—there was a sufficiently accepted constitutional change[448] as to support an evolved

442. *See, e.g.*, Allen G. Hutchinson & Derek Moran, *Calabresian Sunset: Statutes in the Shade*, 82 COLUM L. REV. 1752, 1775 (1982) (reviewing CALABRESI, *supra* note 33) (arguing that the Civil Rights Act of 1964 was not an ordinary statute, as "[i]t heralded a fundamental and pervasive change in the legal and social order. . . . As such, it . . . has exercised, a much greater gravitational pull than other statutes").

443. On this point, see STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 150-52 (1993).

444. *See supra* notes 273-76 and accompanying text.

445. Loving v. Virginia, 388 U.S. 1 (1967).

446. Some theorists claim that *Brown* enunciated a principle of "equal treatment, regardless of race." *E.g.*, Albert M. Sacks, *The Supreme Court, 1953 Term—Foreword*, 68 HARV. L. REV. 96, 96 (1954).

447. *Loving*, 388 U.S. at 12; *See* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 226-45 (1991) (arguing that the Court did not clearly adopt a "racial classification rule" until *Loving*). On its application to *Brown*, see Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 429-30 (1960).

448. Thinking back to the *Sylvania* example, this triple synthesis of *Brown*-The Civil Rights Act of 1964-*Loving* might mean that only the higher-level-of-generality interpretation is correct, as this triple synthesis reveals even further concern with state subsidization of inequalities. This might be enough to shift the burden of persuasion to large companies to prove they do not interfere with the "autonomy of independent businessmen." But note that this argument also assumes there was no change in favor of efficiency.

reading of 501(c)(3) to deny tax-exempt status to a school that prohibited interracial dating.[449]

Robert Cover would apparently disagree, claiming that governmentally imposed normative unity poses a threat to insular communities that cohabit our normative universe.[450] In *Nomos and Narrative*, he masterfully questioned whether mainstream civil rights principles should apply broadly, or whether principles supporting religious freedom should serve as a constitutional boundary.[451]

Unlike the *Bob Jones* Court, none of whom thought the constitutional issue to be significant,[452] a synthesizer cannot avoid the question. *And*, a synthesizer cannot decide this question himself, because he can only look to constitutional doctrine that predates the specific statutory interpretation. Otherwise, synthesis would run into Judge Friendly and Judge Posner's "advisory opinion" criticism of the avoidance canon.[453] A synthesizer inquires *only* whether constitutional principles were sufficiently accepted in constitutional doctrine as to shift "the burden of inertia"[454] to Congress to press the constitutional question directly. With the New Deal change, *Brown-Loving* and the *lack* of changed Religion Clause jurisprudence to the contrary,[455] the answer would be "yes," *there has been sufficiently accepted constitutional change*, at least as applied to schools that prohibit interracial dating in order to maintain white supremacy.

A synthetic judge, however, would still have to ask whether this synthesized interpretation is unfaithful. This is where the *Bob Jones* decision would fail, as a constitutionally updated interpretation of 501(c)(3) would be unfaithful to the statute: "Religious" is specifically enumerated in 501(c)(3); 501(c)(3) was specifically amended in 1976 to add an "amateur sports" exception; in 501(i), Congress had only removed tax-exempt status for social clubs that racially discriminated (and no more); and, the only previously recognized purpose of the tax exemption was to promote diversity

449. A synthetic judge would also focus on the change in the religion clause jurisprudence as well. *Walz v. Tax Comm'n*, 397 U.S. 664 (1970)—cited twice by the majority opinion—approved churches' property tax-exempt status under New York Law, and arguably supported constitutional change in favor of Bob Jones's position. Such an argument is not persuasive because 1970s Establishment Clause decisions, such as *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973), renewed considerations of the "wall" between church and state. *See id.* at 761 & n.5, 772, 781.

450. *See* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 28 (1983) ("The principle that troubled these amici [in *Bob Jones*] was the broad assertion that a mere 'public policy,' however admirable, could triumph in the face of a claim to the [F]irst [A]mendment's special shelter against the crisis of conscience.").

451. *Id.* at 66-67 (excoriating the Court for lacking the "commitment to principle that is embodied in constitutional decision"); *id.* at 66 ("The grand national travail against discrimination is given no normative status in the Court's opinion, save that it means the IRS was not wrong."). Cover's Free Exercise concern suggests that perhaps the Avoidance Canon would justify granting Bob Jones the tax exemption. *But see id.* at 64-66 (differentiating this case from *Catholic Bishop*).

452. Bob Jones Univ. v. United States, 461 U.S. 574, 602-04 (1983); *Bob Jones*, 461 U.S. at 622 n.4 (Rehnquist, J., dissenting).

453. *See supra* notes 98-99 and accompanying text.

454. *See generally* CALABRESI, *supra* note 33, at 146-71 (devising standards when it is appropriate to shift the burden of inertia back to Congress).

455. *See supra* note 449 (discussing the lack of Religion Clause jurisprudence to the contrary).

of viewpoint.[456] Because ε is supposed to be a small number (e.g., 5%), a synthesized interpretation would thus fall outside the "not unfaithful" range, and a synthetic judge would dissent. To reach the modern result, Congress would have to amend the statute.

