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### Interpretation and Institutions

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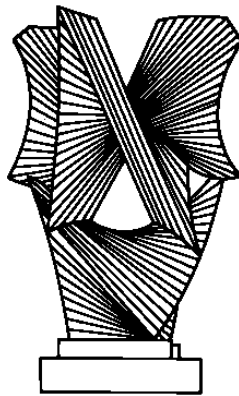
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# CHICAGO

**PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 28**



Interpretation and Institutions

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**THE LAW SCHOOL  
THE UNIVERSITY OF CHICAGO**

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## Interpretation and Institutions

Cass R. Sunstein\* and Adrian Vermeule\*\*

### Abstract

*To evaluate theories of interpretation, it is necessary to focus on institutional considerations—to ask how actual judges would use any proposed approach, and to investigate the possibility that an otherwise appealing approach will have unfortunate dynamic effects on private and public institutions. Notwithstanding this point, blindness to institutional considerations is pervasive. It can be found in the work of early commentators on interpretation, including that of Jeremy Bentham; in the influential work of H.L.A. Hart, Ronald Dworkin, and Henry Hart and Albert Sacks; and in much contemporary writing. This blindness to institutional considerations creates serious problems for the underlying theories. The problems are illustrated with discussions of many disputed issues, including the virtues and vices of formalism; the current debate over whether administrative agencies should have greater interpretive freedom than courts; and the roles of text, philosophy, translation, and tradition in constitutional law. In many cases, an understanding of institutional capacities and dynamic effects should enable diverse people, with different views about ideal legal interpretation, to agree on what actual legal interpretation should entail.*

“The courts are the capitals of law’s empire, and judges are its princes . . . .”

Ronald Dworkin<sup>1</sup>

“The design of a decision-making environment must . . . take into account not only the possibility of error of under- and over-inclusion emanating out of a faithful application of rules in the face of an unpredictable reality, but also the errors likely to be made by less than Solomonic decision-makers when, released from rules, they are empowered to apply background justifications directly to the cases they have to decide.”

Frederick Schauer<sup>2</sup>

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\*\*Professor of Law, The University of Chicago. For valuable comments, we are grateful to Jack Goldsmith, Eric Posner, Richard Posner, Geoffrey Stone, David Weisbach, and workshop participants at the University of Chicago Law School.

<sup>1</sup>Ronald Dworkin, *Law’s Empire* 407 (1985).

<sup>2</sup>Frederick Schauer, *Playing by the Rules* 151 (1991).

Suppose that a statute, enacted several decades ago, bans the introduction of any color additive in food if that additive “causes cancer” in human beings or animals.<sup>3</sup> Suppose that new technologies, able to detect low-level carcinogens, have shown that many potential additives cause cancer, even though the statistical risk is often tiny—akin to the risk of eating two peanuts with governmentally-permitted levels of aflatoxins. Suppose, finally, that a company seeks to introduce a certain color additive into food, acknowledging that the additive causes cancer, but urging that the risk is infinitesimal, and that if the statutory barrier were applied, it would prove absurd and fail to promote the legislative purpose, which is to make food safer. In response, the government argues that the statute must be interpreted literally, and that all additives that “cause cancer” are banned. How should the court resolve the dispute?

We think that current theories of legal interpretation fail to provide an adequate framework for thinking about questions of this sort, and that the failure reveals a serious problem with contemporary views about interpretation in law. Typically interpretive issues are debated at a high level of abstraction, by asking questions about the nature of interpretation, or by making large claims about democracy, legitimacy, authority, and constitutionalism.<sup>4</sup> But most of the time, large-scale claims of these kinds cannot rule out any reasonable view about interpretation. For example, it is impossible to deduce, from such large-scale claims, an answer to a dispute about the meaning of the phrase “cause cancer,” or indeed an answer to any of the current questions about how to approach a statutory or constitutional text. Part of our goal here is to demonstrate the futility of efforts to show that abstract ideals can resolve disagreements about appropriate interpretive methods.

By contrast, we urge that it is far more promising to focus on two neglected issues. The first has to do with institutional capacities. As we shall urge, debates over legal interpretation cannot be sensibly resolved without attention to those capacities. The central question is not “how, in principle, should a text be interpreted?” The question instead is “how should certain institutions, with their distinctive abilities and limitations, interpret certain texts?” If the relevant judges can reliably decide whether a literal interpretation of a statutory term is absurd, the argument for rejecting literalism is greatly strengthened; if the relevant judges are highly fallible, literalism may have some overlooked virtues. A great deal turns as well on the attentiveness of the relevant legislature. The second issue involves the dynamic effects of any particular approach—its consequences for private and public actors of various sorts. If a nonliteral interpretation of the phrase “induce cancer” would introduce a great deal of uncertainty into the system, and reduce Congress’ incentive to make corrections, it might well be sensible to deny exceptions in cases involving trivial risks. By drawing attention to both institutional capacities and dynamic effects, we are suggesting the need for a kind of institutional turn in thinking about interpretive issues.

With an emphasis on institutional capacities and dynamic effects, we will be able to see that nearly all of the most prominent discussions of interpretation—including, for

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<sup>3</sup>This is a modest variation on an actual case. See *Public Citizen v. Young*, 831 F.2d 1108 (DC Cir 1987).

<sup>4</sup>Frank Michelman, *A Brief Anatomy of Adjudicative Rule-Formalism*, 66 *U. Chi. L. Rev.* 934 (1999); Ronald Dworkin, *Law’s Empire* (1985); John F. Manning, *Textualism and the Equity of the Statute*, 101 *Colum. L. Rev.* 1, 36-52 (2001).

example, those by Bentham, Blackstone, H.L.A. Hart, Henry Hart and Albert Sacks, Dworkin, Eskridge, Manning, and Richard Posner—are incomplete and unsuccessful, simply because they tend to proceed as if the only question is how “we” should interpret a text. Where they attend to institutional roles at all, these theorists work with an idealized, even heroic picture of judicial capacities and, as a corollary, a jaundiced view of the capacities of other lawmakers and interpreters, such as agencies and legislatures. And if the spotlight is placed on institutional capacities and dynamic effects, we will find it much easier to understand what underlies many interpretive disagreements in law, and also to see how such disagreements might be resolved.

Consider, for example, the view, often labeled “formalistic,” which sees legitimate interpretation as requiring fidelity to the ordinary meaning of the relevant text when originally enacted.<sup>5</sup> Formalism is rejected by those who insist that legitimate interpretation includes a variety of devices designed to ensure that sense, rather than nonsense, is made of the law.<sup>6</sup> Many opponents of formalism urge that devices of this kind are simply a part of how communication really works.<sup>7</sup> But under certain assumptions, formalism might be seen not as embodying an embarrassingly crude understanding of communication, but as a sensible and highly pragmatic response to institutional limits of generalist judges and institutional capacities of Congress. We believe that in considering these debates, an institutional focus is helpful, not because it always resolves them, but because it shows what many disputes are really about, and because it casts light on central questions that might otherwise be obscured. At a minimum, we urge that an appreciation of institutional capacities and dynamic effects is a necessary part of any theory of legal interpretation. A theory that neglects those issues is seriously incomplete. We also hope that future debates about interpretation will focus on institutional issues, where it remains possible to make a great deal of progress, not least by examining empirical issues, identified below, on which much remains to be learned.

Why have modern interpretive theories neglected institutional issues? This is a large question, and we do not offer a full answer here; but we do have some speculations. Because of their own role, judges themselves naturally ask a particular question (“how is this text best interpreted?”), and that question naturally diverts attention from the issue of institutional capacities. Legal education, and the legal culture more generally, invite interpreters to ask the following role-assuming question: “If you were the judge, how would you interpret this text?” If the question is posed in that way, institutional issues drop out. The very form of the question makes them irrelevant. Academic observers, usually specialists in the subject at hand, often deplore judicial decisions as “wooden” or “formalistic,” without appreciating the risk that generalist judges, unmoored from the text, might do even worse. Indeed it is possible that specialized interpreters should reject formalism but that nonspecialists should embrace it; and academic specialists are unlikely to appreciate this point. Our principal goal here is to pose the question of interpretation in

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<sup>5</sup>See Antonin Scalia, *A Matter of Interpretation* 23-25 (1998); John F. Manning, *Textualism and the Equity of the Statute*, 101 *Colum. L. Rev.* 1, 36-52 (2001).

<sup>6</sup>See Ronald Dworkin, *Law’s Empire* (1985); William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776-1806*, 101 *Colum. L. Rev.* 990 (2001).

<sup>7</sup>See William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 *Colum. L. Rev.* 609 (1990).

a form that will sidestep these role-related and cognitive traps, enabling interpretive theory to highlight the neglected issues.

This Article is organized as follows. Part I is a catalogue of influential work on interpretation. We detail the pervasive indifference, in that work, to institutional issues, and also explain how that indifference has weakened the resulting analysis. We attempt to draw out the neglected questions in a way that will help show the range of variables that bear on the selection of interpretive strategies by generalist judges.

Part II responds to an obvious challenge to our claim: that judgments about institutional issues cannot be helpful without some kind of background normative account of interpretation. A second-best approach, one that asks about interpretive mistakes and dynamic effects, necessarily presupposes some first-best account. This is an important observation, and in a sense it is unexceptionable. But it fails to engage our central point, which is not that a first-best account is worthless or irrelevant, but that it is incomplete without a second-best account that takes account of institutional issues. Institutional analysis is necessary to the choice of interpretive rules, even if it is insufficient. In any case we also offer a further, more ambitious claim: Institutional analysis may indeed be sufficient in some settings, because it may allow interpreters who hold different commitments to converge on particular interpretive rules while bracketing disagreements about their preferred first-best accounts.

Part III shows how a range of issues in public law might be recast if institutional issues are brought to the forefront. We suggest that a formalist or textualist approach to statutes might be most plausibly defended, not by controversial claims about the Constitution or implausible claims about meaning, but through a suggestion that this approach might produce the most sensible system of law, given the institutions that we actually have. We are confident that the standard defenses of formalism based on first principles are very weak; the same can be said for many of the standard challenges to formalism, also based on first principles. We also urge that even if courts should follow the ordinary meaning of text, it is reasonable to suggest that administrative agencies need not, in part because agencies are specialists rather than generalists. Compared to courts, agencies are likely to have a good sense of whether a departure from formalism will seriously damage a regulatory scheme; hence it is appropriate to allow agencies a higher degree of interpretive flexibility.

Moving beyond statutory interpretation, Part III applies the institutional lens to issues of constitutional interpretation and the interpretation of common-law precedents. We explain how attention to institutional issues might shift the debate over competing methods of constitutional interpretation, making it necessary to ask some infrequently posed questions about judicial capacity to implement various approaches. Although constitutional theory has become increasingly sophisticated about large-scale institutional questions, such as the allocation of lawmaking authority between legislatures and courts, it has continued to neglect the role of institutional considerations in the theory of constitutional interpretation by judges; and our analysis provides the tools needed to repair this flaw. Finally, we offer a brief note about the common law, suggesting that similar institutional variables very much bear on the appropriate interpretation of judicial precedents.

In these and other cases, our goal is not to settle on any particular view about what interpretation should entail, but to suggest that it is impossible to answer that question without looking at institutional capacities of various actors and the dynamic effects of competing approaches. We claim, in short, that a focus on institutional issues radically reframes the analysis of legal interpretation—and that it is long past time for those interested in interpretation to see what might be done with that reframing.

## **I. Interpretation Without Institutions: A Catalogue**

Here we supply a panoramic tour of interpretive theory, and influential theorists, from three periods: the English debate over common-law approaches to statutory interpretation (Section A), the formative era of modern interpretive theory (Section B), and contemporary accounts (Section C). Our limited objective is to document the blindness or insensitivity to institutional considerations that pervades these theorists' work. We make no pretense of supplying a complete and adequately nuanced intellectual history of interpretive theory. Indeed our catalogue will have the flavor of Whig history, praising theorists who anticipate the institutional turn and (far more often) condemning those who do not. But our goal is not merely critical. By exploring what has been neglected, we hope to make some movement toward the task, ventured in Parts II and III, of isolating the issues that must be faced by an approach to interpretation that is concerned with institutional capacities and dynamic effects.<sup>8</sup>

### **A. Common-law Interpretation and Bentham's Mistake**

We begin with Blackstone and Bentham, the foremost proponent and critic, respectively, of the common-law approach to statutory interpretation. This approach has many shades and variants, which license varying degrees of judicial freedom in interpretation; but a central or defining idea is that judges appropriately sensitive to legislative purposes and to the surrounding fabric of law should mold and shape statutes with something like the sensitivity and flexibility accorded to judicial precedents. In these respects, the common law approach is a precursor of the legal process school that came to dominate American interpretive theory after World War II.<sup>9</sup>

Our critique, unsurprisingly, is that the common-law style of interpretation presupposes a fanciful, even romantic account of judicial capacities, and also fails to ask questions about likely legislative responses to different judicial approaches. We will see, however, a major historical irony: Blackstone, the archetypal common-law interpreter, came far closer to recognizing the suppressed institutional questions, and the institutional case for formalist statutory interpretation, than did Bentham, the common law's principal

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<sup>8</sup>In what follows, we will put aside the possibility that doctrines of statutory interpretation might be legislated, rather than developed (solely) by judges in common-law fashion. See Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 *Harv. L. Rev.* 2085 (2002). Although the possibility is both important and interesting, past history shows that it is most unlikely that Congress will enact rules of interpretation that will generally resolve the disputed issues of interpretive choice. For good reason, the literature on statutory interpretation both past and present, focuses on the question of what interpretive rules judges should use absent legislative intervention; that is our focus here as well.

<sup>9</sup>See Henry Hart and Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William N. Eskridge & Philip P. Frickey eds.) (1994).

critic. We will also see that later theorists, such as H.L.A. Hart, followed Bentham rather than Blackstone, and hence repeated Bentham's mistake.

Blackstone. William Blackstone's brief account of statutory interpretation in Book I of the Commentaries is easily the most famous description of the common-law style of statutory interpretation;<sup>10</sup> Hart and Sacks featured it prominently in the legal process materials that influenced a generation of leading academic theorists.<sup>11</sup> The object of interpretation, for Blackstone, is to uncover the "will of the legislator" by "exploring his intentions," as manifested in "signs the most natural and probable."<sup>12</sup> Despite this ceremonial bow to legislative supremacy, however, the discussion quickly turns from the words of the statute, of surrounding statutes, and the subject matter, to more fluid interpretive sources, particularly the "reason and spirit" of the law and the Aristotelian principle of "equity"—the latter being the power "of excepting those circumstances, which (had they been foreseen) the legislator himself would have excepted."<sup>13</sup> Interpretive equity, on this view, "depend[s], essentially, upon the particular circumstances of each individual case."<sup>14</sup>

Here are all the hallmarks of the common-law interpretive style: flexible treatment of statutory text, based on a nuanced sensitivity to legislative intentions or purposes and to the surrounding fabric of the common law. Especially striking is the stylized assumption that interpretation according to the "reason" or "equity" of the statute will capture the legislature's true intentions, or the intentions that rational legislators would have had if informed about the particular application at bar, as well as the accompanying insistence that equity is necessarily a particularistic or case-specific consideration. Under certain assumptions about institutional capacities, the common-law style might well be best; but Blackstone says nothing in defense of those assumptions, and fails even to acknowledge them as such. The discussion, almost until the very end, shows remarkably little awareness of several relevant possibilities: that judges might mistake legislative purposes; that they might do better by deferring to legislators' expressed judgments about equity than by enforcing their own; that they might, by treating statutes flexibly, be purchasing case-specific benefits at the price of increased uncertainty, imposing resulting burdens on the interpretive system as a whole; that legislators, confronted with judges refusing to invoke purposes to make sense of text, might be more careful in advance and might make corrections as the need arises.

Consider, as one example among many, Blackstone's remarkably casual embrace of the absurd-results canon: the idea, in Blackstone's words, that

where words bear either none, or a very absurd signification, we must a little deviate from the received sense of them. Therefore the Bolognian law, mentioned by Puffendorf, which enacted 'that whoever drew blood in the streets should be

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<sup>10</sup>See I William Blackstone, Commentaries on the Laws of England 59-62 (1765).

<sup>11</sup>Hart and Sacks, *supra*, at 1170.

<sup>12</sup>Blackstone, *supra*, at 60.

<sup>13</sup>*Id.* at 61.

<sup>14</sup>*Id.*



punished with the utmost severity,’ was held after long debate not to extend to the surgeon, who opened the vein of a person that fell down in the street with a fit.<sup>15</sup>

There is much to be said, pro and con, about interpretation to avoid absurd results; the relevant institutional variables are complex,<sup>16</sup> and we shall say a fair bit about them here. What is important for present purposes is Blackstone’s radical institutional blindness—his failure to identify those variables or to find them even relevant. It may well be true that, if apprised of the surgeon’s case, the legislature would have provided a relevant exception. But it hardly follows that the legislature would necessarily wish the judges to provide the exception themselves, given the legislature’s failure to do so. For many reasons, good and bad, the legislature might want to reserve to itself the authority to correct poorly-drafted statutes. Perhaps the legislature would not trust the judges’ judgments about whether a result would be absurd; perhaps the legislature would be willing to tolerate occasional absurdity for the sake of clarity and predictability. Nor does it follow that, apart from the question of legislative preferences about judicial interpretation, the best overall interpretive system would be one in which the judges possessed this case-specific power to modify seemingly absurd statutory applications in light of purpose, reason, and equity. To know whether that is true would require judgments about a range of matters Blackstone fails to consider, such as the rate of mistaken identification of absurd results and the ex ante effects of such a power on legislative drafting; more on these matters below.

