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# THE DIVERGENCE OF CONSTITUTIONAL AND STATUTORY INTERPRETATION

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## INTRODUCTION

Theories of constitutional and statutory interpretation abound, but they give little focused attention to the relationship between these forms of interpretation.[1] Scholars have noted that constitutional law itself constrains statutory interpretation, and there is a lively contemporary debate about the scope of that constraint.[2] Scholars have also developed theories

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1. Some commentators have noticed the topic in the midst of other concerns. *See, e.g.*, Michael C. Dorf, *The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 14 n.47 (1998) (invoking constitutional interpretation as a familiar reference point for the debate over statutory interpretation but not elaborating on the relationship); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 889 (1996) [hereinafter Strauss, *Common Law Constitutional Interpretation*] (suggesting that an implication of the common law approach to constitutional interpretation is that constitutional interpretation has "less in common with the interpretation of statutes than we ordinarily suppose"); Jeremy Waldron, *Legislators' Intentions and Unintentional Legislation*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 329, 332–33 (Andrei Marmor ed. 1995) (contrasting arguments about the authority of enactors' intentions with regard to constitutional and statutory law); Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 839–41 (1991) (arguing that interpretive methodology for statutes must have grounding in a constitutional argument); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 543, 544–45 (1988) (defending a model of statutory interpretation that rejects the idea that all legal texts are essentially the same and subject to the same principles of interpretation); Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 272–90 (1982) (examining implications of economic analysis of legislation for statutory and constitutional interpretation); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 744–45 (1982) (noting that different rules of interpretation may apply in constitutional and statutory interpretation); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 904, 914–16, 923, 943 (1985) (discussing how prominent early Americans drew on statutory analogy for constitutional interpretation).

Kent Greenawalt gives the comparison of constitutional and statutory interpretation sustained and helpful treatment. *See* Kent Greenawalt, *Are Mental States Relevant for Statutory and Constitutional Interpretation?*, 85 CORNELL L. REV. 1609, 1613 (2000) (examining relevance of enactors' mental states in statutory and constitutional interpretation); Kent Greenawalt, *Constitutional and Statutory Interpretation*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 268 (Jules L. Coleman and Scott Shapiro eds. 2002) [hereinafter Greenawalt, *Constitutional and Statutory Interpretation*] (examining foundational questions of interpretation that arise with regard to statutes and the Constitution). Where Greenawalt's aim is to provide a conceptual overview of interpretive issues that arise in both constitutional and statutory interpretation, I focus on the structure of justification for interpretive approaches for constitutional and statutory interpretation.

2. At the center of this debate is a recent exchange between John Manning and William Eskridge. *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001) [hereinafter Manning, *Equity of the Statute*];

of statutory interpretation self-consciously inspired by constitutional principles.[3] But we do not have an account of the extent to which adopting an interpretive stance in one domain—whether constitutional or statutory—constrains the choice of interpretive principles adopted in the other domain. Must originalists in constitutional interpretation have the same originalist position in statutory interpretation? Must those who embrace dynamic theories of statutory interpretation have the same interpretive stance with regard to reading the Constitution?

In contemporary scholarship, there is a peculiar agreement between defenders of originalism and dynamism that constitutional and statutory interpretation should converge. Justice Antonin Scalia exemplifies this originalist view. He defends interpreting both the Constitution and federal statutes in accordance with their original meaning at the time of enactment: "What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."[4] William Eskridge and Philip

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William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001); John F. Manning, *Response: Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648 (2001).

3. *See, e.g.*, CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 161–92 (1990) [hereinafter SUNSTEIN, AFTER THE RIGHTS] (arguing for the role in statutory interpretation of underenforced constitutional norms, such as federalism, political deliberation, political accountability, and protection of disadvantaged groups); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 412 (1989) (arguing for the development of norms of statutory interpretation that grow out of the basic purposes of the constitutional framework); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 675 (1997) (defending textualism as an implementation of the constitutional prohibition on legislative self-delegation); Nickolai G. Levin, *Constitutional Statutory Synthesis*, 54 ALA. L. REV. 1281 (2003) (arguing for a conception of statutory interpretation in which statutory evolution is a function of change in constitutional doctrine); *see also* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2092–2102 (2002) (providing a typology of the constitutional status of rules of statutory construction).

4. 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 38 (Amy Gutmann ed. 1996) [hereinafter Scalia, *Common-Law Courts*]; *see also* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989) [hereinafer Scalia, *Lesser Evil*] ("Central to [*Marbury*'s] analysis, it seems to me, is the perception that the Constitution, though it has an effect superior to other laws, is in its nature the sort of 'law' that is the business of the courts—an enactment that has a fixed meaning ascertainable

Frickey embrace a dynamic version of this view. They defend interpreting both the Constitution and federal statutes in accordance with the demands of practical reason, and have developed an approach to statutory interpretation in which statutory interpretation is viewed as "fundamentally similar to judicial lawmaking in the areas of constitutional law and common law."[5] On their theory, courts should interpret both the Constitution and statutes to bring their decisions into general alignment with contemporary values, as reflected in the elected branches of government.[6] What Scalia and Eskridge (and his co-authors) have in common is the idea that there is a similarity between the Constitution and statutes such that the same interpretive approach applies to both constitutional and statutory interpretation.

This article seeks to provide a starting point for understanding the connection between constitutional and statutory interpretation by challenging the basis for the interpretive convergence that Scalia and Eskridge posit. Both Scalia and Eskridge invoke democratic and rule-of-law values to justify their positions. Scalia contends that the judicial role in a democracy requires interpreting democratically enacted texts, whether a statute or the Constitution, according to his textualist originalist approach.[7] Eskridge maintains that his dynamic method of interpretation "reconcil[es]" democracy and the rule of law in both constitutional and statutory interpretation.[8] This article concludes that neither democracy nor the values that Eskridge associates with the rule of law require interpretive convergence, and further that these foundations in fact

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through the usual devices familiar to those learned in the law."); ROBERT H. BORK, THE TEMPTING OF AMERICA 145 (1990) [hereinafter BORK, TEMPTING] ("If the Constitution is law, then presumably its meaning, like that of all other law, is the meaning the lawmakers were understood to have intended.").

5. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 382 (1990) [hereinafter Eskridge & Frickey, *Practical Reasoning*]; *see also* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) ("Statutes . . . should—like the Constitution and the common law—be interpreted 'dynamically' in light of their present societal, political, and legal context.").

6. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 29 (1994) [hereinafter Eskridge & Frickey, *Equilibrium*].

7. *See infra* text accompanying notes 18 to 43.

8. *See* Eskridge & Frickey, *Equilibrium*, *supra* note 6, at 77.

suggest that constitutional and statutory interpretation diverge.

The reasons for divergence emerge from examining the character of the argument from these foundational values to interpretive principles in the constitutional and statutory domains. With regard to the democratic justification for originalism, I argue that there are several conceptions of democracy that provide potential justifications for originalism in statutory interpretation, but offer no basis for originalism in constitutional interpretation. Neither majoritarian nor rights-based conceptions of democracy can justify originalism in constitutional interpretation. Likewise, arguments that originalism enhances the democratic process by forcing political actors to deliberate carefully about the laws they enact also do not apply to constitutional interpretation. On the flip side, I argue that democratic justifications for originalism in constitutional interpretation based on appeals to the consent of a past supermajority do not provide the same grounds for originalism in statutory interpretation. The different representative character of constitutional and statutory law lies behind these disjunctures, and points towards different principles of constitutional and statutory interpretation.

Interpretive divergence also arises from analysis of the values Eskridge associates with the rule of law. Eskridge argues that dynamic interpretation promotes legal stability. Eskridge conceives of stability as the law reaching a stable equilibrium—finding a position that will not be subject to override by a coordinate institution.[9] But because the prospect of formal override of the Supreme Court's constitutional decisions is much more remote than statutory overrides, stability in the sense of avoidance of override provides no argument for convergence in constitutional and statutory interpretation. Indeed, on this view of stability, constitutional and statutory interpretation will diverge precisely because of the differential force of political accommodation in the constitutional and statutory spheres. Moreover, even if stability is understood more generally as an alignment with contemporary values and politics, the legitimacy of constitutional interpretation depends on that alignment in a way that statutory interpretation does not; this difference reveals another ground for divergence in in-

9. *See id.* at 32; *see also infra* text accompanying notes 57 to 83.

terpretive method. The general picture that emerges is that the justification for interpretive principles must be situated (and thus relative to) the statutory or constitutional fields in which they operate.

These arguments take a step toward understanding the broader relationship of constitutional and statutory interpretation. They clear aside the suggestion that democracy or the rule-of-law value of stability compels interpretive convergence, and thus emphasize that justifications for interpretive principles from these foundations must be built from within the constitutional or statutory domains. This article thus aims to address two distinct audiences. On one side, it directly engages those, like Scalia and Eskridge, who posit interpretive convergence. On the other side, for those who believe that constitutional and statutory interpretation should diverge,[10] I aim to contribute to the theoretical grounding for that view.

I choose to focus on democracy and rule-of-law values not only because they have a central role in Scalia's and Eskridge's theories, but also because democracy and rule-of-law arguments occupy a similarly central place in theories of constitutional and statutory interpretation.[11] Moreover, this role is no

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10. Most of the commentators cited in note 1, for instance, gesture at or posit divergence.

11. Mainstays of contemporary constitutional theory take as their central project elaborating a conception of constitutional interpretation that is consistent with democracy. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 27 (2d ed. 1986) (arguing that judicial review must achieve consonance with idea that the majority has the ultimate power to replace decisionmakers); JOHN HART ELY, DEMOCRACY AND DISTRUST 4–5 (1980) (stating that central problem of judicial review is that unelected and unaccountable judges are instructing the people's representatives that they cannot govern as they desire); 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 10 (1991) (identifying the legitimate exercise of judicial review with courts serving democracy by protecting principles enacted by the people with broad and deep support). Rule-of-law ideas are also central to constitutional interpretation. *See, e.g.*, Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 Col. L. Rev. 1 (1997) (examining rule-of-law ideals and illustrating their invocation in constitutional interpretation); Jerry L. Mashaw, *Prodelegation: Why Administrative Agencies Should Make Political Decisions*, 1 J.L. ECON. & ORGANIZATION 81, 86 (1985) (noting that a "consistent strain of our constitutional politics asserts that legitimacy flows from 'the rule of law.'"). Democracy and rule-of-law arguments play a similarly foundational role in statutory interpretation. *See, e.g.*, Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 594–97 (1995) [hereinafter Schacter, *Metademocracy*] (identifying the link between statutory interpretation and democratic theory as verging on the canonical); Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legisla-*

accident: the ideals of democracy and the rule of law are foundational commitments in our system of self-government,[12] and as a result, they figure in the conceptions of the authority for constitutional and statutory law. Because theories of interpretation depend in part on theories of authority,[13] it makes sense that our inquiry would look to values, like democracy and the rule of law, that play a role in the theory of authority for these two types of law.

It is worth noting at the outset that I do not deny that there may be foundations from which a theory of interpretive convergence might be constructed. For instance, some scholars argue that interpretation should focus on the pursuit of political justice.[14] If we should adopt interpretive principles in virtue of political justice, and adopt those principles independent of democratic argument, then I make no claim that constitutional and statutory interpretation should diverge. Likewise, in the event that we can adopt interpretive principles without agreement on larger theoretical foundations,[15] it may happen

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*tive Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803 (1994) (defending a theory of statutory interpretation based on democratic arguments, and the democratic deficits of its alternatives); William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. REV. 629, 677 (2001) (commenting that the rule of law is a widely held value in statutory interpretation).

12. *See, e.g.*, PAUL W. KAHN, THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA 9 (1997) [hereinafter KAHN, REIGN OF LAW] (characterizing the rule of law and rule by the people as fundamental ideals in the American conception of political order); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men.").

13. *See* Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 153, 157 (Larry Alexander ed. 1998) [hereinafter Raz, *Authority and Interpretation*]; Waldron, *supra* note 1, at 331. For discussion of the connection between theories of authority and interpretation, see *infra* text accompanying notes 196 to 202.

14. *See, e.g.*, SOTIRIOS A. BARBER, ON WHAT THE CONSTITUTION MEANS 57–59 (1984) (defending the supremacy of the Constitution and its elaboration insofar as it constitutes "our best current conception of the good society"); *cf.* Lawrence G. Sager, *The Incorrigible Constitution*, 65 N.Y.U. L. REV. 893, 953–59 (1990) (arguing that democracy and popular sovereignty are not the exclusive basis of constitutional decision-making, and defending the role of the judiciary in the elaboration of principles of constitutional justice).

15. *See, e.g.*, CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 37–38 (1996); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 42–44 (1999); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003) (arguing that claims about democracy, legitimacy, authority and constitutionalism are inadequate to resolve disagreements about interpretive methods); *cf.* Edward L.

that constitutional and statutory interpretation converge based on lower-level institutional and practical considerations (though my suspicion is that those grounds would provide an even stronger argument for divergence). But in view of the place that argument from democracy and the rule of law have in contemporary interpretive theory, my focus on these values leaves our central commitments and theories at the table.

I also do not aim to settle the debate over what is the best interpretive position for either constitutional or statutory interpretation. Some strengths and vulnerabilities of the positions I address are inevitably exposed, but I do not pursue those arguments. To do so would collapse the inquiry into the familiar debate over what is the best interpretive theory for the Constitution *or* statutes. It also would not address directly the distinctive claim of convergence that I want to examine: the idea that the same interpretive approach extends across the statutory and constitutional fields. My strategy for maintaining a degree of distance from that underlying substantive debate is to accept the core ideals invoked on behalf of these theories—democracy and the rule of law—and then to trace the character of the justification that these ideals provide for interpretive stances in the constitutional and statutory domains.[16]

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Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711 (2001) (arguing that the term democracy be set aside and that a focus on mechanisms of election and administration replace it).