III. APPLICATION TO INTERPRETIVE METHODOLOGY

The last Part discussed how constitutional statutory synthesis might apply to substantive statutory interpretation. This Part expands upon that notion to demonstrate how constitutional statutory synthesis might affect interpretive methodology itself. The central insight comes from Jerry Mashaw, who stated:

> [T]he only way to ground such a methodological commitment . . . is through constitutional argument. To put the matter another way, *we must ground all methodological commitments in the Constitution* before we can recognize them as legitimate. By this I mean simply that it must be possible to explain, by relying explicitly on some vision of the constitutional polity, why that method of interpretation is appropriate for that interpreter with respect to that text.[457]

On one level, Mashaw means that any version of constitutional argument must be based in an underlying political theory, indicating the immense importance of clarifying one's underlying jurisprudential premises. On a second level, Mashaw intimates that one's method of interpreting particular statutes must itself be based in constitutional argument. He, for instance, defends the Court's increased reliance on textualism in cases questioning whether an implied right of action partially as an offshoot of the Court's federalism jurisprudence.[458]

This Part attempts to take Mashaw's insight one step further, by asking what effect a changing Constitution has on the interpreter's choice of methodology. In particular, it analyzes the Court's use of clear statement rules in federalism-related cases.[459] William Eskridge and Philip Frickey have de-

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456. Walz v. Tax Comm'n, 397 U.S. 689 (1970) (Brennan, J., concurring) (stating private groups receive tax exemptions because "each group contributes to the diversity of . . . viewpoint . . . essential to a vigorous, pluralistic society").

457. Mashaw, *supra* note 28, at 839 (emphasis added).

458. *See id.* at 838, 842-45 (also discussing respect for legislative supremacy, decreasing interference with discretionary actors, and to make the separation of powers more effective).

459. This Part is limited to federalism-based clear statement rules, but its theory can apply more generally. Cass Sunstein, for instance, has advocated that various canons of construction should be accepted or rejected according to their value in promoting democratic self-government in a republic. Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); *see also* Jerry Mashaw, *As if Republican Interpretation*, 97 YALE L.J. 1685 (1988) (critiquing Sunstein's theory). A *changing* constitution thus implies that various canons' degree of acceptance or rejection will also constantly change, especially in terms of their relative priority. For an explanation of how certain canons are either federal common law, constitutionally required, "constitutional starting-points," and "constitutional default rules," see Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L.

scribed courts' use of clear statement rules to protect constitutional values, such as nondelegation concerns and federalism, as a form of quasi-constitutional law. They explain how "the Court in the 1980s became somewhat more reluctant to apply constitutional rules to prohibit state and federal legislative action, but somewhat more stingy about interpreting federal statutes, often basing its analysis upon constitutional concerns."[460] This embodies what I call a "countervailing" relationship between the application of constitutional norms in constitutional cases and in statutory cases, whereby the norms become *more* important as a matter of statutory interpretation the *less* they are enforced constitutionally. This Part analyzes the effect of the Rehnquist Court's augmented enforcement of constitutional norms in constitutional adjudication both under this "countervailing" conception and what I call a "complementary" conception, whereby the importance of the norms as a matter of statutory interpretation increases as they are enforced more constitutionally. Part A starts with *Gregory v. Ashcroft*, where both the countervailing and complementary conception apply in an overlapping manner. Part B then proceeds to *Atascadero* as an example where the countervailing conception is more appropriate, and Part C analyzes *BFP* as an example where a complementary relationship holds.

A. Gregory*: Dual Conceptions of Clear Statement Rules' Justification*

In 1985 in *Garcia*,[461] the Court had overruled its previous opinion in *National League of Cities*[462] that had provided states with a constitutional immunity against federal regulation of core state functions. *Gregory*,[463] in 1991, revived this protection of core state functions as "a new super-strong rule of statutory interpretation."[464]

In *Gregory*, the question was whether the proscription against mandatory retirement provided by the federal Age Discrimination in Employment Act[465] (ADEA) prevented a state from requiring its judges to retire by age seventy. The outcome turned on whether a judge was an "employee" for purposes of the statute, an issue that the Court claimed was ambiguous according to the statute itself.[466] Writing for the Court, Justice O'Connor claimed that the ADEA did not apply to state judges because a clear state-

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REV. 2085 (2002).

460. Eskridge & Frickey, *supra* note 83, at 597, 633.

461. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

462. National League of Cities v. Usery, 426 U.S. 833 (1976).

463. Gregory v. Ashcroft, 501 U.S. 452 (1991).

464. Eskridge & Frickey, *supra* note 83, at 623.

465. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended, 29 U.S. C. §§ 621-34 (1994)).

466. *Gregory*, 501 U.S. at 470. Elected state judges clearly came within an exception to the definition of "employee" for elected officials; appointed state judges also arguably came within a different exception for "appointee[s] on the policymaking level." 29 U.S.C. § 630(f) (2000).

ment of the statute's application to state judges was required[467] to make the political safeguards of federalism fully operational:

> [I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."[468]

In her view, these "federal balance" concerns (my term) were justified, because of the benefits of a decentralized system and because the "responsibility" of the people of the States to determine the qualifications of their highest officers is of core constitutional significance under the Tenth Amendment and the Guarantee Clause.[469] (H. Jefferson Powell characterizes these justifications as "autonomy of process"[470] concerns).

The question becomes: How does the Rehnquist Court's recent federalism revival affect the need for a super-strong clear statement rule to protect core state regulatory functions? Under *Gregory*, the answer is unclear, because *Gregory* adopts conflicting conceptions of the relationship between statutory enforcement of federalism norms (through the use of clear statement rules as quasi-constitutional law) and constitutional enforcement of federalism norms (through direct judicial review).[471] The "federal balance" concerns envision clear statement rules in a countervailing relationship to

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467. *See* Michael P. Lee, Comment, *How Clear is "Clear"?: A Lenient Interpretation of the* Gregory v. Ashcroft *Clear Statement Rule*, 65 U. CHI. L. REV. 255 (1998) (describing what suffices as a clear statement).