All this said, the end of Blackstone’s discussion offers a remarkable afterthought that, although barely sketched, anticipates some critical questions for interpretive theory by acknowledging the role of second-best considerations. “[L]aw, without equity, tho’ hard and disagreeable, is much more desirable for the public good, than equity without law; which would make every judge a legislator, and introduce most infinite confusion [by producing] as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.”<sup>17</sup> In this passage “law,” cast in opposition to equity, seems to connote a formalist style of interpretation that enforces rules apparent on the face of statutory texts, rather than molding those texts to background legal principles or attributed legislative purposes. The first-best, Blackstone is suggesting, would be law and equity in an appropriate mix, distributed appropriately across cases. But if the mix is unstable, if judges must choose between enforcing law in all cases or doing equity in all cases, then resolute enforcement of statutory text is preferable on second-best grounds.

On Blackstone’s account, equity without law is defective on two counts: it “makes every judge a legislator” and introduces an unacceptable amount of uncertainty (“most infinite confusion”) into the interpretive system. The first point is a gesture towards the separation of lawmaking power from adjudicative power; later we will argue that this sort of appeal is unhelpful, because it is too abstract to supply valid reasons for or against interpretive formalism. Far more impressive and significant is the second point,

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<sup>15</sup>Id. at 60.

<sup>16</sup>Cass R. Sunstein, *Avoiding Regulatory Absurdity? A New Canon of Construction*, (unpublished manuscript 2002); Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 *Vand. L. Rev.* 715 (1992).

<sup>17</sup>Blackstone, *supra*, at 62.

an early attempt to introduce institutional considerations and ex ante effects into interpretive theory. We will see, however, that Blackstone's passing insight proved infertile. Later theorists largely ignored the significance of second-best considerations.

Bentham. It is illuminating to glance at the interpretive views of Jeremy Bentham, an imposing critic of common-law adjudication in general and of Blackstone in particular. Bentham's critique of Blackstone's *Commentaries* develops the claim that common-law adjudication is both incoherent and inconsistent with a rational, meaning utilitarian, legal order. The positive side of Bentham's program was the codification of utilitarian legal principles, and more generally a consolidation and expansion of legislation's domain that would bring clarity, certainty and order to the law. Increasingly precise and comprehensive codification would ultimately cause adjudication itself to wither away, as citizens and officials could simply consult the code to ascertain their legal rights and duties. In the interim, however, Bentham was intermittently aware that statutes would contain gaps, ambiguities, and generalities ill-adapted to specific cases—the usual sources of difficult interpretive questions. Bentham thus discussed interpretation on several occasions, most prominently in the *Comment on the Commentaries*, which contains two substantial chapters on the “Interpretation of Laws” and the “Construction of Statutes,”<sup>18</sup> although it is fair to say that he nowhere presents a fully-developed account of statutory interpretation.

For our purposes the significance of Bentham's work on interpretation lies in his imperfect utilitarianism—in his neglect of institutional variables in his discussion of the judicial role. Despite his piercing depiction of the sponginess of common-law adjudication, which he equated with arbitrary judicial tyranny, Bentham failed to transpose his critique of judicial capacities to interpretive theory in any consistent way. The chapters on interpretation and construction in the *Comment on the Commentaries* manage both to approve flexible, purposivist interpretation devoted to forwarding legislative “ends,” on one hand, and on the other to mock the pretensions of common-law interpretation by emphasizing what Bentham saw as the arbitrariness of judicial claims about “reason” and “equity.” We see, for example, Bentham both supporting the absurd results canon on purposive grounds, in Blackstone's example of the surgeon prosecuted for “drawing blood” in the streets,<sup>19</sup> and also denying that the common-law judge's appeal to reason or reasonableness is anything other than a statement of personal “opinion.” On the one hand, “reasonableness or unreasonableness is nothing but conformity or nonconformity to . . . opinion.” On the other hand, “[t]he words of a legislator are no otherwise to be regarded than inasmuch as they are expressive of his will.”

But these positions are in tension with each other. Recall that Blackstone's argument for purposive, equitable interpretation assumed that reasonable legislators

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<sup>18</sup>See Jeremy Bentham, *A Comment on the Commentaries and A Fragment on Government* I.9, II.2 (J.H. Burns and H.L.A. Hart eds. 1977).

<sup>19</sup>See *id.* at 111; 160. Bentham sometimes intimates that he endorses purposivism and the absurd results canon only in cases of ambiguous statutory language, see, e.g., *id.* at 160, although it requires some work to square that qualification with Blackstone's example, so it isn't clear how seriously we are to take it. See also Jeremy Bentham, *The Theory of Legislation* 155 (C.K. Ogden ed. 1987) (“urging that “laws should be literally followed”).

would have recognized the need for an exception, if made aware of the application at hand. Purposivism usually attributes goals or aims by envisioning reasonable legislators acting reasonably; certainly that is the premise for purposivism in the later legal process account of interpretation, as we shall see.<sup>20</sup> This may even be a necessary feature of purposivism; it may be conceptually impossible for judges to proceed by imagining what unreasonable legislators would do. So to deny that the judges can assess the reasonableness or equity of some particular statutory application is also to deny purposivism; Bentham cannot have it both ways. Conversely, Blackstone's second-best argument for interpretive formalism was precisely that judicial disagreement about what is equitable would make interpretation unacceptably subjective and uncertain (because of "differences of capacity and sentiment" across judges). Bentham fails to appreciate that the rapier he uses to skewer the common-law judges might be turned against the purposivist statutory interpretation he also embraces. If even Bentham—the greatest critic of the common law and the greatest advocate of legal utilitarianism—overlooks the significance of judicial capacities, and the systemic effects of flexible interpretation, the institutional blindness in interpretive theory runs very deep indeed.

Why might Bentham have neglected, in his critique of common-law method, the institutional critique of flexible interpretation? There may be a clue in his most focused treatment of the relationship between interpretation and judicial discretion—a short discussion in his great unpublished work on legislation, *Of Laws in General*. There Bentham argues that legislative mistakes—the enactment of statutes that are overinclusive or underinclusive relative to their purposes, due to inadvertence, lack of foresight, or changed circumstances—require that judges possess the power to "mould[] statutes into form."<sup>21</sup> Yet this power in turn created the possibility that informational deficits or bad motives on the part of judges would pervert the legislative product and increase legal uncertainty:

How difficult to distinguish what the legislator would have adopted had he adverted to it, from what he actually did advert to and reject. How easy to establish the one under pretence of looking for the other . . . . And thus sprang up by degrees another branch of customary law, which striking its roots into the substance of the statute law, infected it with its own characteristic obscurity, uncertainty, and confusion.<sup>22</sup>

This is a powerful indictment of purposivism and imaginative reconstruction. On the score of institutional sophistication, Bentham here outdoes his jurisprudential successors of the next century, including both H.L.A. Hart and the legal process scholars; we will see that the later accounts fail even to see the problem that Bentham poses.

Yet for this Bentham himself must take a great deal of blame. The prescriptions he offered to cure the problems of purposivism rest on the same sort of idealized or stylized view of institutional capacities that infects most of Blackstone's treatment, and that Bentham might have been expected to transcend. Bentham first suggests that "the necessity of discretionary interpretation" can be "supersede[d]" by the development of a

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<sup>20</sup>See the discussion of Hart and Sacks below.

<sup>21</sup>Jeremy Bentham, *Of Laws in General* 239 (H.L.A. Hart ed. 1970).

<sup>22</sup>*Id.* at 240.

sufficiently perspicacious legislative code (doubtless the code developed in Bentham's own extensive proposals for law reform).<sup>23</sup> But this idealizes legislative capacities, thus reversing the characteristic error of common-law interpretation.<sup>24</sup> Bentham himself recognizes, both here and elsewhere, that institutional limitations on legislatures make the project of a fully-specified code fantastic. So Bentham abashedly sketches a fallback plan, never fully developed, whereby judges would "declare openly" the need for judicial "alteration" of a statute in appropriate cases, and certify a proposed emendation to the legislature; the emendation would have legal force unless "negatived" or vetoed by the legislature within a certain time.<sup>25</sup> Absent from the proposal is any explanation why the judges, whose information and motivations Bentham has so powerfully impeached, will be able to distinguish alterations from interpretations, or be willing to comply with the plan even where alterations are identifiable as such.

Taking Blackstone and Bentham together, the striking irony is that the common-law jurist more nearly appreciates and anticipates the second-best justifications for formalist, rule-bound statutory interpretation than does the great critic of the common law. Bentham's turn into the blind alley of complete codification, under the influence of an idealized picture of legislative capacities, did little more than create a target for subsequent critics, such as H.L.A. Hart, who could justify antiformalist interpretation by pointing to the limits of legislative foresight, while overlooking the countervailing limits on the capacities of antiformalist interpreters.

## **B. The Modern Era: Positivism, Purposivism, and Integrity**

We now turn to the defining period of modern jurisprudence. In this period, academic observers largely attempted to steer a middle course between formalism and realism.<sup>26</sup> They argued that interpretation was not merely a matter of following established rules, but also that it was far from simple or direct policy analysis.<sup>27</sup> For present purposes, we focus on the critique of formalism and on the institutional blindness of that critique—not to show that formalism is right, but to identify the issues on which its acceptance or rejection might turn. One of the most striking features of the period is

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<sup>23</sup>Id.

<sup>24</sup>Hart provides a helpful correction here. See below.

<sup>25</sup>Bentham, *supra* note, at 241.

<sup>26</sup>See, e.g., Edward Levi, *An Introduction to Legal Reasoning* (1949). We do not discuss the realists themselves, though it is noteworthy that they tended to argue for candid and open-ended judicial policymaking in the face of ambiguous statutes, without grappling with the risks posed by judicial discretion. See, e.g., Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To be Construed*, 3 *Vand. L. Rev.* 395, 299 (1950), which, after challenging the canons of construction, suggests that courts should "strive to make sense as a whole out of our law as a whole" (emphases in original), without engaging the obvious institutional problems raised by any such effort. Max Radin, *Statutory Interpretation*, 43 *Harv. L. Rev.* 863, 884 (1930), criticizes the conventional sources of interpretation and suggests that the real question is: "Will the inclusion of this particular determinate in the statutory determinable lead to a desirable result?" Radin does not address the difficulties that courts might face in answering that question. Of course we do not deny the possibility that the sources of law favored by the formalist—above all, the text—will leave ambiguities; in such cases, institutional considerations are highly relevant to the decision how to proceed. *Chevron v. NRDC*, 467 *US* 837 (1984), represents an institutionally grounded choice to leave the resolution to the relevant administrative agency. See part IIIB below for discussion.

<sup>27</sup>See, e.g., Levi, *supra* note, at 3-8.

that it was dominated by the work of the “legal process” school, whose central mission was to focus attention on institutional considerations. And indeed, the legal process materials do talk a great deal about comparative institutional competence,<sup>28</sup> and do discuss the relevance of agency interpretations of law.<sup>29</sup> But even in those materials, the question of interpretation is answered by asking about how ideal judges would proceed, rather than by asking about how real-world judges should proceed. But to say this is to get ahead of the story; let us begin with H.L.A. Hart, simply because his treatment of legal interpretation can be seen as canonical.

Hart. In his treatment of mechanical jurisprudence and rule-skepticism, Hart offers a highly influential account of the failures of formalism—an account that, remarkably, says not a word about institutional issues.<sup>30</sup> A chief contribution of the account is a clear and convincing explanation of why Bentham was wrong to hope that a rule-bound legislative code could sensibly resolve all cases that might arise under it. What is absent is a serious treatment of how institutions should respond to the inevitability that unexpected cases will confound the expectations of rulemakers.

Hart’s principal submission is that in hard cases, interpretive problems arise from legislators’ “inability to anticipate.”<sup>31</sup> In his view, a “feature of the human predicament (and so the legislative one) is that we labour under two connected handicaps whenever we seek to regulate, unambiguously and in advance, some sphere of conduct by means of general standards to be used without further official direction on particular occasions.”<sup>32</sup> These handicaps are “our relative ignorance of fact” and “our relative indeterminacy of aim.”<sup>33</sup> Mechanical jurisprudence or formalism, involving simple application of law to fact (Bentham’s utopia), would be possible only if “the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they combine could be known to us.”<sup>34</sup> But “[p]lainly this world is not our world.”<sup>35</sup>

Hart claims that the “vice known to legal theory as formalism or conceptualism consists in an attitude to verbally formulated rules which both seeks to disguise and to minimize the need for . . . choice, once the general rule has been laid down.”<sup>36</sup> This is sometimes done by freezing “the meaning of the rule so that its general terms must have the same meaning in every case where its applications is in question.”<sup>37</sup> And what is wrong with that freezing? Hart has a simple answer. He urges that this approach secures “a measure of certainty or predictability at the cost of blindly prejudging what is to be done in a range of future cases, about whose composition we are ignorant. We shall thus indeed succeed in settling in advance, but also in the dark, issues which can only be

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<sup>28</sup>Hart and Sacks, *supra*, at 158-72 (surveying the major lawmaking institutions and their relationships)..

<sup>29</sup>*Id.* at 1271-1312 (examining administrative interpretation of statutes).

<sup>30</sup>H.L.A. Hart, *The Concept of Law* 120-130 (1972).

<sup>31</sup>See *id.* at 125 (1972).

<sup>32</sup>*Id.*

<sup>33</sup>*Id.*

<sup>34</sup>*Id.* at 126.

<sup>35</sup>*Id.*

<sup>36</sup>*Id.* at 127.

<sup>37</sup>*Id.*

reasonably be settled when they arise and are identified.”<sup>38</sup> And what is wrong with decision in the dark? Hart urges that this kind of decision forces us “to include in the scope of a rule cases which we would wish to exclude in order to give effect to reasonable social aims. . . .”<sup>39</sup>

Hart is entirely right to urge that the absence of legislative foresight is inevitable, and that this can create serious problems for interpretation. But notice Hart’s apparently unself-conscious use of word “we” to identify the interpreting authority. Of course Hart’s readers do not constitute a community of “we’s” who have the power to adopt a mutually agreeable approach to interpretation. And once it is seen that a system of interpretation must be established that some “they” must apply, the assessment of “decision in the dark” as opposed to of decision based on “to reasonable social aims” will appear in a very different light. If we make our assessment in institutional terms, we will see that Hart is neglecting two points. The first involves the risk of judicial blunder under one or another approach; the second involves the dynamic effects of one or another approach to interpretation.

Suppose, for example, that judges will err if they attempt to discern “reasonable social aims.” At least it is conceivable, in light of human fallibility, that some judges would do better, by the lights of many or most, if they refused to inquire into reasonable aims. An important factor here is that it is sometimes complicated to make that inquiry; an equally important factor is that sometimes people dispute how to answer it. Take *TVA v. Hill*,<sup>40</sup> the famous snail darter case, raising the question whether the Endangered Species Act should be taken to block the completion of an important dam, because of the late discovery, on the land, of an ecologically uninteresting fish. Does this application of the ESA violate reasonable social aims? People do not agree about the answer to that question.

In addition, a sensible system of interpretation is based on an understanding that dynamic effects are highly likely; it sees that the judges’ approach will not be limited, in its effects, to the immediate parties or even to the system of adjudication. Hart seems oblivious to this point. Suppose that courts, deciding the issue in the light, will introduce a high degree of uncertainty into the law, making it harder for people to plan their affairs. Suppose too that if they proceed in the dark, they will create strong incentives for the legislature, which will promptly correct the problems that arise.<sup>41</sup> In these circumstances, might not formalism be the most sensible path? What is most remarkable is that Hart appears not to see the problem at all.

Hart and Sacks. Now consider the influential treatment by Henry Hart and Albert Sacks in their enormously influential legal process materials.<sup>42</sup> In a brilliant “note on the rudiments of statutory interpretation,” Hart and Sacks urge that the task of interpretation requires courts, first and foremost, to “decide what purpose ought to be attributed to the

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<sup>38</sup>Id.

<sup>39</sup>Id.

<sup>40</sup>437 US 153 (1978).

<sup>41</sup>Note here that Congress ultimately authorized completion of the dam involved in *TVA v. Hill*, see note X *infra*, and also significantly amended the Delaney Clause in response to concerns about excessive rigidity. See the Food Quality Protection Act, Pub. L. No. 104-170, 110 Stat. 1489 (1996).