16. I am concerned with constitutional and federal statutory interpretation. I do not address other forms of enacted law, such as popular initiatives, referenda, state constitutions, and treaties. Jane Schacter has examined the manner in which courts employ originalist methods of statutory interpretation to interpret state initiatives and referenda. *See* Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107 (1995). Schacter's critique of the deployment of statutory originalism with regard to popular initiatives, and her proposal that courts frame interpretive norms for these kinds of laws based on the mechanics of the direct lawmaking processes, dovetails with my argument that the foundations of norms for constitutional and statutory interpretations are relative to the field in which those norms operate. Criticism of the application of methods of statutory interpretation to treaties reflects similar concerns. *See, e.g.*, David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 U.C.L.A. L. REV. 953, 1019–26 (1994) (arguing against statutory analogy for treaty interpretation); Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 692 (1998) (arguing against the appropriateness of the form of textualism gaining prominence in domestic statutory interpretation for treaty interpretation). Nor do I address other forms of interpretation, such as interpretation in literature. My emphasis on the distinction between constitutional and statutory interpretation is consistent with the more general view that the different reasons we have to interpret different kinds of texts—say, works of litera-

In pursuing this strategy, I do not offer a particular conception or stipulative definition of democracy or the rule of law at the outset. Rather, I simply accept them as ideals and attend throughout the argument to how different conceptions of these ideals function in the justification for originalist and dynamist positions in constitutional and statutory interpretation.[17]

Part I of this article provides a brief description of Scalia's and Eskridge's theories of interpretive convergence; it provides a basis for my suggestion that Scalia and Eskridge take a misstep in tandem. Parts II and III present the challenge to these positions and the grounds for divergence. Part II presents the democratic argument. It begins by showing how several conceptions of democracy that might justify originalism in statutory interpretation fall flat with regard to constitutional interpretation. It then shows how democratic grounds for originalism in constitutional interpretation are not the same as those in statutory interpretation. Part III presents the critique of Eskridge's argument from the rule-of-law virtue of stability to convergence. It first shows that Eskridge's conception of legal stability as the absence of override provides no argument for convergence, and in fact, the difference in the prospect of override, and the role of contemporary values in the constitutional and statutory domains pushes constitutional and statu-

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ture, shopping lists, and legal constitutions—should be reflected in our interpretive approach to them. For an exploration of this view, with emphasis on the distinction between literary and legal interpretation generally, see Martin Stone, On the Old Saw, "Every reading of a text is an interpretation": Some Remarks (Nov. 7, 2003) (unpublished manuscript, on file with the author).

17. I use the word "interpretation" broadly to refer to the highest-order question of how a court should construe and apply a statutory or constitutional provision. I understand this to be the common usage of the phrase "constitutional interpretation" and "statutory interpretation" (and certainly Scalia's and Eskridge's use). Some have proposed a narrower definition of "interpretation" to refer to a hermeneutic inquiry and contrast that with what a court does when it recognizes a provision as ambiguous. Einer Elhauge, for instance, limits "interpretation" to hermeneutic questions that he believes "give out" at which point "default rules" of construction come into play. *See* Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2030–31 (2002). In contrast, I take both of these questions to be part of constitutional and statutory "interpretation." Those, like Elhauge, who reserve "interpretation" for a hermeneutic inquiry that does not comprise all of what is at issue when a court applies a statutory or constitutional provision, should read "interpretation" throughout to mean "adjudication," which includes the hermeneutic question and whatever else there is. For a helpful discussion of the definition of interpretation in this context, see Greenawalt, *Constitutional and Statutory Interpretation*, *supra* note 1, at 269–70.

tory interpretation apart. It then suggests that even if stability is understood more generally as alignment with contemporary values, the role of contemporary values in constitutional and statutory interpretation is distinct, and thus provides a further ground for divergence. Part IV responds to the objection that different interpretive approaches should apply to each statute or constitutional provision by appealing to general ideas about theories of legal authority and legal interpretation. That discussion situates the work in this article in a larger framework for constructing theories of interpretation for enacted law.

## I. THE CONVERGENCE OF CONSTITUTIONAL AND STATUTORY INTERPRETATION IN CONTEMPORARY THEORY

Our first task is descriptive and constructive: to provide an account of interpretive convergence in Scalia's textualist originalism and Eskridge's dynamism. Both Scalia and Eskridge work out their interpretive positions in the context of statutory interpretation—and in no small measure against and in contrast to each other's views. But both view the interpretive approach they defend in the statutory context as extending beyond the interpretation of statutes to constitutional interpretation.

### *A. Scalia's Textualist Originalism*

With regard to statutes and the Constitution, the core commitment of Justice Scalia's textualist originalist view is that judicial interpretation should aim to discern the "objective indication of the words"[18] as they would have been understood at the time of their enactment.[19] This view is textualist because it takes statutory or constitutional text as the sole interpretive object, and it is originalist because it seeks to capture the understanding of the text at the time of enactment, as opposed to at the time of interpretation (or some other time).[20]

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18. *See* Scalia, *Common-Law Courts*, *supra* note 4, at 29.

19. *See id.* at 38.

20. Textualism need not be originalist. A textualist might insist on reading the text in accordance with its meaning at the time of interpretation, as opposed to at the time of its enactment. *See* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 23 (1988). As explained below, Scalia's textualism is originalist. I use "originalism" broadly to refer to a prescriptive interpre-

Scalia is clear that this interpretive stance applies to both statutes and the Constitution. As noted above, Scalia writes "[w]hat I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."[21]

Scalia's argument for textualist originalism derives from a conception of democracy, and the judicial role within it. For Scalia, the first and most important distinction that judges must make is whether they are operating in a common law mode, or whether they are called upon to interpret and apply democratically enacted texts, such as the Constitution and statutes. The common law judge, Scalia recounts, does not merely apply the law to the facts, but also makes law.[22] He or she determines whether the case at hand is properly governed by the decision of previous cases, or whether circumstances distinguish it from existing precedent, and call upon the judge to devise a new rule of law.[23] But, according to Scalia, that judi-

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tive theory that takes discerning the meaning of the text or the intentions or purposes of the drafters, *at the time of enactment*, as the privileged interpretive aim. On this view, by definition, an originalist need not be textualist.

For discussion of the different interpretive objects of originalism, see, for example, Richard Kay, *'Originalist' Values and Constitutional Interpretation*, 19 HARV. J.L. & PUB. POL'Y 335, 336–39 (1996) (distinguishing interpretive aims of (1) original text, (2) original intentions, (3) original understanding, and (4) original values); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980) (distinguishing textualist and intentionalist originalism). For discussion of the different levels of abstraction to which originalists might aim, see, for example, Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1766–67 (1997) [hereinafter Dorf, *Integrating Normative and Descriptive*] (describing strict and moderate orginalism); Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL'Y 311, 312–13 (1996) (distinguishing hard and soft originalists by level of generality with which they take the Framers' intent); Brest, *supra*, at 204 (distinguishing strict and moderate originalism). Finally, for discussion of the degree of bindingness of the object of originalism—say, as the exclusive or otherwise privileged aim—see Brest, *supra*, at 222–24.

21. *See* Scalia, *Common-Law Courts*, *supra* note 4, at 38.

22. *See id.* at 6.

23. *See id.* at 6, 8–9. Scalia provides a robust portrait of the great common law judge,

> the Holmes, the Cardozo—is the man (or woman) who has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken-field running through earlier cases that leaves him free to impose that rule: distinguishing one prior case on the left, straight-arming another one on the right, high-stepping away from another precedent about to tackle him from the rear, until (bravo!) he reaches the goal—good law.

*See id.* at 9.

cial role should not apply to the interpretation of enacted law. In that arena, the judge is to apply the law that the lawmakers enacted. Judges are "bound" by the democratic process not to "tinker with statutes," and "how much more should they feel bound not to tinker with a constitution, when their tinkering is virtually irreparable."[24] Thus Scalia's originalism in both statutory and constitutional interpretation derives from an idea about the appropriate mechanism for change of enacted law. Whereas common law judges make new law, in Scalia's view, democracy denies judges the role of changing the meaning of enacted law. If meaning of enacted law is to change, it must happen through the prescribed, formal processes. In this vein, Scalia argues that the Supreme Court's method of constitutional adjudication, which takes the Court's own decisions as a starting point, not the text of the Constitution itself, presumes that the Constitution, like the rules of common law, changes over time.[25] For Scalia, this method of adjudication with its presumption of evolution is anathema to constitutional interpretation. If democratically enacted statutes are not altered by reason of time, then, neither should the Constitution, which Scalia posits was enacted for the very purpose of preventing change.[26]

The textualist component of Scalia's originalism also derives from democratic ideas. Scalia's well-known rejection of intentionalist modes of interpretation provides his basic argument for textualism. Scalia argues that "it is simply incompatible with democratic government, or indeed even with fair government, to have the meaning of law determined by what the lawgiver meant, rather than what the lawgiver promulgated."[27] For Scalia, this incompatibility seems to have two principal elements. First, if courts make recourse to legislative intention by way of review of the legislative history, the subjective intentions of particular legislators may trump the text that the majority (or supermajority) enacted. Second, Scalia believes that judges who search for legislative intentions are, as a practical matter, less likely to interpret enacted law in a way that does not change its meaning. If the interpretive task includes discerning legislative intentions, then "under the guise

24. *See id.* at 40.
25. *See id.*
26. *See id.*
27. *See id.* at 17.

or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field."[28] The turn to legislative intentions, Scalia suggests, implicates judges in a process in which they will not be able to avoid imposing their own views as to what the law ought to be. In Scalia's view, the original public meaning of the text is not such a pernicious interpretive object.

Scalia's critique of the Supreme Court's decision in *Church of the Holy Trinity v. United States*[29] illustrates the core tenets of his textualist originalist view. Because Scalia's and Eskridge's opposed readings of this decision so starkly illustrate their respective interpretive positions, it is worth a brief recitation of the case, which is sure to be familiar to most readers.[30] In *Church of the Holy Trinity*, the Court addressed whether a provision in the Alien Contract Labor Act of 1855 prohibiting contracting with any alien, prior to his importation or migration into the United States "to perform labor or service of any kind," applied to New York's Church of the Holy Trinity's contractual arrangement with a British clergyman, residing in England, to serve as its rector and pastor.[31] The Act expressly excluded professional actors, artists, lecturers, singers and domestic servants from its scope.[32] The government sued the Church for civil penalties under the Act. The Court modestly acknowledged that the government's argument on the basis of the text of the statute had "great force."[33] Not only was the language "labor or service of any kind" broad enough to include the rector's services to the Church, but also the class of clergymen did not fall within any of the express exceptions to the Act.[34] The Court, however, denied the government relief.

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28. *Id.* at 17–18; *cf. id.* at 22 ("It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is.").

29. 143 U.S. 457 (1892).

30. *See* Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1835 (1998) (noting that *Church of the Holy Trinity* provides a common point of reference in debates over statutory interpretation).

31. *Church of the Holy Trinity*, 143 U.S. at 458.

32. *Id.* at 458–59.

33. *Id.* at 459.

34. *Id.*

It held that the broad language of the statute did not comport with Congress's intent. The Court concluded, based in part on a reading of the legislative history of the Act, that the "intent of [C]ongress was simply to stay the influx of . . . cheap, unskilled labor."[35] The Court bolstered this conclusion about Congress's intent with its understanding of the United States as a "religious nation."[36] In circumstances where such congressional intent is in clear conflict with the broad language of the statute, the Court held that its role was to follow Congress's intention. "It is the duty of courts . . . to say that, however broad the language of the statute may be, the act, although with the letter, is not within the intention of the legislature, and therefore cannot be within the statute."[37]

For Scalia, *Church of the Holy Trinity* exemplifies the "triumph of supposed 'legislative intent' (a handy cover for judicial intent) over the text of the law."[38] And in his view, this is wrongheaded. "Well of course I think that the act was within the letter of the statute, and was therefore within the statute: end of case."[39] The project of trying to discern legislative intent is "nothing but an invitation to judicial lawmaking," which is fundamentally out of place when courts apply democratically enacted law.[40] Thus, for Scalia, democracy requires a particular kind of restraint on the part of judges: an exclusive focus on the original meaning of the text.

The only differences that Scalia admits between constitutional and statutory interpretation derive from the differences of the Constitution's text. Scalia writes that interpreting the Constitution poses a distinctive problem, "not because special principles of interpretation apply, but because the usual principles are being applied to an unusual text."[41] The text of the Constitution suggests that the interpreter should not expect

35. *Id.* at 465.
36. *Id.* at 516.
37. *Id.* at 472.
38. Scalia, *Common-Law Courts*, *supra* note 4, at 18; *see* Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 473–74 (1989) (Kennedy, J., joined by Rehnquist, C.J., and O'Connor, J., concurring in the judgment) (arguing "the problem with spirits is that they tend to reflect less the views of the world whence they came than the views of those who seek their advice," and suggesting that the Court in *Church of the Holy Trinity* substituted its own values for the will of the enacting Congress).
39. Scalia, *Common-Law Courts*, *supra* note 4, at 20.
40. *Id.* at 21.
41. *Id.* at 37.

"nit-picking detail, and to give words and phrases an expansive rather than a narrow interpretation."[42] But the basic interpretive aim—to discern the original meaning of the text—remains the same.[43] In Scalia's vision, the Constitution is analogous to a statute, and it should be interpreted in accordance with the same norms and interpretive aims that apply to statutes.[44] Scalia thus embraces a principle of democratic interpretive uniformity under which the enactedness of a legal text determines that it will be interpreted according the same interpretive norms as apply to other democratically enacted legal texts—textualist originalism.

### *B. Eskridge's Dynamism*

Professor Eskridge's theory of dynamic interpretation stands in opposition to Justice Scalia's textualism. Whereas Scalia argues that a unitary interpretive metric—discerning the original meaning of the text—is paramount, Eskridge contends that multiple interpretive tools bear on interpretation. Whereas Scalia's theory proceeds from a distinction between common law and enacted law, Eskridge contests this distinction and celebrates a mode of interpretation similar to common law adjudication. But there is an underlying structural similarity between Eskridge's and Scalia's views. Like Scalia, Eskridge envisions a convergence of constitutional and statutory interpretation.