468. *Gregory*, 501 U.S. at 464 (citation omitted); *id.* at 461 (stating that "[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision") (citation omitted).

469. *Id.* at 463. Justice O'Conner explained:

> This federalist structure . . . assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more . . . experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Id. at 458.

470. H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 641 (1993) (describing the "autonomy of process principle" as the importance of the federal government respecting the autonomy of state governments as the possessors of independent institutional processes).

471. Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959 (1994). This note describes how:

> [C]lear statement rules [are] a complex reflection of two conflicting strains in the Court's federalism jurisprudence. One approach holds that the Constitution entrusts the protection of state sovereignty to the political branches of government. By contrast, the opposing doctrine contemplates a judicially enforced law of federalism implied from the structure of the Constitution as a plan for government that includes sovereign, independent, meaningful state entities.

Id. at 1960.

constitutional enforcement of structural federalism norms: Courts require clear statement rules *because* structural federalism norms are constitutionally underenforced.[472] The "autonomy of process" concerns, conversely, establish a complementary relationship between statutory and constitutional enforcement of federalism norms: Clear statement rules protect the benefits of a "localist" system.[473]

Under the countervailing conception, statutory interpretation serves as a "backdoor" to enforce structural constitutional norms that are unenforced or underenforced constitutionally.[474] Clear statement rules protecting the "federal balance" consequently operate as quasi-constitutional law because constitutional adjudication does not suffice.[475] This conception indicates that cases such as *Lopez*[476] and *Morrison*,[477] which restrict the scope of the Commerce Clause, create *less* of a need for super-strong clear statement rules, because constitutional enforcement of structural federalism norms has increased. In this light, *Gregory* would be less legitimate if decided today.

Under the complementary conception, statutory interpretation serves as an additional medium to protect states' autonomy to adopt individual processes as to augment democratic experimentalism[478] and citizen self-

472. *See generally* Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 42 (describing this as "process federalism"). This statutory enforcement of federalism norms is usually described either as a matter of congressional intent, *see* Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 187, or the Constitution's framers' intent, *see* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1494-95 (1994).

473. *See, e.g.*, Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990). Briffault suggests that regionalist systems of government could capture the benefits of localism. *See* Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1 (2000); *cf.* David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 378-79 (2001) (describing how the analysis is more complex, because of the lack of clear baselines describing what local autonomy means, as central power is often deeply (if not visibly) implicated in what is generally understood to be local autonomy).

474. *See* Eskridge & Frickey, *supra* note 83, at 598, 632-35; *id.* at 630 ("[C]ertain constitutional values—most notably the structural rather than individual rights values—are either unenforceable by the Court because they involve essentially nonjusticiable political questions or will be underenforced by the Court.").

475. *See id.* at 633; *see also* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1427 (2001) (describing how, in *Gregory*, "the only plausible justification for employing a clear statement requirement is to ensure that federal lawmaking procedures perform their intended function" as to protect the federal balance). Eskridge and Frickey question this argument based on the leading theories of underenforced constitutional norms, which focus on how "individual liberties such as free speech and equal protection are underenforced because of the Court's concern about the countermajoritarian difficulties in striking down statutes," as well as *Garcia* itself. Eskridge & Frickey, *supra* note 83, at 632.

476. United States v. Lopez, 514 U.S. 549 (1995) (holding the Gun Free School Zones Act of 1990 invalid as beyond the scope of Congress's Commerce Clause power).

477. United States v. Morrison, 529 U.S. 598 (2000) (holding that the portions of the Violence Against Women Act are beyond Congress's Commerce Clause and Fourteenth Amendment enforcement powers).

478. *See generally* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (depicting states as laboratories for democratic experimentalism). *But see* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994) (describing how the benefits to experimentalism come from a decentralized managerial strategy pursuant to a coherent national policy rather than federalism).

government.[479] This "autonomy of process principle" can be traced back to Justice O'Connor's dissenting opinion in *FERC v. Mississippi*,[480] where she stated that "each State is sovereign within its own domain, governing its citizens and providing for their general welfare."[481] In this sense, clear statement rules serve to protect federalism norms for the *same* reasons they are enforced directly in constitutional adjudication.[482] Insofar as decisions such as *New York*[483] and *Printz*[484] (which proclaim it unconstitutional for the federal government to commandeer state legislative and executive officers into service of federal regulatory purposes)[485] augment protection of state autonomy,[486] application of *Gregory*'s clear statement rule becomes more legitimate.

Conflicting conceptions arise within *Gregory*, because the conceptions are not disjoint but overlapping. That is, the countervailing conception leads to complementary concerns because protecting the federal balance is one way to help protect state sovereignty,[487] which itself protects states' autonomy of process. And, the complementary conception augments the federal balance because a decentralized system of government functions as "a check on abuses of [national] government power."[488]

Neither conception applies to *Gregory* unproblematically. The countervailing conception is awkward given the reasons for underenforcing structural constitutional norms stated in *Garcia*, "that [the Court need not] protect federalism values through judicial review, because the structure of the national government protects states' interests and their sovereign integrity."[489] The complementary conception is troublesome given that *Chisom v. Roemer*[490] was decided on the same day—holding that section 2 of the Voting Rights Act (VRA)[491] (which prohibits state electoral processes that re-

479. *See* Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 1003-13 (1993).

480. 456 U.S. 742 (1982).