<sup>42</sup>See Hart and Sacks, *supra*, at 1374-1380.

statute and to any subordinate provision of it which may be involved,” and to “interpret the words of the statute immediately in question so as to carry out the purpose as best it can.”<sup>43</sup> Hart and Sacks caution that courts should not give words a meaning that their text will not bear. But they also urge that courts should require Congress to speak clearly if it wishes to accomplish certain ends, including “a departure from a generally prevailing principle or policy of the law.”<sup>44</sup> These are the building blocks for a complex system of interpretation, in which judges treat legislators as “reasonable people proceeding reasonably,” make “purpose” crucial to interpretation, and push statutory language, where fairly possible, in the direction of sense and consistency with the rest of the law’s fabric.

In the abstract, this approach seems perfectly sensible, and we will not argue that it is indefensible here. But to evaluate it, we need to know how well judges are able to execute the suggested approach, and how other persons and institutions will react to it. The fact that Hart and Sacks do not explore these issues is extremely revealing, for a primary contribution of the legal process materials was to put the spotlight on institutional issues, and indeed to assess much of law in a pragmatic spirit. With respect to legal interpretation, Hart and Sacks did not keep the institutional project in mind, perhaps because of the tenacity of the common law framework with which they began. “Purposes” are their loadstar; but purposes are hardly transparent. Is the purpose of the Delaney Clause to eliminate carcinogenic substances from the food supply? To make Americans safer? To improve the world? The characterization of purposes involves a large element of discretion, and here it is necessary to know how the discretion will be exercised. Sometimes the characterization of purposes will have a significant political or even ideological component. Hart and Sacks pay no attention to that issue; they seem to think that it is irrelevant.

General lessons cannot be drawn from the practice of interpretation under Fascism, but for our purposes, some illumination can be found from the disparate practices of Italian and German courts. The Italian judiciary, faced with a totalitarian regime, engaged in a strategy of resistance, based on the idea of “plain meaning.”<sup>45</sup> They prohibited the government from acting in a way that did violence to the apparent meaning of statutory texts.<sup>46</sup> This was a self-conscious method for limiting Fascist government, by requiring genuine statutory authorization for its goals. By contrast, German judges rejected formalism and construed statutes hospitably and in accordance with their “purposes,” defined by reference to the public values of the Nazi regime.<sup>47</sup> They thought that courts could carry out their interpretive task “only if they do not remain glued to the letter of the law, but rather penetrate its inner core in their interpretations and do their part to see that the aims of the lawmaker are realized.”<sup>48</sup> Thus, for example, the German Supreme Court concluded that a law forbidding “sexual intercourse” between Germans and Jews “is not limited to coition. . . . A broad interpretation is . . . appropriate in view of the fact that the provisions of the law are meant to protect not only German blood but

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<sup>43</sup>Id. at 1374.

<sup>44</sup>Id. at 1377.

<sup>45</sup>See the account in Guido Calabresi, : Two Functions of Formalism, 67 U. Chi. L. Rev. 479 (2000).

<sup>46</sup>Id.

<sup>47</sup>See Ingo Muller, *Hitler's Justice: The Courts of the Third Reich* (Deborah Lucas Schneider trans, 1991).

<sup>48</sup>Id at 101.

also German honor.” A lower court went so far as to conclude that kissing could take “the place of normal sexual intercourse” and therefore violate the statute, in such a way as to justify a two-year jail sentence.<sup>49</sup>

Of course we do not suggest that purposive interpretation is an ally of Fascism, or that it is always illegitimate or unacceptable. Our only claim is that the evaluation of purposive interpretation must depend, in large part, on an assessment of the relevant institutions and of the effects of that approach over time. It is ludicrous to suggest that purposive interpretation is best in the abstract, for the simple reason that no approach to interpretation is best in the abstract. Here, as elsewhere, Hart and Sacks’ elaborate talk about institutional competence is undercut by their stylized, nonempirical treatment of actual institutions and their capacities.

Dworkin. Ronald Dworkin is often taken to be H.L.A. Hart’s antagonist, urging an approach that Dworkin calls “integrity,” meant to be alternative to Hart’s form of positivism.<sup>50</sup> But on the issue that concerns us, Dworkin shares Hart’s blindness. On Dworkin’s account, judges who seek “integrity” attempt to put existing legal materials in “the best light possible.”<sup>51</sup> They owe a duty of fidelity to those materials; but they are also authorized to attempt to understand the materials by reference to what they see as the most appealing principle that organizes them. “Law as integrity asks judges to assume, as far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person’s situation is fair and just according to the same standards.”<sup>52</sup> In arguing for this understanding of adjudication, Dworkin offers not a word about the virtues and the imperfections of judges and the systemic effects of one or another approach to interpretation.

Dworkin spends a great deal of time on Riggs v. Palmer,<sup>53</sup> the famous case posing the question whether judges should adopt a literal interpretation of the law of wills if the consequence would be to allow a murderer to inherit from his victim.<sup>54</sup> And Dworkin is not wrong to argue that Riggs “was a dispute about what the law was, about what the real statute the legislators enacted really said.”<sup>55</sup> But it is inadequate to cast the issue in those terms. The dispute was about the appropriate approach to statute whose literal text produces absurdity. If courts ask about the meaning of “the real statute the legislators enacted,” they will not be asking some of the crucial questions.

Dworkin does not say how he would decide Riggs, but he does offer a conclusion about the appropriate resolution of TVA v. Hill. Dworkin supposes that his idealized judge, Hercules, “shares the substantive opinion that seemed dominant on the [Supreme]

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<sup>49</sup>Id at 202.

<sup>50</sup>See Ronald Dworkin, *Law’s Empire* (1985).

<sup>51</sup>Id. at 243.

<sup>52</sup>Id.

<sup>53</sup>115 NY 506, 22 NE 188 (1889).

<sup>54</sup>*Law’s Empire* at 15-20.

<sup>55</sup>Id. at 20. We say that this is not wrong, but it seems to us unhelpful. Neither view, in Riggs, could be said to be lawless. But to ask what the law “really said” obscures the key issue, which is how judges should interpret it, given the institutional variables discussed in the text.



Court, that the wiser course would be to sacrifice the fish to the dam.”<sup>56</sup> If so, Dworkin urges, it is “not difficult” to see how Hercules will vote, because he “thinks reading the statute to save the dam would make it better from the point of view of sound policy.” Given that judgment, Hercules will vote to allow the dam to be completed.

But to know how to vote in *TVA v. Hill*, is it really enough to consult “sound policy”? Here Dworkin sounds very much like Hart, urging that statutory language should not be taken to conflict with reasonable social purposes. Other things being equal, the claim is surely correct. But it is important to ask whether Congress would overturn a literal interpretation of the ESA, if the consequence was indeed to violate sound policy. Subsequent events showed that Congress was entirely willing to do that.<sup>57</sup> And it is also important to ask about the systemic effects of a ruling that would allow the dam to be completed. If that were the ruling, what would the ESA actually mean? Would subsequent cases become hard too? If this question is in turn difficult to answer, then the consequences of the ruling, in itself sensible, might in their way conflict with “sound policy” as well. And in cases of this sort, do we have good reason to trust judges’ views about sound policy? These points suggest that it is hardly enough to ask, as Dworkin urges, which interpretation of the Endangered Species Act would best complete the story that Congress has begun. If institutional considerations are taken into account, we might conclude that judges should ask themselves a very different set of questions.

Where statutes are entirely ambiguous, it is impossible to decide cases simply by reference to their words. But in *TVA v. Hill*, the words were far more easily taken to ban the completion of the dam; and judicial unreliability, on conflicts between environmental and economic goals, might well be taken to argue in favor of formalism.<sup>58</sup> What is striking about Dworkin’s analysis is that it is undertaken without any thought at all about judicial capacities and about the effects, over time, of one or another approach to interpretation. Like Hart, Dworkin proceeds as if the question is how an idealized judge deals with interpretive problems—not how a real-world judge, operating as part of a decisionmaking committee staffed by multiple actors, should proceed in the face of uncertainty.

### **C. Contemporary Theory: Dynamism, Textualism, and Pragmatism**

Contemporary interpretive theory is increasingly sophisticated along many margins. Philosophy (including pragmatist antifoundationalism), linguistics, and economics have all contributed to ever-more-refined normative accounts of interpretation. Yet on the critical dimension of institutional awareness, many of the most

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<sup>56</sup>Id. at 347.

<sup>57</sup>Congress promptly established an administrative mechanism for granting exemptions from the Endangered Species Act, see Pub. L. No. 95-632, 92 Stat. 3751, 3752-60 (1978), and Congress itself specifically exempted the dam at issue in *TVA v. Hill*, see Pub. L. No. 96-69, 93 Stat. 437, 449 (1979).

<sup>58</sup>Consider in this regard the late nineteenth and early twentieth century struggle between courts and the regulatory state, in which judges, trying to harmonize regulatory statutes with the common law, tended to require Congress to speak unambiguously if it sought to depart from judicial understandings, and abandoned plain or ordinary meaning in order to minimize conflicts with those understandings. The result was to limit the reach of statutes designed to protect workers and consumers. See, e.g., *FTC v. American Tobacco Co.*, 264 US 298, 305-06 (1924); *Shaw v. Railroad Co.*, 101 US 557, 565 (1880).

prominent contemporary theorists do no better than their predecessors, or so we will claim. Institutional blindness remains a pervasive condition in the current scene.

Eskridge. William Eskridge has a claim to being the most prominent interpretive theorist of the modern era; his identification and critique of the “new textualism,”<sup>59</sup> and his advocacy of “dynamic interpretation,”<sup>60</sup> redefined the field in the late 1980s. Yet a neglect of institutional factors undercuts Eskridge’s conclusions just as it did his predecessors’.<sup>61</sup> Dynamic statutory interpretation, it turns out, embodies the nirvana fallacy—the juxtaposition of an idealized picture of judicial capacities with a grudging picture of the capacities of other actors in the interpretive system.

Eskridge’s principal target is the formalist approach that emphasizes the original meaning of statutory text; his principal criticism is that this approach stumbles on the problem of statutory obsolescence—statutes that have fallen out of step with the public values prevailing in the surrounding context of the legal system. Dynamic interpretation is the answer to the problem of obsolescence. Rather than adhering either to ordinary meaning at the time of enactment, or even to legislative intent conceived in strictly originalist terms, courts should “update” statutes by intelligent adaptation of original purposes to new social circumstances, and by taking account of changes in the overall fabric of public law.<sup>62</sup> Yet Eskridge is sensitive to the radicalism of this recommendation, which he moderates and improves by adding a side constraint: judges should treat contemporary public values as something like an interpretive principle or canon, defensible by clear contrary instructions from legislatures.<sup>63</sup>

At first glance this position is attractive, even compelling; how could “wooden” or “mechanical” enforcement of obsolete statutes possibly be the best course of action for judges to take? Eskridge’s claims certainly have some descriptive power, and on certain assumptions, they might be plausible on institutional grounds as well. Yet Eskridge fails to discuss those assumptions or those grounds. He does not consider how the case for dynamic interpretation fares once we recognize the possibility that judges will make serious mistakes in updating, or that the ex ante effects of dynamism on legislative behavior might prove pernicious. We may agree with Eskridge that judicial updating is a good thing, all else equal, but the proviso is crucial. The possibility of judicial mistakes, or of deleterious system effects, makes Eskridge’s defense of dynamism radically incomplete. Dynamic interpretation might or might not prove justified, given adequate information on these variables; here as elsewhere we take no position on that ultimate question. What is clear is that Eskridge has failed to ask, let alone answer, most of the critical questions.

Start with the question of judicial error. The linchpin of dynamism is the claim that “when societal conditions change in ways not anticipated by Congress and, especially, when the legal and constitutional context of the statute decisively shifts as

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<sup>59</sup>See William N. Eskridge, Jr., *The New Textualism*, 37 *UCLA L. Rev.* 621 (1990).

<sup>60</sup>See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 *U. Pa. L. Rev.* 1479 (1987).

<sup>61</sup>Candor requires an acknowledgement that one of the present authors showed a similar blindness in his youth (adolescence? infancy?). See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 *Harv L Rev* 405 (1989).

<sup>62</sup>Eskridge, *Dynamic Statutory Interpretation*, *supra* note, at 1484.

<sup>63</sup>*Id.* at 1482, 1496.

well, this current perspective should, and will, affect the statute's interpretation."<sup>64</sup> This is essentially a recommendation to minimize the false negative or Type II error: the possibility that nondynamic approaches will erroneously fail to update obsolete statutes. But Eskridge says very little about the converse possibility, the false positive or Type I error: the risk that the judges' relative social insulation, and the resulting informational deficits, might cause them to err in the other direction, updating statutes that aren't obsolete because the judges fail to comprehend the statute's current social utility. If judicial updating produces erroneous rewriting of statutes whose sensible and fully up-to-date justifications the judges have simply failed to understand, then dynamism may cause more institutional failure than would a rule denying judges the authority to update. In any case updating may cause harm if the new values, not yet able to receive clear democratic support, are questionable on normative grounds. (Is it entirely irrelevant to mention that Nazi judges were enthusiastic updaters?)

Eskridge also overlooks the possibility that the systemic effects of nondynamic interpretive approaches would prove better, on Eskridge's own criteria, than would the systemic effects of dynamism. Eskridge supports his case for dynamism by drawing upon process theory and public choice, arguing that "the legislature acting alone will be subject to . . . biases,"<sup>65</sup> and that "given the biases of the political process, the fact that judges are not elected may enable them to be better 'representatives' of the people than their elected legislators are (in some instances)."<sup>66</sup> It may be true that interest-group pressure and institutional failures will cause Congress to update statutes with insufficient frequency, relative to some optimal rate of policy change. But that failure might itself be an endogenous consequence of the interpretive theory the judges use. Textualists indeed argue that their methods will spur legislatures to update at an optimal rate,<sup>67</sup> and there is certainly some evidence of updating in response to textualism.<sup>68</sup> If so, then textualism would itself just be the dynamic approach to interpretation that Eskridge advocates. On certain empirical premises about institutional capacities, Eskridge ought to support the very textualism that he spends so much time excoriating.

In later work Eskridge episodically shows an awareness of these considerations, acknowledging, in the limited context of the legislative-history debate, that the desirability of judicial resort to legislative history turns importantly on a cost-benefit calculus that examines judicial performance, litigation costs, and legal certainty in competing legislative-history regimes.<sup>69</sup> Yet he also seems to think this sort of analysis theoretically disreputable or empirically intractable or both. In even more recent work Eskridge reverses his ground, arguing both that empiricism is conceptually meaningless without normative premises (a question we address below) and that the relevant empirical and institutional variables are costly to measure—certainly true, but hardly an argument

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<sup>64</sup>Eskridge, *Dynamic Statutory Interpretation*, supra note, at 1494.

<sup>65</sup>Id. at 1530.

<sup>66</sup>Id.

<sup>67</sup>See Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 103 (2000).

<sup>68</sup>The Delaney Clause was substantially amended by the Food Quality Protection Act, Pub. L. No. 104-170, 110 Stat. 1489 (1996).

<sup>69</sup>See William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 Mich. L. Rev. 1509, 1541 (1998).

for nonempirical interpretive theory.<sup>70</sup> The sum of it is that, as with some of the other theorists we will consider, Eskridge occasionally notes the critical institutional considerations *en passant*, but fails to incorporate them into his normative account of interpretation in any systematic way.

It is worth emphasizing that none of these considerations necessarily refutes Eskridge's dynamic conclusions. If judges update successfully more often than not, and if textualist interpretation causes legislatures to spend most of their time correcting mistaken (because wooden or mechanical) judicial interpretations, then textualism would prove inferior to dynamic interpretation; Eskridge's methods would push the courts closer to the optimal rate of updating. But there is no valid path to that conclusion from Eskridge's institutionally insensitive premises.

Manning. Among contemporary writers, Eskridge's chief formalist adversary is John Manning, whose work details an important textualist account of interpretation rooted in constitutional law, in contrast to Eskridge's nontextualist dynamism. For our purposes, however, the common ground between Eskridge and Manning is more important than their differences. Strikingly, despite spirited debates between them, Eskridge and Manning largely share the crucial and mistaken premise that the important questions about interpretive theory are first-best questions, rather than second-best questions about institutional performance and systemic effects.

Manning's work shows that insufficient attention to institutional capacities is an equal-opportunity hazard, one that afflicts nonformalists and formalists alike. Manning's contribution is to have provided the most rigorous attempt to justify formalist modes of interpretation by reference to formal sources of law, principally the Constitution. In our view, however, the project is an impossible one; it is doomed to failure despite Manning's skill at deductive reasoning from constitutional premises. Interpretive formalism at the operational level—formalism in the jurisprudentially modest sense of rule-bound interpretation that sticks close to the surface of statutory texts, where it is possible to do so—cannot itself be justified by conceptual deduction from constitutional premises. Supplemental institutional and empirical premises are needed, premises about the comparative capacities of institutional actors and about formalism's *ex ante* effects.