Eskridge argues extensively that statutory theories that posit a unitary foundation for interpretation, such as textualism, are descriptively and normatively inadequate.[45] In contrast, Eskridge argues that we should candidly acknowledge that multiple sources bear on statutory construction. He describes the familiar idea of a rough hierarchy of interpretive sources with the graphic image of a "funnel of abstraction."[46] Using this model, the interpreter will consider, from most con-

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42. *Id.* at 37.
43. *See id.* at 38.
44. *See id.*
45. *See* Eskridge & Frickey, *Practical Reasoning*, *supra* note 5, at 321, 324–45; WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 13–47, 107–89 (1994) [hereinafter ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION] (criticizing archeological, liberal, legal process, and normative theories).
46. *See* ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 45, at 56.

crete to most abstract, the statutory text, specific and general legislative history, legislative purpose, evolution of the statute, and current policy.[47] In this view, the interpreter generally will value more highly a strong argument based on more concrete considerations like statutory text than more abstract ones like legislative purpose.[48] But the process of reasoning is not linear or deductive. Instead, the interpreter will move back and forth between the more concrete and more general, "evaluating and comparing the considerations represented by each source of argumentation."[49]

The different character of Eskridge's interpretive approach is well illustrated by his embrace of *Church of the Holy Trinity*.[50] In Eskridge's reading of the case, as for Scalia, the Court's analysis begins with the statutory text. But, for Eskridge, the movement beyond the statute's text is not a straightforward triumph of legislative (or judicial) intent. Rather, Eskridge explains, the Court identifies the broad statutory purpose to limit migration of "'cheap, unskilled labor' into the United States," while not restricting the entry of "brain toilers," such as the clergyman.[51] But that recognition just opens up the question to a wider range of argument. "*Holy Trinity Church*," Eskridge explains, "found the purposivist argument no more dispositive than the textual argument. Instead, the Court examined other historical and current policy arguments to test its tentative conclusion that 'brain toilers' were not within the statutory prohibition."[52] The Court found that specific legislative history, when viewed against the background value that "no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people," was decisive.[53]

For Eskridge, *Church of the Holy Trinity* stands as a "critique of naïve textualism," and "illustrates the operation of our practical reasoning model."[54] Under Eskridge's model, while the text of the statute powerfully supports the government's

47. Eskridge & Frickey, *Practical Reasoning*, *supra* note 5, at 353.
48. *Id.*
49. *Id.* at 354.
50. *Id.* at 360.
51. *Church of the Holy Trinity*, 143 U.S. at 464
52. Eskridge & Frickey, *Practical Reasoning*, *supra* note 5, at 361.
53. *Church of the Holy Trinity*, 143 U.S. at 465; *see* Eskridge & Frickey, *Practical Reasoning*, *supra* note 5, at 361–62.
54. Eskridge & Frickey, *Practical Reasoning*, *supra* note 5, at 363.

position, "the apparent meaning of the text becomes less clear when we consider the statute's purpose and legislative history, and test that meaning against background social values" of religious freedom and "the Court's faith in this as a 'Christian nation.'"[55] Whereas Scalia sees the Court's movement beyond the text of the statute as an invitation for judicial lawmaking, Eskridge views it as an illustration of the balancing and testing of the text against a variety of relevant interpretive considerations; "the opinion may be more persuasive because it weaves different arguments together to present powerful reasons for rethinking the apparent meaning of the bare text."[56]

Eskridge's theory of statutory interpretation does not stop at the level of a nuanced description of the Court's practice. Eskridge defends and elaborates this conception of interpretation by situating it within a larger framework, which he calls "law as equilibrium."[57] On this view, law is the product of sequential institutional interaction in which "each institution has trumping power."[58] He describes this sequencing as follows:

> Congress is the only institution that can enact statutes, subject to Presidential veto power, and agencies can implement the statute in a variety of ways to thwart or expand upon the original legislative design. The Supreme Court can overturn a Congress-President consensus through statutory or constitutional interpretation. The Court's action, in turn is subject to the possibility of an override by Congress acting with the President . . . or by a constitutional amendment.[59]

For Eskridge, this conception of law in which "the rule adopted by each institution can be undone by the next institution to act"[60] has powerful implications for the way in which a court should interpret statutes and the Constitution.[61] Specifi-

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55. *Id.* at 362.
56. *Id.*
57. *See* Eskridge & Frickey, *Equilibrium*, *supra* note 6 at 27.
58. *Id.* at 30.
59. *Id.* at 30–31.
60. *Id.* at 30.
61. *See id.* at 31 ("We conclude [that] the Court will interpret statutes to reflect legislative deals in the short-term and new political balances over time. . . . The Court's constitutional interpretation is equally dynamic, transparently accommodating apparent national equilibria."); *id.* at 77 (defending law as equilibrium in statutory interpretation); *id.* at 87 (defending law as equilibrium in constitutional interpretation).

cally, Eskridge argues that in both statutory and constitutional interpretation, the Court should balance its reading of text, history, precedent, and values at the time of interpretation so that the interpretive outcome reflects what he calls a "stable equilibrium."[62] A decision reflects "a stable equilibrium when no implementing institution is able to interpose a new view without being overridden by another institution."[63] So, with regard to statutory interpretation, Eskridge concludes that "the Court will interpret statutes to reflect legislative deals in the short-term and new political balances over time."[64] Likewise, "the Court's constitutional interpretation is equally dynamic, transparently accommodating apparent national equilibria,"[65] the balance of political will in the institutions of government.

In both statutory and constitutional interpretation, Eskridge argues that this interpretive approach is justified by the rule of law, as well as democracy.[66] Eskridge contends that this form of interpretation serves the rule-of-law values of "continuity, stability, and reliability to law's obligations."[67] It does so by guiding courts, as well as other institutions, toward interpretations that will not be overridden. Eskridge claims that this reconciles the rule of law and democracy because stable interpretations are (by definition) ones that other institutions do not have the political will to overrule. On this view, consideration of the positions, preferences and values of the elected branches of government, and the people who elect them, is built into the rule-of-law analysis. The approach claims a democratic foundation because it takes the substantive positions of the elected institutions of government, which are the best political reflection of popular preferences, as a guide to interpretation; the idea is that the courts should interpret enacted law so that it will correspond to the current policy preferences of the elected branches of government.

In statutory interpretation, this goal of locating a decision point that will not be subject to override is illustrated by

62. *Id.* at 32
63. *Id.*
64. *Id.* at 29.
65. *Id.*
66. *See id.* at 77 (arguing with regard to statutory interpretation that "[o]ur approach has the normative advantage of reconciling democratic values with the rule of law"); *id.* at 87 (defending normative appeal of law as equilibrium in constitutional interpretation).
67. *Id.* at 33.

Eskridge's analysis of the role of statutory text and legislative history in statutory interpretation. Eskridge posits that the interpretive importance of statutory text and legislative history is greater for recently enacted statutes than for older laws.[68] For recently enacted statutes, "the focal power" of statutory text is enhanced because "the text is usually evidence of current political consensus."[69] And with recently enacted but unclear statutory commands, Eskridge urges that "the Court should be inclined to utilize legislative history to establish their meaning."[70] With these statutes, attention to the statutory text and legislative history is justified because it provides the best proxy for the policy preferences of the *current* Congress: close attention to Congress's aims is the best evidence for current political consensus, and thus short-circuits the need for a congressional override to reinstate that policy preference in the face of an aberrant judicial construction.[71]

Over time, however, text and legislative history lose their primacy,[72] and "other considerations become increasingly important in statutory interpretation—the purpose of the law, the surrounding legal terrain, and statutory precedents."[73] These considerations take on greater importance because they provide better indicia of how other institutions are likely to respond to the decision. For instance, an aspect of the surrounding legal terrain that Eskridge believes the Court should explicitly consider is "subsequent legislative history,"[74] that is, congressional indications of the meaning of a statute subsequent to its enactment. "[S]uch history is a potentially useful signal of congressional attitudes toward ongoing legislative implementation."[75] Attention to such congressional signals brings the views of more recent Congresses into the interpretive mix.[76]

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68. *Id.* at 57.

69. *Id.* at 57–58. With regard to recently enacted statutes, then, Eskridge's theory coincides with originalist methods; it is only with the passage of time that the theory's *dynamism* is revealed.

70. *Id.* at 62.

71. *See id.* at 56 ("For recent statutes, this current congressional preference will be strong, because the enacting coalition will still be potent and most of its members will still be in Congress.").

72. *Id.* at 62.

73. *Id.*

74. *Id.* at 65.

75. *Id.*

76. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 45, at 151–52.

In a similar fashion, Eskridge posits that considerations of stare decisis are strongest when the decision at issue is consistent with contemporary values,[77] as reflected by how other institutions have responded to the precedent.[78] The value of stability thus requires the courts to attend to the signals sent by elected branches of government as an indication of current social and political values regarding the path of the law.

An illustration of this approach in a constitutional case is Eskridge's defense of *Brown v. Board of Education*.[79] For Eskridge, the constitutional justification for *Brown* derives not from an original understanding of the Equal Protection Clause of the Fourteenth Amendment, nor from a moral principle of equality the Clause enacted, nor from a constitutional idea of the role of education in a democracy, but rather from its correspondence with contemporary national policy and norms.[80] He writes: "Because segregation reflected a distinctly local—as opposed to national—policy," the Court had a role to play in "enforcement of national norms against recalcitrant or slow-moving states."[81] Although Eskridge allows that the Court should sometimes disrupt a stable position of the other branches of government, he proposes that such intervention should occur only "when the national political branches have failed to deliberate on the relevant constitutional values."[82] In the constitutional domain, just as in the statutory, the Court should locate a decision that will be stable in the near or longer-term.[83] Thus, in Eskridge's theory there is not only a

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77. *See* Eskridge & Frickey, *Equilibrium*, *supra* note 6, at 79.

78. *See* ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 45, at 262 (noting that indicia of legislative equilibrium include congressional rejection of proposals to override a precedent, legislation reenacting the provision the precedent construes without charge and legislation that assumes the validity of the precedent).

79. 347 U.S. 483 (1954).

80. *See* Eskridge & Frickey, *Equilibrium*, *supra* note 6, at 88.

81. *Id.* at 87.

82. *Id.* at 90. In this regard, Eskridge envisions a role for constitutional interpretation, tracking and elaborating John Hart Ely's theory of judicial review, as extending to policing the democratic process in conditions of pluralism. This involves defense of overtly political rights, such as those related to voting and access, intervening in cases of failures of legislative deliberation, and protecting rights necessary to the capacity of minority groups to assert themselves politically. *See* William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 140 U. PA. L. REV. 419, 515 n.298 (2001) (commenting favorably on John Hart Ely's theory).

83. Eskridge & Frickey, *Equilibrium*, *supra* note 6, at 94.

convergence of statutory and constitutional interpretation, but also a substantive convergence of both toward the nation's contemporary social and legal values. The focus of interpretation—looking to responses of political institutions of government to the decision, and its predecessors—dictates this substantive outcome.

For Scalia, the distinction between the mode of common law judges and the judicial task in interpreting democratically enacted text, and the conception of judicial restraint it involves, are critical to the democratic justification of his theory. In contrast, for Eskridge, consistency with the rule of law, and thus democracy, does not require distinguishing judicial from nonjudicial tasks.[84] The aim is rather to promote the stability of law's obligations, which itself involves dynamic interpretations to keep the law consistent with current political preferences. From these contrasting premises, Eskridge can embrace a view of statutory reasoning opposed to Scalia: "[W]hat statutory interpretation is ultimately all about [is] the case-by-case evolution of the statute to meet new problems and societal circumstances, and to meet new understandings of those problems and circumstances."[85] That could easily be a description of common law adjudication; certainly it is not far from Scalia's own portrait of the common law judge, broken-field running.[86] It also captures much of the Supreme Court's common law constitutional practice.[87] Further, Eskridge himself identifies this approach as applying to statutory and constitutional interpretation.[88]

We thus have two opposed theories—one originalist, one dynamist—that both posit convergence in constitutional and statutory interpretation. Both invoke democracy and rule-of-law values to justify their positions.[89] Our task now is to exam-

84. *Id.* at 66, 77.

85. Eskridge & Frickey, *Practical Reasoning*, *supra* note 5, at 378.

86. *See supra* note 23.

87. *See* Strauss, *Common Law Constitutional Interpretation*, *supra* note 1, at 880–91 (arguing that constitutional interpretation is best explained by a version of the common law method).

88. Eskridge & Frickey, *Practical Reasoning*, *supra* note 5, at 383; *see also* Eskridge & Frickey, *Equilibrium*, *supra* note 6, at 42 (claiming that their theory "suggests an easily comprehensible rationality in the Court's approach to issues in constitutional law, statutory law, and administrative law").

89. Scalia, *Common-Law Courts*, *supra* note 4, at 17 (invoking democracy and conception of judicial restraint to justify textualist originalism); Eskridge &

ine how these justifications operate in constitutional and statutory interpretation. I will show that they point to divergence—not convergence—of constitutional and statutory interpretation.

## II. THE DEMOCRATIC FOUNDATIONS OF ORIGINALISM IN CONSTITUTIONAL AND STATUTORY INTERPRETATION

Justice Scalia, as we have seen, justifies his textualist originalist position in statutory and constitutional interpretation on the grounds that no other interpretive position is consistent with democracy.[90] This is a pervasive defense of forms of originalism. In this part, I contend that democratic arguments do not provide the same grounds for originalism in constitutional and statutory interpretation and, more generally, suggest that constitutional and statutory interpretation diverge.

I focus on originalism's democratic foundation because its principal rule-of-law virtue, judicial restraint, is itself defined

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Frickey, *Equilibrium*, *supra* note 6, at 76–77 (defending their theory as reconciling democratic values with the rule of law).

90. *See supra* text accompanying notes 21 to 44; *see also* Scalia, *Lesser Evil*, *supra* note 4, at 862 ("Originalism seems to me more compatible with the nature and purpose of a Constitution in a democratic system."); *id.* at 854 ("The principle theoretical defect of nonoriginalism, in my view, is its incompatibility with the very principle that legitimates judicial review of constitutionality.").

For other arguments that democracy requires originalism, see, for example, BORK, TEMPTING, *supra* note 4, at 143 ("only the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy"); *id.* at 178 ("to oppose original understanding and judicial nominees who insist upon it [is] profoundly undemocratic"); *id.* at 6; John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEXAS L. REV. 703, 791–96 (2002) [hereinafter McGinnis & Rappaport, *Supermajoritarian Constitution*] (arguing that the supermajoritarian character of the Constitution justifies originalism); William Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 699, 706 (1976) (rejecting end run around popular government and rejecting judicial endorsement of rights not "within the four corners" of the Constitution); *see also* Samuel Freeman, *Original Meaning, Democratic Interpretation, and the Constitution*, 21 PHIL. & PUB. AFF. 3, 4 (1992) (noting that one of the primary justifications originalists cite for their approach is that any other approach is inconsistent with democracy).