481. *FERC*, 456 U.S. at 775, 777 (1982) (O'Connor, J., concurring in the judgment in part, dissenting in part); *see* Powell, *supra* note 470, at 641 (discussing *FERC* as the "first building block of O'Connor's federalism").

482. Eskridge and Frickey have stated this point in the converse form: "The[] reasons for unenforcement of federalism norms through judicial review are equally valid arguments for the unenforcement of federalism norms through statutory interpretation." Eskridge & Frickey, *supra* note 83, at 633; *id.* at 634 (stating that "*Gregory* threatens to return to the same quandary—at the interpretive rather than the constitutional level").

483. New York v. United States, 505 U.S. 144 (1992).

484. Printz v. United States, 521 U.S. 898 (1997).

485. *New York*, 505 U.S. at 161 (describing how Congress may not simply "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program") (quotation omitted); *Printz*, 521 U.S. at 898 (extending the anti-commandeering principle).

486. *See* Powell, *supra* note 470, at 650. *But see* Barron, *supra* note 473, at 411-26 (describing how visible central power may augment the authority of state and local governments).

487. *See* Eskridge & Frickey, *supra* note 83, at 642-44.

488. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991); *see also New York*, 505 U.S. at 181 ("[T]he Constitution divides authority between federal and state governments for the protection of individuals.").

489. Eskridge & Frickey, *supra* note 83, at 635-36.

490. 501 U.S. 380 (1991).

491. 42 U.S.C. § 1973 (2000).

sult in the dilution of the voting strength of a racial minority) applies to the election of state judges—and the majority opinion did not even mention the *Gregory* super-strong clear statement requirement.[492] If state "autonomy of process" interests are important, they should be acknowledged uniformly, even if they are occasionally trumped by national policies such as the VRA.[493] The next two examples, *Atascadero* and *BFP*, provide instances where the countervailing and complementary conceptions are more appropriate, respectively.

B. Atascadero*: Eleventh Amendment Immunity as a Countervailing Relationship*

Atascadero[494] is relevant here not for its specific holding (which has since been overruled in *Seminole Tribe*[495]), but for its statement that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute'"[496] (which still applies to appropriate legislation passed under section 5 of the Fourteenth Amendment[497]). *Atascadero* required this "super-strong" clear statement rule[498] because abrogation of Eleventh Amendment immunity, though within congressional power, disrupts the "constitutionally mandated balance of power" between the federal governments and the states, and "it is incumbent upon the federal courts to be certain of Congress's intent before finding that federal law overrides the guarantees of the Eleventh Amendment."[499]

Atascadero stresses only the federal balance concerns themselves derived from *Garcia*.[500] A countervailing relationship applies, because the augmented certainty required regarding congressional intent to abrogate

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492. Only Justice Scalia's dissent mentions the *Gregory* super-strong clear statement requirement. *Chisom*, 501 U.S. at 411-12. *But see id.* at 412 (explaining possible grounds to differentiate the two cases).

493. *See* Eskridge & Frickey, *supra* note 83, at 635, 643.

494. Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).

495. Seminole Tribe v. Florida, 517 U.S. 44 (1996) (holding that Congress may not abrogate States' Eleventh Amendment immunity via legislation passed under the Commerce Clause or Indian Commerce Clause).

496. *Atascadero*, 473 U.S. at 242.

497. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000).

498. Eskridge & Frickey, *supra* note 83, at 621.

499. *Atascadero*, 473 U.S. at 242, 243 (quoting *Garcia*, 469 U.S. at 547).

500. *See id.* at 242 ("By guaranteeing the sovereign immunity of the States against suit in federal court, the Eleventh Amendment serves to maintain this balance. 'Our reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system.'") (citation omitted). The justification for clear statement rules involving state sovereign immunity is different than the justification for state sovereign immunity itself. The former analyzes when one should infer congressional abdication of state sovereign immunity, while the latter considers why state sovereign immunity is an important part of our constitutional structure. Thus, it is possible for state sovereign immunity to protect the dignity "consistent with their status as sovereign entities," Fed. Maritime Comm'n v. South Carolina State Ports Auth., 535 U.S. 743, 122 S. Ct. 1864, 1874 (2002), but for clear statement rules involving state sovereign immunity to protect the federal balance.

States' Eleventh Amendment immunity is designed to counterbalance the loss to the state from being subjected to suit under federal law. The question becomes whether this counterbalancing relationship applies in the converse situation: when constitutional protections from suit are increasing, as in *Kimel*[501] and *Garrett*.[502]

Under *Kimel*, abrogation of State Eleventh Amendment immunity by Fourteenth Amendment legislation requires two steps: First, the statute's intent to abrogate state immunity must be unmistakably clear; second, the legislation has to be "congruent and proportional" to the underlying Fourteenth Amendment injury in order for the statute to qualify as "appropriate legislation" under section 5.[503] In *Kimel*, the Court held that the ADEA met the first requirement (intent to abrogate) but failed the second (appropriateness of abrogation), because Congress failed to identify a pattern of age discrimination by the states as proprietary actors.[504] *Garrett*, involving the Americans with Disabilities Act, also held that the legislation failed the second requirement—to be inappropriate section 5 legislation—as the Court claimed that Congress did not identify "a history and pattern of irrational employment discrimination by the States against the disabled," but only a few isolated instances.[505]

Both *Kimel* and *Garrett* arguably examine appropriateness more strictly than prior precedents.[506] This provides states with more constitutional protection from suit. If clear-statement rules are a counterbalance to constitutional protection, *Kimel* and *Garrett* mean that congressional intent to abrogate immunity could be stated *less* clearly.[507] Future statements of congressional intent to abrogate Eleventh Amendment immunity should not need to be "unmistakably clear" but merely "clear."[508]

C. BFP*: Complementary Relationship and Evolved Plain Meaning*

BFP,[509] a bankruptcy case, extends *Gregory*'s super-strong clear statement rule from federal regulation of state governments themselves to the

501. *Kimel*, 528 U.S. at 62.