Consider Manning's influential critique of judicial resort to legislative history.<sup>71</sup> The argument suggests that the Constitution, particularly Article I's procedure of statutory enactment, should be read to embody an implicit norm against legislative self-delegation. That constitutional norm forbids courts to afford "authoritative" weight to legislative history in statutory interpretation, but allows consultation of legislative history as a persuasive or confirmatory source.<sup>72</sup> But this deduction, even if valid, leaves open the most important questions about legislative history at the operative level, the level of the interpretive doctrines that judges should use. Few people think that the legislative history is "authoritative" in the sense that it trumps unambiguous text; the usual argument is that the history is relevant to ascertaining meaning. That courts may not afford

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<sup>70</sup>See William N. Eskridge, Jr., Norms, Empiricism, and Canons in Statutory Interpretation, 66 U. Chi. L. Rev. 671 (1999).

<sup>71</sup>John F. Manning, Textualism as a Nondelegation Doctrine, 97 COLUM. L. REV. 673, 695 (1997).

<sup>72</sup>*Id.* at 728.

legislative history authoritative weight does not tell us whether courts should use legislative history at all. That question, the crucial one, cannot be resolved through Manning's methods; its resolution depends on institutional issues. Manning's position forbids the judges to afford legislative history authoritative weight, but nothing in the analysis suggests that the Constitution either *requires* or *forbids* the judges to consult legislative history for its persuasive value. The judges presumably retain constitutional discretion to use it, or to eschew it, on other grounds. Whether they should do so is a function of the consequences of the various alternative rules about legislative history that the judges might adopt; those consequences will turn on institutional facts about judges' capacities as interpreters of legislative history and the ex ante effects on legislative drafting.

The general point here is that the formal constitutional premises that Manning marshals, such as the textual separation of powers and its original understanding, mandate neither formalist interpretive methods nor nonformalist interpretive methods.<sup>73</sup> The Constitution cannot plausibly be read to say a great deal about the contested issues of statutory interpretation; what it does say is often so minimal and so abstract as to leave open all the reasonably contested questions of interpretive choice. Article I of the Constitution, for example, specifies the conditions for the enactment of valid statutes,<sup>74</sup> and the Supremacy Clause mandates that constitutionally valid statutes are supreme law,<sup>75</sup> so all major interpretive approaches agree that judges should respect the statutory text. But no provision sets out explicit instructions to judges about what other sources or considerations are admissible and relevant to help interpret the text. Nor do abstractions like the separation of powers supply much in the way of concrete guidance. Textually, provisions like the vesting clauses of Articles I and III separate legislative from judicial power, but textualists, intentionalists, purposivists, and other schools can all validly claim that their preferred method respects this weak constraint. At the level of express commands, the Constitution simply does not choose sides in the competition between first-best interpretive approaches that characterizes modern legal theory.

Furthermore, any supplemental instructions that can be elicited from the text, or infused into it through structural and historical analysis, prove compatible with most plausible positions on the contested problems of statutory interpretation. Consider the recent debate between Manning and Eskridge over the original understanding of the Article III "judicial Power."<sup>76</sup> Manning says that the grant of judicial power, understood

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<sup>73</sup>But see John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 686 (1999) (rejecting the "contention that the Constitution has little to say about the choice between formalist and antiformalist methodologies"). Manning's view here is appropriately nuanced; he disavows any suggestion that "inferences from constitutional structure will always provide clear answers to questions of interpretive design," and notes that "[w]hen they do not, the judiciary may have room to make choices among particular interpretive strategies." *Id.* at 692-93.

<sup>74</sup>See U.S. Const. Art. I, §7 (detailing procedures of bicameral approval and presentment to the President, and requiring that a "bill" must undergo those procedure to become a "law").

<sup>75</sup>See U.S. Const. Art. VI, cl. 2 (declaring that "Laws of the United States" made "in pursuance of [the Constitution] . . . shall be the Supreme Law of the Land").

<sup>76</sup>Compare John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 10-15 (2001) and John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648 (2001) with William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990 (2001).

both historically and in light of structural inferences from other provisions, bars “equitable” interpretation of the Blackstonian sort, and thus commands federal courts to follow a “faithful agent” account of interpretation.<sup>77</sup> Eskridge says that the Blackstonian appeal to statutes’ equity and spirit has a better historical pedigree than faithful-agent approaches, and that courts interpreting equitably are helpful partners in the process of lawmaking—and thus better agents, even on Manning’s own terms, than are courts enslaved to a hierarchical vision of legislative supremacy.<sup>78</sup> This is a fight that can end only in stalemate. As for the history, there are respectable bits of originalist evidence on both sides, and no agreed-upon originalist criterion or metaprocedure exists for adjudicating between them. As for the structural inferences, constitutional premises about equity, agency and legislative supremacy are pitched at too high a level of generality to cut between competing views about, say, the interpretive value of committee reports, or the absurd results canon.

The important point here is that the Manning/Eskridge debate rests on an assumption, common to both parties, that the contest of interpretive theories must take place on constitutional terrain. But the best reading of the Constitution is that interpretive formalism and interpretive antiformalism are constitutionally optional for judges. On this view, Manning’s project fails, not by virtue of any failure in execution, but by virtue of its intrinsic limitations: the tools of constitutional formalism are too weak to produce closure, by themselves, on the contested questions of interpretive doctrine. Those questions require empirical and institutional analysis in addition to first-best theorizing from constitutional premises.

Richard Posner. We conclude our catalogue with Judge Richard Posner, the leading advocate of the view that consequences should matter to a theory of legal interpretation. In his early writing, Posner endorsed an “imaginative-reconstruction” approach to interpretation, asking judges to reconstruct the views of the enacting legislature and to do what it would have done, had it been presented with the case at hand.<sup>88</sup> This approach, borrowed in part from Learned Hand,<sup>89</sup> is an expanded version of Blackstone’s idea that judges should make exceptions to overbroad statutes in “those circumstances, which (had they been foreseen), the legislator himself would have

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<sup>77</sup>Manning, *Equity of the Statute*, supra note, at 57-58, 126-27.

<sup>78</sup>Eskridge, *All About Words*, supra note, at 997, 1087.

<sup>79</sup>Lawrence Lessig, *Fidelity in Translation*, 71 *Tex. L. Rev.* 1165 (1993).

<sup>80</sup>Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 *Sup. Ct. Rev.* 125, 192.

<sup>81</sup>*Id.* at 193.

<sup>82</sup>See generally Symposium, *Fidelity in Translation*, 65 *Fordham Law Review* (1997).

<sup>83</sup>This was one of the themes of Justice Souter’s dissent in *United States v. Lopez*, 514 U.S. 549 (1995), which argued, among other things, that deference to rational congressional judgments about the scope of the interstate commerce power better captured the original understanding. See 514 U.S. at --- (Souter, J., dissenting).

<sup>84</sup>See Peter B. McCutchen, *Mistakes, Precedent and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 *Cornell L. Rev.* 1 (1994).

<sup>85</sup>Daryl Levinson, *Framing Transactions in Constitutional Law*, *Yale L.J.* (2001).

<sup>86</sup>McCutchen, supra, at 37-38.

<sup>87</sup>See Chadha, 462 U.S. 919, 994-95 (1983) (White, J., dissenting).

<sup>88</sup>See Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 *CASE W. RES. L. REV.* 179 (1987).

<sup>89</sup>See, e.g., *Lehigh Valley Cola Co. v. Yensavage*, 218 F. 547, 553 (2d Cir. 1914) (Hand, J.).

excepted.”<sup>90</sup> Like Blackstone’s approach, imaginative reconstruction is blind to institutional considerations of the sort that we have been emphasizing throughout. That the legislature, if informed of the application at hand, would have adopted a particular statutory amendment does not mean that it would want the judges to do so on their own initiative. And if judges frequently err in their counterfactual suppositions about what the legislature would have done, then imaginative reconstruction may, even on its own terms, push the judges even farther away from the legislature’s intentions than unimaginative textualism would have.

More recently, Posner has endorsed a pragmatic account of adjudication generally, one that subsumes a pragmatic account of statutory interpretation.<sup>91</sup> The pragmatic account should be fertile soil for the sort of institutional analysis needed in interpretive theory. Pragmatism, as Posner uses the term, is a form of consequentialism, hospitable territory for the approach urged here. Our theme is precisely that interpretive rules can’t sensibly be chosen without consideration of institutional consequences. And indeed Posner does recognize the possibility that the pragmatic judge might, on certain empirical premises about the institutional capacities of judges and legislatures, decide that interpretive formalism at the operational level would itself be the pragmatically best course of action.

Yet this possibility remains, for Posner, an abstract and unappealing one. As soon as possible he falls back upon a distinction between consequences for the “case at hand” and the “systemic” consequences of decisions. On this view, the pragmatist maximand is to do what is best in the case at hand, subject to a side-constraint: that case-specific adjudication not produce unacceptable systemic costs in legal uncertainty and other undesirable consequences: “The pragmatist thinks that what the judge is doing in deciding the nonroutine case is trying to come up with the most reasonable result in the circumstances, with due regard for such systemic constraints on the freewheeling employment of ‘reason’ as the need to maintain continuity with previous decisions and respect the limitations that the language and discernible purposes of constitutional and statutory texts impose on the interpreter.”<sup>92</sup> The point of all this is to preserve some domain of policymaking discretion for judges, some field in which pragmatic judges can run free, bringing their all-things-considered consequentialist judgments to bear on the parties before them. Posner is quite candid about this: “[A]t their best American appellate courts are councils of wise elders and it is not completely insane to entrust them with responsibility for deciding cases in a way that will produce the best results in the circumstances rather than just deciding cases in accordance with rules created by other organs of government or in accordance with their own previous decisions, although that is what they will be doing most of the time.”<sup>93</sup>

It should be apparent that this distinction between case-specific consequences and systemic consequences, between the pragmatist maximand and the pragmatic side-constraint, is illusory. The decision to license judges, in some domain, to interpret

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<sup>90</sup>Blackstone, *supra*, at 61.

<sup>91</sup>See, e.g., Richard A. Posner, *Pragmatic Adjudication*, in *The Revival of Pragmatism: New Essays on Social Thought, Law, and Culture* 235-53 (Morris Dickstein ed. 1998)

<sup>92</sup>Posner, 62 *U. Chi. L. Rev.* 1421, 1432-33 (1995).

<sup>93</sup>Posner, *Pragmatic Adjudication*, *supra* note , at 244.

statutes so as to maximize beneficial consequences in the case at hand is itself a system-level choice of a particular kind, a choice that will have system-level effects on the legislatures, agencies and litigants who must anticipate the judges' efforts to sort cases from one domain to the other. Depending on the values to be attached to the relevant institutional variables, the legal uncertainty, including decision and litigation costs, that the distinction creates might overwhelm the social benefits attainable in the class of cases that Posner would leave to freewheeling judicial discretion. So the questions are systemic all the way down, and Posner's distinction collapses on itself.

If the distinction is illusory, it nonetheless has harmful effects. The very making of the distinction has real and unfortunate consequences for Posner's account of adjudication generally and interpretation in particular. The insistence, amounting to a faith, that there just *has* to be some domain of entirely carefree discretion left to the wise elders of the bench<sup>94</sup> causes Posner to take a one-sided view of the empirical and institutional variables that a pragmatist would consider, if genuinely open-minded about the possibility that interpretive formalism is pragmatically best for judges.

An example is Posner's claim that American judges have no choice but to assume the burdens of rulemaking and policymaking, because American legislatures (in contrast to Parliament and continental legislatures) do not exercise sufficient oversight of the statutory system, do not correct gaps and resolve ambiguities at a sufficient rate, and thus leave the judges with no option but to amend statutes and fill statutory gaps through interpretation.<sup>95</sup> The institutional analysis here is radically incomplete and perhaps mistaken. Posner offers no systematic analysis of the behavior of American legislatures; he does not show that the legislative failure is as pervasive as he suggests that it is. But suppose that he is right. Even if so, it might well be that the supposed irresponsibility of American legislatures is at least in part the result, not (as Posner assumes) the cause, of the relatively independent, policy-oriented approach to interpretation taken by American courts. Perhaps American legislatures opt for ambiguity and passivity, to the extent that they do, partly because the correctivist stance of American courts ensures that underspecified or ill-considered legislation will in effect be supplemented or amended by judicial decisions. To know which of these stories is true, we would have to know the effects on legislatures of judicial formalism (or antiformalism); as a result we cannot rule out formalism as a strategy for American courts. Posner's claim that American judges cannot be formalist turns out to rest not on evidence, but on intuition and an ungrounded, and highly contestable, causal theory about the dynamic interaction of legislatures and courts.

Our point is not that, when all of the relevant variables are considered, the pragmatic judge should be an interpretive formalist. Our point is that Posner's attempt to treat systemic consequences as merely a side-constraint on interpretation, despite its appearance of institutional sensitivity and hard-headedness, is just one more unsuccessful attempt to wall off institutional considerations from interpretive theory. If this most

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<sup>94</sup>Our point here is not, of course, that all discretion can be squeezed out of interpretation or adjudication, even in cases of real statutory ambiguity. Our point is that judicial discretion always has system-level effects that judges should consider; there just is no domain of discretionary decisionmaking whose effects are confined entirely to the case at hand.

<sup>95</sup>Posner, *Pragmatic Adjudication*, *supra* note, at 250-51.



consequentialist of theorists falls by the wayside, the problem of institutional insensitivity is serious indeed.

## II. First Best, Second Best, and Relevant Questions

Thus far we have criticized a wide range of theorists for their failure to engage institutional issues. But there is an obvious objection to our emphasis on those issues. The objection takes this form: Is it useful, or even possible, to evaluate institutional variables without agreeing on a first-best theory? Without such a theory, we will be unable to know what counts as interpretive error. For some textualists, adherence to the text is simply the definition of a correct judgment; there is no independent measure of whether a judge has blundered. It is easy to imagine an advocate of purposive interpretation, or of integrity,<sup>96</sup> as offering the same claim. Perhaps a judge proceeds correctly if and only if she puts the existing legal materials in the best constructive light. If this is so, what's the point of an institutional turn? Isn't it rudderless, or useful only as an adjunct to the first-best account?

### A. A Minimal Response

Our minimal response to these questions is that without institutional analysis, first-best accounts cannot yield any sensible conclusions about interpretive rules. It is impossible to derive interpretive rules directly from first-best principles, without answering second-best questions about institutional performance. Consider an analogy. In economics, the idea of second best demonstrates that if perfect efficiency cannot be obtained, efficiency is not necessarily maximized by approximating the first-best efficiency conditions as closely as possible; the second-best outcome might, in principle, be obtained by departing from the first-best conditions in other respects as well.<sup>97</sup> So too, if an imperfect judge knows he will fall short of the standard of perfection defined by the reigning first-best account of interpretation, it is by no means clear that he should attempt to approximate or approach that standard as closely as possible.

Suppose, for example, that we believe that the meaning of a statute should in principle be established by ascertaining the subjective intentions of those who enacted it. It may nonetheless turn out that fallible judges ought not, simplemindedly, collect and examine as much evidence of subjective intentions as they can find. If the text supplies reliable evidence of intention, perhaps the best evidence, and if judges will mishandle other types of evidence, such as legislative history, perhaps restricting judges solely to the text will increase the likelihood that the judges will accurately ascertain the legislators' intentions.<sup>98</sup> Or suppose we believe that an ideal interpreter would not allow statutory texts to produce absurd results, results not possibly intended by a rational legislator. From this it does not follow that the interpretive rules should license real

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<sup>96</sup>See Dworkin, *supra* note, at 176-78.

<sup>97</sup>See R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 *Rev. Econ. Stud.* 11 (1956).

<sup>98</sup>See Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 *Stan. L. Rev.* 1833, 1862-77 (1998).

judges to prevent unintended absurdity. If judges will often see absurdity when it isn't really present, simply because they misunderstand the substantive policies in play, then allowing them to attempt to correct absurdity might do more harm than good; perhaps they should not make that inquiry at all.

These examples illustrate that, at the very least, institutional analysis is necessary, even if not sufficient, to an adequate evaluation of interpretive methods. It is of course true, in these examples, that some first-best account is needed in order to define judicial error. Our minimal point is that the first-best account, taken by itself, is necessarily incomplete. It is impossible to derive interpretive rules directly from the first-best account, because institutional considerations always intervene. An intentionalist account of statutes' authority, by itself, tells us nothing about whether real judges should consult or not consult legislative history; a theoretical injunction to avoid absurd outcomes, by itself, tell us nothing about whether real judges should be licensed to use an absurd-results doctrine. In any of these settings, certain findings about institutional capacities might cause the proponent of the first-best account either to adopt or reject the interpretive doctrine in question. Theory without institutional analysis spins its wheels, unable to gain traction on the question of what interpretive rules real-world judges should use.