For arguments about the democratic foundation for originalism in statutory interpretation, see, for example, Redish & Chung, *supra* note 11, at 862; Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1 (1988); RICHARD A. POSNER, THE FEDERAL COURTS 286–93 (1985); Schacter, *Metademocracy*, *supra* note 11, at 589–99.

by democratic ideas. Judicial restraint is a "cultural shorthand" for defining the judicial role by the *absence* of judicial usurpations of the prerogatives of the elected branches of government.[91] For originalism, democratic ideas define the boundary between restraint and usurpation. As a result, judicial restraint does not provide a basis independent from democratic ideas for interpretive convergence.

### *A. Majoritarian Originalism*

One of the most pervasive conceptions of democracy invoked to justify originalism in statutory interpretation comes under the banner of legislative supremacy, and relies on an idea of democracy as majoritarianism, with reference to the current legislative majority.[92] Scalia's argument for textualist originalism assumes this conception. Legislative supremacy is the idea that "the legislature has legitimate authority to make laws, and that the judiciary must respect that authority in making its decisions."[93] By constraining the role of judges to ascertaining and effectuating the original understanding of the rules enacted by the legislature, however that is specified,[94] originalism is taken "to satisfy the demands of democratic theory by allowing popularly elected officials, presumed to be accountable to their constituents, to make policy decisions."[95]

A commitment to a majoritarian conception of political authority underlies this defense of originalism. Originalist methods, the thought goes, allow the rule of the law that the legisla-

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91. I take the useful phrase "cultural shorthand" from Schacter, *Metademocracy*, *supra* note 11, at 597.

92. *See id.* at 594; Redish & Chung, *supra* note 11, at 810–11 (1994); *cf.* SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 3, at 112–13. The "legislative majority" and "legislative supremacy" are a shorthand for the elected majority, including, of course, the legislative requirements of bicameralism and presentment to the President. *See* U.S. CONST. art I, § 7, cl. 2. Bicameralism and presentment do have the effect of imposing a mild supermajoritarian requirement. *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 233–48 (1962); McGinnis & Rappaport, *Supermajoritarian Constitution*, *supra* note 90, at 710–16; Manning, *Equity of the Statute*, *supra* note 2, at 74–75.

93. 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, 769 (1991); *see also* Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 284 (1989) (articulating strong conception of legislative supremacy).

94. *See* Schacter, *Metademocracy*, *supra* note 11, at 594.

95. *Id.*

ture enacted. And originalist interpretation is democratic because the enactments of the legislative majority are the Court's only legal indication of the views of the popular majority. On this view, then, by interpreting a statute according to its original meaning, courts allow democratic rule understood as the rule of the legislative majority authorized by the popular majority.[96] Moreover, because of the possibility that the current legislature can repeal any existing statute,[97] the entire corpus of the United States Code can be said to represent the will of the contemporary Congress.[98] To be sure, this connection between originalism and congressional majorities, much less popular majorities, has been subject to detailed critique in public choice theory as failing to capture the actual mechanics of congressional lawmaking and the electoral process.[99]

But even aside from the public choice critique, it is clear that this majoritarian conception of democracy is a non-starter as a justification of originalism in constitutional interpretation.[100] The core premise of this majoritarian model is that legislative outcomes represent the views of the electorally accountable current legislative majority, and through the legislative majority, the popular majority. This view, however, provides no space for originalism in the constitutional domain. This is because constitutionalism counts as a check on the majority will.[101] So long as constitutional adjudication holds the

96. *See* Scalia, *Common-Law Courts*, *supra* note 4, at 17.

97. For the Supreme Court's pronouncement on this, see Fletcher v. Peck, 10 U.S (6 Cranch) 87, 135 (1810) (Marshall, C.J.).

98. *See* KAHN, REIGN OF LAW, *supra* note 12, at 198–99 (discussing elected representatives as making a representational claim through authorization).

99. For a concise overview and assessment, see JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991).

100. Some scholars, notably Alexander Bickel, have attempted to construct a theory of constitutional interpretation from the conception of democracy as legislative majoritarianism. When this conception of democracy has a prominent place in a theory of constitutional interpretation, it results in a tethering of the Court to the existing national majority. Thus Bickel writes that "the Court should declare as law only such principles as will—in time, but in a rather immediate foreseeable future—gain general assent." *See* BICKEL, *supra* note 11, at 239. In other words, the Constitution should be interpreted in a manner that will soon gain support of the popular majority. That conception of constitutional interpretation is self-consciously non-originalist.

101. *See* JED RUBENFELD, FREEDOM AND TIME 197 (2001) ("If the Constitution's purchase on legitimacy depends on its conformity with present majority will, the price of attaining this legitimacy would be constitutionalism itself.").

possibility of the courts invalidating legislative products on the basis of a construction of the Constitution, interpreting the Constitution according to its original meaning cannot be justified by the legislative supremacy characterization of democracy. In the moment of judicial review, the current legislative majority is poised against the Constitution, and thus the current majority provides no grounds to justify originalism in interpreting the Constitution to invalidate legislation.[102] The legislative majoritarian characterization of democracy that might provide a justification for originalist norms in statutory interpretation thus cannot perform the same justifying work in constitutional interpretation. The institution of judicial review makes that impossible.[103]

What we learn from the obvious failure of this conception of democracy to justify originalism in constitutional interpretation is that if democracy is to justify originalism in the constitutional domain—a necessary condition of its actually sharing that justification with originalism in statutory interpretation—then the understanding of democracy must provide a space for a claim to democratic legitimacy that does not flow from the popular majority as expressed in Congress.[104] The conception of democracy that grounds originalism in constitutional interpretation must be different, and likely more elaborate, than the legislative majoritarian model.[105]

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102. *See* BICKEL, *supra* note 11, at 16–17.

103. Some characterizations of legislative supremacy build in judicial review as an exception to the legislative supremacy. *See, e.g.*, Farber, *supra* note 93, at 283 ("Legislative supremacy, as a doctrine of statutory interpretation, is grounded in the notion that, except when exercising the power of judicial review, courts are subordinate to legislatures.").

104. This holds true for every generation since the Founding, but may not be true for the generation that enacted the Constitution. The generation at the Founding is the only generation that gave the Constitution to itself. *See* PAUL W. KAHN, LEGITIMACY AND HISTORY 32 (1992). For that generation, both the Constitution and federal statutes had a claim to represent the contemporary majority that the Constitution cannot have in every subsequent generation. *See id.* Succeeding generations had "to reconcile the historical givenness of the Constitution with the idea of self-government." *Id.*; *see also* Raz, *Authority and Interpretation*, *supra* note 13, at 169 (arguing that new constitutions may derive their authority from the authority of their authors, but that old constitutions must derive their authority from other sources).

105. *Cf.* Cass R. Sunstein, *Justice Scalia's Formalism*, 107 YALE L.J. 529, 561 (1997) (reviewing A MATTER OF INTERPRETATION (Amy Gutmann ed. 1996)):

> The question of whether original understanding of an old text should bind current generations is not at all simple—why on earth should current Americans be bound by some understandings of some votes by some

### *B. An Originalism of Rights?*

From the perspective of democratic theory, one attractive response to the failures of the majoritarian model of democracy is to cast democratic commitments more broadly, beyond a conception of political authority. Democracy, on this view, involves a commitment not just to a conception of political authority deriving from the many, but also a commitment to certain fundamental political values, whether understood as rights or interests.[106] The commitment to those values is not an instrumental one in the service of the majoritarian view, but an intrinsic aspect of the democratic conception; the protection against the majority is not an exception to democracy, but a requirement of honoring the democratic commitment.[107]

On such a rights-based conception of democracy, the grounding of originalism in the statutory domain could follow roughly the same lines as under the legislative majoritarian model; the originalist would argue that originalist principles structure the judicial role to allow the legislature, with its electoral pedigree, to govern. On this conception, the task of guarding democracy's fundamental values, those that the majority should not control,[108] is assigned to the constitutional domain, and thus, for us, is identified with the Constitution. This view of democracy clearly allows room for constitutionalism within a democratic ideal that the legislative majoritarian conception did not: where the legislative majoritarian view left no space for a claim of democratic values over and against the current legislative majority, this view allows an appeal to democratic values over the heads of the current legislative majority.

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segment of the citizenry over two centuries ago?—a reference to "democracy," though a good start, cannot provide the necessary legitimization.

106. *See* David Lyons, *Constitutional Interpretation and Original Meaning*, 4 SOC. PHIL. & POL'Y 75, 94 (1986). For my purposes here, it is not necessary to specify what these fundamental rights may be.

107. For expression of this view in the Supreme Court canon, see Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means . . . .").

108. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971).

But if the task of the Constitution is to protect the fundamental values at the base of the democratic commitment, why should the Constitution be interpreted in an originalist manner? I want to argue that originalist interpretive methods run counter to the task that this model of democracy assigns to the constitutional domain, and that any link to originalism cannot be a stable one. This tension and instability can be illustrated by considering the following intriguing theoretical solution to bringing originalism together with the constitutional project of elaborating fundamental values. If there were reasons to conceive of the Framers of the Constitution, and its amendments, as *practical authorities* on matters of the fundamental values of democracy—persons whose directives on those matters we are better off if we follow—an originalist interpretive stance coincides with the task of guarding fundamental values.[109] On this solution, reason, required for the elaboration and defense of fundamental values, comes together with originalism through the idea that there are grounds to recognize the Framers as practical authorities. Michael Dorf has elaborated this model as a partial defense for originalism in constitutional interpretation, calling it heroic originalism.[110] Dorf writes that under the model of heroic originalism (and another model he views as operating with it):

> an appeal to the Framers constitutes an appeal to moral authority and expertise. Other things being equal (or even somewhat less than equal), if the Framers thought a consti-

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109. Here I rely on the conditions to recognize another as a practical authority identified by Joseph Raz. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 53 (1986) [hereinafter RAZ, MORALITY OF FREEDOM]. Raz's suggestion, roughly stated, is that the justification for X having authority over Y is that Y is more likely to follow the reasons that apply to him if he follows X's directives, than if he tries to figure out the reasons that apply to him directly. *See id.*; *see also* Waldron, *supra* note 1, at 330 (describing Raz's theory of authority).

110. *See* Dorf, *Integrating Normative and Descriptive*, *supra* note 20, at 1770, 1803–11. Andrei Marmor has proposed a qualified version of this idea to justify intentionalism in statutory interpretation. *See* ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 173–84 (1992). Marmor's basic suggestion is that, to the extent that we recognize legislators as practical authorities on the basis of expertise in the field the statute occupies, we have reasons to defer not just to statutory directives, but also to the legislators' intentions behind their statutory directives. *See id.* at 178–80. For a critique of Marmor's suggestion, see Waldron, *supra* note 1, at 330–40. Neither Dorf nor Marmor offers these suggestions without careful qualification or to solve the particular problem that I am offering them for here.

> tutional provision should work in a particular fashion, that fact counts as an argument in favor of it working in that manner. The Framers' unique historical position and whatever wisdom we believe they possessed justify a degree of deference.[111]

This turn to the idea of a practical authority provides a neat solution to the problem of justifying originalism where the constitutional domain is identified with vindicating fundamental rights: deference to the authority of the Framers follows from the grounds of their authority on matters of fundamental value. But as applied to the Framers of the Constitution, it is always vulnerable to the charge, here expressed by Jeremy Waldron, that recognizing the Framers as practical authorities requires accepting that individuals who lived two hundred years ago in a "loosely federated set of sparsely populated, post-colonial, white-supremacist states, whose economies were based on the exploitation of African slaves in agriculture, and whose politics were confined to those who owned slaves, women, or property," should have a better grasp than we do on "the conditions of subsistence of a continent superpower as a free and constitutional republic, under conditions of ethnic diversity, democratic equality, and post-industrial crisis."[112] That is a considerable burden to saddle upon originalism for the sake of a justification of its interpretive stance deriving from democracy. It also points to a general flaw in this theoretical solution: that the grounds for recognizing a practical authority shift with time.[113]

More important for our purposes, this problem illustrates the instability of the grounds for originalism where the constitutional domain is the domain of reasoned elaboration of principle. An appeal to reason can always dispute the practical authority of the Framers. In response, the originalist must always defend that contingency, and the framework of debate never allows originalism to rest with the claim that we defer to

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111. Dorf, *Integrating Normative and Descriptive*, *supra* note 20, at 1810.

112. *See id.*

113. *See* Raz, *Authority and Interpretation*, *supra* note 13, at 165 (noting that the temporal duration of an authority will vary depending on the circumstances).

the Framers' views because they were *their* views.[114] In the need to defend their practical authority (or for that matter, any other convergence between originalism and reason) on which this solution hangs, and to do so from grounds originalism is ill-equipped to offer, we see the instability of this bridge to originalism from a constitutional task of elaborating fundamental values. In the play of reason, the originalist is consigned to defending contingencies. That position is reflective of the contrary characteristic of originalism and reason as tools of constitutionalism.

This model of rights-based democracy is an advance on the majoritarian view, in that it provides a space for constitutionalism. In response to the obvious failures of the majoritarian view, this model of democracy retreats from grounding constitutional originalism solely in a claim of democratic representation. It assigns to the constitutional domain protections that operate against the popular majority. But that role, which places ultimate authority in the capacities of reason, produces only a strained basis for originalist interpretive norms; in the elaboration of fundamental values, we may be influenced and impressed by the reasons of the Founders, but the extent to which we are is wholly contingent. If the constitutional domain is the domain of public reasoning concerning fundamental values, the embrace of originalism as an interpretive methodology is at odds with the guiding constitutional force.

### *C. Democracy-Promoting Interpretation*

Next consider a distinct democratic demand (and source of justification) for an interpretive approach: that the interpretive principles improve the functioning of the democratic or legislative process.[115] One defense of originalism is that this method of statutory interpretation provides incentives for Congress to legislate more carefully and precisely, and as a result, to force

114. *See* Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CAL. L. REV. 1482, 1506–07 (1985).