502. Bd. of Trustees v. Garrett, 531 U.S. 356 (2001).

503. *Kimel*, 528 U.S. at 73, 82.

504. *Id.* at 82-91. *Kimel* recognized the existence of ample congressional evidence of age discrimination by private employers generally.

505. *Garrett*, 531 U.S. at 357.

506. *E.g.*, Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001).

507. One could argue the converse based on the overlap between the countervailing and complementary conception: that maintaining the federal balance helps protect state sovereignty. *See supra* text accompanying note 487.

508. *Kimel* held that the ADEA's congressional intention to abrogate State Eleventh Amendment immunity was unmistakably clear as it provides for suits by individuals against the states and incorporates the Fair Labor Standards Act's enforcement provisions, *see Kimel*, 528 U.S. at 73-75. Justice Thomas disagreed, focusing on how the ADEA does not make its clear statement in a single section, *see id.* at 100-09 (Thomas, J., concurring in part, dissenting in part). Insofar as less clarity may be required after *Kimel* because of *Kimel*, that might be a reason, for instance, not to have a "single section" requirement.

509. BFP v. Resolution Trust Corp., 511 U.S. 531 (1994).

Bankruptcy Code's preemption of state property law[510]—a core aspect of the local police power regulating private citizens.[511] *BFP* involved a Bankruptcy Code provision that invalidates certain prebankruptcy transfers unless the debtor received "a reasonably equivalent value."[512] The transfer in *BFP* was a foreclosure sale on the debtor's real estate for a fraction of its market value, which was not uncommon because prices at forced sales are not infrequently depressed. The question of the case was whether "reasonably equivalent value" had some substantive component (connected somehow to fair market value), entailed a totality of the circumstances approach, or if it meant the result of the foreclosure sale, whatever that was, as long as it satisfied state procedures.[513]

Writing for the Court, Justice Scalia chose the final opinion based on a textual exegesis of "reasonably equivalent value" as well as an application of the *Gregory* clear statement rule to protect important state interests concerning the security of real estate titles.[514] Consider first the application of *Gregory*. Scalia discussed how, because each state determines the terms of a foreclosure sale, "[t]o specify a federal 'reasonable' foreclosure-sale price is to extend federal bankruptcy law well beyond the traditional field of fraudulent transfers, into realms of policy where it has not ventured before."[515] Scalia considered this undesirable because "[s]tates have created diverse networks of judicially and legislatively crafted rules governing the foreclosure process, to achieve what each of them considers the proper balance between the needs of lenders and borrowers."[516] The opinion consequently relied on the *Gregory* canon to assert that, based on the state's interest in security of titles, the Code must "be presumed to contain an implicit foreclosure-sale exception, which Congress must override expressly or not at all."[517]

BFP thus contains "autonomy of process" concerns, which indicates a complementary relationship between the statutory and constitutional enforcement of federalism norms. Insofar as the "autonomy of process" principle has been expanded in cases such as *New York* and *Printz*, *BFP*'s appli-

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510. *See* William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1545 (1998) (reviewing SCALIA, *supra* note 1).

511. Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199, 211 (1999).

512. Section 548 of the Bankruptcy Code allows the bankruptcy trustee (or, in chapter 11, a debtor-in-possession) to avoid fraudulent transfers (*i.e.*, recoup their value). 11 U.S.C. § 548 (1994). The constructive fraud provision at issue in *BFP* applied to insolvent debtors when certain prerequisites were met and the debtor received "less than a reasonably equivalent value in exchange for such transfer." *Id.* § 548(a)(2)(A).

513. Various circuit court opinions had split on the issue between these three views. *Cf. In re* Banks, 856 F.2d 815 (7th Cir. 1988); *In re* Madrid, 21 B.R. 424 (Bankr. 9th Cir. 1982), *aff'd on other grounds* 725 F.2d 1197 (9th Cir. 1984); Durett v. Washington Nat'l Ins. Co., 621 F.2d 201 (5th Cir. 1980).

514. *BFP*, 511 U.S. at 544-46.

515. *Id.* at 540.

516. *Id.* at 541-42.

517. *Id.* at 565. Eskridge criticizes this point sharply: "[T]he whole point of a federal bankruptcy law is to replace normal rules of state contract and property law with the fresh-start and fairness provisions of the Bankruptcy Code." Eskridge, *supra* note 510, at 1545.

cation of the *Gregory* super-strong clear statement rule becomes more legitimate.

Consider next the meaning of "reasonably equivalent value," as ascertained by Justice Scalia (for the Court), Justice Souter (in dissent), and as a synthetic judge incorporating these complementary federalism norms. Justice Scalia analyzed the "plain meaning" of "reasonably equivalent value" in light of pre-Code practice, contending that it "is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with."[518] Conversely, Justice Souter contended that the "plain meaning" of "reasonably equivalent value" was a fair forced-sale price even if compliance with state foreclosure requirements existed.[519] He based this reading on the fact that Scalia's reading would make the section "a dead letter in reviewing real estate foreclosures."[520] A synthetic judge would recognize the debate and ask whether there was any reason to read evolving federalism norms into the ambiguous meaning of "reasonably equivalent value." As to *BFP*, he would probably answer "no." *New York* had occurred two years before, but that was only one decision, which hardly qualifies as sufficiently accepted constitutional change. By today, he would probably answer "yes," both because of the addition of *Printz* and the fact that the Court has not since denounced the "autonomy of process" principle in constitutional doctrine.