### **B. Bypassing First-Best Disagreements? Incompletely Theorized Agreements on Interpretive Practices**

But we would go further. A second-best assessment of institutional issues might, in some cases, be not only necessary but indeed sufficient to resolve conflicts over interpretive theories, simply because the assessment might lead people with different views on the theoretical issues to agree on the appropriate practices. For example, intentionalists disagree sharply with textualists, at least about the right foundation for interpretation. But they agree on a great deal, and most of the time, their disagreements are quite irrelevant to their resolution of cases. Both agree that the statutory text is the starting point for interpretation, and both accept the view that courts should not lightly depart from the text, which most intentionalists see as strong evidence of intentions. On the current Court, textualists are often able to join opinions written by intentionalists, and vice versa.<sup>99</sup> And given certain empirical and institutional assumptions both the intentionalist and the textualist might even be able to agree upon a rule excluding legislative history. The intentionalist would agree because, on particular empirical premises, the rule would minimize both erroneous determinations of legislative intent and the costs of litigation. The textualist would agree because, on the same premises, the rule would minimize erroneous determinations of ordinary textual meaning and litigation costs. This consensus would be in the nature of an incompletely theorized agreement:<sup>100</sup> interpreters holding different theories of authority might, in this way, be enabled to converge on particular doctrines.

There are many possible examples. In a legal system in which legislators generally corrected absurd outcomes, and in which judicial use of the "absurd results"

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<sup>99</sup> See, e.g., *Dole v. United Steelworkers*, 494 US 26 (1990); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527-28 (1989) (Scalia, J., concurring).

<sup>100</sup> See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

canon was abused to fit with judicial policy preferences, most people would be skeptical of that canon. But if absurd outcomes are uncorrected in some domain, and if courts are careful to apply the canon only in clear cases, what textualist should object<sup>101</sup>? Indeed, institutional analysis might even enable interpreters to choose particular doctrines before, or in place of, choosing a theory of authority. If, on certain empirical findings, it turned out that legislative history should be excluded on any theory of the proper aims of interpretation, then as far as that doctrinal question goes there would be no need to choose a fundamental theory.

So it is uncontroversial that talk of judicial mistakes, and institutional analysis generally, presupposes some underlying, first-best account of interpretation. But the point doesn't cut very deeply, nor does it contravene any of our claims. What modern interpretive theory has largely overlooked is that institutional analysis is a necessary condition for choosing interpretive rules, even if it is not a sufficient condition. And in some domain, it may indeed be a sufficient condition. It is simply a logical blunder to suppose that interpreters must agree upon some *particular* theory of authority in order to agree upon interpretive doctrines. Where an overlapping consensus or incompletely theorized agreement is possible, interpreters may choose rules while bracketing, and remaining agnostic about, first-best accounts. Of course the scope or size of the domain in which such agreement is possible remains uncertain. But that is just one more empirical question for institutional analysis to answer.

### C. Relevant Questions

Let us conclude this section by isolating the ingredients of that analysis, by focusing on the issues, mostly empirical, that must be explored by those evaluating formalism in various legal systems and various domains of law.

- The first question, suggested above, is whether and when formalist decisions that produce clear mistakes will be corrected by the legislature and whether the corrections have low or high costs. Undoubtedly this question will have different answers in different circumstances. We know far too little to know how to answer it in the United States. Is the New York legislature, for example, different on this count from the legislatures of California and Missouri? It would be highly desirable to know much more about the interpretive practices of courts in different states, and to make some evaluation of the different solutions. We might be able, for example, to find state courts that are especially unwilling to make exceptions in cases of evident absurdity—and we might be able to see whether courts of this kind have produced outcomes that have remained legislatively uncorrected. We might also ask whether legislatures are more, or less, likely to oversee and to fix judicial decisions that attempt to follow statutory text.
- A similar inquiry might proceed by comparing judicial and legislative behavior in different domains of substantive law. Perhaps Congress is unlikely to police judicial decisions interpreting the Administrative Procedure Act and the Sherman Act;

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<sup>101</sup>It is noteworthy in this regard that Justice Scalia, the leading textualist on the Court, accepts the idea that absurd outcomes, not reasonably taken as part of Congress' instructions, should not be allowed even if they seem to follow from statutory text. See *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527-28 (1989) (Scalia, J., concurring).

perhaps Congress is entirely willing to oversee judicial decisions in the areas of tax and bankruptcy. If so, different judicial approaches might be sensible in the different areas. Where Congress is inattentive, and appears to rely on courts for long periods of time, an irreverent judicial approach to statutory text might be defensible. Where Congress will correct judicial errors fairly costlessly, formalism is easier to justify. People with different first-best theories might well accept these suggestions. Does our practice, in various domains, suggest that courts are less formal where Congress is less attentive? It would be highly desirable to know. Here there is a large set of empirical projects.

- The second question is whether a nonformalist judiciary will greatly increase the costs of decision, for courts, litigants, and those seeking legal advice. A large issue here involves planning; if nonformal approaches make planning difficult or impossible, there is a real problem.<sup>102</sup> Some areas have a greater demand for planning than others, and hence it might be predicted that courts will perceive themselves as most constrained when planning is necessary. We might expect that the basic rules governing disposition of estates will require a good deal of clarity, and that in view of considerations of fair notice, many courts will be reluctant to interpret criminal statutes flexibly to cover criminal defendants.<sup>103</sup> Is this true? Are generalizations possible about the circumstances in which nonformalism is especially unsettling?
- The third question is whether a formalist or nonformalist judiciary, in one or another domain, will produce mistakes and injustices. Of course people might dispute the content of these categories. One person's error might be another's fidelity to law. But the extent of social disagreement should not be overstated here. It is easy to imagine cases in which courts have used background purposes, not to make sense of the law, but to impose their own views about sound policy.<sup>104</sup> We could know far more than we now do about whether state or federal courts have done well or poorly when they have consulted purposes, attempted to avoid absurdities, or invoked background principles within the legal system. One empirical project would involve comparisons among the courts of different states, to see if large differences can be found in interpretive behavior. Another such project would involve comparisons over time, to see if courts have changed from formalist to nonformalist approaches, or vice-versa, and to see the antecedents and consequences of such shifts.

We do not suggest that these empirical projects would be simple to execute,<sup>105</sup> or that they would lead to uncontroversial normative recommendations. Our central claims are that first-best theories are incomplete without an acknowledgement of the importance of the questions just identified, and that it is not possible to deduce, from large claims

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<sup>102</sup>For a nuanced treatment of the effects of formalism on planning costs in tax law, suggesting that formalism might increase planning costs by encouraging strategic behavior, see David A. Weisbach, *Formalism in the Tax Law*, 66 U. Chi. L. Rev. 860 (1999).

<sup>103</sup>Note that the rule of lenity, calling for courts to interpret statutes favorably to criminal defendants, can be understood as an outgrowth of the fair notice concern.

<sup>104</sup>See the references to pre-New Deal cases, cabining regulatory statutes, in note *infra*.

<sup>105</sup>A good model is provided by *Interpreting Statutes: A Comparative Study* (D. Neil MacCormick and Robert S. Summers 1991). The leading study of congressional overrulings of judicial interpretations is William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331, 334 (1991), and a great deal might be done to build on Eskridge's findings.

about legitimacy or authority, an answer to the reasonably disputed questions of interpretive choice. Precisely because the empirical study of interpretation remains in an extremely primitive state, there is every reason to think that much will be gained by further empirical efforts.

### **III. Implications**

In the foregoing we have argued for something akin to an institutional turn in interpretive theory. What reforms of statutory and constitutional interpretation would such a turn counsel, if it were accomplished? What changes might it produce in public law, if implemented? Here we will sketch, lightly, some possible implications of a resolutely institutional approach to statutory interpretation by courts (Section A), statutory interpretation by agencies (Section B), and constitutional interpretation by courts (Section C). Our aim, as throughout, is not to defend any particular substantive approach to interpretation, but to show how the institutional lens refocuses the relevant questions.

#### **A. Formalism and Empiricism**

Implicit in much of Part II was the straightforward idea that interpretive formalism might best be defended on empirical and institutional grounds. Here we will amplify that idea by indicating the line of argument that such a defense would have to take. We will focus on courts and legislatures, bracketing important questions about agency interpretation and judicial interpretation in a world of agencies, questions taken up in Section B.

A good beginning is to distinguish two senses of the protean word “formalism.” In one sense, formalism refers to a type of justification for legal rulings or doctrines, namely a conceptualistic or essentialist justification. For a large-scale example, consider the Langdellian claim that law, properly so-called, must necessarily be organized by deduction from self-evident first principles. For a small-scale example, consider the Supreme Court’s occasional embrace of conceptualistic jurisprudence in constitutional law, such as the essentialist distinction between “manufacturing” and “commerce,”<sup>106</sup> or between “legislative” and “executive” power.<sup>107</sup>

In a very different sense, explicated by Frederick Schauer among others,<sup>108</sup> formalism refers to a particular decisionmaking strategy that courts might follow. Here courts make a second-order decision<sup>109</sup> to decide cases, where possible, according to rules rather than standards, placing great emphasis upon the value of legal certainty and the value of adhering to common understandings of constitutional and statutory commands. On this account, a judicial preference for formalist decisionmaking need not and cannot rest upon a deduction from any superior source of principles, such as the Constitution or

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<sup>106</sup>United States v. E.C. Knight Co., 156 US 1 (1895). On the similarities and differences between Langdellian formalism and the formalism of the pre-New Deal Court, see Thomas C. Grey, *The New Formalism* 6-9 (unpublished draft 2002).

<sup>107</sup>INS v. Chadha, 462 US 919 (1983).

<sup>108</sup>See Frederick Schauer, *Playing By the Rules: A Philosophical Examination of Rule-Based Decisionmaking in Law and in Life* (1991). See also Grey, *supra*, at 4 (identifying a strand of formalism that emphasizes rule-following and legal determinacy).

<sup>109</sup>See Cass R. Sunstein and Edna Ullmann-Margalit, *Second-Order Decisions*, 110 *Ethics* 46 (1999)..

some definition of law's essence. Formalism is justified, if at all, by reference to a claim that formalism will improve the legal system in relevant respects, with improvement defined by reference to social goods exterior to law itself.

After the institutional turn, we will say, formalism in the second sense can be seen as a potentially sensible decisionmaking strategy for courts interpreting statutes. Formalism in this sense would counsel that courts stick close to the surface meaning of texts, where possible, and place great emphasis on promoting, *ex ante*, the clarity of legal commands and the intelligibility of the default rules against which legislatures must draft statutes in the first instance. The formalist judge would generally decline to attempt to mold statutes to fit their purposes or intentions, would hesitate to declare the apparent import of statutory text "absurd," and would narrow the range of outside sources admissible to impeach textual meanings. It is no objection to formalism, so conceived, to parrot the banality that texts are "clear" only by reference to the practices of some linguistic community. That is certainly true, but it doesn't mean that no text is clear.<sup>110</sup> If so, then courts might choose to be formalists, not by pretending that all texts are self-interpreting in some context-free sense, but on good consequentialist grounds, thinking that things will be better if courts emphasize the surface or apparent meaning of texts (as constituted by relevant assumptions and practices), rather than impeaching them by reference to other sources and considerations.

The significance of the institutional turn, on this view, is just to make clear that formalism in the second, operational sense cannot itself be justified by formalism in the first, justificatory sense. Formalism cannot be justified (or opposed) by an appeal to self-evident constitutional principles, by an appeal to the nature of democracy or lawmaking, or by an appeal to a definition of law. Conversely, however, formalism as a decisionmaking strategy in statutory interpretation, or for that matter in any other setting, can be justified or opposed (solely) on the basis of a forward-looking assessment of the consequences of the competing alternatives. Just as Manning errs by arguing for formalism by reference to formal sources, so Eskridge errs by engaging Manning on the same terrain in order to oppose formalism.<sup>111</sup> The correct ground for opposing formalism is that antiformalism will produce better consequences for public law than formalism would.

Why might it be true (or false) that formalism in the second sense would be the best interpretive method for courts to follow? What would we have to know, about the consequences of the competing alternatives, to know whether courts should subscribe to formalism? The variables are numerous, but can be herded into two large categories: the performance of the interpreting judges, and the systemic effects of the judges' interpretive rules on other actors. The former category subsumes the costs of mistaken rulings, of Type I and Type II errors, and also the costs of decisionmaking itself. The latter category subsumes a range of questions about the effect of the judiciary's interpretive rules on legislative drafting costs and the costs of administrative rulemaking,

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<sup>110</sup>See Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 191 (1987) ("No text is clear except in terms of a linguistic and cultural environment, but it doesn't follow that no text is clear.").

<sup>111</sup>See *supra* notes (recounting this debate).

on citizens' and agencies' compliance with law, and on the behavior of other courts, including both lower courts and future courts at the same level of the legal hierarchy.

A commitment to interpretive formalism, in the operational sense, would follow from particular views about the values of these two (classes of) variables. On a dim assessment of the performance of interpreting judges, for example, interpretive formalism will appear more attractive than antiformalism. Relevant here are many questions about the manageability of alternative interpretive sources, such as legislative history and canons of construction, and about the limits of judicial information. A court interpreting under tight constraints of time and information may do better to ignore or subordinate interpretive sources, like legislative history, whose large volume and unfamiliar components could often provoke judicial error. For similar reasons a court staffed by generalist judges might do better, all else equal, by sticking to the apparent or common meaning of texts, by and by eschewing empirically ambitious innovations in statutory policy. A specialized court, by contrast, would often do better with antiformalist interpretive techniques that give free play to the court's superior appreciation of legislative intentions, interest group deals, statutory policies, and social and economic consequences. (In Section B we will argue, along the same lines, that specialist administrative agencies might often wield nontextualist interpretive techniques more successfully than generalist courts; specialized courts are an intermediate case).

So too, interpretive formalism will look more attractive on certain empirical assumptions about feedback effects on legislative behavior, or system effects more generally. Suppose that judicial formalism would produce more careful legislative drafting, *ex ante*, and would encourage the development of corrective mechanisms, *ex post*, such as the "Corrections Day" procedure recently instituted by the House of Representatives.<sup>112</sup> These possibilities are the ones overlooked by Posner in his claim that the sloppiness of American legislatures requires American courts to adopt an antiformalist stance.<sup>113</sup> It is possible that the effects run in the other direction; to the extent that they do, formalism should be preferred as the approach that will push the interpretive system, taken as a whole, in desirable directions.

Law professors, who are usually highly specialized in some particular field or other, often miss these points about the limited competence of generalist judges.<sup>114</sup> It is very common to see a law professor complaining that some generalist court has blundered in its latest interpretation of the specialized statute that the professor has made a career of studying; usually the blunder occurs because the court has, in the critic's view, interpreted "woodenly," "mechanically," or "formalistically," with insufficient attention to history, policy and nuance. In such cases there is a kind of selection bias in play. By

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<sup>112</sup>See John Copeland Nagle, *Corrections Day*, 43 *UCLA L. Rev.* 1267 (1996).

<sup>113</sup>See *supra* note

<sup>114</sup>See, e.g., Karen M. Gebbia-Pinetti, *Interpreting the Bankruptcy Code*, 3 *Chapman L. Rev.* 173 (2000) ("Advocates, lower court judges, and bankruptcy scholars can, and should, help the Court better understand the music of the Bankruptcy Code" through "thoughtfully written briefs, opinions, and law review articles that place the text of disputed Bankruptcy Code provisions in the context of the linguistic and substantive structure of the Bankruptcy Code" and "place the text in the context of the development of bankruptcy doctrine over time."). For a sophisticated exposition of the costs and benefits of formalist interpretation by generalist judges in a specialized area, see Douglas G. Baird & Robert K. Rasmussen, *Boyd's Legacy and Blackstone's Ghost*, 1999 *Sup. Ct. Rev.* 393.

interpreting woodenly, sticking close to apparent meaning, the court increases the risk of one sort of error (the sort the critic castigates). But the court decreases the risk of another, opposite sort of error—the error that an intellectually ambitious antiformalist court would make by misreading statutory purposes, misidentifying sensible text as absurd, or mispredicting the consequences of its rulings. Where courts are more often formalist than not, the law professor rarely sees that kind of error and rarely complains about it.

There is a useful analogy to ethics here. The choice between interpretive formalism and antiformalism has some of the same intellectual structure as the choice between rule-utilitarianism and act-utilitarianism. The rule-utilitarian will often be placed in the awkward position of defending acts whose immediate effect is, when viewed in isolation, socially detrimental. So too, it is the easiest thing in the world for law professors to mention specific cases in which formalism produces blunders, relative to a nuanced antiformalism that is sensitive to the particulars of cases. In both legal and ethical settings, however, the second-order, rule-based decisionmaking strategies look more appealing where the decisionmaker cannot be trusted to identify socially beneficial acts, or appealing conceptions of statutory purpose.