115. *See, e.g.*, Elizabeth Garrett, *Legal Scholarship in the Age of Statutes*, 34 TULSA L.J. 679, 682 (1999) (considering theories of statutory interpretation justified by improving the legislative process).

congressional consideration and deliberation on the values and policies embodied in their statutory output.[116]

By refusing to look at legislative history, for instance, textualist originalism provides no rewards for legislators whose policy preferences appear in that history, and not in the statute's text.[117] Likewise, in applying clear statement presumptions against the application of federal law beyond the nation's borders, or the canon requiring Congress to explicitly and clearly state its intention to abrogate state immunity from suit in federal court, "interpreters hope to force Congress to pay close and sustained attention to the issue and to deliberate fully before acting."[118]

Whether Scalia's textualist originalism or clear statement rules actually improve legislative deliberation comes down to empirical questions regarding whether Congress's behavior will change as these interpreters predict.[119] But however those empirical questions are settled, they generate reasons for preferring one theory of statutory interpretation over another that do

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116. *See* United States v. Taylor, 487 U.S. 326, 345–46 (1988) (arguing that the Court should conduct its statutory interpretation so that Congress will understand that it may not obtain a result without making that result apparent on the face of the bill that both houses of Congress vote upon, and which the President approves, as opposed to merely stating a preference for that result in the legislative history) (Scalia, J., concurring in part); Garrett, *supra* note 115, at 685 (explicating Scalia's process-enhancing defense of textualism); Schacter, *Metademocracy*, *supra* note 11, at 636–46 (discussing disciplinary and democracy-promoting justifications for text-based originalism in statutory interpretation).

117. *See Taylor*, 487 U.S. at 345–46 (Scalia, J., concurring).

118. Garrett, *supra* note 115, at 685.

119. *Id.* at 685–88 (arguing that textualism and clear statement rules rely on empirical predictions about congressional behavior and suggesting reason to question the accuracy of those empirical predictions); Michael Herz, *Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clean Air Act Interpretation*, 16 HARV. ENVTL. L. REV. 175, 180 (1992) (arguing that textualism may exacerbate problems of special interest legislation in environmental law); William N. Eskridge, Jr., *The New Textualism*, 37 U.C.L.A. L. REV. 621, 677 (1990) (doubting the responsiveness of Congress to textualist principles of statutory interpretation). A deliberation-enhancing defense could also be offered for courts looking at legislative history in cases of ambiguity in statutory language. As Einer Elhauge has recently argued, a court might look to legislative history as evidence from which it may be able to estimate how Congress would act if it were to address the specific issue. Elhauge, *supra* note 17, at 2067. Such a default rule would encourage legislators in floor debates or committee reports "either to make accurate statements about their own preferences, or (in what amounts to the same thing) to state accurately what they are willing to live with on the particular issue to procure the more general statutory result." *Id.*

not count as reasons for preferring one stance in constitutional interpretation over another.

Congress embodies an ongoing legislative process that principles of statutory interpretation could help to structure, or at the very least provide incentives for certain kinds of legislative behavior. In contrast, there is no on-going process of constitutional revision taking place in Congress or the state legislatures for the Supreme Court's approach to constitutional interpretation to shape. An active and widespread politics of formal constitutional amendment is infrequent.[120] As a result, it makes little sense to justify principles of constitutional interpretation with reference to their role in structuring the process of formal constitutional revision.[121]

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120. And perhaps also unimportant. *See, e.g.*, David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001) (arguing that constitutional amendments have not been an important means of changing our constitutional order). It is not that there could not be such an ongoing politics, but that as a practical matter, with regard to the Constitution, there has not been. At a more general level, my conjecture is that the disciplining effects of interpretation decline with the frequency of enactment. So if legislation were enacted only once a generation, the disciplining effects of any interpretive approach the courts applied would be diminished. In such infrequent action, the substance of the output is likely to overtake considerations of interpretive signals sent by courts.

121. It is important to distinguish this point from the fact that constitutional amendments have been adopted to overrule Supreme Court decisions. The Constitution has been amended on several occasions in direct response to a Supreme Court decisions. The Eleventh Amendment was enacted as a direct result of the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dallas) 419 (1793). *See generally* GEORGE ANATOPLO, THE AMENDMENTS AND THE CONSTITUTION: A COMMENTARY 102–103 (1995). The Sixteenth Amendment overturned *Pollock v. Farmer's Loan & Trust Co.*, 158 U.S. 601 (1895). The Twenty-sixth Amendment responds directly to *Oregon v. Mitchell*, 400 U.S. 112 (1970). *See* DAVID KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995, 366–67 (1996). The Civil War Amendments—Amendments Thirteen through Fifteen—were adopted in direct response to *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857). These isolated instances do not amount to an ongoing process of constitutional revision. Moreover, in these instances, Congress and the state legislatures have reacted to (and cast aside) substantive holdings of the Court. But it is not *the fact of response* to the Court's decision that plays a role in the democracy-promoting justification for originalism in statutory interpretation. The idea is rather that originalism, as a mode of interpretation, provides incentives for more careful (read deliberative) legislative conduct with regard to *all* statutory enactments; it provides across-the-board incentives for ongoing legislative processes. On this view, if Congress legislates in certain ways, such as with textual clarity and specificity, it will be spared the effort of overriding judicial decisions that do not mirror its preferences as enacted because textual specificity and clarity, in combination with originalism, will keep judicial constructions tethered to Congress's enacted preferences. Thus, in the statutory context, the fact that Congress occasionally overrules statutory deci-

It might be objected that constitutional interpretation's role in shaping the process of constitutional amendments is not what matters; constitutional interpretation has a role to play in structuring the democratic process as a whole, including the legislative process. It may well be that constitutional interpretation has an important role to play in structuring and monitoring democratic politics. That is certainly the suggestion of process-based theories of judicial review.[122] But emphasis on the role of constitutional interpretation in promoting democratic politics does not justify interpretive convergence. Such process-based theories emphasize the distinct tasks of constitutional and statutory interpretation. On this view, it is precisely because constitutional law is removed from the sway of majoritarian politics that it has a role to play in monitoring the majoritarian political process. That monitoring role casts constitutional interpretation with a non-originalist (but rather process-promoting) interpretive mandate. The aim of constitutional interpretation is to secure the electoral and legislative conditions to provide a substantive basis for courts to treat Congress as a responsive and representative body. But the products of such a body do not themselves call for a process-based interpretation; the achievements of constitutional law are recognized by a mode of statutory interpretation that principally aims at fidelity to legislative products. This precise divergence of constitutional and statutory interpretation is reflected in the most famous process-based theory, John Hart Ely's. Ely's conception of judicial review focuses on protecting the rights necessary for clearing the channels of democratic politics, and (for that reason) his conception of statutory interpretation is originalist.[123] So while there may be grounds for adopting a process-based theory of constitutional interpreta-

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sions merely shows that Congress will expend resources to alter a judicial construction of one of its statutes, but does not bear on the democracy-promoting claim of originalism. In a similar way, the fact that constitutional amendments have overruled Supreme Court constitutional decisions does not provide support for justifying constitutional interpretation based on the incentives it provides for behaviors in the process of formal constitutional revision. That mode of justification for constitutional interpretation founders on the dearth of a politics of constitutional amendment.

122. *See* ELY, *supra* note 11, at 73–134. Eskridge, as noted above, also has some sympathy with reading the Constitution dynamically along these lines. *See supra* note 82.

123. *See* ELY, *supra* note 11, at 73–134.

tion, those grounds also point to the divergence of constitutional and statutory interpretation.

By asking what interpretive principles improve the democratic process, we confront two asymmetries in the constitutional and statutory domains. First, principles of statutory interpretation provide incentives to legislators that reward certain kinds of behavior, and we have reasons to prefer statutory approaches that improve legislative functioning. But because of the relative rarity of formal constitutional amendments, there are not analogous reasons to prefer principles of constitutional interpretation. Second, approaches to constitutional interpretation that aim to improve the democratic or legislative process also put constitutional and statutory interpretation in fundamentally different roles. More generally, our answer to what interpretive principles promote the democratic process depends on the institutional context in which they are deployed; in the statutory and constitutional domains, our answers point in different directions.

### *D. Representation and Sovereignty*

Thus far we have located a variety of reasons why the grounds for originalism in statutory interpretation cannot justify originalism in constitutional interpretation. We can press further and see that the democratic grounds for originalism in constitutional interpretation do not justify originalism in statutory interpretation. This emerges in the context of a more general argument that the representational character of constitutional and statutory law is different in ways that suggest that constitutional and statutory interpretation have a different grounding.

The outlines of this general argument can be summarized in three steps. The first is to say that democratic claims of authority involve claims to represent a popular body, the people. The second is that the democratic body represented in the Constitution cannot be the same as that represented in statutes. The third is to suggest that whether we conceive the body represented in the Constitution as a past supermajority, or as a collective body that extends across generations (corresponding to the two dominant identifications of the constitutional subject), the grounds for constitutional interpretation and statutory interpretation will differ. Let us now consider each of these steps.

The argument begins with the idea that "[p]olitical claims of authority in a democratic polity are directly or indirectly claims to represent the people."[124] The idea is that the democratic authority of law flows from its representation of the views and values of the people.[125] If this is correct—that claims of democratic authority are claims to represent the people—then the democratic authority of interpretation is derivative of that claim of representation.[126] The democratic basis for a conception of constitutional or statutory interpretation, in other words, is a function of whether the interpretive method honors the representative character of the Constitution or statutes.

If we are interested in the democratic grounds for constitutional or statutory interpretation, the task then becomes understanding the representational character of constitutional and statutory law. Which "people" do these forms of law represent, and how do they represent them? This brings us to the second step of the argument, that different democratic subjects are represented by the Constitution and statutes. Statutes represent the legislative majority, and through it, the popular majority. The possibility of repeal of any existing statute by a majority vote makes the legislative majority, and thus, in principle, the popular majority, the body represented in statutes. In the constitutional context, as the legislative majoritarian model discussed above shows, the legislative majority cannot be the democratic subject represented in the Constitution. If the legislative majority were the democratic body represented in the Constitution, there would be no grounds for the Constitution to trump legislation: both the Constitution and statutes would make claims to represent the same subject. Thus, the Constitution presupposes a different democratic subject.

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124. KAHN, REIGN OF LAW, *supra* note 12, at 198; *see also* Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 291 (1989) ("In American constitutional argument, the premise is standard, if often tacit, that all legitimate political authority is ultimately traceable to a popular will.").

125. *See* KAHN, REIGN OF LAW, *supra* note 12, at 202 (suggesting that law's authority is also grounded in representation of people); *id.* at 203 ("Law is, for us, a form of political authority grounded in a representational claim.").

126. Raz, *Authority and Interpretation*, *supra* note 13, at 157 (noting that principles of constitutional interpretation depend in part on the theory of constitutional authority); *see also* McGinnis & Rappaport, *Supermajoritarian Constitution*, *supra* note 90, at 791 (arguing that "[o]nly if we know the source of the Constitution's authority . . . can we hope to know what kind of interpretation will maintain its binding force").

So how do we understand the body represented in the Constitution? The question of identifying the constitutional subject, and how it binds us, is one of the central projects of constitutional theory. Theories of the constitutional subject, in my view, can be broadly divided into two categories, which I call supermajoritarian and sovereign. Even a short sketch of these two conceptions reveals that, for each, constitutional and statutory interpretation must have a different grounding.

### 1. The Supermajoritarian Subject

Supermajoritarian theories locate the basis for the Constitution's authority in a past moment of supermajoritarian consent. It is the supermajoritarian agreement to the Constitution and its amendments that grounds the Constitution's authority. On this view, the constitutional subject is a past supermajority of the people, and it is the heightened supermajoritarian character of that subject that distinguishes it from the democratic subject represented in statutes.

Within this broad outline, scholars take different views of the virtues promoted by the supermajoritarian basis for the Constitution. Some argue that this depth and breadth of popular consideration and resolve, in contrast to that required for ordinary lawmaking, grounds the trumping authority of the Constitution.[127] Others argue that the high supermajoritarian requirements of the constitutional enactment and amendment also provide an assurance that the Constitution will reflect

127. *See* ACKERMAN, *supra* note 11, at 6–10. I classify Ackerman's theory as a supermajoritarian because the source of constitutional authority is, for Ackerman, past supermajorities. On Ackerman's theory, the interpretive operation is also broadly originalist, in that he argues that courts should exercise a preservatist function with regard to the Constitution. Ackerman also argues for recognition of amendments to the Constitution outside the formal amendment procedure of Article V when popular mobilization gains the depth and breadth to rise to the level of higher lawmaking. *See id.* at 58–80. Because Ackerman argues the Constitution has been amended outside the formal amendment process of Article V, his theory requires the courts to heed (and synthesize) these amendments. Ackerman's theory of constitutional amendments sets his view apart from most views considered originalist in the constitutional setting. But the basic interpretive operation that he assigns courts to perform with regard to the Constitution is preservationist. *See id.* at 10, 139–40, 142–62 (arguing that constitutional interpretation is best understood as preservationist).

sound policy.[128] But on either view, it is the high supermajoritarian character of the Constitution that sets it above statutes.

The interpretive theory linked with the supermajoritarian constitutional view is generally originalist.[129] The idea is that if the Constitution has authority in virtue of the supermajoritarian character of its enactment and amendment, then when a court interprets the Constitution, it should aim to preserve its original meaning. The recognized and understood meaning at the time of constitutional enactment "should guide subsequent interpretations to ensure that the Constitution continues to enjoy the indicia that provide its authority."[130] The courts are to exercise a preservationist function to "protect the hard-won principles of a mobilized citizenry against erosion by political elites who have failed to gain broad and deep popular support for their innovations."[131] Here we see a justification for originalism in constitutional interpretation based on an appeal to the political achievements of a past supermajority.

But the same interpretive approach for statutes does not follow from this constitutional conception. To see this, first consider what seems to be the most obvious reading of the supermajoritarian position: that both the justification for why the Constitution trumps statutes and the argument for originalism in constitutional interpretation derive from the supermajoritarian character of the Constitution. The Constitution trumps because it represents the achievements of the supermajority, and it must be interpreted in an originalist manner to preserve the principles that the supermajority affirmed. On this view, there are grounds for originalism in constitutional interpretation that are absent in statutory interpretation. Specifically, if the warrant for originalism is a function of the level of popular support for the law, or required to enact the form of law, the basis for originalism in constitutional and statutory interpreta-

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128. *See* McGinnis & Rappaport, *Supermajoritarian Constitution*, *supra* note 90, at 786–791.

129. *See, e.g.*, ACKERMAN, *supra* note 11, at 10 (arguing preservationist function of courts with regard to the constitution); McGinnis & Rappaport, *Supermajoritarian Constitution*, *supra* note 90, at 802 ("It is only the original meaning of a constitutional provision that has passed through the . . . supermajoritarian filter and has the strong presumptions of correctness that such a process provides.").