That both a synthetic judge and Justice Scalia interpret "reasonably equivalent value" the same does not mean that both interpretations are susceptible to the same attacks. Justice Scalia based his interpretation on congressional intent. This imputation of intent makes him at least partially susceptible to Justice Souter's response that the Code's policy of voiding certain transfers necessarily clouds all sorts of property and contractual transactions otherwise valid under state law, and that Congress considered these federalism concerns when it amended the Code in 1984 and specifically rejected an amendment that would have guaranteed the integrity of state foreclosure sales.[521] This has led commentators to critique Justice Scalia for abandoning his textualist philosophy in favor of political concerns.[522] A synthetic interpretation avoids those critiques—at least moreso than Justice Scalia's interpretation—because it admits ambiguity whether the fraudulent

518. *BFP*, 511 U.S. at 540-45.

519. *Id.* at 562, 569 (Souter, J., dissenting). Justice Scalia rejected this reading based on an expression unius est exclusion alterius argument, since the term "fair market value" was explicitly used in § 522(a)(2) of the Code. *Id.* at 537.

520. *Id.* at 555 (Souter, J., dissenting). Justice Scalia responded that it would not be a superfluity because it will still have independent meaning outside the foreclosure context, and because it allows an attack on procedurally deficient foreclosure sales. *Id.* at 545-46.

521. *BFP*, 511 U.S. at 550 n.1, 553-54 & n.6, 565-69.

522. *See, e.g.*, Eskridge & Frickey, *supra* note 169, at 84; Daniel Farber, *The Ages of American Formalism*, 90 NW. U. L. REV. 89, 104 (1995). For a description of how the Court's interpretation in *BFP*—as well as in bankruptcy cases more generally—tries to "restrict the lower courts to the making of the most ministerial judgments that text and circumstances permit," see Alan Schwartz, *The New Textualism and the Rule of Law Subtext in the Supreme Court's Bankruptcy Jurisprudence*, 45 N.Y.L. SCH. L. REV. 149, 153 (2001).

conveyance provision differs from its surrounding provisions and justifies its reading of "reasonably equivalent value" on grounds independent of intent.[523]

IV. COMPARISON

As the preceding applications have demonstrated, constitutional statutory synthesis is as good as or better than originalism from popular consent and superior competence premises. This is true with intentionalist theories because original intent is often unknowable[524] and difficult to extrapolate through time, inviting criticism of judicial policymaking. In cases such as *Alcoa*, the New Deal constitutional change would have provided a stronger basis for the changes to section 2 doctrine. Textualism is often indeterminate as well, as *BFP* demonstrates.[525] Looking to changed constitutional norms is less subjective and therefore more restrained than deeming one interpretation of "reasonably equivalent value" more plain than another.

The same comparative equivalence (or advantage) also applies to the leading nonoriginalist theories of Dworkin, Sunstein, Eskridge, Aleinikoff, and Calabresi—at least according to the popular consent and superior competence premises of democratic legitimacy.[526] Ronald Dworkin defends a chain-novel approach to legislation aimed to achieve integrity in the law.[527] Integrity in statutory interpretation is obtained both by ensuring sufficient interpretive "fit" with the past authoritative developments of the statutory regime and by possessing the best contemporary justification (which includes the judge's personal convictions about higher-order democratic principles of political integrity and fairness and the "best" moral theory).[528] His theory is nonoriginalist in that he attacks the notion of a canonical moment of statutory creation, trying to justify the statute's life in addition to its

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523. Eskridge and Frickey have described how the Court's "stealth constitutionalism" in cases such as *Gregory* and *BFP* have a "bait and switch" feature:

> [W]hen Congress enacted the statutes in question, the constitutionality of the state-infringing provisions was clear and Congress could not have anticipated the *Gregory* rule; nor could a reasonable observer have predicted the expansion of *Gregory* in *BFP*. When the Court's practice induces Congress to behave in a certain way and the Court then switches the rules, Congress justifiably feels taken.

Eskridge & Frickey, *supra* note 169, at 85. Synthesis does not eliminate the "switch" but it does eliminate the "bait." That is, Eskridge and Frickey's criticism mostly concerns the injustice that arises when congressional intent is ignored because of the imputation of the current constitutional order to the past—a fiction that results from trying to make backwards-looking justification fit with contemporaneous constitutional norms—which leads Congress to feel "taken." Synthesis allows contemporaneity without molding the past into something that it was not.

524. *E.g.*, Easterbrook, *supra* note 158, at 547-48; Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

525. *See, e.g.*, Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 752 (1995) (describing how "plain meaning" is not always very plain).