Our emphasis on institutional considerations derives some support from comparing interpretation in England with that in the United States.<sup>115</sup> In England, interpretation is far more rigid than in the United States. The British Parliament is less likely to delegate discretionary authority to judges. For their part, English judges tend to treat statutes as rules, generally refusing to investigate whether the particular application of the rule makes sense as a matter of policy or principle. Institutional differences help explain the situation. In England, drafting is done by an Office of Parliamentary Counsel, a highly professional body with considerable experience in ensuring against inadvertent mistakes. The Parliamentary Counsel attempts to promote a uniform style of drafting. The Counsel is also closely attuned to the methods of English judges. The judges' practice is itself uniform and relatively simple. Parliament revisits statutes with some frequency, and it fixes mistakes that are shown as such when particular cases arise.<sup>116</sup>

In the United States, by contrast, there is no centralized drafting body and hence less uniformity in terminology. There is less professionalization in the production of statutes. In America, the drafters of legislation are multiple and uncoordinated. Congress appears only intermittently aware of the judges' interpretive practices, which are themselves not easy to describe in light of the sheer size of the federal judiciary and the existence of sharp splits, on just this point, within the Supreme Court. It would be wrong to say that Congress is oblivious to judicial decisions interpreting statutes.<sup>117</sup> But Congress is not in the business of responding rapidly and regularly to particular cases in which interpretations, literal or otherwise, tend to misfire. Hence both law-making and law-interpreting practice are very different here than they are in England.

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<sup>115</sup>We draw in this section on P. S. Atiyah and Robert S. Summers. *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory and Legal Institutions*. (New York: Oxford University Press, 1987).

<sup>116</sup>We are here generalizing, and eliding a great deal of important detail. The English courts, for example, in the recent past abandoned their traditional practice of refusing to consult Parliamentary history. See *Pepper v. Hart*, 1 All E.R. 42 (1993).

<sup>117</sup>See William N. Eskridge, *Dynamic Statutory Interpretation* (1994).



This brief description connects well with the suggestion that the case for formalism depends on institutional competence and on empirical matters. Roughly speaking, the English lawmaking system displays active, professionalized legislative oversight and a formalist judiciary, while the American lawmaking system is different on both counts. None of this suggests that institutional capacities are somehow irrevocably fixed in the two countries, or that American courts must necessarily adopt an antiformalist stance. That is the mistaken view that Richard Posner advances; as we have seen, his view overlooks that institutional capacities might themselves be affected by the interpretive rules courts use, so that the adoption of a formalist stance by American courts might spur American legislatures to increased activity. The important point is just that the two legal systems are highly responsive to their own distinctive institutions. The debate over interpretive formalism turns, most critically, on the structure of the lawmaking system rather than on claims about the nature of communication, democracy, or jurisprudential principles.

## **B. Agencies and Courts**

The *Chevron* question. How should courts approach agency interpretations of law? Should courts decide legal questions on their own, or should they give some weight to the views of the relevant agency? For many years the answer to this question was sharply disputed. It received an authoritative answer in *Chevron v. NRDC*,<sup>118</sup> which sets out a two-step inquiry. Under step one, the question is whether Congress has “directly decided the precise question at issue,” or whether Congress has unambiguously banned what the agency proposes to do.<sup>119</sup> Under step two, courts ask whether the agency’s interpretation of the statute is reasonable.<sup>120</sup> The result is that under *Chevron*, agency interpretations of law should be upheld if they are reasonable and if they do not contradict the clear instructions of Congress. The court is not authorized to reject the agency’s interpretation merely because of disagreement.

How is *Chevron* to be evaluated? It is generally agreed that courts must follow congressional instructions on the question of deference--that if Congress has unambiguously instructed courts to defer to agency interpretations of law, or not to do so, courts must do as Congress says.<sup>121</sup> With this premise, many people have defended *Chevron*, or challenged *Chevron*, by reference to enacted law. Some urge, for example, that the Administrative Procedure Act, which asks courts to “decide relevant questions of law,” argues in favor of an independent judicial judgment on the legal question. But on reflection, statutory law is generally indeterminate on the crucial question. To be sure, courts are told to decide relevant questions of law; but under statutes in which agencies are exercising delegated authority, perhaps the meaning of the relevant law is what agencies say that it is. At the very least, this is a plausible reading of statutes that delegate rulemaking and adjudicative authority to agencies. Plausible, but not necessary; candid

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<sup>118</sup>467 US 837 (1984).

<sup>119</sup>*Id.* at 842.

<sup>120</sup>*Id.*

<sup>121</sup>See Henry Monaghan, *Marbury and the Administrative State*, 83 Colum L Rev 1 (1983).

observers, on all sides, acknowledge that Congress has not authoritatively required or forbidden the *Chevron* principle.<sup>122</sup>

We think that the best defenses of *Chevron* attempt to read ambiguous congressional instructions in a way that is well-attuned to institutional considerations. As the simplest illustration, consider Peter Strauss' defense of *Chevron*.<sup>123</sup> Strauss emphasizes that the Supreme Court is able to resolve a small percentage of cases involving ambiguities in regulatory law. He suggests that because of the sheer number of courts of appeals, independent judicial interpretations of regulatory law would make it extremely difficult to ensure national uniformity. If *Chevron* is followed faithfully, agency interpretations will be authoritative unless there has been clear error; and this means that if the EPA, the FCC, or the NLRB interprets its governing statute in a particular way, national law is likely to be genuinely national. If *Chevron* were not the law, and were not followed faithfully, it is inevitable that regulatory law—involving, for example, the environment, communications, and labor-management relations—will be highly variable across the country. *Chevron* therefore works against balkanization of federal law.

This consideration need not be decisive. But other institutional points are relevant. The resolution of statutory ambiguities must, in many cases, depend on judgments of fact and value. Does the word “source,” as used in the Clean Air Act, refer to particular smoke stacks, or to plants? Does the word “harm,” as used in the Endangered Species Act, refer to intentional or reckless killings, or destruction of habitat as well?<sup>124</sup> It is reasonable to think that by virtue of their specialized competence and relative accountability, agencies are in a better position to make these decisions than courts.

In making this suggestion, we mean to draw attention to two ways of analyzing the *Chevron* problem. The first, and perhaps the most common, is to speak in terms of constitutional considerations, separation of powers, and congressional instructions. We agree that if any of these were clear, the question would be at an end. But here, as in many other contexts, the relevant sources of law do not resolve the choice of interpretive choice. The second way of analyzing *Chevron* is frankly institutional. Our submission here is that the institutional arguments, however they might be resolved, are the best way to think about the problem. And this submission has broader implications. For example, it raises the possibility that the *Mead* decision,<sup>125</sup> depriving interpretive rules of *Chevron* deference, might be wrong, simply because the institutional variables call for deference to interpretive rules too.

A simple submission. Now let us link two parts of the discussion thus far. Suppose we conclude that for many American courts, much of the time, some form of textualism is the best approach to statutory interpretation. Suppose that we also conclude that *Chevron* is correct. Must agencies be textualists? This question has no clear answer under current law. We urge here that attention to institutional considerations can show

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<sup>122</sup>See, e.g., Antonin Scalia, *Judicial Deference to Agency Interpretations of Law*, 1989 Duke LJ 511.

<sup>123</sup>Peter Strauss, *One Hundred Fifty Cases Per Year*, 87 Colum L Rev 1093 (1987).

<sup>124</sup>*Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 US 687 (1995).

<sup>125</sup>*United States v. Mead Corp.*, 121 S Ct 2164 (2001).

why agencies might be given the authority to abandon textualism even if courts should be denied that authority.

Two points are relevant here. First, agencies are likely to be in a better position to decide whether departures from the text actually makes sense. This is so mostly because agencies have a superior degree of technical competence; but it is not irrelevant that agencies are subject to a degree of democratic supervision. Second, agencies are likely to be in a better position to know whether departures from the text will seriously diminish predictability or otherwise unsettle the statutory scheme. If agencies are not concerned about the risk of unsettlement, there is some reason to think that the risk is low. Our suggestion is that because of these points, the case for formalistic interpretation from judges might well be stronger than the case for formalistic interpretation by agencies.

In fact a number of decisions seem to show an implicit agreement with this point. The leading case is *American Water Works v. EPA*.<sup>126</sup> The case involved a creative approach, by the Environmental Protection Agency (EPA), to the regulation of lead in drinking water. The Safe Drinking Water Act requires the EPA to produce maximum contaminant level goals (MCLG) for water contaminants.<sup>127</sup> These goals must “be set at the level at which no known or anticipated adverse effects on the health of persons occur,” with an adequate margin of safety.<sup>128</sup> The EPA’s MCLG for lead was zero, because no safe threshold had been established. Once an MCLG is established, EPA is required to set a maximum contaminant level (MCL), “as close to the maximum contaminant level goal as is feasible.”<sup>129</sup> The EPA is authorized not to set a maximum contaminant level, and to require “the use of a treatment technique in lieu of establishing” that level, if (and only if) it finds “that it is not economically or technologically feasible to ascertain the level of the contaminant.”<sup>130</sup>

For lead, then, the EPA would be expected to set its MCL as close as “feasible” (economically and technologically) to the MCLG of zero, except if it was not “feasible” to ascertain the level of lead contamination (and no one urged that the task of ascertainment was not feasible). But this is not what EPA did, because of some distinctive features of the lead problem. Source water is basically lead-free; the real problem comes from corrosion of service lines and plumbing materials. With this point in mind, EPA refused to set any MCL for lead. The EPA reasoned that an MCL would require public water systems to use extremely aggressive corrosion control techniques, which, while economically and technologically “feasible,” would be counterproductive, because they would increase the level of other contaminants in the water. What appeared to be the legally mandated solution would make the water less safe, not more so. The EPA therefore chose a more subtle and modest approach. Instead of issuing an MCL, it required all large water systems to institute certain corrosion control treatment, and required smaller systems to do so if and only if representative sampling found significant lead contamination.

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<sup>126</sup>40 F.3d 1266, 1271 (DC Cir 1994).

<sup>127</sup>42 USC 300g-1(b).

<sup>128</sup>42 USC 300g-1(b)(4)(a).

<sup>129</sup>42 USC 300g-1(b)(4)(2).

<sup>130</sup>42 USC 300g-1(b)(6)(D).

The EPA did not contend that an MCL was not “feasible” to implement, nor did it argue that it was not “feasible,” in the economic or technological sense, to monitor lead levels in water. Nonetheless, the court upheld the agency’s decision.<sup>131</sup> The court accepted the EPA’s seemingly implausible suggestion that the word “feasible” could be construed to mean “capable of being accomplished in a manner consistent with the Act.” The court said that “case law is replete with examples of statutes the ordinary meaning of which is not necessarily what the Congress intended,” and it added, pointedly and controversially, that “where a literal meaning of a statutory term would lead to absurd results,” that term “has no plain meaning.”<sup>132</sup> Because an MCL would itself lead to more contamination, “it could lead to a result squarely at odds with the purpose of the Safe Drinking Water Act.”<sup>133</sup>

The court therefore accepted EPA’s view “that requiring public water systems to design and implement custom corrosion control plans for lead will result in optimal treatment of drinking water overall, i.e. treatment that deals adequately with lead without causing public water systems to violate drinking water regulations for other contaminants.”<sup>134</sup> It should be plain that the court permitted a quite surprising and even countertextual interpretation of the Act. The statutory terms seem to make no room for the EPA’s refusal to issue an MCL. In upholding the EPA’s refusal, the court authorized the agency to avoid an unreasonable result.

Qualifications. We believe that agencies should not be required to interpret statutes in the same way as courts; but any judgment on this point itself depends on contextual factors. If, for example, Congress would immediately and costlessly correct the problems that would be produced by formalism, then there would be much less need to allow interpretations of the kind upheld in American Water Works. In a legal universe in which Congress can be expected to correct the problem in that case—if it is indeed a problem—the pressure for agency correction would be greatly reduced. And there are other possible problems. Suppose that, in a world not so very different from our own, agencies are systematically distrusted, in part because they are not technically expert after all, in part because they are highly susceptible to the power of self-interested private groups, moving their decisions in predictable directions. In such a world, the argument for purposive agency interpretation, in the face of statutory text, would be very weak. And in fact it is not difficult to imagine a legal system in which courts are, and should be, authorized to engage in purposive interpretation, and in which agencies must follow the text unless courts specifically instruct them not to do so.

With these points we are able to have a better understanding of some continuing disputes about judicial review of agency action. Notwithstanding American Water Works and similar decisions, a number of cases insist that agencies adhere closely to statutory text. If these outcomes are to be defended, it must be with an expectation that Congress will correct the resulting problems, or with a belief that agencies, authorized to depart from text, will move regulatory law in undesirable directions.

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<sup>131</sup> American Water Works v. EPA, 40 F.3d 1266, 1271 (DC Cir 1994).

<sup>132</sup> Id.

<sup>133</sup> Id.

<sup>134</sup> Id.

Another contextual and empirical factor to consider is whether a regime of purposive interpretation by agencies and textualist interpretation by courts would be stable. We might imagine, pessimistically, that the anticipation of judicial review by textualist courts would cause agencies to adopt textualist methods, simply to maximize the chances of having their decisions sustained; agencies' authority to depart from textualism would then become strictly nominal. If so, it would provide a reason, all else equal, for courts and agencies to adopt the same interpretive approach, although we would still face the important choice between across-the-board textualism or across-the-board purposivism. But we might also imagine, more optimistically, that reviewing courts defer to agencies' adoption of a purposive interpretive style, even if the same courts would adopt a textualist approach when deciding cases with no agency in the picture. *Chevron*, after all, can easily be understood to allow the agency some latitude to choose between interpretive approaches, and to vary from the approach the court itself would adopt. In this scenario, the agency would have no need to mimic the judges' own interpretive approach, so a regime of agency purposivism and judicial textualism would not be excessively unstable. These possibilities, like the considerations above, exemplify the sort of institutional questions that a fully-developed analysis of agency interpretation must ask.

Arbitrariness and ossification: a final note on administrative law. Under the Administrative Procedure Act, courts are required to set aside agency action that is "arbitrary" or "capricious." But what do these terms mean? How should courts try to answer that question? For much of the modern period of administrative law, the answer has come from accounts of "agency failure." Drawing attention to administrative susceptibility to powerful private groups, many critics, both on and off the federal bench, have endorsed the idea that courts should take a "hard look" at agency action, in order to reduce factional influences and promote better policymaking.

What has been ignored, for much of the life of the resulting debate, are two sets of risks. The first involves judicial error, partly a product of sheer ignorance.<sup>135</sup> The second and more fundamental involves systemic effects, above all in the form of large-scale alterations in administrative behavior, produced by the very fact of "hard look" review. It is now well-documented that such review has contributed to the "ossification" of notice-and-comment rulemaking, which now takes years, in part as a result of the effort to fend off judicial challenges. In light of the risk of invalidation, many agencies have turned away from notice-and-comment rulemaking altogether—with NHTSA, for example, attempting to promote automobile safety, for example, through ex post recalls, which is generally regarded as a senseless way to proceed. Our claim here is that the analysis of hard look review is ludicrously incomplete if it does not pay attention to institutional considerations of this kind. And indeed, much of the most impressive current work in administrative law attempts to incorporate judicial fallibility, and dynamic effects, into an account of how to assess whether agency action counts as "arbitrary" under the APA.<sup>136</sup>

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<sup>135</sup>See Stephen Breyer, *Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy*, 91 Harv. L. Rev. 1833 (1978).

<sup>136</sup>See, e.g., Richard Pierce, *Seven Ways to Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59 (1995).

### C. Constitutional Interpretation

Overview. Our principal recommendation has been that interpretive theory in legislation and administrative law should take an institutional turn. What of constitutional interpretation? Here we will say that academic theory about constitutional law does far better, on the score of institutional sensitivity, than academic theory about statutory interpretation. Constitutional theorists have, in part, already taken the institutional turn, with important work beginning in the 1970s. At the same time, the turn is as yet incomplete and has not been explicitly recognized as such; the treatment of basic questions in constitutional law, such as judicial review, has always suffered from institutional blindness, and there remain important pockets of contemporary theory that are resolutely oblivious to second-best questions.

We will begin by emphasizing the extent to which the foundations of interpretive theory in constitutional law are deficient on the score of institutional sensitivity. Here the critical case is, of course, *Marbury v. Madison*<sup>137</sup> and its inadequate (because excessively abstract and conceptual) justification for judicial review. After sketching the partial and salutary turn to institutional analysis in modern constitutional theory, and especially in the most recent work, we then discuss several important theorists who exemplify the remaining, unreconstructed resistance to institutional analysis: Ronald Dworkin, Akhil Amar, and Lawrence Lessig. We mean to press claims that parallel our claims about statutory interpretation. First, at a minimum, accounts of constitutional interpretation are incomplete without reference to institutional capacities. Second, and more ambitiously, institutional considerations may enable constitutional lawyers to converge upon interpretive approaches, while bracketing first-best accounts of constitutionalism or simply remaining agnostic about them.

*Marbury v. Madison.* Is judicial review desirable? Does the Constitution call for it? These are old and much-debated questions. Our modest goal here is to do draw attention to a serious problem: Many of the most well-known arguments on behalf of judicial review, including those in *Marbury* itself, are blind to institutional considerations. They ignore the risk of judicial error and the possibility of dynamic consequences. In American law, Chief Justice John Marshall might even be deemed the father, or the founder, of the kind of institutional blindness that we are criticizing.