130. *See* McGinnis & Rappaport, *Supermajoritarian Constitution*, *supra* note 90, at 805.

131. ACKERMAN, *supra* note 11, at 10.

tion would differ, and differ precisely because the Constitution and statutes part company along these lines.

To this, a supermajoritarian might respond by saying that I have highlighted a difference in the basis for constitutional and statutory interpretation, but that difference is only a matter of degree—the difference between the constitutional supermajoritarian requirements and those for statutes—and does not itself suggest reasons for divergence of constitutional and statutory interpretation. But the supermajoritarian cannot simply embrace the view that the difference between the basis of the authority (and warrant for the originalist interpretive method) of the Constitution and statutes is merely a matter of degree. For that view leaves the supermajoritarian view with inadequate grounds to distinguish the authority of the Constitution and that of statutes. Statutes can and do acquire supermajority support. If the only basis for distinction between the Constitution and statutes were the burden of numbers, then the supermajoritarian would be left without a basis to deny constitutional status to statutes reaching some heightened supermajoritarian threshold (however it is set).[132]

This suggests that there also must be some qualitative distinction between the Constitution and statutes lurking in the supermajoritarian position. One way to characterize this distinction is to consider two political supermajorities: one that enacted an amendment to the Constitution, and another that enacted a statute. The constitutional supermajority is not simply marked by a high burden of numbers, but also by some understanding that its political aim—a constitutional amendment—will constrain normal political life. The statutory supermajority may have broad aspirations for social, economic, or foreign policy change, but the aim is not fundamentally to constrain the work of the legislature in the future. Constraint on future legislative politics is fundamental to constitutional supermajorities in a way that it is not to statutory ones. For supermajoritarian theories, this means that the grounds for originalism in constitutional interpretation are not just stronger (as a matter of degree) but are conceptually linked to the constitutional form in a way that they are not for statutes.

132. Ackerman celebrates this point, arguing that statutes that reach a certain level of sustained support reflective of a constitutional moment amount to constitutional amendments. *See id.* at 66, 92, 109–110.

For these theories, originalism is the tool to preserve the enacted constraint. For statutes, by contrast, there is no necessary preservationist imperative. Because statutes generally do not seek to constrain statutory politics themselves,[133] the warrant for originalism is, at best, contingent and statute-specific.

Here lies the divergence of constitutional and statutory interpretation on the supermajoritarian theories. On the supermajoritarian view, whereas constitutional law (through its preservationist function) leads inexorably to originalism, the fact that a statute is being construed does not itself decide the interpretive question. A host of considerations may come to bear on the reading of a statute, considerations directed in part by the character of the statute enacted. And it may be that, in a given case, courts should defer to their best understanding of the original meaning of the statutory provision at issue, but that is the outcome of the interpretation of the statute, not an exogenously determined requirement of the interpretive method. The supermajoritarian reading of the constitutional

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133. No federal statute imposes a supermajority requirement for its own amendment. In 1995, the House of Representatives adopted an internal rule requiring that increases in the federal income tax rate be approved by a three-fifths vote. *See* H.R. DOC. NO. 107–284, at 853 (2003) (setting forth House Rule XXI(5)(b) which provides: "A bill or joint resolution, amendment, or conference report carrying a Federal income tax rate increase may not be considered as passed or agreed to unless so determined by a vote of not less than three-fifths of the Members voting, a quorum being present."). Commentators have debated the constitutionality of this rule, *compare* Bruce Ackerman, et al., *An Open Letter to Congressman Gingrich*, 104 YALE L.J. 1539 (1995) (arguing that the House Rule is unconstitutional) *with* John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483 (1995) (defending the constitutionality of the House Rule), as well as the constitutionality and wisdom of legislation imposing supermajority amendment requirements. *Compare* Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002) (defending legislative entrenchment) *with* Stewart E. Sterk, *Retrenchment on Entrenchment*, 71 GEO. WASH. L. REV. 231 (2003) (arguing that Posner and Vermeule fail to show that entrenchment is normatively attractive or constitutional) *and* John O. McGinnis, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385 (2003) (challenging Posner and Vermeule's arguments and defending legislative entrenchments only where they are enacted by the same supermajoritarian requirements that they impose). Concerns about the capacity of one Congress, acting through legislation, to constrain its successors were also raised about the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99–177, 99 Stat. 1037 (1986), known as Gramm-Rudman. *See* Paul W. Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 HASTINGS CONST. L.Q. 185 (1986) (arguing that Gramm-Rudman unconstitutionally imposes constraints on the permissible character of Congress's future legislative activity).

subject thus forges a connection to originalism in constitutional interpretation that it denies originalism in statutory interpretation.

### 2. The Sovereign Subject

Another strain of constitutional thought rejects the idea that the constitutional subject is reducible to a body existing at any given moment of historical consent.[134] These theories take as a starting point that we cannot be democratically bound by choices made by bodies of which we are not a part. As citizens of the United States, we are not democratically bound by the actions of the Swedish people.[135] And so too, the consent of individuals (even a supermajority of them) that are now long dead does not "hold any particular authority over the present generation."[136] Instead, the democratic authority of the Constitution is seen as a product of its relationship to a collective body that extends from the Constitution's enactment through the present day.[137] The constitutional subject is understood as an intergenerational body that defines our "fundamental nature as a people."[138] The representative character of the Constitution is defined by its association with this intergenerational body.

There is of course a lot of work to be done in these theories to provide an argument showing how such a democratic subject

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134. *See, e.g.*, RUBENFELD, *supra* note 101, at 61–65; KAHN, REIGN OF LAW, *supra* note 12, at 207–229, 234–35; Michel Rosenfeld, *The Identity of the Constitutional Subject*, *in* LAW AND THE POSTMODERN MIND 143 (Peter Goodrich & David Gray Carlson eds. 1998); Robert Post, *Theories of Constitutional Interpretation*, REPRESENTATIONS 13, 23–26 (Spring 1990) [hereinafter Post, *Theories*].

135. I thank Daniel Markovits for suggesting this illustration of the point.

136. *See* Post, *Theories*, *supra* note 134, at 33; RUBENFELD, *supra* note 101, at 61; Christopher L. Eisgruber, *Justice and the Text: Rethinking the Constitutional Relation Between Principle and Prudence*, 43 DUKE L.J. 1, 4 (1993).

137. *See* RUBENFELD, *supra* note 101, at 154 ("[A] people consists not of a set of persons here and now, but of the temporally extended set of persons—past, present, and future—who will have lived under the rule of a particular political and legal order."); Rosenfeld, *supra* note 134, at 147–48 ("Neither the constitutional makers, nor the interpreters of the constitution, nor those who are subject to its prescriptions, are properly speaking the constitutional subject." Rather, "[t]hey all form part of the constitutional subject and belong to it . . . ."); KAHN, REIGN OF LAW, *supra* note 12, at 215–219 (arguing that the people represented in law are permanent, not ephemeral).

138. Post, *Theories*, *supra* note 134, at 24 (quoting Hanna Pitkin, *The Idea of a Constitution*, 37 J. LEGAL EDUC. 167, 169 (1987)).

makes a claim of authority over us. But even aside from the precise structure of those arguments, we can see that this conception of the democratic subject of the Constitution pushes constitutional and statutory interpretation apart. Attention to the way in which this type of body is represented in the Constitution, and the demand this representation places on interpretation, help to reveal this difference.

In the statutory context, the statute represents the legislative majority and ultimately the popular majority through discrete moments of *authorization*. In an election, the authorization flows from the popular majority to the elected officials, and then in the moment of statutory enactment, from the elected officials to the law. The statute's representative character is defined by these moments of authorization.[139] The statute represents us because we have authorized it. And the representation is transparent: we can identify the body represented (the popular majority through the legislative majority) as distinct from its representation (in the statute).[140]

The representation of the constitutional subject, in contrast, is not reducible to discrete moments of authorization. The Constitution *stands for* the people; it is not merely authorized by them.[141] Whereas we can identify the popular majority outside of their representation in a statute, we cannot locate the subject the Constitution represents outside of the Constitution itself. The Constitution defines a temporally extended people; we know we are such a people because we exist in the same constitutional order as the founding generation.[142]

The symbolic character of the Constitution's representation of its subject puts constitutional interpretation on a different footing than statutory interpretation. In the constitutional domain, constitutional interpretation itself must play a role in identifying and forging a connection to the constitutional subject. The authority of the Constitution "does not flow from the antecedent nature of the Constitution, but rather from the par-

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139. *See* HANNAH FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 39–43, 58–59 (1967) (discussing view of representation as authorization); *see also* KAHN, REIGN OF LAW, *supra* note 12, at 199 (discussing representation as authorization).

140. *See* KAHN, REIGN OF LAW, *supra* note 12, at 218.

141. *See* PITKIN, *supra* note 139, at 101–103 (discussing symbolic representation as a "standing for").

142. *See* RUBENFELD, *supra* note 101, at 154 (identifying a people as those living under the same constitutional-legal order).

ticular relationship we have forged with the Constitution" through interpretation.[143] In constitutional interpretation, the Court "makes the sovereign people it purports to represent."[144] Another way of putting this is that because the democratic body represented by the Constitution is a symbolic one, it is not a body that we can identify by looking for some fact outside the legal system itself.[145] This people exists only in its representation in the Constitution.[146] In the constitutional domain, the Court's interpretation of the Constitution, as embodied in its opinions, "sets forth 'principles' that are constitutive of the 'American fabric,'"[147] our "national ethos."[148]

When the tasks of constitutional interpretation are viewed in this way, it is clear that constitutional and statutory interpretation diverge. In statutory interpretation, the body that is represented can be identified outside of the process of interpretation: one could demand that our interpretation preserve the principles or policies that the legislative majority attempted to achieve. With regard to the Constitution, the interpretation is constitutive of the body it represents. Moreover, in the statutory domain, paying attention to the body represented in the statute does not require simultaneously articulating the nation's fundamental commitments.[149] Some statutes may embody those commitments, and therefore a court's interpretation of those statutes may properly reflect those commitments, but the task of interpretation does not itself require such an articulation. On the sovereignty view, the democratic subjects represented by the Constitution and statutes are different in ways that place fundamentally different tasks at the feet of constitutional and statutory interpretation.

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143. *See* Post, *Theories*, *supra* note 134, at 29; KAHN, REIGN OF LAW, *supra* note 12, at 213.

144. *See* KAHN, REIGN OF LAW, *supra* note 12, at 218.

145. *Id.* at 218; *see id.* at 216–218 (arguing that there is no independent "truth" of the people outside their representation in law).

146. *See id.* (arguing the people exist nowhere but in the interstices of the "opinion of the Court").

147. *See id.* at 210.

148. Post, *Theories*, *supra* note 134, at 34.

149. *Cf.* ELY, *supra* note 11, at 3 (stating that were a judge to announce in the interpretation of statute that he intended to enforce, "in the name of the statute in question, those fundamental values he believed America had always stood for, we would conclude that he was not doing his job, and might even consider a call to the lunacy commission").

We can bring these lines of argument together as follows. While majoritarian and rights-based conceptions of democracy can provide a basis for originalism in statutory interpretation, neither provides a stable justification for originalism in constitutional interpretation. The practical demand that our interpretive principles promote democratic functioning does not justify convergence on originalism, and in fact suggests that constitutional and statutory interpretation will diverge. Likewise, the character of the representational claim of the Constitution and statutes also pushes apart the interpretive approach in these two domains. The supermajoritarian character of constitutional enactment and amendment may provide a justification for originalism in constitutional interpretation, but it does not justify originalism in statutory interpretation. And if the constitutional subject is not a supermajoritarian one, but identified as an intergenerational body, the grounds for divergence of constitutional and statutory interpretation are even more stark. With regard to arguments "from democracy" to interpretive principles, then, we have reason to believe that the boundary between the constitutional and the statutory should mark a distinction in our interpretive approach.

## III. THE RULE-OF-LAW FOUNDATIONS OF DYNAMISM IN CONSTITUTIONAL AND STATUTORY INTERPRETATION

In American public law, democracy is not the only source of authority. The authority of interpretation also depends on its connection to the ideal of the rule of law.[150] We require legal interpretation to serve the ideal of the rule of law, both in the sense of constraining judicial discretion and in the sense of imparting predictability and stability to the law. In contrast to Scalia, the connection Eskridge aims to establish between interpretation and the rule of law does not rely on constraining judges by delineating those tasks that are properly judicial from those that belong to the elected branches of government.[151] Rather, for Eskridge, the central rule-of-law virtues are stability and predictability. It is these virtues that he invokes on behalf of his interpretive approach in both the consti-

150. *See* Post, *Theories*, *supra* note 134, at 19 (contrasting rule of law and consent-based theories of authority in constitutional interpretation).

151. *See* Eskridge & Frickey, *Equilibrium*, *supra* note 6, at 32, 33–34, 37, 66.

tutional and statutory domains.[152] In this part, I argue that Eskridge's conception of stability provides grounds for the divergence of the interpretive approach to statutory and constitutional questions.

I focus on dynamism's rule-of-law foundation because, in Eskridge's conception, the rule-of-law virtue of stability and democratic values coincide.[153] For Eskridge, the rule-of-law virtue of stability involves political calculus to achieve interpretations that cohere with current political preferences. The idea is that attention to stability generates interpretations that track the democratic political preferences of the day. On this view, interpretation that is stable is therefore (and at the same time) democratic. As a result, Eskridge's democracy conception does not provide a basis independent from his rule-of-law arguments for interpretive convergence.

### *A. Stability Through Dynamism*

On Eskridge's dynamic conception of interpretation, as we have seen, courts should attend to the actions of other institutions of government, as well as contemporary values, to reach an interpretation that is likely to produce a stable equilibrium. Recall that an understanding of law as a product of sequenced and hierarchical institutional interaction motivates this view: Congress enacts statutes subject to presidential veto, agencies implement statutes in ways that expand or undermine their original design, and the courts can upset the congressional-executive policy through statutory or constitutional interpretation, but are subject to override by Congress and the President for statutory decisions, or by constitutional amendment.[154] So understood, law is the product of this interaction in which "each institution has trumping power."[155]

On this view, the interpretive exercise requires a form of predictive judgment (and talent): the court is asked to read the history of practice in the area with attention to whether the po-

152. *See id.* at 80–81.

153. *See id.* at 77 (arguing that this theory reconciles democratic values with the rule of law).