526. This is mainly because these theorists often operate from different jurisprudential premises.

527. DWORKIN, *supra* note 34, at 228-75, 313-54.

528. *See id.* at 338.

text.[529] This leads him, for instance, to support Justice Brennan's opinion in *Weber*—despite confusion as to Title VII's original meaning—because it was morally superior from a 1979 policy perspective.[530]

Dworkin's theory is problematic from a formalist rule-of-law perspective because Hercules's determination of what the statute has become may be infused with notions of what Hercules thinks the statute should be based on his own conceptions of fairness and justice, which may or may not comport with society's views.[531] This raises significant questions of subjectivity and unpredictability. Constitutional statutory synthesis attempts to solve this problem through a transitive, two-track approach to integrity in the law: Principled evolution should first occur in the constitutional realm before incorporation into the statute itself. This sufficient-prior-constitutional-acceptance requirement helps ensure that a synthetic judge's determination actually comports with "conventional morality,"[532] aiding the ability to determine when societal change is relevant to interpretation.[533]

Cass Sunstein argues that background norms—including constitutional norms—should be used in statutory interpretation as presumptive canons of interpretation to solve the functions and failures of the regulatory state.[534] In particular, he argues as background norms change, so should the interpretation of a statute. In that light, Sunstein's theory and constitutional statutory synthesis are very similar. The theories differ in that Sunstein believes in the notion of "statutory failure," whereby special interests may gain control of the legislative process; and he uses public-value background norms as a way to correct for deficiencies in the legislative process—a "new" legal process concern[535] in response to public-choice scholarship.[536] "A problem here is

529. *Id.* at 348.

530. *See* Dworkin, *supra* note 193, at 316-31.

531. *See* Maxwell O. Chibundu, *Structure and Structuralism in the Interpretation of Statutes*, 62 U. CIN. L. REV. 1439, 1478 (1994) (describing how, for Dworkin, the constraints and freedoms are ultimately "matters of the judgment of the interpreter"). For a critique of how Dworkin's theory ultimately devolves into unconstrained judicial policymaking, at least in the constitutional context, see Richard H. Fallon, Jr., *Reflections on Dworkin and the Two Faces of Law*, 67 NOTRE DAME L. REV. 553, 560 (1992).

532. "Conventional morality" refers to neutral and shared socially desirable principles and policies. Anthony Sebok, *A Road Not Taken: Harry Wellington, Legal Process and Adjudication*, 45 N.Y.L. SCH. L. REV. 207, 215 (2001) (citing Wellington, *supra* note 20, at 244-45).

533. Another advantage of constitutional statutory synthesis is that constitutional doctrine is bounded in scope and of definitive authority whereas Dworkin's methodology looks to every public statement on what the statute has become. DWORKIN, *supra* note 34, at 350.

534. SUNSTEIN, *supra* note 36, at 187. For a similar theory, albeit less dynamic, see Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 227-40 (1986).

535. Weisburg, *supra* note 22, at 240-43 (describing "New Legal Process" as the focus on interpretation and dialog between the branches). Although Sunstein describes how agencies should normally be responsible for most of this statutory "correction," he also discusses how some statutes are built on a distrust for agencies. *See* Sunstein, *supra* note 36, at 445. He also faults the premises of those who interpret statutes as deals to be construed narrowly and argues that courts should treat statutes as purposive, rational, and public-regarding. *See id.* at 446-47. *But see id.* at 447 (claiming a court should respect a deal if it is unambiguously reflected in law).

536. *E.g.*, William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 298-99 tbl. 2, 309 (1988) (describing the "checking

that many statutes cannot easily be characterized,"[537] causing tremendous apprehensions of judicial subjectivity in terms of his public-regarding unmaking of statutes.[538] This risks intruding on legislative supremacy. Constitutional statutory synthesis, conversely, avoids correcting the legislative process and fully enforces statutory dysfunction (at least insofar as part of original intent).[539] It respects the outcome of the legislative process, regardless of its public-regarding demerits, to avoid diminishing legislative supremacy and Congress's primary link to the electorate.

William Eskridge sets forth a theory of "dynamic" statutory interpretation, guided by the leitmotif of "critical pragmatism," rooted in liberal democratic, legal process, and normative political theory.[540] He proposes a series of interpretive guidelines such as: Underenforcement of a statute is more appropriate than overenforcement,[541] judges should protect the interests of marginalized minorities,[542] and statutes should evolve when the statute is normatively unjust.[543] Eskridge's work is nuanced. That, however, is the root of its problems as an acceptable middle ground to originalists. Some of his normative elements create an obligation for judicial value imposition (similar to Dworkin),[544] and some of his representation-reinforcement concerns cause him to unmake certain laws (similar to Sunstein). Limiting judicial updating to situations of constitutional change—one situation in which Eskridge endorses statutory evolution[545]—may be more palatable to individuals concerned with having a direct connection between judicial updating of statutes and, at some point in the past, sufficient popular support.

Alexander Aleinikoff presents a "nautical" metaphor of statutory interpretation, whereby courts should interpret statutes "as if recently enacted."[546] His approach is "nautical" as opposed to "archaeological," because he posits that more than the statute's text and legislative history (its

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function of the judiciary" as well as various mechanisms, depending on the type of statute, for the judiciary to fulfill this role); Macey, *supra* note 534, at 250-52 (arguing that courts should enforce the original public-regarding justifications as a check against interest groups' subsequent efforts to manipulate a statute in their favor).

537. ESKRIDGE, *supra* note 35, at 158.

538. *See supra* note 75.

539. It will, however, enforce the original deal against post-enactment attempts at manipulation.

540. ESKRIDGE, *supra* note 35, at 199-204.

541. *Id.* at 136-37 (citing Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767, 788-89 (1991)). *But see id.* at 137 (discussing how the notion of overenforcement is useless if one disregards the notion of the traditional state common law as the regulatory baseline).

542. ESKRIDGE, *supra* note 35, at 159 (positing a representation-reinforcement theory of interpretation).

543. *E.g.*, *id.* at 185-92 (discussing the implications of feminist republican interpretation).