Indeed, what is most striking about Marshall's arguments for judicial review is that they depend on a series of fragile textual and structural inferences, ignoring the institutional issues at stake. Much of Marshall's emphasis is on the unobjectionable claim that the constitution is "superior paramount law"; but it is possible to accept that claim without also thinking that courts are authorized to strike down statutes that violate that law. A constitution is "superior paramount law" in many legal systems that offer little or no judicial review of legislation. When Marshall famously asserts that "[it] is emphatically the province and duty of the judicial department to say what the law is,"<sup>138</sup> he is offering a conclusion, not an argument on its behalf. Marshall invokes the

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<sup>137</sup>5 U.S. (1 Cranch) 137 (1803).

<sup>138</sup>*Id.* at 177.

Supremacy Clause,<sup>139</sup> which certainly mean that a law repugnant to the Constitution must yield; but that clause offers nothing in support of the institutional claim that courts have the power to strike down laws that, in their judgment, are unconstitutional. Marshall's textual and structural inferences are very weak, and no source of constitutional meaning clearly settles the question. Any evaluation of Marshall's conclusion must depend, in large part, on institutional considerations.

If it appears odd to suggest that judicial review need not be a part of the American constitutional fabric, a reading of the historical materials should dispel the appearance.<sup>140</sup> Larry Kramer urges that for the framers, the "Constitution was not ordinary law, not peculiarly the stuff of courts and judges." Instead it was "a special form of popular law, law made by the people to bind their governors."<sup>141</sup> For many members of the revolutionary generation, constitutional principles were subject to "popular enforcement,"<sup>142</sup> that is, public insistence on compliance with the Constitution, rather than judicial activity. "It was the legislature's delegated responsibility to decide whether a proposed law was constitutionally authorized, subject to oversight by the people. Court simply had nothing to do with it, and they were acting as interlopers if they tried to second-guess the legislature's decision."<sup>143</sup> Kramer traces the controversial early growth of the practice of judicial review, with many seeing it as an "act of resistance." At the founding, a "handful of participants saw a role for judicial review, though few of these imagined it as a powerful or important device, and none seemed anxious to emphasize it. Others were opposed . . . . The vast majority of participants were still thinking in terms of popular constitutionalism and so focused on traditional political means of enforcing the new charter; the notion of judicial review simply never crossed their minds."<sup>144</sup>

In Kramer's account, constitutional limits would be enforced not through courts, but as a result of republican institutions and the citizenry's own commitment to its founding document. Kramer raises serious doubts about the understanding in Marbury v. Madison and in particular about judicial supremacy in the interpretation of the Constitution. He suggests that for some of the framers, judicial review was "a substitute for popular resistance" and to be used "only when the unconstitutionality of a law was clear beyond dispute."<sup>145</sup> What is important for our purposes is the idea that at the American founding, the supremacy of the Constitution was clear, but judicial enforcement was not, in part because of ambivalence about which institutions would be well-suited to ensuring compliance.

Of course judicial review is, at present, constitutionally respectable to say the least; we do not mean to argue against it here. But it is easy to imagine constitutional systems that would refuse to give judges the power to strike down legislation. If judges are corrupt, biased, poorly-informed, or otherwise unreliable, it would hardly make sense to entrust judges with that power. And if legislative officials could be trusted to be

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<sup>139</sup>See U.S. Const. Art. VI, cl. 2 ("Laws of the United States" made "in pursuance of [the Constitution] . . . shall be the Supreme Law of the Land").

<sup>140</sup>See Larry D. Kramer, *We the Court*, 115 Harv. L. Rev. 1 (2001).

<sup>141</sup>*Id.* at 10.

<sup>142</sup>*Id.* at 40.

<sup>143</sup>*Id.* at 49.

<sup>144</sup>*Id.* at 54.

<sup>145</sup>*Id.* at 74.

faithful to constitutional commands, the need for judicial review would be greatly diminished. Or suppose that a constitutional system feared, with reason, that the power of judicial review would weaken the attention paid by other institutions to constitutional requirements—so that judicial review, it was thought, would weaken the grip of constitutional limitations on other branches. This conjecture, empirical in character, has been made in the United States as elsewhere.<sup>146</sup> A system of this kind might be accepted by people who believe emphatically in constitutionalism, but who think that judicial review will tend to undermine rather than to promote its goals. Hence the analysis of the *Marbury* question itself must depend, in part, on the same considerations that we have been stressing throughout.

It is possible to draw a general conclusion. In many domains, the question is posed whether one institution should review the acts of another, and if so, the intensity with which that review should occur. This question arises, for example, in the context of constitutional challenges; attacks on criminal convictions; review of punitive damage awards by juries; appellate review of trial court findings; and judicial review of agency decisions of law, fact, and policy. In all of these areas, it is important to pay close attention to institutional variables. The costs of error and the costs of decision are crucial. It is necessary to examine dynamic effects. There is no sensible acontextual position on the question whether review, of one institution or another, should be intense or deferential, or indeed available at all.

Modern constitutional theory. We do not mean to claim that *Marbury's* institutional blindness fairly represents all of subsequent constitutional theory in America. Many important strands of post-*Marbury* theory have been grounded in accounts of institutional capacities. Most familiar is Thayer's idea that the Constitution might properly be treated, or interpreted, in one way by a legislature and another way by a court, in light of the distinctive characteristics of the interpreting institution. Among the modern refinements of this idea are Alexander Bickel's legal process account of the distinctive attributes of courts as constitutional interpreters, although that account glorified courts' insulation ("the ways of the scholar") while overlooking the informational deficits that insulation produces;<sup>147</sup> and Lawrence Sager's idea that legislatures might properly be charged with responsibility for underenforced constitutional norms. In general, it is unsurprising that a body of theory pervasively structured around the countermajoritarian difficulty should display some sensitivity to institutional role, if only in the stylized, abstract manner of the legal process tradition. In this light, it is perhaps most accurate to say that constitutional theory has always taken some account of the institutional determinants of interpretation.

Indeed, new contributions, of the 1990s and after, have displayed an increasingly sophisticated treatment of institutional attributes and capacities. First, lawyer-economists like Neil Komesar<sup>148</sup> and Einer Elhauge<sup>149</sup> drew upon transaction-cost economics and

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<sup>146</sup>See James Bradley Thayer, *John Marshall* 107 (1901).

<sup>147</sup>Donald Horowitz, *The Courts and Social Policy* (1977).

<sup>148</sup>Neil K. Komesar, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

<sup>149</sup>Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31 (1991).



interest-group theory to refute simple arguments for an aggressive judicial posture in constitutional cases—what Komesar calls “single-institutional” arguments that fail to compare all relevant costs and benefits of the available institutional alternatives.<sup>150</sup> Consider the standard line that judges should intervene to correct failures in political markets. Formulated in a traditional legal process vocabulary by John Hart Ely, this view was translated into the vocabulary of public choice by libertarians and free-marketers in the 1980s. Komesar and Elhauge, however, make clear that process failures in the form of rent-seeking activity and differential interest-group access afflict the courts as well (Elhauge), and that whatever relative insulation judges enjoy comes at the price of severe informational deficits (Komesar), so that the judges are prone to stumble into empirical pitfalls. The premise of comparative judicial advantage underlying the standard line, then, is at best questionable, and defending that line has become far more complicated business.<sup>151</sup>

A second, currently influential strand in recent constitutional theory might be called neo-Thayerian; it is represented by Jeremy Waldron,<sup>152</sup> Mark Tushnet,<sup>153</sup> and Larry Kramer,<sup>154</sup> among others. Waldron has examined how legislative institutions help to resolve otherwise intractable political disagreements; Tushnet has revived and enriched the Thayerian concern with the debilitating effects of judicial guardianship on legislative performance; and Kramer, as we have seen, has worked to dispel overheated claims on behalf of ambitious, interventionist judicial review, especially by impeaching its historical pedigree. In general, the stylized abstractions about legislative and judicial capacities familiar to legal process have been improved by successive doses of realism and analytic sophistication, especially by the neo-Thayerians on the legislative side and by the lawyer-economists on the judicial side—although both camps have enriched our understanding across the whole institutional system, as is fitting for approaches that emphasize comparative institutional analysis and the avoidance of nirvana fallacies.

These strands of recent constitutional theory might be described as involving institutional competence writ large; their focus is on the large-scale allocation of responsibility, for policymaking and lawmaking, between or among the courts and political branches. To these salutary developments we wish to add considerations of institutional competence writ small. To the extent that interpretive authority over certain questions has been allocated to the courts by some background theory of comparative competence, there remains the question what interpretive rules courts should use in constitutional cases. We will claim that important strands of constitutional theory still attempt to answer this last question in an institutional vacuum. The essential defect in these accounts is that they are entirely insensitive to the identity and capacities of the interpreter; they treat the interpreter, explicitly or implicitly, as a theorist much like the constitutional theorist himself, rather than a judicial bureaucrat deciding cases under constraints of time, information and expertise. We will consider three examples: the

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<sup>150</sup>Komesar, *supra* note 17, at 6.

<sup>151</sup>But see Thomas W. Merrill, *Does Public Choice Theory Justify Judicial Activism After All?*, 21 HARV. J.L. & PUB. POL’Y 219, 221-22 (1997) (responding to Elhauge and Komesar).

<sup>152</sup>See Jeremy Waldron, *Law and Disagreement* (2000).

<sup>153</sup>See Mark Tushnet, *Taking the Constitution Away from the Courts* (1999).

<sup>154</sup>See Larry D. Kramer, *We the Court*, 115 Harv. L. Rev. 1 (2001).

interpretive accounts of Ronald Dworkin, Akhil Amar, and Lawrence Lessig. In important respects these theorists perpetuate, even amplify, the flaws in *Marbury*'s logic.

Dworkin (redux), and a philosophical brief. Dworkin's approach to constitutional law is nicely illuminated by an unusual brief submitted to the Supreme Court in the assisted suicide cases, a document widely known as "The Philosophers' Brief."<sup>155</sup> The brief bears Dworkin's distinctive mark, and indeed Dworkin is listed as lead counsel. The Philosophers' Brief offers an ambitious argument, one with considerable appeal. It says that some "deeply personal decisions pose controversial questions about how and why human life has value."<sup>156</sup> In a free society, individuals must be allowed to make those decisions for themselves, out of their own faith, conscience, and convictions." The brief urges that distinctions between "omissions" (failing to provide continued treatment) and "acts" (providing drugs that will produce death) are "based on a misunderstanding of the pertinent moral principles." Drawing on the abortion cases, the brief says that every person "has a right to make the 'most intimate and personal decisions central to person dignity and autonomy,'" a right that encompasses "some control over the time and manner of one's death."<sup>157</sup> The brief thus urges the Court to declare a constitutional right to physician-assisted suicide. Dworkin's personal gloss on the brief says that it "defines a very general moral and constitutional principle--that every competent person has the right to make momentous personal decisions, which invoke fundamental religious or philosophical convictions about life's value for himself."<sup>158</sup>

Simply as a matter of political morality, the argument in the Philosopher's Brief is certainly reasonable, and it cannot easily be shown to be wrong. But suppose that the Court was convinced by the argument in principle; should the Court have held that there is a right to physician-assisted suicide? This is not so clear. Before accepting the argument, it is necessary to ask about judicial competence to evaluate moral arguments of this sort, and also to ask facts and incentives. Perhaps the Court is not especially well-equipped to evaluate those arguments; and if consequences matter, the moral arguments might not be decisive in light of the risk that any right to physician-assisted suicide would, in practice, undermine rather than promote the autonomy of patients.<sup>159</sup>

Many people, including Dworkin himself, appear to think that the Supreme Court should not much hesitate to find a constitutional right of some kind if it is presented with convincing (to the judges) philosophical arguments for that right, at least if the right "fits" with the rest of the legal fabric. For those who take an institutional perspective, this view is wrong. Courts may not understand what justice requires, or may not be good at producing justice even when they understand it. In these circumstances, their understanding of the Constitution is partly a product of their judgments about their own distinctive role as a social institution. Note that this claim does not depend on skepticism about moral or political arguments. It is reasonable to believe that judges are not well-equipped to engage in theoretically ambitious tasks, without also believing that political theory is itself problematic or useless.

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<sup>155</sup> See The New York Review of Books, vol. 44, no. 5, p. 41 (1997).

<sup>156</sup> Id.

<sup>157</sup> Id. at 42.

<sup>158</sup> Id. at 41.

<sup>159</sup> As argued in Cass R. Sunstein, The Right to Die, 106 Yale L.J. 1123 (1997).

Amar. Akhil Amar describes his preferred interpretive approach as “intratextualism.”<sup>160</sup> The term denotes a textualism that makes extensive use of comparisons across clauses, even to the point of insisting that words appearing in widely separated contexts be given similar meanings—a technique capable of generating dramatic readings, such as the claim that the key to understanding the meaning of “speech” in the First Amendment is the meaning of “speech” in the Speech and Debate Clause. Amar’s target is what he calls “clause-bound” interpretation, the judicial practice of reading constitutional provisions and their accompanying history and precedent in (partial) isolation from textually related provisions.

In its emphasis on the authority of constitutional text, and in its populist underpinnings, Amar’s account appears to lie at some polar opposite from Dworkin’s, in which the constitutional text does relatively little work and populism is hardly a defining ideal. Yet for our purposes the two accounts are on a par. What Dworkin and Amar share is a deep commitment to a sort of constitutional holism: a commitment to reading the Constitution (whether that is taken to denote the document’s text or the moral principles underlying constitutional law) as a coherent, integrated whole. It is this shared feature of holism or coherentism that unites our critique of Dworkin with our critique of Amar. Amar, like Dworkin, ignores the possibility that real-world judges charged with holistic interpretation will simply blunder, producing a pattern of incoherent outcomes, or, worse yet, producing an internally coherent but morally misguided vision of public law.<sup>161</sup>

Amar recommends intratextualism as tool suitable to the courtroom as well as the classroom; indeed most of Amar’s intratextualist heroes are famous judges, especially John Marshall. Yet Amar pays no attention to the institutional capacities of the real-world judges who would be charged with *practicing* intratextualism; he ignores the judges’ interpretive capacities or their likely performance under the alternative regimes of intratextualism, on one hand, and clause-bound interpretation, on the other. Compared to the clause-bound alternative, intratextualism requires a more complicated and information-intensive inquiry, one that will reduce decisional accuracy whenever judges read the comparison texts mistakenly. So, for example, a judge who looks to the Speech and Debate Clause to illuminate the Free Speech Clause might well go badly wrong, given that the former provision predated the First Amendment and addresses very different problems. Amar gives us no reason to think that the illuminating effect of intratextualism will predominate over its error-producing effect.

What’s worse, intratextualism in the hands of fallible judges risks producing a holistic, highly coherent, but fundamentally mistaken analysis, one that constitutionalizes a simultaneous misreading of a whole set of related provisions. Justice Douglas’ opinion in *Griswold v. Connecticut*,<sup>162</sup> for example, offered a holistic, coherent account of the Bill of Rights as based upon a general principle of privacy; and it is an account that Amar

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<sup>160</sup>See Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747 (1999).

<sup>161</sup>See Adrian Vermeule & Ernest A. Young, *Hercules, Herbert and Amar: The Trouble with Intratextualism*, 113 Harv. L. Rev. 730 (2000).

<sup>162</sup>381 U.S. 479 (1965).

himself thinks is deeply mistaken.<sup>163</sup> If Amar had a more realistic view of judges' abilities as constitutional interpreters, he might prefer the limited incoherence of clause-bound interpretation to a sweeping, integrated, but erroneous universal account. What Amar has done, in short, is to overlook the principle of second-best. Rather than asking "What interpretive methods should judges use?," Amar has asked "What interpretive methods would I use, were I a judge?"—the question that, as we have seen, is a common cause of institutional blindness in interpretive theory.

Lessig, Interpretation as Translation, and Compensating Adjustments. Similar problems beset Lawrence Lessig's account of constitutional interpretation, which sees that practice as an exercise in "translation."<sup>164</sup> Translation is a particular version of originalism, of "fidelity" to the Constitution of the founding era. Lessig's important insight is that judges might, in principle, act more faithfully to the original constitution by updating constitutional rules to meet changed circumstances than by adhering woodenly to the specific text chosen by the founding generation, or to their specific expectations. Just as a translator might do better to choose a colloquial analogue that captures the flavor of the original, rather than simply using a literal equivalent, so too the original meaning of the constitutional structure might, in changed circumstances, best be preserved by departures from the original understanding. In the area of federalism, for example, Lessig urges the Court to "make up" constitutional rules that restore the original balance between federal and state authority.<sup>165</sup> "[T]o be faithful to the constitutional structure, the Court must be willing to be unfaithful to the constitutional text."<sup>166</sup>

Translation is, without doubt, a valuable contribution to first-best theorizing about constitutional interpretation. No other such account has, in recent years, generated as much comment and as many engaging applications.<sup>167</sup> Translation is best viewed as a refinement of purposivism: like Hart and Sacks' approach, translation boosts the level of interpretive generality from the specific intentions or expectations of a law's framers to their ultimate aims or ends. But Lessig's account also shares purposivism's insensitivity to institutional considerations. Lessig fails to consider the possibility that judges might be poor translators, garbling meanings so badly that a simple-minded transliteration would preserve more of the original than would an ambitious and mistaken attempt to capture the original's real sense. Judicial mistakes might make ambitious attempts at translation self-defeating, driving results further away from the original meaning rather than pushing results closer to it. In the federalism setting, for example, it is by no means obvious that making up rules to approximate the original balance is, even on Lessig's theoretical premises, the right prescription for the Court. The Court might overshoot the mark by announcing stringent restrictions on federal authority that push constitutional law farther away from the founding balance than would deference to national political processes.<sup>168</sup>

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<sup>163</sup>Amar, *Intratextualism*, *supra* note, at 797 & n. 196. In Amar's view, the key to a coherentist reading of the Bill of Rights is constitutional populism, not libertarian privacy. See Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998).