154. *See id.* at 30–31; *see also id.* at 32 ("Law is not simply a prediction that preexists the sequential, hierarchical, and purposive interaction of institutions. It is, instead, a product of that interaction—an *equilibrium*.").

155. *See id.* at 30.

litical branches have a shared position on the question, to consider the bearing of other and more recently enacted laws, and ultimately to arrive at an interpretation that identifies a stable position in this institutional interaction.[156] And stability is a function of whether the decision is likely to be overridden by another branch of government.[157] In both constitutional and statutory interpretation, Eskridge posits that a rational interpretive approach is for the Court to "calibrate" its decision to "avoid an override."[158] Actual overrides are, of course, not the only signals that the Court should attend to in order to discern the contemporary preferences. Institutions signal their positions in other ways.[159] But the avoidance of override by other institutions defines stability.

From these basic starting points, we can see how Eskridge links his dynamism to a conception of stability in law. For courts to generate stability on this view, they must be able to reach decisions with a focus on the current political winds, readings that fit the preferences and values of the current Congress, administration, and other interested actors.[160] And it is that tactical task that Eskridge's dynamic theory of interpretation assigns them.

This conception of stability, however, provides no argument for interpretive convergence. There is, of course, as Eskridge notes, an "asymmetry in the capacity of the political system to override the Court in constitutional cases."[161] The prospect of a formal constitutional amendment to override a decision of the Court on a constitutional issue is, to say the least, remote. This asymmetry in Congress's ability to override

156. *See id.* at 30–31.

157. *Id.* at 32.

158. *See id.* at 37; *see also id.* at 38 (commenting on the Court's "avoidance of overrides"); *id.* at 44 (commenting on overrides in statutory cases).

159. *See id.* at 39 & n.47 (noting that institutions communicate through hearings, speeches, briefs, and litigation), and *id.* at 43 & n.52 (noting range of threats that can be made to the Court). For discussion of the role of these signals in Eskridge's theory, see *infra* text accompanying notes 174 to 193.

160. *See* John Copeland Nagle, *Newt Gingrich, Dynamic Statutory Interpreter*, 143 U. PA. L. REV. 2209, 2212 (1995) (reviewing WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994)).

161. *See* Eskridge & Frickey, *Equilibrium*, *supra* note 6, at 44. *See also* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 334, 338 (1991) [hereinafter Eskridge, *Overriding*] (documenting an average of ten congressional overrides of Supreme Court decisions per Congress between 1967–68 and 1989–91).

or correct the Court's decisions has important implications for the argument from stability to convergence. If stability is a function of a decision not being overridden by another institution, then stability does not require the same interpretive approach in both constitutional and statutory interpretation. On this conception of stability, most of the Supreme Court's constitutional decisions could be characterized as stable regardless of the interpretive approach applied. Put another way, many different interpretive approaches could create stability (as the absence of override) in constitutional interpretation simply because of the difficulty of constitutional revision. Thus, even if Eskridge's dynamic approach to *statutes* would promote greater stability than Scalia's textualism,[162] this conception of stability provides no argument for Eskridge's dynamism in constitutional interpretation, and therefore no argument for convergence.

### *B. Stability and Interpretive Divergence*

We can take this one step further. The gap between the threat of override of the Court's decisions in the constitutional and statutory domains reveals not only that stability in this sense provides no argument for convergence, but actually provides grounds for divergence of constitutional and statutory interpretation.

In both constitutional and statutory interpretation, Eskridge argues that prudential considerations about the possibility of override should play a role in the court's decision-making. These considerations might be thought of as imposing a check or limit on the Court's decision. The interpreting court is expected to track the actions of coordinate political institutions. Thus the interpretation the Court might reach without regard to those other institutions—call it the "but for" (considerations of political accommodation) position—is filtered toward political acceptability. But the possibility of override shapes the extent and character of that limitation.[163] The positions of coordinate institutions exert a greater influence where the possibility of override from those institutions is greater.[164]

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162. *See* Eskridge & Frickey, *Equilibrium*, *supra* note 6, at 77.

163. *See id.* at 49 (noting that the Court is less deferential to institutions that cannot respond to its decisions).

164. *See id.* at 49–51.

The resulting picture is one where statutory interpretation is a domain of political accommodation, and constitutional interpretation is an arena in which the courts' "but for" decisions have wider reign. This view does not wholly eliminate prudential considerations in constitutional interpretation: long-term threats to the courts' legitimacy are still at issue.[165] But the overriding picture is one of the judicial moment hemmed in by political accommodation (in the sense of following the actions of the political branches) in statutory interpretation, and a much less guarded constitutional voice.

This picture has strong resonance in the Supreme Court's recent practice. Consider, for instance, the Court's decisions in *FDA v. Brown & Williamson Tobacco Corp.*,[166] in contrast to *City of Boerne v. Flores.*[167] In *Brown & Williamson*, the Court was confronted with the question of whether the Food, Drug, and Cosmetic Act (FDCA)[168] granted the FDA the authority to regulate nicotine as a "drug" and cigarettes and smokeless tobacco as "drug delivery devices." Despite the broad definition of "drug" in the Act as including "articles (other than food) intended to affect the structure or any function of the body,"[169] the Court denied the FDA authority to regulate nicotine and tobacco products. In the years since the FDCA was enacted, Congress had enacted numerous statutes relating to tobacco. The Court reasoned that "[t]aken together, these actions by Congress over the past 35 years preclude an interpretation of the FDCA that grants the FDA jurisdiction to regulate tobacco products."[170] In this regard, the opinion is a glowing example of Eskridge's theory of statutory interpretation. The Court did not stop at the level of statutory text, from which a good argument could be made to validate the FDA's assertion of authority. Rather, the Court reached its position by reading the text of the statute through the subsequent history of Congress's regulation of tobacco. This attention to subsequent congressional action, over and even against a textual reading of the statute, shows the Court looking to actions of contemporary institutions to gain purchase on the meaning of the statutory

165. *See id.* at 40.
166. 529 U.S. 120 (2000).
167. 521 U.S. 507 (1997).
168. 21 U.S.C. §§ 301–95 (1994).
169. 529 U.S. at 126.
170. 529 U.S. at 155.

question before it. And here, the Court seems to have correctly determined a stable equilibrium: there has been no call in Congress to arm the FDA with the power to regulate tobacco.

The contrast with *City of Boerne* is stark; there the Court manifested no tendency toward political accommodation. In *City of Boerne*, the Court held that the Religious Freedom Restoration Act of 1993 (RFRA)[171] exceeded Congress's enforcement power under Section 5 of the Fourteenth Amendment.[172] Congress enacted RFRA with the express purpose of restoring a compelling interest balancing test that the Court had earlier applied for assessing whether government action violates the Free Exercise Clause, and in direct response to a Supreme Court decision that had cast this test aside.[173] The Act specifically addressed the Court's decision, leaving no doubt as to Congress's preferred position. The Court, opining on the scope of Congress's power, was undisturbed. It reached directly to the debates surrounding the drafting of Section 5, and early decisions under it, to conclude that Congress's action exceeded its power. On the scope of Congress's power, where only a constitutional amendment could disturb the Court's conclusion, attention to the views of coordinate branches is nowhere visible, and yet the Court's decision is no less "stable." *Brown & Williamson* stands as an exemplar of political accommodation, *City of Boerne* of unimpeded pronouncement. Where stability is understood in terms of the possibility of override, the very disjuncture between statutory and constitutional decision on that issue provides grounds for the divergence of constitutional and statutory interpretation. Eskridge's rule-of-law foundations end up pointing statutory and constitutional interpretation in different directions.

### C. *Contemporary Values in Constitutional and Statutory Interpretation*

One possible objection to this argument is that it relies on too formal a conception of stability, defining stability by the absence of override by another branch of government, and neglects other reasons why the courts, in both constitutional and

171. 42 U.S.C. § 2000bb (1994).
172. 521 U.S. at 512.
173. *Id.* at 515.

statutory interpretation, keep their decisions in general alignment with contemporary politics and values. Eskridge notes that there are a variety of ways in which the Congress and the President can threaten and harm the Supreme Court if it steps too far from the political branches' policy preferences, even if a formal override of its decisions is not feasible.[174] For instance, sustained congressional criticism of the Court, threats to strip its jurisdiction over specified subject areas, lackluster responsiveness to its administrative and salary requests, the prospect that the executive will refuse to enforce its decisions, and even threats of impeachment and Court packing, all influence the Court's decision-making.[175] So, the objection would go, to avoid these sources of friction and conflict with other institutions of government, the Supreme Court, acting strategically as Eskridge posits,[176] will keep its decisions in constitutional and statutory interpretation in alignment with contemporary values.[177] On this view, constitutional and statutory interpretation converge because both involve the courts in attending to contemporary values.[178]

There are two distinct responses to this as an argument for convergence of constitutional and statutory interpretation. The first response is to admit that both constitutional and statutory interpretation involve the courts in making judgments about the current social landscape, but to deny this provides any meaningful argument for convergence. We can admit—indeed, it would be a strain to deny—that both constitutional and statutory interpretation involve the courts reading contemporary social practices and values, and reading them in the shadow of the preferences of the elected branches of government. Such judgments are ineluctable features of interpretation because the fulfillment of values embodied in constitutional law and the enforcement of statutes, "depend upon the

174. *See* Eskridge & Frickey, *Equilibrium*, *supra* note 6, at 39–43 & n.52.

175. *See id.* at 43 n.52; GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 72–77 (2d ed. 1991).

176. *See* Eskridge & Frickey, *Equilibrium*, *supra* note 6, at 29, 36.

177. *Id.* at 88–89 (describing how the Court will avoid taking a position that "flatly repudiates concerns of politically salient interests"); *cf.* Eskridge & Frickey, *Practical Reasoning*, *supra* note 5, at 343 (arguing that textualism does not adequately take the interpreter's context, including current values, into account).

178. Eskridge & Frickey, *Equilibrium*, *supra* note 6, at 29 & n.6 (suggesting a broad definition of stability).

social landscape in which they are realized."[179] A court must, for instance, make a judgment about what words would reasonably be construed as "fighting words" to apply the First Amendment;[180] and so too, in the statutory domain, it must distinguish between "roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive."[181] These judgments involve determination of the character and scope of contemporary values. If the Court's understanding of the social landscape is at odds with others in society, and in particular with the institutions of government, there is the prospect for criticism and institutional threats.

But this surely holds not just for constitutional and statutory interpretation. The necessity for attention to the social landscape is also true of the common law, which calls upon the courts to distinguish between the reasonable and unreasonable,[182] and indeed of any adjudication that involves some form of applicative judgment based on principles or policies. Attunement to contemporary values provides an argument for convergence only in the thin sense in which other general adjudicatory principles, such as that like cases be treated alike, could also be said to provide grounds for convergence. But that is only to say that constitutional and statutory interpretation are types of legal adjudication, and as such, share some attributes that apply to legal adjudication generally. Moreover, the fact that constitutional and statutory interpretation share these general attributes is not an argument that interpretation should proceed solely, or even primarily, with reference to those general attributes. Saying that both forms of interpretation involve attention to contemporary values thus maintains plenty of room for divergence in interpretive method. The first

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179. Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and the Law*, 117 HARV. L. REV. 1, 73 (2003) [hereinafter Post, *Culture, Courts, and the Law*].

180. Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942); *see* Post, *Culture, Courts, and the Law*, *supra* note 179, at 73–74 (providing examples, including *Chaplinsky*, of the Court's need to make judgments about contemporary culture).

181. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 82 (1998) (Scalia, J.).

182. *See* Post, *Culture, Courts, and the Law*, *supra* note 179, at 73–74 (noting that constitutional law, statutory law, and the common law all require the courts to draw upon their understanding of cultural practices).

response to the more general characterization of stability, then, is simply to admit that constitutional and statutory interpretation (like other modes of adjudication) involve the courts in making judgments about contemporary values, but to insist that is not an argument for convergence.[183]

The second and more important response takes the form of a substantive argument that even on the more general conception of stability, consistency with contemporary values plays a different role in constitutional and statutory interpretation. The core idea is that the legitimacy of constitutional interpretation depends on the interpretation's consistency with contemporary values in a way that the legitimacy of statutory interpretation does not.

Eskridge's conception of constitutional interpretation reflects the familiar view that the legitimacy of the Supreme Court's constitutional interpretation depends upon its decisions remaining in rough agreement with contemporary values, and in particular contemporary beliefs about what the Constitution should or should not provide.[184] "It is clear enough," Robert

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183. Drawing on the work of the philosopher Hans-Georg Gadamer, Eskridge has also argued that interpretation itself (not just legal interpretation) involves an interaction between the author and interpreter that is dynamic in at least two senses. First, the meaning of a text itself depends upon an interaction between the text and the later interpreter. This interaction, which Eskridge describes, quoting Gadamer, involves a "fusion of horizons" between the historical context, assumptions, and "preunderstandings" of the text's author and that of an interpreter. *See* Eskridge & Frickey, *Practical Reasoning*, *supra* note 5, at 346. This interpretive process is dynamic because it involves an attempt to achieve common ground with the horizons of the text and those of the interpreter. *See id.* Second, interpretation is dynamic because the "horizons" of interpreters shift over time: "the horizon of the interpreter changes over time as new interpreters replace old ones and as the world into which all interpreters are thrown also changes." ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 45, at 63. Thus, as the historical circumstances of the interpreter changes, the interpretation, and even the meaning, of the text will also change. In this regard, Eskridge invokes a general account of the nature of interpretation itself (an account arguably as "grand" and "foundational" as the theories he rejects). *Cf.* Eskridge & Frickey, *Practical Reasoning*, *supra* note 5, at 321. I do not deny that these elements of interpretation, if they hold for interpretation generally, also would apply to constitutional and statutory interpretation. For the same reasons I discuss in my first response in the text, however, I believe that these common aspects of constitutional and statutory interpretation do not provide an argument for convergence in interpretive approach.