544. *See* Lessig, *Translation*, *supra* note 19, at 1258 n.350 (drawing parallels between Eskridge's and Dworkin's theories and their unconstrained advancements of current moral and political goals). It is also arguable that Eskridge's theory is subjective because it is oriented too much in current congressional desires. *See* John Copeland Nagle, *Newt Gingrich: Dynamic Statutory Interpreter*, 143 U. PA. L. REV. 2209, 2214 (1995) (reviewing ESKRIDGE, *supra* note 35).

545. *See, e.g.*, ESKRIDGE, *supra* note 35, at 128-30.

546. Aleinikoff, *supra* note 32, at 50.

archaeological components) are relevant, such as subsequent legislative inaction (in certain cases).[547] Like Sunstein and Eskridge, Aleinikoff lists a multitude of situations in which statutory interpretation should evolve, including constitutional change and agency change.[548] Constitutional statutory synthesis differs from his nautical, present-minded approach, because synthesis only has judges look to constitutional doctrine (or adapted agency interpretations) and thus is decidedly more archaeological. It also perhaps is more limited insofar as sufficiently accepted constitutional values are only a limited subset of the public values that may enter judicial consideration under an "as if recently enacted" approach.[549]

Guido Calabresi's *A Common Law for the Age of Statutes* describes many different forms of statutory anachronism.[550] Calabresi too bases the ground for judicial updating of statutes not in any implicit delegation by Congress but in judges' special ability to maintain synchronic coherence with a complex legal landscape.[551] Although it is unstated, I figure that his common-law statutory adjudication techniques apply only when Congress has explicitly or implicitly so delegated.[552] In that sense, synthesis is deeply consonant with his approach, adding however that accounting for constitutional change is democratically legitimate even in the absence of delegation. The main area of dissonance between constitutional statutory synthesis and his common-law updating of statutes occurs when congressional delegation *does* exist. Calabresi seems to indicate that in the presence of delegation, courts are as free to adapt for constitutional, political, or technological change as any administrative agency.[553] Constitutional statutory synthesis, conversely, is more path-dependent when relevant constitutional change exists in addition to implicit evolutionary delegation, as the discussion of *Sylvania* illuminates.[554]

The commonality joining my critiques of these interpretive theories is that, from a liberal democratic perspective, the optimal interpretive approach over time need not focus on making interpretations "best"—regardless of whether best is defined according to the plainest meaning of the text, application of original intent, moral justification, present-mindedness, solving the failures of the regulatory state, or critical pragmatism—because the process of making something "best" is often the most subjective part of interpretation. Focus instead should be on maximizing the

547. *Id.* at 38-46.

548. *Id.* at 43-46, 58.

549. *See supra* note 123 (differentiating between constitutional and public values).

550. CALABRESI, *supra* note 33.

551. *Id.* at 92-101. *But see* Richard Pildes, Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982) (describing a common-law method as a way to help implement legislative will in a more thorough way than confining intent to the instant of enactment).

552. I base this implicit presumption on a conversation I had with him on March 27, 2001.

553. CALABRESI, *supra* note 33, at 139 (listing a variety of potential concerns).

554. Another potential difference involves the method of resolving the statutory anachronism. Judicial updating of the statutes is only one of his methods for rectifying obsolete statutes. *See id.* at 147-48.

number of easy, objective steps while remaining out of the realm of infidelity. One might well want judges to leave statutes "worse" by consciously using an imperfect proxy instead of "finding" the right answer in the specific case as to minimize judicial lawmaking.

V. CONCLUSION

One last argument in synthesis's favor is a call for judicial candor similar to the one made by Calabresi two decades ago.[555] Calabresi catalogued the complex subterfuges that courts employed to hide their efforts at synchronization out of fear that such attempts contradicted their role as legislative agents. He worried that such actions were deleterious, because "as long as [interpretation] is tied to a search for original legislative intent, interpretation is bound to give courts too much scope in reworking some statutes and, at the same time, to leave courts powerless before other statutory anachronism."[556] Furthermore, the use of subterfuge allowed judicial updating to be unprincipled.[557]

Cases like *Alcoa* demonstrate an additional concern. Not only was the fictional imputation of its result to original intent unnecessary—as updating statutes in light of changed constitutional principles also enhances liberal democratic legitimacy—but also it was harmful, exposing the decision to a line of attack on historical grounds. Given the myriad of conflicting statements in the legislative history, courts following *Sylvania* were able to presume that the Sherman Act's purpose was to protect consumers instead of competitors,[558] which was much easier for advocates of a consumer welfare approach to overcome than the presence of an altered purposive balance following the New Deal.

My point is not to attack *Sylvania* and the antitrust doctrine that followed but to criticize *Alcoa*, *Bob Jones*, *Weber*, and all cases that implicitly rely on the "benign fiction" of intent imputation. As a descriptive matter, judges will achieve synchronic coherence. The only question is whether they will attempt to hide such synchronization in "faithful agent" terms. If judges displace pretenses of fidelity, progress can be achieved because synchronic coherence could be attained in a more restrained and institutionally responsible manner through constitutional statutory synthesis.

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555. *Id.* at 178-82; *see also* David Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987). *But see* Nicholas Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353 (1989) (discussing how judicial candor impedes the ability of the judiciary to "check" administrative agencies).

556. CALABRESI, *supra* note 33, at 42, 172-77.

557. *Id.* at 179.

558. Marrese v. Am. Acad. of Orthopedic Surgeons, 706 F.2d 1488, 1497 (7th Cir. 1983) (Posner, J.) ("[T]hough there is a sense in which the exclusion of any competitor reduces competition, it is not the sense of competition that is relevant to antitrust law . . . . The policy of competition is designed for the ultimate benefit of consumers rather than of individual competitors . . . .").