<sup>164</sup>Lawrence Lessig, *Fidelity in Translation*, 71 *Tex. L. Rev.* 1165 (1993).

<sup>165</sup>Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 *Sup. Ct. Rev.* 125, 192.

<sup>166</sup>*Id.* at 193.

<sup>167</sup>See generally Symposium, *Fidelity in Translation*, 65 *Fordham Law Review* (1997).

<sup>168</sup>This was one of the themes of Justice Souter's dissent in *United States v. Lopez*, 514 U.S. 549 (1995), which argued, among other things, that deference to rational congressional judgments about the scope of

Here is another example, taken not from Lessig's own work but from the secondary literature applying Lessig's insights.<sup>169</sup> Suppose that the original Constitution, rightly understood, bars delegations of legislative authority to the executive, and also bars the legislative veto. (Of course we do not mean to endorse or oppose either claim here). The circumstances of modern government are such, however, that delegations of legislative authority are pervasive, and there is no prospect of returning to the original understanding in this regard. The translation theorist might argue that judges should vote to uphold the legislative veto, even though it is clearly unconstitutional in isolation, on the ground that it is a "compensating adjustment",<sup>170</sup> needed to restore the original structural balance among the branches of government.<sup>171</sup> The legislative veto will, on this view, allow the legislature to limit and police the sweeping delegations of authority that it cannot avoid making. In fact Justice White's dissent in the decision that invalidated the legislative veto urged upholding the veto on just this ground.<sup>172</sup>

Of course there is a competing account. Perhaps the legislative veto falls afoul of the translated Constitution, because it aggravates the power of self-interested private groups over processes of lawmaking, thus defeating the goal of bicameralism and presentment, which is (on this view) to reduce the role of factions in government. On this view, for the Court to uphold the legislative veto might move public law farther away from, rather than closer to, the structure and purposes of the original Constitution. Now this view may be wrong. The problem is that it is no simple task to identify the commitments of the Constitution that are to be translated to fit with modern circumstances. As with purposes, so with commitments: There is no simple task of discovery here.

We are confident that Lessig would not disagree with this claim. But from the institutional perspective, the idea that judges should translate original structures by searching for offsetting constitutional adjustments is defective if unaccompanied by an account of judicial capacities. It takes great confidence in those capacities to think that judges can identify the net effects of such large-scale reforms with enough precision to warrant jettisoning clear constitutional provisions and settled constitutional rules. The overall effect of the legislative veto, or of its invalidation, is a major research question for experts in political science.<sup>173</sup> There is little reason to believe that generalist judges, devoting a brief time to the subject and possessed of limited information, can form even a plausible view of the relevant complexities. Judicial competence is not the only the problem with idea of translation through compensating adjustments; there are serious conceptual puzzles as well.<sup>174</sup> But for our purposes the important objection is that

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the interstate commerce power better captured the original understanding. See 514 U.S. at --- (Souter, J., dissenting).

<sup>169</sup>See Peter B. McCutchen, *Mistakes, Precedent and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 Cornell L. Rev. 1 (1994).

<sup>170</sup>Daryl Levinson, *Framing Transactions in Constitutional Law*, 111 Yale L.J. 547 (2001).

<sup>171</sup>McCutchen, *supra*, at 37-38.

<sup>172</sup>See Chadha, 462 U.S. 919, 994-95 (1983) (White, J., dissenting).

<sup>173</sup>See Jessica Korn, *The Power of Separation: American Constitutionalism and the Myth of the Legislative Veto* 4-5 (1996).

<sup>174</sup>Levinson, *supra*, observes that identifying a compensating adjustment depends upon highly contestable judgments about the framing of constitutional problems: why exactly should the constitutionality of the legislative veto be assessed in relation to the nondelegation doctrine, rather than in isolation? We add that a

translation assumes an optimistic account of the judges' abilities as translators, an account that becomes increasingly questionable as judicial departures from text and original expectations become increasingly ambitious, and as the systemic effects of the adjustment become increasingly difficult for generalist judges to predict.

Some generalizations. We can generalize these points about Dworkin, Amar and Lessig in two ways; both are familiar from the earlier, institutional account of statutory interpretation. The first point is that a master principle of constitutional authority—law as integrity (Dworkin), or the primacy of constitutional text (Amar), or fidelity through translation (Lessig)—taken by itself, can yield no conclusions at all about proper interpretive method. With a certain assessment of judicial capacities, judges might do better, by Amar's own lights, with clause-bound interpretation than with intratextualism. On Lessig's own premises, fallible judges might be better translators if they stick to the unambitious transliteration that Lessig disparages. As for Dworkin, consider the possibility that a fallible judge charged with implementing law-as-integrity might do better, from the moral point of view, by opting for a relatively mechanical adherence to prior rulings, described at a low level of generality, than by ambitiously attempting to bring principled coherence to large areas of law. Thus an epistemically humble Dworkinian judge might look a great deal like the incremental, common-law constitutional jurist, who defers to precedent on the basis of a Burkean appreciation of the limits of individuals' cognitive capacities.<sup>175</sup>

The second, larger point is the possibility of incompletely theorized agreements about interpretive method in constitutional cases. Interpreters who hold various first-order accounts of constitutional authority might, for example, converge on a practice of clause-bound precedent. The Amarian would do so to avoid large-scale, coherent mistakes by fallible intratextualist judges; the Dworkinian would do so because any more ambitious attempt at justificatory ascent might predictably do worse, on Dworkin's own criteria of moral integrity, in the hands of judges who do not resemble Hercules, Dworkin's idealized judge. Moreover, where agreements of this sort are possible, the underlying disagreements between competing accounts of the Constitution's authority could be bracketed or ignored; with respect at least to the role of precedent, it would be possible to choose an approach to interpretation without committing to any such first-best position.

To be sure, any of these stories might or might not be plausible; the empirical agenda we mean to sketch would consist of investigations along these and similar lines. The important point is just that constitutional interpretation is not the same in a second-best world as in a first-best world. As with statutes, so with the Constitution: any account of constitutional interpretation that overlooks the decisive role of institutional considerations is for that reason defective.

A note on tradition in constitutional law. These ideas very much bear on the continuing debate about the proper role of tradition in constitutional law. Justice Scalia,

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critical factor, among others, in deciding upon the proper scope of the transactional frame is the capacity of judges to manage the increased complexity of larger frames.

<sup>175</sup>This is the picture drawn in David A. Strauss, *Common Law Constitutional Interpretation*, 63 U Chi L Rev 977 (1996).

among others, has urged that in the face of textual ambiguity, judges should follow traditions described at a low-level of generality. They should not strike down legislation unless it contravenes actual practices as vindicated by history.<sup>176</sup> “We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”<sup>177</sup> It would be possible to defend this approach on Burkean grounds, with the claim that longstanding practices are likely to be justified, or good, by virtue of their historical pedigree. And for those who dislike Burke, it would be possible to respond that longstanding practices might reflect power or arbitrariness, and hence that tradition is a bad source of constitutional law and in particular of constitutional rights.<sup>178</sup> Much of the debate over tradition has been cast in these terms.

With an institutional focus, the debate looks very different. Perhaps traditionalism is best defended on the ground that judges are highly fallible human beings, and that if they are unmoored from either text or traditions, they might well make mistakes.<sup>179</sup> In fact we could imagine a society, different but not unrecognizably from our own, in which this defense of traditionalism would be convincing to a diverse group of people. Suppose, for example, that political processes functioned extremely well, in the sense that unjust or ill-considered outcomes were highly unlikely, and were corrected politically when they occurred. Suppose too that in such a nation, judges were likely to make big blunders, in the form of decisions that were confused or even invidious, and very hard to correct once made. In such a society, tradition might well be the best foundation of constitutional rights where text is unclear. Perhaps other bright-lines rules—such as a strong presumption in favor of upholding enacted law—would be better still. The point is that an evaluation of traditionalism, as of any other interpretive method, is partly empirical, and based on an assessment of how different institutions are likely to perform under the various alternatives. Without some empirical projections, it is hard to venture sensible answers.

#### **D. The Common Law**

Our emphasis has been on the interpretation of texts, taken as the sorts of commands found in constitutions, statutes, and regulations. But precedents are of course texts too, and in deciding what a precedent means, a common law court should pay close attention to institutional considerations. This point is often well-understood in the common law context, especially in the academic literature on contract interpretation,<sup>180</sup> but not always, for academics often evaluate common law decisions simply by asking whether the existing cases can be unified by an attractive conceptual principle. That is not the question courts should ask; at least it is not the only question. When common law judges, as opposed to theorists of the common law, decide whether to characterize

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<sup>176</sup>See *Michael H v. Gerald D*, 491 US 110 (1989).

<sup>177</sup>*Id.* at 127 n. 6.

<sup>178</sup>See John Hart Ely, *Democracy and Distrust* 62 (1980).

<sup>179</sup>Justice Scalia suggests a similar point: “Because [general] traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society’s views.” 491 US at .

<sup>180</sup>The possibility of formalism in the operational, rule-based sense, justified on the basis of claims about judicial competence and ex ante effects, has recently commanded great deal of interest in the literature on contract interpretation. See, e.g., Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 Nw. U. L. Rev. 749 (2000); Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 Nw. U. L. Rev. 847 (2000).

precedents narrowly or broadly, the questions of judicial fallibility and of dynamic effects are central.

Consider two currently disputed issues frequently faced by common law courts: whether to expand employee protection against at-will discharge<sup>181</sup> and whether to cabin punitive damage awards by juries.<sup>182</sup> It would be possible to analyze precedents in a style akin to Dworkin's, asking what principle puts them in the most attractive light. Under this approach, some people would undoubtedly conclude that courts should limit the power of employers to discharge employees, eventually creating, perhaps, a right to be fired only on job-related grounds. And other people would undoubtedly erect barriers to apparently unreasonable punitive damage awards, expanding judicial power of remittitur to ensure, for example, a sensible relationship between the compensatory award and the punitive award.

It should be clear that any effort to proceed in this way should pay close attention to two problems. First, judges might not know what they are doing. In the labor market, for example, some observers suggest that arbitrary discharges are actually rare,<sup>183</sup> and that a right to be discharged only for job-related reasons would not really protect deserving employees, but increase meritless litigation, with employees being the victims (through reduced wages or employment). Any significant shift in the common law could have large systemic effects on the employment market, and courts are not in a good position to anticipate those effects. With respect to punitive damages, it is not so clear that there should be a sensible relationship, all of the time, between the compensatory award and the punitive award. If, for example, the injury is very hard to detect in most cases, the standard economic approach calls for a large multiplier. In any case state legislators have been very much involved in the process of considering relevant reforms. There has been active debate, in many states, about the permissible grounds for discharge, and even more active debate about cabining large punitive damage awards. Perhaps judicial decisions, attractive in principle, would dampen those debates. Perhaps cautious and incremental judgments, less attractive in principle, would represent a form of deference to ongoing processes that are more likely to settle the relevant areas well.

Here as elsewhere we do not mean to reach a final judgment on the issues in question. And by drawing attention to institutional considerations in the common law setting, we hope that we are not saying anything surprising or novel. Too often, however, the institutional considerations are placed in the background, and the interpretation of precedents is undertaken in a way that is indifferent to them.

## Conclusion

We have argued that issues of legal interpretation cannot be adequately resolved without attention to institutional issues. An extraordinary variety of distinguished people have explored interpretive strategies without attending to the fact that such strategies will inevitably be used by fallible people and with likely dynamic effects extending far

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<sup>181</sup>For a helpful overview, see Mark Rothstein et al., *Employment Law* 680-699 (2d ed. 1999).

<sup>182</sup>*Campbell v. State Farm*, 2001 UT 89; 432 Utah Adv. Rep. 44; 2001 Utah LEXIS 170 (2001), cert. granted, S. Ct. (2002).

<sup>183</sup>See, e.g., Richard Epstein, *In Defense of the Contract at Will*, 51 *U Chi L Rev* 947 (1984).



beyond the case at hand. Two mechanisms seem principally responsible for this institutional blindness. One is a role-related trap: interpretive theorists ask themselves “how would I decide the case, if I were a judge?”—a question whose very form suppresses the key consideration that the relevant interpretive rules are to be used by judges rather than theorists. Another is a cognitive trap: specialists, such as legal academics, criticize the insufficiently nuanced opinions issued by generalist judges in particular cases, overlooking that the same judges might well have done far worse, over a series of cases, by attempting to emulate the specialists’ approach. Overall, the key question seems to be, “how would perfect judges decide cases?” rather than “how should fallible judges proceed, in light of their fallibility and their place in a complex system of private and public ordering?”

Our minimal submission has been that answers to the former question are hopelessly inadequate. We have argued as well that in some cases, an appreciation of judicial fallibility and of dynamic effects will enable people to converge on an appropriate approach despite their disagreements about the right path for perfect judges to follow. At the very least, an appreciation of institutional questions should make it possible for people to have a better appreciation of what they are disagreeing about, and also of strategies for making some progress in the future. We have emphasized the importance of asking about the likelihood of legislative oversight and correction; the values of planning and predictability, and the effects, on these values, of one or another interpretive choice in the particular context; and the actual performance of courts that follow textualism, purposivism, or some other approach. Here there is much room for empirical work, involving, for example, the nature and effects of different interpretive approaches within different states, the responsiveness of state legislatures to those different approaches, and the possible connection between formality in interpretation and legislative attentiveness in various domains of law.

If we evaluate interpretive issues in institutional terms, we will not necessarily adopt any particular approach to interpretation. But we have suggested that once the question is properly framed, it becomes easy to see why reasonable people might favor a formalist approach to statutes in some or many contexts, not on the basis of indefensible ideas about how words work, but on simple institutional grounds. On this view, formalism might be accepted, not because the Constitution requires it (it doesn't), and not because formalism is required by a proper understanding of the concept of law (it isn't), but when and because formalism is the best path for generalist judges who are often ill-equipped to resolve the policy issues at stake. For the same reasons, we have indicated some enthusiasm for the emerging view that administrative agencies ought to be allowed a degree of flexibility in their own interpretations, flexibility that goes well beyond that of courts. Agencies are in a better position to know whether a particular result, apparently compelled by text, really is senseless. They are also in a better position to know whether a departure from text will unsettle the regulatory scheme in a damaging way. If agencies ought not to be given this interpretive flexibility, it is also for institutional reasons, as, for example, in the claim that agencies are subject to the influence of powerful private groups, or in the suggestion that Congress will provide sufficiently prompt corrections of regulatory decisions that, while faithful to statutory text, produce significant harm. Of course there are many empirical issues here.

In many ways the question of constitutional law is harder, simply because people disagree so sharply about what constitutes a good outcome. Ironically, however, constitutional law has already witnessed a significant if partial institutional turn: Many people emphasize that any approach to the Constitution must take account of the institutional strengths and weaknesses of the judiciary. Even here, however, we have seen that influential voices in constitutional law argue in favor of interpretive strategies in a way that is inadequately attuned to the issue of institutional capacities. Those who emphasize philosophical arguments, or the idea of holistic or intratextual interpretations, seem to us to have given far too little attention to institutional questions. Here as elsewhere, our minimal submission is that a claim about appropriate interpretation is incomplete if it does not pay attention to considerations of administrability, judicial capacities, and systemic effects in addition to the usual imposing claims about legitimacy and constitutional authority. But we have also suggested the possibility that in constitutional law, an assessment of those issues might lead to convergence, on appropriate methods, from those who disagree about what ideal judges should do. The New Deal period culminated in a convergence of this kind. In the current period, it is revealing that many people, from their diverse points of view, now seem decreasingly satisfied with the idea that judges should interpret ambiguous constitutional provisions in a way that seems, to those judges, best on grounds of political morality.

Our major goal here has not, however, been to argue on behalf of any particular approach to interpretation. Our ambition has been at once narrower and more critical-- to show that interpretive theory, as elaborated by its most able practitioners, has been remarkably indifferent to institutional issues, proceeding as if judges are reliable and as if their choice of approach lacks systemic consequences. We think that this indifference is a kind of pathology, produced, in large part, by the legal culture's continuing insistence on framing the question of interpretation as, "What would you do, when faced with a problem of this sort?" We hope to have shown that this is a misleading question to ask, and one that has quite damaging consequences not only for the academic study of law, but for legal institutions as well. Once the question is properly reframed, it should be possible to see interpretive questions in a new and better light, and perhaps to adopt new and better answers as well.

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