184. *See* Eskridge & Frickey, *Equilibrium*, *supra* note 6, at 88–89; *see also* BICKEL, *supra* note 11, at 239 (urging "the Court should declare as law only such principles as will—in time, but in a rather immediate foreseeable future—gain general assent"); *id.* at 30 (arguing that legitimacy is the fruit of the consent of

Post writes in this vein, "that if this alignment between constitutional law and constitutional culture is not maintained, if the Court attempts to enforce constitutional principles that seriously diverge from popular constitutional beliefs, its authority will soon be challenged."[185] Put another way, when the Court defies contemporary beliefs about what the Constitution should provide, it does so at the ultimate risk to its own legitimacy. The canonical examples of this, as Post points out, are *Dred Scott* and the Court's actions preceding its switch in time in the New Deal era.[186]

The legitimacy of the Court's statutory interpretation, in contrast, does not manifest this same dependence on alignment with contemporary values. When the Court reaches a statutory decision that is at odds with contemporary values, and more particularly with Congress's current policy preferences, the decision may create tension between the Court and Congress, but the tension is not one that raises question about the legitimacy of the Court's role in our system of self-government. Statutory decisions do not provoke cries to strip the jurisdiction of the federal courts, or to pack the Supreme Court. There is no statutory equivalent to *Dred Scott* or the Court's early New Deal decisions.

Consider, for instance, the Supreme Court's decision in *Boutilier v. INS*,[187] and Eskridge's own account of its over-

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the present majority); Post, *Culture, Courts, and the Law*, *supra* note 179, at 33–35.

185. Post, *Culture, Courts, and the Law*, *supra* note 179, at 34. Moreover, there is empirical evidence that the likelihood of the Supreme Court striking down a congressional statute, particularly a statute enacted by an ideologically remote enacting Congress, is greater when the Court and the sitting Congress are ideologically close. *See* Barry Friedman & Anna Harvey, *Electing the Supreme Court*, 78 IND. L.J. 123 (2003). In contrast, if the Court and the sitting Congress are ideologically distant, the Court "should be more likely to refrain from striking down legislation for fear of congressional retaliation." *Id.* at 130. This empirical evidence supports the idea that the Supreme Court's constitutional decision-making is responsive to contemporary values, at least as those values are embodied in Congress.

186. *See* Post, *Culture, Courts, and the Law*, *supra* note 179, at 34 (citing Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)); *see also* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 988–96 (2000) (providing brief summary of the Supreme Court's review of New Deal legislation in 1934–36).

187. 387 U.S. 118 (1967).

ride.[188] In *Boutilier*, the Supreme Court held that homosexuality constituted a "psychopathic personality" under the Immigration and Nationality Act of 1952, and on that basis upheld the INS's decision to deport a homosexual.[189] More than two decades later, Congress overrode the *Boutilier* decision,[190] and the refuted understanding of homosexuality upon which it was based. Despite the fact that *Boutilier* relied on a conception of homosexuality that was out of step with that in society, Eskridge reports that this "override was treated as a routine policy adjustment, not as an attack on the Court for reading an antihomosexual interpretation into the statute."[191]

In contrast to constitutional decisions, statutory decisions at odds with contemporary values provide a prompt for a well-worn institutional response: corrective legislation. The legislative override functions to resolve the tension between the Court's decision and Congress, and it does so in a way practically unavailable for the Court's constitutional decisions. In the moment of a legislative override, the legitimacy of the Court, and its operation as a statutory interpreter in our system, are not necessarily called into question. In a statutory override, there is no necessary implication that Congress disagreed with the Court's decision as a matter of statutory construction. Congress may decide to override simply because its own policy preferences have shifted since the time the statute was enacted or interpreted, as in the *Boutilier* override, not to refute the Court's own construction. And even when Congress does override out of disagreement with the Court's construction of the statute, that political moment does not raise a *spectre* of illegitimacy about the courts' institutional role as an expositor of statutory meaning.

The underlying reasons for this difference derive from the character of the representative claim that the Court makes in constitutional and statutory interpretation, ideas which we first encountered in the discussion of the democratic arguments

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188. *Boutillier* is one of Eskridge's most frequently invoked examples. *See, e.g.*, ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 45, at 51–58; Eskridge, *Overriding*, *supra* note 161, at 357–59.

189. *Boutilier*, 387 U.S. at 119.

190. Immigration Act of 1990, Pub. L. No. 649, § 601, 104 Stat. 4978, 5067.

191. Eskridge, *Overriding*, *supra* note 161, at 388; *see also id.* at 387–88 (characterizing these types of overrides as "almost always routine affairs, with no intended criticism of the Court's statutory interpretation").

for convergence.[192] In constitutional interpretation, there is a potential conflict between the representational claims of the Court and Congress. The Court acts on behalf of the body represented in the Constitution, but in the moment of judicial review, that claim conflicts with Congress's claim, in the legislation, to represent the contemporary people. By contrast, in statutory interpretation, there is no question that the Congress has a superior claim of representation. It is the body (or at least speaks for the body) represented in statutes. As a result, with statutes, there is not a conflict of representational claims between the Court and Congress. Rather, with regard to the implementation of statutes, the Court's representational claim—the basis upon which we may say that it is effectuating the people's will—is purely derivative of that of Congress.[193] Thus, even when the Court's decisions depart from the views of Congress, that departure does not raise a question of institutional legitimacy; it rather creates an occasion for discipline.

This difference in the dependence of constitutional and statutory interpretation on alignment with contemporary values reveals a further ground upon which constitutional and statutory interpretation part company. Recall that the more general conception of stability in Eskridge's theory posits the Court acting strategically to avoid conflict and threats to its legitimacy. But if the legitimacy of constitutional interpretation depends on its alignment with contemporary values in a way that statutory interpretation does not, then, on Eskridge's own view, constitutional interpretation will involve attention to contemporary values that is not required of statutory interpretation.

My challenge to Eskridge's theory of convergence of interpretive method in constitutional and statutory interpretation

192. *See supra* text accompanying notes 124 to 126, and 134 to 149.

193. The fact that the representational character of the Court's decision is derivative of Congress's representational authority does not exclude the possibility of a role for the courts in jump-starting the legislative process, for instance, through a remand of the statute to the legislature in the case of statutory obsolescence. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 18–19, 120–45 (1982) (examining remand to legislature by judiciary of obsolete or anachronistic statutes); David L. Franklin, Just Ask Congress: Legislative Certification As a Tool of Statutory Interpretation (Dec. 2, 2003) (unpublished manuscript, on file with the author). But even if the Court were to intervene to prompt such legislative reconsideration, if the legislature failed to act, the Court would be obliged to enforce even obsolete statutes.

thus engages his position from two directions. On the one side, if the value of stability in Eskridge's theory is understood in terms of the courts seeking to avoid formal overrides, then stability provides no argument for convergence, and in fact suggest that constitutional and statutory interpretation diverge precisely because of the differential force of the prospect of override in these two settings. On the other side, if the value of stability is understood in more general terms as the courts keeping pace with contemporary values to avoid conflict with other institutions, the greater institutional risks that result from constitutional decisions that clash with contemporary values also distinguishes constitutional and statutory interpretation. Whether the courts are more concerned with stability in the first sense of the absence of override, or the more general impetus to keep pace with contemporary values and institutions, it is not my aim to determine. Rather, the point is that, in either case, constitutional and statutory interpretation diverge, and diverge because Eskridge's theory makes evaluation of the consequences of decision—predictive judgments about how other institutions are likely to react—part of the interpretive exercise. More generally, so long as interpretation is a function of assessing the consequences of decision, the fundamental differences in the practical effects of constitutional and statutory decisions push constitutional and statutory interpretation apart.

## IV. INTERPRETIVE DOMAINS

In pressing the justification of interpretive norms to a more local level than either originalist or dynamic theories of convergence suppose, it is fair to ask why the interpretive particularism that I have defended should stop at the level of these two types of law, as opposed to embracing different interpretive methodologies for different statutes, or specific constitutional provisions. Why be a formalist about what constitutes a "statute" and what is part of the "Constitution"? These questions emphasize that there are elements of the Constitution that are like statutes in their specificity and scope,[194] and transformative statutes that hold a place similar to that of constitutional

194. One familiar example of this is that the President must be thirty-five or older. *See* U.S. Const. art. II, § 1, cl. 5.

text.[195] As a description of contemporary public law, this suggestion holds some truth.

There are reasons, however, to resist the suggestion that the interpretive approach applicable to enacted law must be established separately for each statute or each constitutional provision, and to consider the extent to which formal categories of enacted law—federal statutes and the Constitution, but also different types of state constitutions, treaties, popular initiatives and referenda—mark distinct interpretive domains. These reasons follow from two basic ideas about the character of legal authority and legal interpretation.

The first is that theories of legal authority, as Jeremy Waldron writes, "are usually purchased wholesale, not retail."[196] That is, we do not demand an account of why a particular federal statute, or a particular constitutional provision, has legal authority, but rather why federal statutes generally or the Constitution has authority. One reason for this derives from a more general feature of authority. Part of the justification for treating something as authoritative, as Joseph Raz explains, is that the person subject to the authority is better off by following the authority's directives than by separately determining the reasons that apply to him or her.[197] The core idea is that by following the directives of the authority, persons better comply with the reasons that apply to them—the author-

195. *See* ACKERMAN, *supra* note 11, at 91 (defining superstatutes as statutes that have obtained constitutional status); William N. Eskridge & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001) (arguing for the quasi-constitutional status of certain statutes, including the Sherman Act of 1890, 15 U.S.C. §§ 1–2 (1994), the Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (codified as amended in scattered provisions of 5, 28, and 42 U.S.C. (1994)), and the Endangered Species Act of 1973, Pub. L. No. 93–205, 87 Stat. 884 (codified as amended in scattered sections of 16 U.S.C. (1994)).

196. *See* Waldron, *supra* note 1, at 331. Waldron writes that "theories of legal authority (and *concomitant theories of interpretation*) are usually purchased wholesale, not retail." *Id.* (emphasis added). This remark posits a connection between theories of authority and theories of interpretation. My second point below unpacks aspects of that connection.

197. *See* RAZ, MORALITY OF FREEDOM, *supra* note 109, at 53. This is a rough paraphrase of what Raz calls the normal justification thesis. Raz's normal justification thesis provides that "the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with the reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than trying to follow the reasons which apply to him directly." *See also supra* note 109 (discussing Raz's conception of practical authority).

ity's directives, in other words, are a more reliable guide to the reasons that apply than the person trying to discern those reasons directly.[198] Thus, if we had to determine as to each statute or constitutional provision how (if at all) it was authoritative, a critical part of the benefit from recognizing these sources of law as authoritative would be lost:[199] in questioning whether each statute or provision is a reliable guide to the reasons that apply to them, persons "will be relying on their own judgments rather than on that of the authority, which, we are assuming, is more reliable."[200] On this line of thought, we can posit that a working theory of legal authority applies to a class of directives; it does not simply invite assessment of the merits of each directive individually. It is in this sense that we can say, as Waldron intones, that theories of legal authority apply wholesale, not retail.

The second idea is that the interpretive approach applicable to a type of law depends in part on the theory of legal authority that applies to that type of law. This is a slightly more general statement of a principle that Raz takes as fundamental with regard to constitutional interpretation. "A principle of constitutional theory that commands widespread support," Raz writes, "says that the principles of constitutional interpretation depend in part on the theory of constitutional authority."[201] It seems clear that even the more general statement of this principle also should command widespread agreement. For instance, if the authority of a type of law derives from the authority of its makers, then interpretation of it will have an element of retrieval (of their intentions, purposes, etc.) which will not be present if the basis of the authority for the law is that it provides stability in a society, or because it represents the society's basic moral commitments. Where authority of a type of law derives from its role in creating social stability, interpretation may be directed towards continuity and permitting only incremental developments. Retrieval could play a role, but only in so far as the methods of retrieval themselves generate stability and continuity in interpretation. And so too, if the authority of a type of law derives from its embodiment of the society's basic moral commitments, it may invite interpretation that is guided

198. *See* RAZ, MORALITY OF FREEDOM, *supra* note 109, at 53.
199. *See id.* at 61.
200. *See id.*
201. Raz, *Authority and Interpretation, supra* note 13, at 157.

directly by inquiry into what those commitments require.[202] In each case, the interpretive approach is in part a function of the theory of authority for the type of law at issue.

Putting these two sets of ideas together, they reveal a more general picture. If the interpretative approach for a type of law depends in part on the theory of legal authority applicable to it, and if theories of legal authority need to be adopted with regard to types or classes of law—not provision by provision—then the interpretive approaches should vary with different types of law, or more precisely, with the types of law which are subject to different theories of legal authority. The scope of our interpretive particularism thus will be defined by differences in theories of legal authority.

This point, of course, does not answer the larger question of what defines the boundaries of an interpretive domain—that is, a type or class of law for which there is a distinct conception of authority, and corresponding interpretive approach—or the extent of interpretive uniformity within such a domain. One of my aims has been to suggest reasons why the Constitution and federal statutes occupy different interpretive domains. We can now see that as one part of a larger task of understanding the extent to which formal categories of enacted law mark distinct interpretive domains, and the contours of those domains.

## CONCLUSION

The two most prominent, opposed interpretive schools of the day recommend interpretive approaches that apply not just to statutes or to the Constitution, but to both. They counsel convergence in interpretive method; with them, we need only one theory.

My aim has been to show that the democratic and rule-of-law foundations of Scalia's and Eskridge's theories point towards different interpretive principles in the constitutional and statutory settings. Democracy does not justify the same originalist approach in constitutional and statutory interpretation. A majoritarian conception of democracy might justify originalism in statutory interpretation. Likewise, originalism in statutory interpretation might be defended as promoting

202. *See* Eisgruber, *supra* note 136, at 36–37 (arguing that the conception of the Constitution's authority makes a difference to constitutional interpretation).

democratic politics. But neither of these conceptions justify originalism in constitutional interpretation. Further, the appeal to the authority of a past supermajority that might ground originalism in constitutional interpretation does not provide the same grounds for originalism in statutory interpretation. The underlying reasons for these disjunctures is that the statutes have a different representative character than the Constitution—these forms of law represent different democratic bodies—and that difference in the grounds of their democratic authority distinguishes the interpretive approach applicable to these two types of law.

In a similar fashion, the rule-of-law virtue of stability that Eskridge invokes does not justify interpretive convergence. Eskridge's dynamic theory of interpretation makes predictive judgment about the views of other institutions of government part of the process of legal interpretation. But if evaluation of the consequences of interpretation is part of the interpretive method, constitutional and statutory interpretation will diverge, and diverge precisely because of the different political consequences of these forms of interpretation. By suggesting grounds for divergence of interpretation of the Constitution and statutes, we make a step forward in understanding the relationship between principles of constitutional and statutory interpretation.